

Rule Changes the SEC is Considering, Including Revisiting Recently Amended Rules

By Jeffrey T. Haughey
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SEC Chair Gary Gensler has identified several areas of focus (10b5-1 plans, climate change, human capital management and cybersecurity risk governance among others), while also asking the SEC staff to revisit a number of recently amended rules (proxy voting advice, the integration framework for exempt offerings, the accredited investor definition and resource extraction rules).

Rule 10b5-1 Plans

Rule 10b5-1 permits an insider to establish a plan or contract that specifies pre-established dates or formulas for selling the insider's shares without the risk of a claim of insider trading. The plan or contract must be entered in good faith when the insider is not in possession of material non-public information or MNPI. Such plans are also used by public companies in connection with their stock repurchase programs or by corporate insiders or others to avoid the risk of being prevented from trading due to the possession of MNPI.

In recent statements to the [CFO Network Summit](#) and the [SEC Investor Advisory Committee](#), the Chair suggested the need to “freshen up” Rule 10b5-1 to fill in “the gaps in our insider trading regime” and suggested the following areas for consideration:

- whether to require a “cooling off period” between the time that a plan is established and the first trade under that plan (suggesting four to six months may be an appropriate period of time);
- whether to impose limits on when 10b5-1 plans can be canceled (currently an insider may be able to do so while in possession of MNPI);
- what, if any, disclosures should be required, such as information on adoption, modification, and terms of the plan;
- whether there should be a limit on the number of plans an insider can adopt; and
- other possible rule changes, including its intersection with company stock buyback plans.

The SEC's [new Reg Flex Agenda](#) that was posted on June 11, 2021 targets action for a Rule 10b5-1 proposal by October 2021. Upon submission of a proposal by the SEC staff, the Commission may then propose amendments to Rule 10b5-1 that would then be subject to public comment before the Commission could adopt such amendments.

Other Potential Rule Changes

The SEC's new Reg Flex Agenda also targets action in several other areas. This required regulatory agenda is not binding and frequently changes over time. It does serve, however, as an indication of the SEC Chair's priorities. The following is a list of some of the rules that may be revised according to the agenda as well as the target dates for SEC staff submission to the Commission of each:

October 2021 Target Date

- climate change disclosure, which is supported by the Attorneys General from a dozen states;
- human capital management disclosure;
- enhanced cybersecurity risk governance disclosure, which is consistent with the recent settlement with First American Corporation for [disclosure controls and procedures violations](#) related to a cybersecurity vulnerability that exposed sensitive customer information, but was not disclosed to executive management in a timely manner; and
- disclosure of board diversity.

April 2022 Target Date

- Rule 14a-8, proxy voting advice, and universal proxies for use in contested elections of directors;
- exempt offering framework, including the integration of offerings and the definition of accredited investor; and
- disclosure of payments to resource extraction issuers.

SEC Commissioners Peirce and Roisman [issued a statement](#) opposing the apparent effort to reverse course on a series of recently amended rules. As noted above, the SEC's Reg Flex Agenda now includes proposals to consider further amendments to these recent rule changes:

- Rule 14a-8 related to shareholder proposals (adopted September 23, 2020; effective January 4, 2021) and Rule 14a-2(b) related to proxy voting advice (adopted July 22, 2020; effective November 2, 2020);
- the definition of accredited investor (adopted August 26, 2020; effective December 8, 2020) and the integration of offerings (adopted November 2, 2020; effective March 15, 2021);
- whistleblower rules (adopted September 23, 2020; effective December 7, 2020); and
- Rule 13a-1 on payments to resource extraction issuers (adopted December 16, 2020; effective March 16, 2021);

These two Commissioners noted that the amendments to these rules are less than a year old and have only been effective between three to seven months. To their knowledge, the SEC has received no new information that would merit opening up these rules for further changes at this time. According to them, the SEC “historically has embraced a transparent, methodical, and rigorous rulemaking process to ensure its rules reflect sound policy, transcend political differences, and thus enable our registrants to operate in a consistent, predictable regulatory regime. . . . Past Commissions have generally refrained from engaging in a game of seesaw with our rulebook.”

For questions regarding actions taken by the SEC, please contact your GableGotwals attorney or a member of our [Corporate & Securities team](#).



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