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WAIT CONTINUES FOR ANY SEC PUBLIC RESPONSE TO SENATORS' URGENT CALL FOR RULE 10B5-1 PLAN REFORM

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The wait continues for any public response from the SEC to a recent letter from three Democratic members of the Senate Committee on Banking, Housing, and Urban Affairs, including Senator Elizabeth Warren, urging the SEC to (1) consider reforms to prevent what the senators identified as abusive 10b5-1 plan practices and (2) improve disclosure of and enforcement relating to such plans.

Senators' SEC Requests for Information. The senators asked the SEC to respond to the following questions by Monday, February 22, 2021:

1. What actions does the SEC currently take to ensure that 10b5-1 plans are compliant with the Commission's current rules and requirements?

2. How many enforcement actions has the agency taken with regard to 10b5-1 plans in the past five years? Please provide a list and summary of all such actions.

3. Has the SEC taken action to require a "cooling off period" between the adoption or amendment of any 10b5-1 plan and any stock sales under that plan?

4. Does the agency intend to require that 10b5-1 plans are disclosed publicly and posted online in advance of any trades made under that plan?

5. Has the SEC considered or evaluated modifications of regulations to ensure that 10b5-1 adequately covers "short-swing" purchases?

6. What other actions has the SEC taken or are under consideration to prevent the abuse of 10b5-1 plans?

In the letter, the senators said they believe reforms are necessary in large part because "new evidence indicates that executives – especially those in the health care industry - are abusing these plans to obtain huge windfalls at the expense of ordinary investors." The senators also expressed the view that the permitted non-disclosure of these plans disadvantages other investors.

Specifically, when large sales under insiders' plans are triggered by a rising stock price following a company's "good news" announcement, buyers do not know that they are trading against large sell orders that effectively drive the stock price down.

Alleged Abusive Practices. The senators cited various studies and research in arguing the prevalence of the following alleged abusive plan practices:

- Plans are often set up so that initial trades are based on material non-public information known by the insider at the time of plan adoption.
- Plans often do not provide for a sufficient cooling off period between the date of plan adoption and the date on which sales may begin, and some plans even go so far as to permit sales on the date of plan adoption.
- Insiders often modify or cancel their plans, including days or hours before a company's major positive announcement, to increase their profits.
- Insiders often and without penalty fail to timely report their plan sales on Form 4s, limiting transparency into plan operations.

Remedies. In view of their concerns, the senators recommended that the SEC consider remedies proposed by "experts" that include:

- Imposing a mandatory cooling off period of four to six months between the date of plan adoption or amendment and the commencement date for potential trades under the new or amended plan;
- Requiring that plans be publicly disclosed to provide information to investors and allow for better SEC oversight;
- Stricter SEC enforcement of Form 4 filing deadlines so that the market learns about plan transactions within the two business day time period; and
- To prevent insiders from benefitting from "short-term windfalls that don't translate into long-term gains," amending the short-swing profit rules to apply to an insider's profits from plan sales that follow the company's disclosure of material information, where such sales cause share prices to fall in the period immediately after disclosure.

Rule 10b5-1 plans have been around since the turn of the century – i.e., 2000. Since then and notwithstanding continuing concerns and criticism, the rules have not been amended. Critical rumblings have gotten a bit louder in recent months, with former SEC Chairman Jay Clayton recommending at a senate hearing in November 2020 that the rules be amended to require a mandatory waiting period of four to six months between (1) the date of adoption or amendment of a plan and (2) the date on which trading under the plan (or amended plan) may begin or

recommence. Such a waiting, or "cooling off," period is intended to distance an executive's access to insider information (because he or she cannot be in possession of material non-public information at the time of plan adoption) from his or her sales of company stock under the plan. While cooling off periods have emerged as a best practice, there are no rules mandating them.

To our knowledge and as of the date of this post, the SEC has not yet responded to the senators' letter. It will be interesting to see if, given the new administration, political climate and spotlight on insiders' large profits in recent transactions, the SEC will consider amending the rules governing Rule 10b5-1 plans to address the senators' and possibly others' concerns.

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