Statement on the Proposed Rules Regarding 10b5-1 Plans

Commissioner Elad L. Roisman

Dec. 15, 2021

Good morning. Thank you to the staff who worked on this proposal. I know you spent many hours not only working on this rulemaking, but talking with my team and me about our various questions. I truly appreciate all of your dedication and efforts.

That said, I have very mixed feelings about the proposal before us. I have decided to support it because, as I have said in other contexts, I believe that a so-called "cooling-off" period should take place after individuals have implemented a 10b5-1 plan. However, I do not feel confident that other requirements we are including in this proposal are necessary, and I have several fundamental concerns about the rulemaking process here.

Fundamental Concerns About Our Rulemaking Process

First, the rulemaking appears designed to address a problem in our marketplace, which we do not have much evidence actually exists. I feel similarly about the companion proposal that we will consider later this morning, which would place new requirements on companies purchasing their own outstanding shares, the "Share Repurchase Disclosure Modernization" ("buybacks proposal").[1] These rulemakings seem premised on the justification that 10b5-1 plans and buybacks are being used hand-in-glove by executives to artificially inflate their companies' share prices to benefit themselves and facilitate insider trading. Underpinning this justification are assumptions that existing rules may not adequately enable us to prosecute illegal insider trading and that 10b5-1 plans are facilitating this evasion. I have not seen evidence to support this conclusion or these underlying assumptions.

Second, our proposal to amend rule 10b5-1 has overlapping implications with the buybacks proposal as far as trading by issuers. This overlap muddies the waters in terms of the Commission's or the public's ability to understand the impact that either of these rules will have individually or how they will operate together. It seems clear that for companies, these rules will potentially affect not just how they can purchase their securities, but arguably more importantly, how they can reallocate capital to their shareholders.

Last, the comment period for this rule is only 45 days. All but one of the rules that we will consider at this open meeting have the same short comment period (and the other one, which will fundamentally change a $5 Trillion market, allows only 60 days for comment).[2] Not only is 45 days shorter than our customary comment periods, which have typically been 90 or at least 60 days, these brief comment periods fall over the course of several major holidays. They also overlap with comment periods for *five* other proposed Commission rules.[3] If the

Commission votes to propose all four of the new proposals which we are considering at this meeting, the public will be left with *hundreds of questions* on which we are seeking input in this short amount of time.[4] I worry that we are not allowing enough time to receive the substantive kind of feedback we will need from the many types of market participants whom these rules will affect in order to adapt each of these proposals into workable rules.

With those concerns aside, I will now discuss my views on this particular proposal regarding 10b5-1 plans.

The Proposal's Application to Individuals

Executive trading is an area that the SEC has scrutinized for a long time, and for good reason.[5] Executives have access to a lot of material information about their companies, which is inaccessible to the general public. If they and other insiders were allowed to trade their companies' stock while in possession of that information, they could have an unfair advantage in the marketplace and the integrity of our markets would suffer. Yet, our markets have developed such that a large portion of executives' compensation is made up of their companies' securities. For this compensation to be valuable, those individuals need to be able to access that wealth.

The Commission adopted Rule 10b5-1 in 2000 to define the scope of when company insiders could be subject to liability for insider trading.[6] The rule includes affirmative defenses from liability for corporate insiders and issuers when buying and selling company stock if they adopt trading plans in good faith and while not in possession of material nonpublic information.

I believe our rules regarding 10b5-1 plans can be refined for the benefit of our markets and investors. I support the proposed 120-day, or roughly four-month, cooling-off period for an insider's 10b5-1 plan and disclosure of gifts on Form 4. A four-month cooling-off period can be viewed as "one quarter plus," which seems to be a reasonable amount of time to ensure that even if an executive were in possession of any material non-public information at the time of establishing the plan (which they are not permitted to have for purposes of the affirmative defenses found in Rule 10b5-1(c)), such information would likely have gone stale by the time the plan became effective. Commenters should certainly weigh in on whether 120 days is the right amount of time.

I think this proposal would have been better, however, had it stopped here. In my view, the four-month cooling-off period for individuals will do almost all of the work in ensuring that insiders are not circumventing the purposes of Rule 10b5-1. To say I have reservations about other aspects of the proposal is an understatement. I worry that the additional components of this proposal as it applies to individuals (aside from the Form 4 and 5 requirements) will impose real costs and offer, as far as I can tell, few additional benefits.

I hope that commenters will review all aspects of this proposal and send feedback in response to our many questions as well as alert us to the inevitable unintended consequences that could result from implementing these proposed rules as-is.

Questions about the Proposal's Application to Issuers

Another aspect of this proposal about which I am skeptical is how it will apply to issuers and their purchases of their own outstanding stock. I support requiring issuers to disclose their trading plans. Companies' plans to use excess capital may be material to investors, and I believe the market likely will benefit from having such information publicly available.

The proposal, however, includes a 30-day cooling-off period for issuers. I would have preferred to exclude issuers from the mandatory cooling-off period altogether. Unlike individuals, issuers' knowledge of material non-public information should be easier to ascertain. Companies typically have only specific windows during which they engage in open market transactions, specifically to ensure that they are not trading while in possession of material non-public information. Additionally, issuers must make determinations about whether share repurchases are appropriate—and if so, how many shares to buy and at what price—based on current information about how much cash the company has and what its anticipated uses for it are. A cooling-off period is more burdensome for an issuer than for an individual because it will make these considerations much more uncertain.

I encourage commenters to provide feedback to the Commission on this provision. Is a cooling-off period appropriate for issuers? If so, what is an appropriate length? What risks exist when a company uses a 10b5-1 plan to buy its own stock?

Conclusion

I will conclude by saying that this is not the rule I would have written. Nevertheless, its core requirement—the cooling-off period for individuals—is one that I think is appropriate. For that reason, I am voting to support this proposal. I encourage commenters to make clear to us the ways in which these proposed changes will benefit the market and the ways in which they may hinder otherwise honest and appropriate activity. Also, if commenters believe they need more time to provide this feedback, I hope they will write in to let us know as soon as possible.

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[1] *See* Securities and Exchange Commission, "Share Repurchase Disclosure Modernization" (Dec. 15, 2021), Rel. No. 34-93783, https://www.sec.gov/rules/proposed/2021/34-93783.pdf.

[2] *See* Securities and Exchange Commission, "Open Meeting Agenda - December 15, 2021," https://www.sec.gov/os/agenda-open-121521 (noting that the Commission will consider rule proposals on: (1) Rule 10b5-1 and Insider Trading; (2) Share Repurchase Disclosure Modernization; (3) Money Market Fund Reforms; and (4) Security-Based Swap Positions).

[3] *See* Electronic Submission of Applications for Orders under the Advisers Act and the Investment Company Act, Confidential Treatment Requests for Filings on Form 13F, and Form ADV-NR; Amendments to Form 13F, Rel. No. 34-93518 (Nov. 4, 2021), https://www.sec.gov/rules/proposed/2021/34-93518.pdf (comments due December 20, 2021); Updated EDGAR Filing Requirements, Rel. No. 33-11005 (Nov. 4, 2021), https://www.sec.gov/rules/proposed/2021/33-11005.pdf (comments due December 22, 2021); Proxy Voting Advice, Rel. No. 34-93595 (Nov. 17, 2021), https://www.sec.gov/rules/proposed/2021/34-93595.pdf (comments due December 27, 2021); Electronic Recordkeeping Requirements for Broker-Dealers, Security-Based Swap Dealers, and Major Security-Based Swap Participants, Rel. No. 34-93614 (Nov. 18, 2021), https://www.sec.gov/rules/proposed/2021/34-93614.pdf (comments due January 3, 2022); Reporting of Securities Loans, Rel. No. 34-93613 (Nov. 18, 2021), https://www.sec.gov/rules/proposed/2021/34-93613.pdf (comments due January 7, 2022).

[4] *See* note 2 *supra*.

[5] *See* "Fair To All People: The SEC and the Regulation of Insider Trading," Securities and Exchange Commission Historical Society, https://www.sechistorical.org/museum/galleries/it/corporateDisclosure_a.php.

[6] *See* Securities and Exchange Commission, "Final Rule: Selective Disclosure and Insider Trading" (Aug. 15, 2000), https://www.sec.gov/rules/final/33-7881.htm.