

# CRAVATH, SWAINE & MOORE LLP

WORLDWIDE PLAZA  
825 EIGHTH AVENUE  
NEW YORK, NY 10019-7475

TELEPHONE: +1-212-474-1000  
FACSIMILE: +1-212-474-3700

CITYPOINT  
ONE ROPEMAKER STREET  
LONDON EC2Y 9HR  
TELEPHONE: +44-20-7453-1000  
FACSIMILE: +44-20-7860-1150

JOHN W. WHITE  
EVAN R. CHESLER  
STEPHEN L. GORDON  
ROBERT H. BARON  
CHRISTINE A. VARNEY  
PETER T. BARBUR  
MICHAEL S. GOLDMAN  
RICHARD HALL  
STEPHEN L. BURNS  
KATHERINE B. FORREST  
KEITH R. HUMMEL  
DAVID J. KAPPOS  
DANIEL SLIFKIN  
ROBERT I. TOWNSEND, III  
PHILIP J. BOECKMAN  
RONALD E. CREAMER JR.  
WILLIAM V. FOGG  
FAIZA J. SAEED  
THOMAS E. DUNN  
MARK I. GREENE  
DAVID R. MARRIOTT  
MICHAEL A. PASKIN  
ANDREW J. PITTS  
MICHAEL T. REYNOLDS  
ANTONY L. RYAN  
GEORGE E. ZOBITZ  
GEORGE A. STEPHANAKIS  
GARY A. BORNSTEIN

TIMOTHY G. CAMERON  
KARIN A. DEMASI  
DAVID S. FINKELSTEIN  
RACHEL G. SKAISTIS  
PAUL H. ZUMBRO  
ERIC W. HILFERS  
GEORGE F. SCHOEN  
ERIK R. TAVZEL  
CRAIG F. ARCELLA  
LAUREN ANGELILLI  
TATIANA LAPUSHCHIK  
ALYSSA K. CAPLES  
MINH VAN NGO  
KEVIN J. ORSINI  
MATTHEW MORREALE  
JOHN D. BURETTA  
J. WESLEY EARNHARDT  
YONATAN EVEN  
BENJAMIN GRUENSTEIN  
JOSEPH D. ZAVAGLIA  
STEPHEN M. KESSING  
LAUREN A. MOSKOWITZ  
DAVID J. PERKINS  
J. LEONARD TETI, II  
D. SCOTT BENNETT  
TING S. CHEN  
CHRISTOPHER K. FARGO  
DAVID M. STUART

AARON M. GRUBER  
O. KEITH HALLAM, III  
OMID H. NASAB  
DAMARIS HERNÁNDEZ  
JONATHAN J. KATZ  
DAVID L. PORTILLA  
RORY A. LERARIS  
MARGARET T. SEGALL  
DANIEL K. ZACH  
NICHOLAS A. DORSEY  
ANDREW C. ELKEN  
JENNY HOCHENBERG  
VANESSA A. LAVELY  
G.J. LIGELIS JR.  
MICHAEL E. MARIANI  
LAUREN R. KENNEDY  
SASHA ROSENTHAL-LARREA  
ALLISON M. WEIN  
MICHAEL P. ADDIS  
JUSTIN C. CLARKE  
SHARONMOYEE GOSWAMI  
C. DANIEL HAAREN  
EVAN MEHRAN NORRIS  
LAUREN M. ROSENBERG  
MICHAEL L. ARNOLD  
HEATHER A. BENJAMIN  
MATTHEW J. BOBBY  
DANIEL J. CERQUEIRA

ALEXANDRA C. DENNING  
HELAM GEBREMARIAM  
MATTHEW G. JONES  
MATTHEW M. KELLY  
DAVID H. KORN  
BRITTANY L. SUKIENNIK  
ANDREW M. WARK  
ANDREW T. DAVIS  
DOUGLAS DOLAN  
SANJAY MURTI  
BETHANY A. PFALZGRAF  
MATTHEW L. PLOSZEK  
ARVIND RAVICHANDRAN

PARTNER EMERITUS  
SAMUEL C. BUTLER

OF COUNSEL  
MICHAEL L. SCHLER  
CHRISTOPHER J. KELLY  
KIMBERLEY S. DREXLER  
LILLIAN S. GROSSBARD  
KIMBERLY A. GROUSSET  
ANDREI HARASYMIAK  
JESSE M. WEISS  
MICHAEL J. ZAKEN

March 31, 2022

**File No. S7-20-21**  
**SEC Release No. 33-11013**

Ladies and Gentlemen:

We write in response to the request by the Securities and Exchange Commission (the “Commission”) for comments on the proposed amendments published in Release No. 33-11013, 34-93782, File No. S7-20-21, *Rule 10b5-1 and Insider Trading* (the “Rule 10b5-1 Proposal”).

We generally support the proposed amendments, and appreciate the Commission’s efforts (1) to prevent abuse of the affirmative defense under Exchange Act Rule 10b5-1(c)(1) and (2) to increase transparency into issuer Rule 10b5-1 and other trading arrangements for the investing public. The affirmative defense afforded by Rule 10b5-1 continues to be an essential tool to permit insiders to conduct transactions in compliance with the antifraud rules of the U.S. federal securities laws. We believe enhancements can be made to further prevent potential abuse of the safe harbor. As discussed below, however, we are unaware of any studies or other empirical evidence suggesting abuse by issuers in the context of share repurchases and, accordingly, believe that any potential benefits of imposing additional restrictions, such as a cooling-off period, a prohibition on overlapping plans or a limitation on single-trade plans, on issuer repurchases would be significantly outweighed by the costs of such restrictions.

Today, we are also submitting comments on the proposed rule amendments published in Release No. 34-93783, File No. S7-21-21, *Share Repurchase Disclosure Modernization* (the “Issuer Share Repurchase Proposal”). We refer to certain of those comments in this letter. Given the significant interrelationship between the two rule proposals, we encourage the Commission to harmonize the two proposals as they relate to issuer repurchase activity to avoid duplication and unnecessary complexity. We discuss here the distinction between “plans” under Rule 10b5-1(c)(A)(3), on the one hand, and “contracts” and “instructions” under Rule 10b5-1(c)(A)(1) and (2),

respectively, on the other hand, all of which potentially are entitled to the affirmative defense under Rule 10b5-1(c) but which operate very differently in practice. Consistent with these comments, we will use the term “Rule 10b5-1 plan” to refer to a “plan” under clause (3) as that term is conventionally understood in the marketplace. Under current law, there is not any reason for issuers to draw any legal distinction between these alternative paths to the safe harbor. If the Commission moves ahead with amendments along the lines contemplated in the Rule 10b5-1 Proposal, we suggest that the final rules clarify that references to “plans” or “Plans” are intended to refer to arrangements that are intended to qualify for the safe harbor as “plans” under clause (3) and would not qualify as “contracts” or “instructions” under clauses (1) and (2).

Our responses to select requests for comment in the Rule 10b5-1 Proposal follow.

## **Discussion of Proposed Amendments**

### **A. Amendments to Rule 10b-5.**

#### **1. Cooling-off Period.**

##### *Question 1 —*

We believe that requiring a cooling-off period is an appropriate condition to the Rule 10b5-1(c)(1) affirmative defense for current officers and directors. In our experience, there has been a general trend for issuers to require that insiders include a cooling-off period in their trading plans.

As discussed in response to Question 5, we do not believe that a cooling-off period is a necessary or appropriate condition for issuer trading plans.

##### *Questions 2 and 3 —*

We support the proposal to apply the cooling-off period requirement to current directors and officers. We believe that applying a cooling-off period to all traders is unnecessary. In our experience, it is common for significant shareholders who are neither employees nor directors of an issuer to use Rule 10b5-1 plans to facilitate the sale of shares. These individuals are often founders or former senior executives or their descendants (or entities affiliated with them) that have no access to material non-public information but nevertheless rely on Rule 10b5-1 plans to avoid any appearances of impropriety while disposing of potentially significant amounts of stock over long periods of time. We see no benefit to market integrity to mandating a cooling-off period for all traders seeking to rely on the affirmative defense.

We believe that using the definition of “officer” as set forth in Rule 16a-1(f) for purposes of applying the cooling-off period requirement is appropriate. We share the view expressed in the Rule 10b5-1 Proposal that directors and officers (as proposed to be defined) are the most likely individuals associated with an issuer who would have access to material non-public information. Of course, limiting the cooling-

off period to current directors and officers will in no way limit any particular issuer from imposing the requirement on a broader group of employees as part of its trading policy.

*Question 4 —*

We agree with the observation in the Rule 10b5-1 Proposal that a 120-day cooling-off period would ensure that no trades could be made under the relevant trading plan until the issuer had issued an additional completed fiscal period of financial information. We believe the same goal could be achieved with a less rigid requirement. For example, we believe the goals of the cooling-off period requirement could be achieved by requiring that no trading occur pursuant to a plan until the later of (x) 45 days after the adoption of the trading plan and (y) the second trading day following the next publication of the issuer's financial results for a completed fiscal period. We think a shorter, more flexible policy is particularly important if—as proposed—the cooling-off period also will apply to trading plan modifications.

*Question 5 —*

We respectfully disagree with the proposal to apply a cooling-off period to issuers as a condition to reliance on the Rule 10b5-1(c)(1) affirmative defense. We believe that applying a cooling-off period of any length to issuers would needlessly limit issuers' flexibility to enter into transactions that are in the best interests of their shareholders without addressing the perceived abuses of Rule 10b5-1 plans. Our assessment of the analysis in the Rule 10b5-1 Proposal is not that the Commission believes that issuers are abusing the safe harbor but rather that insiders (specifically officers) are abusing their authority to cause issuers to undertake trading activity that those insiders can then exploit to their own advantage by engaging in their own trading of the issuer's securities.<sup>1</sup> We respectfully submit that any insider conducting these activities may be breaching his or her fiduciary duties and engaging in market manipulation, but this has nothing to do with the safe harbor afforded by Rule 10b5-1 plans. Moreover, if an issuer cooling-off period were adopted, the disloyal insider would simply have to incorporate the issuer cooling-off period into his or her fraudulent scheme. We submit that addressing the insider's trading activity is the issue and that can be done in part by imposing a cooling-off period on the insider.

Unlike the statistical data cited in the Rule 10b5-1 Proposal with respect to incremental trading returns and loss avoidance associated with trading plan transactions by insiders, no data is cited to suggest that Rule 10b5-1 plans have similar consequences for issuers. There is simply no evidence set forth in the Rule 10b5-1 Proposal to suggest that issuers are abusing the affirmative defense. The Commission separately has proposed new rules with respect to issuer share repurchases. We believe that many of those will enhance disclosure and contribute to confidence in the integrity of the market

---

<sup>1</sup> The Rule 10b5-1 Proposal states that "In addition, concerns have been raised about issuers abusing Rule 10b5-1(c)(1) to conduct share repurchases to boost the price of the issuer's stock before sales by corporate insiders." See Rule 10b5-1 Release text at note 17.

as it relates to issuer repurchases. We do not believe that imposing a cooling-off period on issuer Rule 10b5-1 plans would provide similar benefits.

Imposing a substantial cooling-off period on issuer Rule 10b5-1 plans would also impose substantial costs on issuers. It is the overwhelming market practice for U.S. issuers, through their boards of directors, to make quarterly decisions, based on quarterly financial information, as to how much capital to return to shareholders, how to return that capital to shareholders (dividends or share repurchases) and, if repurchasing shares, how best to implement the repurchase. Boards of directors currently are able to make sensible fiduciary decisions to adopt quarterly Rule 10b5-1 plans, notwithstanding the loss of flexibility associated with the need for a set formula *ab initio*, because the boards can use accurate current information in setting the formula, the boards know that the purchases can commence very soon, the boards know the plans will expire of their own accord in 90 days or so, and the boards know that, if there is a dramatic change in the market conditions, the plans can be terminated. The imposition of a substantial cooling-off period is completely inconsistent with that approach to Board decision-making. The cost to issuers of being forced to bear substantial additional market risk is not properly addressed or calculated in the Rule 10b5-1 Proposal.

We believe that imposing a cooling-off period on issuer trading plans would adversely affect the ability of issuers to undertake a variety of legitimate and beneficial financing and capital management transactions. For example, during the onset of the COVID-19 pandemic in early 2020, stock prices on U.S. exchanges decreased dramatically.<sup>2</sup> We believe that many issuers engaged in share repurchase activity during this period and that such activity mitigated share price declines. Had the proposed cooling-off period been in effect at that time, issuers would have been precluded from relying on the Rule 10b5-1(c)(1) affirmative defense in connection with these share repurchases, potentially resulting in even greater market volatility.

Issuers routinely engage in (i) “accelerated share repurchases”, (ii) forward share sales and (iii) “call spread” transactions in connection with convertible debt issuances. These transactions all typically involve a broker-dealer engaging in market purchases or sales as a principal or agent to execute or hedge the transaction. It is market practice for many of these types of transactions to be structured to comply with the requirements of Rule 10b5-1. Imposing a cooling-off period that would delay the time between entering into a transaction and when it could be executed in the market will introduce significant pricing and execution uncertainty that will, at a minimum, increase the cost to issuers, or worse, make such transactions not economically viable.

For the reasons set forth above, we respectfully submit that the revisions to Rule 10b5-1 should not include a cooling-off period for issuers as a condition to reliance on the Rule 10b5-1(c)(1) affirmative defense.

---

<sup>2</sup> By way of example, on March 11, 2020, the Dow Jones Industrial Average closed at 23,553.22, down 20.3% from its February 12, 2020 high of 29,551.42.

If the Commission determines to require a cooling-off period for issuer Rule 10b5-1 plans, we respectfully request that the cooling-off period not apply to any transactions in which a third party is acting as a principal and the issuer has no control over the timing, pricing or other transaction parameters of any trading activity on the part of the third party.

*Questions 6 and 7 —*

We believe that it is important to define the terms “modify” and “modification” for purposes of Rule 10b5-1(c). We respectfully submit that the cooling-off period should only be triggered by a change in “trading parameters” set forth in a trading plan, such as changes to sales prices or price ranges, number of securities to be sold or the timing of sales. We do not believe that the cooling-off period should be triggered by changes to other provisions of a trading arrangement, such as account information. If the definition of “modify” and “modification” covers only trading parameters, we do not believe that a de minimis exception is necessary.

**2. Director and Officer Certifications.**

*Question 8 —*

We appreciate that the Commission intends to reinforce directors’ and officers’ recognition of the conditions to reliance on the Rule 10b5-1 affirmative defense. However, we do not view the proposed certification requirement as an efficient or effective means to heighten this awareness. We believe the proposed certification requirement (including the proposed 10-year retention period) is burdensome and unnecessary. In our experience, broker-dealers who execute trading plans require the person entering into the trading plan to represent that (i) he or she is not aware of material non-public information about the security or the issuer and (ii) he or she is entering into the plan in good faith and not as a part of a plan or scheme to evade the securities laws. If the Commission wishes to implement the policy behind the proposed certification requirement, we would propose that any written trading plan intended to benefit from the affirmative defense be required to include these representations. In this way, the Commission could achieve its intended benefit while leveraging current market practice in an efficient manner. Requiring a separate certification and imposing a 10-year record-keeping obligation would result in incremental expense and administrative burden without any obvious incremental benefit to securities law compliance.

*Question 9 —*

As stated in response to Question 8 above, we do not believe that a certification requirement is appropriate or provides benefits in excess of its costs. If the Commission does include a certification requirement in Rule 10b5-1, we believe the proposed language in the certification is appropriate.

*Question 10 —*

As stated in response to Question 8 above, we do not believe that a certification requirement is appropriate or provides benefits in excess of its costs. If the Commission does include a certification requirement in Rule 10b5-1, we believe the proposed certification requirement should not apply to individuals who are not “officers” under Exchange Rule 16a-1(f) because individuals other than officers generally are not at high risk of access to material non-public information and generally do not have the ability to influence corporate action that might affect the trading market for the securities of their employers.

*Question 11 —*

As stated in response to Question 8 above, we do not believe that a certification requirement is appropriate or provides benefits in excess of its costs. If the certification requirement is adopted, we do not believe that it is necessary to impose a retention period equal to the 10-year statute of limitations. If certification is required, an officer will need to retain the certification in order to demonstrate compliance with Rule 10b5-1. A separate requirement for the issuer to do so is unnecessary. For the same reasons, if certification is required, we believe that allowing individuals and issuers to develop their own retention policies would be the appropriate approach.

*Question 12 —*

As stated in response to Question 8 above, we do not believe that a certification requirement is appropriate or provides benefits in excess of its costs. If the certification requirement is adopted, we believe that the proposed amendments to Rule 10b5-1(c)(1)(ii) should expressly provide that the certification does not establish an independent basis of liability under Exchange Act Section 10(b) and Rule 10b-5. We would propose to extend this so that the amendments also specifically provide that any failure to produce a certification does not itself establish a violation under Exchange Act Section 10(b) and Rule 10b-5.

**3. Restricting Multiple Overlapping Rule 10b5-1 Trading Arrangements and Single-Trade Arrangements.**

*Question 13 —*

We believe that there are legitimate uses of multiple, overlapping Rule 10b5-1 plans. Consider an insider with a meaningful shareholding plus vested options plus unvested equity awards. She might adopt one plan to reduce her existing shareholding over time. She might have another plan for the periodic exercise of options and the sale of the underlying shares, and yet another plan for sale of shares upon the vesting of equity awards. We do not see any reason why this behavior would be problematic or any benefit to be achieved from requiring this insider to style her selling as “one plan” rather than “three plans”. We believe that the proposed cooling-off period is a more effective way to address potential abuse of Rule 10b5-1 than an outright prohibition of multiple, overlapping plans.

If limitations on overlapping plans are adopted, we believe that they should not apply to issuer plans. As with corporate insiders, an issuer may have multiple plans in effect to address multiple strategies and needs. For example, an issuer may enter into a repurchase plan to periodically repurchase shares to mitigate dilution associated with the vesting and exercise of equity compensation awards. Independent of that, the same issuer may wish to enter into a separate plan with different volume and pricing parameters to return capital to shareholders. There are many legitimate reasons an issuer may enter into overlapping trading plans and the proposal does not cite any studies suggesting that this flexibility has been used other than in the best interests of issuer's shareholders. In addition, to mitigate credit risk or for other reasons, an issuer may contract with multiple financial institution counterparties to execute an accelerated share repurchase program. If these arrangements were documented separately, they would arguably constitute prohibited overlapping plans, thereby reducing issuer flexibility without any perceptible benefit.

In addition, if limitations on overlapping plans are adopted, we believe that the Commission should clarify that for these purposes "overlapping" plans are only those plans that contemplate potential trading activity on the same day (*i.e.*, multiple plans in existence at the same time do not constitute "overlapping" plans if those plans would only result in trading activity during different time periods). In particular, we encourage the Commission to confirm that an effective plan may continue to operate and make trades even as a successor to such plan is in the pendency of its cooling-off period. We do not believe this arrangement should be properly understood as "overlapping" plans as it does not implicate the Commission's stated policy concerns with multiple plans making trades, but such confirmation will provide significant clarity as to the intended functioning of the cooling-off period.

*Question 14 —*

As stated in response to Question 13 above, we do not believe that an outright prohibition of multiple, overlapping plans is necessary. If the proposed prohibition is adopted, we believe that it should exclude all plans that relate solely to transactions directly with the issuer as well as plans that relate solely to transactions (including open market transactions) in connection with the vesting, exercise or expiration of equity compensation arrangements. Certain companies allow "net share settlement" of stock options, whereby the issuer withholds a number of shares with a value equal to the exercise price of the options and any required tax payment with the issuer using its own funds to make such required tax payment. Rather than issue fewer shares, forfeit receipt of the option exercise price and use its funds to make these tax payments, another issuer may issue the full number of shares underlying the option and sell into the market on behalf of the exercising optionholder a number of shares sufficient to pay the exercise price of the options and make the corresponding tax payment. These types of transactions are routine and do not exhibit characteristics suggesting potential abuse if undertaken pursuant to Rule 10b5-1 plans.

*Question 15 —*

We believe that the proposed cooling-off period for directors and officers, taken together with a properly defined prohibition on multiple, overlapping trading plans, will be sufficient to reduce the potential for abuse of Rule 10b5-1 plans. Single-trade plans have many appropriate uses to generate liquidity in advance of a single, specific purchase (for example, a college tuition payment), and, in any event, the proposed restriction could be easily avoided through a formalistic splitting of one trade into two. Accordingly, we do not see any benefit to imposing an arbitrary restriction on the number of single-trade plans that an insider may engage in during a specified time period. We also see definitional issues with the concept of a “single-trade” plan insofar as the person entering into the plan does not execute the transactions pursuant to the plan.

If limitations on single-trade plans are adopted, we believe that they should not apply to issuer plans. As with multiple overlapping plans, we do not believe that issuer single-trade plans raise the concerns articulated by the Commission in the Rule 10b5-1 Proposal. Accordingly, we believe that any such limitations would result in costs to issuers in the form of reduced flexibility that would exceed any perceived benefits.

**4. Requiring that Trading Arrangements Be Operated in Good Faith.***Questions 16 and 17; 19 and 20 —*

We do not expect that addition of “and operated” to the good faith requirement would have a meaningful impact and we believe that—as proposed—the concept is ambiguous. We note that, for many if not most plans, the actual “operation” of the plan is done by a third party. We are not aware of evidence to suggest that corporate insiders manipulate the timing of corporate disclosures to benefit trades under Rule 10b5-1 plans. To the extent the opportunity for corporate insiders to engage in this behavior exists, we believe that it will be sufficiently mitigated by the proposed cooling-off period for directors and officers. In addition, as described in our response to Question 18, we think it is improbable that—other than in a truly extreme set of facts—a trier of fact would conclude that a corporate disclosure decision represents the failure by an individual to have “operated” a 10b5-1 plan in effect at the time of that disclosure in bad faith.

*Question 18 —*

Although we believe that the term “operated” is vague and may introduce uncertainty, we cannot offer a proposed definition. The Rule 10b5-1 Proposal suggests that the SEC has two concerns: (i) potential manipulation of the timing of corporate disclosures to benefit trades under Rule 10b5-1 plans and (ii) the termination or amendment of Rule 10b5-1 plans while in possession of material non-public information. Given the complexities associated with the timing of corporate disclosures, we think it is improbable that—other than in a truly extreme set of facts—a trier of fact would conclude that a corporate disclosure decision represents the failure by an individual to



have “operated” a 10b5-1 plan in effect at the time of that disclosure in bad faith. Plan amendments for directors and officers will be subject to a cooling-off period, which substantially mitigates the SEC’s apparent second concern. In addition, we believe that it will be very difficult to establish that a plan termination—again, other than in a truly extreme set of facts—was made in bad faith. Accordingly, we respectfully submit that the Commission omit the “operated in good faith” proposal.

## **B. Additional Disclosures Regarding 10b5-1 Trading Arrangements.**

### **1. Quarterly Reporting of Rule 10b5-1(c) and Non-Rule 10b5-1(c) Trading Arrangements.**

*Questions 21 and 24 —*

We believe that, with revisions, proposed Item 408(a) could provide potentially useful information to investors and the markets. We begin with two overarching comments. *First*, we believe that any incremental disclosure with respect to issuer trading arrangements should be removed from proposed Item 408(a) and included in the rules contemplated by the Issuer Share Repurchase Proposal. *Second*, although the discussion in the Rule 10b5-1 Proposal refers to trading “arrangements”, the text of proposed Item 408(a) (as does the text of Rule 10b5-1 itself) refers to “any contract, instruction or written plan for the purchase or sale of securities”. Because it is not possible to purchase or sell a security without “instructing” at least one party and because even the simplest purchase or sale transaction most likely involves a “contract” with a broker-dealer or another person, we believe that, as drafted, proposed Item 408(a) would require an issuer to make detailed periodic disclosure about every single transaction conducted by its officers and directors. This type of transactional disclosure is already made public on Section 16 filings and we see no benefit in requiring issuers to accumulate and separately disclose the same information on a quarterly basis.

To achieve the stated goal of the Rule 10b5-1 Proposal of providing information “that would better allow investors, the Commission, and other market participants to observe how these trading arrangements are being used”, we believe that proposed Item 408(a) should be revised only to require disclosure of trading arrangements intended to benefit from the Rule 10b5-1(c)(1) affirmative defense. Although, as currently drafted, an oral trading instruction could fit within the safe harbor, we believe that in practice virtually all such plans take the form of written agreements, typically between a shareholder and a broker-dealer. Assuming some form of cooling-off period is adopted for current directors and officers, we believe that oral 10b5-1 arrangements will be even less likely. The Commission may wish to consider requiring that any arrangement intended to benefit from the affirmative defense be memorialized in writing. Doing so would also facilitate the impetus behind the proposed certification requirement without the incremental administrative burden of requiring separate certifications as described in our response to Question 8 above.

For the same reasons that we do not support imposing a cooling-off period (see our response to Questions 2 and 3 above) or a certification requirement (see our response to Question 10 above) for employees who are not directors or officers, we do not support requiring disclosure of trading plans of employees who are not directors or officers.

*Question 22 —*

We believe that requiring disclosure of ongoing uncompleted trading arrangements will create a risk of front-running of trades pursuant to those arrangements. We respectfully submit that the Commission is failing to consider—both here and with respect to the Issuer Share Repurchase Proposal—the possibility that quantitative traders will be able to “reverse-engineer” trading algorithms if these disclosures are required and exploit that information to the disadvantage of the parties whose trading information must be disclosed. We think that this risk will be mitigated if any such disclosure requirement clarifies that no prospective pricing information or particularized timing information is considered “material” for purposes of the disclosure requirement.

*Question 23 —*

Issuers that require “pre-clearance” of trades by directors and officers typically would be aware of the intent of a director or officer to enter into a Rule 10b5-1 plan and may be made aware of a subsequent termination of any such plan, but may not be aware of the material terms of any such plan. Issuers would need to require directors and officers to provide this information in order to include it in the issuer’s periodic reports.

*Question 24 —*

We do not see any benefit to requiring mandatory disclosure by issuers with respect to non-Rule 10b5-1 trading arrangements by directors or officers. Those transactions, by definition, cannot benefit from the Rule 10b5-1(c)(1) affirmative defense, so whether they are made pursuant to a plan or not would not seem to provide valuable information to investors, the Commission or other market participants. Moreover, the details of any such transactions will be included in Section 16 filings. If mandatory disclosure of non-Rule 10b5-1 trading arrangements by directors or officers is required, we believe that the reference to “any contract, instruction or written plan for the purchase or sale of securities” must be substantially narrowed. See our response to Question 21 above.

*Question 25 —*

As stated in our response to Question 21 above, we believe that any new disclosure requirement with respect to issuer Rule 10b5-1 trading arrangements should be addressed in the proposed rules set forth in the Issuer Share Repurchase Proposal. We believe that Forms 10-Q and 10-K are the appropriate forms for any mandatory disclosure by issuers with respect to Rule 10b5-1 trading arrangements by directors and officers.

*Question 26 —*

We believe that any new disclosure requirement with respect to issuer Rule 10b5-1 trading arrangements for foreign private issuers should be addressed in the proposed rules set forth in the Issuer Share Repurchase Proposal. As directors and officers of foreign private issuers are not subject to Section 16, we do not think that requiring mandatory disclosure by foreign private issuers with respect to Rule 10b5-1 trading arrangements by directors and officers is appropriate.

**2. Disclosure of Insider Trading Policies and Procedures.**

*Question 27 —*

We believe that requiring a public company that does not have insider trading policies and procedures to disclose that fact would provide useful information to investors. Although we do not object to proposed Item 408(b), we do not believe that requiring disclosure regarding an issuer's insider trading policies and procedures would provide useful information to investors. In our experience, insider trading policies demonstrate little variation (other than, currently, with respect to the coverage of gifts, where practice is varied). Similarly, we think there is significant overlap with respect to issuers' procedures to operate their insider trading policies and thus that disclosure about these procedures will devolve into "boilerplate" disclosure of little value to investors.

If proposed Item 408(b) is adopted, we would strongly encourage that issuers be permitted to satisfy the insider trading policy disclosure requirement in the manner provided for codes of ethics pursuant to Regulation S-K Item 406(c). Although we are not experts in interactive data methodologies, we believe that our proposal would require modification of the interactive data file requirement of proposed Item 408(c).

The Rule 10b5-1 Proposal implies that the value of proposed Item 408(b) would be enhanced by virtue of the chief executive officer and chief financial officer certifications required by Exchange Act Rule 13a-14. We agree that the disclosure controls and procedures requirements of Exchange Act Rule 13a-15 (and the corresponding certification requirements) have enhanced public company disclosure practices and in that respect would contribute to the accurate disclosure of an issuer's insider trading policy. Although the argument is not made explicitly, if it is the view of the Commission that the failure by an individual to comply with an issuer's insider trading policy would give rise to potential liability to the chief executive officer and chief financial officer under their certifications, we respectfully disagree.

*Question 29 —*

We see no incremental benefit that would be attained by requiring Item 408(b) disclosure in Schedules 14A and 14C and would propose that such disclosure only be required in an issuer's annual report.

*Question 30 —*

We believe that it would be appropriate to require foreign private issuers to provide disclosure of their insider trading policies and procedures in their annual reports. We are not aware of any potentially appropriate modifications to the proposed disclosure requirement to recognize the different legal regimes in which foreign private issuers may operate.

**3. Structured Data Requirements.***Questions 31 - 34 —*

We have no view on the proposed tagging requirements other than that, if adopted, the methodology required to be employed should be clear and unambiguous to facilitate compliance in an efficient manner.

**4. Identification of Rule 10b5-1(c) and Non-Rule 10b5-1(c)(1) Transactions on Forms 4 and 5.***Question 35 —*

We generally support the Commission's proposal to include a mandatory checkbox on Forms 4 and 5 to indicate whether a sale or purchase was made pursuant to a Rule 10b5-1(c) plan. However, if a cooling-off period is adopted, we do not believe such a checkbox is likely to provide useful information about whether a Rule 10b5-1 plan was potentially being used to engage in opportunistic trading based on material non-public information.

*Question 36 —*

We respectfully disagree with the proposal to add an optional checkbox on Forms 4 and 5 to indicate that a sale or purchase reported on these forms was made pursuant to a contract, instruction or written plan that did not satisfy the conditions of Rule 10b5-1(c) because, consistent with our response to Question 24 above, we do not believe that such a checkbox would provide any useful information to investors, the Commission or other market participants.

**C. Disclosure Regarding the Timing of Option Grants and Similar Equity Instruments Shortly Before or After the Release of Material Non-public Information.**

We begin with the general observation that proposed Rule 402(x) is unrelated to Rule 10b5-1 and, with due respect to the Commission, appears to be a somewhat haphazard addition to an otherwise thoughtful and deliberate rule proposal. We believe the most significant potential issues with "spring-loading" or "bullet-dodging" of grants has also been effectively addressed by the staff's recent Staff Accounting Bulletin No. 120, which will make significantly clearer to investors the

accounting implications of option grants and awards of similar equity instruments near in time to the release of material non-public information.

*Question 37 - 39 —*

We do not believe that boards of directors currently consider these impacts. In our experience, awards for existing employees typically are made on a calendarized basis (*i.e.*, in accordance with a preset schedule) and awards to new employees are made concurrently with hiring. It is difficult to predict what effect the proposed disclosures would have on the timing of equity grants. The rule really creates two very different types of windows.

The first type of window period—the one tied to the publication of annual reports, quarterly reports and earnings releases—is knowable in advance. An issuer will be able to decide whether or not it wants to issue equity awards during these periods. If it elects not to, it will effectively not be able to issue equity awards during approximately 25% of each year (a higher percentage if the issuer does not file the corresponding periodic report on the same day as it publishes its quarterly earnings) without triggering disclosure which could be misinterpreted by investors.

The second type of window—tied to the filing or furnishing of a current report on Form 8-K that discloses material non-public information—generally will not be knowable meaningfully in advance. Although the proposed addition to Item 402 refers to “material” non-public information, we believe that, to facilitate administrative efficiency, many issuers will treat each 8-K filing, regardless of the triggering event, as implicating the proposed new Item 402(x) disclosure requirement. This approach will have the consequence of potentially being deemed a stipulation that the underlying disclosure is material, which may have implications unrelated to equity award practices.<sup>3</sup> We encourage the Commission to analyze the average number of 8-Ks filed by issuers during the calendar year. As noted above, approximately 25% of each year will be covered by periodic report filing. If the proposed rule is adopted, each 8-K will introduce an additional 28-day disclosure window. For any issuer that files at least one 8-K per month, essentially every equity award would be covered by the proposed rule. If this is the case, the proposed rule will only result in additional clutter in periodic reports and not provide useful information to investors, the Commission and other market participants.

Under the proposal, each issuer share repurchase also would create a new disclosure window under proposed Item 402(x). The dates of some share repurchases may be known meaningfully in advance; others may not.

---

<sup>3</sup> We note that Instruction 6 to Form 8-K provides that “[a] registrant’s report under Item 7.01 (Regulation FD Disclosure) or Item 8.01 (Other Events) will not be deemed an admission as to the materiality of any information in the report that is required to be disclosed solely by Regulation FD.” We believe that this instruction facilitates enhanced disclosure to the markets by encouraging issuers to disclose items even if it is uncertain as to whether the information is material.

In light of the foregoing, we believe that the proposed disclosure requirement—if adopted—should be revised to (i) meaningfully shorten the window to fewer than 14 days (perhaps to three or five), (ii) enumerate a specific universe of Form 8-K Items that constitute triggering events rather than using a materiality standard and (iii) exclude share repurchases made pursuant to a Rule 10b5-1 plan.

*Question 40 —*

We believe that, if proposed Item 402(x) is adopted, it should employ an averaging period, such as five trading days, for each calculation.

*Question 41 —*

We believe that, if proposed Item 402(x) is adopted, it should apply to smaller reporting companies and emerging growth companies.

*Question 43 —*

For the reasons stated in the Rule 10b5-1 Proposal, we believe that requiring dispositions by gift to be disclosed on Form 4 is appropriate.

*Question 44 —*

We do not believe that any other information with respect to gifts should be required to be disclosed on Form 4.

### **Economic Analysis.**

*Questions 46 and 55 —*

We believe that requiring a cooling-off period for issuers would come at a significant cost that would be borne by the issuer's shareholders and other stakeholders. Although we appreciate the concerns addressed in the Rule 10b5-1 Proposal about information asymmetries between issuers and investors with regard to trades pursuant to a Rule 10b5-1 plan, we believe that the Rule 10b5-1 Proposal significantly underestimates the number of issuers that would be affected by a cooling-off period. We believe issuers routinely rely on Rule 10b5-1 plans. For example, many Rule 10b-18 repurchase plans and accelerated share repurchases are structured to rely on Rule 10b5-1 but, as noted in the Rule 10b5-1 Proposal, this information is not required to be disclosed. And we see little benefit to requiring that it be disclosed in a set of rules independent of those proposed in the Issuer Share Repurchase Proposal as we do not believe that there are widespread concerns (only a limited number of such purported concerns are cited in the Rule 10b5-1 Proposal) about insider trading by issuers under Rule 10b5-1 plans. As discussed in response to Question 5 above, we believe the concerns expressed in the Rule 10b5-1 Proposal are not about insider trading by issuers but instead about insiders

manipulating corporate disclosure for their own benefit. As such, we submit that the costs of applying a cooling-off period to issuers would exceed any perceived benefit.

*General Observations.*

In light of the significant complexity that may be associated with the implementation of the proposed rules—however they may be adopted—we encourage the Commission to include a meaningful phase-in period and express provisions grandfathering Rule 10b5-1 plans entered into before the effective date of the rule amendments. Without these provisions, issuers, directors and officers may be subject to significant uncertainty about whether their existing Rule 10b5-1 plans which comply with the existing rules will be effective, or whether canceling their existing plans (for example, in order to enter plans compliant with the updated safe harbor) may be found to be not “operating” their plan in good faith (if such a provision is adopted).

\* \* \*

We would welcome the opportunity to discuss any of the above issues further with the Commission. Please direct any inquiries to Richard A. Hall (rhall@cravath.com; 212-474-1293), Andrew J. Pitts (apitts@cravath.com; 212-474-1620) or Michael L. Arnold (marnold@cravath.com; 212-474-1664).

CRAVATH, SWAINE & MOORE LLP

Vanessa Countryman  
Secretary  
Securities and Exchange Commission  
100 F Street, N.E.  
Washington, D.C. 20549-1090