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November 22, 2021

Dear Ms. Countryman:

This comment letter is being submitted in response to the solicitation by the Securities and Exchange Commission (the "Commission") of comments regarding proposed new Rule 10D-1 under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), Release Nos. 33-9861; 34-75342; IC-31702; File No. S7-12-15 (the "Proposed Rule"). As mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act"), the Proposed Rule would direct the national securities exchanges and national securities associations to establish listing standards requiring issuers to establish, disclose and enforce policies regarding the recovery of certain incentive-based compensation received by current or former executive officers. We thank the Commission and the staff for their efforts in connection with the Proposed Rule and the opportunity to provide our comments.

Over the past decade, there has been a continued trend toward emphasis of performance-based compensation, so-called "pay-for-performance", with compensation increasingly linked to financial and other performance metrics. This trend has been championed by many constituencies, including Boards of Directors, institutional investors and their advocates, proxy advisory firms, academics in the legal and financial fields and others, and has generally been viewed as a positive development in the areas of corporate governance and executive compensation. The Proposed Rule will have profound consequences in these areas that have already seen substantial changes from private ordering subsequent to the Dodd-Frank Act. Accordingly, we encourage the Commission to seriously consider the comments submitted during both the 2015 and the current re-opened comment periods and adopt thoughtful rules that both preserve sufficient flexibility for implementation and enforcement by issuers as well as provide

certainty regarding the application and scope of the final version of the Proposed Rule that is adopted (the “Final Rule”). We worry that adopting a Final Rule without sufficient flexibility and clarity of application and scope could result in confusion, decreased emphasis on performance-based compensation and/or focus on performance metrics that are not tied to financial reporting measures.

In particular, we highlight below four specific areas of concern in the Proposed Rule.

1. Application to Compensation Granted Prior to Effective Date

The Proposed Rule would require that an issuer’s recovery policy apply to any incentive-based compensation “received” after the effective date of the Final Rule. Under the Proposed Rule, the determination of when compensation is “received” is dependent on when the applicable financial measure is achieved or satisfied and not when the compensatory award or opportunity is granted. As a result, the Proposed Rule would seem to be applicable to contracts or compensatory awards that were executed or granted, as applicable, prior to the effective date of the Final Rule but for which the financial measures have not yet been achieved. In some cases, the grants may have occurred before the issuer even had any registered or listed securities.

If the Proposed Rule is indeed intended to apply to existing contracts or rights, it could interfere with previously negotiated commercial arrangements and, in many cases, it may be unclear as to whether the Proposed Rule and any newly implemented recovery policy conflicts with the terms of the existing award. This will undoubtedly result in disputes regarding applicability and enforcement. For this reason, if adopted, the Final Rule should contain grandfathering provisions for existing contracts or awards and have only prospective application to contracts or awards executed or granted, as applicable, following the effective date of the Final Rule. This would allow issuers to establish clear “rules of the road” for new awards and mitigate the potential for conflict between newly required recovery policies and existing awards.

2. Application Following Acquisition of Issuer

The Proposed Rule is somewhat unclear as to whether the recovery policies would apply following the date the issuer ceases to be publicly listed if it is acquired by a separate issuer. The Proposed Rule provides that incentive-based compensation is subject to recovery if “received” while the issuer has a class of securities listed on a national securities exchange or a national securities association. This would suggest that recovery policies could apply following the date an issuer is no longer registered or listed. On the other hand, the lookback period specified in the Proposed Rule is tied to when “the issuer” is required to restate its financial statements. The fact that there is no reference to successor issuers and that restatements following an acquisition would be undertaken by a separate issuer, if at all, suggests that the recovery policy ceases to apply with respect to compensation received prior to an acquisition of the issuer by another issuer.

We suggest that this issue be clarified in the Final Rules and that an issuer's recovery policy apply only while the issuer itself remains publicly registered or listed. It would be problematic for the recovery policy to apply following an acquisition both because restatement determinations may be made by a different audit firm than the firm that was engaged by the issuer that awarded the compensation and because the policy would be enforced by the Board of Directors of a different issuer than the one that awarded the compensation.

3. Inclusion of Stock Price As a Measure Based on Financial Statements

We believe that the intent of Section 10D of the Exchange Act was to provide for recovery of incentive-based compensation that is paid based on application of a financial measure that was erroneously overstated, putting the issuer and executive in the same place as they would have been had the financial statement measure been correctly calculated at its initial measurement.

The Proposed Rule includes within its ambit awards paid based on stock price or total shareholder return. However, stock price and total shareholder return are not financial statement measures and, therefore, do not directly correlate with a restatement of financial statement measures. Stock price and total shareholder return are determined by numerous factors that are unrelated to issuer financial statements, and, while the Commission has provided some discretion in the Proposed Rule for Boards of Directors to determine the effect of restatements on stock price for this purpose, any such determination will be inherently speculative. This reality is exacerbated by the fact that the accounting restatement at issue may occur years after the payment of an award subject to the recovery policy during which time there may have been many intervening market and company-specific events affecting the issuer's stock price. We believe the speculative nature of this calculation would result in administrative complexity and difficulties in enforcement for issuers, and significant uncertainty for affected executives. As a result, we believe the Commission should exclude awards that vest based on achievement of stock price or total shareholder return targets from the scope of the Final Rule.

4. Application to Foreign Private Issuers

The Proposed Rule would apply to all U.S. listed companies, including those that qualify as foreign private issuers ("FPIs"). We believe that the burden of compliance with the Proposed Rule is particularly onerous in the case of FPIs, which are often subject to different corporate governance standards in their home countries. In recognition of that fact and to encourage foreign companies to list in the U.S., the Commission, the New York Stock Exchange and the Nasdaq have each repeatedly allowed FPIs to follow their home country practices in lieu of complying with various corporate governance and disclosure requirements applicable to regular U.S. issuers. We believe that the Final Rule should adopt the same approach and permit FPIs to follow their home country practices, if any, with respect to recovery policies.

We note that the Proposed Rule permits issuers, including FPIs, to conclude that recovery of compensation is impracticable if both of the following conditions are satisfied: (i) it would violate home country laws as in effect prior to publication of the Proposed Rule (i.e., prior to July 14, 2015) and (ii) the issuer provides an opinion of home country counsel acceptable to the national securities exchange or association that recovery would result in such a violation. This relief is too limited and could put issuers in the untenable position of having to choose whether to violate either U.S. listing standards or local employment laws. Furthermore, the burden on FPIs of compliance with the Proposed Rule could make the U.S. a less attractive place to list. For these reasons, we believe the Commission should exempt FPIs from compliance with the Final Rule.

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We thank you again for the opportunity to submit comments on the Proposed Rule, and appreciate your consideration of these and other submitted comments.

Sincerely,

Jonathan J. Katz
Jennifer S. Conway
Michael L. Arnold
Kimberley S. Drexler

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VIA E-MAIL