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Undoing a Deal with the Devil: Some Challenges for Congress's Proposed Reform of Insider Trading Plans

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UNDOING A DEAL WITH THE DEVIL: SOME CHALLENGES FOR CONGRESS'S PROPOSED REFORM OF INSIDER TRADING PLANS

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I. INTRODUCTION

RECENT studies have suggested that insiders are availing themselves of Securities Exchange Commission (SEC) Rule 10b5-1(c)[1] trading plans ("Trading Plans" or "Plans") to beat the market by trading their own company's shares based on material nonpublic information.[2] For years, the SEC has been aware of industry concerns over the strategic use of these Plans by insiders,[3] but it has hesitated to act. Congress is, however, poised to force the agency's hand.

In January 2019, Financial Services Committee Chair Representative Maxine Waters (D-CA) introduced a new bill, the Promoting Transparent Standards for Corporate Insiders Act ("Corporate Insiders Act").[4] If made law, the Corporate Insiders Act would require the SEC to study a number of proposed amendments to 10b5-1(c),[5] report to Congress, and implement the results of that study through rulemaking. The bill was co-sponsored by Representative Patrick McHenry (R-NC) and is therefore likely to receive bipartisan support.[6]

But there is a problem. The SEC adopted Rule 10b5-1(b) in 2000 to define trading "on the basis of" material nonpublic information broadly as trading with mere "awareness" of such information.[7] The rule makers anticipated concern from the courts that imposing liability on a person who is merely aware of material nonpublic information while trading (without a causal relation between the information and the trade) may not satisfy the requirement of scienter under the general anti-fraud provisions of Section

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1 17 C.F.R. § 240.10b5-1(c) (2019).

2 Alan D. Jagolinzer, *SEC Rule 10b5-1 and Insiders' Strategic Trade*, 55 MGMT. SCI. 224 (2009); Tony Cooke & Serena Ng, *Insiders Prosper Despite SEC Rule*, WALL ST. J. (Aug. 5, 2005, 12:01 AM), https://www.wsj.com/articles/SB112320798601405793; Susan Pulliam & Rob Barry, *Executives' Good Luck in Trading Own Stock*, WALL ST. J. (Nov. 27, 2012, 11:17 PM), https://www.wsj.com/articles/SB10000872396390444100404577641463717344178.

3 *See, e.g.*, Letter from Jeff Mahoney, Gen. Counsel, Council of Institutional Inv'rs, to Mary Jo White, Chairman, SEC (May 9, 2013), https://www.cii.org/files/issues_and_advocacy/correspondence/2013/05_09_13_cii_letter_to_sec_rule_10b5-1_trading_plans.pdf.

4 Promoting Transparent Standards for Corporate Insiders Act, H.R. 624, 116th Cong. (1st Sess. 2019).

5 H.R. 624 § 2(a)(1)(A)–(F).

6 *See* Pete Schroeder, *U.S. House Panel's Top Democrat, Republican Seek Executive Trading Oversight*, REUTERS (Jan. 18, 2019), https://www.reuters.com/article/us-usa-house-regulation/u-s-house-panels-top-democrat-republican-seek-executive-trading-oversight-idUSKCN1PC295.

7 *See* 17 C.F.R. § 240.10b5-1(b) (2019).

10(b) of the Securities Exchange Act (and might therefore exceed the SEC's statutory authority for regulating insider trading).[8] There was also the concern that the broad awareness test may chill legitimate trading by insiders (e.g., for portfolio diversification), which would negatively impact the value of firm shares as a form of executive compensation. To address these concerns, the rule makers added Rule 10b5-1(c) Trading Plans as an affirmative defense to insider trading liability.[9]

To qualify, a Rule 10b5-1(c) Trading Plan must (1) be in writing;[10] (2) detail the amount, price, and date of the securities to be purchased or sold, or include a "written formula or algorithm" that determines the Plan transactions;[11] (3) it must have been entered into while the insider was unaware of material nonpublic information;[12] (4) the insider must not have any subsequent influence "over how, when, or whether to effect [particular Plan] purchases or sales";[13] and, finally, (5) it must have been "entered into in good faith."[14] Moreover, a purchase or sale is not "pursuant" to a qualified Trading Plan if the trader "entered into or altered a corresponding or hedging transaction or position with respect to those securities" trading under the Plan.[15]

The SEC was well aware that an affirmative defense to insider trading for those who execute their transactions through valid Trading Plans would (1) make it harder to detect insiders who hide their illegal trades by executing them through invalid Trading Plans that were adopted based on material nonpublic information, and would (2) provide a loophole in the law for others to strategically terminate otherwise valid Plans based on material nonpublic information.[16] The SEC presumably decided that the evil of

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8 Just prior to the SEC's adoption of Rule 10b5-1(b) in 2000, the Eleventh Circuit rejected the SEC's preferred knowing possession test for insider trading liability as exceeding the agency's statutory authority pursuant to Section 10(b) of the Exchange Act. SEC v. Adler, 137 F.3d 1325 (11th Cir. 1998). The Ninth Circuit soon followed the Eleventh Circuit in rejecting the SEC's knowing possession test in United States v. Smith, 155 F.3d 1051, 1070 (9th Cir. 1998).

9 *See* John P. Anderson, *Anticipating a Sea Change for Insider Trading Law: From Trading Plan Crisis to Rational Reform*, 2015 UTAH L. REV. 339, 341 (2015). This author anticipated many of the reforms proposed by the Corporate Insiders Act in this 2015 article, and raised some of the same concerns detailed below in Section II.A–C of this article. *See id.* at 371–78.

10 17 C.F.R. § 240.10b5-1(c)(1)(i)(B)(2).

11 *Id.* § 240.10b-1(c)(1)(i)(B)(1)–(2).

12 *Id.* § 240.10b5-1(c)(1)(i)(A), (B)(3).

13 *Id.* § 240.10b5-1(c)(1)(i)(B)(3).

14 *Id.* § 240.10b5-1(c)(1)(ii).

15 *Id.* § 240.10b5-1(c)(1)(i)(C).

16 *See* Michael Siconolfi & Jean Eaglesham, *SEC Is Pressed to Revamp Executive Trading Plans*,

strategic use of Trading Plans was worth the prize of increased flexibility in enforcement that would come with the broad awareness test. In sum, the adoption of Rule 10b5-1 was, in a manner of speaking, a deal with the devil that the SEC and some lawmakers now appear to regret having made. The problem is that, as is often the case with such a deal, it cannot be easily undone.

Below, I identify challenges presented by the restrictions on Trading Plan use that Congress has proposed in the Corporate Insiders Act. In light of these challenges, I argue that effective Trading Plan reform cannot be accomplished by simply restricting the use of Trading Plans while leaving Rule 10b5-1(b)'s awareness test in place. If there is to be reform, it should be comprehensive. If neither the SEC nor Congress desires comprehensive reform of our current insider trading regime, however, I conclude by offering the consolation that permitting insiders to continue to use Trading Plans strategically may not be so bad after all. Perhaps even a deal with the devil can be worked for the good of investors.

II. CHALLENGES FOR THE PROPOSED REFORM

If signed into law, the Corporate Insiders Act would require the SEC to carry out a study of whether Rule 10b5-1(c) should be amended to:

- Only permit insiders to adopt Trading Plans during an issuer-adopted trading window.[17]
- Limit insiders' ability to adopt multiple Trading Plans.[18]
- Impose "a mandatory delay between the adoption of a trading plan and the execution of the first trade" under the Plan.[19]
- Limit the frequency with which insiders may modify or cancel Trading Plans.[20]
- Require insiders to file Trading Plan adoptions, amendments, terminations, and transactions with the SEC.[21]

WALL ST. J. (May 9, 2013, 8:54 PM) (quoting former SEC commissioner Joseph Grundfest stating that the weaknesses inherent to Trading Plans were "well known" by the commission and its staff at the time of adoption), https://www.wsj.com/articles/SB10001424127887324059704578473382576553460.

17 Promoting Transparent Standards for Corporate Insiders Act, H.R. 624 § 2(a)(1)(A), 116th Cong. (1st Sess. 2019).

18 *Id.* § 2(a)(1)(B).

19 *Id.* § 2(a)(1)(C).

20 *Id.* § 2(a)(1)(D).

- Require boards of issuers that have adopted Trading Plans to (1) adopt Trading Plan policies; (2) monitor Plan transactions; and (3) ensure that Trading Plan policies include guidelines on equity hedging, holding, and ownership.[22]

The following sections address legal and practical challenges for these proposals.

A. Limiting Adoption to Trading Windows and Imposing Mandatory Delays

Amending Rule 10b5-1(c) to limit the adoption of Trading Plans to issuer-imposed trading windows[23] and to impose a mandatory delay between Plan adoption and the first trade under the Plan would certainly make it more difficult for insiders to hide illegal trades through Trading Plans. The legal and practical price of such reform would, however, be quite high.

First, limiting the adoption of Trading Plans to issuer-imposed trading windows would make it more difficult for insiders to avail themselves of the 10b5-1(c) affirmative defense while effecting legitimate trades in good faith. Imagine that two days after the issuer's trading window closes and a three-week blackout period begins, an executive learns her child is in need of a major operation in four weeks. The executive needs to sell some of her firm shares to cover the expense of the operation. Assume that the executive is not aware of any material nonpublic information at that moment, but she knows she may be aware of such information in one month's time. Under the current regime, the executive could simply enter into a Trading Plan that will execute in one month's time. Under the proposed revisions, however, the Trading Plan would not be an option and the executive would be left with the following unappealing alternatives: If she trades now (while unaware of material nonpublic information), she risks termination for violating her firm's blackout period. If, however, she waits three weeks for the trading window to open, she faces the very real risk that she will become "aware" of material nonpublic information by that time. If she does become aware of material

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21 *Id.* § 2(a)(1)(E).

22 *Id.* § 2(a)(1)(F).

23 Trading windows are issuer-dictated periods during which company employees are permitted to trade company shares. They usually open immediately after the announcement of the issuer's quarterly filings (when employees are least likely to be aware of material nonpublic information) and close prior to the close of the next quarter (when employees are more likely to possess material nonpublic information).

nonpublic information by the time she trades, she *will* be exposed to insider trading liability pursuant to Rule 10b5-1(b) despite the fact that her trading was not caused by the information she possesses and is entirely free of scienter.

Similarly, one can see how imposing a mandatory delay between adoption and first trade will generate the same problem. Mandatory delays of three to six months have been suggested by commentators.[24] But note how such a delay would render Trading Plans useless to the executive in the example above. Again, she knows she will need to sell her shares in one month. She is not aware of material nonpublic information today, but she cannot trade due to the blackout period. If she waits until the trading window opens in one month, she may then be aware of material nonpublic information and will not be able to trade. This is precisely the type of scenario Trading Plans are intended to address, but in this case a three-month delay requirement would render trading plans useless.

Second, any limitations placed on the liquidity of shares issued as compensation (whether by limiting Plan adoptions to trading windows or imposing a mandatory delay) will make those shares less valuable to employees. Such restrictions will therefore force firms to offer more shares as compensation to achieve the same remunerative effect. Limiting the adoption of Trading Plans to trading windows can therefore be expected to come at a cost to the issuer and its shareholders. To address these added costs, firms may be incentivized to broaden their trading windows (and therefore increase the risk of improper insider trading outside of Trading Plans) or decrease reliance on equity as a form of compensation (and therefore deprive themselves of a useful tool for aligning the interests of management and shareholders). Regulators should consider whether these are incentives they want to create.

B. Limiting the Adoption of Multiple Trading Plans and Limiting Termination of Existing Plans

Presumably the proposal to limit the adoption of multiple Trading Plans is aimed at preventing the practice of hedging one Trading Plan against

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24 *E.g.*, Mahoney, *supra* note 3; Sougata Mukherjee, *The Dangerous Game Corporate Executives Are Playing*, TRIANGLE BUS. J. (Dec. 11, 2012, 2:29 PM), https://www.bizjournals.com/triangle/blog/2012/12/the-dangerous-game-corporate.html.

another.[25] But, as noted above, 10b5-1 already expressly prohibits such hedging,[26] so adding this requirement does nothing more than make it more difficult to violate existing law. Any benefits derived from such a prophylactic measure must, however, be weighed against the opportunity costs of the new restriction. There are many legitimate reasons an insider might wish to adopt multiple overlapping Trading Plans. For example, most Trading Plans are more than one year in duration—indeed some commentators have suggested that Plans that are less than one year in duration are "aggressive."[27] If the presumption is that most conservative Trading Plans will be long term, then one must expect that, as personal, world, and market events change over the years, an insider's investment needs may warrant the adoption of a second, long-term, overlapping Trading Plan (or even a third) without the termination of the original Plan. Such flexibility to adopt multiple Trading Plans would be even more important if, as the Corporate Insider Act also proposes, limitations are placed on the ability of insiders to terminate existing Plans.

Limitations on termination of Trading Plans would presumably be implemented in response to studies indicating that insiders are strategically terminating Trading Plans based on material nonpublic information.[28] But if new restrictions make it more difficult for insiders to terminate an existing long-term Trading Plan, and they are also unable to adopt an overlapping plan (also due to new restrictions), then their hands will be tied in the event of a needed change in investment strategy (whether to address changes in market trends or personal status).

Thus, just as limiting adoptions to trading windows and imposing mandatory delays might end up having the unintended consequence of forcing firms to broaden trading windows, proscribing overlapping Trading Plans and limiting the termination of existing Plans may have the unintended consequence of forcing insiders to adopt more aggressive, short-term Plans in

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25 For example, an insider might set up two plans—one to sell 2000 shares of ABC the day before the next earnings announcement and another to buy 2000 shares on that same date. The insider could then wait to see how events transpire. If, based on newly acquired material nonpublic information, it appears that the firm's earnings will beat analyst expectations, the insider may terminate the sell Plan and leave the buy Plan in place. If it appears the firm will disappoint, the insider may leave the sell Plan in place, but terminate the buy plan.

26 *See* 17 C.F.R. § 240.10b5-1(c)(1)(i)(C) (2019).

27 Ed Welsch, *Trading Plans Offer a Good Clue to Sell—Aggressive 10b5-1s Especially Predict Underperformance*, WALL ST. J. (Apr. 9, 2008, 12:01 AM), https://www.wsj.com/articles/SB120770890145300645.

28 *See* Jesse M. Fried, *Insider Abstention*, 113 YALE L.J. 455, 456–57 (2003); *see also*, Allan Horwich, *The Origin, Application, Validity, and Potential Misuse of Rule 10b5-1*, 62 BUS. LAW. 913, 950–51 (2007); Jagolinzer, *supra* note 2, at 227.

order to ensure sufficient flexibility to address unforeseen personal or market exigencies. Moreover, the harder these restrictions make it for insiders to avail themselves of Trading Plans as an affirmative defense for insider trading, the more likely it is that those who are aware of material nonpublic information, but who trade for entirely innocent reasons, will nevertheless incur insider trading liability without scienter under the 10b5-1 awareness test. Again, such a result would threaten the statutory authority for the rule.

C. Mandatory Disclosure

The Corporate Insiders Act proposes that the SEC consider whether issuers and their employees should be required to file Trading Plan adoptions, amendments, terminations and transactions with the SEC.[29] There are no disclosure requirements for Trading Plans under the current regime. A rule requiring disclosure of the establishment, termination, and modification of Trading Plans by directors and executive officers was proposed by the SEC in 2002, but never adopted.[30] At that time, the stated rationale for the rule was that "current reports disclosing that a director or executive officer has entered into, modified or terminated a Rule 10b5-1 [Trading Plan] . . . may provide investors with more extensive disclosure of potentially useful information as to management's views of the performance and prospects of the company."[31] But there are significant concerns raised by any such disclosure requirement.

To begin, the presumed rationale for the disclosure requirement (that it will provide useful "information as to management's views of the performance prospects of the company"[32]) is difficult to reconcile with the role of Trading Plans as an affirmative defense to insider trading liability. After all, Trading Plans may only be adopted by insiders while they are unaware of material nonpublic information and are therefore only trading to either diversify their portfolio or to address a personal need. Consequently, disclosure of Trading Plan adoptions will only give investors useful information concerning the performance prospects of the company if they are used improperly. Such a disclosure regime seems Kafka-esque in the

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29 Promoting Transparent Standards for Corporate Insiders Act, H.R. 624, 116th Cong. (1st Sess. 2019).

30 *See* Horwich, *supra* note 28, at 934–35 (noting that although the SEC proposed that certain Plans should be disclosed, and that proposal was "never formally withdrawn," the proposal "appears to have been consigned to oblivion").

31 Form 8-K Disclosure of Certain Management Transactions, Securities Act Release No. 8090, Exchange Act Release No. 45742 (proposed Apr. 12, 2002).

32 *Id.*

extreme, and it would likely generate more confusion than clarity for investors.

As just explained, for the disclosure requirement to make sense, we must presume that insiders are abusing them on a regular basis. But even so, it must be assumed that they will at least *sometimes* be used properly. The disclosure of *proper* Plans in such an environment may, however, have the odd result of *misleading* the public into assuming that material nonpublic information is causing the planned trades when it is not. Similarly, disclosure of a Trading Plan termination that was not based on material nonpublic information may also send a false message to an investing public that is conditioned to expect that such terminations *are* informed.

Finally, in an attempt to dissuade insider trading based on material nonpublic information, the proposed disclosure requirement for Trading Plans may have the unintended consequence of increasing the risk of the far more harmful practice of market manipulation. Insider trading pushes the price of an issuer's shares in the direction of their true value.[33] Insiders who engage in market manipulation, by contrast, take action to push the price of the issuer's shares *away* from their true value.[34] If market participants react to Trading Plan adoptions as an indication of the future prospects of an issuer, insiders could use these Plans as a means of intentionally misleading the market and manipulating share prices. Executives could, for example, adopt and disclose Trading Plans with large purchase orders for no other reason than to drive share prices up in advance of the trades.

These concerns may help explain why the disclosure requirement proposed in 2002 was never adopted. Regardless, these concerns offer good reason for cautioning against the adoption of a similar disclosure requirement proposal today.

D. Mandatory Compliance

Of the Corporate Insiders Act's proposed reforms, the least troublesome is the requirement that issuers adopt internal policies concerning their employees' use of Trading Plans. After all, it is the corporation that stands the most to lose from insiders' strategic use of Trading Plans. Under at least one theory of insider trading liability—the misappropriation theory—the principal harm done by such trading is that it deprives the issuer of the exclusive use of

33 *See* JOHN P. ANDERSON, INSIDER TRADING: LAW, E, AND REFORM 196 (2018).

34 *See id.* at 29–31.

its own proprietary information.[35] For this reason, issuers would certainly be remiss if they failed to monitor their employees' adoption and use of Trading Plans.

Interestingly, however, scholars have shown that issuers are already keeping a very close eye on their employees' strategic use of Trading Plans; indeed, in some cases they appear to be complicit in it! For example, Professor M. Todd Henderson explains that boards appear to actually "bargain" with executives over constraints on the use of Trading Plans when setting executive pay.[36] Some issuers grant their executives more latitude to trade in the firm's shares than others, and studies show that firms with very restrictive insider trading policies pay their executives about 13% more in total compensation.[37] On the flip side, Professor Henderson's study shows that firms with more liberal insider trading policies tend to pay their employees a lesser amount of total compensation that roughly offsets the profits earned from their (perhaps informed) trading in firm shares, suggesting that these liberal trading policies are being offered to employees as "implicit compensation."[38]

If Professor Henderson and others are correct in concluding that issuers have been negotiating liberal (perhaps even strategic) use of Trading Plans as part of executive pay packages for some time, then it seems firms are already effectively monitoring Trading Plans in the absence of regulatory incentives. Nevertheless, the requirement that firms adopt written policies making such compensation practices explicit would improve transparency and better inform market participants of firms' executive compensation philosophies.

III. WHAT'S THE PATH FORWARD?

The previous section raised serious worries for the reforms proposed by the Corporate Insiders Act, but, given Congress's concern over the strategic use of Trading Plans, what is to be done? One solution is to eliminate the 10b5-1(b) awareness test for insider trading liability. Again, 10b5-1(c) Trading Plans were only adopted to offer an affirmative defense in circumstances

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35 *See, e.g.*, United States v. O'Hagan, 521 U.S. 642, 654 (1997) ("A company's confidential information . . . qualifies as property to which the company has a right of exclusive use. The undisclosed misappropriation of such information, in violation of a fiduciary duty . . . constitutes fraud akin to embezzlement.") (citation omitted).

36 M. Todd Henderson, *Insider Trading and CEO Pay*, 64 VAND. L. REV. 505, 506–07 (2011).

37 Darren T. Roulstone, *The Relation Between Insider-Trading Restrictions and Executive Compensation*, 41 J. ACCT. RES. 525, 540 (2003).

38 Henderson, *supra* note 36, at 506–07.

where the broad awareness test would impose liability despite the fact that the insider's trade was not caused by material nonpublic information. If the awareness test were replaced with an explicit requirement that liability may only be imposed on proof of a causal connection between the material nonpublic information and the trade, then the Corporation Insiders Act's proposed rule-based restrictions on the use of Trading Plans could be adopted without running afoul of Section 10(b)'s demand of scienter, and without a significant chilling effect on legitimate trading by corporate executives.

Alternatively, Congress could act to replace our current fraud-based insider trading regime (with its requirement of scienter) with an equal-access statutory regime similar to the European model.[39] Under an equal-access model, the law would simply prohibit trading by anyone who is aware of material nonpublic information from sources that are closed to other market participants.[40] Since it is not fraud-based, the equal-access model can impose insider trading liability without demanding proof of scienter. Indeed, Senators Jack Reed and Bob Menendez recently sponsored a bill that would impose just such an equal-access regime. The Stop Illegal Insider Trading Act would amend Section 10 of the Securities Exchange Act to make it illegal to "purchase, sell, or cause the purchase or sale of any security on the basis of material information that the person knows or has reason to know is not publicly available."[41] With statutory authority for such an equal-access model in place, the SEC would be free to limit access to the Trading Plan affirmative defense however it wishes without running afoul of the demands of scienter. Of course, an insider trading ban so broad in reach would still risk diminishing the value of shares offered to corporate insiders as compensation (for the reasons suggested above), especially if complemented by a Trading Plan defense narrowed in the ways suggested by the Corporate Insiders Act. Unlike Europe,[42] the United States has a well-earned reputation for enforcing its insider trading laws aggressively, with stiff civil and criminal penalties.[43] As a result, the concern that so broad a prohibition might have a significant chilling effect on legitimate trading (and therefore diminish the value of the

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39 *See* ANDERSON, *supra* note 33, at 122–24.

40 *See id.*

41 Stop Illegal Insider Trading Act, S. 702, 114th Cong. (2015).

42 *See* ANDERSON, *supra* note 33, at 136.

43 *See, e.g.*, Stephen M. Bainbridge, *Incorporating State Law Fiduciary Duties into the Federal Insider Trading Prohibition*, 52 WASH. & LEE L. REV. 1189, 1191 (1995) (noting that insider trading "carries penalties that can only be described as draconian").

shares themselves) is perhaps greater in the U.S. than it is in Europe. This may help to explain why the Senate bill has failed to gain momentum.

If, however, the SEC wishes to preserve its awareness test, and Congress does not plan to introduce a new statutory regime, there may be no alternative but to leave the existing affirmative defense for Trading Plans in place, despite the fact that we know these Plans are sometimes used strategically. But, in light of the fact that, as noted above, issuers appear complicit in the strategic use of these Plans by their employees, one must wonder whether this is such a bad thing. If issuers are negotiating employees' strategic use of Trading Plans in setting compensation, then they are well aware that the company's information is being so used and do not object, so who is harmed? Under the misappropriation theory, insider trading liability is only incurred if the trader fails to first disclose the intent to trade to the source of the information—in this case, the issuer.[44] If indeed insiders are disclosing their intent to trade strategically to issuers when adopting a Plan, there would appear to be no violation. The analysis is more complicated under the classical theory of insider trading liability, where the insider's duty to disclose is to the counterparty (a current or prospective shareholder).[45] Even there, however, the duty to disclose could presumably be satisfied with an ex ante announcement by issuers that they are permitting strategic use of Trading Plans as part of their executive compensation packages, as well a post-trade disclosure of profits earned by insiders through Trading Plans.[46] Such a disclosure regime would put all market participants on notice of which firms are permitting the strategic use of Trading Plans, and the extent of that use.[47]

Some may not be convinced that such notice would be sufficient to satisfy the duty to disclose under the classical theory. Even so, it is difficult to pinpoint the harm or deception to the issuer or counterparty in such trading.[48] Most who would object to the strategic use of Trading Plans with these disclosures would object to *all* trading based on information that is not available to the investing public, but our fraud-based insider trading regime has never been so broad in reach.[49] There is no Section 10(b) insider trading

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44 *See* United States v. O'Hagan, 521 U.S. 642, 652–53 (1997).

45 *See id.*

46 This author previously proposed just such a disclosure requirement for Trading Plans. *See* Anderson, *supra* note 9, at 380–82.

47 *Id.* at 384–85.

48 *Id.* at 382–83.

49 *See* Chiarella v. United States, 445 U.S. 222, 233 (1980) (stating that the formulation of a broad "parity-of-information" rule, which "departs radically from the established doctrine

liability without fraudulent deception.[50] Again, if we want an insider trading regime that does not require proof of fraud, then Congress will have to act.

IV. CONCLUSION

Congress must decide on the insider trading enforcement regime it wants. If it wants a fraud-based regime, then the SEC's implementation and enforcement must satisfy the demands of scienter. If, however, Congress wants an equal-access regime (without the requirement of scienter), then it need only pass a statute defining insider trading along the lines of the European model. What Congress and the SEC should not do, however, is maintain the current Rule 10b5-1(b) awareness test while eviscerating the Rule 10b5-1(c) Trading Plan affirmative defense. Such a move would likely exceed the SEC's statutory authority under Section 10(b). It would also significantly diminish the value of equity as compensation to corporate insiders, which would in turn force issuers to either issue more shares to achieve the same remunerative effect, or give up on equity as compensation altogether. Neither option would be good for issuers or shareholders.

The SEC may have made a deal with the devil when it bought its Rule 10b5-1(b) awareness test at the price of introducing Trading Plans as an affirmative defense to insider trading. Nevertheless, if issuers are monitoring the strategic use of these Plans, discounting executive compensation packages accordingly, and made to disclose this compensation to market participants, then maybe it was not such a bad deal after all.

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that duty arises from a specific relationship between two parties . . . should not be undertaken absent some explicit evidence of congressional intent") (citation omitted).

50 *Id.* at 234–35 (noting that though Section 10(b) was designed as a catchall, "what it catches must be fraud").