



March 31, 2022

Ms. Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549-1090

Dear Ms. Countryman,

Please consider the following comments as it relates to the recent proposal for Rule 10b5-1 and Insider Trading.

The proposed 10b5-1 plan rules contain problems for both investors and issuers repurchasing shares.

- 1. Background - Multiple Plans** – Many corporations (including Gilead) schedule serial plans over multiple quarters. At Gilead, we are nearly always buying our shares (especially, to offset dilution for equity plan issuances). 10b5-1 plans provide us with the ability to repurchase shares through uncontrollable events. In the biotech/pharmaceutical world, there are many binary events (as it relates to science). Gilead puts in place share repurchase programs that can continue through a binary event (good or bad). For example, drug trial data may become unexpectedly known during a quarter indicating that a potential therapy does not work. Alternatively, a trial may be stopped and submitted for approval early when a therapeutic candidate shows signs of providing significant benefit to the patient. Thus, 10b5-1 programs allow us to continuously buy shares and in effect dollar cost average (even during uncontrollable and unknown events). Tactically, we put in place or amend our plans only in open windows (2nd month of every quarter). An example is that we often put in place a 10b5-1 plan for the future near quarter (i.e. Q2 of 2022 – time period 2) with a specific bank (Bank B - repurchase agent). We will also put in place a 10b5-1 plan with a different bank (Bank C – repurchase agent) for Q3 of 2022 (time period 3). At the same time, we may be operating under a 10b5-1 plan for Q1 of 2022 (time period 1) with a specific repurchase agent (Bank A). In other words, 3 plans could be in place at any given time with specific beginning and ending dates that do not overlap. Each bank only sees the information that relates to the plan we are putting in place for that bank. We only modify plans in an open window (which equates to the second month of a quarter – two days after our earnings are released until the last trading day of the second month of the quarter (~20 trading days per quarter). Also, we tactically use grids to

determine the dollar amount of shares repurchased in any given day. For example, the dollar amount to be purchased on a given day may be triggered by a certain price. Further, if the price is lower than a threshold price, we may have a trigger to buy more and conversely, we may have a similar trigger to buy less if the stock is above a certain trigger. In other words, this can allow for a dollar range of stock to be purchased in any given time period. Open windows allow us to adjust these triggers to buy a more targeted dollar spend amount.

- i. **Problem #1 – Multiple serial 10b5-1 Plans Not Allowed – This may create confusion for retail investors** - Under the proposed rules, we would not be able to put in multiple serial 10b5-1 plans that allow us to buy shares over multiple quarters. As such, our ability to continuously buy shares will be removed under the proposed 10b5-1 rule. As a result, we would likely mix in 10b-18 plans between 10b5-1 plans. For example, we might have a 10b5-1 plan in place until our open window begins. Once we are in an open window, we could then put in place a 10b5-1 plan that would start 30 days later. In the meantime, we could repurchase shares for the 30-day period under a 10b-18 plan. In other words, we may put in place a 10b5-1 plan until an open window appears. We could then put in place a 10b-18 plan to repurchase shares to run until the next 10b5-1 plan starts. Thus, under 10b-18 plans we would halt share repurchases for known releases of material non-public information (i.e., a significant event from a clinical trial). **It will be incredibly confusing for the retail investor to know and understand why we are sometimes required to halt our repurchases (under 10b-18 plan) vs. other times where we are not required to halt repurchases (under a 10b5-1 plan). We ask that multiple 10b5-1 plans are not prohibited and that there is no cooling off period during an open window.**
- ii. **Problem #2 – Multiple Plans - Inside information shared with parties that do not need it** - Under the current rules, multiple plans are not allowed at the same time. If we so choose to put in place a 10b5-1, it would need to be for the entirety of a year 10b5-1 and the program would need to be shown to multiple parties (repurchase agents - banks). Under the existing rules, we can divide our program into different sequential time periods (for example quarterly) and only show the specific quarterly plan to the bank for the period in which they are chosen (as the repurchase agent). At the same time, we can ensure complete coverage for the periods in which we would like to repurchase. Under the proposed rules, we would not be able to do this. It appears we would need to put in place a yearly plan (instead of four sequential quarterly plans). If we were to do this, we would then need to

either (i) provide this plan to all the counterparties involved in the plan, or (ii) select one bank for the entire year. The problem with the first alternative is that, in effect, all banks would have visibility to information that they do not need to do their job. This could potentially negatively impact shareholders. **Banks with no clear need to have access to inside information would be exposed to it. Without the ability to limit the distribution of need-to-know information, this could hurt the average investor. The problem with the second alternative is that by awarding the entire annual program to one bank we would be unable to spread the business among different banks. This would have the likely effect of disadvantaging smaller banks and their shareholders since the larger banks would increase their market share of the corporate share repurchase business at the expense of others. For both reasons, we ask that the SEC exclude a prohibition on multiple overlapping plans.**

- iii. **Problem #3 – Multiple Plans – Corporations budget in dollars not shares. The proposed reporting rule on share repurchases makes it very difficult to budget for share repurchases related to offsetting dilution.** In other words, in the corporate world, we budget in dollars and are constrained by dollar amounts. Our Board of Directors (like most BODs) provides share repurchase authorization on a total dollar basis (not shares). As a result, our repurchase programs are set up to not exceed a dollar amount. Additionally, our repurchases (to offset equity compensation) are driven by the expected dilution from equity issuances on a quarterly basis. These issuances are lumpy from a quarterly perspective. **By having the ability to put in place timely plans (with minimal cooling off periods), we can match up the dollar amount with the number of shares needed. As noted earlier, we only put in place new plans and make modifications to existing plans during open windows. This benefits investors in that we are optimizing our share repurchase spend and purchasing the right number of shares to offset dilution (while not exceeding a budget). A 30-day cooling off period impinges on the ability to maximize the budget to buy shares.** Again, we ask that the SEC removes its 30-day cooling off period for companies during an open window.

2. **Background - Structured Repurchases (Accelerated Share Repurchases) –** On occasion, Gilead enters into accelerated share repurchase agreements (“ASR”) with banks. These trades can be very sizeable (billions of dollars). In order to ensure best pricing, these arrangements are often competitively bid to banks. ASRs involve a higher level of trading risk for the bank since the traders take an upfront position

in the volatility of the company's stock. Because of the size of these trades (and to ensure competition), usually at least two banks with the best economics (pricing) are chosen. This ensures more efficient execution by spreading the stock volatility trading risk which provides better pricing to the company. Better pricing ultimately benefits the company's shareholders. The banks then rotate days that they act as a repurchaser for the issuer. For example, bank A would buy on Mondays, Wednesdays and Fridays and bank B would buy on Tuesdays and Thursdays for the duration of the ASR.

- iv. **Problem #4 - Structured Repurchases – The proposed rules will decrease competition in the ASR market.** No longer will multiple banks be able to participate on a rotating basis. This will stifle competition for the execution of accelerated share repurchase programs. Investment banks will make more money at the expense of the company's shareholders. **As a result, investors may be hurt for the benefit of an investment bank. We would request the committee to remove the prohibition for overlapping plans as currently proposed. Alternatively, a special carveout allowing a rotation of daily purchases (between banks) to occur while still only allowing one repurchase bank in the market on any given day.**

This proposed rule appears to have significant challenges and does not benefit a company's investors. In fact, these rules will likely only benefit certain interested parties at the expense of existing company shareholders.

Sincerely,



Brad Vollmer, CFA
Senior Vice President and Treasurer, Gilead Sciences, Inc.

