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D: [redacted]

March 23, 2022

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

BY EMAIL TO rule-comments@sec.gov

Subject: File Number S7-20-21 – Rule 10b5-1 and Insider Trading

To the Commission:

We welcome the opportunity to comment on the proposed rule amendments (the "Proposal") set forth in the Commission's Release No. 33-11013; 34-93782; File No. S7-20-21 (January 13, 2022) (the "Release"). Our law firm advises a wide range of market participants on matters that involve compliance with Rule 10b-5 and reliance on the affirmative defense in Rule 10b5-1(c)(1) (the "Affirmative Defense"), and the Proposal is of particular interest to our public company clients and their directors and officers.

Introduction

In our experience, issuers and their directors, officers and employees overwhelmingly seek to comply in good faith with the principle that they may not trade if they are aware of material nonpublic information ("MNPI"). We believe the vast majority of transactions by these persons are consistent with this principle. Moreover, their trading is desirable and in the public interest. In particular, (a) the ability of directors, officers and employees to sell shares – fairly and in a fair market – is important to a governance culture in which insider ownership of equity is fundamental for alignment between insiders and the investing public, and (b) the ability of issuers to repurchase shares – again, fairly and in a fair market – is an important tool of capital allocation in the interest of investors as well as issuers.

Against this background, the two-part structure of Rule 10b5-1 – trading while aware of MNPI is illegal, but there are affirmative defenses that permit fair trading – has had a far-

reaching beneficial impact in structuring the trading markets. We believe the Commission should proceed prudently in revising this structure.

We recognize the possibility of abuse, as well as the anecdotal evidence of specific instances of abuse, although it is limited in view of the large volume of transactions under the Affirmative Defense. But much of the evidence on which the Proposal is based comes from studies of statistical correlation that are no more than suggestive and do not justify the Commission imposing significant burdens or uncertainties on trading by issuers and their directors, officers and employees. On the contrary, the Commission's goal should be to provide a regulatory framework for trading that is clear and that is not unreasonably restrictive.

Amendments to Rule 10b5-1

1. Some of the New Limits on the Affirmative Defense Should Not Apply to Issuers

In new paragraph (c)(1)(ii), the Commission should exclude issuer trading plans from the scope of sub-paragraphs (B) (cooling-off period), (D) (limitation on multiple overlapping plans) and (E) (limitation on multiple single-trade plans).

The Commission has not advanced any justification for imposing these limitations in connection with issuer transactions. The Release cites academic, journalistic and interest-group commentary on insider trading, but it does not contend that this commentary addresses trading by issuers. The Release also refers to a variety of calls for reform of the Affirmative Defense regime, but we believe these calls for reform have not generally addressed or mentioned trading by issuers. The Release also identifies potential abuses, some of them hypothetical, but not in connection with issuer repurchases.

We thus do not believe there is any showing of a benefit from imposing a cooling-off period on issuers, or preventing issuers from having multiple overlapping plans or multiple single-trade plans. And there would be a substantial cost in burdening the efficiency and legal certainty of issuer repurchases. (Reliance on the Affirmative Defense by issuers is, in our experience, virtually always for purchases rather than sales.) Efficient execution of repurchase programs, and certainty about the circumstances in which they may be conducted without implicating Rule 10b-5 concerns, are in the interest of all shareholders. The proposed limitations would burden legitimate practices that are beneficial to shareholders – practices with respect to which the Commission does not suggest there is a history of abuse.

2. The Commission Should Modify the Cooling-off Period for Directors and Officers

For directors and officers, the Proposal would impose a cooling-off period of at least 120 days after the date of adoption of the plan. The justification presented in the Proposal for the choice of 120 days is "that no trading could occur under a Rule 10b5-1(c)(1) plan adopted during a particular quarter until after that quarter's financial results are announced."

The Commission should reconsider this position. In our experience, plans are typically entered into during the "open window" period between the announcement of results for the prior quarter and a date determined based on the end of the current quarter. For example, a calendar-year issuer that is a large accelerated filer may have an "open window" period that allows an

officer to sell beginning approximately May 1 (after first quarter results have been announced) and ending in June, often either June 15 or June 30 (as prophylaxis against the possibility that a trader is aware of MNPI about second quarter results). Against this background:

- Granting the Commission's rationale, a plan entered into any time during that open window period should permit sales beginning after second quarter results have been announced, around August 1. Under the proposal, however, a plan entered into at the end of the open window period on June 15 will be required to defer trading to October 15. That result is inconsistent with the Commission's rationale.

- The Commission's rationale is unreasonable as to a plan entered into early in the quarter. If a trader enters into a plan on, say, April 15 or May 1, it is very unlikely that they have any visibility on second quarter results, and there is no reason to build the Affirmative Defense on a presumption that they do.

The Commission's objective would be more precisely served by a cooling-off period that ends upon the publication of results for the quarter during which the plan was entered into. A further refinement would be to have the period end on the earlier of (a) the 90th day after adoption of the plan and (b) the publication of results for the quarter during which the plan was entered into. A maximum duration of 90 days would permit plans entered into early in the quarter to provide for trades before the announcement of results.[1]

We recognize that issuers and brokers may impose a longer or more uniform cooling-off period, and many of them do so today. But they should be free to determine the duration they consider appropriate for prophylactic reasons, subject to the constraints imposed by the Commission's rules.

3. The Commission Should Eliminate or Significantly Shorten the Cooling-off Period for Issuers

For the issuer, the Proposal would impose a cooling-off period of at least 30 days after the date of adoption. The Release does not identify a justification for this requirement, and as discussed above we believe it should be eliminated; however, if it is retained the period should be considerably shorter.

It is common for an issuer to instruct a broker during an open window period to purchase shares during the blackout period after the window closes. This is a convenient way to manage a repurchase program that contemplates regular repurchases over a long period. The instructions to the broker reflect an analysis of factors including market conditions and other expected cash

[1] The precise implications of a 90-day cap would depend on the filing status of the issuer, on the specific deadline for the next quarter's results (which depends on the filing status of the issuer and whether the quarter in question is the fourth quarter), on the issuer's blackout period, and on whether the issuer publishes results before the regulatory deadline. For example, if the plan is entered into in the first quarter, the issuer is a large accelerated filer, and the issuer first releases results on the due date for the 10-Q, the effect of the 90-day cap would be to permit purchases beginning before publication of results as long as the plan was entered into before the 30th day of the quarter.

requirements. If the cooling-off period is imposed, issuers will either (a) make that analysis earlier in the quarter, increasing the attendant risks and uncertainties, (b) forgo the Affirmative Defense and purchase during the blackout period[2] without a pre-established plan or (c) forgo repurchases during part or all of the blackout period. None of this is necessary to protect investors or avoid misuse of MNPI, and it will burden efficient capital allocation strategies for no reason.

4. The Commission Should Refine its Description of How a Plan Complies with the Cooling-off Period Requirement

The language of proposed paragraph (ii)(B) provides that the Affirmative Defense is applicable only when "no purchases or sales occur until expiration of a cooling-off period …." This language should be limited to purchases or sales under the plan, so that it is not tripped by an open-market, non-plan purchase during the cooling-off period. It also should refer to what the plan provides, rather than whether purchases or sales occur (actual results under the plan). It would be more precise to say that the Affirmative Defense is applicable only when "the contract, instruction or plan provides for purchases or sales to commence only following a cooling-off period of …."

5. The Commission Should Define Overlapping Arrangements More Precisely

Under the proposed language of paragraph (ii)(D), the Affirmative Defense is applicable only when

> … the person who entered into the contract, instruction, or plan, has no outstanding (and does not subsequently enter into an additional) contract, instruction, or plan for open market purchases or sales of the same class of securities …

The Release makes clear that the Commission's purpose is to prevent misuse of "overlapping trading arrangements," but this language is not limited to *overlaps* (because the language does not require any temporal concurrency) or to *arrangements* (because the language captures any "contract" or "instruction," and every transaction involves some kind of contract or instruction).

For example, suppose an officer instructs their broker in May 2022 to sell shares, with specified price and timing parameters, over a 12-month period from June 2022 through May 2023. Under the proposed language, the Affirmative Defense would become unavailable for sales under those instructions in each of these cases: (a) if the officer sells shares in a one-time transaction during May 2022 before the plan takes effect, (b) if the officer sells shares in a one-time transaction during an open window period in August 2022, or (c) if the officer gives a new instruction in May 2023 (before the first plan expires) for sales over a 12-month period beginning in June 2023 (after the first plan expires). None of these results makes sense.

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[2] Of course the blackout period is not a legal requirement. Most issuers have a securities trading policy, and most securities trading policies impose a trading blackout on officers, directors and employees, as a prophylactic measure to reduce the risk of trading based on MNPI. The policy does not typically apply to the issuer, and the considerations of risk and of policy applicable to trading by the issuer are quite different from those that apply to the issuer's imposition of guidelines on its directors, officers and employees.

On its face, the proposed language could even be read to make the Affirmative Defense unavailable if the officer *ever* enters into another plan, or ever *transacts* in the shares again. The Commission should at least clarify that this reading would be erroneous.

To serve the Commission's purpose more precisely, and to conform better to the language in the Release, the Commission should narrow the description of the other activity that makes the Affirmative Defense unavailable. For example, the provision could be revised to say:

> … the person who entered into the contract, instruction or plan does not have, and does not enter into, another contract, instruction or plan that provides for future open market purchases or sales of securities of the same class during the same period …

There is another respect in which the proposed language of paragraph (ii)(D) goes beyond the objectives the Commission has described. The Commission seeks to prevent overlapping plans that are for open market transactions, and it makes that clear with respect to the other activity that makes the Affirmative Defense unavailable. However, it should also make clear that paragraph (ii)(D) only applies if the trading plan itself is for open market purchases or sales. This could be accomplished by means of an introductory clause within paragraph (ii)(D) saying "if the contract, instruction or plan provides for purchases or sales in the open market, …". This would avoid unintended consequences for a transaction that is not in the open market but relies on the Affirmative Defense – for example, a bilateral derivative transaction with a dealer.

6. The Commission Should Reconsider the Proposed Limitation on Single-Trade Plans

The proposed language of paragraph (ii)(E) would make the Affirmative Defense unavailable for a plan "designed to effect the purchase or sale of the total amount of securities as a single transaction" if during the prior 12-month period the trader had another "contract, instruction, or plan that effected the purchase or sale of the total amount of securities in a single transaction." The Release acknowledges that single-trade plans can be legitimate, and it does not describe an abuse at which this provision is aimed, or how this provision will prevent it. If there is a potential for abuse, the other provisions of the Proposal (the cooling-off period, plus the prohibition on multiple overlapping plans) should be sufficient to prevent it, and the additional prohibition regarding single-trade plans would instead limit the frequency of legitimate use. This does not seem justified.

If the provision is adopted, it should be revised to define more precisely the past circumstance that makes the Affirmative Defense unavailable. That past circumstance should be an *arrangement* for future trading, and it should be one that is *designed* to effect a single trade. As drafted, the language would capture a plan that was expected to result in multiple purchases but instead resulted in a single transaction because a sale was triggered by an unexpected price movement. Moreover, as with (ii)(D) (see point 5 above), because it uses the words "contract" and "instruction" it could be read to capture any transaction at all. This imprecision could be remedied, for example, by revising the proposed language to say:

… the person who entered into the contract, instruction or plan has not during the prior 12-month period entered into another contract, instruction or plan that was designed to effect a future purchase or sale of securities of the same class in a single transaction.

7. The Commission Should Clarify that Terminating a Plan Can Be Consistent with Good Faith Operation

Paragraph (c)(1)(ii)(A) already requires that a trading plan be entered into in good faith, and the Proposal would add a requirement that the trading plan be operated in good faith. The Release identifies, as one motivation for this language, the concern that "a trading arrangement may be canceled or modified in an attempt to evade the prohibitions of the rule without affecting the availability of the affirmative defense."[3] There are, however, many legitimate reasons to cancel or modify a plan, such as changes in availability of funding for purchases, in overall market prices, or in personal financial circumstances. To avoid uncertainty about availability of the Affirmative Defense, the Commission should clarify, in the adopting release or in an instruction, that canceling or modifying a plan may be consistent with good-faith operation.

8. The Proposed Instruction on Modification and Amendment of Plans Should be Qualified

The proposed instruction to paragraph (c) provides that any modification or amendment of a plan is deemed to be a termination and the adoption of a new plan. This language should not apply to a modification that does not affect the course of purchases or sales under the plan. There may be legitimate reasons to amend an outstanding plan that should not require absence of MNPI or imposition of a new cooling-off periods – for example, correction of an error, adjustment for stock splits, compliance with Regulation M, or a change in account information, authorized personnel, or payment mechanics. The Commission could include the word "material" before "modification or amendment," to avoid unintended consequences of immaterial ministerial or administrative changes or changes that do not affect the terms or timing of transactions.

9. If a Plan is Modified or Amended, Continued Transactions During the New Cooling-Off Period Should be Permitted

We assume that one purpose of the proposed instruction to paragraph (c) is to impose a cooling-off period before transactions may begin under an amended plan. We believe that, if a plan is amended and transactions under the amended plan cannot begin until expiration of the cooling-off period, then transactions under the previous plan should be permitted to continue until the amended plan takes effect, without violating the prohibition on multiple overlapping plans. This could be clarified in the adopting release or by revising the instruction itself.

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[3] The reference to "the prohibitions of the rule" in this language is presumably meant to refer to the prohibitions of Rule 10b-5, since Rule 10b5-1 itself does not set forth any prohibitions.

10. The Requirement of Good Faith Operation Should Refer Only to the Person Seeking to Rely on the Affirmative Defense

There can be multiple parties involved in "operating" a trading plan – not only the principal, but also brokers, administrators, custodians, or the issuer itself (where the issuer is not the principal). A person seeking to rely on the Affirmative Defense should not be required to establish that each such party acted in good faith – that would be an unnecessarily difficult burden to meet. That requirement should be limited to good faith on the part of the person establishing the plan.

Additional Disclosures Regarding Rule 10b5-1 Trading Arrangements

11. The Commission Should Clarify the New Annual Disclosure Requirement

Paragraphs (b) and (c) of proposed new Item 408 of Regulation S-K, and new Item 16J of Form 20-F, require that an issuer that has adopted insider trading policies and procedures "disclose such policies and procedures" and do so in an Interactive Data File. The Commission should revise this to clarify what precisely it wishes to elicit.

We suggest that the word "disclose" should be replaced by "describe" (or "provide a summary") to elicit disclosure that is consistent in tone and detail with the rest of the proxy statement or the annual report. If the intention is to elicit the filing of the securities trading policy as a whole, then it should be filed as an exhibit and not set forth in the body of the proxy statement or annual report. Often the policy is lengthy, and it may include didactic material aimed at employees with varying degrees of sophistication, or other policies and procedures that do not pertain solely to promoting compliance with insider trading laws. For a foreign private issuer, the policy may not be in English, and it may reflect considerations of non-U.S. law or practice. If registrants are required to include the full policy in their filings, they will need to compromise between disproportionately long disclosures and unnecessarily short policies.

12. The Requirement for Quarterly Disclosure of Trading Plans Should Exclude "Non-Rule-10b5-1 Trading Arrangements"

The quarterly disclosures under proposed Item 408(a) of Regulation S-K would include disclosures about what the Commission describes in the Release as "non-Rule-10b5-1 trading arrangements." The Commission should eliminate this aspect of the required disclosure. The Release explains the language by stating that if adopted, the proposed amendments may induce issuers, directors or officers to rely on trading arrangements that do not qualify for the Affirmative Defense. But if that were to happen, oversight by the Commission and investors will be fully enabled by the existing disclosure requirements under Section 16 and the newly proposed disclosure requirements for issuer repurchases.[4]

If the Commission determines to retain the requirement for disclosure of "non-Rule-10b5-1 trading arrangements," it should narrow the language, which as proposed is too broad for

[4] For the same reason, there is no need for the proposed new check box in Forms 4 and 5 that permits optional identification of a transaction as being pursuant to non-Rule-10b5-1 trading arrangements.

the Commission's purposes. The language captures a "contract, instruction, or plan" but, as discussed in point 5 above, every transaction involves some form of contract or instruction. The Release uses the expression "*pre-planned* trading contracts, instructions, or plans" (emphasis added), and this idea of pre-planning should be reflected in the language of the proposed rule.

13. The Commission Should Drop the Interactive Data File Requirement

The Proposal would also require that the annual disclosure under new S-K Item 408 and 20-F Item 16J be provided in an Interactive Data File. The impact of this requirement will depend entirely on what tagging is required, which the Proposal does not say. Presumably the Commission's intention is to "update" the DEI Taxonomy and make that update part of the EDGAR Filer Manual. Since the Commission has not disclosed the update, it is impossible to evaluate the impact or justification for this feature of the Proposal. We believe this does not give affected parties a meaningful opportunity to comment, and an opportunity to comment on the taxonomy at some other time should not be separated from the Proposal.

Devising a tagging taxonomy that is workable for issuers and useful to investors will be challenging. The burden on issuers depends on how complex the tagging is, but it can be heavy. The benefit for investors depends on just what is tagged, but we question what legitimate use case exists for (in the words of the Release) "aggregation, comparison, filtering, and other analysis" and "automated extraction and analysis of … granular data … to more efficiently perform large-scale analysis and comparison of this information across issuers and time periods." The Release does not present any argument that this would serve investor protection.[5]

The Interactive Data File requirement is particularly ill adapted to the disclosure of trading policies and procedures under paragraph (c) in each of proposed S-K Item 408 and proposed Item 16J of Form 20-F. Securities trading policies are complex and differ widely among issuers, and they have been developed by the market. Unlike financial statements, they are not subject to a rule framework and they are not designed to be comparable. Indeed it is hard to guess what tags the Commission might seek to require, but whatever they are their impact will be to promote standardization, which would be undesirable and which the Commission has no reason to do.

14. The Commission Should Clarify that Quarterly Disclosure of Trading Plans Does Not Require Disclosure of Pricing Information or of Actual Activity under the Plans

As we read the requirement for quarterly disclosures under proposed Item 408(a) of Regulation S-K, it does not call for disclosure of either the pricing terms of a plan or the transactions actually concluded under the plan. Assuming this reading is correct, we believe it represents a sensible decision. To forestall any confusion, we believe it would be helpful if the Commission affirmed this reading in adopting the amendments.

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[5] We put to one side its potential value to academics and journalists seeking to demonstrate trends or statistical correlations. Uses of that kind are a by-product, not an objective, of the regulatory structure.

We also support the decision not to apply this requirement to foreign private issuers. As the Commission observes in the Release, annual disclosures would not be useful.

15. The Commission Should Not Adopt the Proposed Disclosures Regarding Timing of Option Grants

Proposed new paragraph (x)(2) of Regulation S-K Item 402 would require annual tabular disclosures about certain grants of options, SARs or similar instruments to named executive officers. They are aimed at the practices of "spring-loading" and "bullet-dodging," as described in the Release. As the Commission states, these practices are already required to be disclosed if they occur. The new requirements would create an elaborate tabular disclosure designed to identify, long after the fact, situations in which conditions for spring-loading or bullet-dodging may have existed. This is completely unnecessary, since all the information required by the new disclosures is readily available to investors, academics and journalists looking to analyze it. In addition, the disclosures may be gratuitous, misleading or provocative, as some issuers routinely grant awards on specific days, set well in advance, and do not deviate from the timing regardless of MNPI.

The result of this disclosure requirement will be highly burdensome – a minefield for registrants and useless to investors. In particular:

- The trigger events for the disclosure are "the filing of a periodic report on Form 10-Q or Form 10-K, an issuer share repurchase, or the filing or furnishing of a current report on Form 8-K that discloses material nonpublic information (including earnings information)".
    - The inclusion of share repurchases in this language is unnecessary and will be very burdensome because many issuers conduct regular small repurchases under Rule 10b-18.
    - The inclusion of Forms 8-K (beyond Item 2.02 Forms 8-K) will require issuers to make determinations about which of them discloses MNPI; these determinations can be difficult, and one feature of the Form 8-K regime is that many disclosure topics are required regardless of any materiality judgment.
    - The inclusion of two-week windows either side of every periodic report, every repurchase, and many Form 8-K filings will mean that option grants during a substantial part of the year will be included in the table. The table could be very extensive; alternatively issuers may be forced into unnecessarily restrictive calendars for option grants.
- The table calls for disclosing the market value of the securities underlying the grant around the time of the trigger event.
    - This information is not useful. Someone seeking to connect a trigger with a price impact would need to study changes in price over a period, not the price on a single day; they would need to compare those changes with

movements in the prices of other securities in the broader market; and all this data is readily available without the proposed table.

- Instructions F (market value before the trigger) and G (market value after the trigger) are mutually exclusive, each applying in a different circumstance. This is inconsistent with the description in the Release, which appears to call for market value before and after in all cases.

Transition

16. The Commission Should Provide a Substantial Transition Period Before the Amendments Take Effect

If the proposed amendments are adopted, they will require sweeping changes in procedures by issuers, directors, officers, employees, and financial intermediaries. These will take time and extensive discussion among market participants and their advisers. We urge the Commission to provide ample time for these adjustments. As the Release recognizes, the Affirmative Defense plays a very important role in the eco-system of securities trading.

17. The Commission Should Address the Status of Plans Entered Into Before the Amendments

Rule 10b5-1(c)(i) takes the form of an affirmative defense, which could be asserted by a defendant in a proceeding and whose availability would be determined at that time. But the Affirmative Defenseit effectively structures the nature of permissible trading, as a safe harbor would do, and the Commission's purpose in the Proposal is to adjust trading practices going forward. The Commission should state clearly that the pre-amendment Affirmative Defense remains available for transactions under a given plan if the plan is entered into before the amendments taken effect. Otherwise, there will be uncertainty about whether the Affirmative Defense is available for a transaction under a plan that meets the pre-amendment criteria but not the amended criteria and that either (a) occurs before effectiveness but is the subject of adjudication after effectiveness or (b) occurs after effectiveness under a plan entered into before effectiveness. We believe it would be unfair to deny the Affirmative Defense in either case.

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We appreciate the Commission's attention to these comments. Please direct any questions or comments to Nick Grabar at [redacted] or to Lillian Tsu at [redacted].

Very truly yours,

CLEARY GOTTLIEB STEEN & HAMILTON LLP

By: _____

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