UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

OFFICE OF THE CHAIR

April 14, 2021

The Honorable Elizabeth Warren
United States Senate
309 Hart Senate Office Building
Washington, DC 20510

Dear Senator Warren:

Thank you for your February 10, 2021 letter regarding 10b5-1 plans. I too am concerned about potential abuses of the Rule 10b5-1 affirmative defenses, and I appreciate your input and the thoughtful questions you have raised.

As you know, Exchange Act Rule 10b5-1 defines when the purchase or sale of a security constitutes trading "on the basis of" material nonpublic information in insider trading cases brought under Exchange Act Section 10(b) and Rule 10b-5. A purchase or sale is "on the basis of" material nonpublic information about the security or the issuer if the person making the purchase or sale was aware of the material nonpublic information when the person made the purchase or sale. Adopting a written plan for trading securities – known as a 10b5-1 plan – before becoming aware of the information is one way to establish an affirmative defense that a person's purchase or sale is not "on the basis of" material nonpublic information.

The Commission adopted Rule 10b5-1 in August 2000 and has not substantively revisited it since then. In the intervening years, market developments and other circumstances have revealed aspects of the rule that may need to be reconsidered, including whether better disclosures about these plans are warranted. Your letter identifies a number of approaches, such as cooling off periods, that may enhance the rule's effectiveness. With respect to disclosure, there are no specific requirements related to information about 10b5-1 plans and, while some public companies do disclose the details of transactions made pursuant to their 10b5-1 plans, many do not. Similarly, while some insiders indicate on their beneficial ownership reporting forms when transactions are conducted pursuant to 10b5-1 plans, many do not.

I agree that improvements may be in order, and I have instructed the staff to review Rule 10b5-1 and develop recommendations for possible changes. As part of this review, the staff will consider the points you raise with respect to public disclosure of 10b5-1 plans, cooling off periods and short-swing profits.

With respect to current agency and enforcement actions, while I am unable to discuss the existence or nature of any specific investigations, the Division of Enforcement carefully

evaluates the facts and circumstances regarding 10b5-1 plans during its investigations into matters where such plans are relevant to the conduct under investigation. The Division also considers whether sales pursuant to 10b5-1 plans may be relevant to the proof of potential violations of the federal securities laws. In the past five years, the Commission has brought the following Enforcement actions where the public charging documents mention Rule 10b5-1 plans:

- *In the Matter of Andeavor LLC*, Administrative Proceeding File No. 3-20125 (Oct. 15, 2020) (settled order). In this matter, the SEC found that a company failed to have sufficient internal controls regarding stock buyback transactions. These findings included having insufficient controls surrounding the approval of a 10b5-1 plan to repurchase $250 million of stock. The company was ordered to cease and desist from future violations of Exchange Act Section 13(b)(2)(B) and to pay a $20 million penalty.

- *In the Matter of Interface, Inc., Gregory J. Bauer, and Patrick Lynch*, Administrative Proceeding File No. 3-20085 (Sept. 28, 2020) (settled order). The SEC charged a company, its corporate controller, and its CFO with violations of the federal securities laws for improper accounting. The SEC found that the CFO sold stock pursuant to a 10b5-1 plan. The company was ordered to cease and desist from, among other things, future violations of Securities Act Section 17(a)(2) and to pay a $5 million penalty; the CFO was ordered to cease and desist from, among other things, future violations of Exchange Act Rule 13b2-1, and to pay a $70,000 penalty.

- *SEC v. Peter Armbruster, Bret Naggs, and Mark Wogsland*, 19-cv-481 (E.D. Wis. 2019) (decision pending). In this contested matter, a CFO and company controllers were charged with accounting fraud. The SEC's complaint alleged that the CFO profited from the fraudulent scheme by selling securities through a 10b5-1 plan.

- *SEC v. Clovis Oncology, Inc., Patrick J. Mahaffy, and Erle T. Mast*, 18-cv-02381 (D. Colo. 2018). The SEC charged a company, its CEO, and its CFO with making, or aiding and abetting the making of, false and misleading statements regarding the company's flagship lung cancer drug. The charging documents alleged that the CFO sold stock pursuant to a 10b5-1 plan. The district court entered a judgment on consent and ordered the CFO to pay disgorgement and prejudgment interest of approximately $454,000 attributable to selling stock at inflated prices, and to pay a $100,000 penalty.

- *SEC v. Seaworld Entertainment, Inc. and James Atchison*, 18-cv-08480 (S.D.N.Y. 2018). In this matter, the SEC charged a company and its CEO with fraud for allegedly failing to disclose the material impact of a film documentary on the company's business. The charging documents alleged that the CEO obtained money by means of false statements or omissions, and avoided losses, by selling stock pursuant to a 10b5-1 plan. The district court entered a judgment on consent and ordered the CEO to pay disgorgement and prejudgment interest of approximately $850,000 and to pay a $150,000 penalty.

- *SEC v. Harpreet Grewal*, 18-cv-11778 (D. Mass. 2018). The SEC charged a CFO with violations of the federal securities laws for alleged misrepresentations and a scheme to

defraud concerning a key metric disclosed to investors. The charging documents alleged that the CFO sold stock pursuant to a 10b5-1 plan enacted after he learned certain information about the company's financial results. The district court entered a judgment on consent and ordered the CFO to pay disgorgement and prejudgment interest of $250,000 and to pay a $100,000 penalty.

The Division of Enforcement will continue to evaluate, as appropriate, 10b5-1 plans during its investigations into potential Enforcement matters.

Thank you again for your letter. Please do not hesitate to contact me at (202) 551-2100, or have a member of your staff contact Justin Slaughter, Director of the Office of Legislative and Intergovernmental Affairs, at (202) 551-2010 if you have any additional concerns or comments.

Sincerely,

Allison Herren Lee
Acting Chair