

**KIRKLAND & ELLIS LLP**  
AND AFFILIATED PARTNERSHIPS

April 1, 2022

Vanessa Countryman  
Secretary  
Securities and Exchange Commission  
100 F Street, N.E.  
Washington, D.C. 20549-1090

Re: File Numbers S7-21-21 and S7-20-21

Dear Secretary Countryman,

We are writing to provide our comments to the Securities and Exchange Commission (Commission) on the above-referenced proposal (Proposal) by the Commission. We recognize the laudable aims of the Commission to ensure the integrity of the capital markets and protect investors through insider trading prohibitions and enforcement. To that end, we endorse some components of the Commission's Proposal and seek reconsideration of others, striving for a balance between protecting investors and affording issuers, and the senior executives they compensate with equity, the availability of an affirmative defense that is not so onerous as to make it unusable and a disclosure regime that provides benefits commensurate with its burdens.

Importance of Rule 10b5-1 Trading Plans

Rule 10b5-1 was adopted in 2000 with the goal of "clarity and certainty" for insiders and issuers trading in the issuers' securities.<sup>1</sup> The rule clarified the standard for trading "on the basis of" material non-public information (MNPI) to "enable insiders and issuers to conduct themselves in accordance with the law" and to provide insiders with flexibility in establishing trading strategies and plans.<sup>2</sup> This flexibility has been an important tool allowing insiders, who are typically subject to quarterly and other situational trading blackouts, to obtain liquidity for their equity awards and also to fund the taxes associated with option exercises and the vesting of awards such as restricted stock and restricted stock units, which often vest at unpredictable times and trigger taxes immediately upon vesting. Rule 10b5-1 plans have an established and important role in allowing issuers to align the interests of executives with shareholders through

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<sup>1</sup> Selective Disclosure and Insider Trading, 65 FR 51716-01 (page 15).

<sup>2</sup> Selective Disclosure and Insider Trading, 65 FR 51716-01 (page 15).

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equity compensation awards with the knowledge that the executives will fully value such compensation because they will have liquidity when they need it. As such, in providing flexibility and clarity, Rule 10b5-1 has enabled issuers to provide senior personnel with meaningful equity compensation that aligns their interests with those of shareholders.

Rule 10b5-1 also serves as an important tool for issuers seeking to return capital to shareholders and manage market overhang from equity compensation plans and other potentially dilutive stock issuances by repurchasing shares of the issuer's stock on the open market. Many issuers adopt share repurchase programs that comply with Rule 10b5-1 on an annual or quarterly basis. Shareholders have notice of these programs because issuers disclose that they have board approval for a share repurchase program before the repurchase and they disclose their actual share after the fact on a quarterly basis in their Forms 10-K and 10-Q filings. As such, we believe that issuers currently already avail themselves of Rule 10b5-1 for, and provide the public with disclosure of, their share repurchase programs in a manner that allows them to simultaneously manage their capital allocation objectives and abide by their responsibility to not trade in their own securities when in possession of MNPI.

## Proposal

### 1. Cooling-Off Periods

Under the Proposal, individual insiders would be subject to a cooling-off period of 120 days and issuers would be subject to a cooling-off period of 30 days after the adoption of a Rule 10b5-1 plan before trades may commence under the plan.

We do not believe any statutorily required cooling-off period is required. One of the fundamental tenets of Rule 10b5-1 is its prohibition on the adoption of a plan while in possession of MNPI. A mandated cooling-off period would be superfluous and antithetical to the underlying premise of the rule.<sup>3</sup>

With respect to issuers specifically, Rule 10b5-1 plans are adopted to repurchase, not issue and sell, shares, and the risk of fraud or manipulation in this context is low. We submit that a cooling-off period for issuers is not only unnecessary but also impracticable. As noted above, many issuers adopt share repurchase programs under Rule 10b5-1 on an annual or quarterly basis. As one program rolls off, a new program goes into effect, typically in connection with year-end or quarterly earnings when the market has maximum information about the issuer, the issuer does not have MNPI, and the issuer has good visibility into its financial results and is able

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<sup>3</sup> This would be especially true with the adoption of the proposed certification requirements, which appear to be designed to reinforce the importance of compliance with Rule 10b5-1.

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to best make decisions about how to achieve its capital allocation objectives. The imposition of a cooling-off period would disrupt the implementation and efficient operation of these programs, to the detriment of shareholders. Issuers would need to forecast cash flows over a longer period of time, would be limited in their ability to adapt to changing financial circumstances, and, rather than risk not having enough liquidity, will likely be conservative in structuring their repurchase programs, leading to less efficient capital allocation. Finally, issuers that use Rule 10b5-1 plans as part of an integrated strategy to achieve broader financial targets (e.g., liquidity measures and leverage ratios) would not be able to efficiently and effectively manage towards those targets.

Although we believe that a statutorily required cooling-off period is unnecessary for the reasons set forth above, we recognize that it is common practice for insiders to adhere to a short cooling-off period — up to 30 days — in connection with their adoption of Rule 10b5-1 plans — either because the issuer and/or plan administrator requires it or as a matter of good practice. The proposed 120-day cooling-off period far exceeds this window and, we believe, any period in which insiders reasonably possess MNPI. A quarterly reporting period is 90 days. Under guidance issued by the Commission in December 2003, issuers are required to disclose on a quarterly basis any known trends that could materially affect key drivers of the issuer's financial performance and identify any related risks.<sup>4</sup> These disclosures, together with the annual or quarterly earnings guidance that most issuers provide the market, are designed to afford investors with robust information with respect to intermediate- and short-term expectations for the business. The proposed cooling-off period is at odds with this reporting regime and potentially undermines it by obviating at least part of its purpose. We are concerned that adoption of the proposed mandatory cooling-off periods will cause issuers and their management teams to be less incentivized to provide clear and rigorous forward-looking disclosure expected by investors. Moreover, in today's environment of rapid deal-making and accelerated media cycles, in a period of 120, 90 or even 60 days, information becomes material and stale many times over. We believe that a cooling-off period for individual insiders of 30 days would address concerns about insider fraud and manipulation without diminishing the ability of insiders to rely on Rule 10b5-1 to obtain liquidity vis-à-vis the compensation that they have earned for their service.

The Proposal also seeks to impose a cooling-off period following *any* amendment or modification of a Rule 10b5-1 plan on the theory that the amendment or modification constitutes termination of a plan and adoption of a new plan. Given that amendments and modifications to Rule 10b5-1 plans are permitted only when not in possession of MNPI, for the reasons articulated above we do not think that any cooling-off periods are appropriate. Recognizing that the Commission may nonetheless adopt a cooling-off period, we believe that such period would be appropriate only following a modification to the trading formula itself. Certainly,

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<sup>4</sup> Commission Guidance Regarding Management's Discussion and Analysis of Financial Condition and Results of Operations, Release Nos. 33-8350; 34-48960, (Dec. 29, 2003).

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modifications that are purely technical, curative or otherwise immaterial should not trigger a cooling-off period.

## 2. Overlapping Plans

Alongside the proposed cooling-off periods, the Proposal would also prohibit overlapping trading plans. We support a prohibition on having multiple active trading plans at any one time; however, we strongly urge the Commission to clarify that this provision would not prohibit the adoption of a new plan while an existing plan is in effect so long as no trades may commence under the new plan until the existing plan has expired. This clarification is crucial for issuers seeking to establish and maintain a regular program of share repurchases as described above, particularly if the Commission elects to adopt a cooling-off period for issuers. The clarification is also crucial for insiders who regularly adopt trading plans to fund taxes associated with the vesting of equity awards. As noted above, insiders have minimal, if any, control over the timing of vesting events relative to trading blackouts. Particularly, if the Commission adopts a mandated cooling-off period for insiders, the ability to adopt (but not commence sales under) a trading plan while another plan is in effect will be meaningful to insiders without creating risk of fraud or manipulation.

## 3. Certifications by Directors and Officers

The Proposal would also require directors and officers to make a certification in order to rely on Rule 10b5-1 for an affirmative defense. We respectfully note that most issuers have insider trading policies and procedures that require insiders to confirm that they do not have any MNPI when requesting the ability to trade in the company's securities or enter into a Rule 10b5-1 plan. For directors and senior officers, this confirmation is typically reviewed by senior legal or compliance personnel, as companies are highly motivated to police insider trading given the negative publicity of enforcement. The proposed certification would be duplicative of practices the market has already adopted and that function well in the vast majority of cases. The Proposal already requires that officers and directors operate trading plans in good faith, and insiders are aware of their legal obligations and need for compliance, so the certification would result in no increased awareness of obligations.

Although we acknowledge the Commission's indication that such requirement would not provide an independent basis for liability, we fear adoption of a certification requirement could be used to seek to hold insiders liable. Accordingly, we believe that if the Commission adopts the certification requirements as proposed, it should also explicitly provide that the certifications do not establish an independent basis for liability under any provision of the securities laws.

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## 4. Reporting of Activity under 10b5-1 Plans

Under the Proposal, registrants would be required to disclose in their reports on Forms 10-K and 10-Q the material terms of, and trading activity under, Rule 10b5-1 plans adopted or terminated by the company and its directors or officers in the quarterly period preceding the filing of such report. We do not object to the disclosure in Forms 10-K and 10-Q of the adoption or termination of a Rule 10b5-1 plan. However, we believe that disclosure of specific plan details, the number of shares covered and trading activity would be unduly burdensome on issuers, could lead to manipulation of the issuer's share price and ultimately would not be helpful to market participants. Detailed disclosure of trading activity could allow investors to more accurately predict future trading activity and front run or otherwise manipulate trading. The disclosure of plan details including the number of shares could incorrectly signal executive's confidence in the issuer's performance, for example, if a plan is structured to only sell shares if high price thresholds are met. In addition, because the disclosure would be required before the end of the proposed 120-day cooling-off period, it could in fact lead to trading of the issuer's stock based on hypotheses regarding insiders' trading plans, rather than financial fundamentals, to the detriment of market participants generally.

We note that substantial protection against insider trading exists by virtue of the fact that directors and officers are required to report all trades on Form 4 promptly after they occur.<sup>5</sup> The disclosure of trading activity by the issuer in its annual or quarterly reports would be redundant, would not actually improve the ability of investors to monitor for potential insider trading, and could cause trading based on the disclosure about the plans, rather than the issuer's performance.

Similarly, we are concerned that the proposed daily reporting of issuer share repurchases will provide minimal benefits to shareholders while simultaneously imposing significant burdens on issuers. Daily reporting of repurchases — including the related pricing information and highly public stopping and starting of trading activity — may also cause volatility in, and even manipulation of, an issuer's stock by creating speculation (and potential misinterpretation) of an issuer's target price point and whether the issuer possesses MNPI. The large volume of daily disclosure reports could provide an advantage to large institutional or professional investors in determining the issuer's buyback plans, allowing certain investors to front run the market by impacting the trading dynamics of the stock for their benefit and to the detriment of other market participants. We also believe daily reporting would quickly clog the market with information, potentially creating investor confusion and market inefficiency. Research on the impact of the Australian regime of daily repurchase disclosure on investors indicates that daily reporting

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<sup>5</sup> In light of the fact that it is common practice for insiders to identify on Form 4 when trades are pursuant to a Rule 10b5-1 trading plan, we separately support the Commission's Proposal to amend Form 4 to add a "check box" requirement for sales under 10b5-1 trading plans.

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provides Australian investors with “information overload.”<sup>6</sup> Additionally, a daily reporting requirement would impose significant costs and compliance burdens on issuers that are unjustified and inefficient in light of the minimal benefits (if any) of daily repurchase disclosure on investors.

To that end, we propose monthly reporting of issuer repurchases, aggregated for each of the preceding four weeks, and that the Commission should consider requiring disclosure of such monthly repurchases only above a determined materiality threshold. We believe the *de minimis* thresholds of Rule 144(e)(1) would be appropriate in this context. This proposed monthly reporting should be reported as a new item to Form 8-K, rather than a new Form SR, as Form 8-K is already designed to inform shareholders of important events. Furthermore, we submit that the quality of the information provided to investors on a monthly basis would be superior to information provided on a daily basis because it would show trading activity over a longer period and reflect trends that would be more instructive to investors.

### Conclusion

Our significant experience over the last 22 years has demonstrated that most issuers and corporate insiders operate in good faith in complying with both the spirit and restrictions of Rule 10b5-1. We appreciate the Commission’s sincere desire to address the perception that there may be issuers and insiders who abuse Rule 10b5-1 plans and acknowledge that certain components of the Proposal would provide targeted enhancements to the existing regime. However, some components of the Proposal would have severe real-world consequences for well-intentioned issuers and insiders, as well as the investment community, and ultimately would stymie the good-faith efforts of issuers to return value to shareholders through share repurchase programs, and of insiders to monetize equity compensation awarded in large part to align their interests with those of the shareholders they serve.

We hope that the foregoing is helpful in your evaluation of the Proposal. We would be happy to discuss the Proposal and respond to any questions or comments from the Commission.

Sincerely,

*Kirkland & Ellis LLP*

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<sup>6</sup> Mitchell, Jason David and M. Holub. On-Market Share Buy-Backs: ASX Disclosure. (2012). *Abacus*. 48, (1), 31-59. Research Collection School of Accountancy.