Council of Institutional Investors®
The voice of corporate governance

Via Email

March 24, 2022

Vanessa A. Countryman
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: File No. S7–20–21

Dear Madam Secretary:

The Council of Institutional Investors (CII or Council), appreciates the opportunity to provide comments to the United States (U.S.) Securities and Exchange Commission (SEC or Commission) in response to proposed amendments relating to Rule 10b5-1[1] under the Securities Exchange Act of 1934 (Exchange Act) (Proposed Rule).[2]

CII is a nonprofit, nonpartisan association of U.S. 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 of approximately $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, including public pension funds with more than 15 million participants – true "Main Street" investors through their pension funds. Our associate members include non-U.S. asset owners with about $4 trillion in assets, and a range of asset managers with more than $40 trillion in assets under management.[3]

CII and Rule 10b5-1 Trading Plans

In 2008, CII adopted a membership approved policy about Rule 10b5-1 plans[4] after members became concerned about a number of practices that appeared to be inconsistent with the intent of

[1] Trading "on the basis of" material nonpublic information in insider trading cases, 17 C.F.R § 240.10b5-1 (2000), *available at* https://www.law.cornell.edu/cfr/text/17/240.10b5-1.
[2] Rule 10b5-1 and Insider Trading, Securities Act Release No. 11,013, Exchange Act Release No. 93,782, 87 Fed. Reg. 8,686 (proposed rule Jan. 13, 2022), https://www.govinfo.gov/content/pkg/FR-2022-02-15/pdf/2022-01140.pdf.
[3] For more information about the Council of Institutional Investors (CII), including its board and members, please visit CII's website at https://www.cii.org/about.
[4] Council of Institutional Investors, Corporate Governance Policies, § 5.15 Stock Sales (adopted Oct. 7, 2008) (on file with CII) ("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 [and] 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

the rule.[5] Those practices included: (1) sales of stock through a 10b5-1 plan soon after the plan's adoption; (2) frequent amendments and terminations of existing 10b5-1 plans; and (3) the lack of disclosure of 10b5-1 plan adoptions, amendments and terminations.[6]

CII believed in 2008, as we do now, that those types of activities may indicate that the plans were not adopted in good faith or that material non-public information was a factor in the decision to trade through a 10b5-1 plan.[7]

The stated benefit of Rule 10b5-1 when adopted was to "increase investor confidence in the integrity and fairness of the market . . . ."[8] CII agrees that public confidence that our securities markets are fair to all participants serves the interests of companies and investors.[9] And when public company executives conduct transactions in company stock through a 10b5-1 plan using practices that are inconsistent with the spirit of the rule, public confidence in corporate management teams and the markets can erode.[10]

In December of 2012, CII submitted a rulemaking petition to the SEC (CII Petition).[11] The CII Petition requested that the SEC consider requiring Rule 10b5-l plans to adopt the following 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;

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company policies discuss plan use in the context of guidelines or requirements on equity hedging, holding and ownership.").

[5] *See* Selective Disclosure and Insider Trading, Securities Act No. 7,881, Exchange Act Release No. 43,154, Investment Company Act Release No. 24,599, 65 Fed. Reg. 51,716 (Aug. 15, 2000), https://www.govinfo.gov/content/pkg/FR-2000-08-24/pdf/00-21156.pdf ("the rule also sets forth several affirmative defenses, which we have modified in response to comments, to permit persons to trade in certain circumstances where it is clear that the information was not a factor in the decision to trade.").

[6] *See* Council of Institutional Investors, Corporate Governance Policies, § 5.15 Stock Sales.

[7] *See* Prepared Written Remarks of Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors, United States Securities and Exchange Commission, Investor Advisory Committee 2 (June 10, 2021), https://www.cii.org/files/issues_and_advocacy/correspondence/2021/June%2010%202021%20SEC%20IAC--(final)%20LN%20(005).pdf ("We believed in 2008, as we do now, that those types of activities may indicate that the plans were not adopted in good faith or that material non-public information was a factor in the decision to trade through a 10b5-1 plan.").

[8] 65 Fed. Reg. at 51,733.

[9] *See* Prepared Written Remarks of Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors, United States Securities and Exchange Commission, Investor Advisory Committee at 2 ("CII agrees that public confidence that our securities markets are fair to all participants serves the interests of companies and investors.").

[10] *See, e.g.,* Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors to The Honorable Elissa B. Walter, Chairman, U.S. Securities and Exchange Commission 2 (Dec. 28, 2012), https://www.sec.gov/rules/petitions/2013/petn4-658.pdf ("consistent with our membership approved policies, [CII] 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 [and] . . . are essential to restoring public confidence with respect to purchases and sales of a company's securities by its insiders.").

[11] *See id.* at 1.

- 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.[12]

The CII Petition also requested, consistent with the then CII membership approved policy, that the Commission consider:

- Providing greater disclosure regarding the adoption, amendment and termination of Rule 10b5-1 plans, and
- Making corporate boards explicitly responsible for the oversight of Rule 10b5-1 plans.[13]

In addition to CII member concerns about 10b5-1 plan practices, two sources of information also prompted submission of the CII Petition.

First, in November 2012, the Wall Street Journal (Journal) reported on its analysis of executives who had traded their own companies' stock since 2004.[14] The Journal analysis focused on "20,237 executives who traded in their own companies' stock during the week before their companies made news."[15]

The study found that "1,418 executives recorded average stock gains of 10% (or avoided 10% losses) within a week after their trades," which "was close to double the 7k. who saw the stock they traded move against them that much."[16] The Journal quoted Lauren Cohen, then an associate professor of business administration at Harvard University and the co-author of a study that found corporate insiders' trading was "'statistically much better than we'd expect . . . ."[17] The Journal went on to highlight instances where executives recorded gains and avoided losses for transactions in company shares, including pursuant to 10b5-1 trading plans.[18]

The Journal identified a number of the shortcomings in 10b5-1 plan practices, including:

- An "executive's trading plan set a target price for some of [the executive's] sales that was too high to make it possible to sell [and] [a]n amendment to the plan fixed this."[19]

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[12] Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors to The Honorable Elissa B. Walter, Chairman, U.S. Securities and Exchange Commission at 3.
[13] *Id.* at 2.
[14] *See* Susan Pulliam & Rob Barry, Executives' Good Luck in Trading Own Stock, Wall St. J. (Nov. 27, 2012) (on file with CII).
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *See id.*
[19] *Id.*

- "[T]here is no a rule about how long the [trading] plans must be in place before trading under the plans can begin." [20]
- "Executives can generally cancel a trading plan at any time . . . [including] when they possess private information and when the cancellation of the plan's prescribed trades could benefit them financially."[21]
- "Companies and executives don't have to file these trading plans with any federal agency . . . [meaning] the plans aren't readily available for regulators, investors or anyone to examine."[22]

On these last two points: With respect to the practice of cancelling 10b5-1 plans, the Journal also cited to a study by Alan Jagolinzer, then a business professor at the University of Colorado, that found "46% of early terminations of 10b5-1 plans calling for share sales occurred within 90 days before the company released positive news" and "only 11% of the terminations of plans that called for share sales came before negative company news."[23]

And with respect to the lack of transparency of 10b5-1 plans, the Journal quoted a hedge fund manager, David Berman of Berman Capital Management, who stated: '"Sometimes a 10b5-1 plan is legitimate and other times it's not, but there is no way of knowing because there is no disclosure of anything to investors.'"[24]

The second source of new information that prompted submission of the CII Petition came in the form of an unsolicited telephone call from a prominent corporate securities lawyer in private practice. The lawyer informed us that he was uncomfortable with the current practice for designing and implementing 10b5-1 plans, which he characterized as inconsistent with the spirit, if not the letter, of Rule 105b-1. That lawyer assisted in drafting the CII Petition, including the proposed reforms set forth therein.

In September 2019, CII updated its membership approved executive compensation policies to streamline its voice on pay design. As part of that project, CII decided to address the related issue of insider stock sales through a separate statement, in part to elevate and expand upon our concerns related to the manner and timing of such sales.

Adopted in March 2020, the CII membership-approved "Statement on Stock Sales by Insiders," (CII Statement), which largely tracks the recommendations in the CII Petition, reflects our current position on Rule 10b5-1 plans.[25] The CII Statement provides in relevant part:

> CII recommends that boards adopt a policy requiring that insider stock sales take place either through a robust automatic trading plan governed by Rule 10b5-1 or

[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *See* Council of Institutional Investors, CII Policies, Statement on Stock Sales by Insiders.

> through processes and controls, approved by an appropriate board committee, that mimic the rules and features of such a plan.
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> For Rule 10b5-1 plans to fulfill their legitimate purpose, they should be: publicly disclosed; adopted when the participant is not in possession of material, non-public information; inactive for at least three months following adoption; and ineligible for substantive modification. Participants should not be party to concurrently active 10b5-1 plans, and companies should avoid frequently cancelling and adopting new plans. Boards should periodically monitor plan transactions and adopt written policies covering plan practices, including how plans may be used in the context of guidelines or requirements on equity hedging, holding and ownership; and suspend trading under such plans upon internal awareness of an M&A transaction or tender offer involving the company.
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> **Background & Intent**
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> In seeking to remove insiders' ability to influence the timing of stock sales, the adoption of Rule 10b5-1 in 2000 created a path for insiders in possession of material, non-pubic information to sell stock through automatic trading plans . . . under federal insider trading rules. 10b5-1 plans need to be strengthened to eliminate the insider influence they intended to remove. Currently these plans are not transparent. Existing plans can be revised, or they can be terminated and replaced with newer plans with different terms. Participants can have multiple, overlapping plans, and initial participation does not require a meaningful waiting period, enabling opportunistically-timed selling.[26]

Summary of CII Views on the Proposed Rule

CII strongly supports the Proposed Rule. The following is a brief summary of our responses to key issues raised therein:

Cooling Off Period

CII generally believes the Proposed Rule's 120-day cooling-off period is an appropriate condition to the availability of the affirmative defense from insider trading. The proposed period is superior to a shorter period because we believe it would better deter insiders from seeking to capitalize on unreleased material non-public information for the upcoming quarter.

[26] *Id.*

Director and Officer Certifications

CII generally believes the Proposed Rule's certification requirement is an appropriate condition to the availability of the affirmative defense for directors and officers. We, however, would support revising the Proposed Rule's instruction providing guidance about the retention of the certification to require the issuer, either instead of, or in addition to the director or officer, to retain the certification. We believe that requiring the issuer to retain the certification is generally consistent the CII Statement.

Restricting Multiple Overlapping Rule 10b5–1 Trading Arrangements

CII generally believes it is appropriate for the Proposed Rule to exclude from the affirmative defense multiple concurrent trading arrangements for open market purchases or sales of the same class of securities. We believe the proposed exclusion would deter setting up multiple Rule 10b5-1 plans with trades timed to occur around dates on which it may be expected that the issuer will likely release material non-public information.

Requiring That Trading Arrangements Be Operated in Good Faith

CII generally believes the Proposed Rule's revisions to the existing good faith requirement would have a meaningful impact in helping to deter fraudulent and manipulative conduct and enhancing investor protection.

Quarterly Reporting of Rule 10b5–1(c) Trading Arrangements

CII generally supports the Proposed Rule's required disclosure of the adoption or termination of a trading arrangement by a director, officer or the issuer. We, however, believe the Proposed Rule should be revised to require, consistent with the September 2021 recommendation of the SEC's Investment Advisory Committee (IAC) (IAC Recommendation) that the disclosures be made on Form 8-K rather than on Form 10-Q. We generally believe disclosure of the adoption, cancellation, or modification of a Rule 10b5-1 plan via a Form 8-K would enhance market efficiency by providing investors timelier information about potentially material market signals.

Disclosure of Insider Trading Policies and Procedures

CII generally believes that the Proposed Rule's disclosure requirements regarding a registrant's insider trading policies and procedures would provide useful information to investors. We generally believe specific disclosures concerning registrants' insider trading policies and procedures would benefit investors by enabling them to assess registrants' corporate governance practices and to evaluate the extent to which those policies and procedures protect shareholders from the misuse of material non-public information.

Structured Data Requirements

CII generally believes the Proposed Rule's requirement to tag the required disclosures in Inline XBRL will improve the quality and usability of the Rule 10b5-1 data for investors. We believe

requiring Inline XBRL tagging benefits investors by making the disclosures more readily available and easily accessible for aggregation, comparison, filtering and other analysis, as compared to requiring a non-machine-readable data language.

Identification of Rule 10b5–1(c) and Non-Rule 10b5–1(c)(1) Transactions on Forms 4 and 5

CII believes the Proposed Rule should be revised to add (1) a mandatory checkbox on Forms 4 and 5 to indicate whether a sale or purchase was made pursuant to a Rule 10b5-1(c) plan, and (2) a required disclosure of the date of adoption of the Rule 10b5–1 plan. We generally believe that requiring this disclosure on Forms 4 and 5 would provide greater transparency around the use of Rule 10b5–1 plans that would be useful to investors.

CII Responses to Requests for Comment

More details about CII views on the Proposed Rule in the form of responses to select requests for comment are set forth below. The SEC questions to which we are responding appear in italics.

SEC Request for Comment 1. *Is the proposed cooling-off period an appropriate condition to the Rule 10b5-1(c)(1) affirmative defense for contracts, instructions and written plans? Would a cooling-off period effectively reduce the potential to abuse the rule, such as from selective termination of trades?*[27]

CII Response. CII generally believes the Proposed Rule's cooling-off period is an appropriate condition to the Rule 10b5-1(c)(1)[28] affirmative defense. As indicated, the proposed condition is generally consistent with the CII Petition which included the following provision: "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 . . . ."[29] The views reflected in the CII Petition were informed, in part, by 2012 reporting in the Journal indicating that one of the many shortcomings of 10b5-1 plan practices was that: "[T]here is not a rule about how long the [trading] plans must be in place before trading under the plans can begin."[30]

As indicated, the proposed cooling-off period is also generally consistent with our current membership-approved CII Statement which provides that: "For Rule 10b5-1 plans to fulfill their legitimate purpose, they should be . . . inactive for at least three months following adoption. . . ."[31] The Background & Intent of the CII Statement provides: "[I]nitial participation [currently] does not require a meaningful waiting period, enabling opportunistically-timed selling."[32]

In addition, we generally agree with the SEC that "if adopted, the proposed cooling-off periods would deter officers, directors and issuers from adopting or modifying their Rule 10b5-1 plans

[27] 87 Fed. Reg. at 8,690 (emphasis added).
[28] *See* 17 C.F.R § 240.10b5-1(c)(1).
[29] Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors to The Honorable Elissa B. Walter, Chairman, U.S. Securities and Exchange Commission at 3.
[30] *See* Susan Pulliam & Rob Barry, Executives' Good Luck in Trading Own Stock, Wall St. J.
[31] Council of Institutional Investors, CII Policies, Statement on Stock Sales by Insiders.
[32] *Id.*

on the basis of material nonpublic information."[33] As explained in CII staff remarks before the June 2021 meeting the IAC (CII Remarks): "[S]ales of stock through a 10b5-1 plan soon after the plan's adoption . . . may indicate that the plans were not adopted in good faith or that material non-public information was a factor in the decision to trade through a 10b5-1 plan."[34]

We also generally agree with the SEC that the "proposed cooling off period should also discourage registrants, directors and officers from selectively terminating or cancelling a planned trade under a Rule 10b5-1 trading arrangement because they would be subject to a cooling-off period with respect to the adoption of any new/modified plan."[35] Again as we explained in the CII Remarks: "[T]erminations of existing 10b5-1 plans . . . may indicate that the plans were not adopted in good faith or that material non-public information was a factor in the decision to trade through a 10b5-1 plan."[36] As indicated, this was another troubling 10b5-1 practice explicitly identified by the Journal in 2012: "Executives can generally cancel a trading plan at any time . . . [including] when they possess private information and when the cancellation of the plan's prescribed trades could benefit them financially."[37]

SEC Request for Comment 2: *Should the application of a cooling-off period be limited to directors, officers (as defined in Rule 16a-1(f)) and issuers, as proposed? Should the proposed cooling-off period instead apply to all traders who rely on the Rule 10b5-1(c)(1) affirmative defense?*[38]

CII Response. CII generally supports the Proposed Rule's limiting the application of the cooling off period to directors, officers and issuers as proposed. The proposed application of the cooling off period is generally consistent with the CII Petition which focuses primarily on "companies and company insiders" and "Board responsibilities."[39] The proposed application of the cooling-off period is also generally consistent with CII's Statement which focuses primarily on "executives, officers and directors, . . . companies . . . [and] boards . . . ."[40] We note that neither the CII Petition nor the CII Statement indicates that a cooling off period should apply to all traders.

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[33] 87 Fed. Reg. at 8,690.
[34] Prepared Written Remarks of Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors, United States Securities and Exchange Commission, Investor Advisory Committee meeting at 2; *see, e.g.,* Letter from Stephanie Korenman, Partner, Stern Tannenbaum & Bell LLP to Ms. Vanessa A. Country, Secretary, U.S. Securities and Exchange 2 (Mar. 2, 2022), https://www.sec.gov/comments/s7-20-21/s72021-20118379-271289.pdf ("a waiting period forces time to pass before executing the first trade under a plan, ensuring that whatever knowledge the executive had when adopting the plan has matured into a disclosable fact or has dissipated as ephemeral'").
[35] 87 Fed. Reg. at 8,690.
[36] Prepared Written Remarks of Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors, United States Securities and Exchange Commission, Investor Advisory Committee meeting at 2.
[37] *See* Susan Pulliam & Rob Barry, Executives' Good Luck in Trading Own Stock, Wall St. J.
[38] 87 Fed. Reg. at 8,690 (emphasis add).
[39] Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors to The Honorable Elissa B. Walter, Chairman, U.S. Securities and Exchange Commission at 3.
[40] Council of Institutional Investors, CII Policies, Statement on Stock Sales by Insiders.

We generally agree with the SEC that: "Applying a cooling-off period to directors and 'officers' as that term is defined in Exchange Act Rule 16a-1(f)[41] is appropriate because such individuals are more likely than others to be aware of material nonpublic information in the general course of events, and also more likely to be involved in making or overseeing key corporate decisions that have the potential to affect the issuer's stock price, including decisions about the timing of the disclosure of such information."[42] We also generally agree that "applying a cooling-off period to issuers addresses the concern that issuers may conduct stock buybacks while aware of material nonpublic information . . . [and] would reduce the likelihood of such scenarios and promote investor protections."[43]

SEC Request for Comment 4: *Is the proposed 120-day cooling-off period appropriate for directors and officers? Should we require a shorter or longer cooling-off period? For example, should we require a cooling-off period of sixty days after the adoption of a new/modified trading arrangement or a cooling off period of 180 days?*[44]

CII Response. CII generally believes the Proposed Rule's 120-day cooling-off period is appropriate for directors and officers. The proposed period is generally consistent with the CII Petition and the CII Statement which recommend cooling off periods of "three months or more"[45] and "at least three months[,]"[46] respectively.

We generally agree with the SEC that the proposed 120-day cooling off period is superior to a shorter period, including 60[47] or 90 days, because it would better "deter insiders from seeking to capitalize on unreleased material nonpublic information for the upcoming quarter."[48] We note that the proposed 120-day cooling off period is the minimum period in the IAC

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[41] *See* Definition of terms, 17 C.F.R. § 240.16a-1(f) (2011), *available at* https://www.law.cornell.edu/cfr/text/17/240.16a-1 ("The term 'officer' shall mean an issuer's president, principal financial officer, principal accounting officer (or, if there is no such accounting officer, the controller), any vice-president of the issuer in charge of a principal business unit, division or function (such as sales, administration or finance), any other officer who performs a policy-making function, or any other person who performs similar policy-making functions for the issuer.").
[42] 87 Fed. Reg. at 8690 (footnotes omitted).
[43] *Id.*
[44] *Id.* at 8,691 (emphasis added).
[45] Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors to The Honorable Elissa B. Walter, Chairman, U.S. Securities and Exchange Commission at 3.
[46] Council of Institutional Investors, CII Policies, Statement on Stock Sales by Insiders.
[47] S*ee, e.g.,* David F. Larcker et al., Gaming the System: Three "Red Flags" of Potential 10b5-1 Abuse, Stan. Closer Look Series at 2 ("the first planned trade with a cooling off period between 30 and 60 days is associated with a subsequent -1.5 percent return"); s*ee generally* Council of Institutional Investors, 10b5-1 Trading Plans with Professor Daniel Taylor, Voice of Corp. Governance (Feb. 18, 2021), *available at* https://music.amazon.com/podcasts/9a89141e-e2c4-4c9a-99f9-5011c2498248/episodes/8300a31f-f561-4618-baef-94ca8f5515b1/the-voice-of-corporate-governance-rule-10b5-1-trading-plans-with-professor-daniel-taylor (discussing "Gaming the System: Three "Red Flags" of Potential 10b5-1 Abuse").
[48] 87 Fed. Reg. at 8,690; s*ee, e.g.,* David Slovick & Aaron B. Wesson, SEC Proposes Amendments to the Requirements of Rule 10b5-1 Trading Plans, Nat't L. Rev. (Dec. 22, 2022), https://www.natlawreview.com/article/sec-proposes-amendments-to-requirements-rule-10b5-1-trading-plans ("imposing a 120-day cooling-off period on officers and directors would appear to deter abuse of Rule 10b5-1 trading plans because any undisclosed market event worth trading on presumably would have passed or changed before any nefarious trading under the plan could commence").

Recommendation[49] and at the low end of the days recommended by former SEC Chairman Jay Clayton[50] and echoed by SEC Commissioner Caroline Crenshaw.[51]

We also note that the IAC Recommendation references the recent study by academics at Stanford University and The Wharton School. [52] That study examined over 20,000 Rule 10b5-1 plans, their associated adoption dates and trades representing $105 billion in trading activity.[53] The study included the following recommendation and related analysis generally consistent with Proposed Rule's 120-day cooling off period:

> *Minimal cooling-off periods.* The shorter the interval between plan adoption and the first trade, the more likely it appears that the plan is being used opportunistically. With longer cooling off periods, opportunistic trading disappears.
> *Recommendation.* Require a minimum cooling-off period. A cooling-off period of 4 to 6 months, as suggested by former SEC Chairman Clayton, is supported by the data in our sample. We find that initial trades occurring 4 to 6 months after plan adoption do not systematically anticipate stock price declines.[54]

The IAC Recommendation ultimately concludes that "a cooling off period of at least four months would ensure that insiders could not adopt a plan that executes a trade in the same quarter—the trade would necessarily be in the following quarter."[55] CII agrees.

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[49] *See* Recommendation of the Investor Advisory Committee Regarding Rule 10b5-1 Plans 3 (approved Sept. 9, 2021), https://www.sec.gov/spotlight/investor-advisory-committee-2012/20210916-10b5-1-recommendation.pdf. ("Require a 'cooling off' period of at least four months between the adoption or modification of a Rule 10b5-1 plan and the execution of the first trade under the newly adopted or newly modified plan.").
[50] *See, e.g.,* Paul Keiran, Markets, SEC Chairman Urges Corporate Insiders to Avoid Quick Stock Sales, Wall St. J. (Nov. 17, 2020) (on file with CII) ("'For senior executive officers using 10b5-1 plans to sell stock, I do believe that a cooling-off period from the time that the plan is put in place or is materially changed, until the first transaction, is appropriate' . . . [w]hether that's four months so you cover a full quarter, or it's six months—I can make arguments for either . . . I do think we should do it."').
[51] *See* Caroline Crenshaw & Daniel Taylor, Finance, Insider Trading Loopholes Need to Be Closed, BloombergOpinion (Mar. 15, 2021) (on file with CII) ("In particular, echoing former chairman Jay Clayton, the commission should consider imposing a mandatory 'cooling off period' of four to six months between the adoption or modification of a plan and the first planned trade [and] [i]f implemented, empirical evidence suggests this approach would eliminate a considerable amount of opportunistic trading.").
[52] *See* Recommendation of the Investor Advisory Committee Regarding Rule 10b5-1 Plans at 3.
[53] S*ee* David F. Larker et al., Gaming the System, Three "Reg Flags" of Potential 10b5-1 Abuse, Stan. Closer Look Series at 2 ("Our sample includes data on all sales of restricted stock filed on Form 144 between January 2016 and May 2020 and the adoption date of any corresponding 10b5-1 plans.").
[54] David F. Larker et al., Gaming the System, Three "Reg Flags" of Potential 10b5-1 Abuse, Stan. Closer Look Series at 3.
[55] Recommendation of the Investor Advisory Committee Regarding Rule 10b5-1 Plans at 4; *cf.* Commissioner Elad L. Roisman, Statement on the Proposed Rules Regarding 10b5-1 Plans (Dec. 15, 2021), https://www.sec.gov/news/statement/roisman-10b5-1-20211215 ("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.").

SEC Request for Comment 8: *Is the proposed certification requirement an appropriate condition to the availability of the Rule 10b5-1(c)(1)(ii) affirmative defense for directors and officers? Are there other ways that an officer or director could demonstrate that they do not possess material nonpublic information when adopting a trading arrangement?*[56]

CII Response: CII generally believes the Proposed Rule's certification requirement is an appropriate condition to the availability of the Rule 10b5-1(c)(1)(ii) affirmative defense for directors and officers.[57] We believe the proposed certification is generally consistent with the intent of the CII Petition which was, in part, to address "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."[58]

The proposed certification requirement is also generally consistent with the intent of the CII Statement which was, in part, to strengthen "10b5-1 plans . . . to eliminate the insider influence they intended to remove." [59] We, therefore, generally agree with the SEC that the proposed certification requirement could "reinforce directors' and officers' cognizance of their obligation not to trade or adopt a trading plan while aware of material nonpublic information, that it is their responsibility to determine whether they are aware of material non-public information when adopting Rule 10b5-1 plans, and that the affirmative defense under Rule 10b5-1 requires them to act in good faith and not to adopt such plans as part of a plan or scheme to evade the insider trading laws."[60]

SEC Request for Comment 11: *The proposed instruction provides guidance that a director or officer should retain the certification for ten years consistent with the ten-year statutes of limitations that govern the Commission's insider trading actions. Should we instead require the issuer to retain the certification, either instead of or in addition to the director or officer? If so, how long should the issuer be required to retain the certification? Should we allow the individuals and issuers to develop their own retention policies for the certification?*[61]

CII Response: CII generally believes the Proposed Rule's instruction providing guidance about the retention of the certification should be revised to require the issuer, either instead of, or in addition to the director or officer to retain the certification.[62] We appreciate SEC Commissioner Hester M. Peirce's concern about the potential "burdens associated" with a director or officer retaining the certification for 10 years.[63]

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[56] 87 Fed. Reg. at 8,691 (emphasis added).
[57] *See id.* at 7,729 (proposed Rule 10b5-1(c)(1)(ii)).
[58] Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors to The Honorable Elissa B. Walter, Chairman, U.S. Securities and Exchange Commission 2 (Dec. 28, 2012), https://www.sec.gov/rules/petitions/2013/petn4-658.pdf.
[59] Council of Institutional Investors, CII Policies, Statement on Stock Sales by Insiders.
[60] 87 Fed. Reg. at 8,691.
[61] *Id.* at 8,692 (emphasis added).
[62] *See id.* at 8,729 (proposed instruction to Rule 10b5– 1(c)(1)(ii)(C)).
[63] Commissioner Hester M. Peirce, Statement on Rule 10b5-1 and Insider Trading Proposing Release (Dec. 15, 2021), https://www.sec.gov/news/statement/peirce-10b5-20211215; *see* Client Update, You'd better watch out! New rules for company and insider stock transactions are coming to town, Davis Polk (Dec. 20, 2021), https://www.davispolk.com/insights/client-update/youd-better-watch-out-new-rules-company-and-insider-stock-

We believe that requiring the issuer to retain the certification is generally consistent with the CII Petition's support for "making boards explicitly responsible for the oversight of Rule 10b5-1 plans [and by doing so] will make them more responsive to long-term shareowners and more vigilant in their oversight responsibilities . . . ."[64] Similarly, we believe that requiring the issuer to retain the certification is also generally consistent with the CII Statement which indicates that "Boards should periodically monitor plan transactions and adopt written policies covering plan practices . . . ."[65]

SEC Request for Comment 13: *Are there legitimate uses of multiple, overlapping Rule 10b5–1 trade arrangements? If so, what are they? Is it appropriate to exclude from the affirmative defense multiple concurrent trading arrangements for open market purchases or sales of the same class of securities as proposed? Would the proposal create incentives for corporate insiders to own different classes of stock? Are there alternative approaches to addressing the concerns with multiple trading arrangements discussed above*?[66]

CII Response. CII generally believes it is appropriate to exclude from the affirmative defense multiple concurrent trading arrangements for open market purchases or sales of the same class of securities as proposed. The proposed exclusion is generally consistent with the CII Petition which included the following provision: "Companies and company Insiders should be prohibited from adopting multiple, overlapping Rule 10b5-1 plans. . . ."[67] It is also generally consistent with the CII Statement which provides: "Participants should not be party to concurrently active 10b5-1 plans . . . ."[68]

We generally share the SEC's concerns that multiple, overlapping Rule 10b5–1 trade arrangements can be used to:

> [E]xploit inside information by setting up trades timed to occur around dates on which they expect the issuer will likely release material nonpublic information. . . . [And] [w]e are also concerned that a person could circumvent the proposed cooling-off period by setting up multiple overlapping Rule 10b5–1(c)(1) trading arrangements, and deciding later which trades to execute and which to cancel: after they become aware of material nonpublic information but before it is publicly released.[69]

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transactions-are ("The certification would need to be kept by the officer or director for 10 years (creating paperwork headaches for individuals) . . . .").

[64] Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors to The Honorable Elissa B. Walter, Chairman, U.S. Securities and Exchange Commission at 3.

[65] Council of Institutional Investors, CII Policies, Statement on Stock Sales by Insiders.

[66] 87 Fed. Reg. at 8,692 (emphasis added).

[67] Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors to The Honorable Elissa B. Walter, Chairman, U.S. Securities and Exchange Commission at 3.

[68] Council of Institutional Investors, CII Policies, Statement on Stock Sales by Insiders.

[69] 87 Fed. Reg. at 8,692.

And we note that our shared concern may, in part, be why "[m]any companies do not permit officers and directors to enter into overlapping Rule 105b-1 plans as part of their trading policies."[70]

We also generally agree with the SEC that the proposed restriction with respect to multiple overlapping Rule 10b5–1(c)(1) trading arrangements is appropriately "designed to eliminate the ability of traders to use multiple plans to strategically execute trades based on material nonpublic information and still claim the protection of an affirmative defense for such trades."[71]

SEC Request for Comment 16: *Would the addition of ''and operated'' to the good faith requirement in Rule 10b5–1(c)(1)(ii), as proposed, have a meaningful impact? If not, what are alternative approaches that would address the concern over the manipulation of the timing of corporate disclosures to benefit a trade under a Rule 10b5–1(c)(1) trading arrangement?*[72]

CII Response. CII generally believes the Proposed Rule's addition of ''and operated''[73] to the good faith requirement in Rule 10b5–1(c)(1)(ii), as proposed, would have a meaningful impact. As we described in the CII Petition:

> 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"). 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.
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> 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. *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.*[74]

We generally agree with the SEC that "[a]mending the condition that a Rule 10b5–1 trading arrangement be entered into in good faith to further require that the trading arrangement also be operated in good faith would help deter fraudulent and manipulative conduct and enhance

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[70] Richard Alsop, SEC Proposes Significant Changes to Rule 10b5-1 Plans and Introduces New Disclosure Requirements, Sherman & Sterling (Dec. 24, 2021), https://www.shearman.com/perspectives/2021/12/sec-proposes-significant-changes-to-rule-10b5-1-plans-and-introduces-new-disclosure-requirements#:~:text=Rule%2010b5%2D1%20Plan%20and%20Other%20Trading%20Arrangement%20Disclosures&text=The%20proposed%20rule%20introduces%20a,trading%20of%20the%20company's%20securities.
[71] 87 Fed. Reg. at 8,692.
[72] *Id.* at 8,693 (emphasis added).
[73] *Id.* at 8,729.
[74] Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors to The Honorable Elissa B. Walter, Chairman, U.S. Securities and Exchange Commission at 2 (footnotes omitted and emphasis added).

investor protection throughout the duration of the trading arrangement."[75] We also generally agree with the intended purpose of the proposed amendment "to make clear that the affirmative defense would not be available to a trader that cancels or modifies their plan in an effort to evade the prohibitions of the rule or uses their influence to affect the timing of a corporate disclosure to occur before or after a planned trade under a trading arrangement to make such trade more profitable or to avoid or reduce a loss."[76]

SEC Request for Comment 17: *Is there evidence to suggest that corporate insiders influence the timing of corporate disclosures to benefit their trades under a Rule 10b5–1 trading arrangement? Is there evidence to suggest that any efforts to time corporate disclosures would not be sufficiently mitigated by the 120-day cooling-off period?*[77]

CII Response. CII generally believes that there is evidence to suggest that corporate insiders influence the timing of corporate disclosures to benefit their trades under Rule 10b5-1 trading arrangements. As one recent example, in 2020 Professor Joshua Mitts of Columbia Law School reviewed Form 8-K filings, insider trading reports, and daily share prices from January 1, 1996 to October 30, 2020.[78] As a result of that review Professor Mitts found that:

> Insiders sell more shares in dollar volume under 10b5-1 plans when good news is disclosed, and more on days where the disclosed news is better. T-statistics for the difference in means are given below the point estimates, indicating that all of the differences are highly statistically significant. Taken together these results indicate that prearranged sales of stock under Rule 10b5-1 are more likely to occur on days when public companies announce good news to the market.[79]

SEC Request for Comment 21: *Would the disclosures in proposed Item 408(a) provide useful information to investors and the markets? Does the proposed disclosure requirement specify all of the information that should be disclosed as to registrants' trading arrangements? Does the proposed disclosure requirement specify all of the information that should be disclosed as to trading arrangements of officers and directors? Are there other disclosures that we should require that would provide more transparency into the use of Rule 10b5–1 and non-Rule 10b5–1 trading arrangements? Is there any information that we have proposed to require be disclosed*

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[75] 87 Fed Reg. at 8,693.
[76] *Id.*
[77] *Id.* (emphasis added).
[78] *See* Joshua Mitts, Insider Trading and Strategic Disclosure 7 (Dec. 7, 2020) (Colum. L. & Econ Working Paper No. 636), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3741464 ("To construct my sample, I follow the same approach as Cohen, Jackson & Mitts (2015) and merge together three different data sources: Form 8-K filings, insider trading reports, and daily share prices from CRSP-Compustat.").
[79] *Id*. at 9-10; *see generally* Council of Institutional Investors, Insider Trading and Strategic Disclosure with Professor Joshua Mitts, Voice of Corp. Governance (Apr. 22, 2021), *available at* https://www.audible.com/pd/Insider-Trading-and-Strategic-Disclosure-with-Professor-Joshua-Mitts-Podcast/B0932C6VG6 (describing evidence of corporate insiders selling shares using 10b5-1 plans at the time of disclosure of positive news); *see, e.g.,* Alan D. Jagolinzer, SEC Rule 10b5-1 and Insiders' Strategic Trade , Mgmt. Sci. 18 (Feb. 1, 2009) *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=541502 ("There is evidence that participants' sales, on average, generate abnormal trade returns, that a substantive proportion of selected 10b5-1 plan initiations are associated with pending adverse news disclosure, and that participants terminate sales plans before positive shifts in firm returns.").

that we should not require? We are proposing disclosure about trading arrangements both for registrants and for officers and directors. Should we instead require disclosure about only one of those categories of traders? Should we consider requiring disclosure of trading arrangements of insiders who are not officers or directors? If so, at what level of specificity?[80]

CII Response. CII generally believes that the disclosures in proposed Item 408(a)[81] provide useful information to investors and the markets. We note that currently, with the exception of Form 144's[82] requirement that sellers disclose the date on which a Rule 10b5-1 plan was adopted, there generally are no mandatory disclosure obligations regarding the use of Rule 10b5-1 trading arrangements.[83] As a result, a key aspect of the CII Petition was the need for more disclosures about Rule 10b5-1 plans:

> We believe the required adoption of the protocols and guidelines . . . 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.[84]

Similarly, the CII Statement provides that: "For Rule 10b5-1 plans to fulfill their legitimate purpose, they should be: publicly disclosed . . . ."[85]

We note that CII member views reflected in the CII Petition and CII Statement are generally consistent with IAC Recommendation based on the following related IAC findings:

> Although plans must be adopted in good faith to qualify for an "affirmative defense" against insider trading liability, the current reporting regime lacks transparency around plan adoptions, modifications, terminations . . . . This creates a black box around plans that effectively shields insiders from investor scrutiny and possible enforcement action in cases of potential abuse. Key information such as the adoption or modification of a plan is not readily available to the public, nor is it made available to the Commission.
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> Information on . . . plan cancellations – an area that is particularly vulnerable to abuse – are not subject to mandatory disclosure at all. All of the panelists supported strengthening disclosure, as greater transparency works toward reassuring the

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[80] 87 Fed. Reg. at 8,694 (emphasis added).
[81] *See id*. at 8,728 (proposed Item 408(a)).
[82] *See* Form 144, SEC (last visited Mar. 24, 2022), https://www.sec.gov/files/form144.pdf.
[83] *See, e.g.,* Robert B. Robbins et al., SEC Proposes Broad Amendments to Longstanding Rule 10b5-1 Protections, Corporate Governance Advisor 22 (Mar./Apr. 2022), https://www.mayerbrown.com/-/media/files/perspectives-events/publications/2022/03/corporate-governance-advisormarapr2022.pdf ("Currently, with the exception of Form 144's requirement that sellers disclose the date on which a Rule 10b5-1 plan was adopted, there are no mandatory disclosure obligations regarding the use of Rule 10b5-1 trading arrangements.").
[84] Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors to The Honorable Elissa B. Walter, Chairman, U.S. Securities and Exchange Commission at 3.
[85] Council of Institutional Investors, CII Policies, Statement on Stock Sales by Insiders.

> market that plan adoption, modification, cancellation, . . . associated with Rule 10b5-1 plans, are conducted in good faith and not used by insiders to circumvent insider trading rules.
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> . . . .
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> Collectively, these disclosure gaps: (1) prevent proactive risk assessment and policing by the market; (2) limit the Commission's ability to actively and efficiently monitor the adoption, modification, or cancellation of plan details, for enforcement purposes; and (3) reduce market efficiency by obscuring potentially material signals (such as a sizeable sale by an executive) from full view.[86]

CII generally agrees with the SEC that the Proposed Rule's disclosures "would allow investors to assess the extent to which directors, officers and the issuer are adopting or terminating such trading arrangements during periods when they may be aware of material nonpublic information"[87] We also generally agree with the SEC that the proposed disclosures "would allow investors to assess whether, and if so, how, issuers monitor trading by their directors and officers for compliance with insider trading laws and whether their compliance programs are effective at preventing the misuse of material nonpublic information."[88]

SEC Request for Comment 25: *Is the proposal to require disclosure in Forms 10–Q and 10–K appropriate? Should we instead require disclosure in a different form? Should we consider a different frequency of disclosure*?[89]

CII Response. As indicated, we generally support the proposed disclosure "of the adoption or termination of a trading arrangement by a director, officer or the issuer . . . ."[90] We generally share the SEC's view that such disclosure "provides important information that would better allow investors, the Commission, and other market participants to observe how these trading arrangements are being used."[91] That said, we also generally support the IAC Recommendation that the disclosures be made on Form 8-K rather than on Forms 10-Q and 10-K, as proposed.[92]

More specifically, the IAC Recommendation would:

> Require enhanced public disclosure of Rule 10b5-1 plans, including: . . .
> c. Disclosure on Form 8-K of the adoption, modification, or cancellation of Rule 10b5-1 plans, and the number of shares covered, on a timely basis (i.e., change 8-K rules to include changes to plans by affiliates as material non-public information requiring an 8-K).[93]

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[86] Recommendation of the Investor Advisory Committee Regarding Rule 10b5-1 Plans at 5,7 (footnotes omitted).
[87] 87 Fed. Reg. at 8,694.
[88] *Id.*
[89] *Id.* (emphasis added).
[90] *Id.*
[91] *Id.*
[92] *See* Recommendation of the Investor Advisory Committee Regarding Rule 10b5-1 Plans at 5.
[93] *Id.*

We note that the Proposed Rule provides no explanation as to why this IAC recommendation was not adopted. We also note that this IAC recommendation is aligned with the CII Remarks:

> CII believes, generally consistent with our membership approved 2020 Statement, that the IAC should recommend to the SEC the following actions to strengthen Rule 10b5-1:
> . . . .
> Propose a rule requiring disclosure of Rule 10b5-1 plans, including disclosure of the adoption, modification, or cancellation of those plans, and the number of shares covered, to be filed on Form 8-K.[94]

Consistent with the view of the IAC, we generally believe that more timely disclosure of Rule 10b5-1 plan adoption, modification, or cancellation through the filing of an 8-K would be beneficial to investors. On this point, we share the following observations of the New York City Comptroller Brad Lander:

> Just as the timing of a corporate insider's purchase or sale of company equity may reveal an opportunistic use of a 10b5-1 plan and an insider's expectations with respect to the company's share price, the adoption, cancellation, or modification of a plan may also signal to the market insider expectations. Thus, this information should be made public within days of the activity on the Form 8-K, rather than quarterly, or when a company is filing with respect to other required 8-K matters.
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> . . . .
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> Adding such a requirement for Form 8-K filings will not be unduly burdensome, since the disclosure would be limited to reporting a change in the status of a 10b5-1 plan. However, the burden of 8-K filings will be larger the more modifications and cancellations the company's officers and director make. If officers and directors repeatedly modify and cancel plans, then more 8-Ks will need to be filed. But these are precisely the circumstances—frequent modification and cancellation––where timely information is needed. Indeed, placing a greater disclosure burden on companies whose executives frequently modify and cancel plans should act as a countervailing force to deter such worrisome practices in the first place. Given the benefit of an affirmative defense under Exchange Act Rule 10b5-1(c)(1) to the insider, it is reasonable to expect prompt market transparency.[95]

We generally believe a timelier disclosure of the adoption, cancellation, or modification of a Rule 10b5-1 plan via a Form 8-K would provide more certainty to investors that they are making

[94] Prepared Written Remarks of Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors, United States Securities and Exchange Commission, Investor Advisory Committee at 10.
[95] Letter from The City of New York, Office of the Comptroller, Brad Lander to Vanessa A. Countryman, Secretary, Securities and Exchange Commission 4 (Mar. 23, 2022) (on file with CII).

investment decisions in a transparent market, which should reduce market volatility as a result of uncertainty of the availability of timely information.[96]

SEC Request for Comment 27: *Would the proposed disclosure requirements regarding a registrant's insider trading policies and procedures or lack thereof provide useful information to investors? Is there other information that would be useful to include in Item 408(b)?*[97]

CII Response. CII generally believes that the Proposed Rule's disclosure requirements regarding a registrant's insider trading policies and procedures or lack thereof would provide useful information to investors. The proposed disclosure is generally consistent with the CII Statement which includes the following provision: "CII recommends that boards adopt a policy requiring that insider stock sales take place either through a robust automatic trading plan governed by Rule 10b5-1 or through processes and controls, approved by an appropriate board committee, that mimic the rules and features of such a plan."[98]

More broadly, CII membership approved policies have long supported registrants "maintaining codes of ethics or conduct."[99] Those policies include:

> 1.3 Disclosed Governance Policies and Ethics Code: The Council believes every company should have written, disclosed governance procedures and policies, an ethics code that applies to all employees and directors, and provisions for its strict enforcement . . . .
>
> . . . .
>
> 1.6 Business Practices, Stakeholder Relationships and Long-term Value: CII believes companies should adhere to responsible, ethical business practices and good corporate citizenship. Promotion, adoption and effective implementation of guidelines for the responsible conduct of business and business relationships are consistent with the fiduciary responsibility of protecting long-term investment interests.[100]

We generally agree with the SEC that "[s]pecific disclosures concerning registrants' insider trading policies and procedures would benefit investors by enabling them to assess registrants' corporate governance practices and to evaluate the extent to which those policies and procedures

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[96] *See* Additional Form 8-K Disclosure Requirements and Acceleration of Filing Date, Securities Act Release No. 8,400, Exchange Act Release No. 49,424, 69 Fed. Reg. 15,594, 15,611 (Mar. 16, 2004), https://www.govinfo.gov/content/pkg/FR-2004-03-25/pdf/04-6332.pdf ("Confidence in the expectation of such enhanced disclosure should provide more certainty to those investors that they are making investment decisions in a more transparent market, which should reduce market volatility as a result of uncertainty of the availability of accurate timely information about public companies."); Recommendation of the Investor Advisory Committee Regarding Rule 10b5-1 Plans at 7 ("Collectively, these disclosure gaps: . . . reduce market efficiency by obscuring potentially material signals (such as a sizeable sale by an executive) from full view.").

[97] 87 Fed. Reg. at 8,695 (emphasis added).

[98] Council of Institutional Investors, CII Policies, Statement on Stock Sales by Insiders.

[99] 87 Fed. Reg. at 8,695.

[100] Council of Institutional Investors, Corporate Governance Policies §§ 1.2, 1.6 (updated Mar. 7, 2022), https://www.cii.org/files/03_07_22_corp_gov_policies.pdf.

protect shareholders from the misuse of material nonpublic information."[101] We also generally agree that the proposed disclosures would "provide investors with meaningful information regarding a registrant's insider trading policies and procedures to enable them to better assess the manner in which the registrant promotes compliance with insider trading laws and protects material nonpublic information from misuse."[102]

SEC Request for Comment 31*. Should we require issuers to tag the disclosures required by Item 408 of Regulation S–K in Inline XBRL, as proposed? Are there any changes we should make to ensure accurate and consistent tagging? If so, what changes should we make?*[103]

CII Response. CII generally supports the Proposed Rule's requirement to tag the disclosures required by Item 408[104] of Regulation S-K in Inline XBRL. In 2018, CII publicly supported the SEC's "adoption of amendments requiring the use of Inline . . . XBRL[] format as an important development."[105] Our letter explained:

> Inline XBRL 'allows filers to embed XBRL data directly into the document filed on EDGAR.' This improvement in the functionality of EDGAR makes disclosure documents more valuable and cost-effective for a broad range of users, including market analysts and data vendors that conduct research on smaller companies.[106]

We generally agree with the SEC that:

> Inline XBRL . . . improves the quality and usability of XBRL data for investors. Requiring Inline XBRL tagging of the disclosures provided pursuant to Item 408 would benefit investors by making the disclosures more readily available and easily accessible to investors, market participants, and others for aggregation, comparison, filtering, and other analysis, as compared to requiring a non-machine readable data language such as ASCII or HTML. This would enable automated extraction and analysis of the granular data required by the proposed rules, allowing investors and other market participants to more efficiently perform large-scale analysis and comparison of this information across issuers and time periods. For narrative disclosures, an Inline XBRL requirement would allow investors to extract and search for disclosures about a registrant's insider trading policies and procedures (rather than having to manually run searches for these disclosures through entire documents), automatically compare/redline these disclosures against prior periods, and perform targeted AI/ML assessments of specific narrative disclosures rather than the entire unstructured document.[107]

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[101] 87 Fed. Reg. at 8,695.
[102] *Id.*
[103] *Id.* at 8,696 (emphasis added).
[104] *See id*. at 8,728 (proposed Item 408).
[105] Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors to Nicole Puccio, Branch Chief, Securities and Exchange Commission 2 (July 19, 2018), https://www.cii.org/files/July%2019%202018%20SEC%20Strategic%20Plan%20final%20(003).pdf (footnote omitted).
[106] *Id.* at 2-3 (footnotes omitted).
[107] 87 Fed. Reg. at 8,696.

SEC Request for Comment 35. *Should we add a mandatory checkbox on Forms 4 and 5 to indicate whether a sale or purchase was made pursuant to a Rule 10b5–1(c) plan? Should we require disclosure of the date of adoption of the Rule 10b5–1 plan? Would the Rule 10b5–1(c) checkbox and disclosure of the date of adoption of the plan help provide useful information about whether a Rule 10b5–1 plan was being used to engage in opportunistic trading based on material nonpublic information? Are there alternative methods of providing this information that we should consider?*[108]

CII Response. CII generally believes the Proposed Rule's should add (1) a mandatory checkbox on Forms 4[109] and 5[110] to indicate whether a sale or purchase was made pursuant to a Rule 10b5-1(c) plan and (2) a required disclosure of the date of adoption of the Rule 10b5–1 plan.[111] We addressed this issue in our March 2021 letter[112] in response to the SEC's proposal on "Rule 144 Holding Period and Form 144 filings."[113] In that letter, we explained that adding a mandatory checkbox and requiring disclosure of the date of adoption of the Rule 10b5–1 plan*:*

> [I]s consistent with our long-standing belief that providing greater transparency of Rule 10b5-1 transactions would provide useful information to investors and other market participants. In 2012, The Wall Street Journal published a series of articles that highlighted suspiciously fortuitous trading patterns under Rule 10b5-1 plans adopted by corporate insiders.[114]

Our view on this issue was adopted by the IAC.[115] In support of their related recommendation the IAC explained:

> Information on trades made under Rule 10b5-1 plans is similarly opaque and plan cancellations – an area that is particularly vulnerable to abuse – are not subject to mandatory disclosure at all. All of the panelists supported strengthening disclosure,

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[108] *Id.* at 8,697 (emphasis added).
[109] *See id.* at 8,730. (proposed amendments to Form 4).
[110] *Id.* (proposed amendments to Form 5).
[111] *See, e.g.,* Prepared Written Remarks of Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors, United States Securities and Exchange Commission, Investor Advisory Committee at 10 ("the SEC should enhance the public disclosure of Rule 10b5-1 plans and related transactions [and] [t]his may be accomplished by: • Issuing a final rule in connection with the SEC's 2020 proposed rule on "Rule 144 Holding Period and Form 144 Filings" to require: o Form 4 and Form 5 to indicate via a mandatory check box whether their reported transactions were made pursuant to Rule 10b5-1(c) rather than provide it as an option for the filer . . . .").
[112] *See* Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors to Vanessa A. Countryman Secretary, Securities and Exchange Commission 2 (Mar. 18, 2021), https://www.sec.gov/comments/s7-24-20/s72420-8519687-230183.pdf.
[113] Rule 144 Holding Period and Form 144 Filings, Securities Act Release No. 10,991, Exchange Act Release No. 90,773, 86 Fed. Reg. 5,063 (Dec. 22, 2020), https://www.govinfo.gov/content/pkg/FR-2021-01-19/pdf/2020-28790.pdf.
[114] *See* Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors to Vanessa A. Countryman Secretary, Securities and Exchange Commission at 2 (footnote omitted).
[115] *See* Recommendation of the Investor Advisory Committee Regarding Rule 10b5-1 Plans at 5 ("Enhance disclosure of 10b5-1 trades, including the modification of Form 4 to include the following new, required fields: a. Checkbox to indicate whether a specific trade was pursuant to a Rule 10b5-1 plan. b. A new field to indicate the date of associated Rule 10b5-1 plan adoption or modification.").

> as greater transparency works toward reassuring the market that . . . trades associated with Rule 10b5-1 plans, are conducted in good faith and not used by insiders to circumvent insider trading rules.[116]

And we note that at least one prominent corporate law firm has indicated that "[m]any filers are already making this voluntary disclosure and a checkbox would streamline the process."[117] For all of the above reasons, we generally agree with the SEC that "[r]equiring this disclosure on Forms 4 and 5 would provide greater transparency around the use of Rule 10b5–1 plans and would be consistent with the primary purpose of Exchange Act Section 16."[118]

SEC Request for Comment 45*. Would the proposed amendments to the conditions of Rule 10b5–1(c)(1) benefit investors? In what specific ways would the proposed amendments help protect investor interests?*[119]

CII Response. CII believes the proposed amendments to the conditions of Rule 10b5-1(c)(1) benefit investors. As indicated, the proposed cooling-off periods, the certification requirements, amendments to the good faith provisions, and the exclusion of multiple overlapping trading arrangements are all generally consistent with CII's membership approved policies.[120] As we described in the CII Remarks:

> The stated benefit of Rule 10b5-1 when adopted was to "increase investor confidence in the integrity and fairness of the market . . . ." CII agrees that public confidence that our securities markets are fair to all participants serves the interests of companies and investors. And when public company executives conduct transactions in company stock through a 10b5-1 plan using practices that are inconsistent with the spirit of the rule, public confidence in corporate management teams and the markets can erode.[121]

More specifically, we generally believe the proposed cooling off periods would benefit investors by deterring officers, directors and issuers from adopting or modifying their Rule 10b5-1 plans on the basis of material non-public information.

In addition, we generally believe the proposed certification requirements would benefit investors by reinforcing directors' and officers' cognizance of their obligation not to trade or adopt a trading plan while aware of material non-public information, that it is their responsibility to determine whether they are aware of material non-public information when adopting Rule 10b5-1 plans, and that the affirmative defense under Rule 10b5-1 requires them to act in good faith and not to adopt such plans as part of a plan or scheme to evade the insider trading laws.

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[116] *Id.*
[117] Richard Alsop, SEC Proposes Significant Changes to Rule 10b5-1 Plans and Introduces New Disclosure Requirements, Sherman & Sterling.
[118] 87 Fed. Reg. at 8,697.
[119] *Id.* at 8,712 (emphasis added).
[120] *See* Council of Institutional Investors, CII Policies, Statement on Stock Sales by Insiders.
[121] Prepared Written Remarks of Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors, United States Securities and Exchange Commission, Investor Advisory Committee at 2 (footnotes omitted).

We also generally believe the proposed amendments to the good faith provisions would benefit investors by deterring fraudulent and manipulative conduct and enhancing investor protection throughout the duration of the trading arrangement. This benefit would result from making clear that the affirmative defense would not be available to a trader that cancels or modifies their plan in an effort to evade the prohibitions of the rule or uses their influence to affect the timing of a corporate disclosure to occur before or after a planned trade under a trading arrangement to make such trade more profitable or to avoid or reduce a loss.

Finally, we generally believe the proposed exclusion of multiple overlapping trading arrangements would benefit investors by eliminating the ability of traders to use multiple plans to strategically execute trades based on material non-public information and still claim the protection of an affirmative defense for such trades.

SEC Request for Comment 57*. What are the economic effects of the proposed Item 408 disclosures? Would the proposed disclosures benefit investors, such as by providing additional information to investors or by limiting potential use of MNPI for trading through trading plans?*[122]

CII Response. CII generally believes Proposed Rule's Item 408 disclosures[123] would benefit investors. As indicated, we believe the proposed disclosures are generally responsive to CII's membership approved policies which emphasize the need for public disclosure of Rule 10b5-1 plans as an antecedent to those plans fulfilling their legitimate purpose.[124]

We also generally share the SEC's view that the proposed Item 408 disclosures benefit investors:

> [T]hrough greater transparency about officer, director, and issuer trading arrangements, as well as governance practices with respect to insider trading. The timing of trading plan adoption and termination by officers, directors, or the company itself, as well as a description of the terms of the trading arrangement, would enhance the value of existing trade disclosures, potentially conveying valuable information about the insiders' or the company's views on the company's future outlook, aiding investors in obtaining a more accurate valuation of the company's shares and making more informed investment decisions.[125]

We are optimistic the proposed disclosures will be a catalyst for positive changes to issuer policies and practices relating to insider trading, the disclosure of material non-public information and equity compensation generally.[126]

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[122] 87 Fed. Reg. at 8,716 (emphasis added).
[123] *See id.* at 8,728 (proposed Item 408).
[124] *See* Council of Institutional Investors, CII Policies, Statement on Stock Sales by Insiders ("For Rule 10b5-1 plans to fulfill their legitimate purpose, they should be: publicly disclosed . . . .").
[125] 87 Fed. Reg. at 8,713 (footnote omitted).
[126] *See* Richard Alsop, SEC Proposes Significant Changes to Rule 10b5-1 Plans and Introduces New Disclosure Requirements, Sherman & Sterling ("Requiring disclosure in these areas may also be a catalyst for changing policies and practices relating to insider trading, the disclosure of MNPI and equity compensation grant timing."); *see also* David Slovick & Aaron B. Wesson, SEC Proposes Amendments to the Requirements of Rule 10b5-1 Trading Plans, Nat't L. Rev. ("requiring issuers to disclose whether they have adopted insider trading policies and procedures

More specifically, and as indicated, we generally believe the disclosures required by Item 408(a) would benefit investors by providing useful information that minimizes the information asymmetry between investors and company insiders. We also believe those disclosures would benefit investors by allowing them to assess the extent to which directors, officers and the issuer are adopting or terminating such trading arrangements during periods when they may be aware of material non-public information. We also generally believe the Item 408(a) disclosures would benefit investors by allowing investors to assess whether, and if so, how, issuers monitor trading by their directors and officers for compliance with insider trading laws and whether their compliance programs are effective at preventing the misuse of material non-public information.

In addition, and as indicated, we generally believe the disclosures required by Item 408(b) would benefit investors by enabling them to assess registrants' corporate governance practices and to evaluate the extent to which those policies and procedures protect shareholders from the misuse of material non-public information. We also generally believe the proposed Item 408(b) disclosures would provide investors with meaningful information regarding a registrant's insider trading policies and procedures to enable them to better assess the manner in which the registrant promotes compliance with insider trading laws and protects material non-public information from misuse.

SEC Request for Comment 60. *What are the benefits and costs of the proposed quarterly disclosure regarding plan adoption, modification, termination, and material terms? What are the benefits and costs of alternative reporting requirements or frequencies?*[127]

CII Response. CII believes, consistent with the recommendation of the IAC, that the benefits to investors of replacing the Proposed Rule's quarterly disclosure regarding plan adoption, modification, termination and material terms with a disclosure of that information in Form 8-K exceed the costs. As indicated, the benefits of the timelier disclosure would be valuable to investors outside of the company, whose economic incentives may be affected by this type of information asymmetry. Investors would also benefit to the extent the timelier filing deters insiders from frequently modifying and terminating Rule 10b5-1 plans.

SEC Request for Comment 62. *Would the proposed requirement to structure Item 408 disclosures in Inline XBRL benefit investors? What would be the costs of such a requirement for filers? How would the costs and benefits vary if we were to narrow the scope of structured data requirements, for example to include only the quarterly disclosures that would be required under proposed Item 408(a) of Regulation S–K?*[128]

CII Response. CII generally believes that Proposed Rule's requirement to structure Item 408 disclosures in Inline XBRL would benefit investors. As indicated, CII has long publicly supported the SEC's adoption of amendments requiring the use of Inline XBRL format. We

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incentivizes officers and directors to ensure that the company has done so, and that such policies and procedures are enforced, lest the issuer be charged").

[127] 87 Fed. Reg. at 8,716 (emphasis added).

[128] *Id.*

generally share the SEC's view that the proposed requirement that information be tagged in Inline XBRL would benefit investors by:

> [F]acilitat[ing] access and analysis of the disclosures by investors, potentially leading to more useful and timely insights. In particular, structuring the disclosures about trading plans that would be required under Item 408(a) of Regulation S–K would enable automated extraction of granular data on such trading plans, which would allow investors to efficiently perform largescale analyses and comparisons of trading plans across issuers and time periods. . . . The use of a structured data language could also enable considerably faster analysis of the disclosed data by investors. For the narrative disclosure on policies and procedures that would be required under Item 408(b) of Regulation S–K, structuring the disclosures in Inline XBRL would allow investors to extract information from and search through the disclosures about trading plan policies and procedures (rather than having to manually run searches for these disclosures through entire documents), automatically compare these disclosures against prior periods, and perform targeted artificial intelligence and machine learning assessments (tonality, sentiment, risk words, etc.) of specific narrative disclosures about trading plan policies and procedures rather than the entire unstructured document.[129]

SEC Request for Comment 64*. Would investors benefit from the proposed requirement to disclose the use of a Rule 10b5–1 plan on Forms 4 and 5?*[130]

CII Response. CII generally believes investors would benefit from the Proposed Rule's requirement to disclose the use of a Rule 10b5-1 plan on Forms 4 and 5. As indicated, the proposed disclosures are generally consistent with CII's long-standing belief that providing greater transparency of Rule 10b5-1 transactions would provide useful information to investors and other market participants.[131]

More specifically, we generally agree with the SEC that:

> The proposed amendments adding a Rule 10b5–1 plan checkbox to Forms 4 and 5 would benefit investors by providing transaction-specific disclosure of sales and purchases under Rule 10b5–1 plans. The proposed checkbox disclosure would allow investors easier and timelier access to information about trades under Rule 10b5–1(c)(1). This information would enable investors to more comprehensively identify insider trading pursuant to Rule 10b5–1 plans, as well as provide greater consistency in the disclosure of Rule 10b5–1 plan trades. . . . To the extent that trades under Rule 10b5–1(c)(1) are subject to a different regulatory framework and may have different motivations than other insider trades, the checkbox would allow

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[129] *Id.* at 8,713.
[130] *Id.* at 8,716 (emphasis added).
[131] *See, e.g.,* Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors to The Honorable Elissa B. Walter, Chairman, U.S. Securities and Exchange Commission at 3 ("Providing greater disclosure regarding the adoption, amendment, and termination of Rule 1Ob5-1 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.").

> investors to more readily interpret information in Forms 4 and 5. . . . Because Forms 4 and 5 would continue to use a structured data language, investors would be able to extract and analyze comprehensive information about insider trades under Rule 10b5–1 plans across multiple time periods, individuals, and companies.[132]

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CII appreciates the opportunity to submit comments on the Proposed Rule and is available to provide any additional information the Commission requests.

Sincerely,

Jeffrey P. Mahoney
General Counsel

[132] 87 Fed. Reg. at 8,714.