March 18, 2022

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

Re: Comments on Release Nos. 34–93783; IC–34440; File No. S7–21–21.

Dear Ms. Countryman:

Thank you for the opportunity to comment on the Securities and Exchange Commission's (the SEC or the Commission) proposed amendments "to modernize and improve disclosure about repurchases of an issuer's equity securities that are registered under the Securities Exchange Act of 1934" (the Exchange Act).[1] Thank you for referencing my petition for rulemaking at note 20 of the Release.[2] My comments are my own; I am not acting on behalf of any client or organization.

I commend the Commission for reviewing the existing issuer repurchase rules. Under almost any circumstances, it is wise for the Commission periodically to review its rules to ensure that they continue to achieve their purpose. Such reviews help ensure that the rules reflect changes in markets, technologies, and investor needs. The Commission's review under these circumstances is all the more important since many critics have expressed concerns about issuer repurchases.[3]

Notwithstanding this effort, I do not believe that the disclosure aspect of the Proposal will benefit investors and may cause more problems than it solves. Accordingly, I recommend that the Commission withdraw the Proposal. In addition, I do not believe that the Proposal will address the disclosure failure that I outlined in my rule petition. I urge the Commission to adopt my recommendation for improving disclosure of executive compensation. I explain my views below.

Proposed Form SR

The Commission is proposing new rules that would require issuers to make much more frequent and detailed disclosures of issuer repurchases. The Proposing Release notes:

[1] Release Nos. 34–93783; IC–34440; File No. S7–21–21, (Dec. 15, 2021): 87 FR 8443 (Feb. 18, 2022) (the Proposal or the Proposing Release).
[2] Rule Petition of Stuart J. Kaswell, to the Commission, April 21, 2021 (Kaswell Rule Petition).
[3] Proposing Release, at 8445.

> We are proposing new Exchange Act Rule 13a–21 and Form SR that would require an issuer, including a foreign private issuer and certain registered closed-end funds, to report any purchase made by or on behalf of the issuer or any affiliated purchaser of shares or other units of any class of the issuer's equity securities that is registered by the issuer pursuant to Exchange Act Section 12. The issuer would have to furnish a new Form SR before the end of the first business day following the day on which the issuer executes a share repurchase. The Form SR would require the following disclosure in tabular format, by date, for each class or series of securities:
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> > (1) Identification of the class of securities purchased;
> > (2) The total number of shares (or units) purchased, including all issuer repurchases whether or not made pursuant to publicly announced plans or programs;
> > (3) The average price paid per share (or unit);
> > (4) The aggregate total number of shares (or units) purchased on the open market;
> > (5) The aggregate total number of shares (or units) purchased in reliance on the safe harbor in 17 CFR 240.10b–18 (''Rule 10b–18''); and
> > (6) The aggregate total number of shares (or units) purchased pursuant to a plan that is intended to satisfy the affirmative defense conditions of Rule 10b5–1(c).[4]

The Proposing Release further explains:

> The data currently required to be disclosed under Item 703 [of Regulation S-K] does not provide daily detail about such repurchases. Information asymmetries may exist between issuers and affiliated purchasers and investors, particularly due to the timing of the current Item 703 disclosures. Because issuers are repurchasing their own securities, issuers and affiliated purchasers will typically have significantly more, and more detailed, information about the issuer and its future prospects. Proposed Form SR could provide investors with additional insight into the details of a share repurchase closer in time to the repurchase, which may diminish any informational asymmetry due to the timing of current Item 703 disclosure.[5]

I appreciate that the securities laws rely primarily on the principle of disclosure.[6] However, in some circumstances, immediate disclosure may not be in the best interests of investors. In the case of issuer repurchase transactions, nearly contemporaneous disclosure will cause more problems for investors, not less.

When it adopted Rule 10b-18, the Commission sought to minimize the market disruption that an issuer's repurchase activity might have on the price for its securities. In summarizing the rule in

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[4] Proposing Release at 8446. Citations omitted.
[5] *Id*.
[6] Louis Brandeis famously noted, "sunlight is said to be the best of disinfectants; electric light the most efficient policeman." Brandeis, Other People's Money, *Chapter V, What Publicity Can Do*, (1914).

2003, the Commission noted: "Rule 10b–18's safe harbor conditions are designed to minimize the market impact of the issuer's repurchases, thereby allowing the market to establish a security's price based on independent market forces without undue influence by the issuer."[7]

The 2003 Amendments refined the safe harbor to minimize the market impact of an issuer's purchases:

> The timing modifications are designed to reflect the relative liquidity of the security and, therefore, the likelihood of an issuer that is active in the market affecting the closing price. *** As adopted, the timing condition would work as follows: to qualify for the safe harbor, issuers of more liquid securities (*i.e.*, those having an ADTV value of $1 million or more and a public float value of $150 million or more), may not bid for or purchase their securities during the last ten minutes before the scheduled close of the primary trading session (*i.e.*, 9:30 a.m.– 4 p.m. price discovery session) in the principal market for the security, and during the last ten minutes before the scheduled close of the primary trading session in the market where the purchase is made. These modifications allow issuers of more actively traded securities, which are considered to be less susceptible to manipulation, to stay in the market longer. Issuers of all other eligible securities (i.e., those having an ADTV value of less than $1 million or a public float value of less than $150 million) may not bid for or purchase their securities during the last 30 minutes before the scheduled close of the primary trading session in the principal market for the security, and during the last 30 minutes before the scheduled close of the primary trading session in the market where the purchase is made.[8]

In 2003, the Commission also amended its disclosure rules to provide for a measured disclosure regime to minimize market impact:

> As adopted, Regulations S–K and S– B, and Forms 10–Q, 10–QSB, 10–K, 10–KSB, 20–F, and N–CSR are amended to require periodic disclosure of all issuer repurchases of shares or other units of any class of the issuer's ''equity securities'' that are registered by the issuer pursuant to Section 12 of the Exchange Act. In particular, an issuer is required to disclose information concerning its repurchases in a new table in Forms 10–Q/10–QSB (new Item 2(e)), 10–K/10–KSB (new Item 5(c)), 20– F, and, for registered closed-end funds, Form N–CSR (new Item 8).104 The table in Forms 10–K/10–KSB, 10–Q/10–QSB, and N–CSR includes disclosure of all issuer repurchases of its Section 12 registered equity securities (both open market and private transactions) for its last fiscal quarter (the fourth quarter, in the case of Forms 10–K/10K–SB), or in the case of closed-end funds, semiannual period, including the total number of shares (or units) purchased (reported on a monthly basis), the average price paid per share, the total number of shares (or units) purchased as part of a publicly announced repurchase plan or program, and the maximum number (or approximate dollar value) of shares (or units) that may

[7] Release 34–48766 (Nov. 10 2003); 68 FR 64952 (Nov. 17, 2003), at 64953 (2003 Release). In 2003, the Commission adopted some amendments to Rule 10b-18. This quotation summarizes the purpose of the rule.
[8] 2003 Release at 64937 (citations omitted).

> yet be purchased under the plans or programs. As stated above, the disclosure requirement is independent of the Rule 10b–18 safe harbor.[9]

These amendments require the issuers to make disclosures some time after their purchases. The delay wisely reduces the likelihood that such disclosures will affect the market price of the issuer's stock.

In summary, the Commission designed Rule 10b-18 to minimize the impact that an issuer's purchases have on the market for its shares. Further, the current disclosure requirements inform investors after the issuer has completed its purchases. As a consequence, there is very little likelihood that the issuer's repurchases will disrupt the market.

By contrast, frequent disclosure of repurchases, particularly from companies led by famous chief executive officers, could inflate artificially the price of such securities. The reaction of some to nearly contemporaneous news that the issuer is repurchasing its securities may cause some investors to buy the stock, when they otherwise wouldn't, or not to sell the stock, when they otherwise would. Such activity artificially might inflate the price of the stock, raising the cost of the repurchase to the remaining shareholders. In other words, proposed Form SR may create a "bubble" in the price of the issuer's stock.

The Commission's Economic Analysis does not identify specific investor harms that the current delayed disclosure system has caused. Indeed, the Proposal indicates that more frequent disclosure benefits investors is at best inconclusive or at worst non-existent.[10] As a result, the Proposal may cause a problem where none exists.[11]

Of course, the Proposing Release may elicit further evidence from commentators that validate the need for more frequent disclosure. In the absence of empirical evidence demonstrating that the current disclosure system penalizes investors, I respectfully urge the Commission to withdraw its proposed Form SR and accompanying rules.

Compensation Disclosure

I was disappointed to learn that the Proposal does not squarely address the question of whether an issuer's repurchase will trigger the payout of an executive compensation plan. In my rule petition, I observed:

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[9] *Id* at 64962.

[10] Proposing Release at 8456

[11] It is unlikely that the Proposal meets the standard in Section 3(f) of the Exchange Act, which provides:

> CONSIDERATION OF PROMOTION OF EFFICIENCY, COMPETITION, AND CAPITAL FORMATION. —Whenever pursuant to this title the Commission is engaged in rulemaking, or in the review of a rule of a self-regulatory organization, and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

> When reviewing executive compensation and issuer repurchase disclosures, it is difficult to determine whether an issuer repurchase program altered earnings or price per share, thereby triggering any executive compensation. SEC rules require issuers to explain the compensation plans in detail and to describe their repurchase programs. But there is no requirement that issuers explain any nexus between repurchases and executive compensation. Further, the author could not determine whether an issuer was reporting its [earnings per share (EPS)] before or after the repurchase programs and whether or how the repurchase affected the EPS calculation.[12]

I understand that Regulation S-K Item 402(a)(2) requires issuers to provide "clear, concise and understandable disclosure of all … compensation" paid to the identified executive officers and directors.[13] Further, Item 402(b)(1) requires an issuer to provide a discussion that explains "all material elements of the registrant's compensation of the named executive officers."[14]

Nonetheless, I do not believe that the current disclosure requirements provide investors with information as to whether an issuer's repurchase program triggered additional payouts to "persons covered." The Proposing Release discussed the concern that I raised in my rule petition:

> We believe that the additional information relating to share repurchases that we are proposing would help meet the goals of the rulemaking petition by better enabling investors to determine whether issuer repurchases trigger higher payments to senior executives under performance-based compensation plans, such as by altering earnings per share calculations.[15]

I disagree that it is sufficient for the Commission to require investors to figure out for themselves whether an issuer's repurchase plan triggered additional compensation. SEC rules should not require investors to make educated guesses about whether management is using a repurchase program to "game" that issuer's executive compensation program. This aspect of executive compensation is a clear example of when "sunlight is the best disinfectant," as noted above.[16]

Indeed, the existing instruction may discourage the type of disclosure that would help investors. Rule 402(d) Instruction 7 provides that:

> Options, SARs and similar option-like instruments granted in connection with a repricing transaction or other material modification shall be reported in this Table.

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[12] Kaswell Rule Petition, at 23. I acknowledge that I only surveyed a random selection of executive compensation disclosures. Accordingly, I appreciate that my survey may not have been representative. Nonetheless, the Proposing Release did not indicate that my choice of issuers was unfortunate and that issuers routinely provide such information.

[13] *See* definition of "persons covered" in Rule 402(a)(3).

[14] Although I agree with the approach of requiring issuers to provide "all material information," Regulation S-K does include many specific requirements. Moreover, in my view, the current requirements are not providing investors information about the effect that a repurchase may have on executive compensation.

[15] Proposing Release, at note 20.

[16] I am not suggesting that the Commission should ban issuer repurchase plans that trigger additional compensation for investors. Nonetheless, investors should not have search or guess as to whether a repurchase plan triggered higher compensation for senior executives.

> However, the disclosure required by this Table does not apply to any repricing that occurs through a pre-existing formula or mechanism in the plan or award that results in the periodic adjustment of the option or SAR exercise or base price, an antidilution provision in a plan or award, or a recapitalization or similar transaction equally affecting all holders of the class of securities underlying the options or SARs

This instruction may discourage issuers from disclosing whether a repurchase affects options-like instruments because it specifically exempts disclosure of "a recapitalization or similar transaction equally affecting all holders of the class of securities underlying the options or SARs." Why would an issuer voluntarily provide such information if the Commission provides a pass?

For these reasons, I request that at a minimum, the Commission delete Instruction 7 from Rule 402(d). I would prefer that the Commission add a provision requiring disclosure along the lines of the suggestion I made in my rule petition.[17]

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[17] As noted in my rule petition, I suggest the following ~~deletions~~ and *additions*:

> 7. Options, SARs and similar option-like instruments granted in connection with a repricing transaction or other material modification shall be reported in this Table. ~~However, the disclosure required by this Table does not apply to any repricing that occurs through a pre-existing formula or mechanism in the plan or award that results in the periodic adjustment of the option or SAR exercise or base price, an antidilution provision in a plan or award, or a recapitalization or similar transaction equally affecting all holders of the class of securities underlying the options or SARs.~~ *Explain any repricing that occurred to options, SARS, and similar-optionlike instruments. Such explanation shall include answers to the following questions:*
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> *i. Did the issuer (or its affiliate) undertake an issuer repurchase of securities that resulted in a change in the calculation of the issuer's earnings per share (or similar calculation)? and*
> *ii. Did such change in calculation cause the issuer to pay a different amount of compensation to the persons specified in Item 402(a)(3) than it otherwise would have, had the issuer (or its affiliate) not repurchased the securities?*
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> *If so, specify the repurchase transaction(s) and the resulting changes to compensation, including the amounts, however paid or allocated. If the answer to either of the prior questions is yes, identify the calculation and report the amount of earnings per share (or other calculation) before and after the issuer's repurchase and explain the reason for the adjustment*.
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> Kaswell Rule Petition, at 23.

Thank you for the opportunity to provide my views on the Proposal. I would be happy to meet with Members of the Commission or the Staff to discuss my suggestions in more detail.

Sincerely,

/s/

Stuart J. Kaswell, Esq.