



THE CITY OF NEW YORK
OFFICE OF THE COMPTROLLER
BRAD LANDER

March 23, 2022

Vanessa A. Countryman
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Via email: rule-comments@sec.gov

Re: Proposed Rule on Rule 10b5-1 and Insider Trading, File Number S7-20-21

Dear Ms. Countryman:

I write in support of the Securities and Exchange Commission (the “Commission”) Proposed Amendments Regarding Rule 10b5-1 Insider Trading Plans and Related Disclosures (the “Proposed Amendments”). While I support the requirements set forth in the Proposed Amendments, I believe that they can be strengthened by implementing the Commission’s Investor Advisory Committee (“IAC”) 2021 recommendation with respect to requiring a Form 8-K disclosure. Such disclosure would include the name of the individual, the number of shares covered, and the date of adoption, modification, or cancellation of a 10b5-1 plan, whenever a Section 16 corporate officer or director adopts, modifies, or cancels such a plan. This would provide greater transparency to the investing public at the time changes to the plan are made and improve the Commission’s ability to investigate and enforce violations of Rule 10b5-1. Moreover, it would provide valuable, decision-useful information to investors that should be disclosed promptly rather than remaining unavailable to them until the next quarterly report.¹

As Comptroller of the City of New York, I am a trustee of four of the City’s five retirement systems and investment adviser to all five systems (collectively, the “New York City Retirement Systems,” or “NYCRS”). NYCRS had \$275 billion in assets as of December 31, 2021.

Chair Gensler has repeatedly—and rightfully—expressed concern over the ability of executives to cancel 10B5-1 plans while in possession of material information. Indeed, at the CFO Network Summit, Chair Gensler stated:

“In my view, canceling a [10B5-1] plan may be as economically significant as carrying out an actual transaction. That’s because material nonpublic information might influence an insider’s decision to cancel an order to sell.”²

I agree with the Chair. Requiring 8-K disclosure of plan cancellations by Section 16 insiders would add much needed transparency around an already questionable practice and provide “economically

¹ <https://www.sec.gov/news/press-release/2021-256>; [Federal Register: Rule 10b5-1 and Insider Trading](https://www.federalregister.gov/documents/2021/09/16/2021-19166/rule-10b5-1-and-insider-trading); <https://www.sec.gov/spotlight/investor-advisory-committee-2012/20210916-10b5-1-recommendation.pdf>

² <https://www.sec.gov/news/speech/gensler-cfo-network-2021-06-07>

significant” information to the market.

I also agree with the Commission’s long-held view that “the prohibitions against insider trading in our securities laws play an essential role in maintaining the fairness, health, and integrity of our markets” and 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.”³

Enhanced 10b5-1 Requirements and Disclosure are Warranted

With proper safeguards, 10b5-1 plans can enable executives to sell stock to diversify their holdings to meet legitimate personal needs without fear of prosecution for insider trading. However, many stakeholders, including former Chair Jay Clayton and current Commission Chair Gary Gensler, have recognized the need to strengthen the rule so that it does not facilitate opportunistic trading by corporate insiders. Investors are similarly concerned about the potential for abuse of 10b5-1 plans.

Recent analysis of 10b5-1 plans, and associated trading activity, has identified questionable use of these plans by executives to make fortuitously timed trades. In their 2021 *Gaming The System: Three ‘Red Flags’ of Potential 10B5-1 Abuse*, academics at Stanford University and The Wharton School of the University of Pennsylvania analyzed over 20,000 10b5-1 plan adoption dates and trades and concluded that some executives use 10b5-1 plans to engage in “opportunistic, large-scale selling of company shares.”

The study identified “red flags” associated with such opportunistic use. These red flags include short cooling-off periods; plans that consist of a single trade; and plans adopted in a quarter with trades under the plan beginning before that quarter’s earnings announcement. The study also found that “[s]ales made pursuant to these plans avoid significant losses and foreshadow considerable stock price declines that are well in excess of industry peers.”⁴

Abbott Laboratories executives’ use of 10b5-1 plans provide examples of fortuitously timed trades under these plans. Since 2019, Abbott executives have adopted at least a dozen 10b5-1 plans where the first trade occurred within a month of plan adoption, and the trades avoided declines in stock price in the ensuing 30 days. For example:

- The former CEO adopted a plan on March 15, 2019 and sold \$47 million in stock the next day; Abbott’s share price fell more than 7 percent in the 30 days following the sale.⁵
- The former CFO adopted a plan on January 27, 2020 and sold \$46 million in stock the next day; Abbott’s share price fell 12 percent in the 30 days following the sale.⁶
- An EVP adopted a plan on March 2, 2021 and sold \$755,000 in stock the next day at \$121.79 per share; the day after the sale, Abbott’s share price closed at \$116.01, 5 percent below the EVP’s sale price.⁷

³U.S. Securities and Exchange Commission, Final Rule: Selective Disclosure and Insider Trading, <https://www.sec.gov/rules/final/33-7881.htm>

⁴<https://www.gsb.stanford.edu/sites/default/files/publication-pdf/cgri-closer-look-88-gaming-the-system.pdf>

⁵<https://www.sec.gov/Archives/edgar/data/1800/000117911019004117/xslF345X03/edgar.xml>

⁶<https://www.sec.gov/Archives/edgar/data/1800/000117911020000889/xslF345X03/edgar.xml>

⁷https://www.sec.gov/Archives/edgar/data/1800/000141588921001357/xslF345X03/form4-03052021_040351.xml

The Commission Took Appropriate Action in 2021 but Should also Require Form 8-K Disclosure

In 2021, the IAC published a *Draft Recommendation Regarding Rule 10b5-1 Plans* and, among other things, recommended the Commission impose a four-month cooling-off period, a prohibition on overlapping plans, and enhanced disclosure of plan activity.⁸ Shortly thereafter, the Commission proposed amendments to Rule 10b5-1 addressing enhanced disclosure requirements and investor protections against insider trading. The Proposed Amendments included many of the IAC's recommendations, however, they did not require the timely disclosure of a 10b5-1 plan's adoption, modification, or cancellation on Form 8-K. Instead, the Commission proposed quarterly disclosure.

I am perplexed by this result because on multiple occasions Chair Gensler's speeches and comments have suggested that plan cancellations are economically material events—events deserving of timely disclosure.⁹ Requiring a summary disclosure of active plans in the company's next quarterly report deprives investors such as NYCRS of timely disclosure of important information, including potential market signals as to management's views of the performance and prospects of the company.

Timely Information Concerning Plan Adoption, Modification and Cancellation is Material to Investors and Market Integrity

Like the IAC, I believe the Commission should require Form 8-K disclosure on a timely basis whenever a Section 16 corporate officer or director adopts, modifies, or cancels a 10b5-1 plan. Such disclosure should include the name of the affected individual, the date of adoption, modification, or cancellation of the plan, and the number of shares covered.

As the IAC highlighted, “[r]esearch 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.*¹⁰ In addition, the IAC noted that “insiders also may terminate a plan while in possession of material nonpublic information and still qualify for the ‘affirmative defense,’ as long the terminated plan was initially entered into in good faith.”¹¹

As a result, the IAC supported strengthening disclosure, and working toward reassuring the market that plan activity is conducted in good faith and not used by insiders to circumvent insider trading rules. Moreover, consistent with the view of the IAC, such transparency would enable proactive risk assessment and policing by the market; strengthen the Commission's ability to actively and efficiently monitor the adoption, modification, or cancellation of plans for enforcement purposes, as well as increase market efficiency through the disclosure of potentially material signals based on the change of plan status.¹²

⁸<https://www.sec.gov/spotlight/investor-advisory-committee-2012/20210916-10b5-1-recommendation.pdf>

⁹See speech before CFO Network (<https://www.sec.gov/news/speech/gensler-cfo-network-2021-06-07>) and speech at the June 10, IAC meeting (<https://www.sec.gov/news/public-statement/gensler-iac-2021-06-10>)

¹⁰<https://www.sec.gov/spotlight/investor-advisory-committee-2012/20210916-10b5-1-recommendation.pdf> (Emphasis added). The IAC also cited a 2006 Stanford University review of Rule 10b5-1 trading activity in 1,241 companies that found that sales under trading plans were followed by stock underperformance of nearly 3% relative to the market over the ensuing six months. Alan D. Jagolinzer, SEC Rule 10b5-1 and Insiders' Strategic Trade, *Management Science* (February 2009), <https://ssrn.com/abstract=541502>

¹¹<https://www.sec.gov/spotlight/investor-advisory-committee-2012/20210916-10b5-1-recommendation.pdf>

¹²<https://www.sec.gov/spotlight/investor-advisory-committee-2012/20210916-10b5-1-recommendation.pdf>

We believe that corporate insider transactions are material to investors and the marketplace. There is evidence that Form 4s are the single most heavily downloaded form on EDGAR.¹³ Academic studies show that investors act on the information contained in Form 4 filings *within seconds*.¹⁴ For similar reasons, disclosure of 10b5-1 plan adoption, modification, or cancellation would be valuable to investors outside of the company. To promote the efficient operation of our capital markets, this information should not be known by companies and their executives, but not by investors.

Just as the timing of a corporate insider's purchase or sale of company equity may reveal an opportunistic use of a 10b5-1 plan and an insider's expectations with respect to the company's share price, the adoption, cancellation, or modification of a plan *may also signal* to the market insider expectations. Thus, this information should be made public within days of the activity on the Form 8-K, rather than quarterly, or when a company is filing with respect to other required 8-K matters.

The timeliness of this disclosure is our key concern. The Form 8-K filing of The Boston Beer Company, Inc. ("Boston Beer") on January 13, 2022, provides a clarifying example.

- Boston Beer disclosed in an 8-K on January 13, 2022, filed after the market closed, that its Chairman and Founder terminated his 10b5-1 plan on January 6, 2022. The terminated plan covered the purchase of up to 356,000 shares of the company's class A common stock.¹⁵
- In the same 8-K filing on January 13, 2022, the company also reported that it was lowering its guidance on earnings stating: "[b]ased on information currently in hand, the Company projects full year 2021 earnings per diluted share to be between a loss of \$1.00 and income of \$1.00, a decrease from the prior guidance of income between \$2.00 and \$6.00."

The next day after the 8-K filings, stock prices fell more than 8 percent. If the cancellation of the plan had been disclosed on an 8-K within two business days as proposed by the IAC, investors could have taken into account the possibility that bad news was coming.

Adding such a requirement for Form 8-K filings will not be unduly burdensome, since the disclosure would be limited to reporting a change in the status of a 10b5-1 plan. However, the burden of 8-K filings will be larger the more modifications and cancellations the company's officers and director make. If officers and directors repeatedly modify and cancel plans, then more 8-Ks will need to be filed. But these are precisely the circumstances—frequent modification and cancellation—where timely information is needed. Indeed, placing a greater disclosure burden on companies whose executives frequently modify and cancel plans should act as a countervailing force to deter such worrisome practices in the first place. Given the benefit of an affirmative defense under Exchange Act Rule 10b5-1(c)(1) to the insider, it is reasonable to expect prompt market transparency.

We request that the Commission adopt the Proposed Amendments and additionally require 8-K disclosure, consistent with the IAC recommendations, rather than belated quarterly disclosure. Such action would help ensure that corporate insiders are not afforded an affirmative defense to insider trading that is at odds with the Commission's core mission: protecting investors; maintaining fair,

¹³<https://www.sec.gov/comments/s7-08-20/s70820-7793920-223568.pdf>

¹⁴See Rogers, J. L., Skinner, and S.L.C.Zechman (2017). Run EDGAR Run: SEC Dissemination in a High-Frequency World. *Journal of Accounting Research* 55(2), 459-505; https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2513350; Rogers, J. L., Skinner, and S.L.C.Zechman (2016), The Role of the Media in Disseminating Insider Trading News. *Review of Accounting Studies* 21(3), 7110739, https://accountancy.smu.edu.sg/sites/default/files/accountancy/pdf/Papers/jonathanrogers_paper2.pdf

¹⁵<https://www.sec.gov/ix?doc=/Archives/edgar/data/949870/000095017022000309/sam-20220113.htm>

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orderly and efficient markets; and facilitating capital formation, all of which serve to promote a market environment worthy of public trust.¹⁶

I am hopeful that this recommendation will meaningfully strengthen the Proposed Amendments. Please contact Michael Garland, Assistant Comptroller for Corporate Governance and Responsible Investment (████████████████████; ████████████████████), if you would like to discuss these matters further.

Thank you for your consideration.

Sincerely,



Brad Lander

New York City Comptroller

¹⁶About the SEC, <https://www.sec.gov/about.htm>