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April 1, 2022

Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: **File No. S7-20-21**
Amendments Regarding Rule 10b5-1 Insider Trading Plans and Related Disclosures
Release No. 33-11013; 34-93782

File No. S7-21-21
New Share Repurchase Disclosure Rules
Release No. 34-93783; IC-34440

Dear Secretary Countryman:

We are grateful for the opportunity to present our views on the above-captioned releases and the new rules they propose for Rule 10b5-1 trading plans and related disclosures and for the disclosure of share repurchases. This letter respectfully submits our comments on both releases.

The affirmative defense afforded by Rule 10b5-1 plays a critical role in enabling corporate directors, officers and employees with access to material nonpublic information to monetize their equity compensation in compliance with the federal securities laws. Share repurchases are an important capital allocation tool that permits issuers to return capital to shareholders in an efficient and flexible manner. With respect to share repurchases, Rule 10b5-1 facilitates efficient capital allocation by allowing issuers that establish share repurchase plans while they are in an open trading window to allow share repurchases to be executed pursuant to the terms of the repurchase plan during a quarterly earnings blackout or when they are in possession of material nonpublic information.

The proposed rule changes that we comment on today are animated by concerns the Commission has expressed about the presumptive prevalence of practices of corporate insiders and issuers that involve the misuse of material nonpublic information or that are otherwise manipulative or inappropriate. Based on our extensive experience working with public companies in connection with Rule 10b5-1 trading plans and share repurchase programs, we do not believe that such practices are widespread or that the rules governing Rule 10b5-1 trading plans and share repurchase programs warrant modification. We also respectfully submit that the proposed rules can be modified in ways that are consistent with the Commission's objectives while lessening the burden and costs those rules would create in their currently proposed form for public companies and their shareholders, directors, executive officers and employees. This letter respectfully suggests certain such modifications for the Commission's consideration.

Rule 10b5-1 Trading Plans and Other Trading Arrangements

The proposed amendments to Rule 10b5-1 would add new conditions to the availability of the affirmative defense. The same release also proposes new disclosure requirements, including with respect to the adoption and termination of Rule 10b5-1 and certain other trading arrangements by directors, officers and issuers.

Proposed Changes to Rule 10b5-1

The proposed changes to Rule 10b5-1 on which we would like to comment relate to the proposed cooling-off periods, director and officer certifications, the prohibition of overlapping plans, and the new requirement that plans be operated in good faith.

Cooling-Off Periods

The proposed changes to Rule 10b5-1 would impose cooling-off periods between plan adoption and the first trade under the plan. The proposed 120-day cooling-off period for plans entered into by directors and executive officers seems excessive. Recognizing the value of some time between entry into a plan and execution of trades under the plan, many issuers already impose cooling-off periods of 15 to 30 days from plan adoption or until the opening of the next trading window under the issuer's insider trading policy. Many brokers administering plans impose similar cooling-off periods as part of their own trading practices. If the changes to the rule are adopted as proposed, the impractical length of the cooling-off period may incentivize directors and executive officers to forego the use of Rule 10b5-1 plans altogether and trade only in short windows immediately following an earnings release. The cost that this limitation on liquidity and diversification imposes on directors and executive officers will ultimately be borne by public stockholders through a shift from equity to cash compensation or through generally higher compensation.

We respectfully submit that a shorter cooling-off period for directors and executive officers, and no cooling-off period for issuers, is more appropriate. For directors and executive officers, we propose adopting a 15-day cooling-off period for plans entered into within three trading days after an earnings release, and a 30-day cooling-off period for all other plans. A shorter cooling-off period for directors and executive officers who enter into a plan in connection with the issuance of the earnings release should address the Commission's underlying purpose in establishing cooling-off periods. At the time of an earnings release, a company provides investors with comprehensive financial information and "speaks" to the market about its financial and operating results and the industry outlook. Concerns about the possession of material non-public information by a director or officer at this time should be alleviated. In all other instances, a 30-day cooling off period would significantly reduce any residual concerns about material information possessed by a plan user at the time of plan establishment remaining undisclosed as part of the regular earnings reporting cycle.

We propose no cooling-off period for issuers. In our experience, issuers have robust compliance procedures in place to ensure share repurchases are appropriately structured based on current information regarding the issuers’ cash position and its anticipated uses. The academic literature about Rule 10b5-1 cited in the proposing release that suggests that plans may be entered into at a time when the relevant person was aware of impending release of material nonpublic information is focused on sales of securities by executives, not on repurchases by issuers. A cooling-off period would also be much more difficult to manage for issuers and may preclude their access to certain repurchase techniques, such as accelerated share repurchases (ASRs). Unlike trading plans used by individuals, which may be motivated by near-term cash needs and diversification, trading plans relied on by issuers are driven by broader capital allocation policies, which are refined periodically based on business performance and cash needs as well as general market and economic conditions. Imposing a 30-day delay on the commencement of purchases would make these plans difficult to use, and may make structured repurchase techniques, such as ASRs, prohibitively expensive or complex to execute.

Director and Officer Certifications

We view the proposed certification and ten-year record retention proposal as unnecessary. Typical Rule 10b5-1 plan documentation already requires directors and officers to represent to the executing broker that they have no material nonpublic information and are entering into the plan in good faith. The proposed certification would simply duplicate this representation. The objective of the requirement to retain that certification for ten years remains unclear. Rule 10b5-1 is an affirmative defense, so if a director or executive officer is investigated for trading that occurred in the past, the burden is on such director or executive officer to establish that they had no material nonpublic information when they put the relevant plan in place.

Prohibition of Overlapping Rule 10b5-1 Plans

The proposed changes to Rule 10b5-1 include a prohibition of overlapping plans. According to the proposing release, this is designed to prevent overlapping plans from being used to simulate the kind of hedging that the rule prohibits and/or to circumvent the proposed cooling-off periods. The concern is that insiders could accomplish such hedging or circumvention by establishing multiple overlapping plans and then selectively canceling some of those plans after they come into possession of material nonpublic information. We question whether this prohibition is necessary since overlapping plans that result in impermissible hedges are already prohibited by Rule 10b5-1(c)(1)(i)(C), and it is unclear how overlapping plans can be used to circumvent cooling-off periods.

We are concerned that a prohibition of overlapping plans is overly broad as currently drafted. It makes it a condition to the availability of the affirmative defense under Rule 10b5-1 that the relevant person has no outstanding, and does not subsequently enter into any additional, "contract, instruction, or plan for open market purchases or sales of the same class of securities." *Any* trading in securities involves an "instruction" to a broker. Read literally, the proposed revision would mean that a person's establishment of a Rule 10b5-1 plan would effectively prohibit *any* trading by that person outside the plan for the duration of the plan. In addition, the proposed prohibition would prevent multi-dealer/alternating day or single-dealer/staggered-maturity repurchase structures that are commonly used by issuers to mitigate counterparty credit risk, optimize pricing or for other legitimate business purposes in connection with share repurchases.

We do not believe that the Commission needs to prohibit all overlapping plans to achieve its objective of refusing the protections of Rule 10b5-1 to trading strategies that simulate the effects of impermissible hedging or circumvent the proposed cooling-off periods. The Commission could address any suspected related abuses by making the protections of Rule 10b5-1 for any plan contingent on there being no subsequent cancellation or amendment of any overlapping Rule 10b5-1 plan if trades under that cancelled or amended plan would have offset, in whole or in part, trades under the first plan. Alternatively, the Commission could limit the prohibition against overlapping plans to those that contemplate trades that would offset, in whole or in part, trades under another Rule 10b5-1 plan. In any event, the final rules should clarify that any prohibition of overlapping plans applies only to overlapping Rule 10b5-1 plans, but not to other trading arrangements that do not benefit from the affirmative defense.

We also believe that any rules adopted with respect to overlapping Rule 10b5-1 plans should exclude Rule 10b5-1 plans that are set up exclusively to enable tax withholding transactions with respect to equity compensation arrangements, such as stock options and restricted stock units. While some equity compensation plans structure such tax withholding transactions as deemed sales to the issuer, others raise the funds required for tax withholding upon vesting or exercise by facilitating sales into the market, commonly pursuant to a Rule 10b5-1 plan. Treating such tax withholding arrangements as overlapping Rule 10b5-1 plans would in effect completely prevent insiders of issuers that use such arrangements from using Rule 10b5-1 plans to gain liquidity for any other purpose.

Finally, whatever form of the prohibition is finally adopted should clarify that a plan is treated as overlapping with respect to another plan only if it could result in trades occurring under both plans during the same time period. There should not be any prohibition against establishing a new plan while an existing plan is still outstanding, as long as trades under the new plan can only occur after the initial plan has expired or been terminated.

"Operated in Good Faith" Requirement

The proposed revisions would expand the existing requirement that a Rule 10b5-1 plan must be entered into in good faith to provide that the plan must also be "operated" in good faith. According to the proposing release, this is intended to make it clear that the affirmative defense would not be available to traders that cancel or modify their Rule 10b5-1 plans to evade the prohibitions of the rule or use their influence to affect the timing of corporate disclosure to occur before or after a planned trade with a view towards profit maximation or loss avoidance.

At a minimum, we believe that the Commission should clarify, either in the text of the rule or the adopting release, that any cancellation or amendment of a Rule 10b5-1 plan will not be deemed to be in bad faith if it occurs while the person that established the plan is not in possession of material nonpublic information.

We also propose that the Commission state that persons will not be deemed to be acting in bad faith if they decide to cancel or amend Rule 10b5-1 plans for legitimate reasons. The list of such reasons should include avoiding trades during a period when those persons are aware of material non-public information that, if disclosed, would reasonably be expected to raise the price at which securities are purchased or lower the price at which securities are sold under the plan. For example, issuers that are engaged in Rule 10b5-1 share repurchases may legitimately want to stop those repurchases during pending negotiations of a major corporate transaction. Similarly, directors and officers may want to prevent shares from being sold ahead of the announcement of negative corporate developments to avoid the negative publicity often associated with such sales.

Another legitimate reason for canceling a Rule 10b5-1 plan that should be recognized is compliance with applicable legal or regulatory requirements. As an example, issuers that have outstanding Rule 10b5-1 share repurchase plans may need to cancel those plans to comply with the prohibition against purchases during a Regulation M restricted period in connection with a pending stock merger or other distribution transaction.

Additional Required Disclosure About Trading Arrangements

In connection with its proposed changes to Rule 10b5-1, the Commission has also proposed additional disclosure requirements. These relate to the quarterly reporting of trading arrangements, the filing of insider trading policies, and the quarterly disclosure of option grant timing side-by-side with timing of disclosure of material information and timing of share repurchases.

Quarterly Reporting of Trading Arrangements

The proposed changes to Item 408 of Regulation S-K would require the quarterly disclosure of any contract, instruction or written plan to purchase or sell securities of the issuer by the issuer itself or its directors or executive officers. This would include any termination or modification to such contracts, instructions or plans. According to the proposing release, these new quarterly disclosures are designed to allow investors to assess the extent to which directors, executive officers, and the issuer are adopting or terminating such trading arrangements during periods when they may be aware of material nonpublic information.

We are concerned about the breadth of these disclosure requirements, and we believe that they go well beyond what is necessary to achieve the Commission’s objective of greater transparency regarding the timing of Rule 10b5-1 plans. The proposed rule refers to any “contract, instruction or written plan for the purchase or sale of securities of the registrant,” which means this would include not just the type of arrangements commonly referred to as trading plans, but literally any instruction to a broker to buy or sell the issuer’s securities. We believe that this is much broader than necessary to achieve the Commission's stated objective of allowing investors to assess whether trading arrangements are being adopted or terminated at a time when the relevant person has material nonpublic information.

We respectfully submit that disclosure that focuses on contracts, instructions or plans designed to meet the requirements of Rule 10b5-1 should be sufficient to achieve this objective. If corporate insiders adopt contracts, instructions or plans that fail to satisfy Rule 10b5-1, they lose the protection of the affirmative defense. In that case, there should be no concern about insiders being shielded from liability for trading while in possession of material non-public information. While it is theoretically possible that insiders may establish trading plans that do not comply with Rule 10b5-1 plans when they are in possession of material non-public information without having to report those plans, those plans have no consequences for public investors unless they result in actual trades. Any such trades, whether pursuant to a plan or otherwise, must already be reported under Section 16 of the Exchange Act.

In addition, we are concerned that reporting the termination of a trading plan could give rise to rumors and speculation because issuers, directors and executive officers may not be at liberty to discuss the reasons for the termination. As discussed above, there are legitimate reasons for terminating plans prior to their expiration date that may relate to ongoing negotiations of strategic transactions or other corporate developments that are not ripe for public disclosure. We therefore suggest that the termination of a trading plan need not be reported unless and until a new plan is adopted.

Finally, we believe that, as currently worded, the proposed disclosure requirement related to the terms of the plan would be too open-ended and would force issuers to describe all "the material terms" of the relevant arrangement. This could include information regarding the price at which trades are to be executed, which would enable sophisticated market participants to engage in trading strategies that seek to take advantage of that information. This is particularly problematic in the case of issuer repurchase plans, where such strategies have the potential to artificially inflate the price at which an issuer repurchases its shares and thus adversely affect its public stockholders.

The objective of the proposed quarterly disclosure is to allow investors to assess whether trading arrangements are being adopted or terminated at a time when the relevant person has material nonpublic information. To accomplish this objective, it would be sufficient that the description of such arrangements include the date of adoption or termination, the duration, and the aggregate amount of securities to be sold or purchased—essentially the elements in clauses (i) through (iii) of proposed Item 408(a)(1) of Regulation S-K, and the final rule should make this explicit. We also believe that with respect to duration and amount, the description should be limited to the "maximum" possible under the relevant arrangement, without requiring greater detail.

Disclosure of Insider Trading Policy

Proposed Item 408(b) of Regulation S-K would require the disclosure of an issuer's insider trading policy in annual reports and proxy statements. The relevant information related to an insider trading policy is whether an issuer has one and what persons are covered by it. These policies include information that extends well beyond the substantive restrictions that may be of interest to investors. They are compliance documents that also set forth notification procedures and relevant forms required for compliance, none of which are useful for an investor's understanding of an issuer's insider trading restrictions. Additionally, issuers should have flexibility to amend an insider trading policy without considering whether a previously filed insider trading policy needs to be updated. Accordingly, we are of the view that it is not necessary to require issuers to provide the incremental disclosure called for by Item 408(b) of Regulation S-K. To the extent that the Commission believes that additional disclosure regarding insider trading policies is warranted, we would suggest that the insider trading policy instead be posted to the applicable issuer's website, which is where many issuers post relevant policies, and not be required to be filed, posted or described in connection with SEC filings.

Disclosure of Option Grant Timing

Pursuant to the proposed rules, a new table to be included as part of annual compensation disclosure would list each option award granted within 14 calendar days before or after the filing of a 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 market price of the underlying securities the trading day before disclosure of the material nonpublic information; and the market price of the underlying securities the trading day after disclosure of the material nonpublic information. We understand that the Commission's objective in requiring this new disclosure is to make it easier to identify manipulative practices regarding the timing of option grants relative to the disclosure of material nonpublic information, whether in the form of "spring-loading" (granting options shortly before the release of positive information) or "bullet-dodging" (granting options just after the release of negative information).

In our experience, issuers and their boards already carefully consider option timing, and generally adhere to a fixed schedule of grant dates that remain constant year over year, subject to additional grants required for new hires. Similarly, the release of material corporate information is generally driven by issuers' earnings calendars and the occurrence of unforeseen events that may trigger off-cycle disclosure.

We note that all of the information called for by the proposed new disclosure item is already publicly available through a combination of the compensation discussion and analysis required by existing Item 402(b) of Regulation S-K, the grants of plan-based awards table required by existing Item 402(d) of Regulation S-K, the issuer's filings with the Commission, and public stock price data. Presenting the information side-by-side in the format prescribed by the proposed new table may suggest causal links between option grants and the timing of public disclosures when none exist. This is exacerbated by the necessarily simplistic disclosure format that shows the share price immediately after (in the case of an earlier option grant) or immediately before (in the case of a subsequent option grant) the relevant public disclosure. Assessing whether the option grant benefited from the timing of relevant disclosure would require a lot of additional information, such as the movement of the relevant benchmark index or peer companies during the relevant period. Issuer share prices change all the time as a result of broader market, industry or geopolitical developments and without issuer-specific news.

Particularly unhelpful is the proposed approach of treating every share repurchase as the equivalent of the disclosure of material nonpublic information, which would require inclusion of an option grant in the table if it occurred within 14 days of a repurchase. Issuers with active repurchase programs are often in the market on every available trading day so that they can maximize their repurchase activity within the volume and other limitations of the Rule 10b-18 safe harbor. For such issuers, practically every option grant to named executive officers would need to be included in the table unless issuers were to pause their repurchases for a month every time they grant relevant options.

The administrative burden of this table on issuers will not be limited to collecting and presenting the information called for by the proposed table itself but will also include the need to explain any grants that occurred during the fourteen days around the release of material information or a share repurchase. If the Commission's intent is to push issuers towards avoiding option grants during the one-month periods around such issuers' public report filings, securities repurchases or material announcements, we caution that this may not be practicable. Issuers often set the timing of grants to align with the reporting of quarterly or year end results and the dates of compensation committee meetings, so shifting fixed annual grant schedules could have unintended governance and other consequences.

In addition, we question whether the date of a periodic report filing should be treated as an event where material information is disclosed when such filing is preceded by the issuance of an earnings release. For many public companies, the earnings release precedes the filing of the corresponding periodic report by more than 14 days. Those companies generally still open their trading window shortly after the earnings release has been issued and do not wait until the filing of the corresponding periodic report. This is based on the view that the earnings release typically contains the material information about the quarterly performance. Additional support for this practice comes from empirical research which has consistently shown that investors and analysts react more strongly to earnings releases than to subsequent 10-Q or 10-K filings.

New Share Repurchase Disclosure Rules

The Commission has proposed that issuer share repurchases be reported daily on a new Form SR before the end of the first business day following the day on which the repurchase transaction has been executed. The proposal would also revise Item 703 of Regulation S-K to require issuers to disclose the objective or rationale for their share repurchases and the process or criteria used to determine the amount of repurchases.

New Form SR

We are concerned that daily information about repurchase activity may provide little benefit to most investors while inviting speculation and making repurchases more costly for issuers, thereby harming the majority of public stockholders.

The information value of these daily disclosures to the market would necessarily be limited because of the multiple factors that can affect the amount of repurchases on any given day. Day-to-day changes in repurchase activity may reflect shifts in capital allocation priorities or daily liquidity needs. They may also be simply due to volume and price parameters in an issuer's repurchase plan and their interaction with market prices. Of course, a cessation of repurchases could also be due to pending discussions about a strategic transaction. Similar to the proposed disclosure of the termination of Rule 10b5-1 plans discussed above, daily disclosure about changes in repurchase activity may therefore lead to speculation about potential underlying causes. Issuers may not be able to address questions posed to them regarding the reasons for changes in repurchase activity and be forced to adopt a no-comment policy. A daily drip of repurchase information seems likely to create noise that is difficult to interpret and would serve to engender speculation in the marketplace that will only serve to confuse investors.

While providing little, if any, useful information for most investors, this daily trade reporting is likely to make it easier for a few sophisticated market actors to reverse-engineer the issuer's repurchase strategy or pricing grid (in the case of plan-based purchases) and trade against it. This will secure profits for those sophisticated traders at the expense of non-selling public stockholders who will bear the cost of more expensive repurchase execution by the issuer.

To motivate the proposed daily disclosure requirement, the proposing release also notes that, according to commentators, issuer repurchases could potentially be used to increase share prices and financial ratios in order to enhance executive compensation and insider stock value. It remains unclear, however, why the existing month-by-month disclosure of issuer share repurchases on a quarterly basis is not sufficient to enable investors to identify any such abusive practices to the extent they exist.

Proposed Revisions to Item 703 of Regulation S-K

The proposed revisions to Item 703 of Regulation S-K contemplate additional disclosure by issuers about the objective or rationale for their share repurchases and the process or criteria used to determine the amount of repurchases. We believe that this information is better provided in the MD&A to ensure it is presented in the larger context of the issuer's capital allocation plans and policies rather than as a standalone item. In our experience, issuers treat share repurchases as just one of several tools in their capital and liquidity management. Additionally, we believe that the proposed revisions to Item 703 should be clarified to state that the requirement for an issuer to disclose the process or criteria it used to determine the amount of repurchases does not encompass disclosure of the issuer's trading strategies, tactics, pricing grids or other confidential trading information.

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We hope the Commission and its staff find our comments useful in further considering the proposed revisions and formulating the final rules. If there are any questions about any of our comments, we would welcome an opportunity for further discussion. Please do not hesitate to contact Richard Alsop, Harald Halbhuber, Gillian Moldowan or Lona Nallengara of this firm at [redacted].

Very truly yours,

Shearman & Sterling LLP