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April 1, 2022

Office of the Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Via email to rule-comments@sec.gov

Re: File No. S7-20-21
Rule 10b5-1 and Insider Trading

Dear Ms. Countryman:

This letter is submitted on behalf of the Securities Regulation Committee of the New York City Bar Association (the "**Committee**"). We are responding to the request of the Securities and Exchange Commission (the "**Commission**") for comment on its proposed rules amending Rule 10b5-1 under the Securities Exchange Act of 1934, and related matters (the "**Proposal**").

The Committee includes a wide range of practitioners whose areas of interest and expertise include securities laws and the regulation of the U.S. capital markets and who are employed by or advise public companies, including both domestic and foreign private issuers. The Committee as a whole does not represent any client and the views expressed by the

Committee are those of the Committee and not necessarily the views of any of its individual members or their respective firms or institutions.

The Committee notes the concerns expressed by other commentators regarding the unusually short comment period for the Proposal and the Commission's unwillingness to extend the comment period for significant rule proposals, consistent with the past practice of the Commission to grant such extensions. These periods are particularly important for commenters, such as the Committee, that seek to provide a balanced and thoughtful comment letter that represents the views of a body of experts in the field.

Substantive Recommendations

The Committee also has several concerns regarding the substantive aspects of the Proposal, which are set forth below, along with certain recommendations of the Committee for addressing such concerns.

The Committee has focused on practical, but significant, implementation concerns with respect to several of the proposals, as drafted, and offers what we believe to be solutions that will address these concerns should the Commission proceed with some form of the Proposal.

Mandatory Cooling-Off Periods for Directors and Officers. The Proposal would require a mandatory cooling-off period of 120 days from the date a plan is adopted or modified and the commencement of trading under the plan for officers and directors. The Committee is concerned that a strict 120-day cooling off period (which would span well beyond an entire fiscal quarter without regard to when during a fiscal quarter the plan is adopted or modified) would result in a dramatic decline in the use of plans.

The Committee believes trading by officers and directors pursuant to plans adopted in accordance with Rule 10b5-1 should be encouraged and the Committee believes this specific requirement will have the opposite effect.

As currently in effect, an officer or director may only adopt a plan under Rule 10b5-1 if such person does not possess material non-public information ("**MNPI**") at the time a plan is adopted, so a cooling-off period merely provides a separation in time from adoption and trading that addresses perceptions to the contrary – a benefit many public companies have recognized and incorporated into their trading policies. The Committee believes that a shorter 30-day cooling-off period would be consistent with the practice of many public companies and would be sufficiently long to address the potential for abuse concerns raised by the Commission.

Mandatory Cooling-Off Periods for Issuers. The Proposal would require a mandatory cooling-off period of 30 days from the date a plan is adopted or modified and the commencement of trading under the plan for companies. The Committee is concerned that a mandatory cooling-off period for issuers would significantly reduce the use by companies of Rule 10b5-1 plans and needlessly limit an issuer's flexibility, even during open window periods when the risk of an issuer repurchasing its securities while in possession of material non-public information is remote. Not only would the proposed rule limit a company's ability and willingness to undertake open market share repurchases over a period of time that allows for the company to capture the greatest value for its shareholders, it would also affect companies' ability to do this in non-

market purchases through accelerated share repurchase programs, which typically require that counterparties be permitted to take legitimate risk-hedging positions at the time the program is entered into.

The Committee believes trading by issuers pursuant to plans adopted in accordance with Rule 10b5-1 should be encouraged and the Committee believes this specific requirement will have the opposite effect.

Accordingly, the Committee respectfully proposes that, to the extent that mandatory cooling-off periods are adopted, that such cooling-off periods not be applicable to companies and that, in any event, appropriate exceptions be made to allow for accelerated repurchase and similar programs effected by institutional counterparties.

The Obligation to Retain Certifications for Ten Years. The proposal would require officers and directors to certify (and individually retain such certification for 10 years) to the company that they are not aware of MNPI and they are adopting the plan in good faith and not as part of a scheme to evade the provisions of Section 10 of, or Rule 10b-5 under, the Exchange Act. The Committee is concerned with the unknowable pitfalls that would result from the implementation of a requirement for directors and officers to retain the proposed certifications for a ten-year period. While the Committee believes that the certification requirement, if adopted as proposed, would essentially serve as a formal internal control enhancement for companies, the Committee believes it is impractical to require individuals to retain certification records for such a long period, and that companies would be much better equipped to comply with this record-keeping requirement.

Accordingly, if the Commission elects to adopt the record-keeping requirement in some form, the Committee respectfully proposes that such requirement apply to issuers rather than directors and officers. As to the question of individual liability with respect to certifications, the Committee respectfully proposes that no additional basis of liability is needed, given that the falsity of the certification would implicate the individual's ability to rely on the affirmative defense under Rule 10b5-1, nor is such liability appropriate for otherwise inadvertent failures to comply with, at its essence, a record-keeping requirement.

Prohibition on Overlapping Plans. The Committee is concerned that the proposed prohibition on overlapping plans for open-market trades by officers, directors and companies is far too overreaching. The Committee notes that the stated purpose of this amendment is to address certain specific types of abusive trading practices; however, if adopted as proposed, it would broadly prohibit many uses of overlapping trading arrangements for open-market trades by companies that are considered legitimate and beneficial by shareholders.

For example, certain participants adopt open-market trading plans during the pendency of existing trading plans, with the terms of the new plan specifying that trading will commence after the existing plan expires. The use of these "serial" trading plans allows for legitimate ordinary-course trading activity to continue uninterrupted upon the expiration of an existing plan. If this requirement is adopted as proposed, then if an existing plan expires during a trading blackout period, the additional plan could not be adopted until the next open trading window, which would result in unnecessary and unjustified gaps in legitimate trading activity. Similarly, as proposed, the amendment seems to implicate the ability to concurrently enter into share

repurchase arrangements that are not conducted through open market transactions, such as the types of transactions discussed above with institutional counterparties.

Moreover, to the extent the Commission believes the existing rule allows for the entry into opposite-way plans that allow for the insider or company to later elect to terminate the less favorable plan, the Committee believes this concern is better addressed with a narrowly tailored provision, rather than a provision that also severely limits the availability of Rule 10b5-1 plans for legitimate and widely accepted trading and repurchase activity.

Accordingly, the Committee respectfully proposes that, to the extent that the Proposal is adopted, that the prohibition on overlapping plans with respect to companies not be included in the final rule, or in the alternative, if the Commission adopts a prohibition on overlapping trading arrangements with respect to companies, that any such prohibitions are narrowly tailored to address the specific types of conduct that are the subject of the Commission's concerns.

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We thank you for the opportunity to comment on this important Commission initiative. Members of our Committee would be happy to discuss any aspect of this letter with the Commission staff.

Respectfully submitted,

ROD MILLER
Chair

Securities Regulation Committee
Association of the Bar of the City of New York