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Invested in America

April 1, 2022

Via e-mail to rule-comments@sec.gov

U.S. Securities and Exchange Commission
100 F Street, NE
Washington DC 20549-1090
Attn: Ms. Vanessa A. Countryman

Re: File No. S7-20-21; Rule 10b5-1 and Insider Trading

Dear Ms. Countryman:

The Securities Industry and Financial Markets Association ("SIFMA")[1] appreciates the opportunity to comment on the Commission's proposed amendments to Rule 10b5-1 and related disclosure requirements.[2] The Proposing Release notes that the Commission's objective in proposing the rules is to "address concerns about abuse of the rule to opportunistically trade securities on the basis of material nonpublic information in ways that harm investors and undermine the integrity of the securities markets."[3] SIFMA is supportive of the Commission's goals to increase transparency relating to the use of trading plans by company insiders and to enhance trading plan requirements to deter potential abuses of the affirmative defense under Rule 10b5-1. However, as discussed in this comment letter, SIFMA has concerns with the scope and clarity of certain of the proposed rules and believes the adoption of the amendments as proposed would not serve the Commission's goals. SIFMA has provided alternative approaches for the Commission's consideration where applicable.

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[1] SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry's nearly 1 million employees, we advocate on legislation, regulation, and business policy, affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit http://www.sifma.org.

[2] Rule 10b5-1 and Insider Trading, 87 Fed. Reg. 8686 (proposed February 15, 2022) (the "Proposing Release").

[3] *Id.*

Executive Summary

In Part I of this comment letter, we discuss the use of Rule 10b5-1 trading plans by insiders and provide an overview of our key areas of concern relating to the proposed amendments.

In Part II, we discuss SIFMA's position on the proposed amendments to Rule 10b5-1 applicable to insiders, which can be summarized as follows:

- SIFMA is generally supportive of a cooling-off period for insider Rule 10b5-1 plans but believes a 30-day cooling-off period would be consistent with public commentary and industry practice, would be merited in light of the existing protections in Rule 10b5-1 and would better achieve the Commission's investor protection goals;

- SIFMA urges the Commission to consider whether certain types of Rule 10b5-1 trading plans, including sales to cover withholding taxes in connection with equity vesting, should be excluded from any mandatory cooling-off period;

- SIFMA believes that non-material plan amendments and modifications should not be considered plan terminations triggering a new cooling-off period;

- The term "operated" and the concept of "operated in good faith" are not sufficiently clear as to the conduct they are intended to proscribe; and

- SIFMA is generally supportive of a restriction on multiple overlapping Rule 10b5-1 plans for insiders, but would suggest that the focus of the restrictions be on "opposite-way" plans as well as multiple market sales plans where one plan has the effect of amending the other plan, and also be limited to directors and executive officers.

In Part III, SIFMA discusses its significant concerns regarding proposed new Item 408(a)(2) of Regulation S-K, which would require quarterly disclosure regarding the adoption, termination and material terms of any contract, instruction or written plan for the purchase or sale of equity securities of an issuer "whether or not intended to satisfy the affirmative defense conditions of Rule 10b5-1(c)" by any director or officer subject to Section 16(a) reporting.

In Part IV, we discuss the need for an appropriate transition period and for excluding from the scope of the proposed rules existing Rule 10b5-1 trading plans already in effect as of the date of effectiveness of the new rules and trading plans that are amended, modified or terminated after the effective date.

SIFMA respectfully notes that this comment letter discusses the Proposing Release solely as it relates to company insiders and that SIFMA is concurrently submitting a separate letter regarding the Proposing Release and the Share Repurchase Disclosure Modernization proposal that discusses the implications of the Proposing Release for issuers.

I. Introduction

Since the adoption of Rule 10b5-1 in 2000, the use of Rule 10b5-1 trading plans by company insiders has become increasingly prevalent.[4] Rule 10b5-1 plans are often a useful way for insiders who have concentrated positions in company stock to balance a need for investment diversification or liquidity against the risk of "insider trading" liability under Rule 10b-5. For example, Rule 10b5-1 plans are an effective and efficient means for allowing insiders to meet liquidity requirements, including for tax payments, college tuition or estate planning, or to make charitable donations. Moreover, Rule 10b5-1 plans can be particularly useful for insiders who have narrow "open" windows during which they could otherwise transact in company stock due to restrictions imposed by their companies' insider trading policies. For example, some companies' insider trading policies limit the number of days on which an insider can engage in transactions involving the company's equity securities to fewer than 60 days per calendar year.[5]

In considering the proposed amendments as applicable to corporate insiders, SIFMA strongly urges the Commission to take into account the numerous legitimate reasons insiders have to enter into Rule 10b5-1 trading plans, as well as the benefit to public investors when insiders sell through compliant trading plans rather than in open window periods. We also urge the Commission to be cognizant of the potential unintended consequences of imposing enhanced disclosure requirements relating to insider trades, including the potential that detailed disclosures under proposed new Item 408 could exacerbate asymmetry among different categories of investors by advantaging sophisticated, technical and short-term investors at the expense of retail investors and investors who focus on analyzing company fundamentals and investing over the long term.

II. Analysis of the Proposed Amendments to Rule 10b5-1

SIFMA is generally supportive of a cooling-off period for insider Rule 10b5-1 plans. However, SIFMA believes that a cooling-off period of 30 days, rather than 120 days, would be consistent with public commentary and industry practice, would be merited in light of the existing protections in Rule 10b5-1 and would better achieve the Commission's investor protection goals.

SIFMA is generally supportive of the Commission's proposal to require a cooling-off period for insider Rule 10b5-1 plans. However, we do not believe that a 120-day cooling-off period would serve the Commission's investor protection goals, and we expect that such a lengthy period could significantly reduce the attractiveness of Rule 10b5-1 trading plans without providing corresponding benefits to investors. Accordingly, SIFMA urges the Commission to

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4 "[Rule 10b5-1 plans] accounted for 61% of all insider trades during 2020, up from 30% in 2004, according to data from InsiderScore, a research service tracking executive-trading data." Shane Shifflett, *Executive Stock Sales Are Under Scrutiny. Here's What Regulators Are Interested In.*, Wall Street J. (Aug. 11, 2021), https://www.wsj.com/articles/executive-stock-sales-are-under-scrutiny-heres-what-regulators-are-interested-in-11628682985.

5 Sam Aspinwall, Executive Consulting of Raymond James, *Rule 10b5-1 Plans*, https://www.raymondjames.com/-/media/rj/advisor-sites/sites/e/x/executiveconsulting/files/10b5-1_plan_discussion_paper_ecofrj.pdf.

adopt a cooling-off period of 30 days (and in no event more than 60 days) for insiders. In addition, as discussed below, SIFMA believes that certain insider plans, particularly those related to certain employee benefit plan transactions, should be exempted from any cooling-off period.

The Stanford study to which the Proposing Release cites supports a shorter cooling-off period than the Commission has proposed and does not demonstrate incremental benefits from a 120-day cooling-off period.[6] Specifically, the study found that trades under multiple-trade plans are only loss avoiding within 30 days of plan adoption.[7] The study also suggests that plans with more than a 60-day cooling-off period are not loss avoiding.[8] A 30-day cooling-off period would also be consistent with prevailing market practice. According to industry survey data, the vast majority of companies already require cooling-off periods for insiders, with a plurality of companies requiring 30-day cooling-off periods.[9]

A 120-day cooling-off period would be a significant obstacle for insiders seeking to establish a meaningful Rule 10b5-1 plan. Rule 10b5-1 sales plans have been particularly important for insiders with known liquidity obligations who rely on the proceeds from sales of stock to fund the liquidity events. Often, this includes tuition payments for college, mortgage payments or tax and estate planning. A 120-day cooling-off period would significantly reduce the efficacy of Rule 10b5-1 plans to meet insiders' liquidity needs as insiders may need to liquidate positions sooner than in 120 days. A long cooling-off period could thus result in more insiders executing open market trades during window periods that may be quite short. This could have a distortive effect on the market for a company's equity. In SIFMA's experience, sales under Rule 10b5-1 plans may be more measured and balanced, as many Rule 10b5-1 plans sell shares gradually over time, regardless of whether the stock is up or down, as contrasted to open market trades, which may by necessity be more concentrated on particular days. In this regard, it has been SIFMA's experience that Section 16 insiders tend to be encouraged to engage in transactions early in window periods rather than later, which has the effect of increasing selling pressure in the first few days after the release of earnings.

Further, SIFMA believes that a shift toward more insiders executing open market trades could potentially undermine the Commission's investor protection goals given that the structure of a compliant Rule 10b5-1 plan serves to protect against opportunistic trading.

Putting aside the industry practice of 30-day cooling-off periods, we also believe that the existing protections in Rule 10b5-1 merit a shorter cooling-off period than the 120-day period

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6 *See generally* David F. Larcker et al., *Gaming the System: Three "Red Flags" of Potential 10b5-1 Abuse*, Stanford Closer Look Series (Jan. 19, 2021), https://www.gsb.stanford.edu/sites/default/files/publication-pdf/cgri-closer-look-88-gaming-the-system.pdf.

7 *Id.* at 2.

8 *Id.*

9 *See* Morgan Stanley et al., *Society for Corporate Governance Rule 10b5-1 Plan Practices Survey* (2021), https://higherlogicdownload.s3.amazonaws.com/GOVERNANCEPROFESSIONALS/a8892c7c-6297-4149-b9fc-378577d0b150/UploadedImages/Final_10b5-1_Plan_Report_CS_Survey_2021_V6_-10-19-21_W_o_Comments.pdf.

proposed by the Commission. In particular, we note that Rule 10b5-1, as currently in effect, provides that the affirmative defense is only available if the plan was entered into in good faith and not as part of a plan or scheme to evade the prohibitions of Rule 10b5-1. Accordingly, Rule 10b5-1 plans today already require that they be entered into while an insider is not in possession of MNPI, making a cooling-off period in many ways superfluous.

As the Commission works to adopt final rules, SIFMA urges the Commission to consider whether certain types of Rule 10b5-1 trading plans should be excluded from any mandatory cooling-off period.

SIFMA notes that a "one size fits all" approach may not be appropriate when assessing the applicability or length of a cooling-off period for insider Rule 10b5-1 plans. Specifically, SIFMA urges the Commission to consider an exception from the cooling-off period requirement for Rule 10b5-1 trading plans where immediate effect of the plan is important and where there is little, if any, opportunity for the abuse that the cooling-off period is designed to address. For example, sales to cover withholding taxes in connection with equity vesting, elections under 401(k) plans or employee stock purchase plans and certain other employee benefit plan transactions may be structured as Rule 10b5-1 trading plans, and oftentimes these plans are effective immediately. To SIFMA's knowledge, these transactions do not involve any potential for the misuse of insider information. A cooling-off period for these transactions would require, in many cases, amendments to plans, such as employee stock purchase plans or 401(k) plans, and, in some cases, the need for shareholder approval under securities exchange rules and the Internal Revenue Code. Imposing a cooling-off period on these types of insider Rule 10b5-1 plans would be very disruptive and costly to issuers, while at the same time doing little, if anything, to further the Commission's stated objectives.

SIFMA also urges the Commission to exclude gifts, estate-planning transactions (including transfers into, and sales by, estate-planning vehicles)[10] and derivative transactions from the cooling-off period, if adopted.[11] Although these transactions may be structured as Rule 10b5-1 plans, SIFMA believes that these types of transactions do not present the opportunities for abuse that are the focus of the Proposing Release. This is especially important in the estate-planning context where structures are specifically designed to comply with Rule 10b5-1. Not

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[10] Estate-planning transactions involve the transfer of the value of appreciated assets, such as stock, for tax purposes without relinquishing control over the securities until a future date. Directors and executive officers often use trusts as vehicles for accomplishing these objectives, including living trusts, grantor retained annuity trusts ("GRATs") and charitable remainder trusts.

[11] *See* Bank of America, N.A., Merrill Lynch, Pierce, Fenner & Smith Inc., SEC No-Action Letter, 2011 WL 6015714 (Dec. 1, 2011); Goldman, Sachs & Co., SEC No-Action Letter, 2003 WL 22358822 (Oct. 9, 2003); Goldman, Sachs & Co., SEC No-Action Letter, 1999 WL 1244018 (Dec. 20, 1999); *see also* Securities and Exchange Commission, *Rule 144 – Persons Deemed Not to be Engaged in a Distribution and Therefore Not Underwriters* (April 2, 2007), https://www.sec.gov/divisions/corpfin/guidance/rule144interp.htm.

only is the opportunity for abuse limited in this context, but there is also no indication by the Commission in the Proposing Release that these have been subject to abuse.

SIFMA believes that non-material plan amendments and modifications should not be considered plan terminations triggering a new cooling-off period.

Under the proposed rules, any amendment or modification to an insider's Rule 10b5-1 plan would necessitate a 120-day cooling-off period. Plan amendments and modifications can take a variety of forms. Some amendments and modifications are non-substantive, including changes to fix scrivener errors and changes to notice provisions or share delivery instructions. Other amendments may be substantive, but not material changes of a type that results in a change to an insider's trading instructions. These include changes to the source of shares; changes to commission schedules; changes in the vesting dates of employee compensation awards; changes to how taxes are paid with respect to the vesting of employee compensation awards, which could impact the number of shares available to sell under the plan;[12] changes to address an event that has occurred outside of the plan (*e.g.*, a recapitalization event); or other changes to resolve uncertainty as to how a plan is intended to be executed. Insiders should be able to effect these types of changes without the need to observe a cooling-off period.

In contrast, changes to the material terms of a plan that are equivalent to terminating and entering into a new plan (including changes to the execution parameters in a plan) should be subject to the cooling-off period. As a technical matter, however, SIFMA proposes that such a cooling-off period would apply only to implementation of the change. An insider should be able to modify the trading parameters of a plan (*e.g.*, the limit prices in the plan) if such changes would only impact trades that would be effected after the cooling-off period applicable to the date of the modification. For example, if an insider has a year-long plan using limit orders in anticipation of upcoming liquidity needs, but, due to unforeseen events (*e.g.*, a pandemic), the stock price drops and the orders in the plan will not be executed, an insider should be permitted to maintain the plan but modify orders that will take place after the cooling-off period. In this scenario, the plan would remain in effect on its original terms, and the change to limit prices would take effect for trades after the cooling-off period has passed. As another example, if, in January 2022, an executive extends the expiration date of a plan from June 2023 to July 2023, that extension should be permitted to have immediate effect since that would be a greater time period than any applicable cooling-off period.

For these reasons, we propose that an amendment to a plan should be deemed a termination of the plan only in circumstances where the amendment (1) is directed by the insider (and not the result of administrative changes, such as changes in the number of shares received upon vesting as discussed above) and (2) modifies one or more material terms of the plan. Non-material amendments such as those described above and amendments to order types scheduled to be placed after the cooling-off period from the date of the amendment should not be deemed a termination of the plan.

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[12] For example, if a plan initially contemplates selling shares based on gross shares delivered pursuant to an employee award, but, during the course of the plan, in-kind tax withholding is mandated by the company, this would reduce the number of shares available.

The term "operated" and the concept of "operated in good faith" are not sufficiently clear as to the conduct they are intended to proscribe.

The Commission has asked if the term "operated" and the concept of "operated in good faith" are sufficiently clear as to the conduct they are intended to proscribe. SIFMA believes they are not. In addition, SIFMA does not believe that the additional requirements are necessary to achieve the Commission's stated objectives.

SIFMA believes that the types of activities that the Commission is concerned about, such as improper influence by insiders over the timing of the release of material information, are already covered by antifraud rules — namely, the restriction on trading while aware of MNPI — and general corporate law principles prohibiting insiders from taking actions to benefit themselves. To the extent the Commission determines to modify the ongoing requirements under Rule 10b5-1, it should consider instead focusing on material modifications or amendments to a plan and terminations of a plan that are not made in good faith. The word "operated" is vague, and SIFMA believes that refining the proposed rule to prohibit specific conduct would be clearer. A lack of clarity around the proposed term could result in significant confusion as insiders work to understand the meaning of "operate." This confusion could increase the cost of compliance for insiders and result in fewer insiders choosing to enter into Rule 10b5-1 plans out of concern of inadvertently violating the new requirements. As discussed above, the shift of insider trades to open window periods could lead to the opportunistic trading that undermines investor confidence.

SIFMA is generally supportive of a restriction on multiple overlapping Rule 10b5-1 plans for insiders, but would suggest that the focus of the restrictions be on "opposite-way" plans as well as multiple market sales plans where one plan has the effect of amending the other plan, and also be limited to directors and executive officers.

The Proposing Release discusses the Commission's concern that multiple plans will be used to circumvent the proposed cooling-off periods by allowing insiders to decide which trades to keep and which trades to cancel after such insiders become aware of MNPI.[13] SIFMA is generally supportive of the Commission's proposal for a restriction on multiple overlapping Rule 10b5-1 plans for insiders; however, SIFMA would suggest that the focus of the restrictions be on "opposite-way" plans as well as multiple market sales plans where one plan has the effect of amending the other plan (*e.g.*, sales plans that operate at the same time), and also be limited to directors and executive officers. More specifically, SIFMA respectfully urges the Commission to consider the following clarifications:

- The rules should clarify that overlapping plans that cover the same securities but over different time periods (*i.e.*, trades only begin under one plan once the other plan has been completed) should be excluded from the prohibition. It is not unusual for insiders to establish plans that will start trading once their existing plan terminates,

[13] Proposing Release, 87 Fed. Reg. at 8692.

and this practice does not implicate any of the concerns articulated by the Commission in the Proposing Release.

- The restrictions on overlapping plans should exclude gifts, distributions by investment funds to their limited partners, estate-planning transactions and derivative transactions. To the extent that any of these types of transactions may be structured as a Rule 10b5-1 transaction, SIFMA believes that having these types of transactions occur while a traditional open market sales plan is in effect does not present the opportunities for abuse that are the focus of the Proposing Release. For example, GRATs contemplate specified annuity payments and other distributions to be made to the grantor and the beneficiaries on specified dates under specified conditions. These annuity payments and other distributions should not limit or restrict the ability of an insider to enter into an otherwise compliant Rule 10b5-1 plan.

- The rules should also exclude overlapping plans if an insider has both direct and indirect ownership of the same class of securities. For example, insiders may have one plan for shares directly held by the insider and a separate plan for shares held by the insider's family limited partnership. SIFMA does not believe this sort of arrangement creates an opportunity for abuse that should render the affirmative defense under Rule 10b5-1 unavailable.

- The rules should also exclude certain employee benefit plan transactions where there is little opportunity for abuse. As discussed above, Rule 10b5-1 trading plans for directors and officers are sometimes entered into for sales to cover withholding taxes in connection with equity vesting or stock appreciation rights or option exercises, elections under 401(k) plans or employee stock purchase plans and other employee benefit plan transactions, and SIFMA believes these plans should be excluded.

- The rules should be limited to directors and executive officers. Directors and executive officers are the group most likely to have MNPI and, as we have noted, there are *bona fide* reasons why an individual may have overlapping plans in place. Because there are legitimate reasons to have overlapping plans, we urge the Commission to consider limiting the prohibition to a narrower group.

SIFMA strongly urges the Commission to clarify the definition of a "single-trade" plan, if this concept is retained in the final rules, and to limit the restriction on single-trade plans to only directors and executive officers.

The amendments to Rule 10b5-1, if adopted, should clarify the definition of a "single-trade" plan and limit the restriction on single-trade plans to only directors and executive officers. There are a number of areas where application of the proposed restriction would be ambiguous in practice, and SIFMA urges the Commission to consider clarifying, among other things, that single-trade plans do not include:

- Certain employee benefit plan transactions, including option exercises where settlement may occur after exercise and purchases under employee stock purchase plans;

- Gifts and estate-planning transactions;
- Securities purchase or sale agreements, including forward contracts, whether or not prepaid;
- Derivative transactions;
- Distributions by investment funds to their limited partners;
- Plans that contemplate multiple purchases or sales of shares at designated limit prices, but under which only a single purchase or sale occurs; and
- Multiple limit orders or other "not-held" orders.

The rules, if adopted, should also clarify that single-trade plans covering different classes of securities do not fall within the scope of the rule and that single-trade plans that lapse without the trade being completed do not prohibit the insider from entering into another single-trade plan within 12 months. Finally, the rules should clarify that plans that by their terms cannot be terminated should not be considered as single-trade plans and that an insider should be allowed to enter into, within a 12-month period, a multiple-trade plan following the completion or termination of a single-trade plan.

If the Commission requires insider certifications for the Rule 10b5-1 affirmative defense, SIFMA respectfully requests that the Commission make certain clarifications.

If the Commission adopts an insider certification requirement for the affirmative defense under Rule 10b5-1, the rules should clarify that the no-MNPI and good-faith representations may be included in trading plan documentation and do not need to be in stand-alone documents or monitored by the issuer. Requiring a separate agreement or certification would impose an additional burden on both the insider and the company.

III. Insider Plan Disclosure Requirements

SIFMA does not see a significant benefit to investors from disclosure of directors' or executive officers' plans and believes the existing rules (including prompt Section 16 reporting obligations), proposed cooling-off period and proposed limitation on single-trade plans should adequately address the policy concerns.

SIFMA has significant concerns regarding the Commission's proposed Item 408(a)(2), which would require quarterly disclosure regarding the adoption, termination and material terms of a contract, instruction or written plan for the purchase or sale of equity securities of an issuer "whether or not intended to satisfy the affirmative defense conditions of Rule 10b5-1(c)" by directors and executive officers. While disclosure of an issuer's entry into plans could have benefit to investors (as long as information as to purchase prices and the number of shares to be sold at various price levels at various times is not required to be disclosed), we do not see the same benefit to investors from disclosure of directors' or executive officers' plans. The Proposing Release notes the concern that certain transactions by insiders may be indicative of

their views of a company's prospects.[14] Prospective arrangements for the sale or purchase of a company's securities, which may be conditional or otherwise subject to material limitations (including, for example, limit prices that are significantly in excess of current trading prices), may not, however, be of such significance. There are a variety of reasons why an insider may enter into a Rule 10b5-1 plan. For example, Rule 10b5-1 plans are effective for allowing insiders to meet liquidity requirements, including mortgage payments or college tuition payments. Many executive officers may have concentrated positions in company stock as a result of a company's compensation policies, and they may seek to diversify their holdings. The existence of a Rule 10b5-1 plan no more indicates an insider's view of a company's prospects than, for example, a universal shelf registration statement indicates a company's intention to allocate the entire shelf to equity securities. In other words, requiring disclosure of the mere presence of these plans would attribute meaning where none may exist.

Additional concerns relating to the required disclosure of the material terms of a director's or officer's trading plan details include:

- ***Improper market signaling***. Sometimes plans are terminated in advance of the announcement of significant corporate transactions because the executive officer or director does not want to have outsized gains from an uptick in price. Disclosure of such plan terminations may disproportionately benefit larger, more sophisticated investors, who actively analyze patterns in trades through trading models and attempt to predict when trades may occur, or what the entry into, or modification or termination of, plans may mean, inadvertently creating information asymmetries between large, sophisticated, well-resourced investors and retail investors. Analyzing these patterns requires sophisticated algorithms and may put sophisticated investors at an advantage over smaller, retail investors. In addition, investors generally want executives and directors to be in long-term plans, and, if required to disclose the number of shares put in a plan upfront, this will make it difficult for executives and directors to be comfortable entering into long-term trading plans that spread trades out over time, which would not be to the benefit of a company's stockholders. Further, as discussed above, we believe that a shift toward more insiders executing open market trades could potentially undermine the Commission's investor protection goals.

- ***Front-running and market manipulation***. Insiders should not be required to disclose the duration and total number of shares in Rule 10b5-1 plans for executive officers and directors, which could create front-running risk. Short-term, sophisticated, technical traders could use data about the duration and total number of shares in directors' and officers' Rule 10b5-1 plans to develop algorithms that enable them to determine the undisclosed terms of the plan. These algorithms would provide them with information not available to investors without that capability, including retail investors. Disclosure of these terms could create opportunities for arbitrage that

[14] Proposing Release, 87 Fed. Reg. at 8713.

could unfairly affect the price an insider realizes for his or her stock transaction and could negatively affect the trading market for a stock.

- ***Unnecessary Distraction***. Disclosure of plans, rather than disclosure of trades pursuant to the existing Section 16 regime, could result in investor questions that company investor relations teams will need to address. The decision of a director or executive officer to engage in trades is often separate from the individual's views on the prospects of the company, with trading driven by a number of factors, including diversification, liquidity needs or other events. Disclosure of trading plan details may result in investor speculation and additional questions that need to be addressed by the company, without meaningful new disclosure to investors. Also, as discussed earlier, additional disclosure may disproportionately benefit larger, more sophisticated investors to the disadvantage of retail or other smaller, less sophisticated investors.

The market already receives prompt information regarding director and executive officer trading activity, and SIFMA supports a regime where Section 16 forms must disclose whether trades have been made pursuant to Rule 10b5-1 trading plans, which disclosure would also indicate the date of adoption of the plan. The Proposing Release states that these disclosures would allow investors to assess whether and, if so, how, issuers monitor trading by directors and executive officers for compliance with insider trading laws, and whether their compliance programs are effective at preventing the misuse of MNPI.[15] SIFMA does not agree that additional disclosure regarding trading plans would further these goals and believes that these goals are already achieved by the current Section 16 reporting regime. Moreover, any such required disclosures will result in additional burdens on issuers, who will have to implement new disclosure controls and procedures around such reporting. To the extent that the Commission does determine to impose additional disclosure requirements, SIFMA encourages the Commission to include any additional requirements within the existing Section 16 reporting regime, with the corresponding reporting burden placed on the individuals executing the plans, as opposed to issuers.

SIFMA believes the requirement to disclose any contract, instruction or written plan for the purchase or sale of equity securities that is not intended to satisfy Rule 10b5-1(c) is overly broad.

SIFMA is concerned that the requirement to disclose information about any contract, instruction or written plan for the purchase or sale of equity securities of an issuer "whether or not intended to satisfy the affirmative defense conditions of Rule 10b5-1(c)" is extremely broad and could pick up a variety of traditional transactions that would not be customarily thought of as "Rule 10b5-1 trading plans," including ordinary-course purchase and sale transactions, limit orders and "good 'til cancelled" transactions. To the extent the Commission retains this language in the final rules, SIFMA encourages the Commission to limit the application of the rule only to those plans that contemplate multiple sales at different prices and different volumes

[15] Proposing Release, 87 Fed. Reg. at 8694.

over time. In particular, the Commission should clarify that this concept does not encompass gifts, estate-planning transactions or derivative transactions.

IV. Transition Period

SIFMA urges the Commission to allow for a 12-month transition period before the rules take effect and to exclude from the scope of the final rules Rule 10b5-1 trading plans in effect as of the effective date of the final rules, and plans that are in effect as of the effective date and are amended, modified or terminated after the effective date.

SIFMA strongly urges the Commission to allow for at least a 12-month transition period before the final rules take effect. The proposed rules, if adopted, will require a number of changes to issuers' policies and procedures, as well as to internal reporting processes and disclosure controls and procedures. Some of the proposed disclosure and process requirements will be time consuming to implement and will likely require many issuers to allocate additional resources and establish new disclosure controls and procedures to cover the more frequent and thorough disclosure being required. Adoption of such new disclosure controls and procedures may require approval by an issuer's board or a committee of the board. Certain of the requirements would also impose Inline XBRL reporting on new kinds of disclosures, which would require that taxonomies be developed.

SIFMA also urges the Commission to exclude from the scope of the final rules those Rule 10b5-1 trading plans in effect as of the date of effectiveness of the final rules. Market disruption could be triggered if insiders are required to amend existing plans to comply with the final rules. Moreover, depending on the scope of any amendments, insiders may need to wait until an open trading window in order to implement those amendments. Further, amendments, modifications and terminations of Rule 10b5-1 plans in effect as of the effective date should be excluded. Existing plans should be permitted to operate in accordance with both their terms and the law in effect at the time of adoption. SIFMA believes that it could create unnecessary market uncertainty if Rule 10b5-1 contracts in existence as of the effective date, in essence, had to comply with not only the law in effect at the time of adoption (the date on which they were drafted), but also a future law.

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We appreciate the opportunity to comment on the proposed amendments. If you have any questions or comments, please contact Robert W. Reeder or Catherine M. Clarkin in Sullivan & Cromwell's New York office (212-558-4000), or Sarah P. Payne in Sullivan & Cromwell LLP's Palo Alto office (650-461-5600).

Sincerely,

Kevin M. Carroll
Managing Director and Associate General Counsel
Securities Industry and Financial Markets Association

cc: Renee Jones, Director, Division of Corporation Finance
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