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April 1, 2022
VIA EMAIL/ELECTRONIC SUBMISSION

Securities and Exchange Commission
100 F Street, N. E.
Washington DC 20549-1090
Attn: Vanessa A. Countryman, Secretary

**Re: Rule 10b5-1 and Insider Trading
File Number S7-20-21**

Ladies and Gentlemen:

We appreciate the opportunity to comment on the Securities Exchange Commission's (the "Commission") proposed amendments to Rule 10b5-1(c) and related disclosure rules (the "Proposed Amendments"). We respectfully submit the following observations and recommendations regarding the Proposed Amendments, which we believe will improve them and will better focus on those changes and disclosure requirements that should be sufficient to effectively deter abuse.

1. General. The Commission has indicated that the Proposed Amendments are intended to address concerns about abuse of Rule 10b5-1(c) to opportunistically trade securities on the basis of material nonpublic information, in ways that harm investors and securities markets. Many of the Proposed Amendments are framed as responses to trades under 10b5-1 plans that were established by a person with material non-public information. However (and as discussed in the materials accompanying the Proposed Amendments), we note that Rule 10b5-1(c) already establishes, as a condition for the availability of the affirmative defense provided by the Rule, that the trading plan be adopted when the trader was not aware of material nonpublic information. Rather than impose blanket limits that could restrict appropriate (as well as inappropriate) activity under Rule 10b5-1 trading plans, we suggest that it would be better to increase specific disclosures to allow identification of problematic activity. We believe the Commission should adopt rules that allow the Commission and investors to detect potential abuses of the Rule 10b5-1(c), rather than unduly restrict persons who are in full compliance with both the letter and the intent of the current rules. While there have been recurring expressions of concern, often in academic articles, about possible gambits for abusing the safe harbor, it should not be overlooked that the availability of Rule 10b5-1 trading plans has been very helpful and valuable in providing a predictable path that allows executives and directors of public companies to sell shares they have earned in an orderly, orthodox, reliable fashion with reduced concern over possible unavailability of open trading windows in future periods, or fear of being accused in hindsight of insider trading.

2. Proposed Amendments to Rule 10b5-1(c).

A. Multiple Overlapping Plans. We acknowledge that there is potential for abuse in certain situations by use of multiple overlapping plans, such as where one plan contemplates purchases of securities while another contemplates sales of the same securities, and the insider subsequently cancels one (or more) of those plans when it becomes clear which would be more profitable. We question, however, how often that kind of activity occurs, and we believe the current rules already provide adequate bases for taking action to stop that kind of abuse. The affirmative defense under Rule 10b5-1(c)(i)(i) as it currently stands "is applicable only when the contract, instruction, or plan to purchase or sell securities was given or entered into in good faith and not as part of a plan or scheme to evade the prohibitions of



April 1, 2022
Page Two

this section.” And there are situations where adoption of multiple overlapping plans would not violate the intent of Rule 10b5-1(c). For example, an insider may have plans that cover separate blocks of stock options or other equity awards granted at different times and at different strike prices. Or a stockholder may have different brokers or financial advisors administering different trusts or holdings, with separate plans for each. We do not believe that there should be a prohibition against multiple plans that all involve either only sales or only purchases of securities. If a shareholder has adopted a 10b5-1 plan covering sales of a specified number of shares (say, over multiple quarters or years), there should be no concerns if the shareholder later adopts an additional plan (which would overlap with some portion of the period covered by the first plan) for sales of additional securities. Similarly, and particularly if amendments are adopted to require a significant cooling-off period before the first transaction under a trading plan, we do not see any issues or potential abuse if a shareholder adopts a new 10b5-1 plan prior to the expiration of an existing 10b5-1 plan, with the first transactions under the new plan to occur following expiration of the old plan. For many registrants, their insider trading policies permit insiders to adopt a new 10b5-1 plan only during an open trading window period, which significantly limits the timing opportunity to adopt such plan. The orderly, long-range planning and adoption of 10b5-1 plans by insiders should be encouraged, not discouraged, under the rules.

B. Cooling-Off Periods. In our experience, the insider trading policies of many, if not most, companies already require cooling-off periods. However, we do not believe that a rigid, 120-day cooling-off period for individuals is appropriate or strikes the right pragmatic balance. We suggest that a determination of appropriate cooling-off periods should take into consideration the periodic reporting and earnings announcement calendars of issuers, which are recurring, primary factors in terms of the existence of material (or potentially material) nonpublic information. Typically, trading windows open shortly following the announcement of periodic earnings. If the desire is to require that at least one earnings announcement occurs or one periodic report is filed subsequent to adoption of a trading plan and before transactions commence under that trading plan, a period of 120 days could easily far exceed that term. We suggest that a reasonable cooling-off period for individuals would be 30 days from adoption of the 10b5-1 plan. If the Commission believes that a longer period is absolutely required, the maximum mandated cooling off period should be until the expiration of two trading days following the next filing of a Form 10-Q or Form 10-K (or the earlier point in time when the issuer’s insider trading window is opened following the end of that financial reporting period; we see no principled reason why the rule should preclude trading under a 10b5-1 plan at a time when trading outside of a 10b5-1 plan would be permissible).¹

¹ In connection with consideration of a potential requirement for a cooling-off period, we suggest that the Commission also reconsider the position taken in Compliance and Disclosure Interpretation, Question 120.20 (included below). It should be permissible to adopt a trading plan at a time when the person adopting the plan is aware of particular non-public information (such as the not yet reported financial results for the current or just completed fiscal quarter) if the trading plan is structured to provide a waiting period that requires that that same information will have been publicly disclosed (or otherwise cease to be material non-public information) prior to any transaction under the trading plan.

[Question 120.20] **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. [Mar. 25, 2009]



April 1, 2022
Page Three

C. Modifications. We suggest that insignificant or administrative modifications, that do not alter the key economic terms of the pre-established trades, should not trigger the commencement of a new cooling-off period. For example, amending a 10b5-1 plan to substitute a different brokerage firm, with the same trading parameters continuing from the original plan, does not give rise to potential abuse. Similarly, other minor changes (such as revising addresses for notices) should not trigger a new cooling-off period. We believe a new cooling off period should only be required in the event of an amendment or modification to a 10b5-1 plan that changes the timing, trigger price(s), or volume of shares that would be purchased or sold.

D. Certifications. Our experience is that the standard 10b5-1 plan templates of brokerage firms, and the guidelines for 10b5-1 trading plan terms commonly included in insider trading policies, already require pre-clearance by a compliance officer and for insiders to represent (i) that they do not possess material nonpublic information and (ii) that they are adopting the plan in good faith and not as part of a plan or scheme to evade the prohibitions of Rule 10b5-1. Requiring separate certifications would essentially duplicate these existing provisions and increase administrative burdens. We do not believe certifications should be required unless the Commission reasonably believes that the process of providing these certifications would reinforce the understanding of insiders regarding the applicable requirements for establishing a 10b5-1 plan. But, in any event, it should be clear that failure to retain a copy of the certification (such as through inadvertent destruction) should not create additional liability.

E. Single Trade Provisions. We fail to see the potential abuse that would justify a restriction on use of single trade plans, and there can be legitimate reasons for such plans (such as to raise funds to pay taxes or college tuition, or for other large discrete obligations). We also respectfully suggest that this kind of restriction is artificial and easily circumvented. Similarly, if an insider intends to buy or sell a specified number of securities and establishes a Rule 10b5-1 plan with appropriate trading parameters, it does not appear abusive if the market prices and volumes result in the transaction being implemented in a single day. The proposed restriction applicable to single trade plans does not appear to provide any meaningful protection from abuse.

F. Operated in Good Faith. While we understand the intent of the Proposed Amendments, we believe the term "operated in good faith" is ambiguous and would subject insiders to uncertainty, and ultimately second-guessing with the benefit of hindsight, when implementing their 10b5-1 plans and fulfilling any duties as to the timing of corporate disclosures, a matter which already is subject to review under state corporation law. Alternatively, we suggest that the identified potential problems associated with traders who (i) cancel or modify plans to evade prohibitions or (ii) who use their influence to affect the timing of corporate disclosures in order to make a planned trade under a trading arrangement more profitable, or to avoid or reduce the loss, are better addressed as examples under current provisions that prohibit actions in bad faith or that are part of a plan or scheme to evade the prohibitions of the rule.

3. Additional Disclosures. Rather than imposing restrictions on the substantial majority of well-intentioned insiders who do not employ abusive practices contemplated by the Proposed Amendments, we believe that enhanced disclosure of policies and practices can provide information to allow investors and the Commission to identify such abuses. The Commission notes the benefit of such disclosure by observing that the enhanced information would allow investors to assess the extent to which directors, officers and registrants may be abusing Rule 10b5-1 by adopting or terminating trading arrangements during periods when aware of material public nonpublic information. In particular, the selective termination of trading plans appears to be a recurring source of concern for the Commission. We generally support the disclosure in proposed Item 408(a) of Regulation S-K, but we would suggest that the requirement be limited to plans that are intended to satisfy the requirements of Rule 10b5-1(c),



April 1, 2022
Page Four

and that the required description be limited to the date of adoption or termination of a plan. Our concern is that a requirement to disclose the “material terms” of the contract could be interpreted to require information regarding pricing grids or other information (such as the number of securities to be purchased or sold) that could trigger other potentially abusive practices by allowing other market participants to front run or take advantage of information contained in those disclosures to the detriment of other market participants.

4. Option Grant and Similar Equity Instrument Transaction Timing. In our experience, most registrants establish the date of compensation committee meetings far in advance of a meeting (frequently one or two years, or more) to ensure the availability of committee members. Our concern with the disclosure proposed by the addition of Regulation S-K Item 4.02(x) is the application of the material nonpublic information standard. There are many situations in which nonpublic information clearly is not material, and others in which nonpublic information clearly is material. However, between those poles there is a broad range of information – a “gray area” that under the proposed changes could demand difficult judgment calls by registrants. When faced with challenging determinations applicable to nonpublic information in this broad middle area, registrants can close their trading window to avoid the risk of insiders trading until the questionably material information becomes more certain and/or becomes public. It may be much more difficult to reach a conclusion that will drive whether information is included in a periodic report. Companies will be faced with a choice of providing over-inclusive disclosure (covering disclosure of information that could be material) or potentially omitting required information. Also, it is quite possible that changes in market value of shares during the period between the day before disclosure and the day after disclosure could be significantly influenced by other factors that create broad market changes. Registrants should be allowed to address the influence of these other factors and market changes in their disclosures, rather than create a potential presumption that a registrant's disclosure was the cause of the change in market value. Additionally, if a registrant was repurchasing shares under a previously established 10b5-1 plan, the coincidental repurchase transaction should not be a trigger for additional disclosure or negative implications if the repurchase is within 14 days of a compensation committee meeting scheduled long in advance.

We appreciate the opportunity to provide these comments and respectfully request that the Commission consider these points in developing final rules. We are happy to provide additional information or respond to questions if that would be helpful. Any questions should be directed to the undersigned or to Douglas J. Rein at [REDACTED].

Best regards,

DLA Piper LLP (US)

/s/ Brad Rock _____

Brad Rock
Partner
[REDACTED]

cc: Douglas J. Rein