

Via Hand Delivery

January 22, 2019

The Honorable Maxine Waters  
Chairman  
Committee on Financial Services  
United States House of Representatives  
Washington, DC 20515

The Honorable Patrick T. McHenry  
Ranking Member  
Committee on Financial Services  
United States House of Representatives  
Washington, DC 20515

*Re: H.R. 624, Promoting Transparent Standards for Corporate Insiders Act<sup>1</sup>*

Dear Madam Chair and Ranking Member McHenry:

I am writing on behalf of the Council of Institutional Investors (CII) to express our strong support for H.R. 624, the Promoting Transparent Standards for Corporate Insiders Act.

CII is a nonprofit, nonpartisan association of public, corporate and union employee benefit funds, other employee benefit plans, state and local entities charged with investing public assets, and foundations and endowments with combined assets under management exceeding \$4 trillion. Our member funds include major long-term shareowners with a duty to protect the retirement savings of millions of workers and their families. Our associate members include a range of asset managers with more than \$25 trillion in assets under management.<sup>2</sup>

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<sup>1</sup> Promoting Transparent Standards for Corporate Insiders Act, H.R. 624, 116<sup>th</sup> Cong. (Jan. 16, 2019), <https://www.congress.gov/bill/116th-congress/house-bill/624?q=%7B%22search%22%3A%5B%22H.R.+624%22%5D%7D&s=2&r=1>.

<sup>2</sup> For more information about the Council of Institutional Investors (“CII”), including its board and members, please visit CII’s website at <http://www.cii.org>.

For years, we have heard and read accounts about corporate insiders violating the spirit of the Securities and Exchange Commission's (SEC) Rule 10b5-1<sup>3</sup> apparently in an effort to provide cover for improper stock trades while possessing material non-public information.<sup>4</sup> The *Wall Street Journal* published a series of articles in 2012 that highlighted suspiciously fortuitous trading patterns under Rule 10b5-1 plans adopted by corporate insiders.<sup>5</sup> Empirical research by academics have reached similar results.<sup>6</sup>

In December 2012, at the recommendation and with the assistance of a prominent corporate/securities lawyer, CII submitted a rule making petition to the SEC recommending improvements to Rule 10b5-1.<sup>7</sup> Those improvements were specifically designed to limit the opportunity for executives to continue to abuse the rule and were derived, in part, from our membership approved policies.<sup>8</sup>

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<sup>3</sup> Trading "On the Basis Of" Material Nonpublic Information in Insider Trading Cases, 17 C.F.R. § 240.10b5-1 (Aug. 2000), available at <https://www.law.cornell.edu/cfr/text/17/240.10b5-1>.

<sup>4</sup> See, e.g., Craig M. Scheer, Rule 10b5-1 Trading Plans in the Current Environment: The Importance of Doing it Right, *Bus. Law Today* (Sept. 19, 2018) ("Critics have long viewed the rule as creating an opportunity for abuse, claiming that some insiders may in fact be aware of material non-public information at the time plans are established and that the rule can be used to provide cover for improper trades."), <http://apps.americanbar.org/buslaw/blt/content/2013/02/article-06-scheer.shtml>.

<sup>5</sup> Jean Eaglesham & Rob Barry, Trading Plans Under Fire, *Wall. St. J.*, Dec. 13, 2012 ("the SEC is facing mounting pressure to tighten its rules, following a[n] . . . investigation that found profitable and well-timed trades by more than 1,400 executives."), <https://www.wsj.com/articles/SB10001424127887324296604578177734024394950>; Justin Lahart, Timing Is Everything for Insider Sales, *Wall. St. J.*, Nov. 28, 2012 ("There is substantial wiggle room within 10b5-1 plans—for example, their existence doesn't have to be disclosed, and they can be canceled or changed without disclosure, as well."), <https://www.wsj.com/articles/SB10001424127887324020804578147261230632772>; Susan Pulliam & Rob Barry, Executives' Good Luck in Trading Own Stock, *Wall. St. J.*, Nov. 27, 2012 (initial reporting on investigation finding that more than 1,400 executives, including some with 10b5-1 plans, had made beneficial trades), <https://www.wsj.com/articles/SB10000872396390444100404577641463717344178>.

<sup>6</sup> See, e.g., John Shon & Stanley Veliotis, Insiders' Sales Under Rule 10b5-1 Plans and Meeting or Beating Earnings Expectations, 59(9) *Mgmt. Sci.* iv (Sept. 2013) ("One interpretation of our results is that CEOs and CFOs who sell under these plans may be more likely to engage in strategic behavior to meet or beat expectations in an effort to maximize their proceeds from plan sales."), <https://pubsonline.informs.org/doi/abs/10.1287/mnsc.1120.1669?journalCode=mnsc>.

<sup>7</sup> Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors to The Honorable Elisse B. Walter, Chairman, U.S. Securities and Exchange Commission (Dec. 28, 2012), [http://www.cii.org/files/issues\\_and\\_advocacy/correspondence/2012/12\\_28\\_12\\_cii\\_letter\\_to\\_sec\\_rule%20\\_10b5-1\\_trading\\_plans.pdf](http://www.cii.org/files/issues_and_advocacy/correspondence/2012/12_28_12_cii_letter_to_sec_rule%20_10b5-1_trading_plans.pdf).

<sup>8</sup> *Id.* at 3 (proposed improvements include "imposing a minimum period between the adoption of a Rule 10b5-1 plan and the execution of trades pursuant to such plan, . . . restricting plan modifications and cancellations . . . [and] making boards explicitly responsible for the oversight of Rule 10b5-1 plans"); see Council of Institutional Investors, Corporate Governance Policies, § 5.15b Stock Sales (updated Oct. 24, 2018) ("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."), [https://www.cii.org/files/10\\_24\\_18\\_corp\\_gov\\_policies.pdf](https://www.cii.org/files/10_24_18_corp_gov_policies.pdf).

Despite our repeated requests, the common sense improvements to Rule 10b5-1 that we first recommended in 2012, have not been adopted, proposed for public comment, or to our knowledge even thoughtfully considered.<sup>9</sup> As a result, gaping loopholes in the rule remain that we believe will likely continue to be subject to abuse.

We are pleased that our recommended improvements to Rule 10b5-1 have been incorporated into the study mandated by the provisions of H.R. 624.<sup>10</sup> We look forward to working with you, the Committee, and other market participants in support of this important bi-partisan legislation that we believe will benefit investors and the capital markets.

If we can answer any questions or provide additional information that would be helpful to you or the Committee on this, or other issues, please do not hesitate to contact me at 202.822.0800 or [jeff@cii.org](mailto:jeff@cii.org).

Sincerely,



Jeffrey P. Mahoney  
General Counsel

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<sup>9</sup> See, e.g., Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors to Brent J. Fields, Secretary, Securities and Exchange Commission 1, 8 (Dec. 13, 2018) (requesting that the Securities and Exchange Commission make a priority of proposing amendments to 10b5-1 and referencing some of the prior CII correspondence on the issue), [https://www.cii.org/files/issues\\_and\\_advocacy/correspondence/2018/December%2013%202018%20SEC%20Reg%20Flex%20Letter.pdf](https://www.cii.org/files/issues_and_advocacy/correspondence/2018/December%2013%202018%20SEC%20Reg%20Flex%20Letter.pdf).

<sup>10</sup> See H.R. 624, § 2(a)(1).