Statement on the Proposed Amendments to the Availability of the Affirmative Defense to Allegations of Insider Trading Provided by Exchange Act Rule 10b5-1

Commissioner Caroline A. Crenshaw

Dec. 15, 2021

Thank you, Chair Gensler, and thank you to my fellow Commissioners. And also, as we address the first of several rulemaking proposals today, I'd like to begin by expressing my sincere thanks to all of the many staff members who have worked so hard to make today a reality. Each proposal reflects countless staff hours spent researching, writing, thinking, and working across offices and divisions to promote our agency's three part mission. Fairer outcomes for investors and improved efficiency in our markets are urgent needs, and we are only able to tackle all this work because of the SEC staff's efforts and expertise. We have asked a lot of you, and you have always answered the call. Thank you.

And now, turning to the first proposal under consideration today, regarding proposed amendments to Rule 10b5-1, I'd also like to express my particular thanks to the Divisions of Corporation Finance and Enforcement, the Division of Economic and Risk Analysis, and the Office of the General Counsel, who prepared and contributed to this proposal

Today we are considering several changes to existing Rule 10b5-1 that I am optimistic will better align the interests of corporate insiders, shareholders and regulators. I recognize the important and sometimes competing interests that are present when corporate insiders sell their securities. Corporate executives may need to sell securities to pay for their children's education, to buy a home, or just as part of their personal financial planning. But, those same corporate executives are often exposed to material non-public information, or MNPI. Insider trading laws prohibit trading based on MNPI, in part because it provides an unfair advantage at the expense of the person on the other end of the transaction, as well as corporate shareholders more broadly.[1] As regulators, we seek to balance the legitimate liquidity needs of insiders with our duty to ensure a level playing field to protect investors and the integrity of our markets. Rule 10b5-1 provides an affirmative defense to allegations of insider trading by establishing safeguards and protections around when and how corporate insiders can sell their stock.[2] The goal of the rule is to help ensure that an insider does not have MNPI at the time they make a trade. In turn, that insider is provided some greater certainty that if they comply with the rule, they won't be sued by the SEC for insider trading when they buy or sell their corporation's securities.

The 10b5-1 rule was promulgated twenty years ago. Experience and academic research supports the need for changes so that it can better achieve its stated goals.[3] I believe the proposed amendments represent important improvements, and I support them.

The proposal would require disclosure of all 10b5-1 plans adoptions and cancellations, including salient details about each plan. This empowers corporate boards and shareholders, who have an incentive to scrutinize trades and plan cancellations that occur near in time to the release of news that moves the share price. I believe that, here, increased transparency from issuers and insiders will lead to better outcomes for investors by limiting the temptation for insiders to engage in practices that take unfair advantage or could be perceived to do so.

Importantly, recent academic work shows a concentration of loss avoiding trades by corporate executives made using single trade plans adopted within 60 days of an earnings announcement.[4] Today's proposal may reduce the prevalence of such trades by imposing important additional requirements and restrictions. Under the proposal, going forward all 10b5-1 plans would include a 120 day "cooling off" period between when the plan is adopted and when a trade may be executed under the plan.[5] Also, executives would be limited to adopting only one single trade plan per year, which should further reduce the potential for their abuse.[6]

I believe this combination of changes will help ensure that 10b5-1 plans accomplish the important goal of reducing trading by insiders while in possession of MNPI, while still offering executives a way to safely transact in their corporation's securities. But I also question whether some changes, particularly those impacting single trade plans, go far enough or will be as effective as other available alternatives.[7] I look forward to receiving and reviewing comments on the proposals. And I hope and expect academics and researchers will continue to track how these plans are used in practice. Empirical evidence will help us understand whether this proposal goes far enough or whether there is more work to be done. Our goal is to limit abuses by insiders, and it is important that we consider further modifications in the future if necessary.

I commend the staff on the thoughtful proposed changes, and the insightful questions they pose. I'm pleased to support the proposal.

---

[1] "Insider trading enables certain investors who have access to inside information or who control the timing or substance of corporate disclosures to profit at the expense of other investors. Due to their access to material nonpublic information, insiders can obtain profits through the strategic timing of trades in the issuer's securities. These profits are gained at the expense of ordinary investors, and essentially transfer wealth from other investors to the insider." Rule 10b5-1 and Insider Trading, Release No. [] (proposed Dec. 15, 2021) [hereinafter *the Release*].

[2] "Rule 10b5-1(c) established an affirmative defense to Rule 10b-5 liability for insider trading in circumstances where it is apparent that the trading was not made on the basis of material nonpublic information because the trade was pursuant to a binding contract, an instruction to another person to execute the trade for the instructing person's account, or a written plan (collectively or individually a "trading arrangement") adopted when the trader was not aware of material nonpublic information," but did not address or modify any other aspect of insider trading law. The Release at 8-9, fn. 10.

[3] *See, e.g.*, the Release at n. 15 (citing Alan D. Jagolinzer, *SEC Rule 10b5-1 and Insiders' Strategic Trade*, 55 Mgmt. Sci. 224 (2009); M. Todd Henderson et al., *Hiding in Plain Sight: Can Disclosure Enhance Insiders' Trade Returns*, 103 Geo. L.J. 1275 (2015); Taylan Mavruk et al., *Do SEC's 10b5-1 Safe Harbor Rules Need to be Rewritten?*, Colum. Bus. L. Rev., 133 (2016); Artur Hugon and Yen-Jung Lee, *SEC Rule 10b5-1 Plans and Strategic Trade around Earnings Announcements* (2016))

[4] In March of this year, I co-authored with Wharton Professor Dan Taylor an op-ed that examined academic research regarding the frequency, and profitability, of trades executed by insiders following their adoption of 10b5-1

plans. *See* Caroline Crenshaw & Daniel Taylor, *Insider Trading Loopholes Need to be Closed*, Bloomberg (Mar. 15, 2021).

[5] *See* the Release at 16.

[6] *See id*. at 24.

[7] For example, should single-trade plans be prohibited outright. *See id.* at 27, Request for Comment #15.