

[Securities Regulation Daily Wrap Up, TOP STORY—SEC proposes rules to curb insider trading, hasten disclosure of stock buybacks, \(Dec. 15, 2021\)](#)

Securities Regulation Daily Wrap Up

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By [Anne Sherry, J.D.](#)

At its latest open meeting, the Commission showed a united front on a proposal to strengthen the rules around insider stock trading plans, but recommendations on stock buybacks, money market fund reform, and security-based swap provisions narrowly passed along party lines.

At its final open meeting of 2021, the SEC issued a suite of rule proposals addressing stock trading plans, stock buybacks, money market funds, and security-based swaps. The Commission also approved the PCAOB's 2022 budget request reflecting an 8 percent increase over the current year. While the group showed rare unanimity on the 10b5-1 trading plans proposal, Commissioners Peirce and Roisman dissented from the other three proposals on grounds including regulatory overreach and shorter-than-usual comment periods.

Rule 10b5-1 plans. In June, SEC Chair Gary Gensler announced that his staff was preparing recommendations to close some gaps in Rule 10b5-1, which provides an affirmative defense to insider trading for officers and directors who trade stock under plans entered into in good faith and before learning of material information. Gensler said then that there has been broad bipartisan support for the idea, telegraphing the result of today's vote, which saw all five commissioners [agree](#) to propose rules requiring a cooling-off period and limiting overlapping and one-off plans. While joining their Democratic colleagues, Peirce and Roisman nevertheless expressed reservations about some aspects of the proposal.

Under current rules, traders can adopt a trading plan and then execute a trade the same day, leading to concerns that insiders can capitalize on material nonpublic information. The [amendments](#) to Rule 10b5-1 would impose cooling-off periods delaying transactions under the trading plan for 120 days (for officers and directors) and 30 days (for issuers structuring a share repurchase plan under the rule). The 120-day period for individuals was designed to span an entire quarter, so that no trading could occur under a plan until the financial results associated with that quarter are public.

The amendments would also prohibit overlapping trading plans and limit single-trade plans to one in any consecutive 12-month period. Officers and directors entering into a 12b5-1 plan would also have to certify to the issuer that they are not aware of any material nonpublic information and are adopting the plan in good faith.

Finally, the proposed amendments would require new disclosures. A new table would report any options granted within 14 days of the release of material nonpublic information and the market price of the underlying securities the day before and after that disclosure. Forms 4 and 5 would include checkboxes about the applicability of a 10b5-1 or other plan, and gifts of securities previously reported on Form 5 would be required under Form 4.

Peirce [said](#) that she had been prepared to dissent from the proposal but that the staff ultimately won her over. She said the cooling-off periods and restrictions on overlapping plans are reasonable and that the once-a-year allowance for one-off plans is narrowly tailored. However, she expressed concerns about the certification requirement and the condition that the plan be "operated" in good faith, as well as what she called the "indirect regulation of corporate activity through our disclosure rules."

Like Peirce, Roisman also had [mixed feelings](#) about the proposal. While he believes in the cooling-off period, there is little evidence of an actual problem that the other requirements are designed to solve. Roisman also raised concerns about the interrelationship of the trading plan amendments and the proposal on stock buybacks that the Commission also took up at the meeting. In his view, these should have been a single proposal to allow the SEC and the public to better understand the impact and how the rules will work together. Finally, Roisman

highlighted that the comment period for most of the proposals taken up at the public meeting is only 45 days, with one at 60 days. This does not allow time for substantive feedback especially when the comment periods straddle several major holidays and overlap comment periods for other rules, he said.

Commissioners Lee and Crenshaw, however, expressed broad support for the rule proposal. While the Commission can go after insider trading through its enforcement power, prophylactic measures are vital, Lee [said](#). And in contrast to Peirce and Roisman's concerns about overregulation, Crenshaw [suggested](#) that the rule may not go far enough, saying that empirical evidence will reveal whether more work is needed. Among other things, Gensler [lauded](#) the rule for highlighting the little-discussed fact that charitable giving too is subject to the insider trading laws.

Stock buybacks. In a more controversial measure, the Commission voted 3-2 to [propose](#) a new Form SR to report stock buybacks within one business day. Currently, issuers typically disclose the repurchase plans themselves when the board authorizes them, but not the dates on which they will buy back shares under the plan. As a result, the public generally learns of the actual buybacks in the issuer's periodic reports long after the trades are executed. The new Form SR would require issuers to identify the class of securities purchased, the total amount purchased, the average price paid, and the aggregate amount purchased on the open market in reliance on the safe harbor of Exchange Act Rule 10b-18 or under a 10b5-1 trading plan.

The [amendments](#) would also require an issuer to disclose the objective or rationale for the buybacks and any policies and procedures relating to insiders' purchases and sales during a repurchase program. Finally, the issuer would have to check a box if any officer or director subject to Section 16(a) reporting requirements bought or sold shares within 10 business days before or after the buyback announcement.

Lee [emphasized](#) that the proposal does not prescribe how or why companies buy back their stock, but rather requires disclosures to let investors evaluate how, why, and to what effect companies are engaging in buybacks. Peirce [disagreed](#), however, again calling the disclosure "indirect regulation of corporate activity" and objecting that concerns about informational asymmetries could be addressed through more tailored means. She and Roisman both highlighted an SEC study, mentioned in a footnote to the proposal, concluding that the firms that repurchased the most stock generally did not have compensation targets linked to earnings per share or considered the impact of repurchases when setting the targets or determining if targets were met. Roisman said that a better approach would be for companies to disclose in their Form 8-K that they intend to repurchase shares, and file a new 8-K if their plans change. This would communicate information without the daily reporting burden or the risk of discouraging buybacks, he said.

While Crenshaw [supported](#) the proposal, she agreed with Roisman's point that the buyback rules should be read in conjunction with the proposal on insider trading plans. [Gensler](#) also took up this point and said he is glad that the Commission is proposing the two sets of amendments on the same day, giving the public a sense of the agency's thinking and enabling them to comment within a similar time frame.

Money market funds. The day's third [proposal](#) would impose money market [reforms](#) designed to address the liquidity crisis of March 2020. In response to the COVID-19 pandemic, investors seeking liquidity withdrew from prime and tax-exempt money market funds and fled to government funds. Some of the commissioners posited that this reaction could have been an unintended consequence of the 2010 and 2014 money market reforms, particularly the use of liquidity fees and redemption gates. This may have created a "first mover" advantage where there was a rush to redeem holdings before other market participants. [Gensler](#) likened this to being chased by a bear at a campsite: you don't have to outrun the bear (or financial stress, in this analogy), you just have to outrun your fellow campers.

The proposed rules would increase the liquidity requirements for money market funds: the daily asset threshold would go from the current 10 percent to 25 percent, and weekly asset thresholds from 30 percent to 50 percent. The amendments would also remove the current rule's allowance of liquidity fees and redemption gates. Institutional prime and tax-exempt money market funds would be required to implement swing pricing policies that would shift liquidity costs onto redeeming investors in certain circumstances. Finally, the proposal would amend certain reporting requirements.

While voting against the proposal, both Peirce and Roisman paid it some compliments, and Peirce [said](#) she is open to revising her position based on what she learns through the comment process. Roisman again [objected](#) to the comment period, in this case 60 days compared to the other proposals' 45, but still coinciding with two major holidays and multiple outstanding proposals raising hundreds of questions for comment. Lee called her support for the proposal preliminary and [said](#) she was especially interested in hearing comments on whether swing pricing will mitigate the first mover advantage and how it might impact investor choice. Similarly, Crenshaw [invited comment](#) on how to implement swing pricing, particularly on guarding against excessive variability and on the degree of discretion funds should have when establishing swing factors.

Security-based swaps disclosure. The last rulemaking item of the day was a [reproposal](#) designed to address fraud in security-based-swaps transactions. A new Rule 9j-1 would [prohibit](#) fraudulent, deceptive, or manipulative conduct in security-based swaps, including in connection with the exercise of rights and performance of obligations under a security-based swap. A new Rule 15Fh-4(c) would prohibit personnel from coercing, misleading, or otherwise interfering with the SBS entity's chief compliance officer. Finally, a proposed new Rule 10B-1 would require any owner of a security-based-swap position that exceeds a threshold amount to file a position report on Schedule 10B.

Crenshaw [said](#) that while the proposal may seem somewhat obscure, the security-based-swaps market was at the heart of the financial crisis and remains a multi-trillion-dollar behemoth that can have far-reaching effects, as seen with the Archegos family office collapse. Gensler [posited](#) that the proposal would not only improve transparency, but also market integrity. But Peirce is less confident about that and [objected](#) that the proposal is disproportionate to the concerns it is designed to address. She believes the rules risk disrupting the norms developed by sophisticated participants to meet their hedging needs. Furthermore, Peirce said it is premature to impose more disclosure before seeing the effect of SBS reporting, which began only last month.

While Roisman [said](#) that the securities antifraud provisions have been time-tested and that this parallel approach is confusing to market participants, Lee [countered](#) that "it is vital to have antifraud rules that are tailored to the specific structure and trading patterns of the security-based swap market."

PCAOB budget. Finally, the SEC unanimously [approved](#) the PCAOB's 2022 budget request of \$310.3 million, representing an 8 percent increase over 2021. The increase reflects an expectation that travel will increase, as well as IT costs and personnel. Lee [praised](#) the board for its intention to hire more staff in a number of offices, increase the number of advisers to the board, and engage more consultants. The SEC also approved an accounting support fee of \$297.9 million, to be allocated \$267.2 million to issuers and \$30.7 million to registered broker-dealers.

Although Peirce supported the budget request, she [spoke against](#) the SEC's action earlier in the year to dismiss William Duhnke as chairman and require the remaining four board members to reapply for their positions. Peirce said the action politicized what should be an independent board and left the PCAOB in a "credibility deficit." She also urged the board not to "recast itself as an environmental, social, and governance regulator despite the allure of such issues in Washington these days." Roisman had similar [criticism](#) of the SEC's overhaul of the board, while [Crenshaw](#) and [Gensler](#) focused their comments on their support of the budget and the incoming members, including former SEC Commissioner Kara Stein.

The proposals are [Release No. 33-11013](#) (Rule 10b5-1 plans); [Release No. 34-93783](#) (buybacks); [Release No. 34-93784](#) (security-based swaps); and [Release No. IC-34441](#) (money market funds).

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