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I. INTRODUCTION

In 2021, vaccines for COVID-19 caused stocks from companies like Pfizer and Moderna to surge and hit all-time highs.[1] Vaccine stocks were hot, but timing in the stock market is essential; executives at vaccine companies were able to sell their shares at a suspiciously convenient time.[2] At the end of 2021, the U.S. Securities and Exchange Commission ("SEC") announced proposed amendments to Rule 10b5-1 to combat insider trading.[3] While officers, directors, and issuers may trade company stock without concerns of insider trading liability if done in accordance with a previously established trading plan pursuant to Rule 10b5-1, the SEC's proposed amendments added to the original rule, among other things, additional disclosure requirements and

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1. *See* Lewis Krauskopf & Sinéad Carew, *Pfizer Shares Hit Record High with COVID-19 Vaccine Stocks on a Tear*, REUTERS (Aug. 10, 2021, 4:10 PM), https://www.reuters.com/business/pfizer-shares-hit-record-high-with-covid-19-vaccine-stocks-tear-2021-08-10/ [https://perma.cc/U4SJ-ASCB] (highlighting stock performance from Pfizer and Moderna, including Moderna hitting an all-time high).

2. *See* Jared S. Hopkins & Gregory Zuckerman, *Pfizer CEO Joins Host of Executives at COVID-19 Vaccine Makers in Big Stock Sale*, WALL ST. J. (Nov. 11, 2020, 10:30 PM), https://www.wsj.com/articles/pfizer-ceo-joins-host-ofexecutives-at-covid-19-vaccine-makers-in-big-stock-sale-11605139164 [https://perma.cc/M4RY-SPMM] (highlighting the stock sales of Pfizer CEO Albert Bourla pursuant to a trading plan); Shalini Nagarajan, *Moderna's CEO Sold Nearly $2 Million of His Stock Ahead of the Company's Emergency Use Vaccine Filing. He's Now Worth $3 Billion.*, BUS. INSIDER: MKTS. INSIDER (Nov. 23, 2020, 10:54 AM), https://markets.businessinsider.com/news/stocks/moderna-ceo-sold-million-stock-company-emergency-use-vaccinefiling-2020-11-1029830266 [https://perma.cc/8UBC-KAFH] (highlighting a planned stock sale from a trading plan of Moderna CEO Stephane Bancel before his company filed for emergency use authorization of the COVID-19 vaccine); Jon Swaine, *CEO Of Vaccine Maker Emergent Sold $10 Million in Stock Before Company Ruined Johnson & Johnson Doses,* WASH. POST (Apr. 25, 2021, 8:48 PM), https://www.washingtonpost.com/investigations/emergent-robert-kramer-stock-sales/2021/04/25/de151434-a2b6-11eb-a7ee-949c574a09ac_story.html [https://perma.cc/2XJE-W2WX] (detailing a sale made by the chief executive of vaccine manufacturer Emergent, subject to a trading plan, shortly before a decline in the stock value of the company).

3. Press Release, U.S. Sec. & Exch. Comm'n, SEC Proposes Amendments Regarding Rule 10b5-1 Insider Trading Plans and Related Disclosures (Dec. 15, 2021) (on file with agency), https://www.sec.gov/news/press-release/2021-256 [https://perma.cc/9YCW-LA9T].

cooling-off periods between the establishment of a plan and the time of the first trade pursuant to the plan.[4]

Commentators both criticized and praised the proposed rule, including many criticizing the proposed cooling-off period amendment to Rule 10b5-1.[5] The proposed rule suggested two different cooling-off periods for directors and issuers before the first trade may be made under a newly adopted Rule 10b5-1 plan ("trading plan").[6] The cooling-off period for directors was set at 120 days after the day of the plans adoption while issuers were to be required thirty days post adoption.[7]

Through a critical analysis of the reasons offered for the various cooling-off periods, this note suggests that a more moderate approach to a cooling-off period, around ninety days, could efficiently further the SEC's goals. The SEC's proposed response to the concerns of abuse of Rule 10b5-1 trading plans was comprehensive, strict, and received fair criticism from business interests to suggest that the changes may encourage insider trading outside of the plans.[8] By ultimately deciding on a more moderate approach,[9] the SEC could have created an effective

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4. *See id.* (stating that the new rule would require a table for options granted within 14 days of the release of information, for disclosure whether certain trades were made pursuant to a Rule 10b5-1 trading plan, and for disclosure of the gifting of securities).

5. *See, e.g.*, Letter from Sens. Elizabeth Warren, Chris Van Hollen & Sherrod Brown to Allison Herren Lee, Acting Chair, U.S. Sec. and Exch. Comm'n 1 (Feb. 10, 2022) [hereinafter Warren, Van Hollen & Brown Letter], https://www.warren.senate.gov/imo/media/doc/02.10.2021%20Letter%20from%20Senators%20Warren,%20Brown,%20and%20Van%20Hollen%20to%20Acting%20Chair%20Lee.pdf [https://perma.cc/3A5A-TFEL] ("We write to urge you to review and reform the Securities and Exchange Commission (SEC)'s policies regarding 10b5-1 plans, which grant corporate executives a 'safe harbor' to trade their company's stock."); Comment Letter from Wilson Sonsini Goodrich & Rosati, to Vanessa A. Countryman, Sec'y of U.S. Sec. and Exch. Comm. 1 (Apr. 11, 2022) [hereinafter Wilson Sonsini], https://www.sec.gov/comments/s7-20-21/s72021-20125146-284365.pdf [https://perma.cc/TU4B-43L5] ("We generally support the Commission's efforts to address potentially abusive practices associated with Rule 10b5-1 trading arrangements; however . . . . [I]f all of the proposed amendments are adopted in their current form, there is a strong likelihood that many officers and directors will choose not to enter into Rule 10b5-1 trading arrangements . . . .")

6. Rule 10b5-1 and Insider Trading, 87 Fed. Reg. 8686, 8690 (proposed Dec. 15, 2021) (to be codified at 17 C.F.R. pt. 240.10b5-1).

7. *Id*. at 8688.

8. *See* Wilson Sonsini, *supra* note 5, at 1 ("[I]f all of the proposed amendments are adopted in their current form, there is a strong likelihood that many officers and directors will choose not to enter into Rule 10b5-1 trading arrangements.").

9. Insider Trading Arrangements and Related Disclosures, 87 Fed. Reg. 80362, 80369 (Dec. 29, 2022) (to be codified at 17 C.F.R. pt. 240.10b5-1) (shifting the cooling-off

policy to curb trading while in possession of Material Non-Public Information ("MNPI")[10] while not unnecessarily imposing restrictions that have no effect on irregular stock performance.[11] This note considers whether the cooling-off periods are necessary to achieve the goals of the SEC or are in excess of what is needed for an effective policy. The SEC, in its final iteration of the rule, ultimately adopted a much more moderate response that only requires a cooling-off period that is either ninety days after the adoption of any Rule 10b5-1 plan or two days after a company releases information via a quarterly report.[12]

This Note proceeds in seven parts. Part II of this Note explores the history of the SEC and insider trading in the U.S. and analyzes the provisions of the proposed amendments to the rule.[13] Part III highlights the history of abuse of the previous iteration of Rule 10b5-1 and recent suspicious trades of vaccine-related stocks.[14] Part IV analyzes the positions of advocates and critics of the proposed rule through comments to the SEC.[15] Part V examines studies and surveys of Rule 10b5-1 plans as currently self-regulated by businesses and analyzes what the proper cooling-off period length may be.[16] Part VI explores the history of the Sarbanes-Oxley Act, comparing the blackout period provision to the cooling-off period suggestion.[17] Part VII proposes changes to the length of the issuer and officer cooling-off provisions

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period down from the proposed rules suggestion of 120 days for issuers down to the longer of 90 days or two days after the release of a quarterly report).

10. *See* James Chen, *Material Nonpublic Information (MPNI)?: Definitions and Laws*, INVESTOPEDIA (last updated Apr. 25, 2022), https://www.investopedia.com/terms/r/rule-10b5-1.asp [https://perma.cc/2JLK-Q5J7] (defining Material Non-Public Information (MPNI) as information that has not yet been released to the public that an investor would find important in making an investment decision).

11. *See* David F. Larcker et al., *Gaming the System: Three "Red Flags" of Potential 10b5-1 Abuse*, STAN. CLOSER LOOK SERIES, 11 (Jan. 19, 2021), https://www.gsb.stanford.edu/sites/default/files/publication-pdf/cgri-closer-look-88-gaming-the-system.pdf [https://perma.cc/YT2U-QJLT] (indicating performance compared to the market of pans that employ certain times between plan adoption and a first trade being made and showing that abnormal returns disappear after a minimum of sixty days).

12. Insider Trading Arrangements and Related Disclosures, 87 Fed. Reg. at 80369.

13. *See infra* Part II.

14. *See infra* Part III.

15. *See infra* Part IV.

16. *See infra* Part V.

17. *See infra* Part VI.

and suggests other options to create a more effective rule.[18] Part VIII concludes the Note.[19]

II. BACKGROUND AND HISTORY OF INSIDER TRADING

The Securities Exchange Act of 1934 provides a broad definition of manipulative and deceptive devices that encompasses insider trading.[20] 15 U.S.C. §78j(b) states that it is illegal "[t]o use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe . . . ."[21]

In 1997, *United States v. O'Hagan* provided two definitions of insider trading under the classical theory and the misappropriation theory.[22] The classical theory is "when a corporate insider trades in the securities of his corporation on the basis of material, nonpublic information."[23] The misappropriation theory is trading that occurs when the insider "misappropriates confidential information for securities trading purposes, in breach of a duty owed to the source of the information."[24] This occurs when a fiduciary makes an "undisclosed, self-serving use of a principal's information to purchase or sell securities, in breach of a duty of loyalty and confidentiality . . . ."[25]

In 2000, the SEC implemented Rule 10b5-1 to provide directors, issuers, and other insiders who might make trades while in possession of MNPI an affirmative defense to an insider trading allegation if the trades were part of a predetermined trading plan that makes trades at a set future date and was created prior to gaining access to any MNPI.[26] Rule 10b5-1 plans are set up when the creator of the plan is not in

18. *See infra* Part VII.

19. *See infra* Part VIII.

20. Securities Exchange Act of 1934 § 10, 15 U.S.C. § 78j (1934).

21. *Id.* § 78j(b).

22. *See* United States v. O'Hagan, 521 U.S. 642, 650–52 (1997) (stating that misappropriating confidential information for profit constitutes a violation of the Securities Exchange Act of 1934 prohibition on insider trading).

23. *Id.* at 651–52.

24. *Id.* at 652.

25. *Id.*

26. Trading "on the Basis of" Material Nonpublic Information in Insider Trading Cases, 17 C.F.R. § 240.10b5-1(c) (2000); Adam Hayes, *Rule 10b5-1 Definition, How it Works, SEC Requirements*, INVESTOPEDIA (last updated July 15, 2022), https://www.investopedia.com/terms/r/rule-10b5-1.asp [https://perma.cc/CVS5-SR69].

possession of MNPI to make predetermined trades at set, future dates.[27] The 2000 version of Rule 10b5-1 requires that insiders have no influence over the plan after its adoption, or have any hedging or corresponding transactions under the plan.[28] The rule remained unchanged until an amendment was published on December 29, 2022.[29]

The Supreme Court has provided additional clarity around Rule 10b5-1 by outlining tests to prove insider trading. In *Tellabs, Inc. v. Makor Issues & Rights, Ltd.* the Court held that the "plaintiff must prove that the defendant acted with scienter, 'a mental state embracing intent to deceive, manipulate, or defraud.'"[30] The Court more recently in *Halliburton Co. v. Erica P. John Fund, Inc*. set out the elemental test for a finding of insider trading.[31] Plaintiffs must show: "(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation."[32]

Since adoption, Rule10b5-1 has been criticized for giving plan users too broad of an affirmative defense and allowing them to trade while in possession of MNPI.[33] The proposed amendments address

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27. STEPHEN GIOVE & CHRISTINE COGNETTI MCCASLAND, MORGAN STANLEY, DEFINING THE FINE LINE: MITIGATING RISK WITH 10B5-1 PLANS 1 (2016), https://advisor.morganstanley.com/capitol-wealth-management-group/documents/field/c/ca/capitol-wealth-management-group/Defining_the_Fine_Line___Locked_Version.pdf [https://perma.cc/5NV8-Q7ZF].

28. 17 C.F.R. § 240.10b5-1(c)(B)(3).

29. Insider Trading Arrangements and Related Disclosures, 87 Fed. Reg. 80362 (Dec. 29, 2022) (to be codified at 17 C.F.R. pt. 240.10b5-1).

30. Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 319 (2007) (quoting Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193–94, 193 n.12 (1976)).

31. *See* Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 267 (2014) (adopting a six-element test for insider trading).

32. *Id.* (quoting Amgen Inc. v. Conn. Ret. Plans & Tr. Funds, 568 U.S. 455, 460–61 (2013)).

33. *See* Taylan Mavruk & H. Nejat Seyhun, *Do SEC's 10b5-1 Safe Harbor Rules Need to be Rewritten?*, 2016 COLUM. BUS. L. REV. 133, 135 (2016) (noting concern that insiders could possess MNPI when creating plans); John P. Anderson*, Anticipating a Sea Change for Insider Trading Law: From Trading Plan Crisis to Rational Reform*, 2015 UTAH L. REV. 339, 342 (2015) ("[C]oncern that Rule 10b5-1 has become a de facto safe harbor for insiders trading on material nonpublic information has spurred public demands for the SEC to take action."); Jane Trueper, Comment, *10b5-1 Plans: Further Obscuring the "Smoking Gun" and Proposals for Change*, 16 U. PA. J. BUS. L. 937, 955 (2014) (stating that insiders can implement a plan right before they come into possession of MNPI).

many of the concerns of these critics.[34] The first amendment proposes a cooling-off period.[35] The cooling-off period would require directors and officers[36] to wait 120 days after the adoption of a trading plan before the first trade could be made under that plan.[37] The rule proposes a similar requirement for issuers to buy or sell their own stock,[38] but with a period of only 30 days before the first trade can be made under the plan.[39] The amendment is designed to close a perceived loophole allowing insiders to adopt a trading plan that executes a trade within a very short period after adoption, seemingly inconsistent with the purpose of a trading plan to be blind and not guided by insider knowledge.[40]

The rule contains a myriad of proposed amendments including an amendment that requires the plan utilizer certifies that they lack awareness of any MNPI and that they are utilizing the plan in good faith.[41] Another amendment closes the availability of the affirmative defense to traders who use multiple overlapping plans.[42] While another extends the good faith condition to ensure that the plan was adopted in good faith and continues to be operated in good faith.[43] The rule also imposes additional disclosure requirements.[44] While this Note only

34. Rule 10b5-1 and Insider Trading, 87 Fed. Reg. 8686, 8686 (proposed Dec. 15, 2021) (to be codified at 17 C.F.R. pt. 240.10b5-1).

35. *Id*. at 8688.

36. *See* 17 C.F.R. § 240.16a-1(f). This section defines officer and lists the typical officer positions, which include "president, principal financial officer, principal accounting officer (or the controller), a vice-president of the issuer in charge of a principal business unit, division or function," and then any person that serves a policy making function for the issuer. *Id.* The rule also includes that other directors of the company are subject to the 120-day cooling-off period. *Id.*

37. Rule 10b5-1 and Insider Trading, 87 Fed. Reg. at 8688.

38. An issuer is a legal entity that develops, registers, and sells securities to finance its operations. Issuers may be corporations, investment trusts, or domestic or foreign governments. Adam Hayes, *Issuer,* INVESTOPEDIA (last updated June 26, 2020), https://www.investopedia.com/terms/i/issuer.asp [https://perma.cc/8WUJ-F2AL].

39. Rule 10b5-1 and Insider Trading, 87 Fed. Reg. at 8688.

40. *Id.*

41. *Id.* at 8706–07.

42. *Id.* at 8707.

43. *Id.*

44. *See id.* The rule's additional requirements include: (1) a quarterly reporting of Rule 10b5-1(c) and non-Rule 10b5-1(c) trading arrangements; (2) internal insider trading policies and procedures for how directors, officers, and employees may trade company stock; (3) structured data requirements of information relating to Item 408 and Rule 405; (4) indications of whether the trades were made pursuant to Rule 10b5-1(c); (5) disclosure timing of option grants and equity instruments when MPNI becomes released as public information; (6) reporting bona fide gifts of equity as part of form 4. *Id.*

considers the length and necessity of the cooling-off amendment, it is important to remember that the amendments in the proposed rule work in conjunction with other proposed amendments. Considering the cooling-off period's length provides useful insight to the potential effectiveness of the proposed rules and the overall strength of the SEC's efforts to curb insider trading.

III. INSTANCES OF ABUSE OF RULE 10B5-1 PLANS

While insider trading under Rule 10b5-1 plans was in the public eye in 2021 with vaccine company executives,[45] abuses of the rule existed years before that.[46] For example, the SEC issued a $22.5 million dollar fine in 2010 to the former CEO of Countrywide Financial, Angelo Mozilo, to settle charges and bar him from ever working again as an officer.[47] There were numerous allegations that Mozilo had engaged in wrongdoing, including insider trading by establishing four Rule 10b5-1 plans while he was in possession of MNPI about the credit risk of the company before the housing market crisis.[48]

In 2020 and 2021, allegations of vaccine company executives' suspiciously timed trades made news a few times.[49] Moderna CEO Stephane Bancel sold $1.74 million in shares pursuant to a Rule 10b5-1 plan before the company filed for emergency use authorization for the COVID-19 vaccine.[50] In Bancel's case, the cooling-off period suggested would not have done much, because the plans were amended on May 21, 2020, for a trade that was carried out over 120 days later on

45. *See supra* text accompanying note 2.

46. *See* United States v. Nacchio, 519 F.3d 1140, 1144–47 (10th Cir. 2008), *vacated in part on reh'g en banc*, 555 F.3d 1234, 1236 (10th Cir. 2009) (finding that Qwest CEO Joseph Nacchio abused Rule 10b5-1 and traded on the basis of insider information after selling shares subject to a trading plan due to a significant risk of not meeting year-end goals); Press Release, Sec. & Exch. Comm'n, Former Countrywide CEO Angelo Mozilo to Pay SEC's Largest-Ever Financial Penalty Against a Public Company's Senior Executive (Oct. 15, 2010) [hereinafter Press Release, Sec. & Exch. Comm'n] (on file with agency), https://www.sec.gov/news/press/2010/2010-197.htm [https://perma.cc/X9VG-TJ9Y] (issuing $67.5 million total in fines for Countrywide CEO Angelo Mozilo for misleading investors before the mortgage crisis and alleging engaging in insider trading through adopting four trading plans while in possession of MNPI).

47. Press Release, Sec. & Exch. Comm'n, *supra* note 46.

48. *Id.*

49. *See* Hopkins & Zuckerman, *supra* note 2 (highlighting the stock sales of Pfizer CEO Albert Bourla joining the other vaccine production executives who were doing the same).

50. Nagarajan, *supra* note 2.

November 18 and 19, 2020, but the concerns over suspiciously timed trades by vaccine company executives did not end with Bancel and persisted throughout the pandemic in other pharma executives' sales.[51] Throughout the pandemic, biotech and pharma executives whose companies were working on COVID-19 treatments and vaccines made more than $1 billion selling stock.[52] Albert Boura, Pfizer's CEO, sold nearly $6 million in company stocks on the same day that the company announced that it received positive data on its COVID-19 vaccine.[53] The sale was made pursuant to a Rule 10b5-1 plan totaling about 60% of Boura's shares.[54]

One of the most concerning examples of suspiciously timed trades is the sale of Emergent BioSolutions ("Emergent") stock by its CEO, Robert Kramer, who sold more than $10 million in company stock right before the stock tumbled over 50%.[55] The stock price fell after fifteen million doses of the Johnson & Johnson vaccine were accidentally ruined at Emergent's Baltimore plant.[56] Kramer's trades were made throughout January and early February, before the crash of the stock price on February 19, pursuant to a trading plan that had been adopted on November 13.[57] Michael Krensavage, hedge fund manager of Krensavage Asset Management LLC, warned that these sales of vaccine company shares by insiders "should serve as a warning because it suggests insiders may fear their stocks will decline after hype gives way to the logistics challenges of distributing vaccines."[58]

Recently, outside of the vaccine market, Andrew Marsh, the CEO of Plug Power Inc., ("Plug Power") sold 40% of his shares of the company through an automatic trading plan that had been adopted just

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51. *See* Hopkins & Zuckerman, *supra* note 2 (writing about the scrutiny that Pfizer CEO Albert Bourla drew for selling $5.6 million in stock after announcing positive vaccine news); Swaine, *supra* note 2 (noting that Robert Kramer, Emergent CEO, used a trading plan to sell his shares of the company before disastrous company news was announced).

52. Nagarajan, *supra* note 2; *see also* David Gelles & Jesse Drucker, *Corporate Insiders Pocket $1 Billion in Rush for Coronavirus Vaccine*, N.Y. TIMES (July 25, 2020), https://www.nytimes.com/2020/07/25/business/coronavirus-vaccine-profits-vaxart.html [https://perma.cc/3TTE-VWG2] (indicating over $1 billion in stock sales from vaccine company insiders from March 2020 to July 2020).

53. Hopkins & Zuckerman, *supra* note 2.

54. *Id.*

55. Swaine, *supra* note 2.

56. *Id.*

57. *Id.*

58. Hopkins & Zuckerman, *supra* note 2.

one month earlier.[59] Shortly after the sale of the stock, Plug Power's stock price began to plummet, and the decline led to Marsh avoiding $23 million in losses he would have suffered if he had waited three more months to sell the stocks, a period that the cooling-off period proposed would encompass, plus another thirty days.[60]

The Rule 10b5-1 plans may not be a complete free pass on insider trading allegations however, as Cheetah Mobile Inc. ("Cheetah") recently faced allegations of insider trading by its CEO and by its former president and Chief Technical Officer ("CTO") for trades made pursuant to a rule 10b5-1 plan.[61] These Cheetah executives were dealt $556,580 in civil penalties for insider trading subject to the Rule 10b5-1 abuse.[62] The Cheetah allegations originated in 2016, over a conference call in March discussing that the company's revenues were in a declining trend.[63] The CEO and President of the company engaged in Rule 10b5-1 plans at the end of that month, the plan then sold 96,000 shares prior to the publishing of the negative revenue news in May, avoiding a loss of $303,417.[64]

IV. COMMENTS ON THE SEC RULE

After the release of the proposed rule, various groups provided their comments on the proposed rule. Commenters vary from supporting proposed rule changes, to advocating for further strengthening of the proposed changes, to suggesting that the proposal goes too far. The comments related to the cooling-off period are reviewed below.

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59. Tom McGinty & Mark Maremont, *CEO Stock Sales Raise Questions About Insider Trading*, WALL ST. J. (June 29, 2022, 11:00 AM), https://www.wsj.com/articles/executive-stock-sales-questions-insider-trading-11656514551 [https://perma.cc/5H7Z-28ND].

60. *Id.*

61. Jeff Johnston et al., *Not as Safe as You Thought: Rule 10b5-1 Trading Plans Are Not Immune to Insider Trading Claims*, VINSON & ELKINS (Oct. 14, 2022), https://www.velaw.com/insights/not-as-safe-as-you-thought-rule-10b5-1-trading-plans-are-not-immune-to-insider-trading-claims/ [https://perma.cc/2GYE-9CMV]; Cydney S. Posner, *SEC Charges Executives with Insider Trading—10b5-1 Plan Provided No Defense*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Oct. 10, 2022), https://corpgov.law.harvard.edu/2022/10/10/sec-charges-executives-with-insider-trading-10b5-1-plan-provided-no-defense/ [https://perma.cc/C95T-9JZ6].

62. Johnston et al., *supra* note 61; Posner, *supra* note 61.

63. Posner, *supra* note 61.

64. *Id.*

A. Advocates for the Change

Senators Elizabeth Warren, Chris Van Hollen, Tammy Baldwin, and Bernard Sanders take a position that approves of the rule's efforts, but urges additional, stronger rules.[65] The Senators support strengthening the rule, referencing an earlier letter that asked the SEC to reconsider Rule 10b5-1 after trades made by vaccine company CEOs pursuant to the plans. The Senators cite to an earlier letter written by Senators Elizabeth Warren, Chris Van Hollen, and Sherrod Brown, which detailed abusive trading practices by vaccine company CEOs as further support for their proposition[66] The Senators' comment letter on the proposed rule also highlights a Wall Street Journal article suggesting that insiders who sold within sixty days of the plan's implementation made $500 million more than what they would have had they held on three more months.[67] The Senators' comment goes on to suggest an even longer cooling-off period of 180 days and says that all of the provisions currently existing are necessary in order to curb insider trading.[68] The letter additionally criticizes the distinction made between issuers, who are subject to a thirty-day cooling-off period, and directors and officers, who are subject to a 120-day period.[69]

The letter relies heavily on Tom McGinty and Mark Maremont's article that discusses the suspiciously timed trades made by Plug Power Inc, CEO Andrew Marsh, which were carried out by an automatic trading plan.[70] The article shows that loss avoidance disappears on average 91-120 days after the adoption of trading plans and that loss avoidance of .7% exists on average from sixty-one to ninety days after the adoption of a trading plan.[71] The Senators do not explain why they believe that the cooling-off period should be extended

65. Comment Letter from Sens. Elizabeth Warren, Chris Van Hollen, Tammy Baldwin & Bernard Sanders, to Gary Gensler, Chair, Sec. & Exch. Comm'n 1 (Aug. 12, 2022) [hereinafter Senators Comment Letter], https://www.sec.gov/comments/s7-20-21/s72021-20136042-306780.pdf [https://perma.cc/3U85-AXXZ].

66. *Id.* at 1 (citing Warren, Van Hollen & Brown Letter, *supra* note 5).

67. *Id.* at 1 (citing McGinty & Maremont, *supra* note 59).

68. *Id.* at 3.

69. *Id.*

70. McGinty & Maremont, *supra* note 59.

71. *Id.*

to 180 days or why they believe that the long cooling-off period should apply to issuers and all employees who utilize Rule 10b5-1 plans.[72]

Additionally, some advocacy organizations also submitted comments that supported the proposed rule.[73] Better Markets, Inc., a non-partisan public interest group which supports financial reform post-financial crisis, wrote a letter mirroring the sentiment of the Senators' letter.[74] In this comment, the organization notes that each element of the plan will work to help curb insider trading.[75] In a 2022 comment letter, the Council of Institutional Investors suggests that a four to six month cooling-off period is proper on the basis of the "Gaming the System" study from Stanford University and comments from a former SEC chairman, Jay Clayton.[76] Public Citizen, a consumer advocacy organization, expressed strong support for the 120 day cooling-off period, emphasizing that it needs to be longer than one quarter to eliminate any possibility that investors would not be aware of information from the latest quarterly report.[77]

B. Opponents to the Rule Proposal

Many comments highlight the negatives of the rule and call into question whether the cooling-off periods are longer than necessary. One

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72. *See* Senators Comment Letter, *supra* note 65, at 3 (stating that the senators agree with investor advocates about strengthening the proposed rule).

73. *See* Comment Letter from Stephen W. Hall, Legal Dir., Sec. Specialist, & Jason Grimes, Senior Couns., Better Markets, to Vanessa A. Countryman, Sec'y, U.S. Sec. & Exch. Comm'n 2 (Mar. 21, 2022), https://www.sec.gov/comments/s7-32-10/s73210-20120773-272954.pdf [https://perma.cc/E5FT-BJZP] (encouraging the SEC to keep its proposed iteration of the rule or even strengthen it).

74. *Id.* at 1.

75. . *See id.* at 6 (discussing how the cooling-off period will work in conjunction with the restriction on overlapping plans, disclosure, and good faith requirements).

76. Comment Letter from Dorothy Donohue, Deputy Gen. Couns., Kenneth Fang, Assoc. Gen. Couns., Inv. Co. Inst., to Vanessa A. Countryman, Sec'y of U.S. Sec. & Exch. Comm'n (Apr. 1, 2022), https://www.sec.gov/comments/s7-21-21/s72121-20122898-279268.pdf [https://perma.cc/2LHA-W5C3] (citing the comments of the Stanford study advocating for a four to six month period and the former SEC commissioner advocating that the period is on the short side of what is acceptable as an argument against a shorter period); Larcker et al., *supra* note 11; Paul Kiernan, *SEC Chairman Urges Corporate Insiders to Avoid Quick Stock Sales*, WALL ST. J. (Nov. 17, 2020, 1:31 PM), https://www.wsj.com/articles/sec-chairman-urges-corporate-insiders-to-avoid-quick-stock-sales-11605637892 [https://perma.cc/2FG8-CG2X].

77. Comment Letter from Public Citizen, to Gary Gensler, Chair, Sec. & Exch. Comm'n 2 (Apr. 1, 2022), https://www.sec.gov/comments/s7-20-21/s72021-20121853-274131.pdf [https://perma.cc/9M77-6CMN].

concern is that the SEC's broad inclusion of issuers in a thirty-day period brings in types of companies that have no reason to be included in the rule, such as funds and regulated banking institutions.[78]

Further, the Bank Policy Institute ("BPI") contends that a similar cutout should be made for banks because the rule would make stock buybacks hard to execute within their capital plans, create an inability for the institutions to manage their capital, and conflict with Sarbanes-Oxley act required blackout periods. [79] The BPI advocates for a period of only two weeks for issuers, if they are included, to allow the banks to respond to market changes.[80]

The National Venture Capital Association ("NCVA") highlights the unique obligations of venture capital investors to pull out of their positions when a viable investor emerges, suggesting that the cooling-off period imposes too stringent of a requirement that would limit the liquidity of the officers and directors. The NCVA thus argues the cooling-off period should be a sixty-day period or when the issuer's trading window opens. [81]

Other comments criticize the length of the cooling-off periods length generally and not its application to a certain subgroup of companies. For example, Wilson Sonsini Goodrich & Rosati, P.C., a Silicon Valley-based business law firm, discusses how radical the change is and that it is not based on confirmed accounts of misuse of

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78. *See* Comment Letter from Kathryn E. Collard, Senior Vice President, Assoc. Gen. Couns., Bank Pol'y Inst. & Ananda Radhakrishnan, Vice President, Bank Derivatives Pol'y, Am. Bankers Ass'n, to Sec'y of U.S. Sec. & Exch. Comm'n 2-3 (Apr. 1, 2022), https://www.sec.gov/comments/s7-21-21/s72121-20122500-278556.pdf [https://perma.cc/6HNQ-BSUE] (opining that the issuer cooling-off proposal would make it hard for regulated banking institutions to conduct share repurchases); Donohue & Fang, *supra* note 76, at 5 (imploring the SEC to consider removing funds from the proposed issuer cooling-off period).

79. *See* Collard & Radhakrishnan, *supra* note 78, at 4 (discussing the limiting of the rule's current uses by regulated banking institutes by the proposed rule).

80. *Id.* at 6 ("[T]he cooling-off period should be shortened to no more than two weeks.").

81. Comment Letter from Nat'l Venture Cap. Ass'n, to Sec. & Exch. Comm'n 6–7 (April 1, 2022) [hereinafter Nat'l Venture Cap. Ass'n], https://www.sec.gov/comments/s7-20-21/s72021-20122175-278210.pdf [https://perma.cc/WYU9-AWN5]. A trading window is an insider trading policy that limits the time in which company insiders may make trades, often banning insiders from making trades for the first few days after a quarterly report is released and for the weeks leading up to the quarterly reports release. *See* Wayne R. Guay et al., *Determinants of Insider Trading Windows*, HARV. L. SCH. F. ON CORP. GOVERNANCE (June 2, 2021), https://corpgov.law.harvard.edu/2021/06/02/determinants-of-insider-trading-windows/ [https://perma.cc/XG8W-TNR5] (providing the definition and general parameters of a trading window).

Rule 10b5-1, rather just suspicious trades and that the proposal is based "on the erroneous assumption that . . . directors routinely seek to engage in fraudulent conduct."[82] The firm suggests that 120 days is too long and that the prevailing market practice of sixty days or less is employed by 75% of companies.[83] The issuer period, the firm contends, is not necessary, as issuers lack incentive to abuse the plans through stock repurchases.[84]

A stock repurchase is when a company, the issuer, repurchases its company stock from the marketplace to reduce the number of shares outstanding, which increases the value of the outstanding shares.[85] Issuers typically use the Rule 10b5-1 plans to repurchase stocks when they typically would not be allowed to due to a self-imposed trading blackout period before the quarterly report is released.[86] Stock repurchases, which are done through Accelerated Share Repurchases, ensure that the traders are in compliance with Rule 10b5-1(c) by

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82. Wilson Sonsini, *supra* note 5, at 2.

83. *See id.* at 3 (highlighting common industry practice of a self-imposed cooling-off period of less than sixty days).

84. *See id*. at 4–5 (showing the issuer repurchase process does not incentivize abuse and stating that the SEC has not identified any abuses of issuer repurchases).

85. Thompson Reuters, *Issuer Stock Repurchases: What are the Options*, PRAC. L. CORP. & SEC. https://1.next.westlaw.com/Document/Ibb0a1487ef0511e28578f7ccc38dcbee/View/FullText.html?transitionType=Default&contextData=(sc.Default)&firstPage=true&oWSessionId=ed9edceafb45486f8e70c5f58de8198b&isplcus=true&fromAnonymous=true&bhcp= [https://perma.cc/S9CW-G6LW] (last visited Jan. 26, 2023). While this Note examines the SEC's proposed Rule 10b5-1 amendments, it is important to note that recently a 1% excise tax has been placed on stock buybacks, which could further disincentivize the buyback and add to the effect of a thirty-day cooling-off period for issuers. *See* Christine Short, *Stock Buybacks Under Attack: Tracking Share Repurchase Events Ahead of 2023*, FACTSET (Sept. 29, 2022), https://insight.factset.com/stock-buybacks-under-attack-tracking-share-repurchase-events-ahead-of-2023 [https://perma.cc/D4T7-WEA4] (discussing the signing on August 16, 2022, by President Biden as part of the Inflation Reduction Act, of a 1% excise tax on corporations engaging in stock buybacks to prevent the increases in stock price that result from fewer shares outstanding, and how this could disincentivize companies from engaging in these buybacks).

86. *See* Thompson Rueters, *Supra* note 85 (defining and illustrating the purpose of stock buybacks); *see also* Era Anagnosti et al., *SEC Focuses on Potential Misuse of Material Non-Public Information in Stock Trades: Proposed Amendments Regarding Rule 10b5-1 Trading Plans and Company "Buybacks"*, WHITE & CASE LLP (Dec. 22, 2021), https://www.whitecase.com/insight-alert/sec-focuses-potential-misuse-material-non-public-information-stock-trades-proposed#:~:text=In%202000%2C%20the%20SEC%20adopted,was%20not%20aware%20of%20MNPI [https://perma.cc/29RD-EF9T] (suggesting that issuers opportunistically time repurchases two days after earnings releases and then enter into Rule 10b5-1 plans on the final day before the close of the trading window).

agreeing to purchase a fixed dollar amount of stock back from investors in advance.[87] Average price determines the amount per share over previous quarters.[88] Other law firms similarly criticize the length of both of the cooling-off periods in addition to business interest groups that follow suit.[89]

Finally, the Chamber of Commerce's Center for Capital Market Competitiveness argues that the proposed rule will cause traders to not utilize the plans and explore trading options outside of the plans. [90] The center contends that in the absence of a rule that forces a cooling-off period, self-regulation or standard market practice currently dictates that the proper length of the period is only thirty days and highlights that the issuer period is entirely unnecessary as there is no evidence to suggest that issuers are abusing the Rule 10b5-1 plans.[91] Other business interest organizations have similar concerns and ideas.[92] While both sides cite

87. *See* Wilson Sonsini, *supra* note 5, at 4 (highlighting the process by which Accelerated Share Repurchases occur).

88. *Id.*

89. *See* Comment Letter from Shearman & Sterling LLP to Vanessa A. Countryman, Sec'y of U.S. Sec. & Exch. Comm'n 2 (Apr. 1, 2022), https://www.sec.gov/comments/s7-20-21/s72021-20122368-278403.pdf [https://perma.cc/F78Q-3B8Z] (suggesting that a 15-day period for issuers and 30-day period for all others, calling the current proposal excessive); Comment Letter from Paul, Weiss, Rifkind, Wharton & Garrison LLP to Vanessa A. Countryman, Sec'y of U.S. Sec. & Exch. Comm'n 3 (Apr. 1, 2022), https://www.sec.gov/comments/s7-20-21/s72021-20122190-278230.pdf [https://perma.cc/3QAE-X348] (reasoning that the period length is unnecessarily long and may encourage trading outside of the bounds of the plan if too strict; a 30-day period is proposed as an alternative); Comment Letter from Kirkland & Ellis LLP, to Vanessa A. Countryman, Sec'y of U.S. Sec. & Exch. Comm'n 2–3 (Apr. 1, 2022), https://www.sec.gov/comments/s7-20-21/s72021-20122198-278239.pdf [https://perma.cc/T6S5-M2CU] (explaining that there is no requirement for a statutorily imposed cooling-off period due to other enhanced requirements and disclosures and that a 30-day period is more appropriate as it is indicative of market practice and does not stifle trade when the fast-paced economy would make 60–120-day periods too long due to the pace at which information moves).

90. Comment Letter from Tom Quaadman, Exec. Vice President, Ctr. for Cap. Mkts. Competitiveness, U.S. Chamber of Com., to Vanessa A. Countryman, Sec'y of U.S. Sec. and Exch. Comm. 1 (Apr. 1, 2022), https://www.sec.gov/comments/s7-20-21/s72021-20122318-278366.pdf [https://perma.cc/6HNQ-BSUE].

91. *See id*. at 3 (suggesting adoption of the thirty-day cooling-off period for issuers and insiders, reasoning that it exceeds market practice currently).

92. *See* Comment Letter from Ani Huang, President and CEO, Ctr. on Exec. Comp., to Vanessa A. Countryman, Sec'y of U.S. Sec. & Exch. Comm'n 4 (Apr. 1, 2022), https://www.sec.gov/comments/s7-20-21/s72021-20122207-278246.pdf [https://perma.cc/J57M-QER4] (indicating that a cooling-off period of 120 days is well outside of the market practice in which 14-60 days is used by companies with self-imposed cooling-off periods); Comment Letter from Ted Allen, Vice President, Pol'y & Advoc. & Darla Stuckey, President and CEO, Soc'y for Corp. Governance, to Vanessa A.

studies supporting their opinions, an analysis of the studies shows the issues with their reliance on these studies and that the proper period is in the middle of what is advocated for.

C. Analysis of the Comments

The comments reflect two sets of competing ideologies which indicate the task that the SEC needs to consider when the rule reaches its final form. The rule as it was first formulated may be seen as a "get-out-of jail-free" card that would incentivize trading under the plans as a way to avoid being scrutinized for insider trading.[93] However, the rule is not designed to be unusable, and reading all the amendments together quickly paints a picture of a scenario where an impractical rule is created. Under the proposed formulation of the rule: A director creates a trading plan in good faith at a time when they do not have MNPI, that plan will be disclosed on the next quarterly report, at its shortest thirty days before the first trade is made under the plan, and that the adopted plan is the only one that the trader may create that has overlapping trades with any of that insider's other plans to prevent them from adopting competing positions and then cancelling the least advantageous one.[94] Even without the extra thirty to sixty days, insider trading seems nearly impossible to carry out under the proposed formulation.

Countryman, Sec'y of U.S. Sec. & Exch. Comm'n 6 (Apr. 1, 2022), https://www.sec.gov/comments/s7-20-21/s72021-20122264-278309.pdf [https://perma.cc/HX2B-TWFU] (highlighting the lack of evidence of abuse by issuers, which shows a lack of justification for the issuer cooling period and that the 120-day period exceeds market practice).

93. McGinty & Maremont, *supra* note 59 (quoting Brandon Lynch-Levy, Academic, The Wharton School).

94. *See* Rule 10b5-1 and Insider Trading, 87 Fed. Reg. 8686, 8688–89 (proposed Dec. 15, 2021) (to be codified at 17 C.F.R. pt. 240.10b5-1) (listing broadly the elements and effects of the proposed amendments including the updated good faith requirements and restrictions on multiple overlapping trade agreements). Under the amendment, this would prevent insiders from having multiple trading plans that would respond to the market in various ways and then employing the one that is most advantageous. Rule 10b5-1 and Insider Trading, 87 Fed. Reg. at 8692. For example, a trader could have one plan that buys company stock if there is an anticipation that the price will increase and another plan that would respond favorably to bad news from the company, such as buying competitors' stock, buying short positions, or selling company shares. *See* Rule 10b5-1 and Insider Trading, 87 Fed. Reg. at 8692 (discussing not allowing insiders who create plans with competing positions to access the affirmative defense).

The SEC properly considered toning the rule down to create a usable rule for insiders that protects the market and does not encourage trading outside of the plan. The concern that the trading plan under the rule created a "get-out-of-jail-free card"[95] due to the original iteration being largely unenforceable or that the SEC is overly concerned about a problem without being able to enforce the rule consistently[96] shows change is needed based on the perception of the previous rule. The anecdotes about the vaccine stock abuse[97] and the loss avoidance disappearance[98] indicate that the rule has problems that need to be addressed and that change is proper, including implementing some cooling-off period. However, the 120-day period is likely not necessary to achieve the SEC's goals and could eliminate the efficiency of the plans by creating too strong of requirements that unnecessarily limit the ability of a director or officer to trade under a Rule 10b5-1 plan. Since the plans would be required to be disclosed on quarterly reports[99] when entered, the possibility exists that the market will be able to wait on trading plans to be disclosed at the latest thirty days before the insider is able to make their first trade under the plan with a 120-day cooling-off period in place. This would mean that people could check any potential material information that would be disclosed on the quarterly report and buy or sell before the insiders are able to act under a plan that requires 120 days of cooling-off.

While 120 days may be longer than necessary to affect the goals of those concerned about insider trading, that does not mean that the positions advocated for by businesses interests are correct in their assertions. Critics of the rule point to prevailing market practices but fail to show why prevailing practices are the best alternative to the proposed cooling-off period.[100] The prevailing market practice does not necessarily line up with what would be sensible policy given the

95. McGinty & Maremont, *supra* note 59 (quoting Brandon Lynch-Levy, Academic, The Wharton School).

96. *See* Press Release, U.S. Sec. & Exch. Comm'n, SEC Announces Enforcement Results for FY 2021 (Nov. 18, 2021), https://www.sec.gov/news/press-release/2021-238 [https://perma.cc/Z8CL-9866] (showing enforcement results for the SEC that do not indicate any instances insider trading spurring from the abuse of trading plans).

97. *See supra* text accompanying note 2.

98. McGinty & Maremont, *supra* note 59.

99. Rule 10b5-1 and Insider Trading, 87 Fed. Reg. at 8686.

100. *See* Wilson Sonsini *supra* note 5, at 3; Huang, *supra* note 92, at 4–5 (referencing in both market practice as justification for a shorter than proposed cooling-off period lengths).

concerns about how the plans are being manipulated by insiders using MNPI and there is more that is needed to solve the problem.

The prevailing market practice indicated by the Wilson Sonsini letter is that 75% of companies employ a cooling-off period of less than sixty days.[101] The Center for Executive Compensation indicates that the highest end of the range of cooling-off periods that are employed is sixty days.[102] The articles cited by the group of senators show that fewer than sixty days may give greater returns to insiders that trade under plans.[103] Given that the current market practice is granting insiders around a 1.3% advantage over the market[104] the adoption of a shorter period is not justified by merely a prevailing market practice, especially considering public concerns that the rule is being abused as originally constructed.[105] While the various comments suggest the rule should be updated, the current proposal may be too stringent and the studies on Rule 10b5-1 best help inform the proper length of the cooling-off period.

V. ANALYSIS OF COOLING-OFF PERIOD STUDIES

Studies vary in what they seem to suggest are the problems with the current Rule 10b5-1 plans and the appropriate length of the cooling-off period. One of the studies that the SEC relies on from Stanford University, for example, conducted a study in 2021 showing the potential signs of abuse.[106] While the results of the study support the positions it advocates for, the study's results tend to show that the desired goals can be achieved with shorter cooling-off periods.[107] The

101. Wilson Sonsini, *supra* note 5, at 3.

102. *See* Huang, *supra* note 92, at 4–5 (referencing a survey that the center conducted in 2019 that indicated a range of fifteen to sixty days of cooling before a trade is carried out under a trading plan).

103. *See* McGinty & Maremont, *supra* note 59 (showing returns by days after plan adoption when the first trade is made, but that the advantage is completely gone from 90–120 days).

104. *Id.*

105. *See Supra* note 103 and accompanying text; *see, e.g.*, Senators Comment Letter, *supra* note 66 (illustrating the concerns, especially after the instances of suspiciously timed trades from vaccine company executives, of potential abuses under the original Rule 10b5-1 affirmative defense).

106. Larcker et al., *supra* note 11.

107. *Id.*

Stanford study recommends that a cooling-off period of four to six months would curb the appearance of insider trading.[108]

First, the Stanford study indicates that there is not a systematic anticipation of share price decline if a four-to-six-month cooling-off period is adopted and also indicates that the average days between the plan adoption and the first trade 117.9 days.[109] This average is misleadingly long. The median period before a trade is carried out under an adopted plan is significantly lower at seventy-six days.[110] Seventy-one percent of plans have cooling-off periods of less than 121 days and 59% are less than ninety-one days, which indicates that there may be a number of cooling-off periods that are outliers and bring the average up. The most frequent cooling-off period length employed by these plans is between thirty-one to sixty days, with 25% of plans at this length.[111]

Second, the median preplanned sale size analysis indicates that the median sales size is at its highest when there is a sixty-one to ninety-day cooling-off period, the size is almost identical for 91-120 day plan lengths, before the sales size finally decreases for periods longer than 120 days.[112] It thus seems that after a cooling-off period of over four months, the size decreases which indicates this being an effective policy choice for a cooling-off period. Almost counterintuitively, the sales' size is smaller when the cooling-off period is significantly lower from zero to sixty days than it is when periods are 60-120 days in length.[113] This runs counter to the idea that people will make big trades quickly under the plan with very short cooling-off periods.

Next, the Stanford study considers how well the industry performed following the sale at various lengths of cooling-off periods.[114] If there was a decline in the stock after the sale, that would suggest that the seller sold at the ideal time to avoid losses. The study indicated that this negative rate of return does not disappear after 120 days as one would assume given the suggestion of a 120-day cooling-

108. *Id.* at 3.

109. Larcker et al., *supra* note 11, at 3, 9.

110. *Id.*

111. *Id.* at 9 (showing through Exhibit 4 that 18% of plans are greater than 181 days which could skew the mean towards suggesting a longer cooling-off period may be appropriate, while looking to the median works to remove the potential skewing of the data by periods greater than 180 days).

112. *Id.* at 10.

113. *Id.*

114. *Id.* at 11.

off period, but rather disappears when the plan has a cooling-off period sixty-one to ninety days.[115] After only sixty days, the appearance of opportunistic selling goes away, as the market outperforms stock plans with no transactions for the first sixty days after adoption. [116]

While the study is correct in its suggestion that a four to six month cooling-off period would eliminate the appearance of insider trading, it fails to truly show that this length is necessary to achieve this goal—especially in conjunction with the additional restrictions the SEC plans to implement. The "Gaming the System" study conducted by Stanford University is useful in showing that the appearance of insider trading can be avoided if its suggestions are implemented, while other studies indicate that there is no systematic abuse of share repurchases by CEOs.[117]

A study by authors from The Tingbergen Institute, holds that the only correlation between share repurchases and equity compensation is a spurious one that disappears when a corporate calendar is considered.[118] This study was not considered by the SEC, as it was released after the proposed rule. The study mainly discusses the potential for issues to conduct stock buybacks to raise the prices and artificially influence the amount that they receive in equity compensation.[119] The study specifically addresses Rule 10b5-1 plans and suggests that the correlation between executives' compensation by stock and repurchases does not exist when the company uses a Rule 10b5-1 plan but does when there is a flexible buyback program. [120] Showing that repurchases are not being used to manipulate the market further supports that the imposition of a thirty-day issuer cooling-off period is not necessary. While the cooling-off periods suggest that the SEC may be casting too wide a net with how it seeks to regulate Rule 10b5-1 plans, the growing use of Rule 10b5-1 plans suggests that it may still be the proper time to impose greater regulations of Rule 10b5-1 plans generally.

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115. *Id.*

116. *Id.*

117. INGLOFF DITTMANN ET AL., TINBERGEN INST., THE CORPORATE CALENDAR AND THE TIMING OF SHARE REPURCHASES AND EQUITY COMPENSATION (2022), https://papers.tinbergen.nl/21101.pdf [https://perma.cc/LZH2-6G6F].

118. *Id.* at 1.

119. *Id.*

120. *Id.* at 23.

Morgan Stanley and Shearman & Sterling LLP conducted a survey, which found that from 2003 to 2015 there has been a substantial increase in the percentage of S&P 500 companies that use Rule 10b5-1 plans, up to 51% in 2015 from 26% in 2003.[121] The most notable of the findings is that 2% of the companies using the rule do not require that the company review and approve the plan that directors and officers enter into, and 13% more of these companies only review the template of the plan.[122]

Further, while no companies required rule 10b5-1 plans for insiders in 2003, now 17% of the companies require that their employees use the plans while trading.[123] This increasing reliance may be a result of companies being more risk averse and encouraging use of the plans to avoid insider trading or at least legal liability for insider trading.

The survey also discusses the lengths of the plans and if companies mandate minimums to prevent short term trading schemes.[124] Over 60% of companies do not require that a minimum plan length is set, and an additional 20% only require that the plan last six months.[125] Since a majority of companies do not self-impose any cooling-off periods, the prevalence of the issue of insider trading may not be about the length of the cooling-off period, but the lack of any period allowing many companies to let their directors and officers have free reign.

The survey also indicates lengths of required cooling-off periods by companies, which supports the position many law firms and business side advocates take that the prevailing market practice for a required cooling-off period is thirty days, with 41% of companies requiring thirty days.[126] Surprisingly, the survey suggests that a majority of plans have between no minimum to a thirty-day minimum, with 69% of companies setting cooling-off periods that are less than or equal to thirty days.[127] Only 6% required a cooling-off period of sixty days, while 11% took an approach that did not set out an exact cooling-off period, but rather

121. *See* GIOVE & MCCASLAND, *supra* note 27, at 1.
122. *Id.* at 2.
123. *Id.*
124. *Id.* at 4.
125. *Id.*
126. *Id.* at 5.
127. *See id.* (finding a total of 69% of plans self-employing a cooling-off period of less than thirty days, with 16% of plans having no cooling-off, 12% having under thirty days before the first transaction, and 41% at thirty days before the first transaction).

made the trades execute at the beginning of the next quarter.[128] This would suggest that while market practice is significantly shorter than what the SEC suggests, it is below what "Gaming the System" would suggest is an effective policy. The study noted that companies that had greater than 75,000 employees and a market cap of over $50 billion were more likely to have plans that required cooling-off periods of longer than sixty days.[129] While no other rule proposes a cooling-off period that the proposed Rule 10b5-1 has, parallels can be drawn between the cooling-off period and the blackout period required by the Sarbanes-Oxley Act of 2002.

VI. COMPARING PROPOSED RULE 10B5-1 TO THE SARBANES-OXLEY ACT

The demand for the adoption of the Sarbanes-Oxley Act in some ways mirrors the circumstances that lead to demand for proposed changes to the Rule 10b5-1 plans after vaccine company CEOs made advantageously timed trades during the COVID-19 pandemic.[130] After the Fall of Enron in 2001 and 2002 when the company crumbled because of corporate and accounting fraud, Congress responded by passing the Sarbanes–Oxley Act.[131] Part of the Act prohibited any company director, officer, or issuer from trading the issuer's stock during blackout periods imposed by the company.[132] The blackout periods are any period that are at least three consecutive business days where more than 50% of holders of individual account plans cannot make trades or changes to their pension plan.[133] Most companies

128. *Id.* at 5.

129. *Id.*

130. *See* Warren, Van Hollen & Brown Letter, *supra* note 5, at 1–2 (urging the SEC to reconsider Rule 10b5-1 in the wake of vaccine company executive stock sales made pursuant to trade plans).

131. *See* Matthew R. Webber, *The Enron Scandal and the Sarbanes-Oxley Act*, THE BALANCE (last updated Sept. 13, 2022), https://www.thebalancemoney.com/sarbanes-oxley-act-and-the-enron-scandal-393497 [https://perma.cc/4X66-HGXC] (stating that Sarbanes-Oxley "was passed in response to a number of corporate accounting scandals . . . , most notably . . . Enron," an energy company which "was one of the largest—and thought to be one of the most financially sound—companies in the U.S.").

132. 15 U.S.C. § 7244 (2002).

133. *Id.* An individual account plan is a pension plan where each participant maintains their own account and is based solely off of the amount that is allocated to the participants account. 15 U.S.C. § 7244 (2002).

employ these blackout periods in the weeks before the earnings reports.[134]

A blackout period is a period in which executives, directors, and employees are prevented from trading their shares of the company or making changes under their pension plan before major announcements are made.[135] The purpose of the blackout period is to prevent knowledge about major announcements or the contents of earnings results days before their public release from giving insiders a trading advantage prior to the public release of this news.[136] While the length of the blackout periods is not regulated to a standard length of the government, lengths of periods for pensions have an industry standard of two weeks, but can be up to thirty days.[137] The scandal giving rise to the passing of Sarbanes-Oxley greatly differs from the vaccine company executive stock sales,[138] and Sarbanes-Oxley encompasses far more than insider trading,[139] but the concerns Sarbanes-Oxley's blackout period addresses are similar to those that individuals have that gave rise to the proposed amendments to Rule 10b5-1 —that insiders may trade on the basis of insider information.[140] However, the usefulness of that

134. *See* Bob Schneider, *What Is a Blackout Period in Finance? Rules and Examples*, INVESTOPEDIA (last updated June 3, 2022), https://www.investopedia.com/ask/answers/08/blackout-period.asp [https://perma.cc/ERY7-L66D] (stating that concerns over insider trading led to the adoption of the Sarbanes-Oxley Act).

135. Schneider, *supra* note 134.

136. *See id.* (stating that companies employ blackout periods to avoid suspicion that employees might beneficially trade based on information before the information is released).

137. Eric Reed, *What Is a 401(k) Blackout Period?*, SMARTASSET (Feb. 14, 2022), https://smartasset.com/retirement/what-is-a-401k-blackout-period [https://perma.cc/572V-VGMP].

138. *Compare* Webber, *supra* note 131 (identifying the collusion between accounting firm Arthur Andersen & Co. with Enron which allowed Enron employees to commit financial crimes and make misrepresentations that overvalued contracts, hid bad investments, and diluted earnings), *with supra* note 2 and accompanying text (discussing various instances of vaccine company executives making suspiciously timed trades), *and* Warren, Van Hollen & Brown Letter, *supra* note 5 (imploring the SEC to take action on Rule 10b5-1 in response to the vaccine company executives' suspiciously timed trades).

139. *See* Webber, *supra* note 131 (highlighting the objectives of the Sarbanes-Oxley act to increase the quality of corporate disclosures and restoring public trust in corporations).

140. *See* Schnieder, *supra* note 134 ("They do this to avoid any possible suspicion that the employees might use that information to their benefit ahead of its public release, which would violate SEC rules on insider trading."); Warren, Van Hollen & Brown Letter, *supra* note 5 (opining that the SEC's policy on Rule 10b5-1 plans "grant[s] corporate executives a 'safe harbor' to trade their company's stock").

information may run out in a shorter period due to the fast pace of the economy.[141]

VII. SUGGESTED SOLUTIONS FOR THE RULE AND THE SEC'S DECISION

The cooling-off periods in the SEC's proposed rule are too long. The thirty-day issuer period was too long if it is true there is no evidence that there has been any abuse by issuers in repurchasing their stock[142] and if there is incentive for companies to abuse.[143] If there is no evidence or support as the commenters suggest, the period that applies to the issuers could even be determined to be "arbitrary and capricious" as the SEC may not have "examine[d] the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made'" in regard to the issuer restrictions.[144] However, opportunistic repurchases occur by companies two days after an earnings release and on the first day before a trading window closes.[145] Longer blackout periods—up to thirty days—suggest that the rule as proposed may be acceptable, but other factors may suggest a shorter period is appropriate.[146]

The SEC's decision for the issuer period is proper given the agency's concerns. Ultimately, the SEC decided against implementing a cooling-off period of thirty days for issuers.[147] The SEC bases arrives at this conclusion reasoning that while issuers are currently self-regulating through employing different cooling-off periods and while there is a risk

141. *See* Comment Letter from Kirkland & Ellis LLP to Vanessa Countryman, *supra* note 89, at 2–3 (suggesting that too long of a period may stifle trade when the fast-paced economy would make 60–120-day periods too long due to the pace at which information moves).

142. *See* Quaadman, *supra* note 90, at 3 (stating that the cooling-off period would not help the SEC achieve its objectives nor has there been abuse alleged by issuers).

143. Wilson Sonsini, *supra* note 5, at 4 ("If the Staff's concern is that issuers may be intentionally withholding information that would have a positive effect on share price in order to execute repurchases . . . a cooling off period would do little to address this concern.").

144. Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins., 463 U.S. 29, 43 (1983) (quoting Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962)).

145. Anagnosti, *supra* note 86.

146. Reed, *supra* note 137.

147. Insider Trading Arrangements and Related Disclosures, 87 Fed. Reg. 80362, 80372 (Dec. 29, 2022) (to be codified at 17 C.F.R. pt. 240.10b5-1).

of abuse for investors, the agency needs to further consider adding an issuer cooling-off period without implementing one at this time.[148]

In regard to the officer and director trading period, the proposed 120-day cooling-off period was too long, while the current industry practice of thirty days[149] was likely too short, as the performance of plans that utilize this period outperform the market and enable insiders to avoid losses.[150] Because loss avoidance disappears after sixty days,[151] which is the high end of self-regulation,[152] it is a viable solution from a statistical perspective that would not be so rigid that it would discourage insiders from using Rule 10b5-1. However, it would still leave open the possibility that a trading plan adopted based on MNPI that is discovered in the first thirty days of a quarterly period could be protected by the affirmative defense.

Since the SEC felt that the sixty-day period is still too short, the period that was set should still not exceed the set ninety-day cooling-off period.[153] At ninety days, the period would be longer than the median cooling-off period length of plans[154] and also would be at three months. This means that any MNPI would come out on the quarterly report and prevent insiders from using it.[155] As a special caveat to the plan, the SEC should consider adopting a cooling-off period that expires at the quarter when the next report is issued, a solution which 11% of companies currently use on their own.[156] This would allow for insiders to not be disadvantaged if the plan is implemented but became inefficient as information is released in the quarterly report, giving insiders the ability to be placed on equal footing with the market.

The SEC in its final iteration adopted a rule with an approach that is two-fold, and adopted something resembling the suggestion that a

148. *Id.*

149. *See* GIOVE & MCCASLAND, *supra* note 27, at 5 (indicating that 41% of plans entered into have a thirty-day mandatory cooling-off period).

150. Larcker et al., supra note 11, at 11.

151. *Id.*

152. *See* GIOVE & MCCASLAND, *supra* note 27, at 5 (showing that only 28% of companies employ a mandatory cooling-off period, which may be either greater than sixty days, at the opening of the next quarter, or some other period).

153. Insider Trading Arrangements and Related Disclosures, 87 Fed. Reg. at 80369.

154. Larcker et al., *supra* note 11, at 11.

155. *See* Comment Letter from Kirkland & Ellis LLP to Vanessa Countryman, *supra* note 89, at 2–3 (highlighting how heavy the burden of 120 days may be given the speed at which information moves in our economy and also highlights the length of quarterly reporting period being in conflict with the 120-day suggestion of the proposed rule).

156. *See* GIOVE & MCCASLAND, *supra* note 27, at 5.

plan could make trades after the release of MPNI in a quarterly report,[157] but in actuality is much stricter.[158] Under the SEC's adopted rule, the period is whatever is longer of ninety days, or two days after the latest quarterly report.[159] This plan would make the minimum length ninety days, even if there is a quarterly report that discloses the information that the officer or director relied on, and if the plan is adopted on the first day of the new quarter, would automatically extend the length of the plan to a full quarter plus two days.[160]

The final version of the rule also adds in an additional cooling-off period for insiders that are not within the scope of either an officer, director or issuers, giving those insiders who enter into a plan a required thirty-day cooling-off period.[161]

A hardline rule that would prohibit trading for 120 days (or any other period) could prohibit trading for significant amounts of time after the stock has tanked. This type of impracticability could motivate insiders to trade outside of the plan. While trading outside of the plan would no longer entitle insiders to the insider-trading protections of Rule 10b5-1, there could be an increase in the regulatory burden of investigating potential insider trading violations if the SEC created a rule that is unreasonably harsh and insiders do not use it. The SEC should also consider the strength of the current plan in other areas when considering the length of the cooling-off period. Given the number of disclosures required, the elimination of multiple plans, and the raised certification requirements of the proposed rule, a long cooling-off period may be unnecessary to combat insider trading.[162]

VIII. CONCLUSION

Rule 10b5-1 has long been criticized due to its loose requirements that some viewed as a "get-out-of-jail-free card."[163] The

157. *See supra* text accompanying note 157.
158. Insider Trading Arrangements and Related Disclosures, 87 Fed. Reg. at 80369.
159. *Id*.
160. *Id.*
161. *Id.* at 80371.
162. Rule 10b5-1 and Insider Trading, 87 Fed. Reg. 8686, 8688 (Dec. 15, 2021) (to be codified at 17 C.F.R. pts. 229, 232, 240, 249).
163. McGinty & Maremont, *supra* note 59.

SEC proposed a comprehensive revision to the rule to limit the perceived abuses of the rule but needs to be guided by the original goals of the rule to create an affirmative defense to insider trading that encourages insiders to make trades pursuant to a predetermined trading plan. While the proposal would likely have closed the loopholes that were allegedly being exploited, the proposed rule's heavy-handed approach may have undermined the goal of having insiders use these plans at all. The proposed rule's cooling-off period was longer than necessary to be effective. By adopting a shorter cooling-off period, or a plan that concludes at the end of the quarter, the SEC's final rule should have effectively addressed the concerns of abuse of the plans while appeasing businesses and incentivizing continuous use of the plans by insiders wishing to engage in trading. An effective analysis from the SEC should look towards industry practice, the effectiveness and policy of Sarbanes-Oxley, and the practicality of how the cooling-off period would act in conjunction with the other aspects of the proposed rule to create an effective policy rather than one where many of the individual provisions of the proposed rule standing on their own could achieve the goals of the SEC.

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