

**Draft as of August 26, 2021**  
**To be discussed at the September 9, 2021, Meeting of the Investor Advisory Committee**

**DRAFT Recommendation of the Investor as Owner Subcommittee of the SEC Investor Advisory Committee Regarding Rule 10b5-1 Plans**

The Investor Advisory Committee (“IAC”) recommends that the U.S. Securities and Exchange Commission take the necessary steps to establish meaningful guardrails around the adoption, modification, and cancellation of Rule 10b5-1 trading plans. The IAC offers its recommendation following a Panel Discussion Regarding 10b5-1 Plans at its June 10, 2021, public meeting.<sup>1</sup>

Rule 10b5-1<sup>2</sup> was adopted by the Commission as part of a broader regulatory effort to refine prohibitions against insider trading, which the Commission recognized as an existential threat to the integrity and overall health of the U.S. capital markets.<sup>3</sup> The rule clarifies the circumstances under which a purchase or sale of a security by a listed company or corporate insider in possession of material nonpublic information (“MNPI”) may be subject to legal liability and potential enforcement action — an issue that, at the time, remained unsettled through conflicting case law.<sup>4</sup>

Since its adoption, Rule 10b5-1 has provided greater clarity to company insiders as to how to handle the need to trade in company securities without running afoul of insider trading prohibitions; however, it has not met its full potential to improve transparency regarding insider trades and enable effective investigation and enforcement of violations. Consequently, the rule has not fully achieved its purpose to enhance investor protection and confidence in the fairness of the capital markets.

The IAC believes there is strong bipartisan support for improvements to Rule 10b5-1 that would address these concerns and recommends that the Commission move quickly to close identified gaps in the current rule. As described more fully below, the IAC believes additional requirements are needed to enhance the effectiveness of the “affirmative defense” offered by the Rule. In addition, improving the disclosure requirements for Rule 10b5-1 plans would afford greater transparency to the investing public and improve the Commission’s ability to investigate and enforce violations of the rule.

We believe these modifications would strengthen existing regulation of Rule 10b5-1 plans to ensure the protection of the investing public while continuing to permit legitimate use of these plans by corporate insiders and issuers. These recommendations support the Commission’s core mission to protect investors; support fair competition, efficiency, and capital formation; and serve the public interest by promoting a market environment that is worthy of the public’s trust.<sup>5</sup>

## **Background on Rule 10b5-1**

The adoption of the rule in 2000 was timely, as compensation among executives and employees in many industries was trending away from fixed salary and toward variable equity-based pay. Since these executives and employees are often exposed to MNPI in the normal course of business, trading their company shares for legitimate purposes (such as paying expenses, diversifying investments, or generating cash) was difficult and put them at risk of violating the insider trading rules. The adoption of Rule 10b5-1 thus provided an avenue for employees under these types of pay arrangements to legally liquidate some of their stock-based compensation to satisfy personal financial goals.

A trade is considered “on the basis of” MNPI – and subject to scrutiny under insider trading restrictions – if the person or entity making the purchase or sale was aware of the MNPI when the trade was executed.<sup>6</sup> To provide flexibility to insiders wishing to adopt securities trading plans and strategies, Rule 10b5-1(c) established an “affirmative defense” to insider trading provided trades under these plans – typically referred to as “Rule 10b5-1 Plans” – adhere to the following three conditions:<sup>7</sup>

1. The contract, instruction, or plan is adopted in good faith prior to the insider becoming aware of MNPI;
2. The plan either (a) specifies the amount, price, and date of securities to be purchased or sold; (b) provides written instructions or a formula that would trigger purchase or sale of securities, including the amount, price, and date of any trades; or (c) does not allow the insider to influence how, when, or whether trades are made once a plan is established, provided that the plan is established when the insider is not aware of MNPI; and
3. The purchase or sale of securities was pursuant to the contract, instruction, or plan.

Insiders may modify a plan provided they are not aware of MNPI at the time of modification. Insiders also may terminate a plan while in possession of MNPI and still qualify for the “affirmative defense,” as long as the terminated plan was initially entered into in good faith.<sup>8</sup>

## **Rationale for Reform**

Though well-intentioned, many observers – including investors,<sup>9</sup> academics,<sup>10</sup> lawmakers,<sup>11</sup> and other key market participants<sup>12</sup> – have raised concerns over the years that Rule 10b5-1 may help shield opportunistic insider trading from legal, regulatory and market scrutiny, questioning whether the rule needs to be strengthened. The Commission is among those observers dating back to the adoption of Rule 10b5-1, when there was an expectation the Commission would monitor Rule 10b5-1 plan use and revisit the rule, if necessary, to address any weaknesses in the rule to ensure market fairness and investor protection without overburdening corporate executives and insiders.<sup>13</sup> Subsequent calls for reexamination and reform from previous and currently serving SEC Commissioners<sup>14</sup> as well as senior Commission staff<sup>15</sup> clearly indicate that earlier concerns about Rule 10b5-1 plans in practice remain unresolved.

Against this backdrop, the IAC hosted a panel on June 10, 2021 to consider whether, and to what extent, reforms are needed to Rule 10b5-1.<sup>16</sup>

The panelists discussed how plans established under Rule 10b5-1 are working in practice and offered their perspectives on what improvements, if any, are warranted. The discussion with the IAC focused on two broad areas of potential reform: (1) plan design and appropriate use of the affirmative defense; and (2) information asymmetries between Rule 10b5-1 plan participants and the broader market.

### **Recommendations**

The IAC advises that the Commission take the following actions:

#### **Requirements for “Affirmative Defense” Protection**

- 1. Require a “cooling off” period of at least four months between the adoption or modification of a Rule 10b5-1 plan and the execution of the first trade under the newly adopted or newly modified plan.**
- 2. Do not allow overlapping plans (i.e., a single person or entity may not have more than one Rule 10b5-1 plan at a time).**

Research conducted on the use of Rule 10b5-1 plans by insiders have consistently supported concerns that some plans are used to engage in opportunistic trading behavior that contravenes the intent behind the rule. In particular, the timing of plan adoptions, modifications, and cancellations, appear to present a heightened risk of potential misuse.

A 2006 Stanford University review<sup>17</sup> of Rule 10b5-1 trading activity in 1,241 companies found that sales under trading plans were followed by stock underperformance of nearly 3% relative to the market over the ensuing six months. The author noted that the “free cancellation option,”<sup>18</sup> which allows insiders to cancel a Rule 10b5-1 plan and associated trades at any time regardless of whether the insider is in possession of MNPI, and the ability of insiders to trade under Rule 10b5-1 plans during blackout periods, provide “enhanced legal protection” to opportunistic trading behavior that would otherwise be prohibited. Further, sales executed under Rule 10b5-1 plans appear to occur after price increases and before price declines, resulting in statistically significant forward-looking abnormal returns.<sup>19</sup> Some insiders also appeared to adopt Rule 10b5-1 plans prior to the disclosure of bad news. The author concluded that Rule 10b5-1 trading behavior may be valuable to investors as a predictor of future market performance. Subsequent analyses have raised similar concerns.<sup>20</sup>

A recent examination by academics at Stanford University and The Wharton School of over 20,000 Rule 10b5-1 plans, their associated adoption dates, and trades representing \$105 billion in trading activity provides further evidence of opportunistic selling through the plans. The

researchers identified three “red flags” of Rule 10b5-1 plans that are associated with opportunistic trading behavior, with a focus on mitigating opportunistic loss avoidance:

1. **Plans with a short cooling-off period.** The authors found that the first trades in Rule 10b5-1 plans with cooling off periods of less than 30 days were associated with a subsequent industry-adjusted return of -2.5%, while initial trades in plans with cooling off periods of 30 to 60 days were associated with a subsequent -1.5% return.<sup>21</sup> The authors also found that the average trade size in plans with cooling off periods of less than 30 days was roughly 50% larger than trades in plans with a cooling off period of six months or more. These impacts largely dissipated when initial trading occurred at least four months following plan adoption.<sup>22</sup>
2. **Plans that entail only a single trade.** Nearly 50% of the plans reviewed by the researchers executed only a single trade, and the median size of these single-trade plans was larger than plans executing more than one trade (\$639,000 vs. \$356,000). The authors also found that single-trade plans almost always resulted in loss-avoidance regardless of the length of any cooling-off periods. The largest impact was observed in plans with short cooling-off periods (30 days or less), where insiders avoided an industry-adjusted drop in share price of -4%, on average.<sup>23</sup>
3. **Plans adopted in a given quarter that begin trading before that quarter’s earnings announcement.** The authors noted that 38% of Rule 10b5-1 plans adopted in a given quarter also executed trades before the same quarter’s earnings announcement, and sales executed between the plan adoption date and an earnings announcement were roughly 25% larger than those occurring at least six months following an announcement. They also observed that plan adoptions and sales executed in the same quarter, prior to the quarter’s earnings announcement, appeared to signal large losses and reductions in share price of -2% to -3% over four months after the sale – an effect not observed in trades executed following earnings announcements.<sup>24</sup>

Extending the cooling-off period would help to mitigate the incidence of opportunistic trading behavior within some plans. Notably, a cooling off period of at least four months would ensure that insiders could not adopt a plan that executes a trade in the same quarter—the trade would necessarily be in the following quarter. Further, limiting the “affirmative defense” protections under Rule 10b5-1 to a single active plan would signal to the market that a plan was entered into in good faith. As noted by Keir Gumbs, Vice President, Deputy General Counsel, and Deputy Corporate Secretary at Uber Technologies, during the panel, Uber does not allow overlapping plans “as a matter of policy” for this reason.<sup>25</sup>

## Plan Reporting and Disclosure

3. **Require electronic submission of Form 144.**
4. **Require enhanced public disclosure of Rule 10b5-1 plans, including:**
  - a. **Proxy statement disclosure of the number of shares covered (i.e., scheduled for sale) under Rule 10b5-1 trading plans by each of the Named Executive Officers.**
  - b. **Proxy statement disclosure of the total number of shares covered (i.e., scheduled for sale) under “corporate” Rule 10b5-1 trading plans (i.e., Rule 10b5-1 plans established by the issuer itself for the purpose of selling treasury shares).**
  - c. **Disclosure on Form 8-K of the adoption, modification, or cancellation of Rule 10b5-1 plans, and the number of shares covered, on a timely basis (i.e., change 8-K rules to include changes to plans by affiliates as material non-public information requiring an 8-K).**
5. **Enhance disclosure of 10b5-1 trades, including the modification of Form 4 to include the following new, required fields:**
  - a. **Checkbox to indicate whether a specific trade was pursuant to a Rule 10b5-1 plan.**
  - b. **A new field to indicate the date of associated Rule 10b5-1 plan adoption or modification.**
6. **Ensure all companies with any securities listed on U.S. exchanges (including ADRs and ADSs filing Form 20-Fs) are subject to Form 4 reporting requirements.**

Although plans must be adopted in good faith to qualify for an “affirmative defense” against insider trading liability, the current reporting regime lacks transparency around plan adoptions, modifications, terminations, and trades. This creates a black box around plans that effectively shields insiders from investor scrutiny and possible enforcement action in cases of potential abuse. Key information such as the adoption or modification of a plan is not readily available to the public, nor is it made available to the Commission.

Information on trades made under Rule 10b5-1 plans is similarly opaque and plan cancellations – an area that is particularly vulnerable to abuse – are not subject to mandatory disclosure at all. All of the panelists supported strengthening disclosure, as greater transparency works toward reassuring the market that plan adoption, modification, cancellation, as well as trades associated with Rule 10b5-1 plans, are conducted in good faith and not used by insiders to circumvent insider trading rules.<sup>26</sup>

Corporate insiders, including executives, directors, and all 10% beneficial owners, file Form 4 whenever there is a material change in holdings such as stock purchases or sales, option vesting, and option exercises.<sup>27</sup> Form 4 must be filed within two business days of a transaction, providing investors with a timely account of trades executed. However, Form 4 does not require filers to indicate whether the transaction was made pursuant to a Rule 10b5-1 plan, nor does it require disclosure of the adoption date of a Rule 10b5-1 plan. Further, corporate insiders of non-U.S. companies that are listed on U.S. exchanges are not required to file Form 4 and are therefore shielded from disclosing any trades by corporate insiders.<sup>28</sup> This creates a two-tiered system that advantages non-U.S. firms even though they are listed alongside U.S. firms on the same exchanges. Further, if the non-U.S. firms tend to have weaker internal controls, then the risk of opportunistic behavior is higher. During the Rule 10b5-1 panel discussion, Dr. Daniel Taylor, Associate Professor of Accounting from The Wharton School of Business, University of Pennsylvania, pointed to recent public scrutiny of the timing of trades executed through Rule 10b5-1 plans by executives at Pfizer and Moderna during the COVID-19 vaccine development process – potential scrutiny avoided by AstraZeneca, a non-U.S. company traded in the U.S., because there was no trading data to scrutinize.<sup>29</sup> Dr. Taylor continued that this problem is particularly acute in U.S. exchange-listed companies domiciled in China and Hong Kong, which is only compounded by roadblocks the Commission and the Public Company Accounting Oversight Board (PCAOB) already face in conducting audit and accounting inspections for these firms.<sup>30</sup>

The most comprehensive source of information currently available about Rule 10b5-1 is Form 144,<sup>31</sup> which is filed with the Commission whenever an insider at a U.S.-listed issuer is planning to sell \$50,000 or more in restricted stock in the following three-month period. Form 144 requires disclosure of the number of securities and transaction price of the planned sale. If a planned sale includes equity covered by a Rule 10b5-1 plan, the insider also must disclose the adoption or modification date of the plan.

Unfortunately, and unlike Form 4, which is filed electronically with the Commission, filers may submit Form 144 in paper or electronic form. The vast majority of forms – over 99% in 2019 – are filed on paper, and many are handwritten.<sup>32</sup> Once received, the paper forms are not digitized; instead, they are kept in the Commission’s Public Reading Room in Washington, D.C. for 90 days, after which time the forms are discarded. Data aggregators such as The Washington Service and Refinitiv send couriers to the Reading Room to scan the Form 144s, a service offered for sale to clients with resources to pay for such a service (typically institutional clients), but the data is not similarly available to investors and other key market participants through a free, universal service such as EDGAR.<sup>33</sup> The result is yet another two-tiered system where deeper-pocketed investors have access to potentially critical market data and investors of more modest means do not.

The gap in access to the forms may also interfere with efficient risk assessment and analysis: when Dr. Taylor and his colleagues sought data for their research into potential 10b5-1 abuses, they had to physically visit the Reading Room to scan the available paper filings; still, they required the help of The Washington Service to acquire a sufficiently robust data set for their

research which ultimately consisted of records for 20,000 Rule 10b5-1 plan adoptions between January 2016 and May 2020.<sup>34</sup>

In addition, the inability to access Form 144 filings electronically makes it difficult for everyone, including companies, to detect trading activity by non-insider owners. Form 144 is required for any person intending to trade at least \$50,000 in restricted control shares. In contrast, Form 4 is only required for Section 16 officers, board directors, and owners of 10% or more of a company's shares. All of these filings should be easily accessible in electronic form.<sup>35</sup>

Collectively, these disclosure gaps: (1) prevent proactive risk assessment and policing by the market; (2) limit the Commission's ability to actively and efficiently monitor the adoption, modification, or cancellation of plan details, for enforcement purposes; and (3) reduce market efficiency by obscuring potentially material signals (such as a sizeable sale by an executive) from full view. The IAC thus believes simple and straightforward adjustments to existing disclosures around plan adoptions, shares covered by Rule 10b5-1 plans, and trades reported on Form 4, along with electronic filing of Form 144, would efficiently and effectively address many of these concerns.

**Finally, the IAC encourages the Commission to evaluate its access to information that is necessary to effectively monitor trading plans established under Rule 10b5-1 and pursue regulatory action to obtain that information if not unduly burdensome to issuers and insiders.**

The IAC believes the Commission is in the best position to determine what information and data (including the format and organization of that data) would facilitate effective monitoring, investigation, and enforcement of Rule 10b5-1 plans, and strongly supports, subject to notice and comment, any steps the Commission may choose to take to further advance its investor protection mission in this area.

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The IAC believes that adopting these recommendations will meaningfully improve the effectiveness of Rule 10b5-1 plans and thereby protect investors and enhance the transparency and integrity of our capital markets.

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<sup>1</sup> U.S. Securities and Exchange Commission Investor Advisory Committee Meeting Agenda (June 10, 2021), <https://www.sec.gov/spotlight/investor-advisory-committee/iac061021-agenda.htm>.

<sup>2</sup> 17 CFR § 240.10b5-1.

<sup>3</sup> See U.S. Securities and Exchange Commission, Final Rule: Selective Disclosure and Insider Trading, <https://www.sec.gov/rules/final/33-7881.htm> (“[T]he prohibitions against insider trading in our securities laws play an essential role in maintaining the fairness, health, and integrity of our markets. We have long recognized that the fundamental unfairness of insider trading harms not only individual investors but also the very foundations of our markets, by undermining investor confidence in the integrity of the markets.”)

<sup>4</sup> *Id.*

<sup>5</sup> About the SEC, <https://www.sec.gov/about.shtml>

<sup>6</sup> 17 CFR § 240.10b5-1.

<sup>7</sup> *Id.*

<sup>8</sup> See, e.g., Exchange Act Rules, Questions and Answers of General Applicability, Questions 120.17, 120.18 and 120.19 (updated March 31, 2020), <https://www.sec.gov/divisions/corpfin/guidance/exchangeactrules-interps.htm> (Clarifying that Section 10(b) and Rule 10b5-1 apply only to fraudulent conduct “in connection with the purchase or sale of any security,” (emphasis added) and that liability would only apply upon plan termination if the terminated plan itself was entered into in bad faith (i.e. when the insider was aware of MNPI)).

<sup>9</sup> See, e.g., Rulemaking Petition from Jeff Mahoney, General Counsel, Council of Institutional Investors, to The Honorable Elisse B. Walter, Chairman, U.S. Securities and Exchange Commission (Dec. 28, 2012), [https://www.cii.org/files/issues\\_and\\_advocacy/correspondence/2012/12\\_28\\_12\\_cii\\_letter\\_to\\_sec\\_rule%2010b5-1\\_trading\\_plans.pdf](https://www.cii.org/files/issues_and_advocacy/correspondence/2012/12_28_12_cii_letter_to_sec_rule%2010b5-1_trading_plans.pdf) (Advocating clear standards regarding the adoption, modification, and cancellation of 10b5-1 trading plans as well as strengthened disclosure requirements around plans) and Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors, to Vanessa A. Countryman, Secretary, U.S. Securities and Exchange Commission (Mar. 18, 2021), <https://www.sec.gov/comments/s7-24-20/s72420-8519687-230183.pdf> (Suggesting revisions to the Commission’s Dec. 22, 2020 [proposal to amend Rule 144](#) that would require Forms 4 and 5 to include a mandatory checkbox to indicate whether a sale or purchase of securities was made pursuant to Rule 10b5-1(c), as well as disclosure of the adoption date of the respective Rule 10b5-1 plan on the forms.)

<sup>10</sup> See, e.g., David F. Larcker, et al., Gaming the System: Three “Red Flags” of Potential 10b5-1 Abuse, Stan. Closer Look Series, Corp. Governance Res. Series 1 (Jan. 2021), <https://www.gsb.stanford.edu/sites/default/files/publication-pdf/cgri-closer-look-88-gaming-the-system.pdf> (Authors examine 20,000 Rule 10b5-1 plans, including associated adoption dates and trades, finding that a subset of executives use Rule 10b5-1 plans to engage in opportunistic, large-scale selling of company shares, typically “avoiding significant losses” and “foreshadow[ing] considerable stock price declines that are well in excess of industry peers”); Joshua Mitts, Insider Trading and Strategic Disclosure 1 (Dec. 7, 2020) (Colum. L. & Econ. Working Paper No. 636), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3741464](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3741464) (Showing that public companies disproportionately disclose positive news on days when corporate executives sell shares under predetermined Rule 10b5-1 plans.); Alan D. Jagolinzer, Sec Rule 10b5-1 and Insiders' Strategic Trade, Management Science (February 2009), <https://ssrn.com/abstract=541502>; Jane Sasseen, A Closer Look at Trades By The Top Brass: Some Execs May Be Abusing An SEC "Safe Harbor" Rule on Insider Stock Sales, Bloomberg Businessweek (Nov. 13, 2006), <https://www.bloomberg.com/news/articles/2006-11-12/a-closer-look-at-trades-by-top-brass?sref=mUdKZeAe>; Jane Sasseen, et al., Insiders With A Curious Edge: How Corporate Executives Seem To Be Violating The Spirit, If Not The Letter, Of A Rule Intended To Prevent Insider Trading, Bloomberg Businessweek (Dec. 8, 2006), <https://www.bloomberg.com/news/articles/2006-12-07/insiders-with-a-curious-edgebusinessweek-business-news-stock-market-and-financial-advice?sref=mUdKZeAe>; see also Insider Trading and Strategic Disclosure with Professor Joshua Mitts (Apr. 22, 2021), <https://music.amazon.com/podcasts/9a89141e-e2c4-4c9a-99f9-5011c2498248/episodes/c4c042d3-f185-40ea-8099-5b2cb93f4b8e/the-voice-of-corporate-governance-insider-trading-and-strategic-disclosure-with-professor-joshua-mitts>; Rule 10b5-1 Trading Plans with Professor Daniel Taylor (Feb. 9, 2021), <https://podcasts.apple.com/ee/podcast/rule-10b5-1-trading-plans-with-professor-daniel-taylor/id1433954314?i=1000509840775>.



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<sup>11</sup> See Promoting Transparent Standards for Corporate Insiders Act, H.R. 1528, 117th Cong. (2021) (introduced), <https://www.congress.gov/bill/117th-congress/house-bill/1528> (Bi partisan bill introduced and co-sponsored by the Chair and Ranking Member of the U.S. House Committee on Financial Services would require the Commission to study and report on possible revisions to limit the ability of issuers of securities and issuer insiders to adopt Rule 10b5-1 trading plans, as well as require the SEC to revise the regulations consistent with the results of the study. The bill passed with no opposition in the House and has been referred to the Senate Committee on Banking, Housing, and Urban Affairs. A substantially similar bill in the 116th Congress ([H.R. 624](#)) passed the U.S. House of Representatives 413-3 but did not advance in the Senate prior to the end of the Congressional term); Letter from Elizabeth Warren, United States Senator, et al. to The Honorable Allison Herren Lee, Acting Chair, Securities and Exchange Commission (Feb. 10, 2021), [https://www.warren.senate.gov/imo/media/doc/02\\_10\\_2021%20Letter%20from%20Senators%20Warren,%20Browner,%20and%20Van%20Hollen%20to%20Acting%20Chair%20Lee.pdf](https://www.warren.senate.gov/imo/media/doc/02_10_2021%20Letter%20from%20Senators%20Warren,%20Browner,%20and%20Van%20Hollen%20to%20Acting%20Chair%20Lee.pdf) (Urging the Commission to review and reform policies related to Rule 10b5-1 plans – including increasing plan transparency – that would prevent practices that “damage investors and risk undermining public confidence,” in light of increasing scrutiny of 10b5-1 plan trades by healthcare industry executives linked to COVID-19 vaccine development).

<sup>12</sup> See, e.g., Letter from the North American Securities Administrators Association (NASAA) to the U.S. House Committee on Financial Services re: H.R. 1528, the “Promoting Transparent Standards for Corporate Insiders Act” (Mar. 8, 2021), <https://www.nasaa.org/wp-content/uploads/2021/03/NASAA-Letter-to-Chair-Waters-and-Ranking-Member-McHenry-Re-1528-3.8.21-F-PDF.pdf> (Expressing support for H.R. 1528); NASAA Legislative Agenda for the 117<sup>th</sup> Congress – Principle Four (2021), <https://www.nasaa.org/policy/legislative-policy/legislative-priorities/nasaa-legislative-agenda-for-the-117th-congress-principle-four/> (Calling on Congress to consider enacting restrictions on 10b5-1 trading plans); Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors to The Honorable Maxine Waters, Chairman, Committee on Financial Services re: H.R. 624, Promoting Transparent Standards for Corporate Insiders Act (Jan. 22, 2019), [https://www.cii.org/files/issues\\_and\\_advocacy/correspondence/2019/January%2022,%202019%20Rule%2010b5-1%20Letter%20final.pdf](https://www.cii.org/files/issues_and_advocacy/correspondence/2019/January%2022,%202019%20Rule%2010b5-1%20Letter%20final.pdf) (Expressing support for H.R. 624).

<sup>13</sup> See Michael Siconolfi and Jean Eaglesham, SEC Is Pressed to Revamp Executive Trading Plans, Wall St. J. (May 9, 2013), <https://www.wsj.com/articles/SB10001424127887324059704578473382576553460>.

<sup>14</sup> See, e.g., Chair Gary Gensler, Prepared Remarks: CFO Network Summit (June 7, 2021), <https://www.sec.gov/news/speech/gensler-cfo-network-2021-06-07> (Stating that 10b5-1 plans have “led to real cracks in our insider trading regime” and suggesting reforms including “cooling off” periods, restrictions on plan cancellations, mandatory disclosure requirements, and prohibitions on overlapping plans); Letter from Allison Herren Lee, Acting Chair, Office of the Chair, U.S. Securities and Exchange Commission, to The Honorable Elizabeth Warren, U.S. Senate (Apr. 14, 2021), <https://www.warren.senate.gov/imo/media/doc/Warren%20et%20al%20-%20Rule%2010b5-1%20-%20ES159896%20Response.pdf> (Highlighting concerns regarding potential abuses of Rule 10b5-1 affirmative defenses, and committing SEC staff to review the Rule and recommend changes, focusing on public disclosure, a “cooling off” period, and short-swing profits); SEC Commissioner Caroline Crenshaw and Daniel Taylor, “Insider Trading Loopholes Need to be Closed,” Bloomberg Opinion (Mar. 15, 2021), <https://www.bloomberg.com/opinion/articles/2021-03-15/insider-trading-loopholes-need-to-be-closed?sref=mUdKZeAe> (Highlighting concerns regarding potential plan abuses and calling for reforms including a 4 to 6 month “cooling off” period, greater plan and trading transparency, and requiring that plans reflect multiple transactions over time that demonstrate “a regular, pre-established program of buying or selling” to qualify for the affirmative defense); Letter from Jay Clayton, Chairman, Office of Chairman, United States Securities and Exchange Commission, to The Honorable Brad Sherman, U.S. House of Representatives 2 (Sept. 14, 2020), <https://www.sec.gov/files/clayton-letter-to-chairman-sherman-20200914.pdf> (Calling for a “cooling off” period between plan adoptions, modifications, and terminations to help demonstrate good faith by users and “bolster investor confidence in management teams and in markets generally”); Letter from Robert J. Jackson, Jr., Commissioner, U.S. Securities and Exchange Commission, to The Honorable Chris Van Hollen, U.S. Senate (March 6, 2019), <https://www.sec.gov/files/jackson-letter-030619.pdf> (Citing research showing association between insider trading pursuant to 10b5-1 plans and unusual insider profits).

<sup>15</sup> See, e.g., Speech by Linda Chatman Thomsen, Director, U.S. Securities and Exchange Commission Division of Enforcement, at the Corporate Counsel Institute (March 8, 2007), <https://www.sec.gov/news/speech/2007/spch030807lct2.htm> (Referencing [academic data](#) showing “that

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executives who trade within a Rule 10b5-1 plan outperform their peers who trade outside of such a plan by nearly 6%; it ought to be the case that plan participants should be no more successful on average than those who trade outside a plan. The difference seems to be that executives with plans sell more frequently and more strategically ahead of announcements of bad news.... If executives are in fact trading on inside information and using a plan for cover, they should expect the 'safe harbor' to provide no defense."); Speech by Linda Chatman Thomsen, Director, U.S. Securities and Exchange Commission Division of Enforcement, at the 15<sup>th</sup> Annual NASPP Conference (October 10, 2007), <https://www.sec.gov/news/speech/2007/spch101007lct.htm> ("We and others are looking at the disclosures surrounding 10b5-1 plans. We're looking at multiple and seemingly overlapping 10b5-1 plans and at asymmetrical disclosure around plans — that is, disclosure of entry into a 10b5-1 plan, without timely disclosure of related plan modifications or terminations.").

<sup>16</sup> The panelists represented a cross-section of the investor, issuer, and academic communities and included:

- **Daniel Taylor**, PhD, Associate Professor of Accounting, Arthur Andersen Chair, and Director, Wharton Forensic Analytics Lab The Wharton School, University of Pennsylvania
- **Keir Gumbs**, Vice President, Deputy General Counsel, and Deputy Corporate Secretary at Uber Technologies (*former*)
- **Jeff Mahoney**, General Counsel, Council of Institutional Investors

<sup>17</sup> Alan D. Jagolinzer, Sec Rule 10b5-1 and Insiders' Strategic Trade, Management Science (February 2009), <https://ssrn.com/abstract=541502>.

<sup>18</sup> Although a Rule 10b5-1 plan can be established and modified so long as the executive is not aware of MNPI at the time of the modification, the plan and any associated trades can also be cancelled at any time, *regardless of whether the executive is in possession of MNPI*. Dr. Taylor noted that the latter aspect of Rule 10b5-1 plans is particularly controversial, as it has the effect of allowing executives to set up routine sales, and then pause or cancel sales if they know the company will be announcing news that will push the stock price higher. This practice, known as the "free cancellation option," provides executives with some power to time the market. See [https://www.sec.gov/video/webcast-archive-player.shtml?document\\_id=iac061021-2](https://www.sec.gov/video/webcast-archive-player.shtml?document_id=iac061021-2) ("[H]ere the nuance is that trading on material nonpublic information is illegal, but not trading on material nonpublic information is actually legal.... So the user of the 10b5-1 plan has a free option to cancel the plan at any point regardless of whether the news is good or bad, so this gives some element of market timing to the user.").

<sup>19</sup> Alan D. Jagolinzer, Sec Rule 10b5-1 and Insiders' Strategic Trade, Management Science (February 2009), <https://ssrn.com/abstract=541502>.

<sup>20</sup> See, e.g., Joshua Mitts, Insider Trading and Strategic Disclosure 1 (Dec. 7, 2020) (Colum. L. & Econ. Working Paper No. 636), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3741464](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3741464) (Showing that public companies disproportionately disclose positive news on days when corporate executives sell shares under predetermined Rule 10b5-1 plans, and that the likelihood, share volume and dollar volume of insider sales under Rule 10b5-1 plans are higher when good news is disclosed, and each of these are higher when the disclosed news is better. Also observes that these effects appear to be more concentrated in mid-cap health care firms as well as pharmaceutical manufacturers of COVID-19 vaccines at various milestones in the vaccine drug development process.); Ed Welsch, Trading Plans Offer A Good Clue to Sell, Wall St. J. (April 9, 2008),

<https://www.wsj.com/articles/SB120770890145300645> (Insider sales at 30 companies identified by an independent research firm as having "aggressive" trading plans – defined as plans with terms under one year – were followed by an average 9.7% stock underperformance in the following six months); Susan Pulliam and Rob Barry, Executives' Good Luck in Trading Own Stock, Wall St. J. (Nov. 27, 2012), <https://www.wsj.com/articles/SB10000872396390444100404577641463717344178> (A WSJ examination of trades by 20,237 executives executed during the week prior to major company news found that 1,418 executives recorded average stock gains of 10% (or avoided 10% losses) within a week following the trades)

<sup>21</sup> David F. Larcker et al., Gaming the System: Three "Red Flags" of Potential 10b5-1 Abuse, Stan. Closer Look Series, Corp. Governance Res. Series 1 (Jan. 2021), <https://www.gsb.stanford.edu/sites/default/files/publication-pdf/cgri-closer-look-88-gaming-the-system.pdf>

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> [https://www.sec.gov/video/webcast-archive-player.shtml?document\\_id=iac061021-2](https://www.sec.gov/video/webcast-archive-player.shtml?document_id=iac061021-2); see also Council of Institutional Investors, CII Policies, Statement on Stock Sales by Insiders (Mar. 10, 2020),

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[https://www.cii.org/insider\\_stock\\_sales\\_statement](https://www.cii.org/insider_stock_sales_statement) (“For Rule 10b5-1 plans to fulfill their legitimate purpose, . . . [p]articipants should not be party to concurrently active 10b5-1 plans . . .”).

<sup>26</sup> [https://www.sec.gov/video/webcast-archive-player.shtml?document\\_id=iac061021-2](https://www.sec.gov/video/webcast-archive-player.shtml?document_id=iac061021-2)

<sup>27</sup> See, e.g., SEC Office of Investor Education and Advocacy, “Investor Bulletin: Insider Transactions and Forms 3, 4, and 5,” <https://www.sec.gov/files/forms-3-4-5.pdf>.

<sup>28</sup> *Id.* See also, Letter from David Larcker, Graduate School of Business, Stanford University, et al. to Vanessa Countryman, Secretary, U.S. Securities and Exchange Commission, regarding Rule 144 Holding Period and Form 144 - File No. S7-24-20 (Mar. 10, 2021), <https://www.sec.gov/comments/s7-24-20/s72420-8488827-229970.pdf>.

<sup>29</sup> See, e.g., Business Insider, “Moderna’s CEO sold nearly \$2 million of his stock ahead of the company’s emergency use 1 vaccine filing. He’s now worth \$3 billion,” Shalini Nagarajan (Nov. 23, 2020), <https://markets.businessinsider.com/news/stocks/moderna-ceo-sold-million-stock-company-emergency-use-vaccine-filing-2020-11-1029830266>; and NPR, “Pfizer CEO Sold Millions in Stock After Coronavirus Vaccine News, Raising Questions,” Tom Dreisbach (Nov. 11, 2020), <https://www.npr.org/2020/11/11/933957580/pfizer-ceo-sold-millions-in-stock-after-coronavirus-vaccine-news-raising-questio>.

<sup>30</sup> See, e.g., Alexandra Stevenson and Edward Wong, “Chinese Coffee Chain’s Scandal Renews U.S. Calls for Oversight,” *New York Times* (Apr. 30, 2020), <https://www.nytimes.com/2020/04/30/business/luckin-coffee-china-fraud-wall-street.html>; Mark Maurer, “Audit Watchdog Proposes Framework to Help Implement New Trading Ban,” *Wall Street Journal* (May 13, 2021), <https://www.wsj.com/articles/audit-watchdog-proposes-framework-to-help-implement-new-trading-ban-11620943197>; Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors, to Office of the Secretary, PCAOB 2-3 (June 24, 2021), [https://www.cii.org/files/June%2024%202021%20PCAOB%20letter%20\(final\).pdf](https://www.cii.org/files/June%2024%202021%20PCAOB%20letter%20(final).pdf) (describing the more than 13 year gap in the PCAOB’s ability to inspect and investigate completely auditing firms located in China).

<sup>31</sup> 17 CFR § 230.144.

<sup>32</sup> During his presentation to the Panel, Dr. Taylor showed an image of a handwritten paper Form 144 filing from Chairman and former CEO of the Walt Disney Company Bob Iger, noting the mail processing stamp and observing “Walt Disney has plenty of resources. They have a great legal team. And it’s 2018, and Bob Iger is filling out this Form 144 by hand and mailing it.” [https://www.sec.gov/video/webcast-archive-player.shtml?document\\_id=iac061021-2](https://www.sec.gov/video/webcast-archive-player.shtml?document_id=iac061021-2)

<sup>33</sup> See, Letter from David Larcker, Graduate School of Business, Stanford University, et al. to Vanessa Countryman, Secretary, U.S. Securities and Exchange Commission, regarding Rule 144 Holding Period and Form 144 - File No. S7-24-20 (Mar. 10, 2021), <https://www.sec.gov/comments/s7-24-20/s72420-8488827-229970.pdf>. See also, [https://www.sec.gov/video/webcast-archive-player.shtml?document\\_id=iac061021-2](https://www.sec.gov/video/webcast-archive-player.shtml?document_id=iac061021-2)

<sup>34</sup> *Id.* (The authors examined 20,595 plans covering the trading activity by 10,123 executives at 2,140 unique firms. These plans were responsible for a total of 55,287 sales transactions.)

<sup>35</sup> *Id.*