

United States Senate

WASHINGTON, DC 20510

August 12, 2022

The Honorable Gary Gensler
Chair
U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

Dear Chair Gensler,

We write to express our strong support for the Securities and Exchange Commission's (SEC, the Commission) January 2022 proposed rule regarding 10b5-1 plans, which would increase transparency and curb corporate executives' abuse of "safe harbors" to trade their company's stock.¹ While these plans were designed to prevent insider trading, evidence indicates that corporate insiders have misused them to obtain huge windfalls making questionable trades at the expense of ordinary investors.² A recent report in the *Wall Street Journal* identified "scores of examples where company insiders adopted a plan when a quarter was nearly complete and sold stock under the plan before that quarter's results were announced," and found that "insiders who sold within 60 days reaped \$500 million more in profits than they would have if they sold three months later," indicating that the abuse of 10b5-1 plans is widespread and costly, further underscoring the urgent need for stronger rules.³ We urge you to consider additional, strong rules that would prevent these abusive practices and protect the integrity of our capital markets, and that you implement them without delay.

The SEC created the 10b5-1 "safe harbor" in 2000 to allow corporate executives, who often have continuous access to material nonpublic information about their companies, to sell their stock holdings without running afoul of insider trading laws.⁴ Rule 10b5-1 requires executives to adopt a predetermined trading plan dictating the future sale or purchase of shares according to a set timetable or formula.⁵ Initial trades set up by 10b5-1 plans often appear to be based on material nonpublic information, and executives can and do modify or cancel their plans in response to

¹ U.S. Securities and Exchange Commission, "SEC Proposes Amendments Regarding Rule 10b5-1 Insider Trading Plans and Related Disclosures," press release, December 15, 2021, <https://www.sec.gov/news/press-release/2021-256>.

² <https://www.warren.senate.gov/imo/media/doc/02.10.2021%20Letter%20from%20Senators%20Warren,%20Brown,%20and%20Van%20Hollen%20to%20Acting%20Chair%20Lee.pdf>;
<https://markets.businessinsider.com/news/stocks/moderna-ceo-sold-million-stock-company-emergency-use-vaccine-filing-2020-11-1029830266>

³ Wall Street Journal, "CEO Stock Sales Raise Questions about Insider Trading," Tom McGinty and Mark Maremont, June 29, 2022, https://www.wsj.com/articles/executive-stock-sales-questions-insider-trading-11656514551?mod=itp_wsj&ru=yahoo.

⁴ Columbia Law School and Economics Working Paper, "Insider Trading and Strategic Disclosure," Joshua Mitts, 5 December 7, 2020, pgs. 5-6, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3741464.

⁵ *Id.*

inside information to increase their own profits.⁶ Indeed, “insiders who trade soon after adopting trading plans ‘systematically avoid losses and foreshadow considerable stock price declines.’”⁷

A comprehensive analysis released in June 2022 by the *Wall Street Journal* found that about 20% of “prearranged sales by corporate insiders” occur within 60 days of 10b5-1 plan adoption.⁸ “[C]ollectively, insiders who sold within 60 days reaped \$500 million more in profits than they would have if they sold three months later.”⁹ The *Journal*’s analysis also found “scores of examples where company insiders adopted a plan when a quarter was nearly complete and sold stock under the plan before that quarter’s results were announced,” and instances in which “executives traded the same day they adopted a plan.” As a professor at the University of Michigan put it, when CEOs use recently adopted plans to sell stock in advance of negative news, it “isn’t a smoking gun, it’s a smoking bazooka” that raises reasonable suspicion of insider trading.¹⁰

Trades like these appear to be widespread, particularly in the health care industry. In March of 2018, executives at the biopharmaceutical company Nektar Therapeutics “collectively sold \$48 million of shares at prices ranging from \$83 to \$106 apiece.”¹¹ Made under pre-approved plans, these sales occurred an average of 36 days following plan adoption, and just weeks before the company revealed “‘underwhelming’” results for its new cancer drug.¹² Following the release of those results, the company’s “shares plunged 42%, to \$52.57, in one day.”¹³ Actions like these reflect profiteering of the most egregious kind: executives at Nektar appear to have protected their personal profits by selling their stock at inflated prices just before the company disclosed its failures.

Corporate insiders cannot be allowed to continue to trade based on insiders’ knowledge with impunity. The SEC must act swiftly to ensure that Rule 10b5-1 is no longer “viewed as a ‘get-out-of-jail-free card.’”¹⁴ The amendments proposed by the SEC in January 2022 are an important step in this direction, as they will make it more difficult for corporate insiders to abuse 10b5-1 plans. Each proposed change—including the institution of a 120 day “cooling off period” for officers, directors, and issuers; the elimination of safe harbor availability for multiple overlapping plans; the restriction of safe harbor availability for single-trade plans; the requirement of personal certification and good faith operation; and the implementation of increased disclosures—is necessary for the curtailment of abuse of 10b5-1 plans. The Commission must defend these proposals from any efforts by industry to weaken them.

⁶ Columbia Business Law Review, “Do SEC’s 10b5-1 Safe Harbor Rules Need to be Rewritten?” Taylan Mavruk 6 and H. Nejat Seyhun, June 12, 2016, pgs. 181-182, <https://journals.library.columbia.edu/index.php/CBLR/article/view/1734>.

⁷ *Id.*

⁸ Wall Street Journal, “CEO Stock Sales Raise Questions about Insider Trading,” Tom McGinty and Mark Maremont, June 29, 2022, https://www.wsj.com/articles/executive-stock-sales-questions-insider-trading-11656514551?mod=itp_wsj&ru=yahoo.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

Additionally, as investor advocates have proposed,¹⁵ we encourage the SEC to go further to prevent corporate insiders' abuse of 10b5-1 plans. The Commission should consider lengthening the "cooling-off period" between the adoption of a trading plan and the execution of that plan from 120 days to 180 days; applying the "cooling-off period" requirement consistently to issuers and all employees who rely on the Rule 10b5-1 affirmative defense, rather than just officers and directors; and completely eliminating the availability of a safe harbor for single-trade plans, rather than allowing one single-trade plan per 12 month period.

If corporate insiders were willing to profit off of their own failed responses to the COVID-19 pandemic,¹⁶ they will likely continue to exploit safe harbor rules to line their own pockets. The SEC should consider all options to prevent all such abuses and finally level the playing field for ordinary investors.

Thank you for your work on this proposal, and for your attention to this matter.

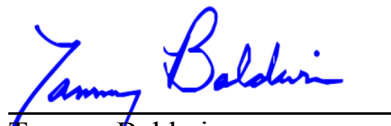
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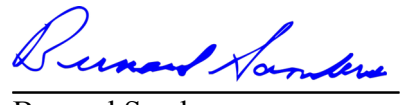
Elizabeth Warren
United States Senator



Chris Van Hollen
United States Senator



Tammy Baldwin
United States Senator



Bernard Sanders
United States Senator

¹⁵ Letter from Better Markets, Inc. to the SEC, April 1, 2022, https://bettermarkets.org/wp-content/uploads/2022/04/Better_Markets_Comment_Letter_SEC_Rule_10b5-1.pdf.

¹⁶ Washington Post, "CEO of vaccine maker Emergent sold \$10 million in stock before company ruined Johnson & Johnson doses," Jon Swaine, April 25, 2021, https://www.washingtonpost.com/investigations/emergent-robertkramer-stock-sales/2021/04/25/de151434-a2b6-11eb-a7ee-949c574a09ac_story.html.