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March 31, 2022

Vanessa A. Countryman
Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

Submitted via email: rule-comments@sec.gov

Re: Proposed Rule Regarding "Rule 10b5-1 and Insider Trading" (File Number S7-20-21)

Dear Ms. Countryman:

Jones Day is pleased to submit comments relating to the Securities and Exchange Commission's (the "Commission") proposed new and amended rules and forms, as set forth in Release Nos. 33-11013 and 34-93782, relating to Rule 10b5-1 and Insider Trading (the "Proposal"). Jones Day is an international law firm with over 2,500 lawyers practicing in 42 offices worldwide. The firm advises a variety of participants in the U.S. capital markets, including issuers, investors, financial institutions and financial advisors.

We support the Commission's mission of protecting investors, maintaining fair and efficient capital markets and facilitating capital formation. That said, we believe that certain elements of the Proposal will make it more difficult for issuers to return value to shareholders, with little to no advantages to investors or the capital markets over existing or alternative rules. Certain elements of the Proposal could also have the effect of pushing more transactions outside the scope of Rule 10b5-1, which could be harmful to investors and the capital markets while also introducing unnecessary legal risk and uncertainty to issuers and other market participants.

Moreover, the application of the Proposal to derivative transactions is unclear, and this ambiguity could discourage capital formation, the return of capital to shareholders and other legitimate and beneficial trading activity. Several elements of the Proposal seem designed to address Rule 10b5-1(c)(1) trading arrangements that are typically executed by directors and executive officers of public companies without consideration of their effect on other transaction types, including derivative transactions executed by issuers that rely on Rule 10b5-1. Accordingly, we anticipate significant unintended consequences as a result of the Proposal if adopted in its current form and without additional clarity from the Commission.

Our comments below, which apply equally to both domestic issuers and foreign private issuers ("FPIs"), where applicable, address select issues associated with the Proposal that are of particular concern.

1. A 30-Day Issuer Cooling-Off Period is Unnecessary and Could be Overly Burdensome

The Proposal would add as a condition to the availability of the Rule 10b5-1 affirmative defense a minimum 30-day cooling-off period after the date of adoption of a Rule 10b5-1(c)(1) trading arrangement by an issuer before any trade could occur. We feel that such a cooling-off period is unnecessary and has the potential to be overly burdensome to issuers.

A. A 30-Day Issuer Cooling-Off Period is Unnecessary Given the Current Regulatory Regime

The federal securities laws prohibit asymmetry of information in connection with the offer and sale of securities by an issuer, yet do not mandate a specific cooling-off period between the time an issuer's board of directors determines to conduct a securities offering and the time at which the offering can occur. In connection with each issuance of securities, the issuer must determine whether disclosure provided to investors satisfies the disclosure and antifraud requirements of the Securities Act as well as Exchange Action Section 10(b) and Rule 10b-5.

We believe that the current regulatory regime applicable to share repurchases, including the availability of the Rule 10b5-1 affirmative defense, appropriately allows an issuer to similarly make decisions regarding whether the issuer possesses material, nonpublic information ("MNPI") at the time of a proposed share repurchase. We believe that if an issuer determines to repurchase its securities at a time at which it concludes that it does not possess MNPI, a bright-line limitation on the timing of when those repurchases are permitted to occur is unnecessary and unwarranted.

B. A 30-Day Issuer Cooling-Off Period Could Limit Capital Return Through Share Repurchases

Further, we believe that a 30-day cooling-off period could constrain an issuer's capital allocation decision making. As an initial matter, and without regulations mandating specific cooling-off periods, many issuers are already limited to narrow trading windows in which they can enter into a Rule 10b5-1(c)(1) trading arrangement or engage in repurchase transactions outside of any such arrangement. A 30-day cooling-off period would likely have the effect of narrowing this window even further. Additionally, issuers often make quick decisions regarding opportunistic share repurchase activity based on real-time information regarding market conditions and cash needs. Requiring an issuer to forego the Rule 10b5-1 affirmative defense if a repurchase occurs prior to the 30-day cooling-off period would likely have a chilling effect on those repurchases to the detriment of the issuer and ultimately to its shareholders.

C. *The Application of the 30-Day Issuer Cooling-Off Period to Issuer Derivative Transactions is Unclear*

Issuer derivative transactions are important tools for issuers to raise capital, return value to shareholders and achieve other corporate finance objectives.

Convertible debt offerings are a critical capital raising tool for many issuers, including growth companies, who are able to raise financing at low rates and in a tax efficient manner in exchange for providing holders a conversion option that can be exercised if the issuer's share price significantly appreciates. These issuers often enter into options transactions with dealers, called "call spreads," which raise the effective conversion price of the convertible debt and therefore effectively increase the share price at which existing shareholders will be diluted. In situations where there is limited market demand for convertible debt with such higher conversion price, a call spread overlay is an important tool available for an issuer seeking to raise capital while managing demand from convertible debt investors and the effect on the issuer's interest costs, other operating expenses and share price.

Issuers frequently use derivative transactions to repurchase shares, including through "accelerated share repurchase" programs ("ASRs"), which are an important tool in the corporate finance toolbox for many public companies. ASRs allow issuers to repurchase shares at a discount to their market price and to retire a significant number of the underlying shares at the outset of the trade. In a typical ASR program, an issuer pays a dealer counterparty a fixed dollar amount upfront and receives an initial delivery of shares. At the maturity of the trade, the issuer either receives a final delivery of shares or owes shares back to the dealer counterparty, depending on the average share price during a calculation period with a defined minimum and maximum length. During the course of the trade, the dealer counterparty would typically purchase (in a principal capacity for its own account) the issuer's shares to hedge its obligations under the ASR.

Public companies also employ derivative transactions for other corporate finance objectives. For example, many issuers enter into forward sale agreements with dealers in order to capitalize on prevailing market conditions to lock in a price at which they can raise capital. Issuers that offer equity incentives to employees, including through non-qualified deferred compensation plans, often enter into swap agreements with dealers to hedge their exposure under such plans.

It has been our experience that the overwhelming majority of derivative transactions executed by issuers with respect to their own shares rely on Rule 10b5-1. In a typical transaction, the issuer will represent and agree that it is not trading on the basis of MNPI, is entering into the transaction in good faith and not part of a plan or scheme to evade the federal securities laws, and will not exercise any influence over any "purchase or sale," including those executed by the dealer counterparty as part of its hedging activity. During the life of the transaction, payments or deliveries may be made without the influence of the issuer, and the issuer may be deemed to automatically exercise an option it holds. Moreover, in our experience, dealer counterparties will require the issuer to make the representations and agreements referenced above, in reliance on Rule 10b5-1, before effecting its hedging activity.

The application of a 30-day cooling-off to derivative transactions is unclear. Many derivative transactions do not involve the issuer directly purchasing or selling shares. (For example, some derivative transactions may be cash settled; others may be options that expire without being exercised.) Most issuer derivative transactions cause the dealer counterparty to purchase and/or sell shares during the life of the trade in order to hedge its obligations under such transactions. Those purchases and sales are generally for the account of the dealer counterparty as principal, and not purchases and sales by the issuer. The execution of many derivative contracts are themselves treated as purchases and sales for the purpose of the Exchange Act. However, we believe the execution of the derivative contract itself, which is a "contract, instruction, or plan" for the purpose of Rule 10b5-1, should not count as a purchase or sale for the purpose of proposed Rule 10b5-1(c)(1)(ii) or it would be impossible to include a cooling-off period. Under a reasonable reading of the Proposal, the cooling-off period condition would not delay a calculation period or valuation period of, or the establishment of an initial price in connection with, a derivative transaction if it does not involve a purchase or sale by the issuer, even if there are purchases and sales by dealer counterparties. However, issuers may be unwilling to enter into such trades absent clarity from the Commission in any final rule or adopting release. We therefore urge the Commission to clarify that the 30-day issuer cooling-off would not apply to derivative transactions that rely on Rule 10b5-1.

In our experience, issuers have established compliance procedures to ensure that they do not enter into derivative transactions like ASRs on the basis of MNPI. Decisions to enter into derivative transactions are typically made after careful consideration by C-suite executives benefiting from the advice of legal counsel. Moreover, dealer counterparties require representations and covenants related to compliance with Rule 10b-5 and other provisions of the federal securities laws to ensure their own compliance with such laws when engaging in their hedging activity. These policies and procedures are reasonably designed to prevent trading on the basis of MNPI without the need for a cooling-off period.

Moreover, certain categories of transactions would not be viable if the proposed cooling-off period meant that any applicable calculation period or valuation period would be delayed at least 30 days or that dealer counterparties would be prohibited from hedging for 30 days. For example, a call spread overlay is executed concurrently with a convertible debt offering, and a 30-day delay would make defeat the purpose of the call spread. As another example, an "at-the-money" forward sale must be priced on the day it is executed; it would not be commercially viable for it to be priced 30 days after execution. In addition, while a small number of ASRs include so-called "forward-starting" mechanics, the vast majority do not. It is unclear how a cooling-off period would apply to certain of these transactions, or what events in connection with the transactions might be delayed. To avoid impairing legitimate capital raising and other transactions without a countervailing benefit to investors or the market, we urge the Commission to clarify that the cooling-off period would not apply to issuer derivative transactions that rely on Rule 10b5-1.

2. A 120-Day Director and Officer Cooling-Off Period Creates Undue Burdens

The Proposal would add as a condition to the availability of the Rule 10b5-1 affirmative defense a minimum 120-day cooling-off period after the date of adoption of a Rule 10b5-1(c)(1) trading arrangement by a director or officer (as defined in Exchange Act Rule 16a-1(f)) of an issuer before any trade could occur.

We appreciate that the intent of the 120-day cooling-off period is to deter directors and officers from adopting or modifying their Rule 10b5-1(c)(1) trading arrangements and, thereafter, quickly trading in circumstances where they might be aware of potential MNPI in the general course of events. Assuming that it is the Commission's view that some cooling-off period for director and officers is necessary to promote investor confidence and reduce the likelihood of trading arrangements being put in place or modified while a director or officer may be in possession of what, in hindsight, constitutes MNPI, we believe that a cooling-off period of 120 days (effectively four months) would be overly burdensome in many circumstances.

For many directors and officers, their equity stake in the issuer represents a significant source of their wealth. Circumstances may arise where a director or officer may require cash quickly, and forcing the director or officer to decide between waiting up to four months or sacrificing the availability of the Rule 10b5-1 affirmative defense may create undue hardship, particularly given alternative cooling-off periods that might also achieve the Commission's policy objectives.

If the Commission determines to retain a cooling-off period, we believe a cooling-off period applicable to directors and officers lasting until the earlier to occur of (1) two months after the adoption of the Rule 10b5-1(c)(1) trading arrangement and (2) the issuer's next quarterly earnings release would be more appropriate.

3. Other Exemptions to the Cooling-Off Periods

In addition to the exemptions relating to derivative transactions discussed above, the Commission should consider whether other specific types of trading activity should be carved out of the cooling-off period requirements. For example, many directors and officers make "sell-to-cover" elections to address tax liabilities associated with the vesting of equity incentive awards or the exercise of stock options. While sell-to-cover elections are often made well in advance of the vesting or exercise, in some circumstances elections are made within 120 days of the vesting or exercise and may depend on circumstances existing at or around the time the vesting or exercise occurs. For example, we have seen situations arise where, because of market volatility and cash constraints, a director or officer has needed to make a sell-to-cover election shortly prior to the vesting of an equity award. We do not believe the policy objectives of the Proposal would be well served if the Commission were to require a cooling-off period associated with such an election, which would likely necessitate the director or officer seeking alternative sources of cash to fund a tax liability. This example similarly warrants consideration of a carve-out to the single-trade limitations discussed below.

The Commission should also consider whether Rule 10b5-1(c)(1) trading arrangements adopted during a period of time when the trader is unlikely to be in possession of MNPI should be exempt from the 30-day cooling off period. For example, most issuers impose regular quarterly "blackout" periods upon their directors, officers and employees, prohibiting those individuals from trading in the issuer's securities when those persons may possess MNPI regarding the issuer's quarterly financial performance. Once the issuer's quarterly financial results are publicly released, the blackout period is lifted and trades may resume. Similarly, we believe that the likelihood of an issuer, director or officer adopting a plan while in possession of MNPI is greatly lessened during a period of time after quarterly earnings have been published. Accordingly, we believe the Commission should consider an exemption window of five business days after an earnings release during which Rule 10b5-1 trading arrangements could be adopted without requiring a cooling-off period.

4. The Commission Should Consider the Impact of its Prohibition on Overlapping Plans and Limitations on Single-Trade Plans

The Proposal would eliminate the Rule 10b5-1 affirmative defense for any trades by a trader who has established multiple overlapping trading arrangements for open market purchases or sales of the same class of securities. The Proposal also would provide that the affirmative defense would not be available for a single-trade plan if the trader had, within a 12-month period, traded securities pursuant to another single-trade plan.

A. Additional Clarity Regarding Prohibited Overlapping Plans is Needed

The Proposal requests comment regarding whether it is sufficiently clear as to what types of overlapping plans a trader can maintain while preserving the Rule 10b5-1 affirmative defense. We believe that additional clarity is warranted, specifically around whether plans will not be deemed to be "overlapping" when a new plan is entered into during the pendency of an existing plan but when trading under the new plan would not begin until such time as trading under the existing plan ceases. Additionally, we believe that further clarity is needed regarding the impact on certain discretionary repurchases; specifically, that the prohibition on overlapping plans will not prohibit discretionary repurchases made outside of any Rule 10b5-1 trading arrangement while the trader is not in possession of MNPI.

B. The Benefits of an Overlapping Plan Prohibition on Issuer Derivative Transactions is Unclear

Issuers frequently execute ASRs with more than one dealer counterparty, with alternating day calculation periods. This structure generally provides more favorable pricing terms to issuers. In addition, issuers often will repurchase shares directly through Rule 10b5-1 agency purchase plans at the same time that an ASR is outstanding. The application of the overlapping plan prohibition to issuer repurchases would limit the flexibility of issuers to engage in such repurchases, to the detriment of shareholders, with no discernable benefit to investors or the capital markets. In addition, issuers who execute call spread overlays in connection with convertible debt offerings nearly always have multiple dealer counterparties, permitting the issuer to manage credit risk, among other things. We know of no compelling reason to prevent issuers from utilizing multiple dealer counterparties while relying on the Rule 10b5-1 affirmative defense, yet the Proposal could make call spreads in reliance on the affirmative defense unviable.

The Commission indicated in the Proposal that the prohibition on overlapping plans is designed to prevent abuse from the selective termination of one or more of multiple overlapping plans. If preventing such selective termination is the goal, the Commission could require parties relying on Rule 10b5-1 to terminate all outstanding plans at once if they terminate any. This would prevent selective termination without limiting an issuer's corporate finance tools to raise capital. Moreover, we are not aware of a circumstance in which the Commission has alleged that an issuer has employed more than one Rule 10b5-1 plan as part of a derivative transaction in an abusive manner or has selectively terminated a plan in order to benefit from MNPI. In fact, derivative transactions are fundamentally different from ordinary sales or purchase plans involving shares trading. Most issuers would make, and most dealer counterparties would require issuers to make, a representation that the issuer is not early terminating a derivative transaction on the basis of MNPI because, unlike the termination of an ordinary sales or purchase plan, the early termination of derivative transactions often involves market activity through dealers unwinding their hedge positions. Therefore, the stated rationale for the overlapping plan condition does not apply to derivative transactions, and we urge the Commission to carve out derivative transactions from the overlapping plan prohibition or clarify that that the prohibition does not apply to issuer derivative transactions.

C. Exemptions to the Single-Trade Plan Limitation

As noted above, many directors and officers make "sell-to-cover" elections to address tax liabilities associated with the vesting of equity incentive awards or the exercise of stock options. As currently drafted, the Proposal's single-trade plan limitation would restrict or prohibit use of Rule 10b5-1(c)(1) trading arrangements in sell-to-cover transactions. Further, the single-trade plan limitation would apply to any trader seeking to avail itself of the Rule 10b5-1 affirmative defense and is not limited to directors, officers and other insiders. The limitation could therefore disproportionately impact non-C-suite employees who are less likely to be in possession of MNPI. Accordingly, if the Commission determines to retain the single-trade plan limitation such that it would impact sell-to-cover elections, it should consider whether an exemption for traders other than directors and officers is appropriate.

D. Additional Clarity Regarding the Application of the Single-Trade Plan Limitation to Issuer Derivative Transactions is Needed

The Proposal is unclear as to what constitutes a "single trade" in the context of issuer derivative transactions, and the Commission did not provide any rationale for the single-trade plan limitation that would apply to such transactions. It is unclear whether this limitation would apply to derivative transactions such as ASRs, which generally involve a calculation period of weeks or months and hedging purchases by the dealer over the course of the trade, but which are documented as single transactions. Similarly, it is unclear whether a convertible debt hedge that is part of a call spread overlay would be deemed to be a single-trade plan—if so, that could imply that an issuer could not execute a call spread overlay with more than one dealer in reliance on the affirmative defense, which could make call spread overlays entirely unviable. To avoid confusion and prevent unnecessarily discouraging issuers from executing more than one ASR per year, alternating day or similar ASR transactions, call spreads overlays with more than one dealer counterparty, or forward sale agreements with more than one dealer counterparty, we urge the Commission to clarify that a derivative transaction is not a "single trade" for the purpose of Rule 10b5-1.

5. Application to Existing Rule 10b5-1 Trading Arrangements

We believe that issuers, directors, officers and other interested stakeholders would benefit from additional clarity regarding the application of the Proposal to existing Rule 10b5-1 trading arrangements. The Proposal, on its face, does not appear to impact existing trading arrangements except to the extent such trading arrangements are modified (where such modification would be equivalent to adopting a new trading arrangement). We believe further detail regarding the applicability of the Proposal to existing Rule 10b5-1 trading arrangements would be helpful to traders considering whether to adopt a new trading arrangement and to issuers in preparing their quarterly disclosures.

6. The New Option Grant Disclosure is Unnecessary and Could Have Unintended Consequences

The Proposal would require issuers to disclose in a new table any stock option awards to named executive officers ("NEOs") or directors that are made within a certain time proximity to the release of MNPI. The Commission noted a desire to provide investors with information regarding an issuer's practice of making award grants that are timed to precede (raising the concern of "spring-loading") or follow (raising the concern of "bullet-dodging") the release of MNPI.

We note that on November 29, 2021, the Commission's Staff issued Staff Accounting Bulletin (SAB) No. 120, which requires issuers that are in possession of positive MNPI to consider whether adjustments to the current price of the underlying share, or the expected volatility of the price of the underlying share for the expected term of a stock option or other share-based award, are appropriate when estimating the cost of its share-based payment transactions. Accordingly, it is our view that the risks associated with the spring-loading of stock options are at least partially mitigated as a result of this Staff guidance.

Additionally, we believe additional disclosure regarding the specific timing of stock option grants has the potential to meaningfully impact the normal grant process and timing as issuers may seek to schedule board and committee meetings in a manner that would avoid triggering additional disclosure obligations. Further, additional complexities and burdens associated with stock option grant timing may result in many issuers reducing the use of stock options or eliminating their use altogether. This could have the unintended consequence of eliminating a valuable tool that is intended to align NEO and director compensation with share performance.

Further, the Proposal would require tabular data of each stock option award granted within 14 calendar days before or after the filing of a Form 10-K or Form 10-Q periodic report, an issuer share repurchase, or “the filing or furnishing of a current report on Form 8-K that contains material nonpublic information.” The MNPI catch-all in the Proposal would require issuers to make affirmative decisions regarding what may or may not constitute MNPI. These decisions may be difficult and in certain circumstances would benefit from hindsight perhaps weeks or months after the disclosure is made. If the Commission determines to retain the tabular data disclosure requirement, we encourage the Commission to consider eliminating the MNPI catch-all and providing additional clarity as to what types of disclosures (for example, earnings releases) would trigger application of the disclosure requirement.

7. Application to Foreign Private Issuers

In addition to our comments set forth above, which apply equally to both domestic issuers and FPIs, where applicable, we believe that any significant new requirements may also dissuade foreign companies from listing securities on U.S. exchanges.

We believe that FPIs should be carved out of the new Rule 10b5-1 requirements. The increased burdens that would be caused by the proposed conditions to the availability of the Rule 10b5-1 affirmative defense, including the extensive cooling-off periods and restrictions on overlapping and single-trade arrangements, would create a significant deterrent for foreign companies, including multijurisdictional disclosure system (“MJDS”) filers, to list their securities in the United States. Dual-listed companies are required to navigate compliance and reporting regimes that often differ, sometimes materially, and the added constraints on Rule 10b5-1 trading arrangements imposed by the Proposal would unnecessarily complicate adherence to those regimes.

Further, we agree with the Commission’s general position to exempt FPIs from the enhanced quarterly disclosure requirements and annual option grant disclosure in the Proposal.

We also agree that the annual disclosure requirements regarding an issuer’s insider trading policies and procedures should carve out MJDS filers as proposed. As set forth in the

Proposal, these requirements only apply to domestic filers on Form 10-K and FPIs on Form 20-F, and the Commission has not proposed to amend Form 40-F to require such disclosures of MJDS filers. We agree with this position, which would be in line with the spirit of the MJDS reporting regime: deference to home country rules in an effort to reduce costs, timing issues and other complications associated with dual regulation.

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Thank you for your attention to this matter.

Sincerely,

/s/ Jones Day