March 30, 2022

Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090
Attention: Vanessa Countryman, Secretary

Re: File Number S7-21-21 (Share Repurchase Disclosure Modernization)
File Number S7-20-21 (Rule 10b5-1 and Insider Trading)

Dear Ms. Countryman:

The PNC Financial Services Group, Inc. appreciates the opportunity to provide the Securities and Exchange Commission with comments on the Commission's proposed rules (1) to enhance disclosure with respect to issuer repurchases of its own equity securities and (2) to strengthen the rules around Rule 10b5-1 contracts, instructions or plans (which we will refer to here as "10b5-1 arrangements"). We are commenting on both proposals in one letter as many of our comments relate to the use of 10b5-1 arrangements in the execution of issuer share repurchases.

PNC is a diversified financial services company with $558 billion in assets as of December 31, 2021. PNC's principal lines of business are retail banking (including residential mortgage), corporate and institutional banking and asset management. We provide many of our services nationally, and our retail branch network is located coast-to-coast. PNC also has strategic international offices in four countries outside the United States.

While we endorse much of what the Commission is seeking to accomplish with its proposed rules—indeed, with respect to the proposed Rule 10b5-1 enhancements, PNC has had for some time internal policies and procedures that are aligned conceptually with many of these proposals—we are concerned that some of the specific aspects of the proposed rules may have unintended or undesirable side effects that outweigh whatever benefits they offer.

We start with two broad principles. First, we believe that 10b5-1 arrangements can be an effective tool for issuer and executive trading, particularly for issuers and executives seeking to engage in multiple transactions over a period of time. While we recognize that there are ways, at least in theory, in which such plans can be used to abuse the protection the rule provides—and with some suggested modifications discussed below, we agree that the proposed enhancements are largely reasonable measures to make such abuses significantly harder to accomplish—we suggest that using 10b5-1 arrangements substantially reduces the risk of trading while in possession of material non-public information. This includes the risk of doing so inadvertently, such as when those charged with evaluating whether non-public information is material misjudge in good faith the materiality of such information. Although there seems generally to be more attention paid

to 10b5-1 arrangements utilized by issuer executives, these arrangements, from our perspective, can provide an effective way to manage an issuer share repurchase program, particularly those intended to execute multiple trades over a period of time. Among other things, the use of such arrangements can ameliorate any concern over the risk that blackout periods, especially those that arise other than in connection with scheduled earnings announcements and the like, might affect the ability to engage in repurchases that support legitimate corporate objectives.

Second, our view is that issuer share repurchases are not intrinsically a bad thing. In many cases, such transactions represent a prudent use of a company's capital. It is the issuer's board of directors' responsibility to manage capital holistically and to determine the extent to which it is held as protection against future setbacks, invested in the business, and returned to shareholders, either through dividends or repurchases.

In our experience, investors care deeply about these decisions over the long term and are entitled to sufficient actionable information about capital deployment to make their own investment and voting decisions. As a result, some regulation of issuer share repurchases, particularly through disclosure, is appropriate, and we do not generally object to the increased disclosure in the proposal.

Overall, while not disagreeing with the desirability of some additional regulation in these spaces generally along the lines proposed, we caution against adopting rules that discourage the use of 10b5-1 arrangements, particularly to achieve issuer share repurchase goals, by imposing undue burdens on their use or creating unnecessary risk from using them. Our comments fall into these categories: (1) the proposal for increased disclosure related to issuer share repurchases, (2) the proposed requirement to operate 10b5-1 arrangements in good faith, and (3) the proposed cooling-off periods for transactions under new 10b5-1 arrangements. Although focused on the interplay between issuer share repurchases and 10b5-1 arrangements, some of our comments will have implications for repurchases and 10b5-1 arrangements more broadly.

1. Increased disclosure related to issuer share repurchases is appropriate but should not extend to disclosure that would impair the ability to conduct repurchase programs in the best interests of issuers and their shareholders.

As noted above, we do not object to additional disclosure regarding issuer share repurchase programs that help investors understand better what the issuer is doing and why, including matters such as which safe harbors or other protective provisions, if any, were relied upon in making the purchases and the general principles used in determining that share repurchases were appropriate. That said, we are concerned that several aspects of the proposed rules could make it harder for issuers, particularly those utilizing 10b5-1 arrangements, to execute share repurchase programs effectively and efficiently in the best interests of the issuer and its shareholders, without any meaningful additional benefit to investors.

a. Daily reporting on Form SR will not provide sufficiently meaningful information to investors to overcome the negative impact on share repurchase programs; instead, delayed aggregated transaction information disclosure should be retained ideally on a quarterly basis as currently required.

Reporting of each day's purchases within a day or so thereafter may give too much information to the market, allowing market participants, in this case primarily professionals and not retail investors, to determine an issuer's trading strategy and themselves trade responsively and potentially abusively, including at the expense of long-term shareholders. This would likely make the issuer's program more expensive or less effective, to the detriment of the issuer and indirectly to those investors not sophisticated enough to identify and act on the issuer's strategy. We suggest still only requiring aggregate reporting of each month's repurchase activity, ideally quarterly as currently required.

We recognize that the extent of the risk of too much information will vary depending on the way an issuer conducts its share repurchases. An issuer that infrequently goes into the market may not have a strategy capable of being reverse engineered through an occasional Form SR filing. But an issuer that is in the market regularly, even daily, may suffer this risk. This is particularly true for issuers that avail themselves of the affirmative defense offered by Rule 10b5-1 to engage in regular repurchases over an extended period of time, perhaps fiscal quarters or longer. In such circumstances, the issuer's purchases are in essence on autopilot, utilizing instructions, with more or less complexity, that the broker can execute without instruction from the issuer. Such instructions will embody a trading strategy that will not change during the pendency of the plan, so that each day's trades will be based on the same instructions. Imagine a 10b5-1 arrangement that provided for daily purchases (perhaps with some form of a cap or floor) calculated using a sliding scale determined by the preceding day's closing price. Over time, a sophisticated investor, in possession of all of the disclosure proposed to be required, including that the issuer was using a 10b5-1 arrangement and thus that there was an essentially locked-in mechanical trading strategy, could use daily purchase information to estimate the instructions embedded in the 10b5-1 arrangement closely enough to use that information in making its own investment decisions. Having one or more larger investors anticipating the trades on a given day of a large buyer would likely distort the market, making the issuer's purchases more expensive and possibly making it harder for the issuer to achieve prudent capital management goals, all to the long-term detriment of the other shareholders not having reverse engineered the issuer's 10b5-1 arrangement. In some cases, being able to reverse engineer the instructions embedded in the 10b5-1 arrangement could allow an investor to determine, with greater apparent precision than offered by monthly average prices paid, the levels above which the issuer was unwilling to purchase its own stock. This could have the effect of setting an artificial ceiling on the stock price (if the issuer will not buy above some threshold, why should outside investors?). This risk would be compounded by the possibility that the market misunderstood the apparent ceiling, which might only reflect aspects of the issuer's capital management strategy rather than its view as to appropriate valuations for the stock.

On the other hand, we do not think that having individual daily purchase amounts will enhance an investor's ability to evaluate the quality of the issuer's management of its capital to any meaningful extent beyond what regular periodic reporting of the same

information in the aggregate would provide. For issuers repurchasing shares regularly, for example using a 10b5-1 arrangement, it will only be the aggregation of many relatively small purchases that will reveal the overall strategy and its execution. On the other hand, even for issuers repurchasing shares infrequently, perhaps in larger individual amounts, getting the information even a few months afterwards would seem to be adequate, particularly as one transaction by itself would not necessarily reveal the issuer's program in its entirety.

In the commentary accompanying the proposed rules, it is clear that one of the Commission's primary concerns underlying its proposal is the potential for abuses in issuer share repurchase programs and the desire to increase disclosure that might identify such abuses. Without addressing the extent to which abuses as described by the Commission are prevalent, we believe that monthly aggregated repurchase information reported on a quarterly basis would not be significantly less effective in deterring them.

One of the risks present in any purchase (or sale) by a person or entity having access to superior knowledge of internal information regarding an issuer is that the person or entity has material non-public information relevant to the purchase (or sale) decision. To some extent, having daily information regarding an issuer's repurchase transactions would facilitate identification of questionable transactions by allowing others to tie the timing of corporate news that affected the stock price to repurchases that benefitted from the news. Typically, this would be positive news moving the stock price up shortly after a repurchase transaction at a lower price. We note the following as to this risk. First, for those issuers using legitimately established 10b5-1 arrangements, the fact of repurchases closely preceding positive corporate news is irrelevant.

The question here is whether or not the issuer had non-public information when it entered into the 10b5-1 arrangement suggesting that the price was likely to be lower when the purchases under it were to be executed, not what it knew at the time of any specific purchase. Second, in many cases, the disclosure of an average price paid over time will help flag circumstances that deserve scrutiny. For example, assume an issuer whose price is generally trading in a range of $20 to $25 a share. It makes an announcement that the market responds to positively, pushing the price into the range of $30 to $35 a share. For the month including the announcement, the issuer discloses share repurchases at an average price of $32 a share. Presumptively, those repurchases substantially if not exclusively followed the announcement. On the other hand, share repurchases averaging $23 a share presumptively fell before the announcement and may deserve greater scrutiny. In many cases, if this effect is not seen, it will be because the share price movement was not all that significant, suggesting a market evaluation that the news or event was not particularly material.

The Commission notes, as another potential abuse, that some issuers may be repurchasing their stock with the goal of benefiting executives holding issuer stock, primarily by reducing the share count to increase the earnings per share and thus presumably the share price. In evaluating this risk of abuse, it is important to consider the value of share repurchase programs to shareholders broadly. All other things being equal, issuer share repurchases, whether prudent or abusive, will have a positive effect on share prices, at least

in the short term,[1] and, indeed, increasing the value of the stock for those shareholders not interested in selling at the current market price is often a worthy goal.

Whether a share repurchase program is prudent depends less on the extent to which it has this effect and more on what other uses of that capital are available to the issuer. A share repurchase program that is undertaken in the best interest of the issuer and its shareholders should not be discouraged merely because it happens to benefit management holding issuer shares.

With that foundation, we do not see daily disclosure as aiding investors in their evaluation whether issuer share repurchases are being made in the interest of the issuer and its shareholders or primarily in the interest of issuer management. Much of the impact of issuer share repurchase on share prices comes from the knowledge that there is an on-going program, in part as the market price for stock tends to represent a multiple of projected future earnings, which generally should reflect the anticipated impact of an on-going repurchase program. Here what is important is the timing and content of the announcement of the program itself and subsequent disclosure of the results of execution of the program, including, for longer-term programs, updates as to the how the program going forward may have been adjusted. To the extent that the market price does not fully reflect the anticipated reduction in share count and impact on total earnings, an individual day's repurchases, particularly if part of a program of regular purchases over time, will not affect reported EPS until that quarter's earnings are announced and are not likely to cause an immediate change in anticipated EPS.

Arguably, any issuer share repurchase program (or other corporate action) should not be viewed as abusive if it is in the best interests of the issuer and its shareholders taken broadly, without trying to parse everything that might have motivated the action. One of the reasons that many shareholders desire for management to own meaningful amounts of issuer stock is to align the interests of management with those of the shareholders—so that decisions that improve the value of the stock benefit both management and the entire shareholder base.

It is worth noting, as another risk presented by daily reporting, that issuers repurchasing daily or almost daily over an extended period of time without relying on the Rule 10b5-1 affirmative defense may inadvertently disclose the possession of material non-public information at a time when not otherwise required to disclose it and when it would be harmful to corporate interests to do so. As an example, assume an issuer without a 10b5-1 arrangement that has purchased daily other than during what are obviously earnings-related blackout periods. Under the proposal, the issuer's daily reporting would have established a market expectation for daily purchases (outside of earnings-related blackout periods). The issuer enters preliminary merger negotiations, and thereafter it deems these discussions to have crossed the line over into materiality. At this point, the issuer prudently ceases its

---

[1] All other things are not likely to be equal, and, as a result, not all share repurchase programs will have the same relative impact on share prices. Depending on the earning opportunities for the cash used for the repurchase, the increase to EPS may be greater or smaller (or even negative), and, depending on future capital deployment opportunities, both as realized and as anticipated by the market, the impact on the share price going forward also may be greater or smaller. As a result, a poorly conceived share repurchase program may not benefit the share price significantly and thus the executives holding issuer stock to any meaningful extent, if at all, even over the short term.

repurchase activity, which the market learns of within days due to the sudden cessation of its prior daily Form SR filings. Generally, at this point the issuer would not otherwise be obligated to disclose the ongoing negotiations, and it is common for premature disclosure of merger negotiations to be potentially detrimental to successful completion of a transaction. For the market, without explanation from the issuer, it would be a logical conclusion at this point that something material had happened, and, depending on what else is known about the issuer at the time, the market may surmise that the cause was a pending merger. Or the market might jump to an unwarranted and inaccurate conclusion as to the source. In either event, the resulting rumors and possible impacts on trading volumes and prices could cause harm to the issuer and its shareholders, including by imperiling a transaction that otherwise might be in the issuer's best interests or by introducing volatility in trading in its stock.

This type of risk is perhaps even higher for financial services companies such as PNC that are regulated by the Federal Reserve Board and other financial regulatory agencies. As such, PNC's share repurchase plans are affected by supervisory actions of those agencies. Those actions, possibly including direction to cease or substantially reduce repurchase activity, could include confidential supervisory information that PNC would be barred from disclosing. In such a circumstance, under the proposal, PNC's disclosures would, in effect, communicate the change in repurchase activity, but PNC would be prevented from explaining to the market the reasons why its reporting indicated a cessation or substantial reduction. This would be true even if the market is speculating that the change resulted from adverse regulatory issues but did not understand them or if the market assumes an entirely incorrect basis for the change in repurchase activity.

Thus, we suggest providing for disclosure of monthly aggregated repurchase information, as is currently required. We believe that this information, combined with the other enhanced disclosures in the proposed rules, would provide sufficient information for investors to evaluate an issuer's management of its capital, while not creating the risks, particularly those affecting issuers using 10b5-1 arrangements or otherwise in the market regularly, described above. Although some of the risks we describe are present in repurchase programs outside 10b5-1 arrangements, we think overall the risks are potentially more consequential for many 10b5-1 arrangements. Thus, as an alternative, if the Commission sees sufficient value in other circumstances to justify the daily reporting requirement, we urge the Commission to exempt trades taking advantage of Rule 10b5-1 from the daily reporting requirement and to allow periodic reporting of those repurchases on an aggregated monthly basis.

b. Requirement to disclose underlying objectives, rationales and policies and procedures should be tailored to avoid disclosure of specific details of trading strategies.

The proposal would require disclosure of the "objective or rationale for [an issuer's] share repurchases and process or criteria used to determine the amount of repurchases." Conceptually, we do not have a concern with this type of additional disclosure, but we encourage the Commission to clarify better what would be expected here. It would be undesirable, in our view, to expect issuers to provide details regarding how they make decisions as to the number of shares to be repurchased to the extent that investors could determine in advance how many shares an issuer is likely to seek to purchase on a given day or at a given market price. In particular, we do not think that issuers using 10b5-1

arrangements should be expected to disclose the purchase instructions provided the broker making the purchases. As with the risk that investors might be able to reverse engineer an issuer's repurchase strategy and trade accordingly, we think that required disclosure that allows investors (and again, likely to be the larger and more sophisticated investors, not smaller retail investors) to anticipate issuer purchases will not generally be in the best interests of the company and its shareholders as a whole. If the Commission adopts this requirement, we encourage it to provide guidance that would make it clear that the degree of detail required is not one that would result in detailed disclosure of strategy and tactics, but instead would provide a general understanding of why an issuer is repurchasing shares in the amounts covered by the program.

c. Any requirement to disclose policies and procedures relating to insider transactions should be limited to those that specifically address transactions during the pendency of issuer share repurchase programs; it should be made clear that there is no expectation that issuers should have such policies and procedures.

We have some concern regarding the proposal to require disclosure of any policies and procedures relating to purchases and sales of issuer securities by officers and directors during a repurchase program. In many cases, repurchase programs are designed to have a relatively long duration. In such cases, it would not be surprising if there was no additional issuer regulation of insider transactions while the program is on-going beyond the normal policies and procedures that apply to insider transactions in issuer securities. Unfortunately, such disclosure requirements are often seen as creating an expectation that well-managed companies should have such policies and procedures. In addition, issuers engaged in a long-term repurchase program that is potentially in the market daily or close to daily may feel obliged to disclose internal policies and procedures governing insider transactions that are not otherwise required to be disclosed. If the Commission feels that this disclosure could be useful, we suggest that it be made clear that it does not require disclosure of policies not directly related to the pendency of share repurchase programs and that this requirement does not embody any expectation that issuers, particularly those that elect to repurchase their shares on a regular, on-going basis, would have such policies and procedures.

d. Issuers should not be required to disclose transactions by insiders within the window around announcement of a repurchase plan or program that represent automatic sales to fund tax withholding.

Finally, the requirement to disclose whether or not any of an issuers' officers or directors have bought or sold with a short window surrounding announcement of an issuer plan or program is not by itself problematic (as such information should generally be determinable from insider Section 16 filings), but we suggest excluding from this disclosure automatic sales to fund tax withholding on share vesting to avoid the risk that the checked box would be provocative despite the fact that the underlying transaction would only reflect a decision made, in most cases, a year or more prior to the sale and a decision not typically made by the officer or director personally.

2. The proposed requirement to operate 10b5-1 arrangements in good faith should be reconsidered to avoid uncertain consequences that may inhibit the legitimate use of 10b5-1 arrangements.

The proposed rules would limit access to the affirmative defense offered under Rule 10b5-1 to those contracts, instructions and plans that are "operated in good faith" in addition to the existing requirement that they be given or entered into in good faith. The breadth of what might be deemed to be covered by this language is extensive and without further guidance could inhibit the legitimate use of 10b5-1 arrangements. The examples provided, while helpful on their face, present their own issues.

As an initial point, we think that the use of the word "operate" in this context is potentially confusing. An individual or issuer having established a 10b5-1 arrangement is generally limited in the ability to "operate" the arrangement thereafter (essentially only to terminate, or perhaps modify, the plan). As a result, there is also lack of clarity as to the scope of "operation" of a 10b5-1 arrangement. If there is some concept of operation of a 10b5-1 arrangement, does that imply an obligation under some circumstances affirmatively to terminate a plan if its continuation could raise questions? Or are there other things that one who has a 10b5-1 arrangement is supposed to be paying attention to in order to make sure that the arrangement is "operated" in good faith. Thus, if there are other examples of potentially non-good faith actions that those with 10b5-1 arrangements should be prevented from taking, they should be spelled out and not left to interpretations of vague and confusing language.

One of the Commission's examples of potential bad faith operation is the cancelation or modification of a 10b5-1 arrangement to "avoid the prohibitions of the rule." We understand the concern over the timing of cancelations or modifications of 10b5-1 arrangements—indeed PNC's longstanding policies and procedures address and limit such actions. That said, however, we think that care should be taken to avoid creating undue risk surrounding a potential cancelation that might deter some from entering into 10b5-1 arrangements, even where otherwise such an arrangement would be desirable by enabling the pursuit of legitimate trading activity while avoiding doing so when tainted by material non-public information. We will focus on issuer 10b5-1 arrangements, although similar points could be made regarding those for individuals.

An issuer might cancel a 10b5-1 arrangement for a number of reasons. First, the issuer might have suffered losses that made the continuation of the repurchase program imprudent, if not unlawful. For a capital-regulated entity such as a bank, that risk is greater than for most companies, and the flexibility to end a repurchase program needs to be retained, regardless of other circumstances. Second, the issuer might have an alternative use of its capital that made the discontinuation of its share repurchase program, such as a previously unanticipated acquisition opportunity. Neither circumstance should be seen as representing an issuer acting in bad faith—in both cases, the issuer is seeking to act prudently in the best interests of the company and its stakeholders. In the first circumstance, and potentially in the second one as well, the price of the issuer's stock is likely to fall upon announcement of the matter underlying the cessation of the share repurchases. This would create a risk that the issuer will be accused of terminating the 10b5-1 arrangement to avoid further purchases at an inflated price pending the public disclosure, which could be deemed to be in bad faith.

Third, the issuer might have terminated the 10b5-1 arrangement for exactly that reason, to avoid purchasing at prices that at the time seem excessive to the board of directors and management. This would seem to be a potentially abusive—not in good faith—action, at least to the extent based on knowledge not generally known to the public. But here, as well, we urge caution in creating an inference that such a step should cause the loss of the affirmative defense.

Any requirement that an issuer canceling a 10b5-1 arrangement justify its actions as being in good faith would penalize issuers using 10b5-1 arrangements as compared to issuers seeking to make regular repurchases without such an arrangement (and thus willingly giving up the ability to do so during information-driven blackout periods). Such issuers would have the same potential reasons for stopping purchases as those with 10b5-1 arrangements but would not face any scrutiny for making that decision, assuming all of their disclosure regarding their repurchase plans was compliant with legal requirements. There is no legal limitation on an issuer changing its mind regarding whether it desires to continue repurchasing its shares.

For several reasons, we do not think that the Commission's rules should affirmatively favor non-10b5-1 arrangement issuer share repurchases over those electing to use such arrangements. First, we think the risks of abuse under a 10b5-1 arrangement are substantially less than under a program where daily decisions are made as to the amount of repurchases. At present, under a 10b5-1 arrangement, the issuer needs to justify entering into the arrangement as being free from knowledge of material non-public information, but the trades thereafter are presumed to be untainted. A reasonable cooling-off period (discussed below) further supports that presumption. A program involving daily decisions regarding whether or not to purchase shares needs that justification for every trade made.

Second, a 10b5-1 arrangement creates the possibility of purchases on every trading day, while issuers seeking to repurchase their shares regularly without such an arrangement need to stop repurchasing for at least some period of time every quarter in anticipation of an earnings announcement when in possession of material non-public information. As a result, the 10b5-1 arrangement issuer would be able to spread its purchases over more trading days, with less impact on the trading market for its shares—less volatility and less upward pressure on the purchase days. Discouraging 10b5-1 arrangements in favor of programs outside the affirmative defense increases the possibility for disruption caused by issuer share repurchase programs, which we believe argues in favor of not doing so.

The other example provided by the Commission is the risk that corporate disclosures are timed to favor those with active 10b5-1 arrangements. We are concerned that efforts to avoid the risk that public disclosure might be deemed to benefit the issuer or a corporate insider with such an arrangement will itself be unduly cumbersome and even affect the process of deciding when to disclose information. Many internal constituencies—such as media relations, investor relations, legal, risk management, and finance—may have relevant views and input as to the appropriate timing of disclosure, all of which may not perfectly align given the different corporate interests for which these constituencies are responsible. To introduce a concern that an individual insider's or issuer's 10b5-1 arrangement might be affected by this decision would complicate an often already complex situation. It is also the case that not all of those involved in these decisions may be aware of all of the 10b5-1 arrangements, including those adopted by non-Section 16 filers, that

might be affected and likely do not know the terms of any of them. Overall, it is not clear how an issuer would monitor its processes to determine if a disclosure timing decision could be viewed as benefitting one or more 10b5-1 arrangements, and then, if it could be viewed that way, how it would confirm that the decision was not tainted by any desire on the part of those involved in making the decision to benefit those arrangements. To do so might, depending on how an issuer manages its 10b5-1 arrangements, require involving employees not otherwise part of the disclosure process but with access to information regarding extant 10b5-1 arrangements, with the effect that access to pre-disclosure market sensitive information might be expanded, commensurately expanding the risk of accidental or intentional abuse of that information.

The mere fact that a corporate disclosure benefited a 10b5-1 arrangement more at the time made rather than if made earlier or later should not by itself demonstrate a lack of good faith. But when this happens, it may be difficult to establish a clear rationale for choosing that timing versus alternatives that would deflect an accusation of bad faith. Imagine a circumstance where the legal department advises that disclosure of an event needs to be made by a certain date (perhaps due to a Form 8-K disclosure requirement) and investor relations would prefer to wait until the deadline as that aligns better with other investor outreach following the deadline. Media relations, on the other hand, would like to make public disclosure through a press release a day or so earlier due to external factors. In the end, the disclosure is accelerated in accordance with media relations' wishes, with any appropriate modifications to investor relations' outreach. If the earlier announcement causes the stock price to rise right before a scheduled sale under the chief executive officer's 10b5-1 arrangement, the issuer might have a hard time showing that the decision was made due to the greater interest of media relations in earlier disclosure than of investor relations in later disclosure rather than the interests of the CEO, who was required to sign off on the decision in any event. It would be even harder to evaluate this issue if disclosure on the earlier date would likely benefit the chief financial officer's 10b5-1 arrangement, while disclosure a day later would likely benefit that of the general counsel, each of whom was involved in the decision-making.

Given the complexities of determining whether or not disclosure is being timed to benefit one or more 10b5-1 arrangements, it would be reasonable for issuers in some cases to accelerate or delay disclosure from the time that would be optimal from an overall corporate strategy standpoint, factoring in all of the types of interests identified above, to avoid an inference that the timing was driven, at least in part, by the interests of 10b5-1 arrangements. This could be a greater risk with respect to issuer arrangements, as all corporate management should have at least some interest in the proper functioning of an issuer's share repurchase program, as opposed to individual insider 10b5-1 arrangements, which would generally be more of an individual concern.

Additionally, it is not clear what the consequences of failing to operate in good faith would be. Does it render all prior transactions outside the affirmative defense, so that trades that took place perhaps months or years in advance of the action that did not constitute good faith operation are now vulnerable to attack if completed while the issuer or individual with the 10b5-1 arrangement was unquestionably in possession of material non-public information? Does it render the specific bad faith action outside the affirmative defense, and, if so, what does that mean if the action is not a purchase or sale and thus would not

need the affirmative defense? Perhaps it applies to all future transactions under the 10b5-1 arrangement, but that too would be meaningless if the action was the cancelation of the arrangement, which is one of the examples provided, as there would be no further transactions under that arrangement.

As a result, we suggest that the Commission reconsider the proposed requirement that 10b5-1 arrangements be operated in good faith. We are not convinced that anything beyond what is already available to the Commission is required to regulate post-commencement conduct with respect to such arrangements. But if the Commission views cancelation of 10b5-1 arrangements as a meaningful risk, we suggest, instead of the proposed good faith operation requirement, adding a cooling off period before entering into a new replacement arrangement, which would function on top of the proposed waiting period for commencement of trades under a 10b5-1 arrangement. This would discourage purely opportunistic cancelations while still permitting those that are prudent, or even required, under then-present circumstances and would not require inquiry into motivations.

3. The cooling-off period for transactions under new 10b5-1 arrangements should be shorter, four weeks for individual arrangements and two weeks for issuer arrangements, but not ending during a quarterly earnings release blackout period.

PNC concurs that cooling-off periods before transactions can be executed under new or modified 10b5-1 arrangements are appropriate. Indeed, PNC has imposed such a requirement on its executives entering into 10b5-1 arrangements for more than a decade; as a practice, it has generally used them in its issuer share repurchase 10b5-1 arrangements as well. We think, however, that the length of the cooling-off periods proposed by the Commission are longer than is necessary to achieve the desired purpose and are likely to deter unduly the use of such arrangements.

We will discuss cooling-off periods by reference to new 10b5-1 arrangements, but these comments generally apply to modified ones as well, at least to the extent that the modification would have the effect of altering the timing and number of shares bought or sold under the arrangement.

We start our evaluation of the need for cooling-off periods recognizing that under existing Rule 10b5-1 one cannot enter into an effective 10b5-1 arrangement while in possession of material non-public information—regardless of whether there is a cooling-off period, and how long it lasts, before the first transaction—which thus already prohibits many of the abusive transactions the Commission is focused on. It is also the case that the existing regulation prohibits entering into a 10b5-1 arrangement other than in good faith, which would also cover some of the abuses to which the proposal is addressed. We do not dispute that some cooling-off period is beneficial in addressing these types of situations. The question for us is whether it is worth trying to eliminate entirely the risk of violations of the existing requirements through extensive cooling-off periods but with the result of making such arrangements difficult to work with for many of those who are, in fact, seeking to enter into them appropriately and in good faith.

For us, the value in cooling-off periods is not primarily the extent to which they prevent insiders and issuers from engaging in harmful or abusive behavior, although they do limit the ability to do so. And we acknowledge that, to the extent it makes this behavior harder,

a reasonable cooling-off period should comfort the market that insiders and issuers are not pushing the limits to take unfair advantage of their position. But, instead, we see significant value in having a cooling-off period through the comfort it provides to those entering into 10b5-1 arrangements in good faith with an intent to comply with the requirements of the rule. Frequently, information develops over time, with good faith evaluations of its materiality similarly evolving. Sometimes, even where information seems to have adequately developed, a good faith materiality evaluation may misjudge its materiality. Without a cooling-off period, there could be a trade within a relatively short period of time following entrance into the arrangement and then disclosure of material information shortly thereafter. If this timing benefits the trades, it may be easy to allege, and hard to refute, that the 10b5-1 arrangement was intended to capture the benefit of material information non-public at the time of the trade. This could be problematic even if the information, as then understood, was evaluated for materiality at the time of entrance into the 10b5-1 arrangement and determined to be immaterial.[2] A cooling-off period, by increasing the separation between the entrance into the arrangement and the trades, reduces this risk. Avoiding even the appearance of impropriety in this context not only benefits the insider or issuer with the 10b5-1 arrangement (and the issuer if the arrangement belongs to one of its insiders) but also the market as a whole by reducing the concern that those with special knowledge are taking unfair advantage of their position.

PNC agrees that it is appropriate to have a shorter time period for an issuer cooling-off period than for those applicable to insiders. A blanket 30-day period for issuer 10b5-1 arrangements is, in our view, however, longer than necessary to achieve the benefits. Having a longer than necessary cooling-off period may inhibit issuers from using them even if otherwise desirable and in their best interests.

Information that is material at one point in time in our experience only infrequently is still both material and non-public 30 days later. The one regular exception to this would be quarterly earnings results, where an issuer generally would have a reasonably good understanding of its results shortly after quarter's end when it closes its books and then not announce them for several weeks thereafter, with the timing varying by industry and issuer and potentially as much as a month or so later. In some cases, an issuer could have a relatively well-developed sense of its results late in the quarter even before the books are closed and procedures performed. Our suggestion is that the cooling-off period for issuers have two components—first, it needs to be for a minimum of two weeks, and, second, it cannot end during the period between the first day of a fiscal quarter and the day after earnings for the prior quarter are publicly announced (which, when combined with the two week minimum, means that an arrangement entered into two weeks before the end of a fiscal quarter would have a cooling-off period of a month or more, depending on the timing of that quarter's earnings announcement). This will provide a buffer for those situations involving non-public event-driven information while making it difficult for an issuer to purchase its shares in advance of an earnings announcement where it has substantive grounds for an expectation that the price will rise upon that announcement.

---

[2] If the best measure of the materiality of information is the response of investors upon it being made public, we note situations where information deemed by the issuer to be material had little to no effect on market prices and trading volumes upon its disclosure, while other information, deemed to be immaterial, had a discernible effect on prices or volumes or both when it was disclosed.

While, as noted above, we concur with a longer cooling-off period for insiders, many of the points made with respect to issuer 10b5-1 arrangements also apply to insider arrangements. It is difficult to imagine any information that would stay both material and non-public for as long as four months. Absent a pending non-public transaction or event of significance, most issuers would allow their insiders to trade shortly after release of earnings on the grounds that all material information regarding the issuer has been made public. To require an insider desiring to enter into a 10b5-1 arrangement rather than trading at that time, perhaps because she wants to engage in a series of diversification transactions over time, to wait until one month following the next earnings release seems excessive. And if the answer is that she should engage in a non-Rule 10b5-1 trade at the time and then enter into an arrangement that takes effect four months later, that suggests an acceptance that she is not in possession of material non-public information at the time and thus would not be abusing the affirmative defense of Rule 10b5-1.

With respect to other types of disclosure—announcements of major transactions or events that move the stock price—we do not believe that situations where an insider could reasonably anticipate such an announcement two to four months in the future and try to set up a trade shortly in advance of that announcement are anything other than extraordinarily rare. Many situations resolve themselves one way or the other in shorter time periods and result in earlier disclosure or lose their materiality. Otherwise, it can be hard to predict that far out whether the announcement will be perceived positively or negatively (or, for that matter, neutrally) by the market. Even the timing of the announcement can be hard to predict. It could even come earlier than the insider anticipates and negate the value of the scheduled trades under the 10b5-1 arrangement. In addition, the price provided by trades made two to four months in the future may be affected by things not anticipated at all at the time of entering into a 10b5-1 arrangement, including an intervening earnings announcement that is better or worse than was expected.

As a result, trying to game the system by entering into a 10b5-1 arrangement that trades more than a month or so out in expectation of public disclosure somewhat further in the future brings financial hazard to the insider that itself should discourage using such an arrangement for the purpose of capturing this particular information asymmetry.

We think that allowing insiders some opportunity to diversify their overall holdings is a good thing. As mentioned above, having meaningful issuer stock holdings provides positive incentives for management, helping align their interests with those of shareholders, but holding too much issuer stock as a portion of an insider's entire portfolio can distort incentives with possible negative consequences. As we have pointed out several times, we think that having access to the affirmative defenses of Rule 10b5-1 is a good thing. Utilizing 10b5-1 arrangements can promote orderly and planned trading in issuer stock, while removing some of the risks that the trades are being conducted inappropriately.

For all of these reasons, our view is that a cooling-off period for insiders of one month is adequate, with the addition of the restriction suggested for issuer 10b5-1 arrangements that prevents them from taking effect in a new quarter prior to announcement of the prior quarter's results.

We have one other point as a result of the proposed requirement for cooling-off periods. We suggest clarification of the proposal that insiders and issuers not be allowed

overlapping 10b5-1 arrangements. We do not object to that proposal, but we think that it should be permissible to enter into a new 10b5-1 arrangement during the pendency of another one, so long as the insider or issuer would otherwise be allowed to take advantage of Rule 10b5-1 at the time (for example, in good faith with no material non-public information and the first trade after expiration of the applicable cooling-off period) and the first trade under the new arrangement not taking place until after expiration of the existing plan in accordance with its terms. Otherwise, those insiders and issuers regularly utilizing 10b5-1 arrangements would need to be out of the market for possibly extended periods of time. In theory, they could fill the gaps with trades outside of such arrangements, increasing the risk of trading while aware of non-public information later deemed to have been material and being unable to trade at all when in corporate black-out periods. If the cooling-off period for insiders is four months, that could include two quarterly earnings black-out periods. Alternatively, they could enter into much longer-term arrangements, with some loss of flexibility to change periodically the trading strategy. We do not think that there is any downside in allowing an insider or issuer to enter into a new plan under such circumstances and strongly encourage the Commission to make it clear that the prohibition on overlapping plans does not apply to a new plan intended to take the place of an existing one upon its termination. We think this clarification is appropriate regardless of the length of the cooling-off periods but clearly more so for longer such periods.

* * *

Thank you for the opportunity to comment on these proposed rules. We would be pleased to discuss our comments with representatives of the Commission at their convenience. In addition, if there are any questions regarding this letter, please do not hesitate to contact the undersigned at 412-762-2594 or randall.king@pnc.com.

Sincerely,

Randall C. King
Treasurer