



April 1, 2022

Chair Gary Gensler
Honorable Commissioners
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549–1090
Via email: rule-comments@sec.gov

Re: Rule 10b5–1 and Insider Trading

File No. S7–20–21

Dear Commissioners,

On behalf of Public Citizen’s more than 500,000 members and supporters across the country, we submit the following comments regarding the Securities and Exchange Commission’s (SEC or Commission) proposal on Rule 10b5–1 and Insider Trading.¹ Many of our members are investors and therein are especially interested in fair markets.

Congress approved federal securities law to ensure fair and transparent markets where investors share common opportunities for information to guide investment decisions. Corporate managers are “insiders” at publicly traded companies and naturally enjoy information not available to the general public.

When an insider trades on non-public information, they are essentially defrauding the investor who is on the other side of the trade. If the insider knows about problems in the company and sells, the investor is overpaying; if the insider knows about a promising development at the firm and buys stock, the investor who sells to the insider is being underpaid. Public Citizen’s members may well be on the losing side of these transactions.

Congress has enacted numerous laws to combat unfair insider trading.² Section 10(b) of the Exchange Act prohibits acts of manipulation or deception in the use of material nonpublic information about that security. The Commission adopted Rule 10b5–1 in 2000 to provide clarity on the meaning of

¹ Securities and Exchange Commission, *Rule 10b-5 and Insider Trading*, FEDERAL REGISTER (Feb 15, 2022) <https://www.govinfo.gov/content/pkg/FR-2022-02-15/pdf/2022-01140.pdf>

² Insider Trading Sanctions Act of 1984, Public Law 98–376, 98 Stat. 1264; Insider Trading and Securities Fraud Enforcement Act of 1988, Public Law 100–704, 102 Stat. 4677, codified at Section 21A of the Exchange Act, 15 U.S.C. 78u–1. Congress has enacted other laws that build on the insider trading prohibition. See, e.g., Section 20(d) of the Exchange Act [15 U.S.C. 78t(d)]; Section 20A of the Exchange Act [15 U.S.C. 78t–1]; STOCK Act, Public Law 112–105, 126 Stat. 291.

manipulation or deception as it applies to insiders.³ Under that rule, an insider is protected from liability for violation of insider trading prohibitions if the insider adopts a plan for the execution of trades in the insider's securities. That plan must include a predetermined time for these transactions to take place and they must be on a scheduled basis. The glaring problem, however, is that the plans may be changed at any time. The insiders planning to make trades on information need not even file the plans or the change in plans with the SEC. Studies show that insiders generally outperform other investors, affirming the possibility they are exploiting inside information in their trading.⁴ One study of 20,000 10b5-1 plans found that a subset of executives use the plans "to engage in opportunistic large-scale selling of company shares."⁵ Another study found that certain drug companies had been "disproportionately disclosing" positive news about Covid-19 vaccines on days when corporate executives were selling shares under Rule 10b5-1 plans.⁶ In one case, in the day before a major drug company announced the result of a trial for the Covid-19 vaccine, the company's CEO modified his 10b5-1 plan and then the next day sold more than 60% of his personal shares in the company, valued at \$5.6 million.⁷

This current SEC proposal would require a minimum 120-day period between when an insider trading plan is adopted or modified and when trading commences. We enthusiastically support this minimum period. It represents more than one calendar quarter, meaning that all investors would be apprised of at least the latest quarterly report as well as all so-called 8-k filings (which are those filed within four days of an extraordinary event where the information would likely affect the price of the security).⁸ Former SEC Chair Jay Clayton proposed a cooling off period of an even longer duration-- 180 days.⁹

We believe this elegant solution of instituting a 120-day time gap between plan changes and trades will greatly improve market integrity. Ensuring that insiders cannot exploit average investors must be a central goal of Commission oversight.

Because of the growth of buybacks, we further propose that insiders be banned from trading during any period of buybacks. Studies affirm a connection between insider trading and buybacks.¹⁰

³ Securities and Exchange Commission, *Selective Disclosure and Insider Trading*, Release No. 33-7881, SECURITIES AND EXCHANGE COMMISSION (Aug. 15, 2000) <https://www.sec.gov/rules/final/33-7881.html>

⁴ Susan Pulliam & Rob Barry, *Executives' Good Luck in Trading Own Stock*, WALL STREET JOURNAL, (Nov. 27, 2012), <https://www.wsj.com/articles/SB10000872396390444100404577641463717344178>

⁵ David F. Larcker et al., *Gaming the System: Three "Red Flags" of Potential 10b5-1 Abuse*, STANFORD UNIVERSITY (January, 2021), <https://www.gsb.stanford.edu/sites/default/files/publication-pdf/cgri-closer-look-88-gaming-the-system.pdf>

⁶ Joshua Mitts, *Insider Trading and Strategic Disclosure* Columbia Law and Economic Working Paper No. 636, COLUMBIA LAW SCHOOL (Dec. 7, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3741464 (

⁷ Sen. Elizabeth Warren, *Letter to The Honorable Allison Herren Lee*, SECURITIES AND EXCHANGE COMMISSION (Feb. 10, 2021), <https://www.warren.senate.gov/imo/media/doc/02.10.2021%20Letter%20from%20Senators%20Warren,%20Brown,%20and%20Van%20Hollen%20to%20Acting%20Chair%20Lee.pdf>

⁸ Securities and Exchange Commission, *Exchange Act Reporting and Registration*, SECURITIES AND EXCHANGE COMMISSION (website accessed March 16, 2022) <https://www.sec.gov/smallbusiness/goingpublic/exchangeactreporting>

⁹ Council of Institutional Investors, *Letter*, SECURITIES AND EXCHANGE COMMISSION (April 22, 2021) <https://www.sec.gov/comments/s7-14-20/s71420-8709408-236962.pdf>

¹⁰ Robert Jackson, *Stock Buybacks and Corporate Cashouts*, SECURITIES AND EXCHANGE COMMISSION (June 11, 2018) <https://www.sec.gov/news/speech/speech-jackson-061118>

Ideally, the SEC would repeal the 10b-5 safe harbor altogether. Insiders should be given no special legal privilege when transacting with their firms' shares just as any other investor who may come upon material non-public information has no immunity from anti-fraud law.

For questions, please contact Bartlett Naylor at [REDACTED].

Sincerely,

Public Citizen