Via Hand Delivery

December 28, 2012

The Honorable Elisse B. Walter
Chairman
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Rule 10b5-1 Trading Plans

Dear Madam Chairman:

I am writing on behalf of the Council of Institutional Investors ("CII"). CII is a nonprofit, nonpartisan association of public, corporate and union pension funds, and other employee benefit plans, foundations and endowments with combined assets that exceed $ 3 trillion.[1]

The purpose of this letter is to share our concerns with respect to the potential misuse of trading plans that are intended to satisfy the requirements of Rule 10b5-1 under the Securities Exchange Act of 1934. Our long-standing interest in Rule 10b5-1 programs is reflected in our membership approved corporate governance best practices which state:

> **5.15b Stock Sales**: Executives should be required to sell stock through pre-announced 10b5-1 program sales or by providing a minimum 30-day advance notice of any stock sales. 10b5-1 program adoptions, amendments, terminations and transactions should be disclosed immediately, and boards of companies using 10b5-1 plans should: (1) adopt policies covering plan practices, (2) periodically monitor plan transactions and (3) ensure that company policies discuss plan use in the context of guidelines or requirements on equity hedging, holding and ownership.[2]

[1] For more information about the Council of Institutional Investors ("Council"), including its members, please visit the Council's website at http://www.cii.org/become_a_member/become_a_member.
[2] Council of Institutional Investors, Corporate Governance Policies **§ 5.15b Stock Sales** (updated Oct. 5, 2012), http://www.cii.org/UserFiles/file/10_5_12_cii_corporate_governance_policies.pdf.

Our concerns with Rule 10b5-1 programs were recently heightened by the November 27, 2012, Wall Street Journal article by Susan Pulliam and Rob Barry, entitled "Executives' Good Luck in Trading Own Stock" ("WSJ Article").[3] The WSJ Article indicated that many executives at public companies have adopted practices with respect to Rule 10b5-1 plans that are inconsistent with the spirit, if not the letter of Rule 10b5-1.

For example, the WSJ Article notes that some company insiders may be adopting Rule 10b5-1 plans at a time that they are aware of material non-public information, which should preclude trades affected pursuant to such plans from being protected by Rule 10b5-1.[4] Similarly, the WSJ Article notes that some insiders frequently cancel or amend plans after they have been adopted, which raises questions regarding whether such plans were adopted in good faith, a prerequisite to a legitimate Rule 10b5-1.[5]

Lastly, it appears that many plans adopted by insiders in reliance on Rule 10b5-1 allow trades to occur pursuant to such plans within mere days after the plan has been adopted, which also raises questions about whether such plans were made in good faith and whether the insider could have been in possession of material non-public information at the time that the plans were adopted.[6]

As a leading voice for long-term patient capital, the Council, consistent with our membership approved policies, strongly believes that clear guidelines regarding the circumstances in which a Rule 10b5-1 plan may be adopted, modified or cancelled, as well as enhanced transparency regarding the existence of such plans would have meaningful benefits for a company, its shareowners and the investing public.[7] We also believe that such guidelines, whether in the form of additional interpretive guidance or an amendment to Rule 10b5-1 itself, are essential to restoring public confidence with respect to purchases and sales of a company's securities by its insiders.

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[3] Susan Pulliam & Rob Barry, *Executives' Good Luck in Trading Own Stock*, Wall St. J., Nov. 27, 2012, http://online.wsj.com/article/SB10000872396390444100404577641463717344178.html.

[4] *See id.* at 5 ("Executives can generally cancel a trading plan at any time . . . [t]his includes times which they possess private information and when the cancellation of the plan's prescribed trades could benefit them financially.").

[5] *Id*. ("One executive's trading plan set a target price for some of his sales that was too high to make it possible to sell[;] . . . [a]n amendment to the plan fixed this.").

[6] *Id*. at 4 ("Although executives must be free of material nonpublic information at the time when they set up such a plan, there is no rule about how long the plans must be in place before trading under the plans can begin.").

[7] *See* **§ 5.15b Stock Sales.**

More specifically, we would respectfully request that the Securities and Exchange Commission ("SEC" or "Commission") consider pursuing interpretative guidance or amendments to Rule 10b5-1 that would *require* Rule 10b5-1 plans to adopt the following protocols and guidelines:

- Companies and company insiders should only be permitted to adopt Rule 10b5-1 trading plans when they are permitted to buy or sell securities during company-adopted trading windows, which typically open after the announcement of the financial results from a recently completed fiscal quarter and close prior to the close of the next fiscal quarter;
- Companies and company insiders should be prohibited from adopting multiple, overlapping Rule 10b5-1 plans;
- Rule 10b5-1 plans should be subject to a mandatory delay, preferably of three months or more, between the adoption of a Rule 10b5-1 plan and the execution of the first trade pursuant to such a plan; and
- Companies and company insiders should not be allowed to make frequent modifications or cancellations of Rule 10b5-1 plans.

We believe the required adoption of the protocols and guidelines outlined above, together with the adoption of the Council's related membership approved policies, will strengthen our capital markets. Providing greater disclosure regarding the adoption, amendment, and termination of Rule 10b5-1 plans will provide long-term shareowners with reasonable access to information about insider trades that complete the partial picture provided by Section 16 and Rule 144 filings.

In addition, imposing a minimum period between the adoption of a Rule 10b5-1 plan and the execution of trades pursuant to such plan, as well as restricting plan modifications and cancellations, will ensure that insiders are not in a position to take advantage of their access to material non-public information in connection with their trades pursuant to Rule 10b5-1 plans. Finally, making boards explicitly responsible for the oversight of Rule 10b5-1 plans will make them more responsive to long-term shareowners and more vigilant in their oversight responsibilities, while such oversight also will make insiders more thoughtful about the Rule 10b5-1 plans that they adopt.

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As indicated, we believe that action by the Commission is needed to address the alleged abuses of Rule 10b5-1 described by the WSJ Article, and the suggestions outlined above provide a good starting point. We emphasize that such protocols and guidelines only serve as a starting point and are not necessarily a complete solution to the problems identified by the WSJ Article. A more complete solution to the problem identified includes not only the adoption of the above protocols and guidelines but, equally important, a robust and active enforcement of insider trading generally and Rule 10b5-1 plans specifically.

We look forward to working with the Commission in its review of Rule 10b5-1 trading plans. If we can provide you with any additional input or assistance in that process or on any other issues that come before the SEC, please do not hesitate to contact me at (202) 261-7081 or jeff@cii.org.

Sincerely,

Jeff Mahoney
General Counsel

cc: Commissioner Luis A. Aguilar
Commissioner Troy A. Paredes
Commissioner Daniel M. Gallagher