EMPIRE STATE
REALTY TRUST

March 29, 2022

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

Vanessa A. Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street NE
Washington DC 20549-1090

Re: Proposed Rules – *Share Repurchase Disclosure Modernization* (File Reference No. S7-21-21) and *Rule 10b5-1 and Insider Trading* (File Reference No. S7-20-21)

The Empire State Realty Trust ("ESRT", "the company" or "we") appreciates the opportunity to provide comments to the U.S. Securities and Exchange Commission (the "Commission or "SEC") regarding the proposed rules, *Share Repurchase Disclosure Modernization*, (the "SRD Proposed Rule"), and *Rule 10b5-1 and Insider Trading*, (the "Rule 10b5-1 Proposed Rule" and, together with the SRD Proposed Rule, the "Proposals"). Although there are many requests for comment in the Proposals, we intend to focus on select issues.

ESRT is a self-managed REIT that operates a portfolio of office, retail, and multifamily properties in Manhattan and the greater New York metropolitan area, including the World-Famous Empire State Building. Its shares are listed on the New York Stock Exchange.

The Rule 10b5-1 Proposed Rules

The affirmative defense in Rule 10b5-1 is now approximately 20 years old. Prior to its promulgation, companies and their employees relied exclusively on trading windows and consultations with the general counsel's office to help avoid risk of violating the insider trading rules enforced by the Commission. The Rule was welcomed because it provided a modicum of certainty for those wishing to comply with the federal securities laws at a cost of modest burdens placed on the company and employees.

[redacted]

We fear that Proposed Rules would add so many layers of burden that the Commission's laudable [redacted]ease to be practical. The proposed release did highlight a potential [redacted]ltiple plans that could be cancelled at will to make transactions [redacted]automatic. We respectfully submit that any changes should be limited [redacted]abuse, as opposed to sweeping changes that would impact everyone in all circumstances. Without such calibration, we expect practice to return to the way it was conducted prior to Rule 10b5-1. We would like to make the following points.

1) **Do Not Apply the Changes to Companies**

Companies like ESRT use Rule 10b5-1 plans to repurchase shares from time to time in the market. They are not used to sell securities. That is one difference from plans adopted by individuals. More importantly, issuer plans are done for the benefit of their shareholders, consistent with the board's fiduciary duties, unlike personal plans that are

done for the individual's own personal benefit. Repurchase plans are approved by the board of directors for legitimate corporate purposes like acquiring shares for benefit plans and/or returning corporate profits indirectly to shareholders. Issuer plans are not done to speculate in the market. Rule 10b-18 adds further safeguards against market manipulation by issuers.

The Commission has brought hundreds of insider trading cases against investors over the past 60 years, yet not a single case of which we are aware against an issuer. Again, we respectfully submit that regulation should be in response to actual or likely abuse. Issuers provide neither and should be left to comply with the well established provisions of Rule 10b5-1.

2) The Cooling Off Periods Do Not Serve a Purpose for Issuers and in Any Event are Too Long

It is difficult to explain why a party must wait a period of time to trade when they could trade instead on the very day they adopt the plan. If there is no insider trading risk on the day a plan is adopted, why would there be a risk for any days thereafter (whether 29 or 119)?

At a minimum, issuers should not be subject to any cooling off period to begin purchases. The lack of related cases against issuers clearly evidences they are not likely to abuse material nonpublic information ("MNPI"). The open trading window periods in which to create and approve a plan are brief, and the markets could be roiling in a matter of 30 minutes, let alone 30 days. Issuers may need to move quickly for reasons not relevant to Rule 10b-5. The Proposal acknowledged a difference for issuers vs. individuals and shortened the issuer's cooling off period to 30 days, but that can be an eternity in volatile markets.

For individuals, it is our understanding that best practice over two decades has come to mean a 30-day cooling off period for the first transaction and for any replacement plans. It is difficult enough to explain the reasoning as to why employees must wait 30 days, let alone 120 days to trade when they could contact their broker and buy or sell that very [redacted]ommission adopts these proposals, we suspect our employees are likely to not utilize Rule 10b5-1 plans in the future, except in rare circumstances.

[redacted] wants to adopt a 120 or 180 day cooling off period for individuals, then [redacted] in place plans while they are aware of MNPI, if a long cooling off period [redacted]PI to become stale in the interim. We could understand long waiting periods in such circumstances.

3) Multiple Plans and Amendments Should be Permitted

To require only a single plan for all transactions is too restrictive. The same is true for trades outside of a plan. Circumstances can change for an employee. They could have unexpected medical or caregiving needs for example. They should not be a prisoner to a unitary plan created months or years ago. The abuse articulated by the Commission is the use of multiple plans coupled with discretionary canceled plans, which have the effect of undercutting the purpose of the Rule. As such, we respectfully suggest that any final

amendments be focused on just that abuse. There are many ways the Commission can accomplish that. There could be an elongated cooling off period imposed. There could be a rule that if you cancel one, you must cancel them all. That would stop any abuse. There is no need to go further and severely restrict any trading by an employee for perfectly valid reasons. Consider too whether minor amendments to a plan might warrant less restriction.

4) SRD Rule Proposals

As indicated above, issuer share purchases benefit shareholders, and they do not lend themselves to abuse. Rule 10b-18 was put in place to provide a safe harbor for issuers to help avoid potential manipulative effects of their repurchases. To provide information to shareholders about the extent of purchases under a plan, the Commission promulgated Item 703 of Regulation S-K to provide detailed information on a quarterly basis. This regulatory system is functioning well and is free of abuse. As such, it is difficult for the Commission to justify a burdensome regime of new reporting obligations.

5) The Proposed Reporting Benefits Professional Traders, Not Shareholders

As share repurchases benefit shareholders, it is in their interest that the plans execute cost-effectively. Each dollar spent paying a higher price than necessary is a dollar out of shareholders pockets. Daily reporting will allow any professional trader to forecast the timing and price triggers of a company. In doing this, traders will "front run" orders of a company, driving up the price paid marginally. Given the large volume of shares repurchased by most public companies, these pennies per share will add up, solely at the expense of the shareholders the Commission should be protecting, and lining, instead, the pockets of professional traders that already enjoy large advantages over the retail investor.

6) Daily Trade Information is not Needed or Even Reliably Understandable and Useable by Shareholders

Just as an effective board of directors oversees the company on a quarterly basis, so too [redacted]ersee corporate repurchase with quarterly information. Just as boards are cautioned from micromanaging day to day affairs of the company, so too should shareholders not be acting on the daily actions of the company. Corporate law [redacted]s.

[redacted]e trade reporting of the Company's board and officers. Section 16 of the Securities Exchange Act of 1934 was designed to allow shareholders to police potential insider trading by its fiduciaries. Over the years, a secondary benefit developed as some shareholders thought that trading by its insiders might signal speculation that shareholders might like to mimic. The burden of two-day reporting is not especially burdensome to our officers and directors because they do not trade often. We suspect this is true for all public companies.

Unlike its insiders, companies trade frequently. On some occasions we could purchase shares multiple times a day on a series of days. Unlike our insiders, we repurchase shares

for multiple reasons, having nothing to do with speculation. It is not a signal of a buying opportunity for a shareholder. To mimic the trading of the company could be a mistake by a shareholder who is not privy to the purpose or design of the company's repurchases.

Shareholders have their primary voice once a year when they vote their shares. They also are free to reach out with questions and concerns at any time, but daily trade reporting gives them no necessary tool to meaningfully further their oversight function or their market activity. It should properly be viewed as minutia that signals nothing.

7) **The Commission Underestimates the Regulatory Burden**

The Paperwork Reduction Act of 1980 requires federal agencies such as the Commission to weigh carefully the regulatory reporting burden placed on the public. The Act requires each agency to propose reductions in the reporting burden each year and seek clearance from the Office of Management and Budget. We respectfully submit that the Commission likely underestimates the time and expense it will take to collect and collate trade information, research and correct possible errors, consult legal and other experts. This would be a major rule placing a major burden upon companies to comply.

The Commission considers potential costs and benefits as a matter of good regulatory practice whenever it adopts rules. We would be surprised if the Office of Economic and Risk Analysis, upon the application of close scrutiny, would find that the benefits to investors outweigh the costs to companies and shareholders. The current reporting regime provides sufficient information to investors and shareholders. To justify such a burden should require either a great need that is not met or a major and widespread abuse. Even then, there are less burdensome alternatives like monthly reporting.

Conclusion

We appreciate the desire of the Commission to revisit rules and consider whether improvements are advisable. Here, we think the burdens far outweigh any benefits. We appreciate the opportunity to comment. If you have any questions on the content of this letter, please contact me at [redacted]

Sincerely,

[redacted]

Thomas N. Keltner, Jr.
Executive Vice President & General Counsel

cc: The Honorable Gary Gensler, Chair
The Honorable Hester M. Peirce, Commissioner
The Honorable Allison Herren Lee, Commissioner
The Honorable Caroline A. Crenshaw, Commissioner