

Via Email

March 18, 2021

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

Re: File Number S7-24-20¹

Dear Madam Secretary:

I am writing on behalf of the Council of Institutional Investors (CII), a nonprofit, nonpartisan association of U.S. public, corporate and union employee benefit funds, other employee benefit plans, state and local entities charged with investing public assets, and foundations and endowments with combined assets under management of approximately \$4 trillion. Our member funds include major long-term shareowners with a duty to protect the retirement savings of plan participants – true “Main Street” investors through their pension funds. Our associate members include non-U.S. asset owners with about \$4 trillion in assets, and a range of asset managers with more than \$35 trillion in assets under management.²

The purpose of this letter is to comment on the Securities and Exchange Commission (SEC or Commission) proposal “to amend Rule 144^[3] to revise the holding period determination for securities acquired upon the conversion or exchange of certain market-adjustable securities of issuers that do not have securities listed on a national securities exchange” (Proposed Rule).⁴

¹ Rule 144 Holding Period and Form 144 Filings, Securities Act Release No. 10,991, Exchange Act Release No. 90,773, 86 Fed. Reg. 5,063 (Dec. 22, 2020), <https://www.federalregister.gov/documents/2021/01/19/2020-28790/rule-144-holding-period-and-form-144-filings>.

² For more information about the Council of Institutional Investors (CII), including its board and members, please visit CII’s website at <http://www.cii.org>.

³ Persons Deemed Not to be Engaged in a Distribution and Therefore Not Underwriters, 17 C.F.R. § 230.144 (1972), available at <https://www.law.cornell.edu/cfr/text/17/230.144>.

⁴ 86 Fed. Reg. at 5,063.

Our letter focuses on two issues raised in the Proposed Rule: (1) Rule 10b5-1(c)⁵ transaction indication in Forms 4⁶ and 5⁷; and (2) Mandatory electronic filing of Form 144.⁸

Rule 10b5-1(c) transaction indication in Forms 4 and 5

The Proposed Rule would “add a check box to Forms 4 and 5 to provide filers the option of disclosing that their sales or purchases were made pursuant to Rule 10b5-1(c).”⁹ CII generally supports this provision. We, however, would respectfully request that this provision be revised to *require*: (1) “Form 4 and Form 5 to indicate via a check box whether their reported transactions were made pursuant to Rule 10b5-1(c) rather than provide it as an option for the filer[;]”¹⁰ and (2) disclosure of the adoption date of the respective Rule 10b5-1 plan on the forms.¹¹

Our requested revision is consistent with our long-standing belief that providing greater transparency of Rule 10b5-1 transactions would provide useful information to investors and other market participants. In 2012, *The Wall Street Journal* published a series of articles that highlighted suspiciously fortuitous trading patterns under Rule 10b5-1 plans adopted by corporate insiders.¹²

⁵ See, e.g., Trading “on the Basis of” Material Nonpublic Information in Insider Trading Cases, 17 C.F.R. § 240.10b5-1(c) (Aug. 2000), available at <https://www.law.cornell.edu/cfr/text/17/240.10b5-1> (describing the conditions that must be met for a trading plan to provide a person an affirmative defense to insider trading).

⁶ See, e.g., SEC Staff Investor Bulletin No. 137 (Feb. 2013), <https://www.sec.gov/files/forms-3-4-5.pdf> (“In most cases, when an insider executes a transaction, he or she must file a Form 4 [and] [w]ith this form filing, the public is made aware of the insider’s various transactions in company securities, including the amount purchased or sold and the price per share.”).

⁷ *Id.* (“A Form 5 is . . . only required from an insider when at least one transaction, because of an exemption or failure to earlier report, was not reported during the year.”).

⁸ See 86 Fed. Reg. at 5,068-69.

⁹ *Id.* at 5,072.

¹⁰ *Id.*

¹¹ See Letter from David Larcker, Graduate School of Business, Stanford University, Director, Stanford Corp. Governance Research Initiative et al. to Vanessa Countryman, Securities and Exchange Commission 4 (Mar. 10, 2021), <https://www.sec.gov/comments/s7-24-20/s72420-8488827-229970.pdf> (“We urge the Commission to require disclosure of the adoption date of the respective 10B5-1 plan on the Form 4.”).

¹² Jean Eaglesham & Rob Barry, Trading Plans Under Fire, *Wall. St. J.*, Dec. 13, 2012, <https://www.wsj.com/articles/SB10001424127887324296604578177734024394950> (“the SEC is facing mounting pressure to tighten its rules, following a[n] . . . investigation that found profitable and well-timed trades by more than 1,400 executives); Justin Lahart, Timing Is Everything for Insider Sales, *Wall. St. J.*, Nov. 28, 2012, <https://www.wsj.com/articles/SB10001424127887324020804578147261230632772> (“There is substantial wiggle room within 10b5-1 plans—for example, their existence doesn’t have to be disclosed, and they can be canceled or changed without disclosure, as well.”); Susan Pulliam & Rob Barry, Executives’ Good Luck in Trading Own Stock, *Wall. St. J.*, Nov. 27, 2012, <https://www.wsj.com/articles/SB10000872396390444100404577641463717344178> (initial reporting on investigation finding that more than 1,400 executives, including some with 10b5-1 plans, had made usually beneficial trades).

In December 2012, at the recommendation and with the assistance of a prominent corporate securities lawyer with experience advising clients with Rule 10b5-1 plans, CII submitted a rulemaking petition to the SEC recommending improvements to Rule 10b5-1.¹³ Those improvements were specifically designed to provide “a good starting point to address the alleged abuses of Rule 10b5-1.”¹⁴

The recommended improvements included “[p]roviding greater disclosure regarding the adoption, amendment, and termination of Rule 10b5-1 plans . . . [to] provide long-term shareowners with reasonable access to information about insider trades that complete the partial picture provided by Section 16 and Rule 144 filings.”¹⁵ That recommendation is consistent with CII membership approved policies which state:

For Rule 10b5-1 plans to fulfill their legitimate purpose, they should be: publicly disclosed; adopted when the participant is not in possession of material, non-public information; inactive for at least three months following adoption; and ineligible for substantive modification.

....

. . . 10b5-1 plans need to be strengthened to eliminate the insider influence they intended to remove. Currently these plans are not transparent.¹⁶

Over the past year, the concerns about insider trading and Rule 10b5-1 plans, including the lack of transparency of those plans have increased. At a September Congressional hearing focusing on insider trading during the Covid-19 pandemic, Jill E. Fisch of the University of Pennsylvania Law School testified: “A shortcoming of the existing regulatory structure is that current law does not require corporate executives to disclose the existence of their 10b5-1 trading plans.”¹⁷

In December, a research paper entitled “Insider Trading and Strategic Disclosure” was issued by Associate Professor Joshua Mitts of Columbia Law School (Mitts Paper).¹⁸ The Mitts Paper provided new evidence indicating that executives—especially those in the healthcare industry—

¹³ Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors to The Honorable Elisse B. Walter, Chairman, U.S. Securities and Exchange Commission (Dec. 28, 2012), http://www.cii.org/files/issues_and_advocacy/correspondence/2012/12_28_12_cii_letter_to_sec_rule%2010b5-1_trading_plans.pdf.

¹⁴ *Id.* at 4.

¹⁵ *Id.* at 3.

¹⁶ CII policies, Statement on Stock Sales by Insiders (Mar. 10, 2020), https://www.cii.org/insider_stock_sales_statement.

¹⁷ Insider Trading and Stock Option Grants: An Examination of Corporate Integrity in the Covid-19 Pandemic, Before the H. Subcomm. on Inv. Prot., Entrepreneurship, & Capital Mkt. of the Comm. on Fin. Serv., 116 Cong. (Sept. 17, 2020) (testimony of Jill E. Fisch, Saul A. Fox Distinguished Professor of Business Law, University of Pennsylvania Law School at 5), <https://docs.house.gov/meetings/BA/BA16/20200917/111013/HHRG-116-BA16-Wstate-FischJ-20200917.pdf>.

¹⁸ Joshua Mitts, Insider Trading and Strategic Disclosure 14-15 (Dec. 7, 2020) (working draft), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3741464.

were abusing Rule 10b5-1 plans to obtain windfalls at the expense of investors.¹⁹ The Mitts Paper also criticized the lack of transparency of Rule 10b5-1 plans, noting that “the SEC has not required public disclosure of the details of 10b5-1 plans . . . and voluntary disclosure rarely occurs.”²⁰

In January, Stanford University published a case study on Rule 10b5-1 plans (Stanford Paper).²¹ The Stanford Paper, entitled “Gaming the System, Three ‘Red Flags’ of Potential 10b5-1 Abuse,” also presented new evidence that “show[s] that a subset of executives use 10b5-1 plans to engage in opportunistic, large scale selling of company shares [and] . . . avoid significant losses.”²² Of specific relevance to the Proposed Rule, the Stanford Paper contains the following discussion of the current lack of transparency of Rule 10b5-1 plans and the issues it creates for investors and other parties:

Currently, researchers, regulators, and shareholders have a limited understanding of how 10b5-1 plans are used in practice. The SEC does not require public disclosure of 10b5-1 plans, and executives are not required to indicate whether the trades they report on Form 4 are made pursuant to such plans. Executives are only required to notify the SEC if a 10b5-1 plan is used to sell restricted stock through Form 144, and if so, provide the date the plan was adopted Strangely, the SEC does not require electronic submission of Form 144 and continues to allow such forms to be mail-filed. From 2016 to 2019, 99 percent of Form 144 filings (over 90,000 filings) were filed by mail and are not publicly available through EDGAR. Instead, the paper filings are stored in the SEC reading room and destroyed 90 days after receipt. As a result, comprehensive data on the structure and use of 10b5-1 plans is not widely available either to the public or to the Commission.²³

The Stanford Paper also includes a series of recommendations to reform Rule 10b5-1 plans, including the following recommendation to improve transparency:

Evidence of these [Rule 10b5-1 plan] abuses has not been known to the public because relatively basic but critical information is not required public disclosure, and companies are choosing not to publicly disclose it. The SEC should consider requiring the following:

¹⁹ See *id.* at 1 (“I show that, whatever might be said about health care executives’ advantageous stock sales as they developed vaccines during the pandemic of 2020, those sales were not uncommon.”).

²⁰ *Id.* at 14-15.

²¹ David F. Larcker et al., Gaming the System, Three “Red Flags” of Potential 10b5-1 Abuse, Stan. Closer Look Ser. (Jan. 19, 2021), <https://www.gsb.stanford.edu/faculty-research/publications/gaming-system-three-red-flags-potential-10b5-1-abuse>; see Rule 10b5-1 Trading Plans with Professor Daniel Taylor, CII (Feb. 3, 2021), <https://www.cii.org/podcasts>.

²² David F. Larcker et al., Gaming the System, Three “Red Flags” of Potential 10b5-1 Abuse, Stan. Closer Look Ser. at 1.

²³ *Id.* (footnotes omitted).

- Disclosure of 10b5-1 plans; or, at a minimum, the adoption, modification, suspension, or termination of a plan, and the maximum number of shares scheduled to be sold under a 10b5-1 plan.
- Filers to indicate on Form 4 whether the reported transaction is pursuant to a 10b5-1 plan and, if so, the date of plan adoption or modification.
- Electronic EDGAR reporting of Form 144.²⁴

We generally share the following views contained in the March comment letter from the authors of the Stanford Paper in response to the Proposed Rule:

We urge the Commission to make the check box mandatory. The benefits to investors and filers from mandatory reporting of 10B5-1 trades outweighs the minimal cost to filers. . . .

. . . Numerous academic papers show that the return patterns following 10B5-1 trades are materially different from those following non-10B5-1 trades . . . These patterns reflect differences in how corporate insiders use 10B5-1 plans. On the one hand, if insiders use 10B5-1 plans as intended— for diversification and liquidity needs—then such trades should not predict subsequent stock returns to the same extent as non-10B5-1 trades. Alternatively, if 10B5-1 plans are being used opportunistically, then such trades should predict subsequent stock returns to a greater extent than non-10B5-1 trades. In either case, there is informational value to the public in being able to distinguish 10B5-1 trades from non-10B5-1 trades.

. . . .

We urge the Commission to require disclosure of the adoption date of the respective 10B5-1 plan on the Form 4. . . . While the cost of disclosing the adoption date is negligible, the informational benefits (to the Commission and the public) are high. Both the Commission and public would have access to the adoption dates

²⁴ *Id.* at 3 (footnote omitted); *cf.* Caroline Crenshaw & Daniel Taylor, Finance, Insider Trading Loopholes Need to Be Closed, Bloomberg Opinion (Mar. 15, 2021), <https://www.bloombergpint.com/gadfly/insider-trading-loopholes-need-to-be-closed> (“the commission should consider requiring corporate insiders to disclose publicly whether their trades are planned, and either (i) disclose the plan or (ii) disclose the plan adoption (or modification) date and the total amount of shares covered by the plan”); Letter from Sherrod Brown, United State Senator to The Honorable Allison Herren Lee, Acting Chair, Securities and Exchange Commission (Feb. 10, 2021), *available at* <https://www.warren.senate.gov/imo/media/doc/02.10.2021%20Letter%20from%20Senators%20Warren,%20Brown,%20and%20Van%20Hollen%20to%20Acting%20Chair%20Lee.pdf> (citing recent research and requesting “SEC views . . . regarding 10b5-1 plans [including:] Does the agency intend to require that 10b5-1 plans are disclosed publicly and posted online”); Promoting Transparent Standards for Corporate Insiders Act, H.R. 1528, 117th Cong. § 2(a)(1)(E) (2021), <https://www.congress.gov/bill/117th-congress/house-bill/1528/all-info> (“The Securities and Exchange Commission shall carry out a study of whether Rule 10b5-1 (17 CFR 240.10b5-1) should be amended to . . . require issuers and issuer insiders to file with the Commission trading plan adoptions, amendments, terminations and transactions”).

of all 10B5-1 plans used by Section 16 insiders. This data, in turn, would allow the public (and the Commission) to better scrutinize whether such plans are being used as intended and identify any outliers.

Mandatory electronic filing of Form 144

The Proposed Rule “would mandate the electronic filing of Form 144”²⁵ We generally support this proposed requirement and believe that it “should facilitate the efficient and rapid incorporation of price-relevant information in Form 144 filings into the market and enhance the sum of information available to investors.”²⁶

As indicated in the Stanford Paper, in the absence of a rule requiring a mandatory electronic filing on EDGAR, much of the information contained in the Form 144 filings will be stored in the SEC reading room and destroyed after 90 days.²⁷ As a result, some useful data on the structure and use of Rule 10b5-1 plans will remain widely unavailable to investors, the public or the Commission.²⁸ We agree with the Commission that the “proposed amendments to mandate the electronic filing of Form 144 clarify and streamline the filing requirements for the form and should . . . benefit users of the information in Form 144 by facilitating easier access to, and faster retrieval of such information.”²⁹

Thank you for the opportunity to comment on the Proposed Rule. Please contact me with any questions.

Sincerely,



Jeffrey P. Mahoney
General Counsel

²⁵ 86 Fed. Reg. at 5,068.

²⁶ *Id.* at 5,079; *see generally*, Letter from Kenneth A. Bertsch, Executive Director, Council of Institutional Investors to Brent J. Fields, Secretary, U.S. Securities and Exchange Commission 2 (July 28, 2016) (expressing general support for improving information delivery, including through enhancing the functionality of the EDGAR system).

²⁷ *See* David F. Larker et al., Gaming the System, Three “Red Flags” of Potential 10b5-1 Abuse, Stan. Closer Look Ser. at 1.

²⁸ *Id.*

²⁹ 86 Fed. Reg. at 5,083.