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VIA E-MAIL

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

Re: File No. S7-20-21 Rule 10b5-1 and Insider Trading Comments to Release Nos. 33-11013; 34-93782

Dear Ms. Countryman:

Fenwick & West is pleased to submit to the Securities and Exchange Commission ("Commission") comments on the proposed rules under the Securities Exchange Act of 1934 ("Exchange Act") relating to Rule 10b5-1 and insider trading per the proposing release referenced above (the "Proposing Release").

We represent and have represented over the years a large number of publicly-held technology and life science companies. Many of our clients and their executive officers and directors rely on trading plans pursuant to Rule 10b5-1(c) of the Exchange Act to transact in their company's securities. The comments we provide in this letter are derived from our experience with this practice.

Background

Since the adoption of Rule 10b5-1 in August 2000, many companies have allowed, and in some cases encouraged or even required, their executive officers and directors (collectively referred to herein as "insiders") to establish written trading plans (referred to herein as "10b5-1 plans") that meet the requirements under Rule 10b5-1(c). That rule, of course provides an affirmative defense to claims of insider trading if the insider adopts the plan while he or she is not in possession of material nonpublic information ("MNPI"). The Commission notes in the Proposing Release that some parties, including courts, commentators, and lawmakers, have expressed concerns that insiders have been using 10b5-1 plans to "opportunistically" trade securities on the basis of MNPI.

In our experience 10b5-1 plans are almost always reviewed in advance of adoption by a company's in-house legal counsel or compliance officer to ensure compliance with Rule 10b5-1 and its insider trading policy. Most insider trading policies require insiders to receive such company preapproval and also require the insider to certify that: (i) he or she is not in possession of MNPI at the time of adoption, (ii) all trades will be made in accordance with applicable SEC rules, and (iii) the plan complies with the requirements of Rule 10b5-1. Furthermore, such policies usually require that the insider adopt the plan during an open trading window and prohibit the start of trading under the plan for a specified period of time after adoption. In addition, companies often do not have access to the specific terms of the trading arrangement, including information such as dates, amounts or planned timing of trades. Such information is determined by the insider and broker which administers the plan and is typically provided in a schedule to the written 10b5-1 plan.

Cooling-off Period – Questions 1, 4, 5 and 6

We begin from the fundamental premise that a cooling-off period is an unnecessary addition to Rule 10b5-1 in light of the existing provisions of the Rule and the potential criminal and civil liability for trades conducted under a plan adopted to exploit MNPI [1]. An elemental, perhaps the elemental, component of Rule 10b5-1 is that an insider not possess MNPI at the time of adoption of a plan. Adding a cooling-off period to the rule appears to be based on a presumption that insiders who illicitly adopt plans while in possession of MNPI cannot be held accountable under existing laws and regulations for doing so. In the absence of such accountability, a lengthy cooling-off period would be needed to ensure that the insider did not possess MNPI that would benefit trading under the plan. We do not agree with this presumption.

Having said as much, in our experience most companies' insider trading policies provide for a cooling-off period prior to the first trade under a 10b5-1 plan. This is not based on a presumption that a cooling off period is needed to prevent insiders from abusing the Rule but rather as a prophylactic measure to create a record that negates any such presumption. Accordingly, we support a rule provision to establish a cooling-off period. However, we believe the proposed 120-day cooling-off period is unduly long to achieve the goal of Rule 10b5-1. We believe that a cooling-off period of 30 days for insiders would be sufficient to both bolster the fundamental intention of Rule 10b5-1, that being to prevent

[1] 15 U.S.C. § 78(j)(b) and 17 C.F.R. § 240.10b-5.

the use of plans to illicitly trade on the basis of MNPI, as well as to give the market confidence that insiders are not adopting the plan to take advantage of MNPI.

We believe that a 120-day cooling-off period would dissuade insiders from adopting 10b5-1 plans. During such a long cooling-off period any manner of worldwide, national, or local events or conditions may arise and significantly affect the trading price of the subject security. In addition, conditions relating directly to the company that were unforeseen at the time of a plan's adoption may arise and affect the price of the company's securities. Further, for a variety of reasons the personal circumstances of the insider may change significantly. We believe that exposure to such risks during a long cooling-off period would be regarded by many as outweighing the benefits afforded by Rule 10b5-1's affirmative defense. It is difficult for us to appreciate why an amendment that has the potential to dramatically reduce reliance on the Rule is in the interest of investors.

We take issue with the justification in the Proposing Release for the 120-day cooling-off period - "[t]he length of the proposed cooling-off period would deter insiders from seeking to capitalize on unreleased material nonpublic information for the upcoming quarter." We acknowledge the obvious possibility that in the period shortly before the end of a fiscal quarter through the announcement of that quarter's results the opportunity exists for an unscrupulous insider to trade on MNPI regarding the quarter. We believe there is vastly less opportunity for insiders to establish plans early in a quarter to take advantage of MNPI for that upcoming quarter. Virtually all of our clients, when reporting their quarterly results, provide guidance, usually written and also repeated in a call with market participants, as to the expected operating results for the upcoming quarter. In addition, the Management's Discussion and Analysis of Financial Condition and Results of Operations in a company's Form 10-Q or Form 10-K are required to disclose any trends or uncertainties that have had or that are reasonably likely to have a material effect on operating results. In this context, there is much less opportunity for an insider to possess MNPI regarding the potential results of an upcoming quarter.

Any cooling-off period for modifications to a 10b5-1 plan should be limited to only material modifications. Such material modifications would include actions such as cancelling a trade or changing the formula used to determine sales or purchases under the plan. Modifications that are purely administrative or de minimis in nature should not trigger the mandatory cooling-off period.

We do not believe that a cooling-off period for transactions by issuers is necessary for the protection of investors and may discourage company repurchases and increase the cost of doing so, each to the detriment of company investors. Issuers use Rule 10b5-1 plans for repurchase transactions, given the disclosure and transactional provisions of the

Securities Act of 1933 for sales of securities. Thus, the concern underlying an issuer cooling-off period is that issuers will seek to repurchase their shares while aware of positive MNPI. We believe that existing securities laws and regulations effectively address this potential abuse of companies purchasing their securities while in possession of MNPI. A company adopting a Rule 10b5-1 plan while aware of MNPI would be denied the affirmative defense afforded by the rule even if trading did not commence under the plan until after the MNPI was publicly announced. Further, a company adopting a Rule 10b5-1 plan and commencing trading under such plan before such information is made public would be the paradigm case for Rule 10b-5 liability. The issuer's subsequent quarterly reporting under Regulation S-K Item 703 would shine a spotlight on repurchase activity in the sensitive period prior to which the previously unannounced information is disclosed by the company or otherwise made public.

Companies believe it to be in the best interests of their investors that they have the flexibility to conduct share repurchases promptly after such repurchases receive the requisite corporate approval. We believe that a cooling-off period after the adoption of a Rule 10b5-1 plan limits this flexibility. Further, some frequently used repurchase transaction structures would be much less desirable if a cooling-off period is required. For example, a company may enter into an accelerated share repurchase program, or ASR, under which its counterparty will deliver a number of shares to the company at the time of entry into the contract and, potentially, a closing balance at the end of the purchase period. ASRs are structured so that the company has the benefit of Rule 10b5-1 for purchases conducted by the counterparty. The cost of these programs would almost certainly increase substantially, and the attractiveness (and perhaps even viability) of entering into them decrease, if the counterparty must wait for 30 days after the entry into the contract before it can commence transactions to cover the initial borrowed shares and acquire any applicable balance to fulfill the contracted amount, or even to hedge its obligation to do so.

Director and Officer Certifications – Questions 10 and 12

An elemental, perhaps the elemental, component of Rule 10b5-1, is that the adopting insider not have MNPI at the time of adoption of the plan. Accordingly, we believe insiders are already powerfully incented to adopt plans when not in possession of MNPI and that adding a certification in the rules will not add to this incentive. As already noted, many companies' insider trading policies already require insiders to make certifications that a proposed trading plan meets the requirements of Rule 10b5-1, including the affirmation that the insider does not have MNPI. Accordingly, while we do not believe that requiring such certification by rule will meaningfully serve the purpose of Rule 10b5-1, we do not object to the certification requirement under the proposed rules. We do believe that any final rules should provide that any required certification should not provide an independent basis for liability for directors or officers under Exchange Act Section 10(b) and Rule 10b-5, given that they will already be subject to the much more serious ramification of losing the affirmative defense otherwise available for any trades conducted under any plan tainted by MNPI at the time of adoption. We also believe that any such independent certification-liability basis would simply dissuade some insiders from utilizing Rule 10b5-1 to no benefit of investors.

Restricting Multiple Overlapping Rule 10b5-1 Trading Arrangements and Single-Trade Arrangements – Question 14.

We understand the Commission's desire to prevent efforts to circumvent Rule 10b5-1 by establishing multiple overlapping plans some of which could be terminated based on MNPI. However, it is unclear which overlapping trading arrangements would be allowed under the proposed rules. An insider may have legitimate reasons for establishing a "trading arrangement" that co-exists with a Rule 10b5-1 plan. For example, if an insider has a standing order with a broker to sell shares to cover tax withholding in addition to a 10b5-1 plan, such an arrangement could be viewed as an "overlapping trading arrangement" with the 10b5-1 plan which would violate the proposed rules.

We believe an arrangement to cover tax withholding or to pay the exercise price for stock option awards should not be considered an overlapping plan or a single trade which would be precluded under the proposed rules. Relatedly, many companies customarily withhold shares in connection with the payment of taxes for restricted stock awards or permit their insiders to conduct cashless option exercise of shares. If such arrangements are considered overlapping or single trade arrangements, it may discourage companies from issuing equity compensation awards.

It is also not clear whether the restrictions regarding overlapping plans or single trade arrangements should be applied to separate pools of securities managed by different brokers. Take for example a situation where an insider has a pool of founders' shares of common stock held through one broker and another pool of shares held through the captive broker that administers his company's equity awards. The insider should be able to have a trading arrangement with respect to each pool of shares at the same time. In this situation, the same concerns regarding using multiple plans to hedge against losses based on MNPI are not as salient and prohibiting both pools of securities owned from having 10b5-1 plans in place during the same time would unnecessarily inhibit the insider's ability to transact in the company's securities. Accordingly, the Commission should create an exception from the prohibition on multiple overlapping and single-trade arrangement for clearly distinct and separately managed accounts.

Similarly, it is unclear how the cooling off period requirement interacts with the restriction on multiple overlapping trading plans. As we have previously noted, many companies already have cooling off periods for 10b5-1 plans under their insider trading policies. In our experience, insiders will frequently adopt a new 10b5-1 plan toward the end of the life of their existing 10b5-1 plan (rather than waiting until after its expiration), to allow the new trading plan to be effective when the prior plan expires. We recommend that the Commission clarify that such a practice is permitted and that the cooling off period and/or a provision under the plan that delays any initial trades until after expiration of the prior plan shall not be deemed to be an overlapping plan for purposes of the restriction on multiple overlapping plans.

Requiring Trading Arrangements be Operated in Good Faith - Questions 16 and 18

We do not believe that the addition of the "and operated" to the good faith requirement under Rule 10b5-1(c)(ii) will have a meaningful impact and may introduce unnecessary ambiguity. The Proposing Release notes that this language was added to address concerns that insiders may improperly influence the timing of the announcement of MNPI to benefit a planned trade under a 10b5-1 plan. The concern that the insider may later manipulate a plan that had been entered into in good faith warrants more precise language, as it is unclear what "operated" means in the context of a trading plan. Currently, once an insider establishes a trading arrangement with a broker, the insider should not have any further involvement with the execution of the plan in order to be able to rely on Rule 10b5-1. Accordingly, the insider should lack the ability to "operate" the plan at all, for it to be valid under Rule 10b5-1. As proposed, the term would be ambiguous not only to insiders but to brokers as well, who must execute the trading plan and may be reluctant to enter into such arrangements without more clarity regarding what it needs to do to comply with the proposed requirement. We would suggest using the term "modified," instead of "operated" so that trading arrangements must be "entered into and modified in good faith." This change would provide greater clarity and would address situations where an insider amends or terminates a 10b5-1 plan because of MNPI.

Additional Disclosures Regarding 10b5-1 Trading Arrangements – Questions 21, 22 and 25

Proposed Item 408(a) of Regulation S-K would require companies to disclose the "material terms of the contract, instruction or written plan" for any trading arrangements entered into or terminated each quarter by themselves or their insiders. The proposed rule provides for the disclosure of certain enumerated material terms of 10b5-1 plans, including the adopting person, the date of adoption or termination, the duration, and the aggregate number of securities to be purchased or sold. It is not clear whether these are the only material terms that would be required to be disclosed. It is unclear whether the inclusion of other terms such as the dates, amounts and prices of particular trades under the trading arrangement is subsumed under the general "material terms" language the precedes the enumerated items, and issuers and insiders are likely to feel compelled to make such disclosure in the absence of clarifying guidance. We believe that requiring such disclosure would encourage frontrunning by other market participants based on the specific trades under the plan. Such a disclosure requirement would also create a number of shareholder and employee relations issues (e.g., inquiries as to why the insider believes that $X is a good price to sell). Disclosure of information beyond the enumerated items (i.e., the name of insider, date, term, and aggregate number of securities subject to the arrangement) would likely discourage the use of trading arrangements by companies and issuers alike. We recommend that disclosure of the terms of 10b5-1 plans be expressly limited to the person adopting the plan, the date of adoption or termination, and duration. For the aforementioned reasons, we do not believe that the aggregate number of securities subject to a trading plan should be one of the enumerated disclosure elements.

In addition, information such as the dates, amounts and prices regarding particular trades in a company's securities by insiders is already required to be disclosed on Form 4. Many insiders already indicate on the form whether the securities transactions on which they are reporting are done in connection with a 10b5-1 plan and the proposed rules, if adopted, would require filers to check a box on Forms 4 and 5 indicating whether the transaction was made pursuant to a trading arrangement. We recommend that the Commission clarify that the enumerated material terms are the only terms required to be disclosed.

Furthermore, companies often do not have access to the terms of specific trades under a trading arrangement which is established by the insider and his broker. Accordingly, an insider is in a better position than the company to provide such information and if the Commission believes that it is in the best interests of the investing public to have information regarding specific trades despite the front running and stakeholder relations concerns noted above, we believe that the burden should be on insiders to provide more specific information than the enumerated items.

In sum, proposed Item 408(a) disclosure requirements should be limited to the insider's name, date of adoption or termination, the duration of the plan. The disclosure of specific transactions under a 10b5-1 plan would be duplicative and unnecessary.

Disclosure of Insider Trading Policies and Procedures – Questions 27 and 29

The proposed rules would require companies to disclose their insider trading policies and procedures in Form 10-K and Schedules 14A and 14C through the adoption of new Item 408(b) of Regulation S-K. We agree with the Commission's goal of providing investors with meaningful information regarding a company's insider trading policies and procedures and, as noted earlier, most companies have such policies and procedures already in place and some already disclose them on their corporate websites whether as standalone policies or as part of codes of conduct or similar documents. We recommend changing the proposed rule so that a company would be able to refer to the location of its insider trading policies and procedures on its website. Item 406(c)(2) of Regulation S-K provides companies with this flexibility with respect to disclosing their codes of ethics and we believe that it would be appropriate for insider trading policies and procedures as well. Item 407 of Regulation S K similarly provide such flexibility for a variety of disclosures.

Identification of Rule 10b5-1(c) and non-Rule 10b5-1(c)(1) Transactions on Forms 4 and 5 – Question 35

The Proposing Release asks whether a mandatory checkbox should be added to Forms 4 and 5 to indicate whether a sale or purchase was made pursuant to a Rule 10b5-1 plan. As previously noted, many insiders already indicate by footnote on their Forms 4 and 5 whether their trades are pursuant to a 10b5-1 plan. Accordingly, requiring a checkbox would just facilitate a common disclosure practice. To the extent the Commission believes that it is important for market participants to understand when insider trades are made pursuant to 10b5-1(c), the insider would be in the best position to provide such information in a filing under Section 16(a) of the Exchange Act.

Disclosure Regarding the Timing of Option Grants and Similar Equity Instruments Shortly before or after the Release of Material Nonpublic Information – Question 38

In the Proposing Release, the Commission expresses concern that existing disclosure requirements do not provide investors with adequate information regarding a company's policies and practices regarding stock option awards timed to occur before or after the release of MNPI. However, we do not believe that the table proposed in new Item 402(x) would provide meaningful disclosure because the information sought for the table is already required to be disclosed. Proposed Item 402(x) would require disclosure of each option or similar award either 14 calendar days before or after a periodic report, a company's share repurchase or the filing or furnishing of a Form 8-K that contains MNPI. Companies must already disclose certain equity awards such as option grants to named executives officers and directors under Item 5.02(c) and(e) of Form 8-K. Insiders must also report option grants received on Forms 3, 4 or 5, as required by Section 16(a) of the Exchange Act. Investors can already examine the filings disclosing option and similar equity awards and compare their timing with the release of information disclosed on Forms 8-K. Further, companies would be required to design and administer additional disclosure controls and procedures to fulfill their obligations for accurate reporting, a burden for which there does not appear to be any benefit.

Furthermore, with respect to the disclosure of awards related to a Form 8-K filing, it may be difficult for a company to assess whether some Forms 8-K contain MNPI. Companies are not required to disclose all MNPI on Form 8-K, and not all required Form 8-K disclosures are material. Companies may also choose to disclose information on Form 8-K that is not material as a precautionary measure or on a voluntary basis. For example, a company may furnish a Form 8-K to prevent a possible claim of Regulation FD violation following a meeting of a select group of securityholders and the company's executives at a conference, even though the company does not regard the information discussed to be material. If Item 402(x) is adopted, when the company provides the information for the table, it could make the determination that the previously filed Form 8-K did not contain MNPI and not include option grants made in the 14 calendar days before or after the filing of the Form 8-K. However, that decision could be subject to second-guessing by plaintiffs or enforcement officials who could argue that the Form 8-K contained MNPI, and any option or similar awards made in the 14 days before or after the Form 8-K should have been disclosed.

The difficulty in making materiality determinations is also illustrated by the fact that Forms 8-K that relate to items involving often difficult decisions regarding materiality are excluded from the analysis to determine Form S-3 eligibility. In providing this exception to eligibility in Instruction I.A.3 to Form S-3, the Commission realized that an event's materiality may only be evident after some time has passed – even then it may be unclear – and it would be inappropriate to penalize issuers for making an incorrect decision regarding materiality. The limited safe harbor from liability from Section 10(b) and Rule 10b-5 liability for the timely filing of Forms 8-K for certain items of disclosure underscores the challenges of determining materiality as well. Therefore, companies should not be subject to potential penalty or liability under proposed Item 402(x) if they do not report option or similar awards within the specified time period of an 8-K filing if they made the erroneous determination that the Form 8-K did not contain MNPI.

Due to the uncertainty regarding what may constitute MNPI, we recommend limiting the requirement under proposed Item 402(x) to disclosures of option and similar awards made within 14 days of the furnishing or filing of Forms 8-K disclosing specified items that are more likely to impact the price of or trading in a company's securities such as

Item 1.01 (entry into a material definitive agreement) or Item 2.02 (results of operations and financial condition).

If the Commission's Staff would care to discuss any of the comments contained in this letter, please contact David Bell, Co-Chair, Corporate Governance at dbell@fenwick.com, and Robert Freedman, Co-Chair, Capital Markets & Public Companies at refreedman@fenwick.com.

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