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April 1, 2022

Via E-mail: rule-comments@sec.gov

Securities and Exchange Commission,
100 F Street, N.E.,
Washington, DC 20549-1090.

Attention: Vanessa A. Countryman

Re: Rule 10b5-1 and Insider Trading – File No. S7-20-21

Ladies and Gentlemen:

We appreciate the opportunity to comment on the Rule 10b5-1 and Insider Trading proposal[1] of the Securities and Exchange Commission (the "SEC"). We support the SEC's efforts to address potentially abusive practices associated with the Rule 10b5-1 affirmative defense and improve the transparency of the use of trading plans by company insiders. However, we believe that the scope of the proposed rules is too broad in certain respects and will result in unintended consequences, as discussed in further detail in Parts I-V below. Aspects of the proposed rules that we believe raise the most significant concerns include:

- The length and scope of the proposed cooling-off period for insiders and the applicability of any cooling-off period to issuers;
- The scope of the certification requirement for insiders;
- The proposal that any plan amendments and modifications are deemed terminations of a plan;
- The applicability of the proposed restrictions on overlapping plans to issuers and the scope of such restriction as applied to insiders;
- The lack of clarity around the term "single-trade" plan, and the scope of the proposed restriction on single-trade plans;

[1] Rule 10b5-1 and Insider Trading, 87 Fed. Reg. 8686 (proposed Feb. 15, 2022) (the "Rule 10b5-1 Release").

- The vagueness of the terms "operate" and "operated in good faith";
- The proposed disclosure requirements under Item 408(a)(2) and Item 402(x)(2) of Regulation S-K; and
- Applicability of the proposed disclosure requirements relating to insider trading policies and procedures to foreign private issuers ("FPIs").

If adopted, we urge the SEC to provide for at least a 12-month transition period between adoption and effectiveness of final rules and to exempt existing Rule 10b5-1 plans (and any amendments or modifications thereof) from the scope of the rules.

I. Proposed Amendments to Rule 10b5-1

A. Proposed Rules Applicable to Insiders

Rule 10b5-1 trading plans have become an important tool for corporate insiders to monetize concentrated positions in company stock in order to satisfy a number of legitimate objectives in a manner that mitigates the risk of "insider trading" liability. For example, insiders use Rule 10b5-1 plans as an effective and efficient means to diversify their investment opportunities, satisfy liquidity needs, such as tax obligations and tuition payments, and accomplish their estate planning or charitable giving objectives. In particular, given the increasing use of public company stock to compensate corporate insiders, which often represents a substantial percentage of an executive officer's overall compensation package, Rule 10b5-1 plans have become a necessary tool for insiders to achieve their legitimate liquidity objectives.

Importantly, establishing a Rule 10b5-1 trading plan eliminates the need to evaluate the materiality of any nonpublic information that the insider may possess at each instance a transaction under the plan is contemplated; rather, the materiality determination needs to be made only at the time of plan enactment. This is particularly important for insiders who often may be sidelined from trading for longer periods of time due to strategic transactions or other corporate developments that may be deemed material. Whether a person has material nonpublic information ("MNPI") will always be judged with benefit of hindsight. As a result, for certain companies engaged regularly in M&A or other potentially significant strategic transactions or companies that may face uncertainty regarding significant corporate developments or regulatory or legal matters, the opportunity for insiders to transact in company securities may be very limited. This increases the importance of the ability of an insider to put in place a Rule 10b5-1 trading plan at a time the insider is not in possession of MNPI.

In considering the proposed amendments as applicable to corporate insiders, we strongly urge the SEC to take into account the numerous legitimate reasons insiders have to enter into Rule 10b5-1 trading plans, as well as the potential benefit to public investors when insiders sell through Rule 10b5-1 compliant trading plans rather than in open window periods.

We support a cooling-off period for insider Rule 10b5-1 plans, but believe that a cooling-off period of 30 days, rather than 120 days, is appropriate and consistent with industry practice and public commentary.

We are generally supportive of the SEC's proposal to require a cooling-off period for insider Rule 10b5-1 plans, but strongly urge the SEC to adopt a cooling-off period of 30 days, rather than 120 days, for insiders. In addition, as discussed below, we think that certain types of insider Rule 10b5-1 trading plans should be exempted from any cooling-off period.

We do not believe that a 120-day cooling-off period provides greater investor protection than the market standard 30-day cooling-off period. For example, the Stanford study to which the SEC cites in the Rule 10b5-1 Release found that trades under multiple-trade plans are only loss avoiding within 30 days of plan adoption, which does not support such a lengthy cooling-off period as the SEC has proposed.[2] Moreover, the study suggests that plans with more than a 60-day cooling-off period are not loss-avoiding.[3]

A 120-day cooling-off period would significantly impact the efficacy of Rule 10b5-1 plans to meet corporate insiders' liquidity needs as insiders may need to liquidate positions sooner than in 120 days. A long cooling-off period could thus result in more insiders executing open market trades in their corporate open window period. Corporate trading windows at the executive officer and director level can sometimes be very short. Increased non-plan open market trades could impact the trading prices of a company's equity securities as sales would be concentrated, potentially in very compressed window periods. By contrast, in our experience, many Rule 10b5-1 plans are structured to sell shares gradually over time, with trades occurring during and outside of corporate open trading windows. By allowing trading to be spread out over time, Rule 10b5-1 plans can lessen the impact on market prices of insider sales.

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[2] David F. Larcker et al., *Gaming the System: Three "Red Flags" of Potential 10b5-1 Abuse*, Stanford Closer Look Series (Jan. 19, 2021), https://www.gsb.stanford.edu/sites/default/files/publication-pdf/cgri-closer-look-88-gaming-the-system.pdf, at 2.

[3] *Id.* at 2.

We urge the SEC to exclude certain employee benefit plan transactions and other non-traditional types of Rule 10b5-1 trading plans from any mandatory cooling-off period as they do not present opportunities for potential abuse.

We urge the SEC to exempt from any mandatory cooling-off period requirement Rule 10b5-1 trading plans where immediate effect of the plan is important and where there is minimal, if any, opportunity for the potential abuses that the cooling-off period is designed to address.

The Rule 10b5-1 Release appears to use the term Rule 10b5-1 trading plan to encompass a traditional Rule 10b5-1 trading plan that has a grid of limit prices and associated shares to be sold at the various limit prices. The Rule 10b5-1 Release does not appear to take into account the breadth of the types of transactions that could be designed to comply with Rule 10b5-1. These include option transactions,[4] forward sale agreements and even standard securities purchase and sale contracts. Structuring transactions to comply with Rule 10b5-1 allows participants to avoid issues that could arise in satisfying their obligations if, at a later time, they become aware of MNPI. For example, in analyzing a standard securities purchase or sale transaction structured to comply with Rule 10b5-1, the MNPI analysis is done at the trade date, not the settlement date. Because the securities purchase or sale contract sets forth the quantities of securities to be purchased or sold, the sale or purchase price and the settlement date, it operates like a classic Rule 10b5-1 plan. Likewise, a limit order that may be outstanding for an extended period of time if "not held" can also be structured to comply with Rule 10b5-1. In light of the breadth of the types of transactions that may be structured as a Rule 10b5-1 plan to mitigate transaction execution failures and insider trading liability, the final rules should exclude from any cooling-off period transactions outside the scope of what the SEC is intending to regulate.

For instance, certain types of employee benefit plan transactions, including sales to cover withholding taxes in connection with equity vesting and elections under 401(k) plans or employee stock purchase plans, may be structured as Rule 10b5-1 trading plans, sometimes with immediate effect. We do not think these transactions implicate the concerns the SEC raises in the Rule 10b5-1 Release, and a mandatory cooling-off period for these transactions would require, in many cases, amendments to plans and, in certain cases, the need for shareholder approval under securities exchange rules and the Internal Revenue Code. Consequently, requiring any cooling-off period for these types of insider Rule 10b5-1 trading plans would be disruptive and costly to issuers, without furthering the SEC's stated objectives.

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4 *See* Chicago Board Options Exchange, SEC No-Action Letter, 1991 WL 176745 (February 22, 1991).

Other types of transactions that we believe also do not present the opportunities for abuse that are the focus of the Rule 10b5-1 Release include gifts, estate-planning transactions and derivative transactions, including the writing of call options, purchase of put options or entry into forward contracts. The staff of the SEC has granted no-action and interpretive relief to facilitate these types of transactions.[5] These types of transactions can be structured as Rule 10b5-1 transactions and, to that extent, could be within the scope of the cooling-off period requirement. However, these transactions are not susceptible to the same types of abuse as a more typical open market trading program. We do not believe that imposing a mandatory cooling-off period for these types of transactions is necessary to achieve the SEC's investor protection objectives and, in many instances, requiring a mandatory cooling-off period could be very difficult to accomplish given the types of some of these transaction structures. Consequently, we urge the SEC to exclude these transactions from any mandatory cooling-off period, if adopted.

We urge the SEC to eliminate the proposed certification requirement or, alternatively, to require certification only by executive officers and directors, which may be satisfied by Form 4 filings.

Proposed Rule 10b5-1(c)(1)(ii)(C) would require Section 16 officers and directors to promptly furnish a written certification to the issuer stating that they are not aware of any MNPI and that they are adopting the contract, instruction, or plan in good faith and not as part of a plan or scheme to evade Rule 10b-5. We urge the SEC to eliminate the certification requirement as it would impose an additional burden on both issuers and insiders without additional corresponding benefits to investors. The Rule 10b5-1 affirmative defense expressly requires that a person entering into a plan does so in good faith and not as part of a plan or scheme to evade Rule 10b-5. The existing anti-fraud provisions of the Exchange Act of 1934 (the "Exchange Act") as well as companies' internal policies and procedures relating to Rule 10b5-1 plans impose these obligations, which protect both the issuer as well as investors. In almost all cases, the certification the proposed rules seek to require is in the Rule 10b5-1 sales plan itself in the form of a representation and warranty, and there would appear to be no need for an additional certification.

If the SEC retains the certification requirement in the final rules, we believe it should be limited to executive officers and be included on the Form 4 itself. By contrast to officers, who are employees of an issuer and with whom issuers are in close contact on a daily basis, directors may have more limited contact with the appropriate

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[5] *See* Bank of America, N.A., Merrill Lynch, Pierce, Fenner & Smith Inc., SEC No-Action Letter, 2011 WL 6015714 (Dec. 1, 2011); Goldman, Sachs & Co., SEC No-Action Letter, 2003 WL 22358822 (Oct. 9, 2003); Goldman, Sachs & Co., SEC No-Action Letter, 1999 WL 1244018 (Dec. 20, 1999).

reporting personnel at an issuer and may not necessarily want to inform issuers of their share trading plans, especially since, in our experience, these frequently involve estate planning and charitable giving. We also urge the SEC to allow a longer period of time to provide the certification, as the proposed rule requires directors and officers to furnish the certification on the date of adoption. This should at least be the two business days for filing a Form 4.

In addition, we believe that the SEC should make clear that the certification does not establish an independent basis of liability for directors or officers under Exchange Act Section 10(b) and Rule 10b-5 if the final rules are adopted. Similarly, we believe that failure to comply with the certification retention requirement included in the instruction to proposed Rule 10b5-1(c)(1)(ii)(C) should not render the Rule 10b5-1 affirmative defense unavailable.

Lastly, the rule should only be limited to those individuals who constitute Section 16 officers and directors. In paragraph (C), the rule refers to directors or officers of the subsidiary, which we expect is intended to mean that a Section 16 officer may technically be an officer of a subsidiary, rather than the issuer. However, this language could introduce ambiguity, particularly given paragraph (B) does not refer to officers of subsidiaries.

We support a restriction on overlapping Rule 10b5-1 trading plans for insiders, but urge the SEC to make certain modifications and clarifications.

We generally support a restriction on overlapping Rule 10b5-1 trading plans for insiders. However, we believe this restriction should be focused on "opposite-way" plans that have the effect of cancelling their corresponding trades, as well as multiple market sales plans where one plan has the effect of amending the other plan. To that end, we believe the SEC should consider excluding from the restriction certain transactions that do not pose opportunities for potential abuse:

Exclude gifts, estate planning transactions and derivatives from the restriction on overlapping plans. As discussed above, these transactions may be structured to comply with the Rule 10b5-1 affirmative defense, thereby offering greater certainty that future transactions under these arrangements will not be circumscribed by the subsequent possession of MNPI. The operation of an insider's ordinary course Rule 10b5-1 trading plan covering open market trades through a broker, while at the same time the insider engages in gifts, estate-planning transactions and derivative transactions, including the writing of call options, purchase of put options or entry into forward contracts, does not present the opportunities for abuse that are the focus of the restriction on multiple overlapping plans. For example, many charitable donations are made around year-end when insiders may possess MNPI with respect to anticipated year-end results.

To address this situation, insiders implement Rule 10b5-1 plans to make donations at year-end to meet their charitable contributions. Similarly, insiders use Rule 10b5-1 plans to fund estate-planning vehicles, such as family limited partnerships, grantor trusts or donor advised funds, all of which tend to be funded at year-end. Annuity payments and other distributions under grantor retained annuity trusts are made on specified dates under specified conditions to comply with Rule 10b5-1. Gifts, estate-planning transactions and derivative transactions are not the types of transactions that, in our experience, are done with the purpose or effect of hedging or cancelling opposite-way transactions under separate Rule 10b5-1 plans, an abuse which we understand the restriction on overlapping plans is designed to address.

Exclude certain employee benefit transactions from the restriction on overlapping plans. The restriction on overlapping plans should also exclude certain employee benefit plan transactions, including sales to cover withholding taxes in connection with equity vesting or stock appreciation right or option exercises and elections under 401(k) plans or employee stock purchase plans. We do not believe these transactions implicate the concerns articulated by the SEC. Moreover, these plans are common features of equity awards where transactions occur throughout the year. In the case of 401(k) plans, payroll deductions are typically made each pay period. Therefore, applying the restrictions to these types of transactions or plans would effectively eliminate the ability of many corporate insiders to enter into a traditional Rule 10b5-1 trading plan.

Other clarifications. Similarly, for the reasons discussed above, we urge the SEC to exclude from the restriction (1) overlapping plans covering the same securities but over different time periods (*i.e*., trades begin under one plan only after the other plan has been completed) and (2) overlapping plans where an insider has both direct and indirect ownership of the same class of securities (*e.g*., one plan for shares directly held by the insider and a separate plan for shares held by the insider's family limited partnership). We do not think any of these practices implicates the concerns articulated by the SEC that should render the affirmative defense under Rule 10b5-1 unavailable.

In addition, we believe the restriction on overlapping trading plans should be limited to directors and executive officers. Because there are many legitimate reasons for individuals to have overlapping plans, we believe the restriction should be narrowly tailored so as not to prohibit a significant number of individuals from putting in place multiple plans in compliance with Rule 10b5-1.

Lastly, the language in proposed Rule 10b5-1(c)(1)(ii)(D) would seem to potentially preclude a covered person from entering into in the future an "instruction" for an open market purchase or sale of the same class of securities. Effectively, this would appear to prevent an individual from making any trade in securities while a Rule 10b5-1 trading plan is in effect, other than pursuant to the plan. Accordingly, the proposed rule would not only limit multiple overlapping trading plans, but also any open market purchase or sale while a trading plan is in place. We urge the SEC to clarify in any final rules that the restriction on overlapping trading plans does not extend to purchases or sales outside of a Rule 10b5-1 trading plan. We also note that the parenthetical reference in clause (D) to not entering into subsequent trading plans after a first has been entered into does not appear to have any time limitation. We urge the SEC to clarify in the final rules that any such restriction takes effect only when there is a separate trading plan that remains in effect.

In addition to the foregoing clarifications specifically relating to the proposed restriction on overlapping Rule 10b5-1 trading plans for insiders, we have certain other concerns regarding the scope of the proposed Rule 10b5-1 amendments as applied to both insiders and issuers, which we discuss in Part I.C. below.

B. Proposed Rules Applicable to Issuers

Issuers rely on share repurchase programs to achieve multiple and varied commercial and financial goals, and different share repurchase structures have developed to provide issuers with flexibility to achieve these goals. Many of these share repurchases fall within the category of repurchase programs that are intended to comply with Rule 10b5-1 to mitigate the risk of insider trading liability. Among other benefits, share repurchase programs allow issuers to return capital to shareholders in a tax efficient manner and to minimize dilution associated with employee equity incentive plans. Shareholders often publicly support buyback programs. In addition, in times of market stress or order imbalances, issuer share repurchases can help reduce volatility in stock prices.

Issuer share repurchase programs take a variety of forms, including open market repurchases and derivative transactions, such as accelerated share repurchase programs ("ASRs"). Issuers frequently use Rule 10b5-1 plans when engaging in open market share repurchases, whereby a financial institution counterparty will effect share repurchases on an issuer's behalf in accordance with pre-determined parameters over a specified period of time. The use of Rule 10b5-1 trading plans to repurchase shares over a period of time has a number of benefits, which include reducing the impact of share repurchases on market prices, eliminating the need to "front load" repurchases at a time shortly after the release of quarterly earnings, generating a more representative average price of repurchases and helping to reduce volatility by producing continuous market liquidity.

In addition to traditional open market repurchase programs, issuers also use other structures that may be designed to benefit from the Rule 10b5-1 affirmative defense. For example, ASRs can be structured to operate as Rule 10b5-1 plans and may be used by issuers in lieu of open market repurchases to increase the number of shares being purchased, which has pricing and accounting benefits. With an ASR or other derivative transaction, the financial institution counterparty takes on risk upon entry into the contract, and market activity undertaken after entry into the contract is effected for the direct benefit of the counterparty; the issuer does not have the ability to determine how, whether or when market activity related to the derivative or similar transaction takes place, nor does it directly participate in profits or losses arising from those hedging activities. This is in contrast to a typical open market share repurchase program, where trades under the program are directly and entirely for the issuer's account. Additionally, in traditional open market share repurchase programs, the issuer typically can terminate the contract at any time (subject to the good faith requirement), which is in contrast to a derivative or similar transaction, where the issuer typically cannot terminate without the agreement of the financial institution counterparty that has taken on the market risk.

Issuer Rule 10b5-1 plans should be treated differently than insider Rule 10b5-1 plans as they do not present the same opportunity for potential abuse.

The SEC has historically supported use of issuer share repurchase programs and recognized the programs' low level of potential abuse. For example, in connection with the adoption of Rule 10b-18, the SEC noted that "issuer repurchase programs are seldom undertaken with improper intent" and "may frequently be of substantial economic benefit to investors."[6] For that reason, in the past the SEC has declined to impose additional rules regarding share repurchases, recognizing that "undue restriction of these programs is not in the interest of investors, issuers, or the marketplace."[7] Rather, since the adoption of Rule 10b-18, the SEC has "endeavored to achieve an appropriate balance between" its multiple policy objectives and "the need to avoid complex and costly restrictions that impinge on the operation of issuer repurchase programs."[8]

In the Rule 10b5-1 Release, the SEC noted concerns about the misuse of MNPI in connection with an issuer's stock purchases and potential information asymmetries between issuers and investors. In our experience, issuer compliance functions play an important role in preventing potential abuse by assessing whether the plan design and activities conducted under the plan (*e.g.*, amendments to the plan) are

6 Purchases of Certain Equity Securities by the Issuer and Others; Adoption of Safe Harbor, 47 Fed. Reg. 53,333, 53,334 (proposed Nov. 26, 1982) (the "Rule 10b-18 Proposing Release").

7 *Id.*

8 *Id.*

consistent with Rule 10b5-1. In addition, the general anti-fraud provisions of the Exchange Act prohibit issuers from taking advantage of those asymmetries when repurchasing their securities, regardless of the form the share repurchase takes. To comply with these general anti-fraud provisions, issuers have adopted disclosure controls and procedures to ensure that that they are not entering into plans, or engaging in discretionary repurchases, at a time when the issuer has MNPI. Consistent with this, it is standard practice for financial institutions entering into contracts to conduct share repurchases for issuers, whether acting as executing broker or derivative counterparty, to receive representations from the issuer that it is not aware of MNPI.

Notably, boards of directors, management and internal compliance functions focus not only on the risk of the issuer repurchasing shares while in possession of MNPI, but also on the risk of corporate insiders trading on the basis of their inside knowledge of an ongoing corporate stock buyback plan. Steps taken by issuers to protect against insiders using their knowledge of an issuer's repurchase program include, among others, the pre-clearance of trading by legal counsel and the imposition of trading blackouts for those insiders who are directing share repurchases. These measures are in addition to the general restrictions and protections under the anti-fraud rules under the Exchange Act.

We believe that, in light of the legitimate uses of Rule 10b5-1 plans by issuers and the potential deleterious effects the proposed rules may have on issuers and investors, the proposed amendments to Rule 10b5-1 should not apply to issuers.

We believe that imposing additional requirements to the Rule 10b5-1 affirmative defense, as applied to issuers, would have a harmful effect on share repurchase programs generally. In addition, the amendments to Rule 10b5-1, as applicable to issuers, are not necessary to achieve the SEC's stated policy objectives, namely to address potentially abusive practices associated with the use of Rule 10b5-1 trading arrangements. We discuss each of the proposed amendments in turn.

Cooling-Off Period

There is no general market practice for *issuers* to impose a waiting period on themselves in connection with adopting Rule 10b5-1 share repurchase plans, unlike Rule 10b5-1 trading plans for *insiders*, where a cooling-off period is much more prevalent and effective in managing the perception of informational asymmetries and mitigating the potential for abuse. Implementing a cooling-off period for issuers could have significant practical consequences, including:

- *Limiting issuer operational flexibility*. In the context of traditional open market share repurchase programs, issuers often want the flexibility to immediately start making repurchases under the programs. The imposition of a cooling-off period could cause issuers to abandon the use of traditional Rule 10b5-1 trading plans. Alternatively, imposing a cooling-off period may lead issuers to enter into two separate programs, one that is an open market program (which also may be structured to be in compliance with Rule 10b-18) without the benefits of the Rule 10b5-1 affirmative defense that takes effect immediately, and a second that is a Rule 10b5-1 plan that takes effect after the mandatory cooling-off period, resulting in unnecessary cost and complexity for issuers.

- *Resulting in increased market volatility*. The imposition of a cooling-off period for issuers could also potentially lead to increased market volatility as issuers would be limited to repurchasing shares during much shorter windows for trading than they currently use. For example, issuers that implement Rule 10b5-1 plans on a quarterly basis would effectively be out of the market for 120 days of the year, with each quarterly plan requiring a separate 30-day cooling-off period. As a result, the amendments could have the unintended consequence of compressing share repurchase activity into shorter windows, which could have a more significant impact on the trading price of the issuer's stock or, in the alternative, result in the issuer curtailing its share repurchase program, potentially resulting in a loss of return of capital to shareholders. Similarly, clustering share repurchases in open trading periods, which could happen if issuers cease using Rule 10b5-1 plans, could potentially increase market volatility.

- *Incompatibility with ASRs and other derivative transactions structured to comply with Rule 10b5-1.* Derivative transactions, such as ASRs, that may be structured as Rule 10b5-1 plans, also are typically entered into with essentially simultaneous pricing and the commencement of execution. The requirement of a cooling-off period (or forward-starting arrangement) as applied to these plans could impact the pricing and other terms that issuers receive for these types of arrangements, leading to greater inefficiencies in the marketplace. For example, derivatives are priced based on the market conditions at the time of execution. A disconnect between the time at which a derivative is priced and the time at which the valuation period begins will expose market participants to undue risk and expense, which will result in an inefficient market for these products, which in turn could negatively impact both issuers and their shareholders.

We believe that the existing anti-fraud regime provides investors with adequate protection, while also providing issuers with the flexibility to structure their repurchase plans in a manner that enables them to maximize the value that is returned to shareholders. A 30-day cooling-off period would reduce an issuer's flexibility to repurchase shares in a manner most advantageous to its shareholders and would impinge on the board of directors' and management's authority to manage an issuer's capital structure.

Finally, a cooling-off period for issuers has not been a prominent part of the dialogue around enhancements to the Rule 10b5-1 affirmative defense, and such dialogue has considered, nearly exclusively, whether insiders' (not issuers') Rule 10b5-1 plans should be subject to a cooling-off period. In particular, the SEC's Investor Advisory Committee noted that it did not consider issuer share buybacks in its deliberations and that share buybacks should be addressed separately.[9] The proposed imposition of a cooling-off period for issuers contrasts dramatically with the existing dialogue and research around the imposition of cooling-off periods on insiders to address individuals' potential misuse of Rule 10b5-1 plans. As the SEC itself has historically recognized that issuer repurchase plans inherently present fewer opportunities for misuse,[10] we respectfully submit that the negative impact of a cooling-off period as applied to issuers significantly outweighs any perceived benefits.

Overlapping Trading Plans

As applied to issuers, we believe that the proposed restriction on overlapping Rule 10b5-1 trading plans would have significant negative impacts. It is not uncommon for issuers to have multiple Rule 10b5-1 trading plans in effect at any given time for legitimate purposes. For example, for business reasons, including competitive pricing and mitigating counterparty credit risks, issuers may enter into multiple Rule 10b5-1 trading plans, each operating in a different time period (where the plans are designed to comply with Rule 10b-18). In addition, issuers may have multiple types of Rule 10b5-1 plans to address different types of considerations or goals. For example, an issuer could have one plan to offset dilution from equity compensation, a second plan to methodically reduce the overall share count during the course of the year and a third plan with a price limit below the current market price that would repurchase shares at prices the issuer considers undervalued.

In our experience, when issuers enter into multiple Rule 10b5-1 trading plans, these plans typically have different time, pricing and volume parameters, and, as a

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9 *See* Securities and Exchange Commission, Investor Advisory Committee, *Recommendation of the Investor Advisory Committee regarding Rule 10b5-1 Plans*, 8 n.1 (Sept. 9, 2021), available at https://www.sec.gov/spotlight/investor-advisory-committee-2012/20210916-10b5-1-recommendation.pdf ("The IAC did not consider issuer share buybacks in its deliberations on this recommendation and believes that any changes to the regulation of these programs should be addressed separately.").

10 Rule 10b-18 Proposing Release, 47 Fed. Reg. at 53,334.

result, one plan would be unlikely to have the effect of cancelling or modifying another plan or, put another way, permit issuers to "strategically execute trades based on material nonpublic information and still claim the protection of the" Rule 10b5-1 affirmative defense.[11]

If the SEC does determine to adopt a rule prohibiting multiple overlapping plans, we urge the SEC to, at a minimum, clarify the language in the final rule to remove the reference to "plan[s] for open market purchases or sales of the same class of securities." If this language is retained, Rule 10b5-1(c)(1)(ii)(D) could be read to restrict multiple Rule 10b-18 programs even if they are not Rule 10b5-1 trading plans, which does not appear to be the intent of the SEC's proposed language.[12] In addition, the rules should clarify that it is permissible for an issuer to have multiple plans, where trades under one plan commence only once an existing plan has been completed or terminated. For example, an issuer may enter into four Rule 10b5-1 repurchase programs at the start of a year, with each Rule 10b5-1 plan covering one quarter, with this arrangement driven by a variety of reasons, including to mitigate counterparty credit risk or to retain commercial relationships. The rules should not prohibit issuers from entering into plans covering different time periods, including plans that operate on alternating trading days between multiple financial institutions, as this practice does not implicate any of the concerns articulated by the Rule 10b5-1 Release.

In addition to the foregoing, other concerns regarding the scope of the proposed Rule 10b5-1 amendments as applied to both insiders and issuers are discussed in Part I.C. below.

If the SEC determines to adopt amendments to Rule 10b5-1 applicable to issuers, the amendments should apply only to traditional open market share repurchase programs.

If the SEC determines to adopt amendments to Rule 10b5-1 applicable to issuers, we strongly urge the SEC to provide that such rules should apply only to traditional Rule 10b5-1 plans that contemplate specified share purchases over their term pursuant to one or more limit or market orders (such transactions being referred to herein as "Agency Contracts"). In these plans, the financial institution is acting as the issuer's agent in effecting the transactions, whether on a traditional agency basis or a riskless

11 Rule 10b5-1 Release, 87 Fed. Reg. at 8692.

12 U.S. Sec. & Exch. Comm'n, Fact Sheet, Rule 10b5-1 and Insider Trading: Proposed Rules (2021), https://www.sec.gov/rules/proposed/2021/33-11013-fact-sheet.pdf ("The proposed amendments would add new conditions to the availability of the Rule 10b5-1(c)(1) affirmative defense to insider trading liability, including: […] [t]he affirmative defense under Rule 10b5-1(c)(1) does not apply to multiple overlapping *Rule 10b5-1 trading arrangements* for open market trades in the same class of securities." (emphasis added)).

principal basis.[13] Agency Contracts are in contrast to derivative or similar transactions, such as ASRs, which are described on pages 8 and 9 above.

As noted above, ASRs and other derivative transactions, if structured to comply with Rule 10b5-1, would be fundamentally adversely impacted by the proposed rules. Imposing a cooling-off period on these transactions would change the nature of the transaction and its pricing terms. For example, a time lag between entry into and execution of trades under an ASR introduces additional market risk due to the stock price and volatility uncertainty, which would result in increased costs to the issuer in the form of a smaller discount or no discount, or a premium, to the VWAP and therefore a higher average price paid per share repurchased. A cooling-off period would introduce significant uncertainty into a financial institution's costs and other pricing inputs, which would adversely impact pricing for issuers, and the increased complexity and uncertainty could also deter issuers from using ASRs or other derivative transactions. These impacts would, in turn, lead to less efficient returns of capital to shareholders. Similarly, having multiple trading plans in place, one of which includes a derivative transaction, does not create opportunities for abuse that the proposed rule is designed to protect against. For example, a written put option should not prevent purchases under a Rule 10b5-1 plan. Finally, we note that an ASR functions in a very different manner than an open market repurchase program, and limiting issuers' flexibility to have such concurrent arrangements could result in unnecessary costs without producing corresponding investor protection benefits. Subject to the anti-fraud provisions of the Exchange Act, an issuer and its board of directors are in the best position to determine the best way to structure and implement a share buyback program.

C. Proposed Rules Applicable to Both Insiders and Issuers

We urge the SEC to exclude non-material plan amendments and modifications from the definition of plan terminations that would trigger a new cooling-off period.

The proposed amendments to Rule 10b5-1 would provide that, "[a]ny modification or amendment to a prior contract, instruction, or written plan is deemed to be the termination of such prior contract, instruction, or written plan, and the adoption of a new contract, instruction, or written plan." We believe the definition of plan terminations should be limited to material modifications and amendments. This is consistent with the guidance of the Staff under Section 16 of the Exchange Act relating to

[13] Under Rule 10b-18, a "riskless principal transaction" is defined to mean a transaction in which a broker or dealer, after having received an order from an issuer to buy its security, buys the security as principal in the market at the same price to satisfy the issuer's buy order.

amendments to derivative securities.[14] Although certain plan amendments and modifications are substantive, many types of amendments or modifications, such as changes to notice provisions or updates to plans to fix scrivener errors, are not. Moreover, even substantive changes—such as changes to address an event that occurred outside of the plan or other changes to resolve uncertainty as to how a plan is intended to be executed—are not always material to trading instructions. Issuers and insiders alike should be able to effect these types of non-material changes without being deemed to have terminated a plan and subject to a new cooling-off period.

We do not think the new concept of "operated in good faith" is necessary to achieve the SEC's goals of reducing abuses of the Rule 10b5-1 affirmative defense. Moreover, the concept of "operated in good faith" is not sufficiently clear as to the conduct it is intended to prescribe.

The concept of "operated in good faith" is neither necessary to achieve the SEC's goals nor sufficiently clear as to the conduct it is intended to proscribe.

Anti-fraud rules, including, in particular, the prohibition against trading while aware of MNPI, already prohibit issuers from taking advantage of such asymmetries when repurchasing their securities and insiders from improperly influencing the timing of release of material information. Accordingly, adding the additional requirement that a Rule 10b5-1 be "operated in good faith" is not necessary to further the SEC's investor protection goals.

We also believe the word "operated" is vague and could lead to significant confusion and in turn to fewer Rule 10b5-1 plans and, consequently, more trades during open window periods. As discussed above, we do not believe increased trades during open windows would further the SEC's investor protection goals. Rather than incorporating a requirement to operate a plan in good faith, we urge the SEC to focus on specific types of conduct, such as material modifications or amendments to, or terminations of, a plan that are required to be made in good faith. In this manner, issuers will have more certainty as to the steps needed to avail themselves of the Rule 10b5-1 affirmative defense.

We strongly urge the SEC to clarify the definition of a "single-trade" plan. Issuers should not be subject to the limitations on single-trade plans and the restriction, as

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14 Peter J. Romeo & Alan L. Dye, *Section 16 Treatise and Reporting Guide* § 10.04(5)(f), at 1050 (5th ed. 2019).

applicable to corporate insiders, should be limited to only directors and executive officers.

We believe there is significant uncertainty as to the concept of a single-trade plan in the proposed rules and have significant concerns regarding the potential scope of this restriction.

We strongly urge the SEC to clarify the definition of a "single-trade" plan, if this concept is retained in the final rules. For example, is a derivative transaction, such as an ASR or the writing of a put option, a "single-trade" plan? Is a limit order a "single-trade" plan? Is a securities purchase agreement a "single-trade" plan? Is an instruction to make a charitable contribution or fund an estate planning vehicle at year-end a "single-trade" plan?

We also urge the SEC to clarify in the final rules, if adopted, that the following transactions, at a minimum, do not fall within the scope of single-trade plans: (i) derivative transactions; (ii) gifts and estate-planning transactions; (iii) securities purchase or sale agreements, including forward contracts, whether or not prepaid; (iv) employee benefit plan transactions, including option exercises where settlement may occur after exercise and employee stock purchase plan trades; (v) plans that contemplate multiple purchases or sales of shares at designated limit prices, but under which only a single purchase or sale occurs; and (vi) multiple limit orders or other "not-held" orders.

The rules, if adopted, should also clarify that single-trade plans covering different classes of securities do not fall within the scope of the rule and that single-trade plans that lapse without a trade being completed do not prohibit the person from entering into another single-trade plan within 12 months. Finally, the rules should clarify that plans that by their terms cannot be terminated should not be considered single-trade plans and that a person should be allowed to enter into, within a 12-month period, a multiple-trade plan following the completion or termination of a single-trade plan.

Given the potential scope of a restriction on single-trade plans, if the SEC does determine to retain such a restriction, we strongly urge the SEC to limit applicability of this rule to executive officers and directors, rather than applying to issuers and other entities and individuals more broadly. Even if the concept of a single-trade plan is clarified in the final rules, issuers should not be subject to the limitation on single-trade plans. Issuer single-trade plans do provide a significant opportunity for the potential abuses which the SEC is concerned about in the Rule 10b5-1 Release. Consequently, limiting issuers' flexibility to engage in these types of plans could unnecessarily constrain their ability to engage in derivative transactions for legitimate business reasons and to return capital to shareholders.

II. Proposed Item 408 of Regulation S-K

We are generally supportive of the proposed new Item 408(a)(1) of Regulation S-K, but urge the SEC to consider certain clarifications.

Proposed Item 408(a)(1) of Regulation S-K would require quarterly disclosure of an issuer's adoption, modification or termination of "any contract, instruction or written plan for the purchase or sale of securities […] whether or not intended to satisfy the affirmative defense conditions of Rule 10b5-1(c)." If so, an issuer would be required to describe the material terms of the contract, instruction or written plan, including (i) the date of adoption or termination; (ii) the duration of the contract, instruction or written plan; and (iii) the aggregate amount of securities to be sold or purchased pursuant to the contract, instruction or written plan.

In addition to the clarifications discussed below, we urge the SEC to limit proposed Item 408(a)(1) to disclosure of traditional Rule 10b5-1 plans that contemplate specified share purchases over their term pursuant to one or more limit or market orders (Agency Contracts). As discussed below, extending disclosure obligations to other trading arrangements not intended to comply with Rule 10b5-1 raises significant interpretive questions. If the SEC determines not to limit the proposed rule to Agency Contracts, we request that the SEC clarify how non-Agency Contracts should be disclosed and, in particular, confirm that non-Agency Contracts should continue to be disclosed in the same manner as currently required pursuant to Item 703 of Regulation S-K.

We believe the SEC's policy concerns behind proposed Item 408(a)(2) are better addressed by existing Section 16 reporting obligations and urge the SEC to eliminate Item 408(a)(2) from the proposed rules, if adopted.

Proposed Item 408(a)(2) would require issuers to disclose quarterly the same type of information discussed above with respect to the adoption or termination of a Rule 10b5-1 trading plan or other pre-planned trading arrangement by any director or officer of the issuer. The SEC notes in the Proposing Release that this disclosure could provide investors or the SEC with important information about potential misuse of insider information and deter potential abuses of Rule 10b5-1 trading plans or other trading arrangements. We urge the SEC to eliminate proposed Item 408(a)(2) for several reasons:

Disclosure duplicative of Section 16 filings. The SEC has proposed, and we generally support, amendments to Forms 4 and 5 to include a Rule 10b5-1 check box indicating that a transaction was made under a plan intended to comply with Rule 10b5-1. Section 16 filings already frequently describe whether transactions are made pursuant to Rule 10b5-1 trading plans, and including the box will provide the SEC and investors with important information about the use of these plans. Section 16 disclosure and trading restrictions were designed to prevent insiders from making unfair use of confidential corporate information.

Extensive disclosure of insider's trading plans is unnecessary for investor protection. By contrast to disclosure of an issuer's entry into a share repurchase plan, which can be meaningful to investors, we do not see a significant corresponding benefit to investors from disclosure regarding directors' and executive officers' entry into Rule 10b5-1 plans. There are a variety of reasons why an insider may enter into a Rule 10b5-1 plan—including to meet tax obligations, to make mortgage payments or to make charitable donations—and the entry into trading plans relating to such transactions by insiders is not necessarily indicative of their views of a company's prospects. Disclosure on Forms 4 or 5 provides the necessary details to allow market participants to observe how these plans are being used.

Reporting obligations should be the responsibility of insiders, not the issuer. Issuers should not be responsible for monitoring all of the trading actions of their directors and officers. Requiring disclosure of this information would necessitate issuers to adopt new disclosure controls and procedures, which could be time consuming to adopt—and, in many cases, could require board of directors and/or committee approval—and require significant resources to implement in practice. As discussed above, the SEC's proposed new Rule 10b5-1 check box on Forms 4 and 5 would provide more meaningful information to investors.

To the extent Items 408(a)(1) and/or (2) are adopted, we strongly urge the SEC to consider several clarifications.

Eliminate references to plans that are not intended to satisfy the 10b5-1 affirmative defense. First, we urge the SEC to remove all references to plans that are "not intended to satisfy the affirmative defense conditions of Rule 10b5-1(c)." This reference raises a number of interpretative issues as it could potentially encompass an extraordinarily broad scope of transactions, including, but not limited to, open market purchases, derivative securities and employee benefit plan arrangements. The open-ended nature of this language raises the question of whether transactions, such as verbal instructions to brokers or multiple limit orders, would fall within the scope of the proposed rule. Adopting this requirement as proposed could cause substantial confusion and result in inconsistent disclosures that will not provide meaningful information to investors. To the extent the SEC determines to retain this language in the final rules, we believe this rule should be limited only to Agency Contracts. In addition, we urge the SEC to clarify that this language does not encompass derivative transactions or gifts or estate-planning transactions.

Descriptions of plans should be limited to enumerated items. Second, we encourage the SEC to limit the required description of material terms to only those enumerated in the proposed rule and to delete the word "including." Other "material" terms of a contract, instruction or written plan to purchase or sell securities could include, among other things, limit prices and the amount to be purchased at each limit price or quantities to be purchased at particular price levels. We believe disclosure of such detailed information would raise front-running and improper market signaling concerns. Specifically, disclosing such information would benefit short-term, high-frequency traders to the detriment of less sophisticated, smaller or retail investors. Only sophisticated, well-resourced traders could potentially mine data and prepare algorithms enabling them to determine the undisclosed terms of the plan, resulting in opportunities for arbitrage. By contrast, other investors, including retail investors, who do not have those same capabilities, would find themselves at a comparative disadvantage. In addition, requiring executive officers and directors to disclose detailed terms of a plan could disincentivize executive officers and directors from entering into long-term trading plans that spread trades out over time, which could potentially undercut the SEC's investor protection goals and not be beneficial to a company's shareholders.

Eliminate disclosure of termination of plans. Finally, proposed Item 408(a) should not require disclosure of the termination of a plan. A trading plan may be terminated in advance of announcement of a significant corporate transaction, such as a merger. Similar to the concerns raised above, requiring disclosure of such plan terminations could inadvertently benefit larger, well-resourced and more sophisticated investors, who are better positioned to analyze the meaning and implications of plan terminations, to the relative disadvantage of other investors, including retail investors.

Non-material plan amendments and modifications to plans should not be considered terminations.

The note to proposed Item 408(a) provides that, "[a]ny modification or amendment to a prior contract, instruction, or written plan is deemed to be the termination of such prior contract, instruction, or written plan, and the adoption of a new contract, instruction, or written plan." For the reasons noted above in our discussion of the proposed cooling-off periods, we believe this should be limited to material modifications and amendments.

We are generally supportive of proposed Item 408(b), subject to certain clarifications.

We are generally supportive of proposed Item 408(b) of Regulation S-K, which would require disclosure of an issuer's insider trading policies and procedures (to the extent an issuer has adopted such policies and procedures). However, we urge the SEC to clarify that a description of the material terms of an issuer's insider trading policies and procedures would be sufficient to satisfy the proposed rule. If the SEC determines that disclosure of the actual policies and procedures is required, we respectfully suggest that the SEC clarify that this requirement can be satisfied by either (i) disclosing the issuer's website address along with the fact that it has posted such policies and procedures on its website, or (ii) attaching the policies and procedures as an exhibit to the relevant filing. This approach would be similar to the flexible approach provided in existing Item 406 of Regulation S-K, which provides issuers with three alternative paths for disclosure of their code of ethics.

III. Proposed Amendments to Forms 4 and 5

We are generally supportive of including a new check box on Forms 4 and 5 relating to Rule 10b5-1, subject to one drafting change. However, we urge the SEC to delete the check box for non-Rule 10b5-1(c) transactions.

The SEC has proposed adding new check boxes to Forms 4 and 5 that would indicate whether "a transaction was made pursuant to Rule 10b5-1(c)" or pursuant to a contract, instruction or written plan that "did not satisfy the conditions of Rule 10b5-1(c)."

We urge the SEC to modify the proposed check box to require disclosure of "whether a transaction was intended to satisfy" the Rule 10b5-1 affirmative defense rather than whether a transaction "was made" pursuant to the affirmative defense. For a number of legitimate reasons, reporting persons may find it difficult to definitively state whether a transaction was in fact made pursuant to the Rule 10b5-1 affirmative defense. The "intended to satisfy" language would also be consistent with the SEC's approach in other proposed rules, such as proposed Item 703(c)(2)(iii), which would require disclosing the number of shares purchased "[p]ursuant to a plan that is intended to satisfy the affirmative defense conditions of [Rule 10b5-1(c)]."

In addition, for the reasons discussed earlier in this letter, we urge the SEC to delete the requirement to disclose whether a transaction was made pursuant to a contract, instruction or written plan that "did not satisfy the conditions of Rule 10b5-1(c)."

IV. Proposed Item 402(x)(2) of Regulation S-K

If proposed new Item 402(x) is adopted, we urge the SEC to eliminate clause (2) thereof from the final rule.

Proposed new Item 402(x)(2) of Regulation S-K would require issuers to provide tabular disclosure for each named executive officer on an aggregate basis if, during the most recent fiscal year, a grant of stock options, stock appreciation rights

("SARs") or similar instruments was awarded to a named executive officer within 14 days before or after the filing of (i) a periodic report on Form 10-Q or Form 10-K, (ii) an issuer share repurchase or (iii) the filing or furnishing of a Current Report on Form 8-K that discloses MNPI.

To the extent the SEC determines to adopt proposed Item 402(x), we believe clause (2) thereof should be eliminated from the final rule as it would impose a significant burden on issuers, without corresponding benefits to stockholders. Requiring issuers to prepare the information required by proposed Item 402(x)(2) would impose a significant and unnecessary burden on issuers as preparing disclosures based on when grants are made vis-à-vis periodic reports and share repurchases will require adoption of new internal processes and disclosure controls and procedures, which will likely be costly and time consuming. Section 16 filings are already required to disclose information regarding grants of stock options, SARs and similar instruments to named executive officers (among others), and such disclosures are made on a more timely basis than the information would be provided under proposed Item 402(x)(2). Accordingly, there would likely be minimal added benefit to investors from the tabular disclosure required by Item 402(x)(2).

To the extent the SEC determines to adopt Item 402(x)(2), we urge the SEC to make several clarifications.

First, we urge the SEC to remove the requirement to disclose grants within 14 days of "an issuer share repurchase" or, at a minimum, limit this requirement to only adoption or announcement of a new share repurchase program, rather than any share repurchase transaction. Many issuers engage in repurchase activity regularly and, in some instances, daily, and this requirement could pose a substantial burden on issuers not commensurate with any potential benefit to investors. Tying the disclosure requirement to adoption or announcement of a new share repurchase program would also be consistent with proposed Item 703 of Regulation S-K,[15] which would require disclosure of whether an officer or director purchased or sold equity securities "within ten (10) business days before or after the issuer's announcement of such repurchase plan or program."

Second, we urge the SEC to eliminate the reference in proposed Item 402(x)(2) to Form 8-Ks that disclose MNPI. Instead, we suggest that, to the extent proposed Item 402(x)(2) is adopted, it should include a bright line rule regarding which Form 8-Ks fall within the scope of the disclosure requirements. We believe that, if retained, this requirement should be limited to Item 2.02 Form 8-Ks that disclose earnings information. In our view, this would be of greater benefit not only to investors,

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15 *See* Share Repurchase Disclosure Modernization, 87 Fed. Reg. 8443 (proposed Feb. 15, 2022).

who would receive more consistent and material information, but also to issuers, who would not be burdened with making materiality assessments for each of their Form 8-Ks.

V. Applicability of Proposed Rules to FPIs

FPIs should be excluded from the requirement to disclose insider trading policies and procedures.

Under the proposed rules, FPIs would also be subject to annual disclosure of insider trading policies and procedures under proposed new Item 16J of Form 20-F, similar to the proposed new Item 408 discussed above. FPIs should be exempted from the proposed disclosure requirements relating to insider trading policies and procedures, and we urge the SEC to eliminate proposed Item 16J from the final rules. Among other concerns, this disclosure requirement could inadvertently create an implicit requirement for FPIs to adopt to new insider trading policies and procedures. This would be inconsistent with the SEC's historical treatment of FPIs, who have been permitted to follow home country corporate governance standards.

VI. Transition Considerations

The SEC should provide for at least a 12-month period between adoption and effectiveness of the rules and exempt existing Rule 10b5-1 plans (and amendments and modifications thereto) from the scope of the rules.

The rules, if adopted, would represent a significant expansion of the disclosure requirements relating to insider trading and significantly alter the Rule 10b5-1 affirmative defense requirements. As a result, we believe the SEC should provide for at least a 12-month transition period between adoption and effectiveness of the rules. If adopted, the proposed rules will require modifications to existing, or adoption of new, policies and procedures, internal reporting processes and disclosure controls and procedures, all of which will require feedback from numerous stakeholders, including internal and external counsel, and possibly require approval by an issuer's board of directors or a committee thereof. Implementation of the Inline XBRL reporting will require the development of new taxonomies, which will also take substantial time to implement.

We also urge the SEC to exclude from the scope of the new rules any Rule 10b5-1 trading plans already in effect as of the effective date of the new rules. Potentially requiring issuers and insiders to enter into amendments to existing plans in order to comply with the new rules could result in significant and unnecessary market disruption and uncertainty. In addition, existing plans should be permitted to operate in accordance with both their terms and the law in effect at the time of adoption, and amendments, modifications and terminations of Rule 10b5-1 plans in effect as of the effective date should accordingly be excluded from the scope of the proposed rules. Requiring existing plans to comply with the new rules would result in retroactive application of the law and in turn lead to significant confusion and uncertainty.

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If you would like to discuss our letter, please feel free to contact Robert W. Reeder III or Catherine M. Clarkin at [redacted], or Sarah P. Payne at [redacted].

Very truly yours,

Sullivan & Cromwell LLP