Dear Chair Gensler, Commissioners Peirce, Lee, and Crenshaw, and Other Administrators and Officials Involved in Considering the Proposed Rule,

I was flattered to see my research on 10b5-1 cited and quoted in the Proposed Rule discussion in S7-20-21. Rather than reiterating that research's ideas, findings, and proposals, I instead will briefly tell a story that I have told to law students for a long time and that I think illustrates the dilemma facing you today.

First, a few preliminary comments. Next, a hypothetical that I've used with my law students as to the availability of the affirmative defense under Exchange Act Rule 10b5-1(c)(1) versus the "messiness" of the real world, for lack of a better terminology. Onward, then, to the preliminary comments.

Any thoughtful person who has considered the dilemma of how material non-public information (MNPI) about a publicly-traded firm disseminates and becomes, suddenly or gradually, publicly-known information "on the Street" (Wall Street, in this case) recognizes this is a complex process.

Perhaps even more so today with CEOs on Twitter, Telegram groups of fund managers, and the risk that a junior person at the firm may inadvertently share something on her blog that is MNPI.

But we (and the "we" here includes academics, Congress, enforcement counsel, and so forth–and includes me, frankly) have spent too much time thinking about prohibitions and not enough time thinking about process. Neither prohibition nor process exists in a vacuum, there is a relationship (ideally, a symbiosis).

While the consideration of process may lead to prohibitions, thoughtfulness about process is a reasonable prerequisite to creating durable and effective prohibitionary policy. And, of course, there may be things of which we disapprove or things we'd like to discourage that may not require prohibition (conversely, there may be things we like or want to encourage that do not require 10b5-1(c)(1)'s safe harbor incentive).

Rather than considering first what behaviors we dislike (and then enacting the prohibitions that prevent those behaviors), we should instead contemplate where information will flow if the prohibition is put in place. Information, like water, finds the next-easiest route to its destination persistently.

So how does information flow from the whispering estuaries of MNPI inside the firm to the meandering publicly-accessible rivers of information to which investors enjoy similar, if not perfectly equal, access?

Let's return to that example from my law school classroom.

In this hypothetical, Tony Stark (apologies to Marvel/Disney) is a CEO. He is at an important pre-board meeting of key board members. His firm is publicly-traded and domiciled in the United States and Mr. Stark and the directors often meet on the day before the board meeting to discuss the agenda and key numbers, including MNPI KPIs such as sales figures, as is reasonably common in the modern era.

Pepper Potts, Mr. Stark's loyal executive assistant, has been working with Mr. Stark for a long time and is familiar with what Mr. Stark looks like when he is in a good mood, a mediocre mood, or a foul mood.

Ms. Potts recently befriended her neighbor, Nick Nosy, with whom she often has a drink after work. Unbeknownst to Ms. Potts, Mr. Nosy has a substantial investment portfolio and is fishing for MNPI.

Mr. Nosy is aware Ms. Potts works closely with Mr. Stark and inquires as to Mr. Stark's mood, knowing the board meeting is tomorrow, Thursday, and that the firm is scheduled to release earnings on Friday.

Mr. Stark's firm has consistently beaten the Street's expectations in recent quarters and Mr. Stark is well-known for his extroverted showmanship at product launches and earnings announcements.

Ms. Potts remarks that Mr. Stark was in a particularly foul mood leaving the executive conference room today and was, in fact, so upset that he was not planning to attend drinks with board members tonight.

Mr. Nosy excuses himself from coffee and fires off an all-caps text to his friend, Bobby Broker, telling him to sell the stock. With Bobby's help, the arrangements are made by the close of the trading day.

Where did the information leak occur here?

The point of the hypothetical is not to confuse or frustrate students. It's to illustrate that information will leak from the privacy of senior executives' minds into the public sphere in unusual and unexpected tributaries. Is Mr. Stark's observed bad "mood" as he leaves the meeting and slams the door of his office really material non-public information? Is it MNPI because it's his mood right after hearing the KPIs?

These are the more subtle routes information takes from darkness to daylight in the real world.

Recognizing that regulation of more overt or direct paths for information generally forces the noncompressible hydraulics of information to find another route to public knowledge should be, in my view, closer to the starting point of the regulatory analysis and promoted from its current status as a footnote consideration (and even enjoying that status only in the niche of law-and-economics conversations). Do we *really* want people trading on Mr. Nosy's interpretation of Ms. Potts's interpretation of Mr. Stark's mood? Is that *the best way* for information to reach and move markets?

We can restrict Mr. Stark. But when we do so we must admit that we are also constraining markets' access to information that Mr. Stark's trades, if allowed, would contain. We are forcing that information to leak more slowly, less predictably from other places, like Ms. Pott's neighbor… or even their bartender.

Prices contain information. Trade orders contain information. We want information to reach markets.

Yet, in real life, it is often not Mr. Nosy or Mr. Broker making the trade. It is instead Mr. Stark, who also is able (to varying degree) to control the flow of news and able to send louder signals than Ms. Potts's observations of "mood." And Mr. Stark may craft what comes from the corporate megaphone, specifically holding bad news until after his 10b5-1 plan sell date and accelerating good news to hit the Street prior to that sell date. *What should be done to supply information to markets while restraining insiders?*

This is the key question and one I wish were more explicitly contemplated in the proposed rule document.

My other sentiments as to 10b5-1 have not materially changed since my research you cite (and I still believe the timing-of-news issue is concerning and material), but I hope this example, as to the change considered, is illustrative of how difficult, nuanced, and slippery this particular family of problems is… and the issues of making Exchange Act Rule 10b5-1(c)(1)'s safe harbor into the right "carrot" for good behavior (or of carving enforcement/prohibitionary/prosecutorial tools into the right "sticks" for misbehavior).

Respectfully yours,

Karl T. Muth, J.D., M.B.A., M.Phil., Ph.D.
The University of Chicago Booth School of Business