U.S. Chamber of Commerce

1615 H Street, NW
Washington, DC 20062-2000
uschamber.com

April 1, 2022

Ms. Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

Re: Rule 10b5-1 and Insider Trading (Release Nos. 33-11013, 34-93782; File No. S7-20-21)

Dear Ms. Countryman:

The U.S. Chamber of Commerce's ("Chamber") Center for Capital Markets Competitiveness ("CCMC") appreciates the opportunity comment on the Securities and Exchange Commission's ("SEC") February 15, 2022, proposed rule regarding Rule 10b5-1 and insider trading ("the Proposal").

The Chamber supports efforts by Congress and the SEC to ensure that America's capital markets maintain their status as the most competitive, transparent, and liquid in the world, which includes holding those who choose to engage in illegal behavior accountable. While the Chamber supports efforts to ensure that corporate insiders cannot game the system or bend the rules in their own favor, we are concerned that the approach the SEC has embraced with the Proposal may not be workable.

As the SEC considers potential amendments to Rule 10b5-1, we encourage the Commission to consider the following:

1. The SEC should consider how existing regulations already prohibit illegal insider trading. Changes to Rule 10b5-1 should consider new evidence before implementing new restrictions and ensure the benefits of such changes outweigh the costs.
2. The SEC should reconsider some of the provisions included in the Proposal which may have the effect of rendering Rule 10b5-1 unworkable for individuals and incentivizing trading outside of 10b5-1 plans.
3. The Proposal should not be looked at in isolation given its relationship with the recent stock buyback proposal and other proposals that the SEC has issued in recent months. The condensed comment periods the SEC has provided for

many of these proposals will make it difficult for the SEC to assess to assess the cumulative impact of these rules on investors and the capital markets.

We thank the Commission for taking these considerations into account as it works through how to provide investors with adequate information and ensure that Rule 10b5-1 plans do not contain loopholes.

ANALYSIS

1. **The SEC should consider how existing regulations already prohibit illegal insider trading. Changes to Rule 10b5-1 should consider new evidence before implementing new restrictions and ensure the benefits of such changes outweigh the costs.**

It is critical for investors to have confidence in SEC rules that are designed to prohibit insider trading based on Material Nonpublic Information ("MNPI"). Rule 10b5-1 provides an affirmative defense for an individual and for companies that, prior to becoming aware of MNPI, enter into a binding contract to purchase or sell the company's shares at a predetermined amount, price, and date. Since the SEC's adoption of Rule 10b5-1 in 2000, these plans have been a vital tool to guard against perceptions that insiders regularly use their knowledge of MNPI to make inappropriately advantageous trades.

Inherent to Rule 10b5-1, issuers and management are prohibited from defrauding investors by trading in possession of MNPI. Accordingly, Rule 10b5-1 provides companies and corporate insiders with a mechanism to conduct trades in their own stock according to a prescribed plan that has been entered into prior to possession of MNPI. Under Section 10(b) of the Securities and Exchange Act of 1934, the SEC has broad authority to pursue actions related to manipulative practices, including insider trading. Aware of this authority, companies and corporate insiders treat 10b5-1 plans and their execution seriously.

As page 128 of the Proposal identifies, "The purpose of the proposed amendments is to address potentially abusive practices associated with Rule 10b5-1 trading arrangements, grants of options and other equity instruments with similar features and the gifting of securities."[1] A common example offered to demonstrate such manipulative practices points to the timing of corporate share repurchases and the

[1] https://www.sec.gov/rules/proposed/2022/33-11013.pdf

execution of 10b5-1 plans. However, recent academic work,[2,3] as well as a study conducted by the SEC's own staff,[4] find that there is little evidence to support the claim that these events are manipulated to be advantageously timed and that rather, the timing of such events are explained by the regular cadence of the corporate calendar.

The Chamber supports efforts to root out illegal behavior in the market but encourages the Commission to more completely analyze available evidence and to first consider its existing authority to bring enforcement as it weighs how to proceed on subsequent rulemaking.

2. **The SEC should reconsider some of the provisions included in the Proposal which may have the effect of rendering Rule 10b5-1 unworkable for individuals and incentivizing trading outside of 10b5-1 plans.**

In seeking to modernize Rule 10b5-1, the SEC should be careful that any new requirements do not make operating such a plan onerous to the extent that 10b5-1 plans become unworkable.

The Proposal contemplates a 120-day "cooling-off" period for Section 16 insiders and a similar 30-day period for issuers, both of which exceed current market practice and may deplete the practicality of 10b5-1 plans. Under the conditions of current arrangements, issuers and insiders alike enter into plans asserting that they are not in possession of MNPI; insiders then often wait an additional 30 days to begin the execution of these plans. As issuers and insiders cannot enter into these plans in

---

[2] *See* Dittmann, I., Li, A. Y., Obernberger, S., & Zheng, J. (2022). The impact of the corporate calendar on the timing of share repurchases and equity grants (January 21, 2022). Dittman, Obernberger and Zheng examine whether insiders use share buybacks to sell equity at inflated stock prices around a stock buyback. The authors find that the timing of both buyback programs and insider sales is largely determined by the issuer's corporate calendar through blackout periods and earnings announcement dates – times when both repurchases and insider sales are restricted. The authors conclude that any positive correlation between share repurchases and insider selling is likely driven by blackout periods and not opportunistic insider trading around repurchases. *Available at* SSRN: https://ssrn.com/abstract=4004098.

[3] *See* Lewis, C., White. J. addendum to U.S. Chamber of Commerce white paper on share repurchases (Fall 2021). *Attached and available at* https://www.centerforcapitalmarkets.com/resource/addendum_stockbuy-back/

[4] *See* SEC Staff Response to Congress: Negative Net Equity Issuance (Dec. 23, 2020), at 11. "There are a number of reasons why insider sales may coincide with repurchase program announcements, making it difficult to ascertain the motivations underlying insider sales. For example, because repurchase program announcements often coincide with earnings announcements and companies often prohibit insiders from trading in the period leading up to earnings announcements, insider sales activity may be the result of pent-up demand." *available at* https://www.sec.gov/files/negative-net-equity-issuance-dec-2020.pdf.

possession of MNPI, the additional cooling off period helps cleanse any perception of unfair trading by adding additional distance between the entrance of an agreement and its execution.

It is notable that the Proposal does not recognize the widespread existing use of cooling off periods for 10b5-1 plans. A 2018 survey found that nearly 9 in 10 companies required a cooling off period for trades to commence for individuals, with 30 days being the most commonly used period.[5] Some companies instituted longer periods, while a significant number required waiting until the trading window for insiders opened during the next quarter.

Accordingly, instituting long, mandated cooling off periods would not serve a necessary function to ensure that plans are executed legally and indeed may inadvertently reduce the use and benefits of 10b5-1 plans altogether. To the extent the SEC pursues a prescribed, mandatory cooling-off period, it could codify the current market practice of 30 days for Section 16 insiders.[6] 30 days would continue to create distance from events in the corporate calendar while maintaining opportunities for liquidity provision and changes in economic circumstances. While 30 days may be standard practice for individuals, the SEC should not institute a cooling-off period for issuers. A 30-day cooling-off period for issuers, coupled with proposed prohibitions for overlapping 10b5-1 programs for issuers,[7] would disrupt the ability of companies to make prudent management decisions pertaining to share repurchases. The cooling off period, as applied to issuers, would not help achieve the Commission's articulated regulatory objectives, nor is the Chamber unaware of any claimed abused with issuers' use of the cooling off period as applied to issuers share repurchase programs. Companies would lose the flexibility to adjust share repurchase volume, if needed, which could interrupt effective capital allocation activities in response to changing market or economic conditions and disrupt their ability to exercise flexibility over variables such as settlement timing and share price cap.[8] Moreover, as proposed, the

[5] *See* National Association of Stock Plan Professionals. Insights and Trends: Evolving Practices for 10b5-1 Plans. 89% of companies require cooling off periods. *Available at* https://advisor.morganstanley.com/chesapeake-group/documents/field/c/ch/chesapeake-group/10b5-1%20Evolving%20Practices.pdf

[6] Id.

[7] The Proposed 10b5-1(c)(1)(ii)(D) states "[t]he person who entered into the contract, instruction, or plan, has no outstanding (and does not subsequently enter into an additional) contract, instruction, or plan for open market purchases or sales of the same class of securities." If the SEC moves forward with this provision, the Commission should clarify that it intends this provision to be limited to overlapping 10b5-1 plans and does not extend to other open market purchases

[8] Lewis, C., White, J. Corporate Liquidity Provision and Share Repurchase Programs. October 2021. *Available at* https://www.centerforcapitalmarkets.com/wp-content/uploads/2021/09/CCMC_Stock-Buybacks_WhitePaper_10.2.21.pdf

Proposal could concentrate issuer repurchases into "window periods," which could increase market volatility and decrease focus on long-term value. Similarly, to reduce the likelihood of additional volatility, the SEC should also clarify that the Proposal's quarterly and individual disclosures do not require prospective price levels or discrete quantities that may be purchased at a particular price level.

Relatedly, while many companies already have limited the use of employee overlapping plans,[9] the SEC should carefully consider whether an across-the-board ban on overlapping plans would affect those cases where companies allow overlapping plans for specific reasons. For example, companies may allow multiple plans to be used if each plan was designated for a specific tranche of stock or options. In these circumstances, an outright limitation on overlapping plans could create issues that limit what otherwise might be good and effective company management of plans and could create undue problems around individual liquidity provision.

The Proposal appears to assume that if an individual has multiple 10b5-1 plans in place, the likelihood is that the individual is seeking to circumvent the requirements of Rule 10b5-1. The large number of companies that already prohibit the use of overlapping plans – and the restrictions put in place by those companies that do allow for overlapping plans – call into question the premise underlying this provision of the Proposal.

Additionally, the SEC could provide more information into what constitutes a "modification" to an existing 10b5-1 plan but should be careful to ensure that rules around plan modifications do not unduly limit issuers' ability to manage liquidity. Importantly, the SEC should also avoid applying cooling-off periods in circumstances where an issuer has entered into a principal-to-principal contract with a dealer.

Finally, the SEC should also take care to ensure that "good faith" requirements as proposed are well defined and understood. Particularly, as noted by Commissioner Hester Peirce in her statement at release of the rule, an ongoing "good faith" requirement should continue to provide confidence that plans executed under Rule 10b5-1 maintain their affirmative defense and are not evaluated on fluid or shifting criteria or other retroactive subjective judgment.

3. The Proposal should not be looked at in isolation given its relationship with the recent stock buyback proposal and other proposals that the SEC has issued in recent

[9] *Supra* note 5

months. The condensed comment periods the SEC has provided for many of these proposals will make it difficult for the SEC to assess to assess the cumulative impact of these rules on investors and the capital markets.

We note that the Proposal represents just one of the 14 rule proposals the SEC currently has out for public comment. Many of these proposals deal with issues of corporate governance and corporate disclosure – including proposals on stock buybacks, cybersecurity practices and disclosures, and the recently proposed rule on climate change. Public companies are working to assess the overall impact all of these new rules could have on their cost of compliance, competitiveness, and ability to focus on growth and hiring.

Unfortunately, the SEC has failed to provide adequate comment periods for many of these proposals and, even more troubling, has not conducted any type of comprehensive analysis regarding the cumulative costs these new rules will have on an economy that is still working its way out of the economic shock caused by the pandemic. We are concerned that the economic analyses underlying these individual proposals therefore may be inadequate and reliant on assumptions that are not rooted in evidence and fact.

In the context of 10b5-1 plans, we note that the proposal does not consider the implications or interrelatedness of the SEC's recently proposed share buyback proposal. As Commissioner Roisman noted:

> our proposal to amend rule 10b5-1 has overlapping implications with the buybacks proposal as far as trading by issuers. This overlap muddies the waters in terms of the Commission's or the public's ability to understand the impact that either of these rules will have individually or how they will operate together. It seems clear that for companies, these rules will potentially affect not just how they can purchase their securities, but arguably more importantly, how they can reallocate capital to their shareholders.[10]

We echo these concerns and urge the SEC to conduct a more holistic review and analysis of all of its recent proposals.

Conclusion

The Chamber supports the SEC's efforts to update 10b5-1 rules but encourages the SEC to consider the issues raised above to ensure that rules do not become

[10] *Available at* https://www.sec.gov/news/statement/roisman-10b5-1-20211215

unworkable or onerous to the point of disincentivizing their use. We also urge the SEC to provide the public with sufficient time to consider the cumulative impact of the SEC's current regulatory agenda. We look forward to continuing to work with SEC commissioners and staff on these critical issues.

Sincerely,

Tom Quaadman
Executive Vice President
Center for Capital Markets Competitiveness
U.S. Chamber of Commerce

https://www.centerforcapitalmarkets.com/resource/addendum_stockbuy-back/