

Capital Markets

Skadden

Rule 10b5-1 Trading Plans

Benefits	<p>Sales and purchases of securities made pursuant to a Rule 10b5-1 trading plan are afforded an affirmative defense to insider trading liability under Section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934, as amended (Exchange Act).</p> <p>Plans provide flexibility to listed companies and their executives and directors, who have limited windows in which they do not possess material nonpublic information (MNPI). Plans allow them to plan and execute future trades with greater certainty, even if they later become aware of MNPI.</p>
Requirements	<p>The plan must:¹</p> <ol style="list-style-type: none">1. Be in writing;2. Be adopted before the adopting person or entity becomes aware of any MNPI;3. Specify a non-discretionary trading method by:<ul style="list-style-type: none">• identifying the (i) amount (number of securities or dollar value) of securities to be purchased or sold, (ii) price (market price on a particular date, limit price or particular dollar price), and (iii) date (in the case of a market order, a specified day (or as soon thereafter as is practicable under ordinary principles of best execution) or, in the case of a limit order, a day on which a limit order is in force) for each purchase or sale;• including a written formula, algorithm, or program to determine the amount, price, and date for each transaction; or• not permitting the plan creator to exercise subsequent influence over how, when, or whether to effect trades. Any person who, pursuant to the plan, did exercise such influence must not have been aware of the MNPI when doing so; and4. Be made in good faith and not to evade insider trading prohibitions. <p>In order to be afforded the defense, the purchase or sale must have been <i>pursuant</i> to the plan. This would not be the case if the trader deviated from the plan (<i>e.g.</i>, by changing the amount, price, or timing of the purchase or sale) or entered into or altered a corresponding or hedging transaction or position.</p> <p>Any individual who has access to MNPI of the issuer may establish a plan. Plans can also be adopted by entities (<i>e.g.</i> an issuer may conduct a share repurchase program pursuant to a plan).</p> <p>Plans can cover sales of debt or equity securities, including the sale of stock acquired upon the exercise of options. Plans can also be used for ongoing purchases, although this is less common for individuals.</p>
Best Practices	<p>Plans can be a valuable tool if best practices are followed, including:</p> <ul style="list-style-type: none">- Adopt plans only during open trading windows and while not in possession of MNPI.- Do not use multiple, overlapping plans that cover the same securities.- Consider a waiting period between the establishment of a plan and the first trade.- Avoid multiple plan modifications (which may be treated as the entry into a new plan), suspensions (similar to modifications), and terminations, all of which may challenge the good faith determination. Any modification should only occur while not in possession of MNPI.- Do not use plans for a one-off trade.- If adopted by an issuer or senior executive, consider an 8-K or other public disclosure.
Interplay with Other Federal Securities Laws	<p>Must still comply with other regulatory requirements including:</p> <ul style="list-style-type: none">- Rule 144 of the Securities Act: If an insider is selling securities pursuant to Rule 144 as opposed to a resale registration statement, they may need to file a Form 144. Adoption of a plan to sell securities in reliance on Rule 144 does not change the due date for Form 144. The Form 144 must be transmitted for filing concurrently with either the placement of a sell order for a brokerage transaction, or the execution of such sale directly with a market maker. The Form 144 filing may be made in advance upon adoption of the plan. However, the notice is effective for a maximum of three months, so sales over longer periods will require multiple filings.² Sales under a plan will also need to comply with the holding, volume and manner of sale requirements of Rule 144, to the extent applicable.- Section 16 of the Exchange Act: Trades under a plan may need to be disclosed on Forms 4 and 5. Trades made pursuant to a plan are not exempt from short swing profit liability under Section 16.- Section 13 of the Exchange Act: Disclosure obligations under Section 13(d) of the Exchange Act apply to trades made under a plan. Purchases and sales may need to be reported on a Schedule 13D or 13G if the insider owns or acquires more than 5% of a company's securities.

¹ Rule 10b5-1(c) of the Securities Exchange Act of 1934.

² See CDI 120.01.