



April 1, 2022

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

U.S. Securities and Exchange Commission
100 F Street, NE
Washington DC 20549-1090
Attn: Ms. Vanessa A. Countryman

Re: File No. S7-21-21; Share Repurchase Disclosure Modernization; File No. S7-20-21; Rule 10b5-1 and Insider Trading

Dear Ms. Countryman:

The Securities Industry and Financial Markets Association (“SIFMA”)¹ appreciates the opportunity to comment on the Share Repurchase Disclosure Modernization proposal² (the “Share Repurchase Proposal”) and the Rule 10b5-1 and Insider Trading proposal³ (the “Trading Plans Proposal” and, together with the Share Repurchase Proposal, the “Proposals”). Because the Share Repurchase Proposal and the Trading Plans Proposal are inextricably linked and would affect issuers in interrelated ways, SIFMA discusses the issuer-related proposed rules from both Proposals together in this comment letter.

The Commission has stated that its objective in proposing amendments to Rule 10b5-1 is to “address concerns about abuse of [Rule 10b5-1] to opportunistically trade securities on the basis of material nonpublic information in ways that harm investors and undermine the integrity of the securities markets.”⁴ In the Share Repurchase Proposal, the Commission has stated that it

¹ SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry’s nearly 1 million employees, we advocate on legislation, regulation, and business policy, affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit <http://www.sifma.org>.

² Share Repurchase Disclosure Modernization, 87 Fed. Reg. 8443 (proposed Feb. 15, 2022) (the “Repurchase Disclosure Modernization Proposing Release”).

³ Rule 10b5-1 and Insider Trading, 87 Fed. Reg. 8686 (proposed Feb. 15, 2022) (the “Rule 10b5-1 Proposing Release”).

⁴ Rule 10b5-1 Proposing Release, 87 Fed. Reg. at 8686.

seeks to improve the “quality, relevance, and timeliness of information relating to issuer share repurchases” and address perceived information asymmetries between issuers and investors.⁵ SIFMA is supportive of certain enhancements to Rule 10b5-1 trading plan requirements to deter potential abuses of the affirmative defense under Rule 10b5-1. SIFMA is also supportive of the Commission’s goals to improve the quality, relevance and timeliness of information related to issuer share repurchases and the use of trading plans by issuers. However, as discussed in this comment letter, SIFMA has concerns with the scope of certain of the proposed rules and believes the adoption of the amendments as proposed would not serve the Commission’s goals and would have a deleterious effect on issuer share repurchases more broadly, which could in turn harm investors. SIFMA has provided alternative approaches for the Commission’s consideration where applicable.

Executive Summary

In Part I of this comment letter, we discuss the key structures that issuers use to effect share repurchases, the benefits of share repurchases to investors, the Commission’s historical view of share repurchases and the potential impacts of the Proposals on issuer share repurchases, along with key areas of concern.

In Part II, we discuss SIFMA’s position on the proposed amendments to Rule 10b5-1 applicable to issuers, which can be summarized as follows:

- SIFMA believes that, in light of the legitimate uses of Rule 10b5-1 plans by issuers and the potential for the proposed rules to reduce the benefits of share repurchase programs to issuers, shareholders and markets in general, the proposed amendments to Rule 10b5-1 should not apply to issuers;
- If the Commission determines to adopt amendments to Rule 10b5-1 applicable to issuers, the amendments should apply only to traditional open market share repurchase programs, and we urge the Commission to consider several additional clarifications and exclusions;
- To the extent the Commission determines to adopt a cooling-off period for issuer trading plans, SIFMA believes that non-material plan amendments and modifications to Rule 10b5-1 trading plans should not be considered plan terminations triggering a new cooling-off period; and
- The term “operated” and the concept of “operated in good faith” are not sufficiently clear as to the conduct they are intended to proscribe.

In Part III, we discuss SIFMA’s position on the proposed changes to disclosure requirements applicable to issuers, which can be summarized as follows

⁵ Repurchase Disclosure Modernization Proposing Release, 87 Fed. Reg. at 8444.

- SIFMA is strongly opposed to daily reporting of issuer share repurchases on Form SR and instead proposes reporting of repurchases on a monthly, aggregated basis, consistent with the current Item 703 of Regulation S-K.
- SIFMA is generally supportive of the proposed amendments to Item 703 of Regulation S-K, subject to certain clarifications, and encourages the Commission to use the existing Item 703 regime for reporting share repurchases rather than create a new Form SR.
- SIFMA is also generally supportive of the proposed new Item 408 of Regulation S-K as it applies to issuers' trading plans, subject to certain clarifications.

In Part IV, we discuss the applicability of the proposed rules to foreign private issuers (“FPIs”) and urge the Commission to apply only certain of the proposed rules to FPIs, and in Part V, we discuss the need for an appropriate transition period and for excluding from the scope of the proposed rules existing Rule 10b5-1 trading plans already in effect as of the date of effectiveness of the new rules and trading plans that are amended, modified or terminated after the effective date.

I. Overview of Issuer Share Repurchase Structures and Practices, the Existing Legal Framework and Key Areas of Concern in the Proposals

Share repurchases enable issuers to respond in real time to emerging business needs.

Share repurchase programs are an important tool for issuers to return capital to shareholders, and it has become increasingly important for issuers to be able to access the markets to repurchase their shares on a regular basis to respond nimbly to business and operational needs. Issuers purchase their own securities for a variety of reasons, including to mitigate dilution associated with employee equity incentive plans, as well as to return capital to shareholders in a tax-efficient manner. In addition, issuer share repurchases can help reduce volatility in stock prices during times of market stress or order imbalances. Many public companies have active share repurchase programs, with some issuers engaging in repurchase activity regularly and, in some instances, daily. Other issuers engage in repurchase activity only in response to a specific situation, such as the need to effectively and efficiently return proceeds from an asset sale to shareholders.

Repurchase decisions are typically made following thorough consideration by an issuer's board of directors and senior management.

In SIFMA's experience, decisions regarding share repurchases are made with diligence and executed with care. Generally, a public company would elect to repurchase its shares only after its board of directors and senior management have carefully analyzed, among other things, all relevant facts relating to its business, strategy and liquidity position, as well as regulatory, legal and contractual obligations. Notably, boards of directors, management and internal compliance functions focus not only on the risk of the issuer repurchasing shares while in possession of material nonpublic information (“MNPI”), but also on the risk of corporate insiders trading on the basis of their inside knowledge of an ongoing corporate stock buyback plan.

Multiple share repurchase methods have evolved to meet corporate needs within the bounds of existing regulation.

Issuer share repurchase programs take a variety of forms, generally falling into two categories: open market repurchases and derivative transactions. In either case, issuers may structure these transactions as trading plans designed to satisfy the Rule 10b5-1 affirmative defense.

Open Market Purchases: Many issuers conduct share repurchases by engaging a financial institution to act as the issuer's agent to purchase shares on the open market in accordance with the issuer's instructions. Such purchases are usually structured to comply with the safe harbor from liability for manipulation provided by Rule 10b-18 under the Securities Exchange Act of 1934 (the "Exchange Act"). Issuers frequently use Rule 10b5-1 plans when engaging in open market share repurchases. Open market repurchase plans involve an issuer providing a financial institution counterparty with a set of parameters (which may include price and volume limits) within which the financial institution will go into the market on the issuer's behalf over a specified period of time. Because these plans may extend to a time when an issuer may have MNPI, such as at quarter-end, issuers frequently structure these plans to benefit from the affirmative defense afforded by Rule 10b5-1. Issuer compliance departments and in-house and external counsel play an important role in assessing whether the plan design and activities conducted under the plan (*e.g.*, amendments to the plan) are consistent with Rule 10b5-1.

Accelerated Share Repurchase Programs and Other Structured Arrangements: In addition to traditional open market repurchase programs, issuers also use other structures when repurchasing their stock that may also be designed to benefit from the Rule 10b5-1 affirmative defense. For example, issuers may elect to use accelerated share repurchase programs ("ASRs") in lieu of open market repurchases for a number of reasons, including: (i) the pricing benefit of repurchasing shares at a discount to an average daily Rule 10b-18 volume-weighted average price ("10b-18 VWAP") and (ii) the accounting benefit of retiring shares on an accelerated basis.⁶ ASRs can be structured to operate as Rule 10b5-1 plans. In contrast to open market

⁶ Under a typical ASR, an issuer and a financial institution enter into a contract referencing a fixed dollar amount of its shares that the issuer desires to repurchase. The issuer pays the financial institution that amount at inception of the trade in exchange for delivery of a specified percentage (typically 80-90%) of the number of shares, determined by dividing the prepayment amount by the most recent closing market price of the issuer's common stock prior to execution. The financial institution obtains shares for the initial share delivery by borrowing them from stock lenders. Following the initial share delivery, the financial institution purchases shares of the issuer's common stock in the open market over the term of the ASR to close out the short borrow position and, if applicable, to acquire shares to enable the financial institution to satisfy any obligation it may have to deliver additional shares to the issuer upon termination of the ASR. A typical ASR has a scheduled termination date, which may be accelerated by the financial institution at any time after a specified minimum term. The scheduled termination date and minimum term are subject to a number of transaction-specific and company-specific considerations, including the size of the ASR and the trading volume in the issuer's common stock, with the term of the ASR being referred to as the "averaging period." The final price per share to be paid by the issuer for its shares in an ASR will generally equal (i) the arithmetic average of the daily 10b-18 VWAP of the issuer's common stock over the averaging period, sometimes subject to a cap and/or floor price, minus (ii) a pre-agreed discount. If, as expected, the number of shares delivered to the issuer at inception is less than the result of the prepayment amount divided by the final price, the financial institution will be required to deliver additional shares to the issuer

repurchase transactions, in an ASR or other derivative transaction, market activity is undertaken by the financial institution or counterparty (which has taken on risk) after entry into the contract, and the issuer does not have the ability to determine how, whether or when market activity related to the derivative or similar transaction takes place.

The Commission has historically supported the use of issuer share repurchase programs and recognized the programs' low level of potential abuse.

In connection with the adoption of Rule 10b-18, the Commission noted that “issuer repurchase programs are seldom undertaken with improper intent” and may “frequently be of substantial economic benefit to investors.”⁷ For that reason, in the past the Commission has declined to impose additional rules regarding share repurchases, recognizing that “undue restriction of these programs is not in the interest of investors, issuers, or the marketplace.”⁸ Rather, since the adoption of Rule 10b-18, the Commission has “endeavored to achieve an appropriate balance between” its multiple policy objectives and “the need to avoid complex and costly restrictions that impinge on the operation of issuer repurchase programs.”⁹

The existing legal framework protects investors against issuers' and their insiders' potential abuse of information asymmetries.

Material information asymmetries may exist between issuers and investors, but the general anti-fraud provisions of the Exchange Act prevent issuers from taking advantage of such material asymmetries when repurchasing their securities, regardless of the form that the share repurchase may take. To comply with these general anti-fraud provisions, issuers have adopted disclosure controls and procedures to ensure that they are not entering into plans or engaging in discretionary repurchases at a time when the issuer has MNPI. Consistent with this, it is standard practice for financial institutions entering into contracts to conduct share repurchases for issuers, whether acting as executing broker or derivative counterparty, to receive representations from the issuer that it is not in possession of MNPI.

Similarly, in SIFMA's experience, issuers also take steps to protect against their insiders using their knowledge of the issuer's repurchase program, and the actions taken under any such program, for their benefit. These steps, such as the pre-clearance of trading by legal counsel or the imposition of trading blackouts for those insiders who are directing share repurchases, are in addition to the general restrictions and protections under the anti-fraud rules under the Exchange Act.

to cover the difference. Otherwise, the issuer will be required to deliver shares or pay additional cash to the financial institution to cover any shortfall.

⁷ Purchases of Certain Equity Securities by the Issuer and Others; Adoption of Safe Harbor, 47 Fed. Reg. 53,333, 53,334 (proposed Nov. 26, 1982).

⁸ *Id.*

⁹ *Id.*

The current disclosure framework provides investors with significant information regarding issuers' share repurchase activity.

Item 703 of Regulation S-K, adopted by the Commission in 2003, provides investors with disclosure regarding issuer repurchase activity on a quarterly basis. Adoption of Item 703 enhanced the transparency of issuer share repurchase activity by requiring issuers to disclose each quarter their purchases of registered equity securities for each month in the quarterly reporting period. The disclosure provides investors with information as to whether, and to what extent, the issuer has repurchased shares under previously announced plans, and allows investors to assess the possible impact of share repurchase activity on the issuer's stock price, liquidity and capital position, similar to periodic disclosure of issuer earnings and dividend payouts.

SIFMA encourages the Commission to consider the potential negative impacts of the proposed rules, including the reduction of operational flexibility for issuers and the creation of new informational asymmetries that will disadvantage certain categories of investors, including retail investors.

As discussed above, companies rely on share repurchases to achieve multiple and varied commercial and financial goals, and different share repurchase structures have developed to provide issuers with flexibility to achieve these goals. Many of these share repurchases fall within the category of repurchase programs that are intended to comply with Rule 10b5-1. As such, issuers and their advisors have developed internal controls and procedures and compliance toolkits to ensure that these share repurchases are conducted in compliance with applicable law, regulation and Commission guidance, including the requirements of the Rule 10b5-1 affirmative defense. When adopting new requirements relating to issuer share repurchases, we encourage the Commission to take into account any potential deleterious effects that the rules may have on issuers' ability to use share repurchases to address ongoing, legitimate business needs.

The affirmative defense in Rule 10b5-1 permits an issuer to conduct its purchases over time. This has a number of benefits: reducing the impact of the share repurchases on market prices; eliminating the need to "front load" repurchases at a time shortly after the release of quarterly earnings; generating a more representative average price of repurchases; and helping to reduce volatility by producing continuous market liquidity. SIFMA strongly urges the Commission to take these benefits into account in considering the Proposals and to recognize that, in general, these considerations benefit investors and reduce market volatility, while at the same time providing issuers with a valuable mechanism to return capital to shareholders.

Finally, we urge the Commission to be cognizant of the unintended consequences of imposing enhanced disclosure requirements relating to issuer repurchases and repurchase programs, including the potential that detailed and near real-time disclosures could advantage sophisticated, technical and short-term investors at the expense of retail investors and investors who focus on analyzing company fundamentals and investing over the long term. SIFMA has concerns that if the proposed disclosure requirements are adopted as proposed, there could be further asymmetry among categories of investors, with certain investors benefiting at the expense of not only issuers, but investors as a whole.

II. Analysis of the Proposed Amendments to Rule 10b5-1

SIFMA believes that, in light of the legitimate uses of Rule 10b5-1 plans by issuers and the potential for the rules to reduce the benefits to issuers, shareholders and markets in general of share repurchase programs, the proposed amendments to Rule 10b5-1 should not apply to issuers.

SIFMA is concerned that the proposed amendments to Rule 10b5-1, as applied to issuers, would have a harmful effect on share repurchase programs in general, and SIFMA believes that the amendments are not necessary to achieve the Commission's stated policy objectives, namely to address potentially abusive practices associated with the use of Rule 10b5-1 trading arrangements. We discuss each of the proposed amendments in turn.

Cooling-Off Period

As applied to issuers, SIFMA does not believe that a cooling-off period is necessary to achieve the Commission's objectives. The Rule 10b5-1 affirmative defense already requires that an issuer enter into a plan in good faith and when it is not in possession of MNPI. In addition, SIFMA does not believe that there is general industry practice for *issuers* to impose a waiting period on themselves in connection with Rule 10b5-1 share repurchase plans. This is in contrast to trading plans for *insiders*, where SIFMA acknowledges that a cooling-off period is much more prevalent and effective in managing the perception of informational asymmetries and mitigating the potential for abuse.

Implementing a cooling-off period could have significant practical consequences for issuers. In the context of traditional open market share repurchase programs, issuers often want the flexibility to immediately start making repurchases under the programs. The imposition of a cooling-off period could cause issuers to abandon the use of traditional Rule 10b5-1 trading plans and rely solely on the Rule 10b-18 safe harbor for open market repurchases. Alternatively, imposing a cooling-off period may lead issuers to enter into two separate programs, one that is an open market program (which often may be structured to be in compliance with Rule 10b-18) without the benefits of the Rule 10b5-1 affirmative defense that takes effect immediately, and a second that is a Rule 10b5-1 plan that takes effect after the mandatory cooling-off period, resulting in unnecessary costs for issuers and creating unnecessary complexity.

Imposition of a cooling-off period could also lead to increased market volatility as issuers would be limited to repurchasing shares during much shorter windows for trading than they currently use. For example, issuers that implement Rule 10b5-1 plans on a quarterly basis would effectively be out of the market for 120 days of the year, with each quarterly plan requiring a separate 30-day cooling-off period. As a result, the amendments could have the unintended consequence of compressing share repurchase activity into shorter windows, which could have a more significant impact on the trading price of the issuer's stock or, in the alternative, result in the issuer curtailing its share repurchase program, potentially resulting in a loss of return of capital to shareholders. Similarly, clustering share repurchases in open periods could potentially increase market volatility. This effect could be exacerbated by the proposed disclosure framework. The new proposed Form SR would require an issuer to inform the market when it is

buying its shares, which could incentivize issuers to undertake significant amounts of repurchase activity in short time periods.

Similarly, derivative transactions, such as ASRs, that may be structured as Rule 10b5-1 plans also are almost exclusively entered into with essentially simultaneous pricing and the commencement of execution. The requirement of a cooling-off period (or forward-starting arrangement) as applied to these plans could impact the pricing and other terms that issuers receive for these types of plans, leading to greater inefficiencies in the marketplace. Derivatives are priced based on the market conditions at the time of execution. If there is a disconnect between the time at which a derivative is priced and the time at which the valuation period begins, that will expose market participants to undue risk and expense, which will result in an inefficient market for these products. This could in turn negatively impact both issuers and their shareholders.

We believe that the existing antifraud regime provides investors with adequate protection while also providing issuers with the flexibility to structure their repurchase plans in a manner that enables them to maximize the value that is returned to shareholders. A 30-day cooling-off period would reduce an issuer's flexibility to repurchase shares in a manner most advantageous to its shareholders and would impinge on the board of directors' and management's authority to manage an issuer's capital structure.

We would also note that a cooling-off period for issuers has not been a prominent part of the dialogue around enhancements to the Rule 10b5-1 affirmative defense, and such dialogue has considered, nearly exclusively, whether insiders' (not issuers') Rule 10b5-1 plans should be subject to a cooling-off period. In particular, the Commission's Investor Advisory Committee noted that it did not consider issuer share buybacks in its deliberations and that share buybacks should be addressed separately.¹⁰ The proposed imposition of a cooling-off period for issuers contrasts dramatically with the existing dialogue and research around the imposition of cooling-off periods on insiders to address individuals' potential misuse of Rule 10b5-1 plans. As the Commission itself has historically recognized that issuer repurchase plans inherently present fewer opportunities for misuse,¹¹ SIFMA respectfully proposes that the negative impact of a cooling-off period as applied to issuers significantly outweighs any perceived benefits.

Overlapping Trading Plans

SIFMA also respectfully submits that the proposed restriction on overlapping Rule 10b5-1 trading plans as applied to issuers would have significant negative impacts on issuers and their ability to engage in share repurchase activity, and at the same time is unnecessary for investor protection. It is not uncommon for issuers to have multiple Rule 10b5-1

¹⁰ See Securities and Exchange Commission, Investor Advisory Committee, *Recommendation of the Investor Advisory Committee regarding Rule 10b5-1 Plans*, 8 n.1 (Sept. 9, 2021), available at <https://www.sec.gov/spotlight/investor-advisory-committee-2012/20210916-10b5-1-recommendation.pdf> ("The IAC did not consider issuer share buybacks in its deliberations on this recommendation and believes that any changes to the regulation of these programs should be addressed separately.").

¹¹ Purchases of Certain Equity Securities by the Issuer and Others; Adoption of Safe Harbor, 47 Fed. Reg. 53,333, 53,334 (proposed Nov. 26, 1982).

trading plans in effect at any given time for legitimate purposes. For example, for business reasons, including competitive pricing and mitigating counterparty credit risks, issuers may enter into multiple Rule 10b5-1 trading plans, each operating in a different time period (in compliance with Rule 10b-18). In addition, issuers may have multiple types of Rule 10b5-1 plans to address different types of considerations or goals. For example, an issuer could have one plan to offset dilution from equity compensation, a second plan to methodically reduce the overall share count during the course of the year and a third plan with a price limit below the current market price that would repurchase shares at prices the issuer considers undervalued.

In SIFMA’s experience, when issuers enter into multiple Rule 10b5-1 trading plans, these plans often have different parameters (*e.g.*, time, pricing, volume), with the plans unlikely to have the effect of cancelling or modifying another plan. Accordingly, having multiple plans in place, with different price, volume and timing parameters to achieve legitimate business objectives, is unlikely to have the abusive effect that SIFMA believes the Commission is concerned about. The use of multiple plans by issuers in this manner does not permit an issuer to “strategically execute trades based on material nonpublic information and still claim the protection of the” Rule 10b5-1 affirmative defense.¹²

If the Commission does determine to adopt a rule prohibiting multiple overlapping plans, SIFMA urges the Commission to, at a minimum, clarify the language in the final rule to remove the reference to “plan[s] for open market purchases or sales of the same class of securities.” Without this change, the final rule could be read to restrict multiple Rule 10b-18 programs even if, for example, they are not Rule 10b5-1 trading plans. SIFMA does not believe that this is the intent of the Commission’s proposed language.¹³

Limitation on Single-Trade Plans

As discussed in more detail below, the amendments to Rule 10b5-1, if adopted, should clarify the definition of a “single-trade” plan. However, even with the requested clarity, SIFMA believes that issuers should not be subject to the limitations on single-trade plans. Depending on how the Commission defines these plans, issuers could be unnecessarily limited in their flexibility to engage in share repurchases. For example, if ASRs are determined to be single-trade plans and issuers wish to structure these as Rule 10b5-1 trading plans, issuers will be limited to one such trade per 12-month period, which will severely limit the usefulness of these types of programs and also limit the ability of issuers to go into the market on a targeted basis to execute repurchases. SIFMA does not believe that single-trade plans, particularly as effected by issuers, provide a significant opportunity for abuse or raise the concerns articulated by the Commission in the Trading Plans Proposal. Therefore, limiting issuers’ flexibility to engage in

¹² Rule 10b5-1 Proposing Release, 87 Fed. Reg. at 8692.

¹³ U.S. Sec. & Exch. Comm’n, Fact Sheet, Rule 10b5-1 and Insider Trading: Proposed Rules (2021), <https://www.sec.gov/rules/proposed/2021/33-11013-fact-sheet.pdf> (“The proposed amendments would add new conditions to the availability of the Rule 10b5-1(c)(1) affirmative defense to insider trading liability, including: [...] [t]he affirmative defense under Rule 10b5-1(c)(1) does not apply to multiple overlapping *Rule 10b5-1 trading arrangements* for open market trades in the same class of securities.” (emphasis added)).

these types of plans could present an unintended and unnecessary constraint on issuers' ability to return capital to shareholders at multiple points during the year or to engage in derivative transactions for legitimate business reasons that reduce volatility and may be less manipulative in nature than open market repurchases. Moreover, if adopted, SIFMA urges the Commission to clarify that the 12-month period referred to in the proposed rule will only be measured starting at effectiveness of the final rule, and that the initial 12-month period will not be retroactive. As currently drafted, SIFMA believes market participants may not have sufficient information to determine whether they must amend their current trading behavior in anticipation of a final rule in order to avoid a prohibition on single-trade plans immediately upon effectiveness of the final rules.

If the Commission determines to adopt amendments to Rule 10b5-1 applicable to issuers, the amendments should apply only to traditional open market share repurchase programs.

If the Commission determines to adopt amendments to Rule 10b5-1 applicable to issuers, SIFMA strongly urges the Commission to provide that such rules should apply only to traditional Rule 10b5-1 plans that contemplate specified share purchases over their term pursuant to one or more limit or market orders (such transactions being referred to herein as "Agency Contracts"). In these plans, the financial institution is acting as the issuer's agent in effecting the transactions, whether on a traditional agency basis or a riskless principal basis.¹⁴

Agency Contracts are in contrast to derivative or similar transactions, such as ASRs. In a derivative or similar transaction, market activity is undertaken by the financial institution or other counterparty after entry into the contract, and the issuer does not have the ability to determine how, whether or when market activity related to the derivative or similar transaction takes place. For example, in an ASR, after the trade is entered into, the financial institution counterparty takes on risk and engages in hedging activity whereby the issuer does not directly participate in profits or losses arising from those hedging activities. This is in contrast to a typical open market share repurchase program, where trades under the program are directly and entirely for the issuer's account. In Agency Contracts, the financial institution is simply executing the trades for a standard commission or spread, in contrast to a derivative or similar transaction, where any trades executed in the market by the financial institution are done as principal and for the financial institution's own account. Additionally, in Agency Contracts, the issuer typically can terminate the contract at any time (subject to the good faith requirement), which is in contrast to a derivative or similar transaction, where the issuer typically cannot terminate without the agreement of the financial institution counterparty that has taken on the market risk. In SIFMA's experience, a substantial majority of issuer share repurchases are structured as Agency Contracts.

As noted above, ASRs, if structured to comply with Rule 10b5-1, would likely be fundamentally adversely impacted by the proposed rules. Imposing a cooling-off period on ASRs would change the nature of the transaction and its pricing terms. Issuers will receive materially less favorable economic terms from their financial institution counterparties for

¹⁴ Under Rule 10b-18, a "riskless principal transaction" is defined to mean a transaction in which a broker or dealer after having received an order from an issuer to buy its security, buys the security as principal in the market at the same price to satisfy the issuer's buy order.

derivative programs that have a delayed effective time, particularly one that is 30 days after execution. Among other things, a time lag between entry into and execution of trades under an ASR introduces additional market risk due to the stock price and volatility uncertainty, which results in increased costs to the issuer in the form of a smaller discount or no discount, or a premium, to the 10b-18 VWAP and, therefore, a higher average price paid per share repurchased. A cooling-off period would introduce significant uncertainty into a financial institution's costs and other pricing inputs, which would adversely impact pricing for issuers. These impacts would, in turn, lead to less efficient returns of capital to shareholders.

If the Commission determines to adopt amendments to Rule 10b5-1 that apply to issuers, we also urge the Commission to consider several additional clarifications and exclusions.

If the Commission determines to amend Rule 10b5-1 as it applies to issuers and retains the basic construct as proposed (*i.e.*, a cooling-off period and prohibition on multiple plans), SIFMA urges the Commission to consider additional clarifications and exclusions.

The rules should provide that it is permissible for an issuer, subject to the existing legal framework, to have overlapping Rule 10b5-1 trading plans relating to the purchase of its own shares. As noted above, it is not uncommon for issuers to have multiple Rule 10b5-1 trading plans in effect at any given time for legitimate purposes. Further, this restriction as applied to issuers would have significant negative impacts on issuers and their ability to engage in share repurchase activity and is unnecessary for investor protection. For example, an issuer may enter into four Rule 10b5-1 repurchase plans at the start of a year, with each Rule 10b5-1 plan covering one quarter. Alternatively, an issuer may enter into multiple plans, each designed to address different considerations or goals. For example, an issuer could have one plan to offset dilution from equity compensation, a second plan to methodically reduce the overall share count during the course of the year and a third plan with a price limit below the current market price that would repurchase shares at prices the issuer considers undervalued. It could also enter into concurrent plans with multiple financial institutions, such as ASRs with multiple counterparties, or concurrent plans with a single financial institution, such as an open market repurchase on an agency basis overlapping with an ASR where the financial institution bears the related trading risk. These various arrangements are driven by a multitude of reasons, including long-term planning while not in possession of MNPI, mitigating counterparty credit risk, retaining commercial relationships, addressing different corporate goals and maximizing price benefits to the issuer and its shareholders. In SIFMA's experience, when issuers enter into multiple Rule 10b5-1 trading plans, these plans often have different parameters (*e.g.*, time, pricing and volume), with one plan unlikely to have the effect of cancelling or modifying another plan. Accordingly, having multiple plans in place, with different price, volume and timing parameters to achieve legitimate business objectives, is unlikely to have the potentially abusive effect that SIFMA believes the Commission is concerned about. The use of multiple plans by issuers in this manner does not permit an issuer to "strategically execute trades based on material nonpublic information and still claim the protection of the"¹⁵ Rule 10b5-1 affirmative defense.

¹⁵ Rule 10b5-1 Proposing Release, 87 Fed. Reg. at 8692.

We strongly urge the Commission to clarify the definition of a “single-trade” plan, if this concept is retained in the final rules. For example, is a derivative transaction, such as an ASR, a “single-trade” plan? Is a plan under which no trades have been executed or only one trade has been executed a “single-trade” plan? In addition, if an issuer has implemented a single-trade plan but that plan lapsed without the trade being completed, would that issuer be prohibited from entering into a new single-trade plan within 12 months? At a minimum, if no trade has ever been executed under the previous single-trade plan, the issuer should be allowed to enter into another single-trade plan within that 12-month period. Certain Rule 10b5-1 plans provide for a market order purchase at maturity if no purchases have been made under the plan prior to maturity. The rules should clarify that these should not be treated as single-trade plans even though only one purchase occurs under this type of Rule 10b5-1 plan. Likewise, a Rule 10b5-1 plan that contemplates multiple purchases of shares at designated limited prices under which only a single purchase occurs should not be treated as a single-trade plan.

Finally, the rules should clarify that plans that by their terms cannot be terminated should not be considered as single-trade plans and that an issuer should be allowed to enter into, within a 12-month period, a multiple-trade plan following the completion or termination of a single-trade plan.

To the extent the Commission determines to adopt a cooling-off period for issuer trading plans, SIFMA believes that non-material plan amendments and modifications to Rule 10b5-1 trading plans should not be considered plan terminations triggering a new cooling-off period.

Under the proposed rules, any amendment or modification to a Rule 10b5-1 plan would necessitate a cooling-off period. Plan amendments and modifications can take a variety of forms. Some amendments and modifications are non-substantive, including changes to fix scrivener errors and changes to notice provisions or share delivery instructions. Other amendments, although substantive, are not of the type that result in a change in an issuer’s trading instructions. These include changes to commission schedules, changes to address an event that has occurred outside of the plan or other changes to resolve uncertainty as to how a plan is intended to be executed. Issuers should be able to effect these types of changes without the need to observe a cooling-off period.

Alternatively, if, notwithstanding the above, the Commission determines to adopt a cooling-off period for issuer trading plans, only changes to the material terms of a plan that are equivalent to terminating and entering into a new plan (including changes to the execution parameters in the plan) should be subject to the cooling-off period that the Commission determines to implement for issuers. As a technical matter, however, SIFMA proposes that such a cooling-off period apply only to the extent that the changes would otherwise apply to trades that would occur during the cooling-off period. For example, an issuer should be able to modify the trading parameters of a plan (*e.g.*, the limit prices in the plan) if such changes would only impact trades that would be effected after the cooling-off period applicable to the date of the modification, with the plan permitted to continue to operate, if desired, on its original terms during the cooling-off period.

For these reasons, we propose that an amendment to a plan should be deemed a termination of the plan only in circumstances where the amendment (1) is directed by the issuer

and (2) modifies one or more material terms of the plan. Non-material amendments such as those described above and amendments to order types scheduled to be placed after the cooling-off period from the date of the amendment should not necessitate a cooling-off period for the plan as a whole.

The term “operated” and the concept of “operated in good faith” are not sufficiently clear as to the conduct they are intended to proscribe.

The Commission has asked if the term “operated” and the concept of “operated in good faith” are sufficiently clear as to the conduct they are intended to proscribe. SIFMA believes they are not. In addition, SIFMA does not believe that the additional requirements are necessary to achieve the Commission’s stated objectives.

SIFMA believes that the types of activities that the Commission is concerned about are already covered by antifraud rules — namely, the restriction on trading while aware of MNPI — and general corporate law principles. To the extent the Commission determines to modify the ongoing requirements under Rule 10b5-1, it should consider instead focusing on (1) an issuer’s actions while a plan is in effect (*e.g.*, modifications) and prohibitions on taking actions that have the effect of amending a plan in circumstances where it would not be permitted and (2) making clear that any termination of a plan be made in good faith. The word “operated” is vague, and SIFMA believes that refining the proposed rule to prohibit particular types of actions would be more clear. A lack of clarity around the term could increase the cost of compliance as issuers work to understand the meaning of “operate,” and potentially result in a lower likelihood that issuers choose to enter into share repurchase plans.

III. Analysis of the Proposed Disclosure Amendments

SIFMA does not support daily reporting of issuer share repurchases on Form SR.

SIFMA has significant concerns regarding the Commission’s proposal to require share repurchase disclosure on a daily basis. SIFMA does not believe that disclosure of share repurchase activity on a near real-time basis is necessary to protect investors and, in fact, such disclosure could have significant adverse consequences not only for issuers, but also for market participants. In particular, and as described further below, the proposed requirement that trades be disclosed within one business day on Form SR would significantly increase issuers’ costs, adversely affect their trading execution, create asymmetries among categories of investors, create opportunities for unfair front-running by a small subset of sophisticated technical investors and lead to improper and potentially misleading market signaling. In addition, SIFMA does not believe that daily reporting will provide useful information to investors on issuer share repurchase activity, as the sheer volume of data reported will create substantial “white noise,” impeding rather than helping investors monitor and evaluate issuer activity. Many forms of disclosure are fundamental to an issuer’s valuation (and quickly reflected in an issuer’s stock price), but others can be more technical in nature. The proposed disclosure of daily corporate share repurchase activity on Form SR would be the latter. Without being relevant to an issuer’s earnings or valuation, daily disclosure of an issuer’s share repurchase activity could nonetheless influence an issuer’s stock price, assuming such information is not equally understood by all investors.

SIFMA's primary concerns regarding daily reporting requirements are discussed below:

- **Front-Running.** The parties that would most benefit from the disclosures would be high-frequency traders that could gain an unfair advantage by potentially mining the data contained in the daily disclosures to front-run future orders and manipulate the underlying security price. Short-term, sophisticated, technical traders, rather than investors who focus on company fundamentals, would be able to take advantage of Form SR's non-aggregated trade data (including volumes and price) to develop algorithms that enable them to determine the undisclosed terms of a plan. These algorithms would provide them with information not available to investors without that capability, including retail investors.
- **Improper Market Signaling.** Requiring daily reporting of trades could make it immediately clear to the market when an issuer has suspended repurchase activity and may have MNPI that it is not yet prepared or required to disclose. Daily reporting could thus lead to unintended messaging to the market and spark unwanted speculation and market rumors if, for example, an issuer that has a regular cadence of share repurchase activity discloses share repurchases for several consecutive days or months and then suddenly stops. For example, acquisitive issuers with active share repurchase programs must continually evaluate the impact of potential strategic transactions on their ability to engage in repurchase activity. If required to report daily, a decision to suspend repurchases in open market transactions or pursuant to a trading plan could cause market speculation as to a potential transaction. Similarly, issuers that seek to access the capital markets must comply with, among other things, the "restricted period" under Regulation M of the Exchange Act and may cease purchases in advance of a proposed offering. The suspension of trading activities in these cases could lead to distortions and short-term dislocations in issuers' share prices.
- **Cost / Burden.** The requirement that Form SR be filed on a T+1 basis would significantly burden both large issuers, who are often in the market frequently, and smaller issuers and emerging growth companies, who may make less frequent purchases but for whom compliance costs weigh particularly heavily. Share repurchase activity is widespread among issuers of all sizes. SIFMA understands from feedback that there are over 500 companies that repurchase shares on an average trading day. Based on this number, SIFMA estimates that adoption of a daily reporting requirement could necessitate the preparation of 500 Form SRs each day, or 125,000 new filings per year. Any reporting, including the proposed Form SR, requires multiple individuals in an organization to devote time to gathering and verifying the information in the reports and often requires coordination or consultation with outside advisors. Daily reporting would be a substantial change from current reporting requirements applicable to issuers, with even the shortest of issuer reporting requirements consisting of four business days, in the case of Current

Reports on Form 8-K.¹⁶ Moreover, as discussed in more detail in Part IV below, a daily reporting requirement would result in duplicative costs and significantly increase administrative burdens on FPIs.

SIFMA respectfully submits that many of the policy and other reasons articulated by the Commission in the Share Repurchase Proposal do not support a change to daily reporting. For example, the Commission raises the concern that, because issuers are repurchasing their own securities, informational asymmetries may exist between issuers and investors with regard to the issuer and its future prospects.¹⁷ However, daily reporting of an issuer's trades does not eliminate any such informational asymmetries and, to the contrary, daily reporting could create confusion and speculation in the market about an issuer's future actions, as investors attempt to distill patterns or information about the future from historical stock-trading activity. Misuse of these information asymmetries by issuers in repurchasing shares is already addressed by the existing anti-fraud regime, with issuers prohibited from trading on the basis of MNPI. The Commission has also noted that more frequent, and in certain cases, daily, reporting was supported by "several commentators" in response to the Commission's 2016 Concept Release covering, among other things, the topic of issuer share repurchases.¹⁸ However, only two commentators — Americans for Financial Reform and two lawyers who jointly submitted a comment letter — actually supported more frequent reporting of all repurchases, while the rest of the commentators who addressed Item 703 did not.

Rather than daily reporting, SIFMA proposes monthly reporting of share repurchase activity, presented on an aggregated basis.

To address the concerns listed above while enhancing disclosure to investors, SIFMA would propose requiring reporting of repurchases on a monthly, aggregated basis, consistent with the current Item 703 of Regulation S-K. Monthly reporting would, in practice, allow for more informative data and greater and more effective public commentary and analysis of repurchase activity than would daily reporting. Monthly disclosure of aggregated data would facilitate review by a wider range of analysts, investors and journalists monitoring public company conduct as such aggregated disclosures would provide more material and accessible information than would a constant stream of daily or near-daily immaterial releases. Moreover, monthly disclosure would address the Commission's concern about the timeliness of information between reporting periods as it would accelerate the current quarterly requirement for issuers to make such disclosures. A monthly disclosure requirement would also be consistent with the current requirement to disclose repurchases for each month within a quarter.

If the Commission believes that it is important to have more accelerated disclosure of share repurchase authorizations, SIFMA would support prompt disclosure, on the same four-

¹⁶ We note that the four-business-day filing requirement was adopted by the Commission to implement the "real time" requirements of Section 409 of the Sarbanes-Oxley Act of 2002.

¹⁷ Repurchase Disclosure Modernization Proposing Release, 87 Fed. Reg. at 8445.

¹⁸ Repurchase Disclosure Modernization Proposing Release, 87 Fed. Reg. at 8456 n.92.

business-day time frame as filings on Form 8-K, of a share repurchase authorization, including the date and size of the authorization.

SIFMA also encourages the Commission to use the existing Item 703 regime for reporting share repurchases rather than create a new Form SR, and is generally supportive of the proposed amendments to Item 703 of Regulation S-K, subject to certain clarifications.

If the Commission adopts any accelerated reporting requirements, SIFMA urges the Commission to model these reporting requirements on Item 703, rather than a wholesale new reporting regime for issuers, as contemplated by proposed Form SR. Current reporting of repurchases under Item 703 is well understood by issuers, investors and analysts, and has been in place for almost two decades. SIFMA is unaware of any criticism of the operation of Item 703. Given the market acceptance of reporting under Item 703, SIFMA is further supportive of the Commission's goals to improve the quality of information related to issuer share repurchases as set forth in the proposed revisions to Item 703.

In connection with the proposed amendments to Item 703, SIFMA urges the Commission to clarify that, rather than specifying whether a purchase was made in "reliance on" the Rule 10b-18 safe harbor, issuers should only be required to disclose whether a purchase "was intended to comply" with such safe harbor, similar to the language in proposed Item 703(c)(2)(iii) relating to purchases intended to satisfy the conditions of the Rule 10b5-1 affirmative defense. Given the speed at which markets change, purchases intended to be made under Rule 10b-18, for example, may fall narrowly outside of the safe harbor without being manipulative. For instance, as previously noted by the Commission, "the increased speed of today's market activity, as evidenced by flickering quotes, has made it increasingly difficult for issuers to ensure that every purchase of its common stock during the day will meet [Rule 10b-18's] current price condition."¹⁹

Additionally, in connection with the proposed amendments to Item 703, the requirement for issuers to disclose "the process or criteria used to determine the amount of repurchases" could result in the disclosure of competitively sensitive or confidential capital management strategies. Disclosure of such processes or criteria may also enable sophisticated technical investors to discern the issuer's target pricing information, which would contribute to the possibility of front-running and market manipulation. In addition, disclosure of criteria, particularly to the extent that such criteria changes from quarter to quarter, could result in issuers having to disclose strategic information regarding M&A activity, capital expenditure plans and other matters that could be used by competitors. For these reasons, SIFMA recommends that the Commission remove the proposed amendment to Item 703 that would require issuers to disclose "the process or criteria used to determine the amount of repurchases."

SIFMA is also generally supportive of the proposed new Item 408 of Regulation S-K as it applies to issuers' trading plans, subject to certain clarifications.

¹⁹ See Purchases of Certain Equity Securities by the Issuer and Others, 75 Fed. Reg. 4713, 4714 (proposed Jan. 29, 2010).

SIFMA is supportive of enhanced disclosure regarding issuers' previously entered-into trading arrangements as set forth in the proposed new Item 408 of Regulation S-K, subject to certain limited comments:

- *Limit the proposed rule to Rule 10b5-1 plans for Agency Contracts.* SIFMA urges the Commission to limit the proposed Item 408 to Rule 10b5-1 plans, rather than all plans “whether or not intended to satisfy the affirmative defense conditions of Rule 10b5-1(c),” and to Agency Contracts. It is unclear what types of trading arrangements could be covered by the Commission’s reference to “other preplanned trading arrangement[s],”²⁰ and SIFMA is concerned that the breadth of the proposed rule — specifically, its coverage of all trading plans “whether or not intended to satisfy the affirmative defense conditions of Rule 10b5-1(c)” — could encompass an unnecessarily broad scope of trading activity, from open market purchases, to private trades that have an extended settlement period, to derivative securities, employee benefit plan arrangements and beyond. For example, would providing a verbal instruction to a broker to purchase shares under a market order be a preplanned arrangement that is prohibited if there is a Rule 10b5-1 plan in place? Or would a single private repurchase with a settlement period or other gap between signing and closing be considered a Rule 10b5-1 trading plan or a preplanned arrangement for this purpose? Or would providing multiple limit orders to a broker be considered a preplanned arrangement?

SIFMA understands the Commission’s concern that issuers might otherwise potentially seek to avoid the proposed disclosure requirement by structure trading arrangements that do not satisfy the conditions of Rule 10b5-1(c)(1). However, SIFMA respectfully reminds the Commission that any sort of repurchase activity will be disclosable under Item 703 of Regulation S-K and, accordingly, disclosure of such activity ultimately will occur.

If the Commission determines not to limit the proposed rule to Agency Contracts, the Commission should clarify how non-Agency Contracts should be disclosed and, in particular, confirm that non-Agency Contracts should continue to be disclosed in the same manner as under the current disclosure requirements of Item 703.

- *Clarify that material terms do not include pricing, volume or other details.* SIFMA also urges the Commission to clarify that the reference in the proposed rule to “provid[ing] a description of the material terms of the contract, instruction or written plan” is not intended to require exact pricing, volume or timing information or the prospective price levels or discrete quantities that may be purchased at a particular price level (*i.e.*, a “grid”). Disclosure of such information would raise certain of the same front-running and improper market signaling concerns discussed above in connection with Form SR.

²⁰ Rule 10b5-1 Proposing Release, 87 Fed. Reg. at 8712.

SIFMA also does not object to the annual disclosure of insider trading policies. However, if adopted, the final rule should clarify that a description of the material terms of an issuer's insider trading policies is sufficient and that the policies themselves do not need to be filed as exhibits.

Market practice outside of the United States illustrates some of the unintended and negative consequences for issuers and shareholders that can arise from requiring daily reporting of trades.

The Commission has noted that a limited number of foreign jurisdictions require next-day reporting of repurchase activity. In some of these markets, this disclosure obligation has had a powerful effect on shaping how issuers conduct buybacks. SIFMA understands that in some jurisdictions that require daily reporting, such as the United Kingdom, companies sometimes continue conducting repurchases in order to avoid sparking rumors of potential transactions by suddenly ceasing to file the required daily reports, even when repurchases on such terms may not be the right economic decision for shareholders. Similarly, in the United Kingdom, SIFMA understands that issuers try to avoid disclosing their trading strategy to sophisticated investors who monitor their daily filings by, for example, limiting their average daily trading volume (“ADTV”) to try to ensure that sophisticated investors view the daily trades as immaterial, even if the issuer believes that a larger ADTV would benefit its shareholders.

Lastly, SIFMA would highlight that, as the Commission has noted, issuers in jurisdictions that require daily reporting only file such reports on Form 6-K where the issuer deems those reports material to investors. Not all of these daily reports are filed on Form 6-K, however, which suggests that daily disclosure is not consistently material to investors. SIFMA believes that requiring that all issuers begin disclosing immaterial information to investors will impede necessary corporate action without protecting investors from the potential misuse of share repurchases that the Commission has identified.

IV. Foreign Private Issuers

SIFMA does not believe that all of the proposed amendments should apply to Foreign Private Issuers.

Under the proposed rules, FPIs would also be subject to annual disclosure of insider trading policies and procedures under new Item 16J of Form 20-F, similar to the proposed new Item 408 described above, and such disclosures would be subject to the officer certifications required by Section 302 of the Sarbanes Oxley Act of 2002.

In addition, the proposed rules on reporting and disclosure for share repurchases would also extend to foreign private issuers, who would be required to furnish the new Form SR and be subject to enhanced annual disclosure requirements for share repurchases under amended Item 16E of Form 20-F, similar to the proposed amended Item 703 described above.

Form SR: In particular, SIFMA urges the Commission to exempt FPIs from the proposed new requirement to furnish Form SR on the business day following the day on which an FPI executes a share repurchase. This filing requirement would be inconsistent with the Commission's historic treatment of FPIs with respect to share repurchases specifically and

disclosure obligations generally, and it is not necessary to ensure that U.S. investors access material information about FPIs' share repurchases.

Existing rules ensure that U.S. investors obtain via Form 20-F and Form 6-K the material information about FPIs' share repurchases that is necessary for them to make informed investment decisions. Under existing rules, FPIs make annual disclosures of share repurchases under Item 16E of Form 20-F. Many FPIs are also subject to additional home country disclosure requirements, including those subject to United Kingdom, European Union and Australian listing standards, and FPIs are required to disclose such information to U.S. investors promptly on a Form 6-K to the extent that information disclosed under these home country requirements is material to U.S. investors.

Requiring that FPIs additionally furnish a Form SR could be particularly burdensome, both in comparison to domestic U.S. issuers and in comparison to other FPI filing requirements. Unlike U.S. domestic issuers, some FPIs would be subject to two different share repurchase disclosure regimes, both in the United States and in their home markets. In addition, Form SR would also be the only form that FPIs would be required to file with the Commission within a one-business-day time frame.

Requiring FPIs to file a Form SR would also be a departure from the Commission's previous regulation of FPIs' share purchases, which has favored allowing FPIs' home countries to regulate how such purchases can be conducted and disclosed. In the context of share repurchases, allowing home country regulators to set disclosure standards is particularly important, given difference in market structure across jurisdictions. As the Commission noted in the Rule 10b-18 adopting release, that safe harbor was crafted based on the manner in which the securities markets operate in the United States, while FPIs were often subject to home country rules and disclosure requirements regarding issuer repurchase activity and often conducted share repurchases while benefiting from safe harbors available to them under the rules of their home country or other non-U.S. markets on which their shares trade.²¹ The points raised by the Commission in adopting Rule 10b-18 remain true today. Many FPIs are already subject to regulation designed to limit the risk of market manipulation and insider dealing and to disclosure requirements designed to elicit relevant material information in light of how a particular non-U.S. securities market operates. The proposed Form SR, by contrast, would enable FPIs to indicate only whether they have availed themselves of the Rule 10b-5 affirmative defense or Rule 10b-18 safe harbor, the latter of which was intentionally designed to limit its reach into the non-U.S. markets where most FPIs primarily trade. SIFMA would urge the Commission to retain its historic approach of permitting FPIs to comply with the more tailored disclosure requirements crafted by their home country regulators, and then continue providing any such material disclosure to U.S. investors on a Form 6-K.

At a minimum, the Commission should exempt from the requirement to file a Form SR any FPI already subject to requirements to disclose in its home country any share purchase that it would be otherwise required to file on a Form SR. In the event that the Commission

²¹ See *Purchases of Certain Equity Securities by the Issuer and Others; Adoption of Safe Harbor*, 47 Fed. Reg. 53,333 (proposed Nov. 26, 1982).

nevertheless determines to apply the Form SR requirement to FPIs, such obligation to furnish a Form SR should be expressly limited to disclosure of transactions executed in the United States.

Item 16E: SIFMA is broadly supportive of the proposed new disclosure requirements under Item 703 of Regulation S-K as would be implemented on Form 20-F, subject to the clarification, discussed above, that issuers should not be required to specify whether a purchase was made pursuant to the Rule 10b-18 safe harbor or a Rule 10b5-1 plan. As discussed above, the reference to Rule 10b-18 with respect to FPIs is particularly inapt.

Item 16J: SIFMA urges the Commission to exempt FPIs from the proposed new requirements regarding disclosure of registrants' insider trading policies and procedures. FPIs are already subject to home country corporate governance disclosure requirements. In addition, although structured as a requirement to disclose insider trading policies and procedures, SIFMA believes that this detailed disclosure requirement could ultimately function as an implicit requirement that FPIs adopt such policies, which would be inconsistent with the Commission's historical approach of permitting FPIs to follow home country corporate governance standards.

V. Transition Period

SIFMA urges the Commission to allow for a 12-month transition period before the rules take effect and to exclude from the scope of the final rules Rule 10b5-1 trading plans in effect as of the effective date of the final rules, and plans that are in effect as of the effective date and are amended, modified or terminated after the effective date.

SIFMA strongly urges the Commission to allow for at least a 12-month transition period before the final rules take effect. The proposed rules, if adopted, will require a number of changes to issuers' policies and procedures, as well as to internal reporting processes. In addition, issuers will need to reassess how they structure their share repurchases, which will involve discussion at the board of directors level, likely over multiple meetings. Issuers may also adopt new trading policies and procedures, which will need to be reviewed and approved by the board of directors. In addition, some of the proposed disclosure and process requirements will be time-consuming to implement and will likely require many issuers to allocate additional resources and establish new disclosure controls and procedures to cover the more frequent and thorough disclosure being required. Certain of the requirements would also impose Inline XBRL reporting on new kinds of disclosures, which would require that taxonomies be developed.

For these reasons, SIFMA urges the Commission to provide issuers with sufficient time to implement any required changes to their share buyback policies and practices, which may require substantial issuer resources, including, but not limited to, review by an issuer's board of directors. SIFMA believes that a transition period of 12 months should provide issuers sufficient time to implement any changes.

SIFMA also urges the Commission to exclude from the scope of the final rules those Rule 10b5-1 trading plans in effect as of the date of effectiveness of the final rules. Significant market disruption could be triggered if issuers are required to amend existing plans to comply with the final rules. This disruption would not only affect issuers' open market repurchase

programs, but also structured repurchase programs, many of which will have been in effect well in advance of the new rules' effective date.

Further, amendments, modifications and terminations of Rule 10b5-1 plans in effect as of the effective date should be excluded. Existing plans should be permitted to operate in accordance with both their terms and the law in effect at the time of adoption. SIFMA believes that it could create unnecessary market uncertainty if Rule 10b5-1 contracts in existence as of the effective date, in essence, had to comply with not only the law in effect at the time of adoption (the date on which they were drafted), but also a future law.

* * *

We appreciate the opportunity to comment on the Proposals. If you have any questions or comments, please contact Robert W. Reeder or Catherine M. Clarkin in Sullivan & Cromwell's New York office [REDACTED], or Sarah P. Payne in Sullivan & Cromwell LLP's Palo Alto office [REDACTED], or Joseph Corcoran at SIFMA [REDACTED].

Sincerely,

A handwritten signature in cursive script that reads "Joseph P. Corcoran".

Joseph Corcoran
Managing Director and Associate General Counsel
Securities Industry and Financial Markets Association

cc: Renee Jones, Director, Division of Corporation Finance
Felicia Kung, Office Chief, Office of Rulemaking, Division of Corporation Finance
Sean Harrison, Special Counsel, Division of Corporation Finance
Steven G. Hearne, Senior Special Counsel, Division of Corporation Finance