Are Changes to Securities Trading Plan Rules on the Horizon?

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On the heels of announcing last fall that their respective companies produced a vaccine that was effective in the fight against COVID-19, top executives at Pfizer and Moderna sold millions of dollars' worth of company stock and profited handsomely. The trades were legal, even though they were set in motion before the news was made public, under a "safe harbor" in U.S. Securities and Exchange Commission ("SEC") rules. Unsurprisingly, that safe harbor has come under renewed scrutiny in recent months and some are calling for reform to the SEC's insider trading policies.

The Securities Exchange Act of 1934 prohibits manipulative and deceptive practices in the trading of securities and directs the SEC to issue rules enforcing that prohibition. While those rules generally prohibit insider trading—the buying and selling of stock by employees and certain third parties who are privy to material nonpublic information (MNPI)—Rule 10b5-1 offers a safe harbor for corporate insiders who buy or sell their shares according to a trading plan set up in advance. A typical trading plan will outline the price, amount, and date for the anticipated trade. Because high-level corporate executives are arguably always in possession of MNPI, trading plans protect them from civil and criminal liability.

But one person's safe harbor is another person's loophole, and some argue that Rule 10b5-1 is so broad it invites abuse. While the rule prohibits adopting, modifying, or cancelling a trading plan while the employee possesses MNPI, recent curiously-timed trades have raised suspicions about how strictly the Rule is followed and enforced. Pfizer CEO Anthony Bourla implemented a trading plan on August 19, 2020, the day before Pfizer announced positive early data on its vaccine trials and stated that it was on track to seek FDA review by October 2020. Acting under that trading plan, Bourla sold $5.6 million in stock—60% of all his shares—the same day Pfizer announced that its vaccine was over 90% effective. Several Moderna executives engaged in similarly-timed trades.

Last week the Chairman of the Senate Banking Committee and two other Committee members called for the SEC to reconsider the broad latitude afforded by trading plans and to engage in more rigorous scrutiny of planned trades to ensure they do not exceed the limits of Rule 10b5-1. Among the reforms outlined in their letter to the Acting Chair of the SEC, the Senators suggested that the SEC consider adopting a "cooling off period" that would require insiders to wait several months—at least one fiscal quarter—between adopting or changing their plans and executing any trades under those plans. The Senators also urged the SEC to increase transparency by requiring public disclosure of trading plans and to penalize stock sales following the public disclosure of material information that causes stock prices to drop. The Senators have required the SEC to respond by February 22, 2021 and address "how the SEC views existing regulation and enforcement regarding 10b5-1 plans."

Even if legally permissible and done in good faith, the timing of trades can generate the kind of public relations sideshow any company would rather avoid. When evaluating the strength of your company's insider trading policy and internal controls, there are sound reasons to consider publicly disclosing trading plans for certain top executives and adopting a "cooling off" or similar requirement to protect both the company and its employees from actual or perceived impropriety.

We Can Help

Miller & Martin is here to advise corporations on how to minimize risk in balancing a robust securities compliance program with their executives' needs to make financial planning decisions. For more information, contact litigation and risk management attorney Eileen Rumfelt or any member of our White Collar & Corporate Investigations practice.