

March 9, 2022

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

***Re: File No. S7-20-21, Rule 10b5-1 and Insider Trading***

Dear Ms. Countryman:

We thank the SEC for the opportunity to provide comment on the above-referenced proposed rule. Though the proposed rule entails several components, we would like to specifically comment on the proposal to amend Exchange Act Rule 16a-3 to require reporting of bona fide gifts of equity securities on Form 4. This proposal removes the differential treatment of bona fide gifts from other transactions vis-a-vis Form 4 vs. Form 5 reporting.

As researchers and educators who have studied the capital market consequences of insider giving, we would like to provide some evidence that may be pertinent to your deliberations on this proposed amendment. We discuss both the evidence of insider giving behavior and the consequences of insider giving on equity markets. In doing so, we note that any opinions expressed herein represent our own views and not those of our employers.

### ***Insider Giving Behavior***

As the proposed rule suggests, there exists substantial evidence that insiders who are limited in their ability to freely trade equity shares may instead make use of charitable giving as a vehicle to “trade” based on their information. For example, Ghosh and Harjoto (2011)<sup>1</sup> provide evidence that tax benefits tied to prevailing equity prices are a key factor in the timing of stock donations to public charities, though this feature is attenuated by corporate social responsibility initiatives. Avci et al. (2016)<sup>2</sup> and Avci et al. (2021)<sup>3</sup> provide consistent and large-sample evidence of giving among a variety of corporate insiders, demonstrating that timing when price is at a peak plays a pivotal role in giving decisions. In a sample of CEO gifts, Yermack (2009)<sup>4</sup> demonstrates that these effects of strategic giving behavior are even more pronounced when gifts are to (nonoperating) private foundations. In the case of Avci et al. (2016, 2021) and Yermack (2009), evidence suggests the reporting lag inherent in Form 5 vs. Form 4 reporting plays a role in the strategic giving behavior

---

<sup>1</sup> Ghosh, Sudip and Maretno Harjoto. 2011. “Insiders’ Personal Stock Donations from the Lens of Stakeholder, Stewardship and Agency Theories.” *Business Ethics: A European Review* 20(4): 342-358.

<sup>2</sup> Avci, S. Burcu, Cindy Schipani, and H. Nejat Seyhun. 2016. “Manipulative Games of Gifts by Corporate Executives.” *University of Pennsylvania Journal of Business Law* 18(4): 1131-1174.

<sup>3</sup> Avci, S. Burcu, Cindy Schipani, H. Nejat Seyhun, and Andrew Verstein. 2021. “Insider Giving.” Forthcoming, *Duke Law Journal*.

<sup>4</sup> Yermack, David. 2009. “Deductio’ *Ad Absurdum*: CEOs Donating Their Own Stock to their Own Family Foundations.” *Journal of Financial Economics* 94(1): 107-123.

of insiders. All of this evidence suggests both prevalence of insiders making gifts strategically and potential consequences of accelerating public disclosure of such gifts as proposed in the amendment to Exchange Act Rule 16a-3.

### *Consequences of insider giving on equity markets*

Given the observed propensity of insiders to time donations in accordance with their (nonpublic) information, we have recently conducted research examining the equity market consequences of such behavior. The research study – Arya et al. 2022<sup>5</sup> – builds on a well-established economic model of an equity market by incorporating both traditional market traders and insider donors, some of whom may possess nonpublic information. In the study, we derive the equity market pricing equilibrium in which insiders make giving decisions based on both non-pecuniary and tax benefits of donation, a decision which is attenuated by the long-term retention value of the equity. This ultimately leads to insiders’ nonpublic information about retention value being reflected in those choices. A built-in market discipline constrains such strategic insider giving from making excessive use of nonpublic information. This is because when recipient charities liquidate donated stock, the sale puts downward pressure on stock price. With donors receiving charitable deductions at market price, this downward pressure constrains giving for tax reasons.

Because insiders’ donation decisions entail a comparison of tax savings that are tied to observed market price vs. after-tax long-term retention value tied to nonpublic information, donation choices deviate from the choices of traditional market traders. After all, traditional market traders are making a comparison only between price and retention value. Given this, we show that insider donations have different effects on markets than insider trades or trades by other parties in possession of nonpublic information. More specifically, we demonstrate that insider giving behavior engenders greater market liquidity and equity price efficiency than would be observed if insiders were instead to engage in direct trading activity. The working paper (available [here](#)) provides full details.

### *Considerations for the SEC*

In light of the research on insider giving by ourselves and other colleagues referenced herein, there are two areas of consideration we wish to bring to your attention as you deliberate the proposed rule.

- (1) If insiders remain able to delay public observation of donations via Form 5 rather than Form 4 disclosure, there does exist a market mechanism that can discipline insider giving behavior, notably the immediate price pressure giving brings. The impact of this market mechanism can be materially different for different types of charitable gift recipients. In particular, many public charities have disposal policies that would facilitate such price pressure, whereas a private foundation gift would typically permit the donor to retain control over the assets and delay disposal accordingly. One example of this price pressure

---

<sup>5</sup> Arya, Anil, Brian Mittendorf, and Ram N.V. Ramanan. 2022. “Tax-favored Stock Donations by Corporate Insiders and Consequences for Equity Markets.” Available at SSRN: <https://ssrn.com/abstract=4003698>.

that played out in the public eye is the case of price declines concurrent with quick disposal of WATT shares by the Fidelity Investments Charitable Gift Fund subsequent to the gift of equity ownership by Malcolm and Emily Fairbairn, as documented in [Fairbairn et al vs. Fidelity Investments Charitable Gift Fund](#) lawsuit. The notion that a private foundation affords power to bypass the attendant price pressure is supported by the evidence in Yermack (2009) suggesting that private foundation gifts are used more strategically than gifts to public charities. Given the differential in donor control over disposal, does it make sense to treat gifts to (nonoperating) private foundations differently than gifts to operating public charities for the purposes of this amended rule? A more thorough examination of disposal policies of Donor-Advised Fund sponsors may also justify extending private foundation treatment to Donor-Advised Funds if they too permit donors to exercise sufficient control over liquidation.

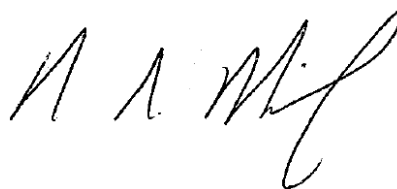
- (2) In order to avoid exploitation of information by insiders who delay disclosure on Form 5, the proposed rule essentially places insider trades not pursuant to a 10b5-1 plan and insider donations on equal footing from a rule-making standpoint. However, research demonstrates their effects on equity markets are different, with insider giving yielding higher market liquidity, price efficiency and charitable proceeds. Could the proposed rule that places giving and trading by insiders on equal footing actually shift behavior away from donating by insiders and inadvertently increase insider trading behavior? If this is the consequence of the amended rule, it could have deleterious effects on equity market pricing and liquidity. An ideal rule amendment would presumably provide additional safeguards from exploitation of material nonpublic information in stock gifts while retaining favorable treatment of gifts over trades.

Thank you for taking the time to consider these factors in your deliberations. We appreciate the opportunity to share insights from academic research on your rule-making process.

Respectfully,



Dr. Anil Arya  
John J. Gerlach Chair  
Fisher College of Business  
The Ohio State University



Dr. Brian Mittendorf  
Fisher Designated Professor  
Fisher College of Business  
The Ohio State University



Dr. Ram N.V. Ramanan  
Associate Professor  
School of Management  
Binghamton University