

United States Senate  
WASHINGTON, DC 20510

February 10, 2021

The Honorable Allison Herren Lee  
Acting Chair  
Securities and Exchange Commission  
100 F Street NE  
Washington, DC 20549

Dear Acting Chair Lee:

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.<sup>1</sup> These plans were designed to prevent insider trading, but new evidence indicates that executives – especially those in the healthcare industry – are abusing these plans to obtain huge windfalls at the expense of ordinary investors.<sup>2</sup> These abuses, and the plans' lack of transparency, damage investors and risk undermining public confidence. We urge you to improve disclosure and enforcement of 10b5-1 plans and to consider further reforms that would prevent abusive practices.

On the same day that Pfizer announced that its vaccine for the novel coronavirus (COVID-19) was found to be more than 90% effective in clinical trials, Pfizer CEO Albert Bourla sold more than 60% of his personal shares in the company, valued at about \$5.6 million.<sup>3</sup> The shares were sold under Bourla's 10b5-1 plan, which allows corporate executives to set an advance plan for purchase and sale of their corporate stock.<sup>4</sup> The SEC created the 10b5-1 "safe harbor" in 2000 in order to allow corporate executives, who often have continuous access to material nonpublic information, to sell their holdings without engaging in insider trading.<sup>5</sup> Research, however, suggests that initial trades set up by 10b5-1 plans often appear to be based on material nonpublic information, and executives can and do modify or cancel their plans in

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<sup>1</sup> Business Insider, "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." Shalini Nagarajan, November 23, 2020, <https://markets.businessinsider.com/news/stocks/moderna-ceo-sold-million-stock-company-emergency-use-vaccine-filing-2020-11-1029830266>.

<sup>2</sup> Columbia Law School and Economics Working Paper, "Insider Trading and Strategic Disclosure," Joshua Mitts, December 7, 2020, pgs. 5-6, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3741464](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3741464).

<sup>3</sup> Wall Street Journal, "Pfizer CEO Joins Host of Executives at COVID-19 Vaccine Makers in Big Stock Sale," Jared S. Hopkins and Gregory Zuckerman, November 11, 2020, <https://www.wsj.com/articles/pfizer-ceo-joins-host-of-executives-at-covid-19-vaccine-makers-in-big-stock-sale-11605139164>.

<sup>4</sup> *Id.*

<sup>5</sup> Columbia Law School and Economics Working Paper, "Insider Trading and Strategic Disclosure," Joshua Mitts, December 7, 2020, pgs. 5-6, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3741464](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3741464).

response to inside information in order to increase their own profits.<sup>6</sup> Moreover, the windfall profits obtained by Mr. Bourla and other Pfizer executives are hardly unique: a recent study found that “public companies disproportionately disclose positive news on days when corporate executives sell shares under predetermined 10b5-1 plans,” distorting stock prices for other investors. These sales are greatest in the health care sector.<sup>7</sup>

Although trades made under 10b5-1 plans are intended to be set months in advance, it is not unusual for the plans to be modified days or hours before a major public announcement.<sup>8</sup> Mr. Bourla’s plan, for example, was modified on August 19, 2020, one day before Pfizer announced the result of the first phase of its clinical trial for the COVID-19 vaccine.<sup>9</sup> An analysis of 10b5-1 plans across industries found that “executives at over 100 companies used plans that executed a trade the same day the plan was adopted.”<sup>10</sup> These short-term trades undermine the purpose of the 10b5-1 provision by eliminating the distance between the executive’s access to inside information and their transactions. Concerns about this use of 10b5-1 plans led the SEC Chair to call for a “cooling-off period” of four to six months between the adoption of a 10b5-1 plan and the execution of its first trade.<sup>11</sup> But the SEC has yet to take action on such a cooling-off period, which would mark a significant change, affecting 70% of plans adopted from 2016 to 2019.<sup>12</sup>

The misuse of 10b5-1 plans appears to be creating significant disadvantages for other investors. Experts believe that 10b5-1 plans often set a “trigger” price at which the executive’s shares will be sold, which appears to be one of the primary mechanisms leading to large stock sales on the days of “good news” announcements, such as Pfizer’s.<sup>13</sup> These plans and prices, however, are not disclosed to the public in advance. As a result, institutional and retail investors who buy shares on the day of these positive announcements are unaware that they are trading

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<sup>6</sup> Columbia Business Law Review, “Do SEC’s 10b5-1 Safe Harbor Rules Need to be Rewritten?” Taylan Mavruk and H. Nejat Seyhun, June 12, 2016, pgs. 181-182, <https://journals.library.columbia.edu/index.php/CBLR/article/view/1734>.

<sup>7</sup> Columbia Law School and Economics Working Paper, “Insider Trading and Strategic Disclosure,” Joshua Mitts, December 7, 2020, pgs. 5-6, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3741464](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3741464).

<sup>8</sup> The Hill, “How the SEC can and should fix insider trading rules,” Alan Jagolinzer, David Larcker, and Daniel Taylor, December 17, 2020, <https://thehill.com/opinion/finance/530668-how-the-sec-can-and-should-fix-insider-trading-rules>.

<sup>9</sup> NPR, “Pfizer CEO Sold Millions in Stock After Coronavirus Vaccine News, Raising Questions,” Tom Dreisbach, November 11, 2020, <https://www.npr.org/2020/11/11/933957580/pfizer-ceo-sold-millions-in-stock-after-coronavirus-vaccine-news-raising-questio>.

<sup>10</sup> The Hill, “How the SEC can and should fix insider trading rules,” opinion, Alan Jagolinzer, David Larcker, and Daniel Taylor, December 17, 2020, <https://thehill.com/opinion/finance/530668-how-the-sec-can-and-should-fix-insider-trading-rules>.

<sup>11</sup> Wall Street Journal, “SEC Chairman Urgest Corporate Insiders to Avoid Quick Stock Sales,” Paul Kierman, November 17, 2021, <https://www.wsj.com/articles/sec-chairman-urges-corporate-insiders-to-avoid-quick-stock-sales-11605637892>.

<sup>12</sup> The Hill, “How the SEC can and should fix insider trading rules,” opinion, Alan Jagolinzer, David Larcker, and Daniel Taylor, December 17, 2020, <https://thehill.com/opinion/finance/530668-how-the-sec-can-and-should-fix-insider-trading-rules>.

<sup>13</sup> Columbia Law School and Economics Working Paper, “Insider Trading and Strategic Disclosure,” Joshua Mitts, December 7, 2020, pg. 13, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3741464](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3741464).

against a large sell order from the company's executives, which effectively pulls the share price down. In fact, empirical evidence shows that stock prices decline faster from their peak when positive announcements are accompanied by high levels of 10b5-1 selling, and these reversals increase when the 10b5-1 selling makes up a larger share of the stock's trading volume.<sup>14</sup> Other investors are therefore unaware of this dynamic until, at the earliest, executives' trades are disclosed two days after the fact – if at all.<sup>15</sup> Since 2014, more than 14,000 trades by corporate executives, worth more than \$6 billion, have been filed more than 10 days late.<sup>16</sup>

To address these abusive practices, experts have suggested a number of possible remedies. First, the previous SEC Chair's recommendation of a four-to-six month "cooling off period" between adoption or amendment of a plan before trading under the plan may begin or recommence would reinforce the intention to separate executives' decisions to sell their holdings from their knowledge of immediately forthcoming events.<sup>17</sup> Second, the content of 10b5-1 plans, as well as trades that are made pursuant to such plans, should be disclosed to the SEC and the public so that other shareholders can factor in the degree to which stock prices are influenced by corporate executives' plans.<sup>18</sup> This would also provide the public with valuable information about executives' compensation incentives.<sup>19</sup> Without disclosure of the content of the plans themselves, there is currently no way for the SEC to ensure that executives are actually following the commitments laid out in the plans; disclosure would allow for stronger oversight.<sup>20</sup>

In addition, the SEC should also enforce existing filing deadlines to ensure that the public is not kept in the dark for weeks after executives' trades are initiated. And the agency has a responsibility to ensure that forms disclosing 10b5-1 adoption dates are posted in the public EDGAR database.<sup>21</sup>

Finally, the SEC should explore options to better align executives' incentives with those of shareholders and the public by considering enforcing penalties when executives benefit from

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<sup>14</sup> Columbia Law School and Economics Working Paper, "Insider Trading and Strategic Disclosure," Joshua Mitts, December 7, 2020, pg. 13, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3741464](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3741464).

<sup>15</sup> *Id.*, pg. 15

<sup>16</sup> The Hill, "How the SEC can and should fix insider trading rules," opinion, Alan Jagolinzer, David Larcker, and Daniel Taylor, December 17, 2020, <https://thehill.com/opinion/finance/530668-how-the-sec-can-and-should-fix-insider-trading-rules>.

<sup>17</sup> *Id.*

<sup>18</sup> Columbia Law School and Economics Working Paper, "Insider Trading and Strategic Disclosure," Joshua Mitts, December 7, 2020, pgs. 14-15, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3741464](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3741464).

<sup>19</sup> The Hill, "How the SEC can and should fix insider trading rules," opinion, Alan Jagolinzer, David Larcker, and Daniel Taylor, December 17, 2020, <https://thehill.com/opinion/finance/530668-how-the-sec-can-and-should-fix-insider-trading-rules>.

<sup>20</sup> Columbia Business Law Review, "Do SEC's 10b5-1 Safe Harbor Rules Need to be Rewritten?" Taylan Mavruk and H. Nejat Seyhun, June 12, 2016, pg. 183, <https://journals.library.columbia.edu/index.php/CBLR/article/view/1734>.

<sup>21</sup> The Hill, "How the SEC can and should fix insider trading rules," opinion, Alan Jagolinzer, David Larcker, and Daniel Taylor, December 17, 2020, <https://thehill.com/opinion/finance/530668-how-the-sec-can-and-should-fix-insider-trading-rules>.

short-term windfalls that do not translate into long-term gains.<sup>22</sup> Section 16(b) of the Securities Exchange Act of 1934 already requires that any profit an insider obtains from a “short-swing” purchase and sale of a stock held for less than six months must be returned to the company.<sup>23</sup> The SEC could consider working with Congress to modify the rule to cover profits obtained through 10b5-1 sales that follow disclosure of material information that cause share prices to fall in the period immediately following the disclosure. Such a requirement could disincentivize executives from pursuing short-term gains at the expense of the public while rewarding those whose management creates long-term value for the company and its shareholders.<sup>24</sup>

In addition to harming ordinary investors, the abuse of 10b5-1 plans and the short-term, windfall profits obtained by insiders through abuses of these plans undermine public confidence in open, fair markets and the products they create. Public trust in the COVID-19 vaccines produced by Pfizer and Moderna may have already been shaken by the dramatic profits obtained by pharmaceutical company executives and their liquidation of large amounts of their own holdings following the clinical trial announcements, because the questionable “actions of the executives will affect what people think of the vaccines themselves.”<sup>25</sup> These examples reveal the need for the SEC to reexamine its policies regarding 10b5-1 plans to improve transparency, enforcement, and incentives, to ensure that these plans increase fairness and trust.

In order to better understand how the SEC views existing regulation and enforcement regarding 10b5-1 plans, we ask that you respond to the following questions by Monday, February 22, 2021.

1. What actions does the SEC currently take to ensure that 10b5-1 plans are compliant with the Commission’s current rules and requirements?
2. How many enforcement actions has the agency taken with regard to 10b5-1 plans in the past five years? Please provide a list and summary of all such actions.
3. Has the SEC taken action to require a “cooling off period” between the adoption or amendment of any 10b5-1 plan and any stock sales under that plan?
4. Does the agency intend to require that 10b5-1 plans are disclosed publicly and posted online in advance of any trades made under that plan?

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<sup>22</sup> Columbia Law School and Economics Working Paper, “Insider Trading and Strategic Disclosure,” Joshua Mitts, December 7, 2020, pgs. 17-18, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3741464](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3741464).

<sup>23</sup> 15 U.S. Code § 78p (b); JD Supra, “Second Circuit Gives Guidance on Section 16 ‘Short-Swing’ Profits with Possible Implications for Hedge Funds,” Drew Dean and Daniel Tabak, June 2, 2020, <https://www.jdsupra.com/legalnews/second-circuit-gives-guidance-on-16690/>.

<sup>24</sup> Columbia Law School and Economics Working Paper, “Insider Trading and Strategic Disclosure,” Joshua Mitts, December 7, 2020, pgs. 17-18, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3741464](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3741464).

<sup>25</sup> Chicago Tribune, “Good COVID-19 vaccine news and a flurry of stock sales by executives: A study detects a pattern,” Maya Lau, December 15, 2020, <https://www.chicagotribune.com/business/ct-biz-vaccine-insider-stock-sales-20201215-xmy5wtlevrf7vktd2fjyfcbeq-story.html>.

5. Has the SEC considered or evaluated modifications of regulations to ensure that 10b5-1 adequately covers “short-swing” purchases?
6. What other actions has the SEC taken or are under consideration to prevent the abuse of 10b5-1 plans?

Thank you for your attention to this important matter, and we look forward to your response.

Sincerely,



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Elizabeth Warren  
United States Senator



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Sherrod Brown  
United States Senator



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Chris Van Hollen  
United States Senator