

April 1, 2022

Via Online Form Submission

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

Re: File No. S7-20-21, Comments to Proposed Rule 10b5-1 Amendments and Insider Trading Disclosure Requirements

Dear Ms. Countryman,

The following comments are submitted by International Bancshares Corporation (“IBC”), a publicly-traded, multi-bank financial holding company headquartered in Laredo, Texas. IBC maintains 170 facilities and 263 ATMs, serving 76 communities in Texas and Oklahoma through five separately state-chartered banks ranging in size from approximately \$474 million to \$9.5 billion, with consolidated assets totaling over \$16 billion. IBC is one of the largest independent commercial bank holding companies headquartered in Texas.

This letter responds to the request of the Securities and Exchange Commission (the “SEC”) for comment on its proposal to: (i) amend Rule 10b5-1 under the Securities Exchange Act of 1934 (the “Exchange Act”) by imposing new conditions on the use of Rule 10b5-1(c)(1) as an affirmative defense; (ii) establish new disclosure requirements concerning issuers’ insider trading policies and the adoption, modification, and termination of certain trading arrangements; (iii) amend issuers’ compensation-disclosure requirements regarding the timing of equity compensation awards to directors and executives made in close proximity to an issuer’s disclosure of material nonpublic information (“MNPI”); and (iv) amend Forms 4 and 5 to require Exchange Act Section 16 corporate insiders to identify transactions made in connection with Rule 10b5-1(c)(1) trading arrangements and to report gifts of securities on Form 4 (collectively, the “Proposal”). While IBC appreciates the SEC’s desire to implement changes that will “increase investor confidence in the markets[.]”¹ we believe the SEC’s focus misses the

¹ Press Release, Sec. & Exch. Comm’n, SEC Proposes Amendments Regarding Rule 10b5-1 Insider Trading Plans and Related Disclosures (Dec. 15, 2021) (quoting Gary Gensler, Chair, Statement on Rule 10b5-1 and Insider Trading (Dec. 15, 2021)).

mark. While IBC can understand the SEC's desire to thwart the inappropriate use of 10b5-1 plans by corporate insiders in possession of MNPI, IBC believes the SEC goes too far with respect to issuer 10b5-1 plans. Indeed, the Investor Advisory Committee's own recommendation cited in the Proposal plainly states that the committee "did not consider issuer share buybacks in its deliberations on this recommendation and believes that any changes to the regulation of these programs should be addressed separately."² IBC strongly believes that the SEC should instead allocate more of its attention to combatting the pervasive practices of fraudulent short sellers. Indeed, the Proposal will enable short sellers' manipulative tactics. The proposed enhancements to the Rule 10b5-1 disclosures are unduly burdensome and overly expansive, punishing all reporting companies in ways that will be particularly harmful to community banks like IBC while failing to address the bad behavior of some. For those reasons, IBC opposes the Proposal and urges the SEC to reconsider its implementation.

I. To reinstate investor confidence in the marketplace, the SEC should focus its attention on predatory short-sale practices, dark-pool trading, and market manipulation.

IBC is, and has always been, an advocate for data transparency and accessibility.³ We believe that the more transparent the marketplace, the better the market serves all participants. For that reason, IBC strongly supports the recently proposed amendments to FINRA's short sale reporting program. In its enhanced form, Rule 4560 will foster market integrity, level the playing field between short sellers and all other investors, and help prohibit nefarious short selling practices that undermine FINRA's responsibility to prevent fraud and manipulation and to promote fairness and equity in the marketplace.⁴

² Recommendations of the Investor Advisory Committee Regarding Rule 10b5-1 Plans (Sept. 9, 2021), note 1, *available at* <https://www.sec.gov/spotlight/investor-advisorycommittee-2012/20210916-10b5-1-recommendation.pdf>.

³ Letter from Dennis Nixon, Chief Exec. Officer & Chairman, Int'l Bancshares Corp., to Sec. & Exch. Comm'n (May 13, 2016), <https://www.sec.gov/comments/4-691/4691-8.pdf> ("Congress has called for, and today's market requires, disclosure rules that address the lack of transparency and susceptibility to abuse and manipulation related to short selling."); Letter from Dennis Nixon, Chief Exec. Officer & Chairman, Int'l Bancshares Corp., to Sec. & Exch. Comm'n (July 18, 2011), <https://www.sec.gov/comments/4-627/4627-169.pdf> (advocating for real time reporting of short sale positions because "[t]he only way to fully level the playing field is to require the same transparency from short sellers that we require from other investors"); Letter from Dennis Nixon, Chief Exec. Officer & Chairman, Int'l Bancshares Corp., to Sec. & Exch. Comm'n (June 17, 2009), <https://www.sec.gov/comments/s7-08-09/s70809-3685.pdf> ("IBC strongly believes the lack of reporting and transparency regarding short selling activities facilitates the nefarious actions of a handful of short selling predators to the detriment of thousands of legitimate shareholders holding long positions."); Letter from Dennis Nixon, Chief Exec. Officer & Chairman, Int'l Bancshares Corp., to Sec. & Exch. Comm'n (June 9, 2009), <https://www.sec.gov/comments/s7-08-09/s70809-3390.pdf> (supporting Regulation SHO amendments that would require more "transparency into the transactions of market makers").

⁴ 15 U.S.C. § 78o-3(b)(6).

The trading regulations meant to protect investors and to promote fairness of opportunity in the marketplace are only as effective as the regulatory system demanding compliance with them.⁵ While unabusive short selling practices may theoretically facilitate pricing efficiency and offer market liquidity,⁶ the current regulatory framework has become a free-for-all for virtually unchecked institutional short selling power and pervasive market manipulation. One investor's loss is a short seller's gain, and deceptive practices like naked short selling,⁷ "short-and-distort" schemes,⁸ and dark-pool trading⁹ enable short sellers to exploit that gain by profiting from the artificial manipulation of stock prices.

Many unsuspecting companies have been the target of institutional short sellers' calculated and relentless short sale attacks, but the recent brawl between GameStop Corporation short sellers and "long" investors has shone a spotlight on the radical information asymmetry and manipulative tactics that short sellers have long taken advantage of to the detriment of others. The short interest of GameStop was reported at an illogical 141.8%¹⁰ during the first week of January 2021 when trading volume averaged

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- ⁵ See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929X, 124 Stat. 1376, 1870 (2010) (codified at 15 U.S.C. § 78o) (requiring the SEC to "prescribe rules providing for the public disclosure of the name of the issuer and the title, class, CUSIP number, aggregate amount of the number of short sales of each security, and any additional information determined by the [SEC] following the end of the reporting period"). *But see Implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act*, U.S. SEC. & EXCH. COMM'N, <https://www.sec.gov/spotlight/dodd-frank.shtml#> (Dec. 23, 2020) (click "Other") (indicating that the short-sale reform under Section 929X of the Dodd-Frank Act is one of three remaining mandatory rulemakings that the SEC has neglected to impose since Congress mandated the rulemaking more than a decade ago).
- ⁶ See SEC Concept Release: Short Sales, Exchange Act Release No. 34-42037, 6 Fed. Reg. 57996 (Oct. 28, 1999) <https://www.sec.gov/rules/concept/34-42037.htm> (demonstrating the SEC's longstanding belief that "[s]hort selling provides the market with two important benefits: market liquidity and pricing efficiency").
- ⁷ MARK JICKLING, CONG. RSCH. SERV., RS22099, REGULATION OF NAKED SHORT SELLING (2009) (noting that when a stock's short interest is high, the "virtually unlimited quantity of shares" that can be created by naked short selling can have a "strong impact on the share price" and allow for "a market based on supply and demand [to] be seriously distorted"); see also Press Release, Sec. & Exch. Comm'n, SEC Charges Broker-Dealer with Order Execution Violations (May 20, 2021) (discussing a broker-dealer's repeated naked short selling in violation of Rules 200(g) and 203(b)(1) of Regulation SHO).
- ⁸ Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Hedge Fund Adviser With Short-and-Distort Scheme (Sept. 12, 2018) (summarizing the SEC's complaint against a hedge fund adviser for participating in a typical short-and-distort scheme by establishing a short position in a company then "ma[king] a series of false statements to shake investor confidence in [the company], lower its stock price, and increase the value of his position).
- ⁹ Luis A. Aguilar, Comm'r, Sec. & Exch. Comm'n, Public Statement: Shedding Light on Dark Pools (Nov. 18, 2015), <https://www.sec.gov/news/statement/shedding-light-on-dark-pools.html> (warning of the dangers of alternative trading system "dark pools" that meet "institutional investors' growing need to trade large blocks of stock without causing markets to move against them" by "offering ever more trading on an anonymous basis, and without displaying specific order information before trades occur").
- ¹⁰ John McCrank, *Explainer: How Were More than 100% of GameStop's Shares Shorted?*, REUTERS (Feb. 18, 2021, 10:15 AM), <https://www.reuters.com/article/us-retail-trading-shortselling-explainer/explainer-how-were-more-than-100-of-gamestops-shares-shorted-idUSKBN2AI2DD> (reporting a

around 6.5 million shares.¹¹ By the next week, the number of shares exchanging hands increased nearly tenfold.¹² As short sellers scrambled to cover their positions, the stock price swung from less than \$20 at the start of the year to its peak of \$483 on January 28, 2021.¹³ With more shares shorted than existed, short sellers were forced to cover at losses totaling billions of dollars, while GameStop shares have risen roughly 950% since the start of the year.¹⁴ GameStop's market volatility and the media frenzy surrounding it have been remarkable, but the abusive short selling practices and market manipulation that set the stage for the GameStop saga to unfold are unfortunately commonplace.

Steps must be taken to fill the regulatory gaps that have enabled short sellers to trade in the shadows with no real-time oversight of or consequences for the manipulative market practices that have gone on for years without being rectified.

On one hand, the SEC acknowledges the pervasive fraud carried by short sellers; on the other, the SEC would be fascinating those practices by making the type of information required by the Proposal accessible to short sellers.

II. While the disclosures required under the Proposal may theoretically offer investors insight into the relation between insiders' possession of MNPI and implementation of Rule 10b5-1 trading plans, in practice, the scope of the information elicited by the Proposal inhibits its effectiveness.

peak short interest of 141.8% of GameStop's float according to the data of financial analytics firm S3 Partners); see also See Game Stopped? Who Wins and Loses When Short Sellers, Social Media, and Retail Investors Collide: Hearing Before the H. Comm. on Fin. Servs., 117th Cong. (2021) (statement of Kenneth C. Griffin, Chief Executive Officer, Citadel LLC) (attributing institutional investors' lending of GameStop shares that were purchased short as the explanation for how GameStop could be short-sold to over 140% in January 2021 without illegal naked short selling occurring).

¹¹ Historical Price Data of GameStop Corp., YAHOO! FINANCE, <https://finance.yahoo.com/quote/GME/history> (click "time period"; then set the time period as Jan. 3, 2021 – Jan. 29, 2021; then click "apply") (reporting daily trading volume of GameStop, from which average weekly trading volumes were calculated to be 6,730,000 shares from Jan. 4-8, 2021 and 61,410,840 shares from Jan. 11-15, 2021).

¹² *Id.*

¹³ Bailey Lipschultz & Divya Balji, *Historic Week for GameStop Ends With 400% Rally as Shorts Yield*, BLOOMBERG (Jan. 29, 2021), <https://www.bloomberg.com/news/articles/2021-01-29/historic-week-for-gamestop-ends-with-400-rally-as-shorts-yield>.

¹⁴ Saqib Iqbal Ahmed, *Analysis: With GameStop Earnings on Tap, Option Traders Bet on Muted Moves*, REUTERS (Sept. 8, 2021, 6:00 AM), <https://www.reuters.com/business/with-gamestop-earnings-tap-options-traders-bet-muted-moves-2021-09-08/> ("GameStop is up about 950% for the year and down 8% so far this quarter."); see also Jen Wiczner, *Hedge Funds and Other Short-Sellers Have Lost an Astounding Amount Betting Against GameStop*, FORTUNE (Jan. 29, 2021, 3:51 PM), <https://fortune.com/2021/01/29/gamestop-stock-how-much-hedge-funds-have-lost-sellers-losses-gme-steve-cohen-point72-andrew-left-citron-research-short-squeeze/> (explaining that by Friday, January 29, 2021, "short-sellers had lost \$19.75 billion on GameStop so far [in the month of January] alone, according to S3 Partners").

The current framework of Rule 10b5-1 sufficiently addresses concerns of insider trading and tempers the interests of the public in having adequate information to make well-informed investment decisions, of corporations in being able to effectively manage their capital-allocation plans, and of the market in ensuring that company disclosures do not act to spoon-feed fraudulent short sellers in their manipulative short-and-distort quests. The disclosures required under the Proposal unjustly tip Rule 10b5-1's balance in favor of manipulative bad actors while burying everyday investors in information that will do more harm than good. Rather than aiding investors' understanding of issuers' capital management programs and ability to discern when corporate insiders' use of the affirmative defense afforded by Rule 10b5-1(c)(1) raises red flags, the disclosures required by the Proposal will operate as an information overload. Unlike experienced short-selling firms who are keenly aware of the power of the information solicited by the Proposal and who have sophisticated, often automated techniques and advanced technological tools to quickly parse through truckloads of data and information, the everyday investors who the SEC serves to protect will be lost in the information reported by companies in accordance with the Proposal.

III. If implemented, the Proposal's cooling-off period and prohibition on overlapping 10b5-1 plans will derail the ability of community banks like IBC to manage capital prudently.

IBC would also like to echo the views of the Bank Policy Institute and the American Bankers Association regarding the proposed 30-day cooling off period as set forth in their letter to the SEC of even date herewith (the "PCI/ABA Letter").

The proposed 30-day delay between setting trade parameters and executing such trades, together with the prohibition on overlapping 10b5-1 plans, drastically reduces an issuer's flexibility to sensibly react to any occurrence during such period, including any that do not involve MNPI. This could eliminate issuers' use of these plans as part of their capital management strategies. In addition, the cooling off period would make it difficult, maybe even impossible, for regulated financial institutions to implement the amount of share repurchases planned as part of their capital management strategies.

As stated in the PCI/ABA Letter:

It is already impermissible to adopt or modify 10b5-1 plans or otherwise enter into share repurchase agreements while in possession of MNPI, and firms have robust policies and procedures in place to avoid doing so. For reasons entirely unrelated to possession of MNPI, issuers, including Regulated Banking Institutions, that frequently engage in share repurchases may adopt or update 10b5-1 trading plans (including by terminating existing plans and adopting new ones) several times over the course of a year. Adopting or updating these plans helps maximize shareholder value by allowing issuers to account for general market developments (whether positive or negative), unforeseen circumstances, and issuer performance over the period since the previous 10b5-1 plan

adoption or update. In addition, Regulated Banking Institutions constantly manage their regulatory capital ratios to ensure they are meeting regulatory minimums and management targets; therefore, 10b5-1 plan adjustments may help ensure that the Regulated Banking Institution's share repurchases are properly calibrated to support these regulatory capital requirements and goals.

Unlike most issuers, financial institutions like IBC have their capital levels closely examined by both the market and banking regulators. Precluding such institutions from being able to adopt or amend 10b5-1 plans to account for the above could actually create an unsafe or unsound practice that is inconsistent with bank regulatory requirements. The Proposal would also weaken the Rule 10b5-1(c) safe harbor for many issuers given the manner in which they use it. To minimize the potential of violating the SEC's antifraud and antimanipulation rules, issuers generally structure trades under their 10b5-1 plans consistent with both the Rule 10b5-1(c) safe harbor and the Rule 10b-18 safe harbor. Layering the volume limits of Rule 10b-18 on a mandatory cooling off period under the 10b5-1 safe harbor would meaningfully limit the effectiveness of the Rule 10b5-1(c) safe harbor, if only one 10b5-1 plan could be in place at a time. Many regulated financial institutions like IBC rely on 10b5-1 plans to execute trades during blackout periods near quarter-end and quarterly earnings releases, when other methods of executing trades are not available due to the potential possession of MNPI. For these issuers, as stated in the PCI/ABA Letter:

[A]ny non-MNPI developments between 10b5-1 plan adoption and trade execution that render the planned trades disadvantageous would effectively shorten the firm's trading window for that quarter.¹⁵ In addition, the cooling off period could lead to artificially created market volatility due to the shortened windows within which issuers would be executing their planned repurchases.

Given the numerous legitimate reasons an issuer may periodically update its share repurchase plans, IBC strongly opposes any cooling off period with respect to an issuer's

¹⁵ In this context, an issuer enters into a 10b5-1 plan *prior* to the beginning of the firm-designated blackout period, during which, under firm policies and procedures designed to comply with the prohibition on trading while in the possession of MNPI, firms deem themselves to potentially be in possession of MNPI due to the availability of preliminary information about quarterly results. 10b5-1 plans in this context include trades to be executed during the blackout period, when other methods of executing share repurchases are not possible, thereby allowing issuers to spread their share repurchases more evenly throughout the quarter. Under the 10b5-1 Proposal, if an issuer's blackout period begins ten days prior to quarter-end and extends until its earnings announcement about 14 days after the end of the quarter, then the issuer would need to enter into a 10b5-1 plan covering trades as many as 55 days in the future (the 30-day cooling off period, plus a 25-day blackout period). If any developments during the 30-day cooling off period (which would be prior to the beginning of the firm's blackout period), render the execution parameters under the 10b5-1 plan disadvantageous, then the issuer would be unable to execute any share repurchases during at least a portion of the firm's blackout period (since the issuer would be subject to an additional 30-day cooling off period before the execution of any trades).

adoption or amendment of a 10b5-1 plan, and we respectfully request that the SEC eliminate this requirement from the final rule.

INTERNATIONAL BANCSHARES CORPORATION

A handwritten signature in blue ink, appearing to read 'DENIXON', is written over the company name.

Dennis E. Nixon, President and CEO