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March 31, 2022

Re: Request for Comment on Rule 10b5-1 and Insider Trading and Share Repurchase Disclosure Modernization, Release Nos. 33-11013, 34-93782 (File No. S7-20-21) and Release No. 34-93783 (File No. S7-21-21).

Ms. Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F. Street, N.E.
Washington, D.C. 20549-1090

Dear Ms. Countryman:

We appreciate the opportunity to submit this comment letter in response to the request by the Securities and Exchange Commission (the "Commission") for comments on its releases entitled "Rule 10b5-1 and Insider Trading," as published on January 13, 2022 (the "10b5-1 Release"), and "Share Repurchase Disclosure Modernization", as published on December 15, 2021 (the "Share Repurchase Release" and together with the 10b5-1 Release, the "Releases"). For the reasons described in detail below, we believe that certain provisions of the proposed rules contained in the Releases would impose significant burdens on issuers, with corresponding adverse impact on their shareholders, that outweigh any benefit to investors.

Share repurchase disclosure on Form SR

In our experience, public companies effecting open market share repurchases typically conduct such repurchases through programs that are already structured to comply with or otherwise track the conditions of Rule 10b-18, an existing rule that functions as a safe harbor for market manipulation assertions under Rule 10b-5 and Section 9(a)(2) of the Securities Exchange Act of 1934, as amended, and that contains strict limitations on timing, price and volume of repurchases. Due to the volume restrictions set forth in Rule 10b-18, companies are often in the market buying back securities at relatively small levels on a routine and even daily basis, including both during open "window periods" following the quarterly release of earnings and, through Rule 10b5-1 plans, during closed window periods as well. As a result of this dynamic, with issuers making repurchases of relatively small

amounts on a daily or near-daily basis throughout the year depending on market conditions in compliance with Rule 10b-18, we believe that the proposed new Form SR's daily filing and disclosure requirement, including the requirement that repurchases be reported on the same day that repurchases are made, will be both costly and administratively burdensome for issuers without providing meaningful information to investors.

We are additionally concerned that the daily reporting requirement of proposed Form SR will unintentionally harm companies that are frequently repurchasing shares in the market under Rule 10b5-1 and Rule 10b-18, as well as their retail and long-term investors, due to the fact that high volume professional traders, hedge funds and others may use a company's Form SR filings, or the absence thereof, to speculate regarding the possibility of a pending extraordinary transaction or the existence of other material non-public information ("MNPI"). For example, if an issuer is frequently making share repurchases and therefore making daily Form SR filings with the Commission, if the issuer temporarily curtails its repurchasing and fails to make Form SR filings, the lack of reporting could be interpreted as a signal, accurately or not, by market participants that the issuer is in possession of MNPI and thus spark speculative and disordered trading, ultimately harming retail and long-term investors. Daily Form SR filings also raise the potential for market participants to attempt to reverse engineer a company's standing repurchase instructions in an effort to profit by trading against them.

Although we agree with the Commission that information about equity securities an issuer has repurchased provides value to investors, we note that such information (aggregated on a monthly basis) is already required to be filed quarterly in a company's 10-K and 10-Q filings. To the extent that the Commission believes that more frequent reporting of this activity is desired, we believe it would be more appropriate to require issuers to make a Form SR filing on a monthly basis, providing aggregate monthly data rather than daily repurchase information, which is likely to be immaterial and potentially misleading. Alternatively, a filing triggered by certain repurchase thresholds (e.g., 2% of outstanding shares) may be more meaningful to investors than daily reports while also substantially decreasing the administrative burden on issuers. In either case, we would propose that such filing be required to be made within four business days of the end of the month (or trigger event), consistent with what is currently required for material events under Form 8-K.

Lastly, we recommend the Commission clarify the proposed Form SR rules with regards to how and when companies are required to report private (off-market) transactions. The Share Repurchase Release states that a trade would be required to be reported "after it is executed," which could be interpreted as the beginning or end of a transaction, since most accelerated share repurchases ("ASRs") are "fixed notional" where the number of shares to be purchased and the average price are finally determined at the end of the contract.

Amendment to Rule 10b5-1(c)(1) to add a condition of a minimum 30-day cooling-off period for issuers

Similarly, we believe the proposed amendments to Rule 10b5-1, imposing a 30-day cooling-off period before any share repurchases can commence under the trading arrangement after its adoption, are also problematic. Given the daily volume limitations

under Rule 10b-18 and the desire by issuers to maximize the number of shares repurchased, companies will typically engage in Rule 10b-18 repurchases during open window periods and separately put in place Rule 10b5-1 plans (also limited by Rule 10b-18 limits and typically without cooling-off periods) in order to commence repurchase activity starting on the first day of a closed window period and extending until the opening of the next quarterly window. Ideally, there are no gaps between the two methods.

Imposing a 30-day minimum cooling off period for Rule 10b5-1 issuer repurchase plans will make execution along these parameters difficult, if not impossible. First, most companies have limited open window periods during which they do not possess MNPI and share repurchases can be made. Typically, these window periods open one or two days after the announcement of earnings and close at some point (typically somewhere between two and four weeks) prior to the end of the current fiscal quarter. As a result, some companies routinely have open windows of less than thirty days per quarter. For these companies, a 30-day cooling off period will necessarily result in a gap between the open window Rule 10b-18 repurchases and the closed window Rule 10b5-1 repurchases, even if the issuer enters into the Rule 10b5-1 plan on the first day of the open trading window. Moreover, even for issuers that have open window periods of 30 days or more, imposing a mandatory 30-day cooling off period will require those companies to adopt Rule 10b5-1 plans promptly following their earnings release, rather than at the end of the window period. This will unnecessarily limit companies' flexibility to tailor plan formulas and volumes by taking into account repurchases made during the open window under Rule 10b-18 and more current trading prices, which may lead to inefficient or inaccurate plan instructions to the broker. We respectfully submit that there are already sufficient limitations in place via both Rule 10b-5 and Rule 10b-18 to sufficiently guard against the possibility that companies are violating federal securities laws in their share repurchase activities. We therefore urge the Commission to reconsider requiring any type of cooling off period as it relates to issuer repurchases.

To the extent that the Commission nonetheless elects to move forward with a cooling off period of some duration, we would separately recommend that ASRs and other similar privately negotiated transactions be explicitly excluded from the scope of any such cooling off requirement. These types of transactions are typically entered into during an open window period and already require an issuer to represent to the counterparty (typically a broker-dealer) that it is not in possession of MNPI at the time of entry into the transaction. However, settlement of these types of transactions often occur in a closed window period in reliance on Rule 10b5-1. Requiring a cooling-off period in this circumstance would materially impair how these types of transactions are typically executed, without providing investors with any commensurate benefit.

Amendment to Rule 10b5-1(c)(1) to add a condition of a minimum 120-day cooling-off period for directors and officers

While we understand the Commission's desire to reduce the risk of directors and officers benefiting from MNPI by proposing a minimum cooling-off period between the time that a Rule 10b5-1 plan is adopted or modified and when transactions can be executed under the plan, we believe that the proposed 120-day period is excessive and unnecessary.

A 120-day period would prevent trades from commencing for more than one full quarterly earnings cycle, which we believe would strongly discourage insiders from adopting 10b5-1 plans and therefore result in larger, more concentrated volumes of insider-directed sales taking place during open window periods rather than spread out over the duration of 10b5-1 plans, leading to increased market volatility.

Typically the time period from the end of an open window period to the next earnings release is approximately 45-60 days, depending on when the window period closes and when the company next announces earnings. Although insiders occasionally may possess MNPI that is not disclosed as part of quarterly reporting, in the vast majority of cases, once the issuer has released quarterly information, insiders are fully cleansed of MNPI and the company is able to open its window for them to trade or enter into a Rule 10b5-1 plan. As a result, in most cases, a 120-day cooling-off period would be far longer than necessary for insiders to be cleansed of MNPI, unnecessarily limiting insider transactions without providing a material benefit to investors. Therefore, while we believe that a cooling-off period of 30 days is sufficient and consistent with current best practices, to the extent that the Commission feels that a lengthier cooling-off period is required we would suggest a period of 60 days or, if shorter, until the next earnings release or periodic report, which would accomplish the same objectives without unnecessarily limiting the trading options available to directors and officers.

Amendment to Rule 10b5-1(c)(1) to restrict overlapping Rule 10b5-1 trading arrangements

While we understand the Commission's concern about insiders using overlapping trading plans in order to simulate hedges or otherwise attempt to exploit the protections offered by Rule 10b5-1, we believe that the scope of the proposed Rule 10b5-1(c)(1)(ii)(D) should be clarified and narrowed in certain ways as described below.

We believe that any prohibition on overlapping trading plans should exempt arrangements effected through Rule 10b5-1(c)(1) for the sale of securities by directors and employees in the open market to raise cash proceeds to meet tax obligations incurred upon the vesting of equity awards.. Many public company employees and directors rely on these so-called "sell-to-cover" arrangements to meet tax obligations triggered upon the vesting of certain equity awards. Unlike typical Rule 10b5-1 plans, securityholders generally have little control over the parameters of "sell-to-cover" arrangements. In a customary "sell-to-cover" arrangement, sales occur (i) as soon as practicable on or after the date on which vested securities are delivered by the company, (ii) at then-prevailing market prices, (iii) with the number of securities sold determined by the broker based on the amount of the tax obligation and net proceeds realized, and (iv) in the case of employees, proceeds remitted directly to the employer. As a result, "sell-to-cover" arrangements effected in accordance with Rule 10b5-1(c)(1) arrangements should present minimal risk of abuse because of the lack of securityholder influence over such sales.

In addition, we suggest that the proposed Rule 10b5-1(c)(1)(ii)(D) be revised to allow for the adoption of a new Rule 10b5-1 plan during the pendency of an existing plan so long as the new plan does not permit sales or purchases to be effected until the expiration

date of any plans in place at the time of the new plan's adoption. We suggest tying the earliest date on which trades can occur under the new plan to the expiration date of the existing plan in order to avoid strategic terminations intended to trigger the initiation of transactions under the new plan. This would prevent the adoption of plans with concurrent trading periods, thereby mitigating the risk of securityholders using concurrent plans to simulate hedges and decreasing the potential to benefit from strategic cancellations. At the same time it would allow mandatory cooling-off periods to run concurrently with active plans so that persons subject to such cooling-off periods who intend to continue trading would not be forced to repeatedly spend significant periods of time outside of a plan.

Disclosure of insider trading arrangements and policies in proposed new Regulation S-K Item 408(a)

We generally support the Commission's efforts to improve quarterly disclosure regarding whether issuers or any directors or officers may have used Rule 10b5-1 and other non-Rule 10b5-1 trading arrangements in the proposed new Item 408(a) of Regulation S-K.

We are concerned, however, that the proposals for Item 408(a)(2)(iii) and 408(a)(2)(iv), which would require the disclosure of the duration and size of plans, when combined with the Commission's other proposals to report completed transactions, would serve only to encourage market participants to attempt to draw conclusions about the formulas devised by officers and directors. These formulas are often driven by personal and idiosyncratic considerations such as such individuals' immediate liquidity needs, performance of other investments, risk tolerance, tax considerations, and retirement or estate planning goals. Attempts to derive hidden intelligence from insiders' transaction formulas could drive speculative and disordered trading, harming investors while also unfairly disadvantaging these insiders by allowing others to front-run their trades. We believe these considerations would likely discourage a number of insiders from adopting plans.

To the extent that the Commission nonetheless elects to move forward with disclosure under Item 408(a), we would recommend bifurcating the Item 408(a) disclosure requirements between issuers and directors or officers. Specifically, information relating to director and officer sales under Rule 10b5-1 plans should be presented under Item 408(a) while information relating to issuer plans should move to Item 703, which would consolidate issuer reporting on share repurchases generally.

Disclosure of insider trading policies and procedures in proposed new Regulation S-K Item 408(b)

We believe that the proposed new Item 408(b) of Regulation S-K, in particular the requirement that issuers annually disclose on Form 10-K whether they have adopted insider trading policies regarding trading by directors, officers and employees and, if they have done so, to disclose those policies and procedures, and if they have not done so, to explain why not, is unnecessary. First, a similar reporting regime currently exists: Item 406 of Regulation S-K requires a registrant to disclose whether it has adopted a code of ethics that applies to its principal executive officer, chief financial officer, and other appropriate executives and, if it has not adopted such a code, to state why it has not done so. In fact,

many issuers are required to maintain codes of ethics or conduct under exchange listing standards that are required to contain specific policies and restrictions that address compliance with laws, rules and regulations, including insider trading laws.[1] Further, it is unclear why disclosure of insider trading policies would enable investors to make better informed decisions about whether to invest in the company's shares and at what valuation, since officers and directors are already prohibited from trading when in possession of MNPI and are subject to civil and criminal penalties.

To the extent that the Commission nonetheless elects to move forward with disclosure under Item 408(b), we would recommend that the disclosure required be limited to a more general statement regarding the existence of such policies and procedures rather than specific disclosure of their details.

Disclosure of share repurchase policies and procedures in new Regulation S-K Item 703(c)(4)

We believe that the enhanced disclosure requirements contained in the proposed amendments to Item 703(c)(4) requiring issuers to report on policies and procedures relating to director and officer purchases and sales during a repurchase program are unnecessary. As the Commission points out in the Share Repurchase Release, the benefits of the disclosure of whether any officer or director has purchased or sold securities of the issuer around the repurchase announcement may be small to the extent the investors can obtain the same information from existing Section 16 beneficial ownership disclosures and public announcements of repurchases. The Commission also notes that the benefits of share repurchase policy and procedure disclosure may be more limited to the extent that past insider selling activity, disclosed on beneficial ownership filings, could be sufficiently representative of future insider selling behavior in such circumstances, even in the absence of a disclosure of restrictions.

To the extent that the Commission nonetheless elects to move forward with disclosure under Item 703(c)(4), we would separately recommend issuers only be required to report their policies and procedures annually. This change would be accomplished by moving the disclosure in 703(c)(4) to Item 408(b).

Disclosure regarding the timing of option grants and similar equity instruments shortly before or after the release of MNPI

While we appreciate the Commission's rationale for adopting the proposed new Item 402(x) of Regulation S-K insofar as it relates to providing annual proxy disclosure of compensation granted within the 14 days preceding a periodic report, we do not share that view as it relates to the provisions of Item 402(x) relating to compensation granted within 14 days following publication of a periodic report.

We believe grants of compensation awards within 14 days following a periodic report is not a problematic practice and, therefore, rulemaking in this area is unnecessary

[1] See NYSE Listed Company Manual Section 303A.10; Nasdaq Rule 5610.

and unduly burdensome. Companies routinely will disclose all MNPI in their periodic reports and related earnings releases, so if a stock award is granted after the release of that information, the market price for that company's securities should reflect all such information at the time of grant. Accordingly, we fail to see an issue with this practice or why incremental disclosure is necessary. We furthermore note that it is likely that board meeting processes will be impacted by the new rules, as compensation committees frequently meet and grant awards quarterly concurrently with board meetings and prior to the filing of a periodic report (Form 10-K or 10-Q) to decide on stock-based compensation.

We appreciate the opportunity to submit, and the Commission's consideration of, our comments. We would be pleased to discuss our comments with you or provide any additional information you would find useful. If you have any questions regarding this letter, please do not hesitate to contact Joseph H. Kaufman at 212-455-2948 or Kelli Schultz at 650-251-5148.

Very truly yours,

/s/ Joseph H. Kaufman

Joseph H. Kaufman