



Via Hand Delivery

May 9, 2013

The Honorable Mary Jo White
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 reiterate the request contained in our December 28, 2012 letter to U.S. Securities and Exchange Commission (“SEC” or “Commission”) Chairman Walter regarding Rule 10b5-1 trading plans.² That letter respectfully requested that the SEC “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 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;

¹ For more information about the Council of Institutional Investors (“CII”), including its members, please visit CII’s website at <http://www.cii.org/members>.

² Letter from Jeff Mahoney, General Counsel, to The Honorable Elisse B. Walter, Chairman 1 (Dec. 28, 2012), http://www.cii.org/files/issues_and_advocacy/correspondence/2012/12_28_12_cii_letter_to_sec_rule%2010b5-1_trading_plans.pdf.

- Companies and company insiders should not be allowed to make frequent modifications or cancellations of Rule 10b5-1 plans;
- Companies and company insiders should disclose Rule 10b5-1 program adoptions, amendments, terminations and transactions; and
- Boards of companies that have adopted Rule 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.³

Since the issuance of our letter, evidence continues to mount that many companies and company insiders have adopted practices that are inconsistent with the spirit, if not the letter of Rule 10b5-1. Most recently, an April 24, 2013 Wall Street Journal article by Susan Pulliam and Rob Barry, entitled “Directors Take Shelter in Trading Plans,” recounts instances in which company directors, who also operated investment firms, established Rule 10b5-1 plans that their firms then used as vehicles to pursue opaque, opportunistic trades in the company’s stock.⁴ Your spokesman described those trades as “exotic permutation[s]” that were not contemplated when Rule 10b5-1 was originally issued.⁵ We view those trades as yet another example of the breadth of current uses of Rule 10b5-1 plans that appear, at best, inherently unfair to CII members⁶ and other market participants.⁷

³ *Id.* at 3.

⁴ Susan Pulliam & Rob Barry, *Directors Take Shelter in Trading Plans*, Wall St. J., Apr. 24, 2013, at 1 (on file with CII), <http://online.wsj.com/article/SB10001424127887323696404578300073046959086.html> (subscription required) [hereinafter *Directors*].

⁵ *Id.* at 2.

⁶ See, e.g., Council of Institutional Investors, *Corporate Governance Policies § 5.15b Stock Sales* (updated 2008), http://www.cii.org/corp_gov_policies#exec_comp (Long-standing membership approved policy providing for greater transparency, accountability, and oversight of Rule 10b5-1 plans.).

⁷ See, e.g., *Directors* at 2 (quoting Thomas Rohback, a partner at law firm Axinn, Veltrop & Harkrider LLP, “[i]f you have someone who is a director on a company’s board and he also runs some type of investment firm, he shouldn’t be trading in that company’s stock because of the appearance of impropriety, at the very least . . . [i]t appears he has an advantage over other investors”).

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We are strongly supportive of the SEC's reported efforts working with federal prosecutors in connection with several ongoing criminal investigations relating to alleged abuses of Rule 10b5-1 plans.⁸ In our view, however, a more effective and efficient long-term strategy to address the variety and number of abuses that have been identified is to *combine* robust and active enforcement with additional guidance or amendments to Rule 10b5-1.⁹ On this point, we agree with former SEC Commissioner Joseph Grundfest who noted that when the SEC established Rule 10b5-1 in the year 2000 "issues and potential for abuse" were identified and now, more than a dozen years later in light of experience and changing market conditions, the Commission should review Rule 10b5-1 and consider what additional guidance or amendments may be necessary.¹⁰

As always, we would welcome the opportunity to discuss this request with you or your staff in more detail at your convenience. Please feel free to contact me directly at (202) 261-7081 or jeff@cii.org.

Sincerely,



Jeff Mahoney
General Counsel

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

⁸ See, e.g., Susan Pulliam et al., *Insider-Trading Probe Trains Lens on Boards*, Wall St. J., Apr. 30, 2013, at 1 (on file with CII), <http://online.wsj.com/article/SB10001424127887323798104578453260765642292.html> (subscription required).

⁹ See Letter from Jeff Mahoney at 4 ("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.").

¹⁰ See, e.g., Jean Eaglesham & Rob Barry, *Trading Plans Under Fire*, Wall St. J., Dec. 13, 2012, at 2 (on file with CII), <http://online.wsj.com/article/SB10001424127887324296604578177734024394950.html> (subscription required).