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FOCUS

10b5-1 Plans Under Fire from the SEC: Understanding and Preparing for the Changes That Are Coming

By Mary P. Hansen, Partner, Duane Morris

There has been significant public discourse and discussion about “10b5-1 plans,” i.e., agreements that allow corporate insiders to trade in their company’s securities without regard as to whether the insider is in possession of material non-public information. The Securities and Exchange Commission (“SEC”) promulgated Rule 10b5-1 under Section 10(b) of the Securities Exchange Act of 1934 to provide somewhat of a safe harbor, or affirmative defense, to insiders when they engage in transactions in their company’s securities. While 10b5-1 plans have been criticized for years, current SEC Chair Gary Gensler started his term expressing serious concerns that 10b5-1 plans “have led to real cracks in our insider trading regime” and promised to take action quickly to fill those cracks. On December 15, 2021, the SEC filed proposed updates to Rule 10b5-1 to “freshen up” the rule and impose certain additional requirements and limitations to it.

The Basis of Insider Trading Law

In order to understand and appreciate the value of 10b5-1 plans to insiders, it is important to have a general understanding of insider trading laws. To be clear, there is no law that defines and prohibits “insider trading.” Rather, insider trading law has been developed in the courts using Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. Section 10(b)

and Rule 10b-5 prohibit “any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange ... [t]o employ any device, scheme, or artifice to defraud ... in connection with the purchase or sale of any security.” Using Section 10(b) and Rule 10b-5, courts developed the classical theory of insider trading, which prohibits corporate insiders from trading in securities of their company “on the basis of” material non-public information in breach of a fiduciary duty. Importantly, it is well-established that being “in possession of” material non-public information means the same as trading “on the basis of” material non-public information. In other words, the government (or civil plaintiff) does not have to prove that an insider traded because of the material non-public they knew; only that they knew the information at the time they placed the trades. Since insiders are often “in possession” of non-public information, they can be easy targets for SEC insider trading investigations and private class actions. In addition, since insiders generally owe a fiduciary duty to company shareholders and corporate policies generally prohibit insiders from engaging in trading while in possession of material non-public information, it is very easy for the government (or civil plaintiffs) to prove that

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insiders breach their fiduciary duty while trading while in possession of material non-public information.

The Evolution of 10b5-1 Plans

In an effort to provide some flexibility and protection to insiders when they trade in their companies' securities, the SEC promulgated Rule 10b5-1 to provide insiders with a "safe harbor" or "affirmative defense." Generally speaking, Rule 10b5-1 allows insiders acting in good faith, and while not in possession of material non-public information, to set up a formal trading plan or agreement that provide specific pre-established plans, such as preset dates or formulas, that cannot thereafter be changed by the insider. If insiders conduct their trading pursuant to the terms of the 10b5-1 plan, the trades will not be deemed to be made "while in possession of material non-public information."

Over the last 20 years, the investing public and the SEC have become suspicious of 10b5-1, and the plans are now often viewed as vehicles to allow insiders to resourcefully take advantage of their positions. Why have the public and regulators become skeptical of 10b5-1 plans? First, most 10b5-1 plans did not contain any sort of "cooling-off" period, meaning that insiders can adopt a plan and start executing transactions immediately. Second, insiders can modify the plan at any time provided they do not have possession of material non-public information. Third, insiders can terminate 10b5-1 plans at any time, regardless of whether they are in possession of material non-public information. Fourth, there are currently no specific requirements with respect to the number of trades or the timing of trades. Lastly, there are no reporting requirements with respect to the adoption, modification or termination of 10b5-1 plans.

The lack of a cooling-off period raises concerns that insiders can use a 10b5-1 plan to "put some distance" between the time they learn material non-public information and the time of their trades and then unfairly use the 10b5-1 plan as a defense to justify the trading. The timing

of nonpublic information is often used to assess the materiality of non-public information. For example, information relating to a potential corporate acquisition may be less material in the early phases of corporate discussions when the probability of the transaction is unknown than information that a corporate acquisition has been approved by the board. Where the information becomes "material" between those two points involves a factual analysis, so it may not always be clear when an insider came into possession of material non-public information. The ability to modify the 10b5-1 plan at any time raises similar concerns.

The ability to terminate the plan at any time raises additional concerns because an insider's decision to terminate the plan, i.e., cancel all planned trades, is not deemed to be "in connection with the purchase or sale of any security." Accordingly, the lack of trading takes the "termination" out of the contours of Section 10(b) and, therefore, undercuts the ability to hold insiders who do trade on material non-public information accountable.

The lack of specific requirements causes consternation because the government and the public worry that the vagueness of plans can be used to exploit the protection that such plans were intended to provide. Plans can be used for single trades or multiple trades and insiders can adopt multiple plans that are effective at the same time, making it difficult to assess whether insiders are adopting plans for legitimate reasons or simply to provide a cover story for their trading.

While insiders must report their transactions in securities on Forms 4 and 144, there are no requirements that they (or their companies) report the adoption, modification or termination of 10b5-1 plans (other than the requirement on Form 144 to provide the date of plan adoption if the sale was under a 10b5-1 plan).

The Proposed Changes to Rule 10b5-1

On December 15, 2021, the SEC's proposed amendments to Rule 10b5-1 were

announced in an effort to, in the words of Chair Gensler, fill the "cracks" that 10b5-1 plans have appeared to create with respect to insider trading law. Importantly, the proposed amendments do not change the fact that Section 10(b) only prohibits an insider from trading company securities while in possession of "material non-public information." Rather, the proposed amendments are intended to limit the perceived, or actual, potential for insiders to abuse the protections currently afforded by Rule 10b5-1. In addition, the amendments seek to cover a broad range of directors and officers. The term "officer" is governed by Rule 16a-1 of the Exchange Act and broadly defines "officer" as "an issuer's president, principal financial officer, principal accounting officer (or, if there is no such accounting officer, the controller), any vice-president of the issuer in charge of a principal business unit, division or function (such as sales, administration or finance), any other officer who performs a policy-making function, or any other person who performs similar policy-making functions for the issuer."

There are several important proposed amendments to Rule 10b5-1. First, the proposed amendments impose cooling-off periods of at least 120 days after the adoption or modification of any plan by officers and directors and at least 30 days by an issuer. Second, the availability of the affirmative defense requires that officers and directors certify in writing that they are not aware of any material non-public information at the time they adopt or modify the 10b5-1 plan. The company would be required to maintain these certifications for 10 years. These certifications will undoubtedly play a significant role in both SEC and DOJ investigations involving insider trading. A false certification would certainly be used to show that an officer or director acted with the requisite "scienter" or bad intent in connection with the purchase or sale of securities. For that reason, officers and directors should seek legal advice on certifications before signing them.

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Third, the proposed amendments generally restrict the use of multiple overlapping plans. The amendments, however, do not affect situations where a person buys and sells securities directly from the company, such as through an employee stock ownership plan. Single-trade plans would also be limited to one in any 12-month period.

Finally, in addition to the existing requirement that plans be entered “in good faith,” the amendments would also require that the plan be operated “in good faith.” The SEC suggested that cancelling or modifying a plan while in possession of material non-public information or influencing the timing of a corporate disclosure to make trading under a plan more profitable would not be considered “acting in good faith.”

In addition to changes to plans themselves, the SEC also proposed additional company disclosures. Issuers would be required to disclose annually the company’s insider trading policies and procedures and, if the company does not have such policies and procedures, explain why. Moreover, companies would need to disclose quarterly the adoption, modification and termination of Rule 10b5-1 plans by the company, its directors and officers, including the name and title of each director and officer. In addition, issuers

will have to disclose the timing of equity grants shorts before or after the release of material non-public information.

The proposed amendments would also affect Section 16 reporting. A checkbox would be added to Forms 4 and 5, requiring filers to indicate whether a transaction was made pursuant to a Rule 10b5-1 plan and, if it was, the date upon which the plan was adopted. A second box would allow filers to indicate that the trade was not pursuant to a 10b5-1 plan and, therefore, not intended to qualify for the affirmative defense.

Considerations Moving Forward

As we await the final amendments to Rule 10b5-1, issuers should consider implementing changes with respect to 10b5-1 plans for the issuer’s benefit and the benefit of its officers and directors. For example, companies should approve such plans and require that plans be established, modified, terminated or suspended during open trading windows and impose a cooling-off period after the initial establishment of the plan or any modification thereafter. Issuers should prohibit insiders from adopting multiple overlapping plans. Issuers should consider adopting a pre-approved form of plan and requiring insiders to use a pre-selected broker to execute

the trades. Most importantly, companies should conduct robust insider trading and disclosure policies for all employees as well as for their board of directors. Such training should include training with 10b5-1 plans. Finally, because of the changing landscape and the erosion of the scope of protection previously provided by Rule 10b5-1, companies and insiders may be well-served to seek counsel prior to entering into 10b5-1 plans.



Mary P. Hansen,
Partner, Duane Morris

Mary P. Hansen is a partner in Duane Morris’s White Collar Criminal Defense and Corporate Investigations Practice Group where she represents individuals and companies in connection with financial regulatory and criminal investigations and litigation involving the Securities and Exchange Commission, the Commodity Futures Trading Commission, FINRA, the National Futures Association, state attorney general offices, state securities commissions and the Department of Justice. Prior to entering private practice, Mary served as an Assistant Director in the SEC’s Division of Enforcement where she supervised a broad range of investigations involving the federal securities laws.

ACC News

ACC In-house Counsel Certification Program: July, 11-21 Virtual

The [In-house Counsel Certification Program](#) covers the core competencies identified as critical to an in-house career. This virtual training is a combination of self-paced online modules and live virtual workshops. The workshops will be conducted over a two-week period, four days a week for three hours each day

ACC Executive Leadership Institute July 26–29, Chicago, IL

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Philly Bar 5K Run/Walk for Charity

May 15, 2022



Annual Spring Fling

Insectarium & Butterfly Pavilion

May 12, 2022



Annual In-house Counsel Conference

May 4, 2022



Meet Your Counterparts w/Dechert

Lola's Garden

April 26, 2022



GC-CLO Summit

March 23, 2022



Women's Summit

March 17, 2022





New Board Member Spotlight

Josh Romirowsky,
Senior Counsel, Audacy, Inc.

1. Tell us a bit about your current position, and the year that you started it.

I am currently Senior Counsel with Audacy, Inc., focusing on privacy, data-security and tech matters. I started this position in August 2021.

2. In what year did you first work in-house, and how did you end up in your current position?

If I could sum it up in one word, it would be: agility. I first went in-house in 2017 to join UGI/AmeriGas Propane's Legal Department. I was able to get really meaningful and diverse in-house experience at UGI/AmeriGas. I embraced a changing business need by taking on privacy and marketing legal support. I spear-headed its CCPA compliance effort and digital/marketing teams. I also became a certified information privacy professional through IAPP's program. All of those things – as well as networking - helped me to transition to my current role.

3. What law school did you attend? Where did you attend college and graduate school? What degrees do you hold?

I earned a J.D. from Widener University School of Law (now Delaware Law School) and a BA in Political Science from the University of Maryland in College Park, MD.

4. Can you tell us how you successfully navigated your career from law school to your current position?

My legal career has been a journey – going from clerkship, to litigator, to managing litigation and claims in-house, to a non-litigation/business counseling role in-

house. I've always worked hard, looked for opportunities to grow and develop marketable skills, and networked in an effort to develop mentors.

5. What do you consider to be your most pivotal career move?

My decision to leave my law firm to pursue an in-house career path was the most defining moment in my legal career.

6. What is the best thing about your current job?

I'm in a newly created-role with a company that's moving quickly to enhance existing digital products and develop new ones. I love that there are a lot of opportunities to develop new initiatives from scratch as part of a strong legal team.

7. What is the worst job you have ever had?

During the summer before my junior year in college I had a job holding a sign on the corner of 76th and Lexington in Manhattan (think sandwich board). On the 2nd day I smuggled headphones on the job. On the 3rd day, a homeless man offered me food. The 4th day I quit.

8. What is the most valuable life lesson you still apply today?

Be genuine and kind to others, have the confidence to be yourself, and keep learning.

9. What do you consider to be the best thing about ACC membership?

The network of smart, successful professionals dealing with similar issues.

10. What tips do you have for attorneys new to in-house?

JOIN THE ACC, get into the business, and continue to drive value every day. If you don't earn the trust of your colleagues and understand how the business works and

the pressures that the business teams are under your value will be limited.

11. What are your interests outside of work? What do you do to decompress and relax?

I love tennis, cycling, hiking, and watching the West Wing over and over again.

12. If I were not practicing law, I...

Would be a teacher.

13. My favorite vacation spots are:

A beach near tennis courts, great food, and other fun outdoor activities. Tel Aviv ranks at the top of my list!

14. A place I have never been but would most like to visit is:

I'm eying a trip to Iceland and the national parks in Utah – both are on my bucket list.

15. My all-time favorite movies are:

National Lampoon's Vacation (Wally World), Good Will Hunting, and Saving Private Ryan.

16. If applicable, please tell us about your pet(s):

I have 3 little girls (ages 3, 6, and 8). I can barely keep my plants alive, let alone take on a pet!

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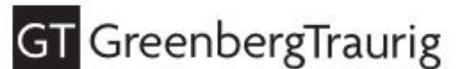
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A Professional Network: Value Beyond the Obvious, Value Throughout Your Career

By Meredith Ainbinder, Vice President and General Counsel

For many in-house lawyers who spent time in private practice, one of the greatest perks of the transition to in-house practice is the elimination of the business development responsibility. Not having to worry about where to find clients, how to cultivate contacts, and whether we are playing the long-game with prospects or just giving out a bit too much free advice, is a great relief. Putting the stress aside, it also means a retreat from the dreaded networking events and awkward pseudo-social interactions.

Or does it?

The value of a professional network cannot be overstated and is an essential part of career growth and assistance throughout one's career. As someone who "grew up" as a lawyer attending bar association events and has been known to serve on a law school reunion planning committee or two, I have learned to appreciate the opportunity to get to know and learn from other attorneys.

I was fortunate because, in my law firm days, I was encouraged to get involved in activities that interested me rather than those someone else thought would be beneficial. This meant I was able to enjoy the work and find meaning in it and, in turn, make genuine connections with those outside the workplace. Then, as now, I find these relationships not merely helpful but sustaining.

Professional networks provide work-related resources

Putting aside the personal element, many organized (as well as informal) groups provide excellent referral sources, model documents, and job postings. In addition, having a reliable network allows you to stay on top of best practices in your industry and across different business types.

By having credible information about how other organizations address



common issues, we are better resourced internally. Although we want to be innovative and cutting-edge, sometimes we are asked by our internal clients to provide a middle ground or to help them avoid taking an outsized risk. Adopting a guideline provided by someone from a network can be a time-saving solution. For example, during the pandemic, we have been asked to provide information about how others are handling issues such as return-to-work, vaccines, and safety.

When things are their worst at work, knowing you are not just part of your organization but part of a legal community, alongside other honorable lawyers, can be what keeps you in practice and gives you hope for a new opportunity that will be fulfilling.

A network can be a sounding board

When thinking about how we manage our careers, a professional network provides a sounding board. Having trusted colleagues outside of your organization can be a way to get advice on how to negotiate your compensation,

how and when to make a career move, and whether the experiences you have in the workplace are common.

Being a lawyer can be draining and frustrating. When things are their worst at work, knowing you are not just part of your organization but part of a legal community, alongside other honorable lawyers, can be what keeps you in practice and gives you hope for a new opportunity that will be fulfilling.

Choose or build a network that includes peers, role models, and mentees

Many lawyers gravitate toward others at their practice level and build their networks laterally. And there are so many benefits to having a network with a number of peers. You may be at similar levels of expertise and have common concerns about your career trajectory.

You may also be going through lifecycle events at the same time and it may be helpful to find out what resources are available for professionals balancing work with child or elder care.

It's also critically important to reach out to those in different spots in their careers. Network members may be able to provide you with perspectives that

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help you do everything from find a new position to be a better supervisor.

By volunteering in a professional organization, you are able to demonstrate your attitude, reliability, and competence. In turn, other volunteers get to know your work ethic and may provide a reference for you or have you top of mind when they learn of an employment opportunity. Also, it can be very satisfying to help others connect with potential employers finding ways to promote more junior lawyers.

It's never too late to build or expand a network

Many lawyers realize they need resources later in their careers. Perhaps when they are facing a professional crisis, their companies are sold, or they

find themselves in a new industry or geographic location. The unknown can be overwhelming. You've toiled away at your desk for years and now you are starting at square one. The good news is that whether it is ACC, your law school, or another organization, you will not be turned away.

You can find opportunities that match your personality, expertise, and availability. Whether you are most comfortable giving a speech, writing an article, mentoring a junior lawyer, developing a library of model materials, or mingling at a social event, there is some way to connect. Find the activities and people who reflect your interests and values. From there, you will be best able to position yourself for success.

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In turn, the voice of the bar is stronger and we are better counselors to our clients and role models in our community.

As we work to build relationships in the legal profession, we make our practices more collegial and more productive. In turn, the voice of the bar is stronger and we are better counselors to our clients and role models in our community. Take the time to invest in your own connections; it will pay dividends for you and others.

2022 Upcoming ACCGP Events

Visit [ACC Greater Philadelphia](#) for the most current event details or to register for chapter events.

July 14

Meet Your Counterparts Networking Reception with Armstrong Teasdale @ Savona

July 19

Corporate & Securities CLE Webinar with Faegre Drinker (Virtual)

July 20

Family Fun Night & Ballgame @ Frawley Stadium in Wilmington, DE

July 26

Meet Your Counterparts Networking Reception with Fisher & Phillips (In-person) @ Estia, Radnor

August 3

Ethics CLE Institute with Dechert & Manko Gold (Virtual)

August 11

Meet Your Counterparts Networking Reception with Cozen O'Connor (In-person)

August 16

Health, Biotech & Pharma CLE Webinar with Stradley Ronon (Virtual)

August 17

Women's Networking Reception with Duane Morris (In-person)

August 23

Meet Your Counterparts Networking Reception with Faegre Drinker (In-person)

August 25

Roundtable with Schnader Harrison Segal & Lewis LLP

Be on the lookout for calendar updates!

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