PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

1285 AVENUE OF THE AMERICAS
NEW YORK, NEW YORK 10019-6064

TELEPHONE (212) 373-3000

LLOYD K. GARRISON (1946-1991)
RANDOLPH E. PAUL (1946-1956)
SIMON H. RIFKIND (1950-1995)
LOUIS S. WEISS (1927-1950)
JOHN F. WHARTON (1927-1977)

UNIT 5201, FORTUNE FINANCIAL CENTER
5 DONGSANHUAN ZHONGLU
CHAOYANG DISTRICT, BEIJING 100020, CHINA
TELEPHONE (86-10) 5828-6300

SUITES 3601 – 3606 & 3610
36/F, GLOUCESTER TOWER
THE LANDMARK
15 QUEEN'S ROAD, CENTRAL
HONG KONG
TELEPHONE (852) 2846-0300

ALDER CASTLE
10 NOBLE STREET
LONDON EC2V 7JU, UNITED KINGDOM
TELEPHONE (44 20) 7367 1600

535 MISSION STREET, 24TH FLOOR
SAN FRANCISCO, CA 94105
TELEPHONE (628) 432-5100

FUKOKU SEIMEI BUILDING
2-2 UCHISAIWAICHO 2-CHOME
CHIYODA-KU, TOKYO 100-0011, JAPAN
TELEPHONE (81-3) 3597-8101

TORONTO-DOMINION CENTRE
77 KING STREET WEST, SUITE 3100
P.O. BOX 226
TORONTO, ONTARIO M5K 1J3
TELEPHONE (416) 504-0520

2001 K STREET, NW
WASHINGTON, DC 20006-1047
TELEPHONE (202) 223-7300

500 DELAWARE AVENUE, SUITE 200
POST OFFICE BOX 32
WILMINGTON, DE 19899-0032
TELEPHONE (302) 655-4410

WRITER'S DIRECT DIAL NUMBER
[redacted]

WRITER'S DIRECT FACSIMILE
[redacted]

WRITER'S DIRECT E-MAIL ADDRESS

April 1, 2022

Via email to rule-comments@sec.gov

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

Re: Request for Comment on Proposed Amendments to Rule 10b5-1 (Release Nos. 33-11013; 34-93782; File No. S7-20-21)

Ladies and Gentlemen:

We respectfully submit this letter in response to the above-referenced request for comment by the Securities and Exchange Commission (the "Commission"). We fully support the Commission's efforts to address potentially abusive practices associated with trading arrangements implemented in reliance on Rule 10b5-1 under the Securities

Exchange Act of 1934, as amended, and appreciate the opportunity to comment on the Commission's proposed rules.

Since Rule 10b5-1 was first adopted in 2000, we have advised many public companies and shareholders of public companies in connection with the implementation of Rule 10b5-1 plans and questions around trading in publicly traded securities by insiders more generally. Our views below are based on our experience with issuers, corporate insiders, large institutional shareholders and other shareholders. In particular, we provide below observations and comments about the cooling off period, and option equity award disclosure aspects of the Commission's proposal, as well as questions raised by the proposal on the ability to enter into successive Rule 10b5-1 plans, the ability to trade outside of Rule 10b5-1 plans, the proposed periodic disclosures by issuers of Rule 10b5-1 plans, and the impact of its adoption on existing plans.

Cooling Off Periods

We understand and endorse the Commission's goal of reducing the likelihood that trades under Rule 10b5-1 plans are made on the basis of material non-public information, and we appreciate that implementing mandatory cooling off periods has come to be viewed as helping to reduce and/or eliminate this concern. It is important to remember, however, that it is already a condition to the Rule 10b5-1 affirmative defense that a person may not be in possession of material non-public information at the time of entering into a Rule 10b5-1 plan. In proposing lengthy mandatory cooling off periods, the Commission stated that its goal was to "address concerns that traders are able to misuse the rule to set up trading arrangements that use material non-public information about an issuer prior to the disclosure of such information." We respectfully note that such conduct would run afoul of Rule 10b5-1 as currently drafted, as traders may not implement a Rule 10b5-1 plan while in possession of such information. Moreover, the SEC staff has made it clear that establishing a plan while in possession of material non-public information cannot be cured by a waiting period.[1]

It is also important to remember that corporate insiders are free to trade outside of a Rule 10b5-1 plan at any time they are not in possession of material non-public information. Under the Commission's proposed 120-day cooling off period for individuals, a corporate insider establishing a plan following a quarterly earnings release would have to wait *four months* before a trade could be executed under the plan, but

---

[1] See C&DI Question 120.20, Mar. 25, 2009:
Question: Is the Rule 10b5-1(c) affirmative defense available where a person establishes a Rule 10b5-1 written trading plan while aware of material nonpublic information if the plan is structured so that plan transactions will not begin until after the material nonpublic information is made public?
Answer: No.

would be free to execute discretionary trades immediately for so long as the company's trading window remains open and the individual has no material non-public information.

Not only is the proposed 120-day cooling off period unnecessary in light of the existing requirements of Rule 10b5-1, it could have the unintended consequence of discouraging corporate insiders from using Rule 10b5-1 plans in the first place. A corporate insider who has a need for liquidity (for example to pay for unexpected healthcare bills) would be faced with a choice of waiting four months for a Rule 10b5-1 to become effective, or immediately trading on a discretionary basis. As a general matter, we believe that Rule 10b5-1 plans are a positive tool for avoiding insider trading in the U.S. capital markets, and we are concerned that there will be more opportunity for abuse of the insider trading laws if corporate insiders are deterred from implementing these plans.

We would urge the Commission to use the enforcement tools at its disposal, along with the enhanced disclosures called for by the proposed rules, to demonstrate where a Rule 10b5-1 plan does not meet the requirements of the existing rule, rather than mandating an arbitrary and burdensome delayed implementation of the plan.

If the Commission does pursue a mandatory cooling off period, we would strongly encourage the Commission to reduce the period for individuals to 30 days, which would be consistent with the proposed cooling off period for issuers and generally consistent with best practices in the market. We do not see a principled basis for distinguishing between individuals and issuers in this context, and for the reasons stated above, we believe a 120-day mandatory cooling off period would be arbitrary and burdensome and unlikely to achieve in practice the Commission's stated policy goals.

Successive Plans

We would appreciate the Commission's clarification regarding the ability of corporate insiders and issuers to implement successive, springing plans. For example: an officer has a current Rule 10b5-1 plan that is set to expire on December 31, 2022 and that officer enters into a subsequent Rule 10b5-1 plan prior to December 31, 2022 which is to take effect on January 1, 2023. In this example, the corporate insider does not have two overlapping "effective" plans, but it is not clear whether both plans would be considered "outstanding" and thus ineligible for the affirmative defense of Rule 10b5-1.

Trading Outside Rule 10b5-1 Plans

We would also appreciate the Commission's clarification that proposed Rule 10b5-1(c)(ii)(D) would not restrict the ability of issuers, directors, and officers to engage in discretionary trades after entering into a Rule 10b5-1 plan. We appreciate the Commission's concerns regarding overlapping plans and its desire to eliminate this practice, but the language of proposed Rule 10b5-1(c)(ii)(D), insofar as it includes "instructions" or "contracts" could be construed broadly to include more than

overlapping plans, and could reach any discretionary trades (which we presume was not the Commission's intent).

Rule 10b5-1 Plan Pricing Disclosure

We note that pricing terms are not included in the list of "material" terms required to be disclosed under new proposed Item 408(a) of Regulation S-K, but that the list itself does not appear to be exclusive. We would appreciate the Commission's clarification that pricing terms will not be required to be disclosed thereunder.

Transition

In our experience, many, if not most, existing Rule 10b5-1 plans would not meet the proposed revised requirements of Rule 10b5-1. We would welcome any clarity the Commission can provide regarding the treatment of existing plans and the transition to the effectiveness of these new rules. We would think that any plans made in accordance with the Rule at the time of adoption and in place as of the effective date of the amendments could remain in place.

Option Awards Disclosure

We understand the Commission's objectives in proposing new Item 402(x) of Regulation S-K to require disclosure of any option awards made in the 14 days prior to the disclosure of any material non-public information; however, the requirement to disclose option awards made within 14 days *after* such disclosure seems unnecessary and inconsistent with existing rules and practices. Typically, public companies' trading windows open one to two trading days after publication of their quarterly earnings releases because they believe that is sufficient for the market to digest material non-public information. We believe the same time period would also suffice to address the Commission's concerns about the timing of options awards. We urge the Commission to consider reducing the requisite disclosure period to two days after the disclosure of material non-public information in proposed Item 402(x).

In addition, we query whether the filing of periodic reports or issuer share repurchases are appropriate triggers for the disclosure contemplated by proposed Item 402(x). It seems to us that the appropriate trigger for the Item 402(x) should be the disclosure of material non-public information. Individual issuer share repurchases conducted pursuant to a previously announced plan or the filing of periodic reports during an open trading window following the release of earnings do not seem to pose the same opportunity to abuse material non-public information because these events themselves are not material non-public information.

* * * * *

We thank you for the opportunity to provide our views on the matters above, and would be pleased to discuss our comments or any questions your convenience – please

feel free to contact David S. Huntington at [redacted] or Raphael M. Russo at [redacted].

Very truly yours,

Paul, Weiss, Rifkind, Wharton & Garrison LLP

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP