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

Via email: rule-comments@sec.gov

31st March 2022

Dear Secretary Countryman,

Re: Release No. 33-11013; 34-93782; File No. S7-20- Rule 10b5-1 and Insider Trading

The International Corporate Governance Network (ICGN) appreciates the opportunity to comment on the Securities and Exchange Commission's (SEC) proposal to:

- 1) amend and add new conditions to the availability of the affirmative defense under Exchange Act Rule 10b5-1(c)(1) that are designed to address concerns about abuse of the rule to opportunistically trade securities on the basis of material nonpublic information in ways that harm investors and undermine the integrity of the securities markets;
- 2) propose new disclosure requirements regarding the insider trading policies of issuers, and the adoption and termination (including modification) of Rule 10b5-1 and certain other trading arrangements by directors, officers, and issuers;
- 3) propose amendments to the disclosure requirements for executive and director compensation regarding the timing of equity compensation awards made in close proximity in time to the issuer's disclosure of material nonpublic information; and
- 4) propose amendments to Forms 4 and 5 to require corporate insiders subject to the reporting requirements of Exchange Act Section 16 to identify transactions made pursuant to a Rule 10b5-1(c)(1) trading arrangement, and to disclose all gifts of securities on Form 4.

Led by investors responsible for assets under management in excess of US\$59 trillion, ICGN is a leading authority on global standards of corporate governance and investor stewardship. Headquartered in London, our membership is based in more than 45 countries and includes companies, advisors, and other stakeholders. ICGN offers an important international investor perspective on corporate governance and investor stewardship to help inform public policy development and the encouragement of good practices by capital market participants. Most of our members are invested in the U.S. capital market. For more information on the ICGN, please visit www.icgn.org.

ICGN has two foundational documents that set forth guidance for boards and investors which guide our views on the Proposed Rule and amendments. The ICGN Global Governance Principles ("GGP", Revised 2021) provide guidance for boards of directors at publicly listed



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companies “around corporate governance issues that are most likely to influence investment decision-making. They are also relevant to non-listed companies which aspire to adopt high standards of corporate governance practice.”¹ In addition, “the GGP are of relevance to a company’s core financial stakeholders, which can include both bond holders and equity investors.”²

The ICGN Global Stewardship Principles (“GSP”, Revised 2020) are primarily for investors, setting out recommendations that are “intended to apply, with appropriate flexibility, to all investment styles and approaches. The Principles offer a comprehensive framework of key stewardship responsibilities and are capable of being applied in either developed or emerging markets.”³

In response to the proposed amendments to Exchange Act Rule 10b5-1, ICGN’s members would be deeply concerned by any misuse of material nonpublic information and insider trading based upon that information. We agree that the U.S. securities laws’ antifraud provisions should “play an essential role in maintaining the fairness and integrity of our markets.”⁴ Investors must have confidence that capital markets and the companies in which they invest operate in open and transparent ways. According to this release, the Proposed Rule enhances disclosures to close information gaps and improve reporting to provide investors with more timely information to make their investment decisions.

We have responded to the questions as described in the release, within the four themes identified within the proposed Rule.

Proposed Rule: Four Areas of Review

1. The SEC has proposed new conditions to the availability of the affirmative defense under Exchange Act Rule 10b5-1(c)(1) that are designed to address concerns about abuse of the rule to opportunistically trade securities on the basis of material nonpublic information in ways that harm investors and undermine the integrity of the securities markets.

ICGN supports the Commission’s efforts to tighten the process to address investor concerns that corporate insiders may have an advantage through their access to material nonpublic information. While an affirmative defense may need to be available to issuers, corporate board members and executive officers, the best way to address concerns of abuse is for the board of directors and management to provide a corporate environment that demonstrates “a culture of high standards of business ethics and integrity aligned with the company’s purpose and values at the board level and throughout the workforce.”⁵ In this way, a company will instil confidence in its policies that address ethical conduct, conflicts of interest and the use of nonpublic information.

¹ ICGN Global Governance Principles, [ICGN Global Governance Principles 2021.pdf](#), p. 5.

² ICGN Global Governance Principles, [ICGN Global Governance Principles 2021.pdf](#), p. 5.

³ ICGN Global Stewardship Principles, [ICGN Global Stewardship Principles 2020_1.pdf](#), p. 6.

⁴ Securities and Exchange Commission, [Proposed rule: Rule 10b5-1 and Insider Trading \(sec.gov\)](#), p.5.

⁵ ICGN Global Governance Principles, Principle 4, Corporate Culture, [ICGN Global Governance Principles 2021.pdf](#), p.14.



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The ICGN Global Governance Principles (GGP), Principle 9, Shareholder Rights, states:

9.7 Equality and redress. The board should ensure that shareholders of the same series or class are treated equally and afforded protection against misuse or misappropriation of the capital they provide due to conduct by the company's board, its management or controlling shareholder, including market manipulation, false or misleading information, material omissions and *insider trading*. (*Italics added*)

The board of directors is uniquely situated to approve policies on ethical conduct, conflicts of interest and to maintain confidentiality of nonmaterial information for the board, management, and insiders to abide by, with consequences for noncompliance.

Question 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?

A cooling-off period is one method to reduce potential abuse of the Rule. Another provision is to require that any written agreements for trading are executed well before corporate announcements, are clear in the instructions to traders and any insiders are restricted from instructing trading on any material nonpublic information.

Investors are rightly concerned with insider trading activity that occurs in close concert with an issuer's announcements of material information. As the Commission noted in the proposed Rule's narrative, some academic studies have shown that trading pursuant to the Rule "consistently outperforms" trading that does not occur within the affirmative defenses of the Rule.⁶

Question 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?

Any individual that has access to material insider information and would have the ability to make or oversee trading or corporate decisions should be covered under the proposed cooling-off period. Otherwise, individuals will be able to skirt the proposed rule requirements by utilizing a non-covered individual to trade on their behalf. If a trading agreement is in place and the trader has no knowledge of any material insider information, the individual may be in a position to rely on the Rule's affirmative defense.

Question 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?

A cooling-off period of 120-days to directors and "officers", as the terms are defined in Exchange Act Rule 16a-1(f)³⁶, appears to be an appropriate amount of time. These individuals are more likely than others to be aware of material nonpublic information in the general course

⁶ [Proposed rule: Rule 10b5-1 and Insider Trading \(sec.gov\)](#), pp. 7-8.



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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. They may be involved with the decisions including the timing of a disclosure by the company, whether it pertains to a merger or acquisition, departure of a named executive officer or financial statement.

Question 5. Is the proposed 30-day cooling off period appropriate for issuers? Would a different period be more appropriate?

ICGN would note that the application of at least a 30-day cooling-off period for issuers would help address the concern that issuers could conduct stock buybacks while they are aware of material nonpublic information. The rise of stock buybacks has caused concern from investors wherein insiders, with significant stock holdings, can gain financial advantages due to knowledge of nonpublic information.

Question 7. Should there be an exception from the cooling-off period for de minimis changes to a Rule 10b5-1(c) trading arrangement? If so, what should be the parameters of such an exception?

ICGN would not recommend an exception from the cooling-off period for any de minimis changes to a trading arrangement. Investors can be harmed when nominal trading occurs that is based upon material nonpublic information. The affirmative defense should be enough of a protection for certain trading activity under the Rule.

Question 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?

Question 10. Should the proposed certification requirement also apply to individuals who are not "officers" under Exchange Rule 16a-1(f)?

A certification requirement for directors and officers would be another document to provide the Commission and investors with a degree of confidence that material nonpublic information will not be used prior to adopting a trading arrangement. As ICGN has stated in its responses to previous questions, the issuer should establish clear policies for directors and officers at the outset, before any trading arrangements are entered into. It is not just the Commission's responsibility to enforce these provisions; the issuer should be the first party to forbid the use of material nonpublic information and enforce its own policy.

Any other individuals that have access to material nonpublic information and are involved in the trading program should be part of the issuer's policy and the Commission's proposed certification requirement.

2) Propose new disclosure requirements regarding the insider trading policies of issuers, and the adoption and termination (including modification) of Rule 10b5-1 and certain other trading arrangements by directors, officers, and issuers.



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Question 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)?

In short, yes, the insider trading policies and procedures from issuers and registrants would be important information for investors. The policies should be clearly available by being posted on the corporate website. Currently, investors only have access to the information contained in the required disclosure in Forms 10-Q and 10-K, which may not provide the required level of detail for investors. Pursuant to other provisions in the proposed amendments, disclosures should be on a continual, or real time basis, to inform investors and the Commission on trading activity under the Rule.

ICGN is pleased that the SEC has added a new Item 408(b) to Regulation S-K, which would require registrants to:

- Disclose whether the registrant has adopted insider trading policies and procedures governing the purchase, sale, and other dispositions of the registrant's securities by directors, officers, and employees or the registrant itself that are reasonably designed to promote compliance with insider trading laws, rules, and regulations, and any listing standards applicable to the registrant. If the registrant has not adopted such insider trading policies and procedures, explain why it has not done so; and
- If the registrant has adopted insider trading policies and procedures, disclose such policies and procedures.⁷

Investors would also like to know if there has been any violation(s) of the insider trading policies and procedures since the past filing period and how the violations were handled.

As ICGN stated in its response to the proposed rules on stock repurchase modernization, the proposed item 703 and the proposed Form SR should include the requirement that the issuer is using the safe harbor provision and not attempting to manipulate the stock price at the disadvantage of investors. ICGN noted that we support the amendments to require an issuer to disclose whether it repurchased its securities pursuant to a Rule 10b5-1 plan. We also recommend that all applicable parties should be subject to the same requirements.

3) Propose amendments to the disclosure requirements for executive and director compensation regarding the timing of equity compensation awards made in close proximity in time to the issuer's disclosure of material nonpublic information.

Question 37. To what extent does the board of directors or compensation committee currently consider the impact of granting option awards made close in time to disclosure of material nonpublic information? What type of effect would the proposed disclosures have on the timing and granting of option awards if this requirement for Item 402(x) were adopted?

Question 39. The proposed disclosure requirements under new Item 402(x) would apply to option awards made within a 14-day period before or after the filing of a Form 10-Q or

⁷ [Proposed rule: Rule 10b5-1 and Insider Trading \(sec.gov\)](#). p. 30.



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the filing (or furnishing) of a Form 8-K containing material nonpublic information with the Commission.

High levels of executive compensation paid to senior management has become a major area of concern for investors. Whilst external consultants may be hired by companies to assist with the design and implementation of remuneration levels, the responsibility of setting reasonable compensation rests with the boards of directors. ICGN's Global Governance Principles recognize that the board of directors is responsible for executive remuneration policies. In GGP Principle 5, Remuneration, it states:

5.1 Level. The board is responsible for ensuring that executive remuneration is reasonable and equitable in both structure and quantum, and is determined within the context of company's values, internal reward structures and competitive drivers while being sensitive to the expectations of shareholders, stakeholders, and societal norms. Societal norms reflect concerns about income inequality and call for executive remuneration levels to take into consideration the level of pay of the average company worker and relative to the average median income of the company's place of domicile.

In the ICGN Guidance on Executive Director Remuneration, Preamble, it states:

Executive director remuneration is an important field of corporate governance, and is of relevance to companies and investors. Remuneration structures should provide meaningful and rigorous incentives for a company's executive management. With the growing trend of investor "say on pay" votes in many markets, investors have taken a more active role in the remuneration debate. Moreover, remuneration also features as a subject of engagement between investors and companies. At the same time, many investors remain concerned about remuneration structures that are unduly complex, employ inadequate performance metrics, or provide a disproportionate quantum of reward that is difficult to justify.⁸

As an additional reference, some asset managers will vote against remuneration packages that include awarded shares options or any other form of variable / performance based pay as part of the remuneration unless it is a widespread practice in the local market.⁹ They prefer to consider remuneration packages set as part of the regular activities of a management or board member.¹⁰ A disclosure requirement in the 10-Q, available to investors, would help investors cast informed votes on executive pay and other compensation.

ICGN is clear that the board of directors *and* the compensation committee should hold the company and its board, management, and insiders to the highest levels of transparency and reporting in relation to all aspects of their work, including setting remuneration packages. The

⁸ [ICGN Guidance on Executive Remuneration \(2016\).pdf](#), Preamble, p.5.

⁹ 2022 Kempen Voting Policy, <https://www.kempen.com/-/media/Asset-Management/ESG/Polocies/2022-Kempen-Voting-Policy.pdf>, p. 12.

¹⁰ 2022 Kempen Voting Policy, <https://www.kempen.com/-/media/Asset-Management/ESG/Polocies/2022-Kempen-Voting-Policy.pdf>, p 10, based on the Eumedion principles for a sound remuneration policy for members of the management board of Dutch listed companies, Principle 6.



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granting of option awards either shortly before or after announcements of material information can cause regulators to be concerned that insider information was taken into consideration. Full disclosure within a 14-day window of time is the best sunlight on these awards and will give investors a degree of confidence that the awards are appropriately tied to long-term performance targets.

Question 41. Should smaller reporting companies and emerging growth companies be required to provide all of the proposed disclosure?

Yes. ICGN would recommend that any issuers trading in the public markets, whether small reporting companies, emerging growth companies or new startups, be required to provide all of the proposed disclosures. Once a company goes public and provides investors with the opportunity to acquire shares or invest in other ownership instruments, concerns will be raised how insiders use material nonpublic information. There should be no perceived burden on directors, management, or insiders. The disclosure regime provides them with protections as well. Stock prices in those cases would be more greatly impacted by abuse and therefore investors would benefit if applied to all types of issuers as well. The requirement might even be most important in these cases, as the market and investors will have less information about the company, making it harder for the Commission and investors to obtain vital information.

4) Propose amendments to Forms 4 and 5 to require corporate insiders subject to the reporting requirements of Exchange Act Section 16 to identify transactions made pursuant to a Rule 10b5-1(c)(1) trading arrangement, and to disclose all gifts of securities on Form 4.

Question 43. Should we require dispositions by gifts of equity securities to be disclosed Form 4 instead of Form 5, as proposed?

Question 44. Should we require disclosure of other information about gifts on Form 4 that are not already required by Form 4? If so, what information should we require?

Under the proposed amendment, an officer, director, or a beneficial owner of more than 10 percent of the issuer's registered equity securities making a gift of equity securities would be required to report the gift on Form 4 before the end of the second business day following the date of execution of the transaction. This would be significantly earlier than what is required under current reporting rules. This earlier reporting deadline would help investors, other market participants and the Commission to better evaluate the actions of these insiders and the context in which equity securities gifts are being made.

ICGN would also recommend that the Commission consider a lower threshold on gifts under Form 4, to require an officer, director, or beneficial owner of more than 5 percent of the issuer's registered securities report the gift on Form 4. The 5 percent threshold would mirror the reporting requirement, per the Commission's Schedule 13D or 13G reporting:

If your company has registered a class of its equity securities under the Exchange Act, shareholders who acquire more than 5% of the outstanding shares of that class must file beneficial owner reports on [Schedule 13D](#) or [13G](#) until their holdings drop below 5%. These filings contain background information about the shareholders who file them as



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well as their investment intentions, providing investors and the company with information about accumulations of securities that may potentially change or influence company management and policies.¹¹

XBRL Data Reporting Requirement

ICGN would be in favor of the SEC adopting a requirement that structured data be tagged and disclosed in filings under the proposed Rule. The data would become more standardized, reviewable, and easily compared amongst issuers. As the Commission noted, “the proposed amendments would require the additional quantitative disclosure to be submitted in Inline XBRL. This proposed requirement is expected to benefit investors by facilitating automated extraction of the disclosure information for purposes of aggregation, analysis, and comparison (across time periods and filers), potentially enabling more informed investment, and voting decisions.”¹² We would appreciate this inclusion.

Thank you for the opportunity to provide our perspective on the Proposed Rule and the amendments to Rule 10b5-1 plans. ICGN’s members and their beneficiaries benefit from efficient capital markets, which should equally be a priority for issuers.

If you would like to follow up with questions or comments, please contact me or ICGN’s Global Governance and Stewardship Manager Carol Nolan Drake by email at: carol.nolandrake@icgn.org

Yours faithfully,

Kerrie Waring
Chief Executive Officer, ICGN

CC: George Dallas, ICGN Policy Director: george.dallas@icgn.org

¹¹ Beneficial Ownership Reports, [SEC.gov | Officers, Directors and 10% Shareholders](https://www.sec.gov/Officers_Directors_and_10%_Shareholders).

¹² [Proposed rule: Rule 10b5-1 and Insider Trading \(sec.gov\)](https://www.sec.gov/Proposed_rule_Rule_10b5-1_and_Insider_Trading), p. 107.