March 29, 2022

VIA ELECTRONIC DELIVERY

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

Dear Ms. Countryman:

RE: **Proposed Rule, Share Repurchase Disclosure Modernization**, **Release Nos. 34-93783; IC-34440; File No. S7-21-21 (Dec. 15, 2021)**

Proposed Rule, Rule 10b5-1 and Insider Trading, Release No. 33-11013; 34-93782; File No. S7-20-21 (Dec. 15, 2021)

Virtu Financial, Inc. ("Virtu")[1] respectfully submits this letter in response to the above-referenced rule proposals issued by the Securities and Exchange Commission (the "SEC" or "Commission") on December 15, 2021. The first proposed rule would impose significant and burdensome disclosure requirements on issuers seeking to repurchase shares of their own stock (the "Share Repurchase Proposal").[2] The second proposal would introduce certain "good housekeeping" requirements aimed at targeting fraudulent behavior in 10b5-1 plans, which we support, but would also impose stringent new reporting and certification requirements for 10b5-1 plans and establish a more onerous liability framework for issuers and employees participating in such plans (the "10b5-1 Proposal").[3] We respectfully submit that certain aspects of both proposed rules represent unnecessary and unwarranted attempts by the Commission to insert itself into the management decisions of corporate issuers without demonstrating a need or a benefit to the market. Each proposal seeks to impose burdensome limitations and conditions on the discretion of issuers and management in making business decisions and in how companies compensate their employees

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[1] Virtu is a leading financial firm that leverages cutting edge technology to deliver liquidity to the global markets and innovative, transparent trading solutions to its clients. Virtu operates as a market maker across numerous exchanges in the U.S. and is a member of all U.S. registered stock exchanges. Virtu's market structure expertise, broad diversification, and execution technology enables it to provide competitive bids and offers in over 25,000 securities, at over 235 venues, in 36 countries worldwide. As such, Virtu broadly supports innovation and enhancements to transparency and fairness which enhance liquidity to the benefit of all marketplace participants.

[2] U.S. Securities and Exchange Commission, Proposed Rule, *Share Repurchase Disclosure Modernization*, Release Nos. 34-93783; IC-34440; File No. S7-21-21 (Dec. 15, 2021), *available at* https://www.sec.gov/rules/proposed/2021/34-93783.pdf.

[3] U.S. Securities and Exchange Commission, Proposed Rule, *Rule 10b5-1 and Insider Trading*, Release No. 33-11013; 34-93782; File No. S7-20-21 (Dec. 15, 2021), *available at* https://www.sec.gov/rules/proposed/2022/33-11013.pdf.

and are yet another example of indirect regulation of corporate activity through disclosure requirements.

At an even more fundamental level, the proposals fail to identify market failures related to share repurchases and employee stock ownership and sales programs that need to be addressed. Except for discrete components of the 10b5-1 Proposal aimed at preventing fraud, the proposals are a solution in search of a problem and needlessly add administrative hoops, all of which come at a cost. The Commission's economic analysis is deficient in that it fails to articulate a baseline of the potential harms that could flow from the existing regulatory framework, and lacks data sufficient to justify why imposing additional costs on issuers and employees to address these theoretical harms is warranted.

The Share Repurchase Proposal

Among other items, the Share Repurchase Proposal would require issuers to report share repurchases to the SEC within one day, with detailed information including the class of securities purchased, the total amount purchased, the average price paid, and the aggregate total amount purchased in reliance on the safe harbors under Rule 10b of the Exchange Act. The proposal would also require significant new public disclosure about an issuer's equity securities, including "the objective or rationale for the share repurchases and the process or criteria used to determine the repurchase amounts; any policies and procedures relating to purchases and sales of the issuer's securities by its officers and directors during a repurchase program, including any restriction on such transactions; and whether the issuer is making its repurchases pursuant to a plan that it intends to satisfy the affirmative defense conditions of Exchange Act Rule 10b5-1(c) and/or the conditions of the Exchange Act Rule 10b-18 non-exclusive safe harbor."[4]

We respectfully submit that the justification offered in the proposal for these enhanced disclosures is unpersuasive and unsupported. The purported objective of the proposal is to address information asymmetries between issuers and investors by imposing a burdensome disclosure regime aimed at preventing "opportunistic share repurchases" that may be designed to enhance executive compensation and insider stock value. Specifically, the Share Repurchase Proposal suggests that stock buybacks can be used as a form of earnings management, and that " [s]hare price- or EPS- tied compensation arrangements can thus incentivize executives to undertake repurchases, in an attempt to maximize their compensation, even if such repurchases are not optimal from the shareholder value maximization perspective."[5] Importantly, this line of argument ignores the fact that *all* shareholders – not just insiders – benefit from earnings-per-share accretion. And, in any case, information about whether an executive has EPS-linked compensation incentives and an issuer's share repurchase activity is already subject to mandatory public disclosure in a company's quarterly, annual, and proxy reports.

Notably, as Commissioner Roisman pointed out in his dissent, the SEC staff's own analysis fails to support the assertion that opportunistic buybacks are in fact a problem: "Although today's

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[4] *See* U.S. Securities and Exchange Commission, Press Release, *SEC Proposes New Share Repurchase Disclosure Rules* (Dec. 15, 2021), *available at* https://www.sec.gov/news/press-release/2021-257.
[5] *Supra* n. 2 at pp. 41-43.

proposal includes considerable discussion of this purported problem, it includes very little discussion of substantial contrary evidence. Relegated to a footnote in the release is the mention of a study conducted *by our own staff—less than one year ago!*—containing analysis and findings running counter to the release's premise about such a problem."[6] Specifically, the staff study referenced by Commissioner Roisman found that, of the 50 firms that repurchased the most stock in 2018 and 2019, "82% of the firms reviewed either did not have EPS-linked compensation targets or had EPS targets but their board considered the impact of repurchases when determining whether performance targets were met or in setting the targets."[7]

The real motivation behind the proposal is quite apparent – political grandstanding rather than a genuine effort to advance a policy goal through the securities laws to provide for greater participation in the fruits of economic activities – and share repurchases are a proven means of accomplishing that goal. For example, buying back shares is an efficient way for an issuer to return earnings to shareholders. Share repurchases are also a valuable tool in demonstrating management's confidence in the business and help to support the price of the issuer's securities. Repurchases also generate significant shareholder value by increasing shareholders' ownership percentage by reducing the total number of outstanding shares. Put another way, share repurchases concentrate shareholder value rather than diluting it.

Critics contend that share repurchases only serve to benefit issuers. But let us not forget who owns the issuers – shareholders with varying backgrounds and objectives. These shareholders include workers who participate in union pension plans, company pension and 401k plans, and traditionally underserved retail investors who are for the first time getting access to the capital markets through no account minimum, no fee, fractional share offerings. They are all shareholders too, and share buybacks allow them to participate in the fruits of an issuer's economic activities. In recent years, share repurchases have grown to be a political hot button issue, and this proposal is nothing more than an effort by the SEC to name and shame issuers to use surplus cash to fund stakeholder capitalism rather than maximize shareholder value. We reject the notion that regulators or legislators are better positioned than management to make decisions about how, where, and why to allocate an issuer's profits. The proposal is yet another example of the SEC trying to exert control of corporations to advance social policy agendas.

Furthermore, extensive regulatory guardrails are already in place that govern share repurchase programs. Issuers are currently subject to reporting obligations under Item 703 of Regulation S-K, as well as stringent conditions related to timing of repurchases, average daily volume limitations, and pricing restrictions to qualify for the safe harbor under Rule 10b-18. Share repurchase programs are generally subject to substantial scrutiny and approval by a company's board of directors.

Simply put, the Share Repurchase Proposal is a solution in search of a problem – a thinly veiled attempt by the Commission to micromanage the behavior of public company issuers to

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[6] *See* SEC Commissioner Elad Roisman, *Dissenting Statement on Buybacks Disclosure Proposal* (Dec. 15, 2021), *available at* https://www.sec.gov/news/statement/roisman-buybacks-20211215
[7] *See* SEC Commissioner Hester M. Peirce, *Dissenting Statement on Buybacks Disclosure Proposal* (Dec. 15, 2021), *available at* https://www.sec.gov/news/statement/peirce-buyback-20211215.

advance social policy goals. As Commissioner Peirce eloquently noted in her dissent, "Such an argument assumes that the politician, regulator, or academic making it is in a better position than management to assess corporate opportunities and determine appropriate levels of cash in company coffers. History is replete with examples of central planners allocating resources poorly, and I expect this experiment will end no better."[8]

The 10b5-1 Proposal

Among other items, the 10b5-1 Proposal would impose a 120-day "cooling off" period before individual plan participants could begin trading, prohibit overlapping trading plans, and impose limits on "single-trade plans". These proposed limitations appear to be narrowly tailored,[9] "good housekeeping" changes targeted at inappropriate behavior. Virtu is generally supportive of these aspects of the proposal, which are aimed at addressing potential abuses of Rule 10b5-1(c) trading arrangements.

However, the proposed amendments would also impose burdensome obligations on issuers with respect to their policies and procedures related to insider trading and their practices around the timing of options grants and the release of material nonpublic information. For example, the proposal would require 10b5-1 trading arrangements entered into by issuers to include a 30-day cooling-off period before any trading can commence under the trading arrangement after its adoption, including adoption of a modified trading arrangement. We question the aim and utility imposing such a requirement on issuers. As Commissioner Roisman pointed out, unlike individuals, issuers' "knowledge of material non-public information should be easier to ascertain. Companies typically have only specific windows during which they engage in open market transactions, specifically to ensure that they are not trading while in possession of material non-public information. Additionally, issuers must make determinations about whether share repurchases are appropriate—and if so, how many shares to buy and at what price—based on current information about how much cash the company has and what its anticipated uses for it are."[10]

For example, many issuers executing an authorized and disclosed share repurchase program aim to be consistently and reliably in the market buying shares in attempt to achieve something approximating a volume weighted average price ("VWAP") during the course of the authorization period. We understand it to be common practice for issuers to utilize 10b5-1 plans to maintain a steady rate of repurchase during restricted periods, by executing or extending 10b5-1 plans during open window periods following an earnings announcement. The introduction of mandatory cooling off period will force issuers to choose between being out of the market for approximately one third of every quarter and the resulting drift from VWAP, or else committing to longer term plans that span multiple quarters, without the ability to evaluate cash capacity on a

[8] *Id*.
[9] While we agree in concept with the policy goal behind imposing a cooling off period for individual plans, we respectfully submit that 120 days may be overly punitive to plan participants and that the same protections could be achieved with a shorter period – e.g. 45 or 60 days.
[10] *See* SEC Commissioner Elad Roisman, *Statement on the Proposed Rules Regarding 10b5-1 Plans* (Dec. 15, 2021), *available at* https://www.sec.gov/news/statement/roisman-10b5-1-20211215.

quarterly basis. In light of its potential to interfere with legitimate goals of a company's share repurchase program, we strongly agree with Commissioner Roisman's view that a "cooling-off period is more burdensome for an issuer than for an individual because it will make these considerations much more uncertain,"[11] and we urge the Commission to abandon this requirement.

The proposed amendments would also impose substantial new, additional disclosure requirements on issuers including, just to name a few: (i) recurring disclosure of whether or not the company has insider trading policies and procedures, and, if so, separate public disclosure of the trading policy; (ii) recurring disclosure of stock option grant policies and practices; (iii) recurring disclosure of the adoption, termination, and terms of Rule 10b5-1 plans arranged by directors, officers, and issuers; (iv) recurring disclosure of the adoption, termination, and terms of other pre-planned, "non-Rule 10b5-1" trading contracts, instructions, or plans arranged by directors, officers, and issuers; and (v) comprehensive disclosures related to grants of options in advance of the release of positive MNPI (i.e., "spring loading"). The proposed rules also would add significant recurring disclosure obligations – and corresponding costs and burdens – for companies regarding their Rule 10b5-1 plans. Like Commissioner Peirce, we question the need and rationale for the proposed disclosure requirements relating to insider trading policies and procedures.

The Commission's proposal does not make a persuasive case that this information is material, and we are concerned about the very significant costs of complying with a raft of compensation decisions. Most importantly, we are concerned about the chilling effect these obligations could have with respect to management.

Finally, the 10b5-1 Proposal includes an obligation that officers and directors certify that they comply with existing law. Specifically, the proposal requires certification to two elements which already must be satisfied in order for an officer or director to rely on the affirmative defense, so we question what purpose will be served by forcing officers and directors to make such certifications. It seems to us that the new certification obligation is nothing more than a stern "reminder" from the SEC to comply with existing regulations, and therefore would needlessly add costs and burdens to an already complicated regulatory regime. We also worry that this new obligation (specifically the "good faith" certification) sets an amorphous standard that could be second guessed by SEC examiners and enforcement staff. We respectfully submit that the existing obligations imposed on officers and directors entering into 10b5-1 plans are wholly adequate and requiring certifications is an inappropriate and unwarranted exercise of the Commission's discretion.

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[11] *Id*.

While Virtu strongly supports the goals of enhancing transparency, promoting shareholder rights, and protecting investors, we urge the Commission to take a balanced approach that also preserves the discretion of issuers to operate their businesses efficiently and for management to make decisions about the deployment of capital.

Unfortunately, the Commission's Share Repurchase Proposal and aspects of the 10b5-1 Proposal applicable to issuers represent paternalistic attempts by the agency to have a seat at the table in corporate management decision-making about capital management and employee compensation. They are inappropriate exercises of Commission authority and should be abandoned.

Respectfully submitted,

Douglas A. Cifu
Chief Executive Officer

cc: The Honorable Gary Gensler, Chair
The Honorable Hester M. Peirce, Commissioner
The Honorable Allison H. Lee, Commissioner
The Honorable Caroline A. Crenshaw, Commissioner
Ms. Renee M. Jones, Director, Division of Corporation Finance