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Medarex's Pien Passes Up a Windfall

By DAVID J. REYNOLDS

Through a quirk in insider-trading law, the chairman and chief executive of [Medarex Inc.](#) had a chance to pocket \$250,000, but he didn't take the money.

Howard Pien's decision to pass up the easy cash illustrates the ethical, legal and public-relations dilemma faced by corporate insiders tempted to capitalize on a loophole in securities law.

In the month before [Bristol-Myers Squibb Co.](#) offered \$2.1 billion to buy the Princeton, N.J., drug maker, Mr. Pien sold 34,000 Medarex shares through a trading plan he entered a year ago, according to company disclosures. After the offer was announced last week, Medarex shares nearly doubled, to \$15.87. Mr. Pien had sold his shares for an average price of \$8.31.



Howard Pien

Stock-trading plans such as Mr. Pien's, called 10b5-1 plans after the section of securities law that established them in 2000, are billed as a way for company insiders to assure regulators and investors that their trades don't reflect inside information. Under such plans, an insider can map out stock transactions in advance and have the trades automatically executed, even if the insider later learns material nonpublic information.

A loophole in 10b5-1, however, allows executives to cancel a plan. While it could have been illegal for Mr. Pien to buy shares leading up to the merger, there is no law against canceling a plan to sell.

With no trade, there is no illegal insider trading.

So could Mr. Pien have canceled his plan before the merger announcement and collared the \$250,000?

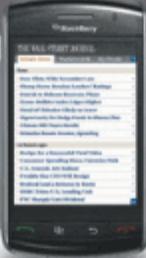
"The short answer is yes," said a Securities and Exchange Commission lawyer who has litigated insider-trading cases. "That's the state of the law today," he said.

Mr. Pien, who declined to be interviewed about his trades, put the plan in place over a year ago to cover tax obligations, a spokeswoman for Medarex said. "He didn't want to tamper with the plan" in advance of the Bristol-Myers transaction, she said.

On [footnoted.org](#), a site that scrutinizes the fine print of SEC filings, blogger Michelle Leder said she sees Mr. Pien's transactions as reason to doubt the usefulness of

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following insider trades.

However, research by Stanford University professor Alan D. Jagolinzer concludes that 10b5-1 trades are actually more predictive of future stock movements than other transactions. He proposes that one explanation is that insiders often don't behave the way Mr. Pien did.

"Early termination would remove sales that would otherwise be nonprofitable, so sales that are retained likely reveal modest patterns of strategic trade," Mr. Jagolinzer wrote in a recent paper.

Last month, the SEC charged former Countrywide Financial Corp. Chief Executive Angelo Mozilo with civil insider-trading charges tied to prearranged stock-trading plans that took in more than \$139 million for him. Mr. Mozilo's lawyer has called the SEC's allegations "baseless" and denied that Mr. Mozilo made any improper trades.

Stanley C. Morris, a defense lawyer and former SEC prosecutor, said he would advise caution. "There's a practical implication beyond strict legality," he said. "It's going to look suspicious."

Mr. Morris argued that gaming a trading plan, even if it is technically legal, isn't worth the trouble, especially for a corporate insider about to cash in on a buyout offer.

Indeed, Mr. Pien sold only a fraction of the 435,555 shares and options he owned, according to the company's April proxy statement.

A conservative approach is better, Mr. Morris said. "Would you want the hassle of litigation and bad press?" he said. "My advice would be: Don't touch that plan."

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