

# COMPLIANCE WEEK

## At Age Five, Individual Trading Plans Hit Their Stride

By Melissa Klein Aguilar — November 15, 2005

**F**ive years after the adoption of Securities and Exchange Commission Rule 10b5-1(c), public company executives' use of individual trading plans finally appears to be taking off.

Rule 10b5-1 trading plans, which were instituted in October 2000 along with Regulation Fair Disclosure, are programs for trading securities designed to gain the protections of Rule 10b5-1's affirmative defenses against insider trading. Under such plans, insiders can spread stock trades over a period of time regardless of any material, non-public information they may receive after adopting their plans.

Evidence from numerous sources suggests that 10b5-1 trading plans, which in the past have barely registered a blip on many companies' radar screens, are becoming mainstream. A recent survey by Restricted Stock Systems and data from compensation research firm Equilar both show that executives at a large number of public companies now have 10b5-1 plans in place. The trading plans were also a topic of discussion at the annual conference of the National Association of Stock Plan Professionals, held earlier this month, and over addressed in a survey earlier this year by the Society of Corporate Secretaries & Governance Professionals.



Besner

Until recently, the adoption of trading plans has been fairly slow, notes Greg Besner, chief executive of RSS. According to Besner, whose Princeton, N.J.-based company launched at the same time the SEC rule was passed, "The topic of 10b5-1 was very quiet for the first three years." But that's changed over the last 24 months. "All our clients wanted to talk about is Rule 10b5-1 software," says Besner, whose firm provides software and services related to restricted stock transactions.

"We've seen the number of brokerage firms' clients who have these trading plans quickly growing," says Besner. "Our business has doubled in the last year and most of that growth has been software and services to manage 10b5-1 trading plans."

### Disarming The Investment Community


According to RSS' Besner, the rapid adoption may be, in part, due to the fact that companies are finally getting comfortable with the rules. "Five years ago when the regulation was enacted, the markets were very soft, to say the least," he says. "There were no best practices, and very little case study for corporate counsel, companies and executives to follow." In fact, the earliest plans were typically complex and seldom utilized. "The early trading plans we saw were set up with limit prices that were very high and using fairly complicated algorithms," says Besner. "Most of those plans never even triggered any sales or purchases."


#### RELATED RESOURCES

 [View Restricted Stock Systems' 10b5-1 Survey](#)

 [View Equilar's Spreadsheet Of 10b5-1 Trading Plans](#)

#### Related Coverage

 [More Execs Adopting Stock-Selling Plans, Or Disclosing More? \(Nov. 2004\)](#)

 [Individual Trading Plans Can Help Defend Securities Fraud Claims \(July 2004\)](#)

Fast forward five years. Among the 592 respondents to a trading practices survey conducted earlier this year by the Society of Corporate Secretaries & Governance Professionals, 69 percent said their company allows 10b5-1 plans. And the “2004 Stock Plan Design and Administration Survey” survey by the National Association of Stock Plan Professionals and KPMG showed that 94 percent of roughly 500 participants surveyed said their company has an insider compliance program.

#### THE RULE

### Rule 10b5-1: Adopting A Plan

The excerpt below is from Rule 10b5-1: Trading "on the Basis of" Material Nonpublic Information in Insider Trading Cases:

...a person's purchase or sale is not "on the basis of" material nonpublic information if the person making the purchase or sale demonstrates that:

- A. Before becoming aware of the information, the person had:
  1. Entered into a binding contract to purchase or sell the security,
  2. Instructed another person to purchase or sell the security for the instructing person's account, or
  3. Adopted a written plan for trading securities;
- B. The contract, instruction, or plan described [above]:
  1. Specified the amount of securities to be purchased or sold and the price at which and the date on which the securities were to be purchased or sold;
  2. Included a written formula or algorithm, or computer program, for determining the amount of securities to be purchased or sold and the price at which and the date on which the securities were to be purchased or sold; or
  3. Did not permit the person to exercise any subsequent influence over how, when, or whether to effect purchases or sales; provided, in addition, that any other person who, pursuant to the contract, instruction, or plan, did exercise such influence must not have been aware of the material nonpublic information when doing so; and
- C. The purchase or sale that occurred was pursuant to the contract, instruction, or plan. A purchase or sale is not "pursuant to a contract, instruction, or plan" if, among other things, the person who entered into the contract,

The increased prevalence of 10b5-1 trading plans may also be due to accelerated Form 4 filing deadlines; most insider trades now must be filed electronically with the Securities and Exchange Commission in as few as two business days. The readily accessible filings have created a flurry of data that institutional investors have begun scouring for hints of corporate direction. “We’re seeing more and more companies using the regulation to disarm the investment community,” acknowledges Besner. “Instead of explaining why insiders are trading their stock in a one-off transaction, companies can explain that the trades were pre-arranged during an open trading window.”

Recent data suggests the use of trading plans is indeed becoming more prevalent. The survey by RSS of public companies found that among 170 respondents, more than half (54 percent) have 10b5-1 plans in place. In addition, 26 percent of 168 companies responding said their "non-Section 16" insiders also have 10b5-1 Plans in place. Thirty percent of 166 respondents said their company encourages or mandates 10b5-1 plans for insiders planning to sell. Among 147 respondents who didn't have a plan in place, 35 percent said their company is considering a 10b5-1 program for insiders and others.

An analysis by executive compensation research firm Equilar of Form 4 filings disclosed over the 22-month period from January 2004 to October 2005 showed executives at 30.6 percent of S&P 500 companies reported the use of 10b5-1 trading plans. During that same period, non-executive directors at 10 percent of companies in the S&P 500 reported the use of trading plans.

According to the Equilar data, 360 executive officers at 123 S&P 500 companies conducted at least one equity transaction pursuant to a 10b5-1 trading plan between Jan. 1 and Oct. 21, 2005, compared with 355 executive officers at 114

instruction, or plan altered or deviated from the contract, instruction, or plan to purchase or sell securities (whether by changing the amount, price, or timing of the purchase or sale), or entered into or altered a corresponding or hedging transaction or position with respect to those securities...

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**Source:**

 [Securities Lawyer's Deskbook, University of Cincinnati College of Law](#)

companies for all of 2004.

In addition to the Form 4 filing data, which suggests that the plans are being widely used, Equilar President Tim Ranzetta points to the fact that 10b5-1 plans were on the agenda at the October NASPP conference as another indication that the topic “is garnering more interest.”

In addition, Besner says that public companies typically weren’t involving themselves in the establishment and administration of 10b5-1 plans, other than giving legal approval for a trading plan.

But over the last year, he says, “more companies are getting more involved in the process of helping insiders set up these plans; companies are clearly becoming more hands-on in helping insiders to administer this process.”

As a result, in September, RSS began offering its 10b5-1 software directly to public companies. “There’s more emphasis on disclosure, and more scrutiny with regards to insider transactions,” says Besner. “I don’t think it’s a coincidence that 10b5-1 trading plans are becoming much more prevalent a few years after Sarbanes-Oxley as companies are focusing more on corporate governance.”

Related coverage and resources, including examples of transactions conducted pursuant to 10b5-1 trading plans at some S&P 500 companies, are available from the box above right.

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