

March 2, 2023

As Rule 10b5-1 Revisions Take Effect, the SEC Brings Another Enforcement Action

This week, there have been two important developments concerning plans implemented under SEC Rule 10b5-1, which allows for advance directives to trade securities in a manner that provides protection against claims of unlawful insider trading. *First*, the SEC's recent amendments to Rule 10b5-1 took effect on Monday, February 27. Accordingly, the new requirements (discussed [here](#)) are now operative, and companies should update their policies to comply with the revised rule and inform affected personnel, if they have not done so already.

Second, the SEC yesterday brought contested insider-trading charges against the executive chairman of Ontrak, Inc., alleging that he was in possession of material nonpublic information when he entered into two separate 10b5-1 plans, thereby rendering the plans invalid. [SEC v. Terren S. Peizer \(C.D. Cal. Mar. 1, 2023\)](#). The Department of Justice also announced a parallel criminal [indictment](#).

The government alleged that Peizer entered into the 10b5-1 plans when he was aware of the likely termination of Ontrak's most important customer relationship. Accordingly, the affirmative defense under Rule 10b5-1 was unavailable because Peizer did not establish the plans in conformity with the requirements of the rule, or in good faith. When Ontrak ultimately disclosed the termination of the customer relationship, its stock price fell by 44%. The government alleges that Peizer avoided over \$12 million in losses by selling stock prior to the disclosure.

The government also asserts that Peizer shopped for a broker-dealer that would not require a cooling-off period before trades could be executed. Such shopping could not succeed now, as the cooling-off periods mandated under the amended rule (at least 90 days for a director or Section 16 officer) have taken effect.

We expect the SEC will now avidly search for violations of the newly tightened standards. One method they will deploy is foreshadowed by the SEC's disclosure that the Peizer case "arose from a data-driven initiative into executive trading pursuant to 10b5-1 plans" – further underscoring the need for vigilance in revising policies and in alerting executives to the risks they face if their trading plans are not entered into, designed and operated in accordance with the SEC's new rules.

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