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

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

Dear Ms. Countryman:

The National Association of Manufacturers ("NAM") appreciates the opportunity to provide comment to the Securities and Exchange Commission ("SEC") on File No. S7-20-21, the Commission's proposed rule on Rule 10b5-1 and Insider Trading.[1]

The NAM is the largest manufacturing trade association in the United States, representing manufacturers of all sizes and in all 50 states. Manufacturing is a capital-intensive industry, requiring significant investments for equipment purchases and research and development ("R&D"). Manufacturers often turn to the public capital markets to finance these pro-growth activities, which set the stage for economic expansion, innovation, and job creation. Thus, a vibrant public market that supports capital formation and long-term growth is critical to the sustained success of manufacturing in America.

The NAM strongly supports effective rules and robust enforcement with respect to insider trading. As the proposed rule notes, insider trading harms everyday shareholders and unfairly advantages individuals who leverage information asymmetries to execute unlawful transactions. Further, insider trading can undermine investors' faith in the market. Manufacturers depend on a trusted public market to finance critical investments, so the NAM stands with the SEC in its efforts to combat bad actors and enforce the securities laws' antifraud provisions.

At the same time, employees still need avenues to liquidate equity holdings. Equity compensation is an extraordinarily common tool to attract and retain talent, and competitive pay packages are often weighted away from cash compensation and toward equity awards, in large part because their growth potential gives executives further incentive to work in shareholders' best interests. However, these incentive-based plans are only effective if there are opportunities in the future for employees to liquidate their holdings and utilize the resulting capital.

In the same vein, public companies need to be able to buy and sell their shares to manage the business's balance sheet. A business planning to invest in new facilities, launch a new product line, or pursue an acquisition needs flexibility to offer and sell its own securities. The same goes for companies seeking to return value to shareholders via stock buybacks.

[1] *Rule 10b5-1 and Insider Trading*, 87 Fed. Reg. 8686 (15 February 2022). Release Nos. 33-11013, 34-93782; *available at* https://www.govinfo.gov/content/pkg/FR-2022-02-15/pdf/2022-01140.pdf.

The affirmative defense provisions in Rule 10b5-1 were designed specifically to balance these competing pressures. Under Rule 10b5-1, issuers and employees benefit from an affirmative defense against insider trading allegations provided that any trades are executed based on a pre-set trading arrangement adopted when the issuer or employee was not aware of any material nonpublic information ("MNPI") about the business or its securities. This framework separates insiders' knowledge of MNPI from any trades from which they might benefit, effectively protecting shareholders while still ensuring that issuers and employees can purchase and sell securities. For this reason, Rule 10b5-1 plans often play a critical role in public companies' share repurchase programs and in company executives' compensation packages.

The NAM appreciates that the SEC is continuing to consider the balance between liquidity and investor protection inherent in Rule 10b5-1's limitations. However, we are concerned that some of the provisions in the proposed rule would upset this balance, potentially making Rule 10b5-1 plans too difficult to adopt and too onerous to administer. Additionally, overly cumbersome restrictions could ultimately incentivize issuers and their employees to trade on a discretionary basis outside the boundaries of Rule 10b5-1—where it is even harder to purchase or sell securities while still protecting investors.

As the SEC works to finalize the proposed rule, the NAM respectfully encourages the Commission to adjust some of the proposal's more far-reaching restrictions to more specifically target bad behavior. Such an approach would still facilitate appropriate and necessary investor protections, but would avoid the unintended consequence of unduly limiting regular, non-abusive uses of Rule 10b5-1 plans.

I. <u>The proposed rule's cooling off periods are overly long and could unnecessarily limit companies' and employees' usage of Rule 10b5-1 plans.</u>

A. The SEC should shorten its proposed 120-day cooling off period for officer and director Rule 10b5-1 plans.

The NAM understands the SEC's desire to institute a cooling off period between the adoption of a new Rule 10b5-1 plan and the execution of any trades pursuant to that plan. However, the existing requirement that individuals entering into a Rule 10b5-1 plan be unaware of any MNPI about the issuer or its securities largely obviates the need for a long cooling off period: if the individual is unaware of MNPI, then there is no information that needs to be "cooled off" before a trade can commence. This dynamic is all the more salient under the proposed rule's requirement that officers and directors provide a mandatory certification that they are not aware of any MNPI and are adopting the Rule 10b5-1 plan in good faith. Given that these provisions target the same behavior (trading based on MNPI), the proposed cooling off period is to a large extent duplicative of the existing and proposed MNPI limitations.

Nevertheless, we understand that some period of delay between the adoption and execution of Rule 10b5-1 trading arrangements could help to avoid the appearance that trades were made based on MNPI. However, we believe the proposed 120-day cooling off period for officers and directors utilizing Rule 10b5-1 plans is overly long, impractical, and unnecessary.

As discussed, Rule 10b5-1 plans are critical to officers' and directors' ability to realize their compensation. These individuals need to be able to access this significant portion of their pay; otherwise, equity compensation would inflate their theoretical net worth without being useful to their day-to-day expenses. Under the proposed rule, however, officers and directors would effectively be limited to cashing their paychecks just three times per year. This overcorrection would both reduce the viability of equity awards as a compensation practice and disincentivize the usage of Rule 10b5-1 plans.

According to the proposing release, the highest risk for abusive activity comes when trades are commenced "within the same fiscal quarter as the adoption of the [Rule 10b5-1] arrangement."[2] Yet the proposed 120-day cooling off period would in all cases extend the trading limitation well beyond an issuer's fiscal quarter. Given the existing requirement that Rule 10b5-1 plans can only be adopted when insiders are unaware of MNPI (and the proposed rule's requirement that officers and directors provide a certification to this effect), this extended restriction would not provide much additional protection to investors but would impose significant limits on the usage of Rule 10b5-1 trading arrangements. Even assuming *arguendo* that an extended cooling off period is necessary, it remains the case that most Rule 10b5-1 plans are adopted in the days following an issuer's quarterly earnings release, because that period is when officers and directors are least likely to be aware of MNPI. As such, under the SEC's view of the underlying policy issue, it would make much more sense to set a cooling off period that extends until the release of quarterly earnings information rather than to mandate a full 120 days. Such an approach would address the policy concerns voiced in the proposing release without adding additional and unnecessary days of trading restrictions.

In the NAM's view, a shorter cooling off period would be more reflective of the limited risks posed to investors and the duplicative nature of the cooling off proposal and the existing and proposed MNPI requirements. Specifically, the NAM respectfully encourages the SEC to consider a cooling off period of 30 days or until the release of an issuer's quarterly earnings report, whichever is shorter. The quarterly earnings release would always be an appropriate end of the cooling off period given that these statements "free" any MNPI to the public—so insiders no longer have the type of informational asymmetries that can result from material knowledge of pending or expected financial results. For the same reason, there should be an exception to the cooling off period requirement for plans entered into within five business days after an earnings release. For intra-quarter trades (except for those subject to our proposed exception for plans entered into shortly following an issuer's quarterly earnings release), the NAM believes 30 days is an appropriate compromise that would avoid the appearance of impropriety while still relying on the prohibition against insiders adopting Rule 10b5-1 trading arrangements while in the possession of MNPI.

The proposing release solicits comment on whether the cooling off period should be extended to any company employee relying on Rule 10b5-1 protection, not just officers and directors. Due to their more limited financial resources, non-executive employees are more likely to need to be able to access and liquidate equity they hold. At the same time, these employees are less likely to have access to MNPI—and, if they do, they would be disallowed from adopting a Rule 10b5-1 plan in the first place. There is simply no need to impose cooling off restrictions on these employees, and doing so could significantly harm start-ups' and smaller businesses' ability to attract and retain talent.

B. The proposed cooling off period for issuer Rule 10b5-1 plans is unnecessary and overly burdensome.

As with the proposed cooling off restrictions for officers and directors, the NAM is concerned that a cooling off period for issuers could be unnecessary and limiting. Like officers and directors, issuers are prohibited from entering into a Rule 10b5-1 plan if the individual making investment decisions on behalf of the company is aware of MNPI. As such, there is no information that needs to be "cooled off" before a trade can be commenced.

In the issuer context, the cooling off period introduces significant administrative difficulties, particularly for businesses utilizing Rule 10b5-1 plans to execute share repurchase programs. The NAM appreciates that the SEC has recognized the difference between issuer and executive plans by

[2] *Id.* at 8689.

proposing a 30-day cooling off period for businesses rather than a 120-day period—but we still have concerns with the practical impact of such a limitation.

As noted, many public companies utilize Rule 10b5-1 plans to return capital to shareholders via stock buybacks. However, we are concerned that the SEC in this proposal and in its proposal on share repurchase disclosures[3] has not fully addressed the ways in which these issues interact. In our comment letter in response to the buybacks rule, the NAM noted that many companies are in the market virtually every single trading day repurchasing shares—in many cases, pursuant to a Rule 10b5-1 plan.[4] The SEC's Rule 10b5-1 proposal would impose new limitations on so-called "overlapping" plans despite the common practice of having multiple Rule 10b5-1 plans to effectuate consecutive time periods within the same buybacks program. Combined with the proposed 30-day cooling off period, these restrictions could have the effect of prohibiting buybacks during large swaths of the year.

For example, suppose a company would normally have three Rule 10b5-1 plans to execute its share repurchase program during the second quarter: one for April, one for May, and one for June. These plans would all have been adopted during a period in which the company was unaware of any MNPI, likely during a window period following an earnings release. Under the proposed restriction on overlapping plans, the company would have to wait until the April plan expired before initiating the May plan—except the proposed rule would also impose a 30-day cooling off period. So even if the company was unaware of any MNPI at the end of April and it adopted a new plan immediately upon expiration of the April plan, it would be unable to trade pursuant to the new plan until *June*—skipping May entirely. This result would significantly limit the company's ability to effectively manage its capital and return value to shareholders.

Applying the proposed cooling off period after cancellations or modifications of an issuer's Rule 10b5-1 plan could have a similar effect. Often, companies cancel or modify Rule 10b5-1 plans for reasons completely unrelated to the stock's performance or knowledge of MNPI—for example, if capital that had been earmarked for share repurchases is needed to finance a new M&A opportunity, fund an expansion project, or meet liquidity needs (all of which would be beneficial to shareholders). Under the proposed rule, such cancellations or modifications would trigger a new cooling off period. Further, cancellations or modifications could call into question whether a company's Rule 10b5-1 plan was "operated in good faith" under the new expanded affirmative defense requirements. The NAM does not believe that the SEC would want businesses to forgo new investments or jeopardize liquidity because of the proposed limits on cancellations and modifications of Rule 10b5-1 plans, nor do we believe that a 30-day prohibition on buybacks via Rule 10b5-1 is an appropriate result for canceling or modifying these plans. Accordingly, the SEC should eliminate the cooling off period for issuer Rule 10b5-1 plans and clarify that a cancellation or modification of an issuer plan would not jeopardize the issuer's affirmative defense under the new requirements.

Finally, we are concerned that the proposed cooling off period is overly broad in terms of scope, which could potentially chill otherwise legitimate activity. For instance, a company with a Rule 10b5-1 plan could be prevented from repurchasing its own shares *outside* of the plan during the cooling off period—even when it is not in possession of MNPI (for example, during a window period following an earnings release). Such a broad restriction on activity outside of the Rule 10b5-1 framework, even when a company is not in possession of MNPI, collaterally freezes the legitimate practice of returning value to shareholders via repurchases.

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[3] *See Share Repurchase Disclosure Modernization*, 87 Fed. Reg. 8443 (15 February 2022). Release Nos. 34-93783, IC-34440; *available at* https://www.govinfo.gov/content/pkg/FR-2022-02-15/pdf/2022-01068.pdf.

[4] NAM Comments on File No. S7-21-21 (1 April 2022). *Available at* https://documents.nam.org/tax/nam_buybacks_comments.pdf.

The NAM respectfully encourages the SEC to remain mindful of these interactions and their unintended consequences as it works to finalize its Rule 10b5-1 proposal. The NAM does not believe that cooling off periods for issuer Rule 10b5-1 plans are necessary: the usage of Rule 10b5-1 plans is both commonplace and unlikely to result in abuse in the context of stock buybacks, so investors are sufficiently protected by the existing requirement that plans not be adopted when the company is in possession of MNPI. The NAM urges the SEC to consider the significant administrative difficulties that would be imposed by an issuer cooling off period and to forgo its proposed 30-day cooling off requirement.

II. The SEC should consider the unintended consequences of its proposed limitations on "overlapping" Rule 10b5-1 plans and take steps to more directly target abusive behaviors.

Under the proposed rule, the affirmative defense under Rule 10b5-1 would not be available to issuers or individuals that have established "multiple overlapping trading arrangements" with respect to a class of securities.[5] The NAM understands the SEC's desire for protections against manipulation of Rule 10b5-1 plans, and we support commonsense limits—including the existing prohibition on hedging transactions—to protect investors from misuse of Rule 10b5-1 plans. However, we are concerned that the SEC's proposed restrictions would unfairly limit legitimate transactions.

A. The SEC should narrowly define "overlapping" to target nefarious behavior—and to explicitly exclude non-abusive trading arrangements.

First, the SEC should more exactly define "overlapping" to target only the fact pattern of selective and abusive plan cancellations described by the proposing release. We are concerned that several innocuous fact patterns could be captured by a vague and broad definition of "overlapping" and thus that individuals and issuers conducting non-controversial trades that happen to trigger this overbroad restriction would not be able to avail themselves of the Rule 10b5-1 affirmative defense protection.

For example, in many cases issuers adopt multiple Rule 10b5-1 plans that exist at the same time but cannot be executed during the same period. In the example described above, a company had three plans in place for April, May, and June. Though technically "overlapping" in their existence, the trades under these plans would never (and could never) be executed in the same month. Such an approach presents no opportunity for abuse, yet a broad reading of the restriction on overlapping plans could prevent the company in question from benefiting from Rule 10b5-1 affirmative defense. The NAM does not believe that the SEC intended to prohibit the common practice of adopting multiple plans that would be in effect over different periods (and other similar, non-abusive arrangements), yet the proposed rule would severely limit, if not outright prohibit, this practice. The NAM respectfully encourages the SEC to clarify that plans that do not overlap during their execution period would not be disqualified from affirmative defense protection. Such a clarification would be particularly critical for companies that utilize Rule 10b5-1 plans to effectuate stock buybacks. As noted, the combination of the proposed 30-day cooling off period with the proposed overlapping plans restriction could effectively prohibit regular share repurchases, limiting companies' ability to efficiently manage capital and return value to shareholders.

Similarly, the granting of restricted stock units ("RSUs") to employees is often accompanied by a requirement that employees agree at the time of the grant to automatic sale instructions to cover the employer's withholding obligations upon vesting of the stock (called "sell to cover" transactions). These transactions are scheduled to coincide with the vesting dates of the grant in order to generate funds to cover the employer's withholding obligation. They are structured as a "binding contract" in compliance with Rule 10b5-1. As such, the employees benefit from Rule 10b5-1's affirmative

[5] Proposed Rule, *supra* note 1, at 8692.

defense protections. All of the "sell to cover" transactions necessary under an RSU program are scheduled when the RSUs are granted—which is to say, they could be considered "overlapping" by a broad reading of the proposed rule. Yet these pre-scheduled transactions present no opportunity for abuse, as employees have no discretion as to their timing nor the number of shares that will be sold (which is calculated by the employer based on their withholding obligation). The NAM does not believe that the SEC intended to curtail companies' usage of RSUs to compensate employees, yet the tax consequences of not being able to prearrange "sell to cover" transactions would severely limit, if not outright prohibit, the practice by preventing employers from collecting the funds necessary to cover their withholding obligation. The NAM respectfully encourages the SEC to clarify that pre-scheduled RSU "sell to cover" transactions (and other similar, non-abusive arrangements[6]) would not be subject to the proposed rule's restrictions on overlapping Rule 10b5-1 plans.

These fact patterns, though not exhaustive, show the potential unintended consequences of the SEC's proposed prohibition on overlapping Rule 10b5-1 plans. As the SEC works to finalize the proposed rule, the NAM respectfully encourages the Commission to remain mindful of these and other, similar scenarios that could effectively prohibit legitimate businesses activity that poses no real threat of insider trading. At a minimum, the SEC should clarify the definition of "overlapping" to explicitly exclude these and other, similar fact patterns—making clear that the purpose and effect of the proposed prohibition is solely to counter the pattern of selective and intentionally abusive plan cancellations described by the proposing release.

B. The SEC should reconsider its proposed prohibition on overlapping Rule 10b5-1 plans and instead promulgate a more targeted approach to counter truly abusive transactions.

The NAM questions the need for a full prohibition on overlapping Rule 10b5-1 plans given the potential for unintended consequences under the SEC's proposed approach. Insiders are already prohibited from adopting Rule 10b5-1 plans while in possession of MNPI[7] and from exercising influence over "how, when, or whether" trades are executed pursuant to a plan.[8] Further, the proposed rule would add a new requirement that Rule 10b5-1 plans be "operated in good faith"[9] (in addition to the existing requirement that the plans be "entered into in good faith"[10]). Moreover, the proposed rule would institute an obligation for issuers to disclose, on a quarterly basis, "the adoption or termination of a trading arrangement by a director, officer, or the issuer."[11] These restrictions and disclosures should be more than sufficient to shine a light on and ultimately curtail the abusive behavior contemplated by the proposing release. The NAM would support robust enforcement of truly abusive transactions, but it remains the case that most so-called "overlapping" plans exist for benign reasons.

The NAM respectfully encourages the SEC to exercise caution as it considers its approach to overlapping Rule 10b5-1 plans. If it intends to move forward with a prohibition on overlapping plans, the SEC should offer clarity on the trading arrangements to which the prohibition would apply; in so doing, the Commission should take steps to specifically exempt non-abusive fact patterns so that benign, commonplace plans and transactions would not be unnecessarily or unfairly limited. For

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[6] For example, some employees schedule additional sales to cover their tax liability elections. Similar to "sell to cover" transactions, these transactions should not be considered "overlapping" under the proposed rule's restrictions.

[7] 17 CFR 140.10b5-1(c)(1)(i)(A).

[8] 17 CFR 240.10b5-1(c)(1)(i)(B)(3).

[9] *See* Proposed Rule, *supra* note 1, at 8693.

[10] 17 CFR 240.10b5-1(c)(1)(ii).

[11] *See* Proposed Rule, *supra* note 1, at 8694.

example, multiple Rule 10b5-1 plans with disparate execution periods, scheduled RSU "sell to cover" transactions, and discretionary issuer repurchases made outside of a Rule 10b5-1 plan when an issuer is not in possession of MNPI—as well as other, similar fact patterns—should not be prohibited.

The SEC should also consider other approaches that might be more targeted and effective than an outright ban on overlapping Rule 10b5-1 plans, taking into account the impact of the existing and proposed restrictions and disclosures that would target the same fact patterns of abuse. The NAM supports the SEC's efforts to protect investors from manipulation of Rule 10b5-1 plans, but we are hopeful that any final rule will more surgically target abusive plans and transactions without unduly limiting legitimate plans and transactions that pose no threat to shareholders.

III. The SEC should soften its proposed restrictions on single-trade Rule 10b5-1 plans in order to allow employees to address critical liquidity needs.

As with the restriction on overlapping plans, the NAM understands that the SEC is eager to deter abuse with respect to single-trade plans. Under the proposed rule, Rule 10b5-1's affirmative defense would only be available to one single-trade plan during any 12-month period. The NAM is concerned that such a restriction may be too broad and thus unfair to many employees, particularly at start-ups and smaller businesses, who depend on single-trade plans to access liquidity for significant life events.

The proposing release expresses a concern that single-trade plans consistently generate returns and avoid losses, and thus must have a heightened potential for abuse. However, the release ignores the fact that most single-trade plans have execution criteria that include a specific sell price, so it is not surprising that trades pursuant to these plans would perform well. With a high execution price in place, a single-trade plan will always "sell high" (and thus generate returns) and never "sell low"—because the plan will simply not execute at any value below the predetermined price. Specifically, many executives have optimistic views of the potential for stock price appreciation, so they enter into Rule 10b5-1 plans structured as a limit order at a high price, which will never result in a trade if the high price is not reached. Additionally, executives are often granted equity compensation in the form of stock options, which have an exercise price set at the market price on the date of grant (meaning that decreases in the stock price result in an "underwater" option that cannot be exercised).

Given the mischaracterization of single-trade plans in the proposed rule, the NAM questions whether it is necessary to limit single-trade plans to just one per year. After all, as the proposing release notes, single-trade plans are critical for employees' ability to "address one-time liquidity needs."[12] This is particularly true for lower-level employees, or those working for start-ups or smaller businesses. These employees need access to their equity holdings for regular life events, from putting a down payment on a home to buying a new car to sending a child to college. Overly strict limitations on single-trade plans could unfairly impact these workers and ultimately devalue their compensation packages.

In order to guard against potential abuse while still allowing employees to access their compensation, the NAM believes it would be more appropriate to impose more targeted limits on single-trade Rule 10b5-1 plans. The SEC should consider allowing more than a single trade during a 12-month period—perhaps by softening the limit to allow one trade per quarter or two trades per year. As an alternative approach, the SEC could also consider relying on cooling off periods, as it has proposed to do for multi-trade plans. The NAM's proposed approach of cooling off periods that span 30 days or until the release of quarterly earnings, whichever comes first, would effectively limit

[12] *Id.* at 8692.

the number of transactions per year while also distancing any trades from an employee's knowledge of MNPI.

IV. The proposed rule's certification requirements are duplicative of existing regulations related to officers and directors adopting Rule 10b5-1 plans in good faith and without knowledge of MNPI.

The proposed rule would add a new certification requirement for officers and directors utilizing Rule 10b5-1 plans. In order to be eligible for affirmative defense protection, officers and directors would be required to certify that they are not aware of MNPI at the time of the plan's adoption and that they are adopting the plan in good faith. The NAM questions whether this duplicative requirement is necessary given the similar limitations that already exist for the adoption of Rule 10b5-1 plans.

Under current law, officers and directors are already prohibited from entering into a Rule 10b5-1 plan when they are aware of MNPI about an issuer or its securities.[13] They are also required to enter into any plan "in good faith and not as part of a plan or scheme to evade the prohibitions" of Rule 10b5-1.[14] It is not clear what new benefits would accrue to investors were the SEC to require officers and directors to provide a new certification about these well-known restrictions.

Despite the lack of new information or protection for investors, the proposed certification requirement nevertheless seems likely to create new liability and additional costs for officers and directors. The proposed rule claims its intent is not to create liability, but the proposed certification is still a new legal obligation—and one on which the availability of Rule 10b5-1's affirmative defense protections would hinge. Further, the proposed rule would require officers and directors to retain a copy of their certifications for ten years after adoption of a plan. While officers and directors are likely to retain their certifications to ensure they can prove their eligibility for Rule 10b5-1's affirmative defense, setting an extraordinarily long ten-year retention *requirement* is yet another opportunity to increase liability for individuals entering into Rule 10b5-1 plans and ultimately to make the plans more costly and burdensome to utilize and administer. At a minimum, the SEC should allow companies to maintain these certifications rather than officers and directors given the difficulties of extended document retention—but the NAM encourages the SEC to reconsider whether the certification requirement and the associated ten-year recordkeeping obligation are necessary at all.

New administrative red tape could pose risks to officers and directors who enter into Rule 10b5-1 plans in good faith but who make a clerical error of some sort with respect to the required certifications. These individuals could lose the protection of Rule 10b5-1's affirmative defense despite fully complying with the underlying substantive restrictions. These additional layers of administrative burden and legal liability could ultimately disincentivize officers and directors from entering into Rule 10b5-1 plans. The NAM respectfully encourages the SEC to reconsider the necessity of the proposed certification requirements and instead to focus its efforts on fulsomely enforcing the existing Rule 10b5-1 restrictions.

V. The SEC should allow for flexibility regarding new disclosure requirements related to companies' Rule 10b5-1 plans and other insider trading policies and procedures.

The proposed rule would add new quarterly disclosure obligations for companies that utilize Rule 10b5-1 plans, or whose officers or directors do so. Separate from Rule 10b5-1, the rule would create a new annual disclosure for all public companies related to their insider trading policies and

[13] 17 CFR 140.10b5-1(c)(1)(i)(A).

[14] 17 CFR 240.10b5-1(c)(1)(ii).

procedures, require disclosure of certain option grants occurring shortly before or after the release of MNPI, and shorten the reporting window for equity gifts. The NAM respectfully encourages the SEC to make several targeted changes to the proposed reporting obligations to reduce the associated administrative burden while still providing appropriate transparency for investors.

A. The NAM questions the need for quarterly Rule 10b5-1 disclosures; if implemented, the SEC should require such disclosures only after trades have been executed.

The NAM understands the SEC's desire to increase transparency around Rule 10b5-1 plans adopted by issuers, officer, and directors. However, we are concerned that the proposed quarterly disclosures stem from a mischaracterization of legitimate, legal activity. As noted, equity awards are an extremely common component of modern compensation packages, and there is nothing untoward about employees seeking to liquidate equity holdings. Similarly, stock buybacks are a standard practice for allocating capital and returning value to shareholders, and Rule 10b5-1 plans often enable issuers to execute these commonplace transactions. Yet the proposing release implies that abuse of Rule 10b5-1 plans and their affirmative defense protections is both common and a significant danger to investors—and, as such, that regular disclosures about issuers' and employees' Rule 10b5-1 plans are necessary. The NAM does not agree with these assumptions. Manufacturers support appropriate transparency, but reporting requirements should not be designed to "name and shame" law-abiding employees or to discourage legitimate business activity.

Additionally, the NAM is concerned about the impacts the proposed quarterly disclosure obligations could have on Rule 10b5-1 plans that are adopted during the relevant quarter but that have not yet been executed. (Under the proposed rule, this category would include *all* officer and director Rule 10b5-1 plans given the proposed 120-day cooling off period.) Disclosing the specifics of these plans before any trades are executed could expose potentially sensitive information to the market. The proposing release is cognizant of this risk, requesting comment on whether requiring disclosure of the terms of upcoming trades could encourage front-running of those trades. If the SEC chooses to move forward with a quarterly reporting requirement, the NAM respectfully encourages the Commission to consider requiring disclosure only after the relevant trades have been executed and settled. Post-trading quarterly disclosures—similar to the Item 703 reporting obligation for stock buybacks—would provide all the same information about Rule 10b5-1 plans to investors while minimizing the risks to officers, directors, and issuers.

B. The SEC should allow for flexibility with respect to companies' annual disclosures of insider trading policies and procedures.

The proposed rule would impose new annual reporting requirements about companies' insider trading policies and procedures. Specifically, companies would be required to disclose whether they have adopted insider trading policies and, if so, to disclose them on Form 10-K under new Item 408(b). Virtually all public companies have policies and procedures to discourage and police insider trading, so it would not be a significant burden to verify annually that said policies are in place. However, disclosing the specifics of such policies could create costs for companies while providing limited new information to investors given the similarities likely to emerge between most issuers' plans. If the SEC chooses to move forward with annual disclosures of businesses' insider trading policies, the NAM respectfully encourages the Commission to allow for a significant degree of flexibility with respect to the specifics of these plans and the associated disclosures. Such flexibility would decrease cost and liability for public companies without negatively impacting the availability of useful information for investors.

C. The NAM opposes the proposed reporting requirement for stock option grants.

The proposed rule would institute a new requirement that companies provide tabular disclosures of any option awards that are granted within 14 days before or after any 10-Q, 10-K, or 8-K filings. These disclosures would also be required for any options granted within 14 days of an issuer share repurchase. The NAM believes these reports are unnecessary and could limit the legitimate use of stock options for employee compensation.

The proposing release voices a concern that issuers are misusing so-called "spring-loading" and "bullet-dodging" arrangements by timing option grants to take advantage of information asymmetries related to MNPI.[15] Yet the SEC has already made clear that such practices are material and as such should be fully disclosed in issuers' Compensation Discussion and Analysis ("CD&A") disclosures.[16] As such, it is not clear what additional benefit would accrue to investors under the proposed reporting requirements.

Also, the proposed rule's approach to option grants implies that any grants close in time to the release of MNPI are intrinsically suspect. Yet such grants are relatively common, as issuers often conduct such activity (including granting stock options and adopting Rule 10b5-1 plans) during the open window following the release of MNPI. Additionally, option grants often fall after earnings releases simply because compensation is naturally evaluated on a quarterly and/or annual basis. The NAM is concerned that the proposed disclosures could cast a cloud over and ultimately discourage these legitimate, legal compensation practices. Further, given the fact that many issuers conduct stock buybacks virtually every day of the year, the restriction that options must be disclosed when granted within 14 days of a buyback would effectively treat *every* option grant as potentially suspicious.

The NAM respectfully encourages the SEC not to adopt the proposed disclosure requirements for stock option grants. These disclosures would not inform investors any more than the current CD&A and Form 4 reporting requirements but could limit companies' ability to compensate employees using stock options.

D. The SEC should extend the filing deadline for reports related to "bona fide" gifts and only require such reports after transactions have settled.

The proposing release voices concern about the filing deadline for reports related to "bona fide" gifts of securities by Section 16 officers. Currently, these reports are generally due within 45 days of an issuer's fiscal year end. The proposed rule would shorten the reporting period to two days following the execution of a transaction.

The NAM is concerned that this tight timeframe will be functionally unworkable. There is often a significant time lag between when an individual executes a trade order and the broker and gift recipient confirm and finalize a transaction. Many bona fide gifts are given to non-profits and other third parties with often-complex processes for receiving gifts of equity; others involve complicated family trusts and similar estate-planning tools. In many cases, it will simply be impossible to file an accurate report within two days of a trade's execution. At a minimum, the NAM encourages the SEC to trigger any reporting requirement on the settlement of such transactions—not their execution. We also urge the SEC to consider a longer reporting deadline than two days given the significant departure from current law that the proposed change would represent.

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[15] *See* Proposed Rule, *supra* note 1, at 8697.

[16] *See Executive Compensation and Related Person Disclosures*, 71 Fed. Reg. 5318 (8 September 2006). Release Nos. 33-8732A, 34-54302A, IC-27444A; *available at* https://www.govinfo.gov/content/pkg/FR-2006-09-08/pdf/06-6968.pdf.

These targeted amendments would still allow the SEC to achieve its goal of increased transparency into bona fide gifts without unnecessarily burdening the individuals making said gifts—and without imperiling needed funding for non-profits and limiting the transfer of assets to the next generation.

VI. The SEC should make clear that existing Rule 10b5-1 plans would not be subject to any new limitations imposed by a final rule.

The proposed rule would impose a multitude of new limits on the usage of Rule 10b5-1 plans and on the availability of Rule 10b5-1's affirmative defense protections. As discussed, the NAM is concerned that some of these limits could have the effect of discouraging the use of Rule 10b5-1 by making the plans overly difficult to adopt and administer. Nevertheless, we understand the SEC's desire to bolster investor protection, and we support targeted limitations and disclosures that are carefully designed to safeguard investors without disincentivizing issuers and their employees from adopting Rule 10b5-1 plans.

Irrespective of the breadth and depth of the limitations the SEC ultimately chooses to adopt, the NAM strongly encourages the Commission to include specific grandfathering language for Rule 10b5-1 plans already in place in order to allow these plans to continue to operate under the current rules. These arrangements are structured as binding contracts and were effectuated pursuant to the existing requirements that traders enter into the plans in good faith and without knowledge of MNPI. Continuing to operate these plans pursuant to existing contracts should in no way be implicated by the SEC's adoption of new amendments to Rule 10b5-1. The NAM strongly supports explicit grandfathering provisions to make clear that any existing Rule 10b5-1 plan adopted prior to the adoption of any final rule would be unaffected by such a rule—and, specifically, that the individual or issuer utilizing such a plan would still be able to avail themselves of Rule 10b5-1's affirmative defense protections based on their compliance with the rules as they existed prior to the new amendments.

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The NAM is concerned that some of the Commission's assumptions about Rule 10b5-1—namely, that companies and their employees routinely abuse Rule 10b5-1 plans and their affirmative defense protections—have led to a proposed rule featuring several overbroad limitations and requirements. The NAM does not believe abuse of Rule 10b5-1 is endemic among public companies and their officers and directors; as such, we support robust enforcement against bad actors and commonsense, targeted restrictions that protect investors without limiting appropriate usage of Rule 10b5-1 plans.

The NAM respectfully encourages the SEC to take steps to strike this critical balance as it works to finalize amendments to Rule 10b5-1. Manufacturers are hopeful that any final rule will include effective insider trading protections while still preserving the ability of companies and their employees to utilize Rule 10b5-1 to access liquidity and execute legitimate, legal transactions.

Sincerely,

Chris Netram
Managing Vice President, Tax and Domestic Economic Policy