



ICGN

International Corporate Governance Network
Inspiring good governance & stewardship

Vanessa A. Countryman, Secretary
100 F Street, NE
Securities and Exchange Commission
Washington, D.C. 20549-1090

Via email: rule-comments@sec.gov

March 31st, 2022

Dear Secretary Countryman,

Re: Release Nos. 34-93783; IC-34440; File No. S7-21-21 Share Repurchase Disclosure Modernization

The International Corporate Governance Network (ICGN) appreciates the opportunity to comment on the Securities and Exchange Commission's (SEC) proposal to modernise and improve disclosure about repurchases of an issuer's equity securities that are registered under Section 12 of the Securities and Exchange Act of 1934 (Exchange Act) (Proposed Rule).

Led by investors responsible for assets under management in excess of US\$59 trillion, ICGN is a leading authority on global standards of corporate governance and investor stewardship. Headquartered in London, our membership is based in more than 45 countries and includes companies, advisors and other stakeholders. ICGN offers an important international investor perspective on corporate governance and investor stewardship to help inform public policy development and the encouragement of good practices by capital market participants. For more information on the ICGN, please visit www.icgn.org.

ICGN has foundational documents that set forth guidance for boards and investors which guide our views on the Proposed Rule. The ICGN Global Governance Principles (GGP, Revised 2021) provide the basis primarily for boards of directors at publicly listed companies "around corporate governance issues that are most likely to influence investment decision-making. They are also relevant to non-listed companies which aspire to adopt high standards of corporate governance practice."¹ In addition, "the GGP are of relevance to a company's core financial stakeholders, which can include both bond holders and equity investors. While ownership of equity has provided the traditional investor focus on governance, increasingly, holders of debt securities also recognise the importance of good corporate governance to protect their fixed income investments."²

The ICGN Global Stewardship Principles (GSP, Revised 2020) are the foundational document for investors, setting out recommendations that are "intended to apply, with appropriate flexibility, to all investment styles and approaches. The Principles offer a comprehensive framework of key stewardship responsibilities and are capable of being applied in either developed or emerging markets." They can also be applied to other asset classes in addition to listed equities, such as fixed income investment and other arrangements.³

Share repurchases or stock buybacks have been an important topic at ICGN and are also the subject of public scrutiny in light of their potential abuses. This potential for abuse has been discussed in a past

¹ ICGN Global Governance Principles, [ICGN Global Governance Principles 2021.pdf](#), p. 5.

² ICGN Global Governance Principles, [ICGN Global Governance Principles 2021.pdf](#), p. 5.

³ ICGN Global Stewardship Principles, [ICGN Global Stewardship Principles 2020_1.pdf](#), p. 6.



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ICGN webinar on the governance considerations of buybacks and has been a consideration of a 2020 ICGN Viewpoint on Covid 19 and Capital Allocation. Further, our ICGN executive remuneration guidance opposes share repurchase plans that are established to primarily offset dilution from executive compensation.

To be clear, our policy documents and guidance support share repurchases as a valuable capital allocation tool if appropriately utilised; but our investor members have seen abuses. The Proposed Rule is welcomed and appears to be a constructive solution to protect against potential problems. The Proposed Rule enhances disclosures in appropriate ways to close information gaps and enhances periodic reporting to provide investors with better information to make investment decisions. Hence our overall reaction is positive.

However, we would observe that stock repurchases are simply one element of the broader capital allocation agenda. Looking at repurchases in isolation provides only a limited perspective for investors.

While it is good for the SEC to address share buybacks and related disclosures, we think it makes the most sense to do so with a broader awareness of how buybacks link with other critical elements of capital allocation including:

- Investment in organic growth
- Financing mergers and acquisitions (M&A)
- Re-paying debt/balance sheet management: balancing shareholder and creditor interests
- Paying dividends to shareholders
- Investing in strategic partnerships or establishing cross-shareholdings with other companies
- Executive incentive awards
- Returns on capital versus weighted average cost of capital (economic profitability)

In our view future SEC disclosure should seek to integrate the discussion of share buybacks with these issues so that investors can have a more holistic understanding of how buybacks relate to a broader capital allocation policy. ICGN addresses these disclosures in detail in its 2019 Viewpoint on the corporate governance dimensions of capital allocation.⁴

We answer the questions in line by number without restating the questions. ICGN offers the following comments on the Proposed Rule:

Review of Form SR

- 1. Should we adopt new Form SR to require daily repurchase disclosure, as proposed? Would less frequent disclosure of daily share repurchases (e.g., weekly, monthly, or quarterly disclosure) provide sufficiently timely information about issuer repurchases? Would less detailed disclosure (e.g., aggregated disclosure of repurchases on a weekly or monthly basis, rather than daily), that is furnished more frequently than under current Item 703, provide sufficiently useful disclosure? Instead of adopting Form SR, should we amend Form 8-K or another existing form to require daily repurchase disclosure?***

⁴ ICGN Viewpoint on the corporate governance dimensions of capital allocation, 2019: <https://www.icgn.org/sites/default/files/2021-05/2.%20ICGN%20Viewpoint%20on%20Capital%20Allocation.pdf>



We believe that the Commission should adopt new Form SR to require daily repurchase disclosure, as proposed. Less frequent reporting would not provide input on whether or not issuers stayed within the minimum daily trading requirement. Moreover, the company is the ultimate insider. Its trades should be made public sooner.

- 2. Should we instead require an issuer to disclose its share repurchase program and continue to report actual share repurchases on a periodic basis? If so, should we require the issuer to disclose its planned share repurchases at least 30 days prior to the first repurchase transaction? Would a different disclosure deadline be more appropriate? Should the disclosure specify the number of securities that may be purchased or any additional information? How would the burden of complying with such requirements compare with the burdens of complying with proposed Form SR? In reporting actual share repurchases under this approach, should we require the periodic disclosure to be broken out on a monthly basis, as currently required under Item 703 of Regulation S-K, Item 16E of Form 20-F, and Item 9 of Form N-CSR, or should we expand the disclosure to require a breakout of repurchase activity on a more frequent basis?***

Issuers should be required to disclose their share repurchase programs. Our materials even recommend that issuers get shareholder approval of such programs. The question posed suggests that this should be done instead of using Form SR. Form SR is the most elegant solution in that it at least directly solves the problem of reporting on the daily trading limits. There is a trade-off of burden and transparency. The existing trading patterns appear to show that the daily reporting may be necessary to curb the abuses of a few.

- 3. Should we amend issuers' exhibit filing requirements to require issuers to provide daily, weekly, or biweekly repurchase disclosure in an exhibit to the issuer's periodic reports? If so, should such an exhibit requirement be in lieu of or in addition to reporting on Form SR?***

Form SR represents well-crafted solution to a deep-seated problem and should be maintained. The exhibit requirement should be in addition to reporting on Form SR.

- 4. Should we require disclosure of executed share repurchase orders on Form SR, as proposed? Are there concerns that executed orders may fail to settle and that issuers would not be able to accurately disclose the shares purchased on the next business day? How frequently do executed orders fail to clear and settle? Should we base the requirement on something other than order execution? For example, should we require issuers to furnish Form SR within one business day after the order clears and settles and the issuer receives trade confirmation?***

Yes, the Commission should require disclosure on Form SR as proposed. Other markets get this done in a day. It is not clear why it could not be done in the US.



5. ***Should we require an issuer to furnish disclosure on Form SR within one business day of execution of a share repurchase order, as proposed? Would issuers have sufficient time to prepare and furnish such disclosure? If not, how long should an issuer have to furnish Form SR? How would a longer time period to furnish Form SR impact the costs associated with preparing the disclosures and the benefits to investors of more timely disclosure? Would a longer period compared to the proposal (e.g., two days, five days, ten days or more) still provide timely information about issuer repurchases? Would the proposed deadline for furnishing Form SR negatively impact issuers' ability to effectively conduct share repurchases, such as by increasing the price issuers may have to pay to repurchase their securities?***

Issuers will have to modify processes but can get it done and quite frankly should be able to get it done. As noted in the commentary to the Proposed Rule and above, other markets get it done. Furthermore, insiders report in two days.

6. ***As discussed above, proposed Form SR would require daily reporting of the total number of shares repurchased, the average price paid per share, issuer share repurchases on the open market, shares purchased in reliance on the safe harbor in Rule 10b-18, and shares purchased pursuant to a plan that is intended to satisfy the affirmative defense conditions of 19 Rule 10b5-1(c). Should we adopt these Form SR disclosure requirements, as proposed? Should we eliminate or modify any of these requirements? Should we add any disclosure requirements to Form SR, such as disclosure of the highest and lowest price paid per share for open market purchases or any other information?***

Yes, the Commission should adopt Form SR disclosure requirements as proposed.

7. ***Should we require issuers to furnish an amended Form SR to correct material changes to transactions previously reported on Form SR, as proposed? Alternatively, should we require all corrections to be made on an amended Form SR, regardless of materiality?***

All corrections should be made on an amended Form SR. Form SR is used to monitor daily trading. Adding a materiality requirement confuses what changes will need to be made. Daily trading for any issuer may not be material using some rubrics that focus on the quantum, however it would be material if an issuer surpasses the daily trading limit routinely. In other words, an issuer could report a standard number below the daily trading limit requirement and not correct it because it will never be material when it has daily trades well above the daily limit. Form SR should present the correct information. If an issuer notes that the information is incorrect, the issuer should correct the information.

8. ***We have proposed that foreign private issuers would have the same Form SR filing obligations as domestic issuers. Should we exempt all foreign private issuers from the requirement to file a Form SR or provide different requirements? We note that some foreign private issuers are required to provide daily detailed disclosure in their home jurisdictions. To the extent these issuers file public reports pursuant to their home country requirements with respect to share repurchases, some also file those reports***



under Form 6-K where the issuer deems those reports material to investors. Should we exempt these foreign private issuers from the Form SR requirement?

Foreign private issuers should have the same Form SR filing obligations.

- 9. Should we exempt or provide different requirements for registered closed-end funds from the Form SR requirements? Those funds already provide share repurchase disclosure less frequently than most other issuers subject to the disclosure requirement in that they disclose the information semi-annually rather than quarterly. Would less frequent disclosure continue to be appropriate for these issuers or, conversely, would investors benefit from the more frequent disclosure on Form SR? Alternatively, because the proposal would only apply to issuers with securities registered pursuant to Section 12 of the Exchange Act, it would only apply to those registered closed-end funds with securities that trade on an exchange. Should we expand the scope of covered registered closed-end funds to more closely match the scope of corporate issuers subject to repurchase disclosure requirements by applying the requirements to registered closed-end funds that would be subject to Section 12(g) of the Exchange Act but for Section 12(g)(2)(B) (15 U.S.C. 78l(g)(2)(B)), which exempts them from the requirement to register their securities under that section unless they are listed on an exchange?***

Investors would benefit from more frequent disclosures by registered closed-end funds.

- 10. We have observed that smaller issuers generally conduct fewer issuer share repurchases, but that smaller issuers tend to trade in less liquid markets where share repurchases may have more pronounced impacts. Should we consider an exemption from the proposed Form SR reporting requirement for non-accelerated filers, smaller reporting companies, or emerging growth companies?***

There should be no exemption for smaller issuers. Share repurchases may have a more pronounced impact and therefore becomes even more important for investors. In other words, manipulation is easier in smaller companies. The safe harbor is supposed to protect against such abuses. The question seems interesting in that relief would be given in the area that may be impacted most by issuer trades in its own stock.

- 11. Should we provide a de minimis exception to the Form SR reporting requirement for share repurchases that are below a certain level? Should any such threshold be based on a dollar threshold, share number, a percentage of public float, or another metric? If so, what level would be appropriate and why?***

There should be no *de minimis* exception. All repurchases should be disclosed. It is a matter of fairness.

- 12. Should we require that Form SR be furnished, as proposed? Alternatively, should we require the form to be filed? Should a late or missing Form SR filing affect an issuer's Form S-3 eligibility or eligibility to file a short-form registration statement on Form N-2? Alternatively, would extending the timeframe for providing Form SR (e.g., to one day after settlement, or two or more business days after order execution) alleviate concerns such***



that we should require the Form SR to be filed rather than furnished? As proposed, Form SR would be furnished to the Commission, but the Item 703 disclosure would be filed as part of the periodic report. Should repurchase information in the Form SR be subject to different liability than disclosure in issuer periodic reports?

The Commission's approach to have Form SR furnished given the nature of the daily reports and continue to have Item 703 filed appears to be appropriate. There is a difference in potential liability, but it is more academic than practical. Again, the Commission appears to have settled in an elegant space where shareholders will get the information requirements met without placing an outsized burden in a daily report.

Amendments to Other Reports

13. Many issuers voluntarily choose to announce their share repurchase plans or programs publicly. Item 703 currently requires disclosure of the date each plan or program was announced if the issuer did publicly announce it. Should we clarify what constitutes an announcement for purposes of the disclosure requirement? For example, should the announcement have to have been made in a Form 8-K, another existing form, or press release? Should we require all open market share repurchase plans to be publicly announced?

The Commission should require each issuer to announce its share repurchase program publicly. Form 8-K provides an excellent vehicle for such announcement. In the alternative, the issuer could explain why there is no need to announce a plan where it will be purchasing its own shares publicly.

14. We have proposed requiring issuers to indicate via the proposed checkbox if any officer or director reporting pursuant to Section 16(a) of the Exchange Act purchased or sold the issuer's equity securities that are the subject of an issuer share repurchase plan or program within 10 business days before or after any announcement of an issuer purchase plan or program. How would investors use this information? Would the proposed requirement discourage issuers from publicly announcing plans or programs? Is there other information in combination with, or instead of, this disclosure that could notify investors and help them process information regarding officer and director transactions made close in time to the issuer's share repurchase plan announcement? If an issuer doesn't publicly announce its repurchase plan, should the issuer be required to check the box if there are officer or director transactions within a certain time from the initiation of the repurchase plan or program (for example, within 10 business days of initiation)?

Issuers should provide details regarding officer and director purchases. Our materials are most critical of share repurchase programs that are primarily used to fund executive and director compensation. Additional disclosure is needed in this area to clarify that share repurchase programs are operating for the benefit of the long-term interests of the issuer, apart from facilitating paying executives and directors.



15. Is a 10-business-day period before or after the announcement an appropriate window for the proposed indication about officer and director transactions? Would a shorter or longer period provide more appropriate notice to investors and cover a sufficient time period where an insider may be most likely to trade in relation to the issuer's announcement of a share repurchase plan? Should we add a proposed checkbox to Form SR, in lieu of or in addition to Item 703, Form 20-F, and Form N-CSR?

A ten business-day period before and after would be an appropriate timeframe.

16. Issuers would need to rely on representations from, or Section 16 reports filed by, their officers and directors to indicate whether any officer or director has purchased or sold the issuer's securities in the relevant time period. Should we provide guidance about the issuer's scope of inquiry and explain what an issuer may rely on for purposes of complying with the checkbox requirement?

The issuer has more control of the requirement than the question suggests. Investors and others can compare Section 16 reports to issuer trading activity to verify, so it is clear that the issuer can do at least that. It can employ any additional mechanism, but there is no need to require one. Investors will use the publicly available reports to verify.

17. Should we require issuers to describe the objective or rationale for their share repurchases and process or criteria used to determine the amount of repurchases, as proposed? How would investors use this information? Should we also require information regarding how share repurchases are financed or their anticipated or actual impact on leverage ratios or the cost of capital? Should we ask issuers to disclose if they specifically considered other uses for the funds being used for the share repurchase? Is there additional disclosure regarding the reasons for, or expected effects of a share repurchase plan that should be required? Would this proposed requirement result in boilerplate disclosure?

Issuers should communicate the objective and rationale for the share repurchases as well as how the repurchases are funded. This may lead to boilerplate disclosures, but even boilerplate disclosures will provide investors more information than they get currently. The issuer must comply with the boilerplate. It will likely become a point of engagement, and shareholders will be able to inquire about allocation decisions or provide praise if warranted.

18. Proposed Item 703 and proposed Form SR would require issuers to disclose whether repurchases were made pursuant to a plan that is intended to satisfy the affirmative defense conditions of Rule 10b5-1(c). Does the proposal require an appropriate level of detail regarding Rule 10b5-1 plans? Should this disclosure additionally contemplate repurchases made pursuant to "other pre-arranged trading plans" that issuers may seek to rely on in lieu of Rule 10b5-1 plans? How should we define "other pre-arranged trading plans" in this circumstance? How would investors use information regarding these plans?

Proposed Item 703 should require issuers to disclose whether repurchases were made pursuant to a plan that is intended to satisfy the affirmative defense conditions of Rule 10b5-1(c). Any pre-arranged



trading program should be appropriate to the intent of the safe harbor, avoiding manipulation. We would be critical of a share repurchase program focused primarily on paying executives. However, we are not trying to create problems for issuers that are acting appropriately. It would be best if repurchases could be separated from executive compensation in a way that is credible. Currently, it is unclear how an issuer can buy its shares for value and executives can simultaneously sell at value. There should be few routes to avoidance.

19. Proposed Item 703, and proposed Form SR would require disclosure of whether shares were purchased in reliance on the safe harbor in Rule 10b-18. How would investors use this information? Is the use of the term “purchased in reliance on the safe harbor” sufficiently clear?

Proposed Item 703, and the proposed form SR should include the requirement that the issuer is using the safe harbor. Otherwise, trading in its own shares should be prohibited. On one level, it is stating the obvious, but it is a small requirement that allows the continued use of share repurchases that were once considered to be stock manipulation, period.

20. How would investors use the proposed disclosure regarding 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? Should we require disclosure of broader policies and procedures related to a repurchase program, for example, how material nonpublic information is controlled for or potential impacts, if any, on executive compensation metrics? Is there additional information about repurchase plans and trading by insiders that we should require to be disclosed?

Investors review allocation decisions. Getting information on this important allocation decision provides investors with decision useful information that will be used in engagements, voting and in making allocation decisions.

21. In this release, we are proposing amendments to require an issuer to disclose whether it repurchased its securities pursuant to a Rule 10b5-1 plan, and if so, the date that such a plan was adopted or terminated. We also are proposing amendments to Item 703 to require disclosure of any policies and procedures the issuer has established relating to purchases and sales of its securities by its officers and directors, including any restriction on such transactions. In a separate release described in note 21 above, we are proposing new Item 408 under Regulation S-K and corresponding amendments to Forms 10-Q and 10-K to require: (1) quarterly disclosure of the use of Rule 10b5-1 and other trading arrangements by a registrant, and its directors and officers, for the trading of the issuer’s securities; and (2) annual disclosure of an issuer’s insider trading policies and procedures. If the Commission adopts both the proposed Item 703 and Item 408 amendments, are there opportunities to streamline or simplify overlapping disclosure requirements that may apply to an issuer’s repurchase plan? If so, which provisions should we eliminate or how should we modify the proposed disclosure requirements?

We support the amendments to require an issuer to disclose whether it repurchased its securities pursuant to a Rule 10b5-1 plan. We support the Commission adopting both the Item 703 and the Item 408 amendments. We have identified no provisions that should be streamlined and are comfortable



with some overlap. In fact, it is necessary. The impacted parties are in a good position to coordinate compliance.

22. As proposed, disclosure of issuer share repurchases would be required on a daily basis on Form SR. In addition, Item 703 would continue to require monthly summary disclosure of share repurchases that would be similar to, but not the same as, Form SR tabular disclosure. What are the costs and benefits of providing this disclosure as proposed? Do these different sets of share repurchase disclosures provide distinctly valuable information for investors and market participants? Should there instead be more alignment between Item 703 and Form SR tabular data? Alternatively, should we adopt a subset of the proposed disclosures, such as: • Only Form SR; • Form SR and Item 703 and Forms 20-F and N-CSR, amended as proposed, but without monthly data; • No Form SR, but Item 703 and Forms 20-F and N-CSR, amended as proposed and including daily, weekly, or bi-weekly repurchase disclosure; or No Form SR, but Item 703 and Forms 20-F and N-CSR, amended as proposed, with an exhibit providing daily detail about share repurchases made during the period covered by the report?

The different sets of requirements provide distinct benefits. The best option is not presented in that Form SR as proposed and an exhibit providing daily detail in the Item 703 and other reports appears the most valuable. Getting the daily detail weeks or months after the fact does little to address the noted information asymmetries.

23. We have not proposed exemptions or different requirements from the proposed revisions to Item 703, Form 20-F, and Form N-CSR for foreign private issuers, registered closed end funds, non-accelerated filers, smaller reporting companies, or emerging growth companies. Should we exempt or provide different requirements from some or all of the proposed amendments for these or other classes of issuers?

All applicable parties should be subject to the same requirements. Stock prices in those cases would be more greatly impacted by abuse and therefore investors would benefit if applied to foreign and smaller issuers as well.

Structured Data Requirement

We strongly support structured data and encourage the Commission to be as ambitious as reasonably possible with regard to the information being tagged and disclosed. The data becomes more standardised, reviewable, and easily compared.

Conclusion

We commend the Commission for pursuing this project, the quality of the review and the focus of the Proposed Rule. We believe the Proposed Rule addresses the problem that we have noted through disclosure. This will maintain the capital allocation option of share repurchases while correcting the activities of the issuers that appear to abuse the current system. For most companies, this will be a minor compliance exercise. Others will modify their share repurchase programs to comply with the original intent of the safe harbor. This correction is necessary, and as stated earlier, has been adopted in other markets. As noted in our comments we encourage the SEC to pay greater attention to capital allocation disclosures more broadly, and we provide in the Appendix below a list of specific issues the SEC might wish to address in future disclosure requirements.



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Thank you for the opportunity to provide our perspective on the Proposed Rule. ICGN's members and their beneficiaries benefit from efficient capital markets. If you would like to follow up with us with questions or comments, please contact me or ICGN's Policy Director George Dallas by email at: george.dallas@icgn.org

Yours faithfully,

Kerrie Waring

Chief Executive Officer, ICGN

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Appendix: ICGN's proposed disclosures on capital allocation (from its 2019 Viewpoint)

ICGN believes that corporate disclosures and reporting are critical for investors' understanding of a company's approach to capital allocation. The information shareholders and bondholders' value and would benefit from most includes the following points below. We highlight in **bold** the specific disclosures related to share buybacks.

- A framework underlying long-term capital allocation strategy, focusing on key aspects, how balance is achieved among different relevant stakeholder interests and what is believed to be the right balance;
- Governance and decision-making process - respective roles of boards and management in developing capital allocation framework and taking major capital related decisions, independent scrutiny of management's proposals by non-executive directors, thresholds for board decisions;
- A view of the management on their cost of capital and how it relates to the company's long-term value creation, including the company's use of cash, debt and equity;
- R&D projects and CAPEX plans - philosophy, governance & decision-making, key internal metrics and Internal Rate of Return thresholds for capital intensive businesses;
- Degree of financial leverage required to support the company's long-term strategy. This can also include a strategy to maintain a targeted credit rating;
- M&A approach and key criteria for evaluating opportunities (an explanation from the management of how the performance of acquisitions undertaken in the past 5 years compares to the original assumptions that justified the financial metrics of these individual transactions would enhance investor confidence in the management's M&A strategy);
- A distribution strategy, providing a realistic picture of what distributions can be expected and what the management's priorities are, comprising:
 - A dividend policy, including rationale behind payout ratios/levels and changes in circumstances that may result in reducing or not paying a dividend; approach to special dividends; use of scrip dividends (if any);



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- Use of share buybacks as a capital management tool, including triggers for a share buyback programme, determination of a repurchase price, and explicit disclosure on whether and if so, how share buybacks could impact performance metrics under executive incentive schemes;
- Rationale behind any strategic shareholding in another listed company and cross-shareholdings, in particular, and their impact on the returns on capital.