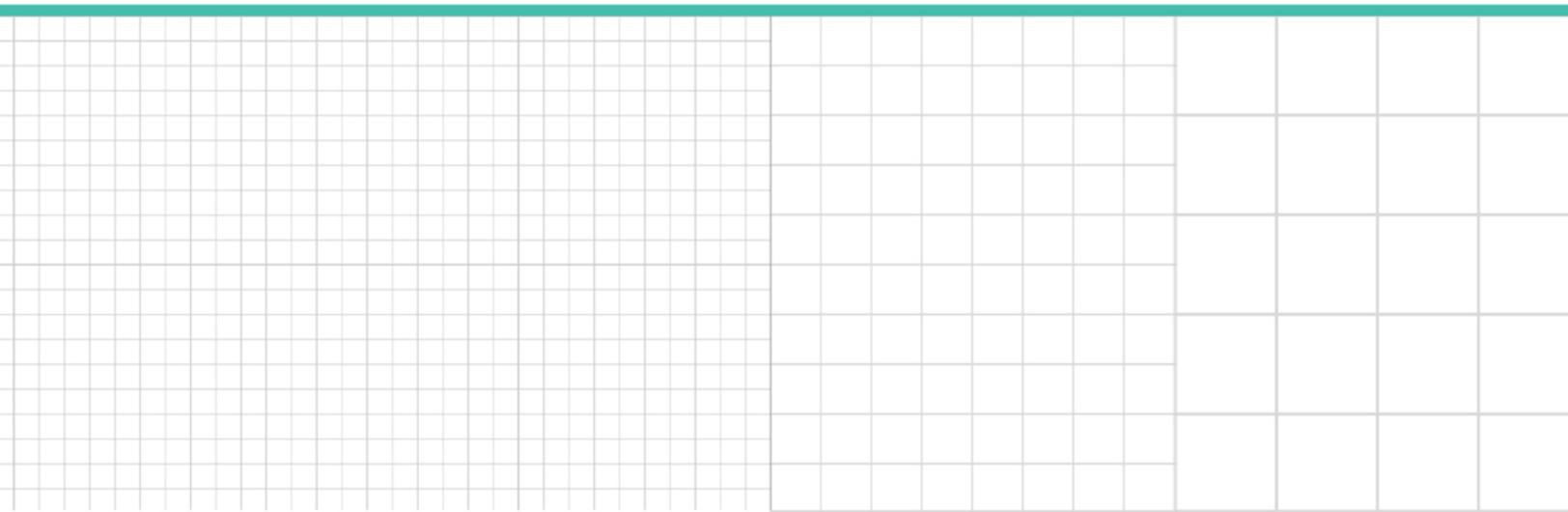


Professional Perspective

Establishing an Issuer Rule 10b5-1 Plan with an ATM Offering

*Michael Hermsen, Brian Hirshberg, and Anna Pinedo,
Mayer Brown*

Reproduced with permission. Published September 2019. Copyright © 2019 The Bureau of National Affairs, Inc.
800.372.1033. For further use, please visit: <http://bna.com/copyright-permission-request/>



Establishing an Issuer Rule 10b5-1 Plan with an ATM Offering

Contributed by [Michael Hermsen](#), [Brian Hirshberg](#), and [Anna Pinedo](#), Mayer Brown

This article summarizes key questions that an issuer may raise in connection with deciding whether to establish a Rule 10b5-1 trading plan in conjunction with the issuer's at-the-market offering program.

Rule Purpose

Section 10(b) of the [Securities Exchange Act of 1934](#), as amended and Rule 10b-5 promulgated thereunder, prohibit, among other things, the sale of a security on the basis of material non-public information. Rule 10b5-1 specifies that a sale constitutes trading on the basis of material non-public information where the person making the sale was aware of material non-public information at the time the sale was made. Rule 10b5-1, adopted in August 2000, codifies the position of the Securities and Exchange Commission that awareness, not use, of material non-public information is sufficient to establish liability in insider trading cases.

In addition, the rule creates a mechanism whereby any person or entity can enter into a trading plan (a "Rule 10b5-1 plan") that will provide an affirmative defense to a claim that a trade occurred "on the basis of" material non-public information. A Rule 10b5-1 plan is a written plan for trading securities that complies with Rule 10b5-1(c). Any person or entity executing pre-planned transactions pursuant to a Rule 10b5-1 plan that was established in good faith at a time when that person or entity was not aware of material non-public information has an affirmative defense against accusations of insider trading, even if actual trades made pursuant to the plan are executed at a time when the individual or entity may be aware of material non-public information.

Issuers

While Rule 10b5-1 plans are most commonly associated with individuals (such as directors and officers), entities, including an issuer itself, can also establish a Rule 10b5-1 plan. The SEC's Rule 10b5-1 adopting release expressly confirms an issuer's ability to utilize a Rule 10b5-1 plan for its own securities ("[A]n issuer could adopt a written plan, when it is not aware of material non-public information, that uses a written formula to derive amounts, prices, and dates. Or the plan could simply delegate all the discretion to determine amounts, prices, and dates to another person who is not aware of the information—provided that the plan does not permit the issuer to (and in fact the issuer does not) exercise any subsequent influence over the purchases or sales").

Issuers often establish Rule 10b5-1 plans in connection with issuer repurchase programs that are entered into in compliance with the repurchase safe harbor under Rule 10b-18, as well as in connection with accelerated share purchase programs and other equity derivatives transactions, such as forward contracts. By establishing a Rule 10b5-1 plan in conjunction with such a transaction, the issuer relinquishes control regarding the timing of repurchases of its securities to the executing broker, which acts pursuant to the pre-set plan that was established. Therefore, an issuer that has established a Rule 10b5-1 plan would be able to continue to engage in repurchases, for example, even during the issuer's traditional "blackout" periods.

ATM Offering

In an ATM offering, an issuer sells newly issued shares of its common stock incrementally through a broker-dealer at market prices. In a typical ATM offering, the broker-dealer, acting as the company's agent, can continuously change the amount and manner of sales depending on market conditions and the issuer's instructions (i.e., the company may start or stop the sale of shares pursuant to the program as desired).

Sales made pursuant to an ATM offering program are structured so that they do not involve special selling efforts and may be limited so that, on any given day, or during any specified period, the number of shares sold is not significant in relation to the issuer's average daily or weekly trading volume or its public float. The activity pursuant to an ATM offering program

generally closely resembles traditional dealer activity and can be contrasted with a securities distribution that involves an active selling effort and a substantial number of shares being sold in a single offering.

Many issuers with an ATM program limit sales pursuant to the program as a result of regular blackout periods, generally around quarterly earnings releases, or one-off blackout periods, such as when an issuer is considering a material business combination transaction. As we discuss further below, if an issuer were to establish a Rule 10b5-1 trading plan in conjunction with its ATM program, it could maintain a steady and consistent issuance of shares throughout the year and during the entire life of the ATM program. By increasing the potential number of available trading days, the issuer may maximize the overall value of its ATM program. Of course, the issuer and its counsel will want to carefully consider the [Securities Act Section 11](#) issues.

Blackout Policy

As a general matter, most issuers establish a “quiet period” (“blackout” period) around the release of potentially sensitive information and material non-public information, such as regular earnings announcements. A blackout period also may be imposed by the issuer if the issuer is aware of other information that may have a significant effect once announced on the issuer's stock price or credit spreads, such as an acquisition, a disposition, the entry of an order or judgment by a court or a regulator, etc.

There is no bright line rule regarding the length of an issuer's blackout period. Many issuers adopt a blackout policy that commences anywhere from 15 to two days before the quarter-end and ends at the commencement of trading on the day of or the day following the issuance of the earnings release. Over time, however, many issuers have reviewed their blackout policy and determined that given the availability of information, it may be appropriate to end the blackout period immediately following the earnings release. This is an area where there is a fair bit of variation in practice.

Blackout periods are prophylactic measures designed to provide a measure of protection as to when it may be safe to transact in issuer securities. Blackout periods are scheduled for times when it is highly likely that insiders may have access to material non-public information. They are not specifically required by a rule or regulation. During a blackout period, an issuer generally suspends transactions in its own securities and prohibits its directors and officers from engaging in transactions in issuer securities. Of course, an issuer cannot suspend regular trading in the secondary market in the issuer's own securities—the public will buy and sell the issuer's securities, dealers will buy and sell the issuer's securities, and market makers in the issuer's securities will continue to make markets.

As noted above, to avoid the appearance that the issuer is engaging in repurchases of its securities while in possession of material non-public information and in order to continue to engage in repurchases pursuant to a Rule 10b-18 repurchase plan, an issuer may adopt a Rule 10b5-1 plan.

Benefits

Rule 10b5-1 plans provide the following benefits in connection with an ATM program: an affirmative defense to insider trading allegations as explained above, greater execution certainty since trades can continue to occur even when an issuer has material non-public information, and more opportunities for an ATM agent to sell shares on the issuer's behalf.

How the Plan is Established

An issuer can adopt a Rule 10b5-1 plan when it does not have material non-public information (typically for a period of time following the filing of a quarterly or an annual report) in order to bolster the element of good faith and avoid the appearance of establishing a plan while in possession of material non-public information. In addition, as part of executing the ATM distribution agreement establishing the ATM offering, the issuer will be required to represent that it did not possess any material non-public information at the time the Rule 10b5-1 plan is established. Typically a waiting period is imposed between the establishment of the Rule 10b5-1 plan and the date on which the initial trade is made pursuant to the plan. The term of the Rule 10b5-1 plan does not necessarily need to mirror the term of the ATM. The term may be short or long as the issuer prefers (typically between six months and a year).

Under a Rule 10b5-1 plan, an issuer can specify the number of shares to be sold within a price range and within specified time periods or dollar value of securities. There is no restriction on the total amount of securities a Rule 10b5-1 plan may cover. A Rule 10b5-1 plan can be set up to execute trades with minimum or maximum prices or with prices that change over time or that are calculated based on a formula, so long as the price targets or the method for determining the price targets are specified in the plan and there is no discretion left with the issuer. The formula should be included in the distribution agreement or in the transaction confirmation exhibit attached to the distribution agreement. Alternatively, the issuer might consider using a market-based formula (such as a formula based upon the stock's relative performance compared to specified market or industry index). Generally, in this case, the distribution agreement would prohibit block trades.

Communications

After the Rule 10b5-1 plan is adopted, there should be no communication between the ATM agent and the issuer with respect to execution or any material non-public information. For each ATM sale, the ATM agent should provide the issuer with a confirmation and the related calculation establishing that the sale was made in accordance with the pre-arranged formula. Of course, the issuer may amend or terminate the ATM program at any time pursuant to the terms of the distribution agreement.

Disclosure Issues

Sales under an ATM program generally will be made pursuant to a shelf registration statement on Form S-3 or Form F-3 that automatically incorporates by reference the issuer's periodic reports filed under the [Exchange Act](#). The issuer also prepares a prospectus supplement in connection with offers and sales to be made pursuant to the ATM program if the Form S-3 is a universal shelf registration statement. As a result of the integrated disclosure system and future incorporation by reference, the issuer would not need to repeat or update the prospectus supplement relating to its ATM program to reflect material events that occur after the date of the prospectus supplement.

To the extent there is a fundamental change in the issuer's business that requires that the issuer suspend use of its effective shelf registration statements, including the registration statement relating to its ATM program, the issuer would suspend or terminate the program. The Rule 10b5-1 plan may also provide for automatic suspension or termination of trading under the plan if the issuer's general counsel or compliance officer informs the ATM agent that the issuer is suspending use of its effective shelf registration statements.

Representations and Warranties

The distribution agreement will contain representations and warranties to be made by the issuer to the ATM agent and the timing of when these representations and warranties are made, typically upon entering into the distribution agreement, at the time of each ATM offering as well as at the time of filing of an [Exchange Act](#) periodic report. Such provisions include a representation and warranty that the ATM prospectus and the related registration statement (including the [Exchange Act](#) periodic reports incorporated by reference) do not include a material misstatement or omit to state a material fact required to be stated therein.

Public companies typically furnish press releases containing the company's quarterly operating results on a Form 8-K (an earnings press release). In order to keep the ATM prospectus and the related registration statement current and ensure the accuracy of the representations and warranties, such earnings press release (assuming it contains material developments) should be filed, rather than furnished, with the SEC on Form 8-K and specifically incorporated by reference into the offering documents, unless the issuer also files the related Form 10-K or 10-Q at the same time.

ATM Sales Versus Underwritten Public Offering

Unlike a typical underwritten offering, ATM program sales conducted pursuant to a Rule 10b5-1 plan do not involve special selling efforts (no road show, investor solicitation or other special marketing efforts) on the part of the issuer or the ATM agent; relate to an amount of stock that would not be considered significant or of a magnitude typically associated with a

"distribution" of securities; involve sales at a sale price that is related to the prevailing market price; and does not involve compensation that typically would be associated with an underwriting but rather is more consistent with dealer activity.

The ATM agent executes sales of the company's securities through ordinary brokers' transactions on securities exchanges or through electronic trading systems at prices related to the daily trading price or the volume-weighted average price for the company's securities. As a result of these various offering-related solicitation factors, routine sales under an ATM program are akin to the ordinary sales transactions occurring in the issuer's securities in the secondary market and are distinguishable from underwritten offerings.

Unlike an underwritten offering, wherein the issuer has made a determination to issue and sell its securities on a particular day and is engaging with potential investors and the underwriter is soliciting investor interest and all securities are sold by the issuer to the underwriter at a fixed price that is at a discount to then current market price of VWAP, in an ATM program paired with a Rule 10b5-1 plan, there is no issuer decision to sell or refrain from selling on any particular day and the market price is presumed to reflect complete information about the issuer given the issuer's ongoing reporting obligations.

Precedent

The federal securities laws do not require companies to publicly disclose the adoption of a Rule 10b5-1 plan. However, several issuers have included language in publicly filed distribution agreements establishing the ATM program that confirms transactions consummated thereunder are intended to comply with the requirements of Rule 10b5-1.