

Via E-Mail

March 31, 2022

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

Re: File No. S7-21-22

Dear Madam Secretary:

I am writing of behalf of the Council of Institutional Investors (CII) in response to the Securities and Exchange Commission's (SEC or Commission) request for comment on 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 (Proposed Rule).¹

CII is a nonprofit, nonpartisan association of United States (U.S.) public, corporate and union employee benefit funds, other employee benefit plans, state and local entities charged with investing public assets, and foundations and endowments with combined assets under management of approximately \$4 trillion. Our member funds include major long-term shareowners with a duty to protect the retirement savings of millions of workers and their families, including public pension funds with more than 15 million participants – true “Main Street” investors through their pension funds. Our associate members include non-U.S. asset owners with about \$4 trillion in assets, and a range of asset managers with more than \$40 trillion in assets under management.²

In evaluating proposals to expand company disclosure, CII considers materiality to investment and voting decisions; depth, consistency and reliability of empirical evidence supporting the connection between disclosure and long-term shareowner value; anticipated benefit to investors, net of the cost of collection and reporting; prospect of substantially improving transparency, comparability, reliability and accuracy.³

¹ *Share Repurchase Disclosure Modernization*, 87 Fed. Reg. 8443 (Feb. 15, 2022),

<https://www.federalregister.gov/documents/2022/02/15/2022-01068/share-repurchase-disclosure-modernization>.

² For more information about the Council of Institutional Investors (“CII”), including its board and members, please visit CII’s website at <http://www.cii.org>.

³ Council of Institutional Investors, CII Policies, Policies on Other Issues, *Statement on Company Disclosure* (Mar. 10, 2020), https://www.cii.org/policies_other_issues#Company_disclosure.

We believe the Proposed Rule would improve the relevance and timeliness of disclosure on buyback activity without impinging on companies' ability to put capital toward its best use. We will provide perspectives on capital allocation before turning to the Proposed Rule itself.

CII supports capital allocation decisions moored by board oversight and consistency with business strategy

CII believes managers, informed by firm-specific, industry-specific, and overall market factors, should execute capital allocation decisions that further the company's business strategy, and that boards should hold to account those managers who allocate in ways that run contrary to that strategy.⁴

Public companies are always looking for ways to invest profits to increase their future growth. At some point they may run out of investment opportunities with enough growth potential to justify an investment. In those cases, companies may decide to use their profits in another way, to buy back shares of the company or to grant dividends. As Vanderbilt Professor Craig M. Lewis explains:

Economic theory argues that new investment should only be taken if new projects are expected to earn returns that exceed the opportunity cost of capital. That is, a firm should only invest in projects that have positive net present value (NPV). Suboptimal investments – those with negative NPVs – destroy firm value. When firms do not have attractive investment opportunities, repurchasing shares is a sensible alternative to investment in negative net present value projects.⁵

Money spent on buybacks does not evaporate; it is often invested by company owners in other companies that need capital more than the company executing the buyback. That reinvestment in a higher use creates a benefit that inures to investors and society more broadly.⁶ As Prof. Lewis explained:

Another point that is often overlooked in the share repurchase debate is that the cash paid to shareholders does not disappear. Investors selling shares either spend the cash received on goods and services or reinvest it elsewhere. The reallocation of capital into consumption and other investments potentially redirects it to activities that have higher value than incremental investments available to firms. In the long-run, this stimulates

⁴ See CII Corporate Governance Policies, policy 2.7, *Board's Role in Strategy and Risk Oversight*. (https://www.cii.org/corp_gov_policies#BOD). A National Association of Corporate Directors (NACD) survey suggests more than four in five U.S. public company boards annually review capital allocation for consistency with company strategy. See *2019-2020 NACD Public Company Governance Survey* at p. 10.

⁵ *Examining Corporate Priorities: The Impact of Stock Buybacks on Workers, Communities and Investors: Hearing Before the Subcomm. On Inv'r Prot., Entrepreneurship, & Capital Mkts. Of the H. Comm. On Fin. Servs.*, 166th Cong. (2019) (testimony of Craig M. Lewis at 7-8), <https://financialservices.house.gov/uploadedfiles/hhrg-116-ba16-wstate-lewisc-20191017.pdf>.

⁶ Commissioner Hester M. Peirce Speech, *Festivus, Fortnite, and Focus: Remarks before the Council of Institutional Investors Spring Conference* (Mar. 5, 2019), <https://www.sec.gov/news/speech/speech-peirce-030519>.

growth and creates better jobs than would be possible if firms were to make suboptimal investments simply because the cash was unavailable.⁷

Similarly, Harvard Law professor Jesse Fried has testified:

[S]hareholder payouts by public firms can ... benefit the economy as a whole by making capital available to smaller, growing firms that will engage in investment and hire American workers, the vast majority of whom work for private firms.⁸

Harvard Law Professor Mark Roe addresses concerns that stock buybacks drain U.S. corporations of cash to fund capital spending, research and development investments.

[S]tock buybacks have increased greatly during the past two decades. But the full context of the rise in buybacks needs to be analyzed...[B]uybacks have come nowhere close to draining corporations of cash, which is today near record high levels. During the past decade, the total cash held by (nonfinancial) S&P 500 companies has actually been *rising*.

...

With post-crisis interest rates at historic lows, many companies borrowed heavily and used much of the proceeds to buy back stock...In effect, corporate America was.. recapitalizing its balance sheet with cheap debt....Stock buybacks should be seen as part of an economy-wide recapitalization of equity into debt.

...

The widespread claim is that executives overly focused on quarterly earnings will forgo R&D spending because R&D expenses reduce current earnings while the payoff from the R&D comes in the future. The plain truth...is that total R&D spending in the U.S. as a proportion of GDP has been steadily rising, not falling—in fact it has doubled since the 1970s.⁹

CII supports enhancing disclosure on share repurchase activity

Investors need useful information to monitor the impact of share repurchases. The Proposed Rule, in our view, would improve the relevance and timeliness of disclosure on buyback activity without impinging on companies' ability to put capital toward its best use, a fundamental characteristic of U.S. economic dynamism.¹⁰

⁷ Testimony of Craig M. Lewis at 4.

⁸ *Examining Corporate Priorities: The Impact of Stock Buybacks on Workers, Communities and Investors: Hearing Before the Subcomm. On Inv'r Prot., Entrepreneurship, & Capital Mkts. Of the H. Comm. On Fin. Servs.*, 116th Cong. (2019) (testimony of Professor Jess M. Fried, Dane Professor of Law, Harvard Law School, <https://financialservices.house.gov/uploadedfiles/hrg-116-ba16-wstate-friedj-20191017.pdf>).

⁹ Roe, Mark J., Looking for the Economy-Wide Effects of Stock Market Short Termism (December 14, 2021). Available at SSRN: <https://ssrn.com/abstract=3986570>.

¹⁰ For an interactive plot of the fluctuation of capital allocation activity across sectors and over time, see Ric Marshall and Ahasan Amin, Looking Anew at Buybacks and Other Capital Allocations, MSCI (July 6, 2021),

Since 2003 the SEC has required companies to disclose, on a quarterly basis, share repurchase activity including the number of shares purchased, reported on a monthly basis and by class; the average price paid and the total shares purchased as part of any publicly-announced buyback program; and the maximum number of shares yet to be purchased under the program. The same rule requires footnote disclosure of details regarding buyback plans or programs.¹¹ The Proposal, which the Commission put forward more than five years after obtaining market participant input from the 2016 Regulation S-K Concept Release, would require companies to disclose a new Form SR detailing share repurchases on a daily basis and enhance periodic disclosure about repurchase activity.¹²

CII supports enabling investors to better understand share repurchase activity, including the timing, consideration paid, the effect of share repurchases on per-share measures including as earnings per share¹³, and relationships, if any, between company share repurchases and insider stock trades.¹⁴ We believe such enhancements could strengthen the market's ability to assign premia to companies that make capital allocation decisions optimizing the company's long-term performance and assign discounts to companies that do not. We support requiring the use of Inline XBRL for repurchase-related disclosures, which would both enhance the utility of the information for investors and lower their costs to gather it.

Contents and timing of Form SR

CII supports Form SR including, as proposed: the date of repurchase, number and class of shares repurchased, average price paid, total shares repurchased on the open market, total shares purchased in reliance of the safe-harbor in Rule 10b-18, and shares purchased pursuant to a plan that is intended to satisfy the affirmative defense conditions of Rule 10b5-1(c).¹⁵ We agree that domestic issuers and foreign private issuers should be subject to the same filing obligations.

We are receptive to concerns that one business day turnaround to furnish Form SR could present compliance challenges, including in cases where trade orders fail to settle. Extending the turnaround requirement from one business day to two days would diminish investors' ability to immediately evaluate repurchases and their effects on the market, but we consider the transparency of daily repurchase data to be the Proposal's core improvement, underscoring the need for compliance to be practical. Companies are well-accustomed to filing insider stock sales

<https://www.msci.com/research-and-insights/insights-gallery/looking-anew-at-buybacks-and-other-capital-allocations>.

¹¹ Purchase of Certain Equity Securities by the Issuer and Others, 68 Fed. Reg. 64963 (Nov. 17, 2003).

¹² *Business and Financial Disclosure Required by Regulation S-K*, 81 Fed. Reg. 23915 (April 22, 2016).

¹³ CII letter from Kenneth A. Bertsch, Executive Director, responding to Regulation S-K Concept Release (July 8, 2016), https://www.cii.org/files/issues_and_advocacy/correspondence/2016/07_08_16%20CII%20S-K.pdf.

¹⁴ Council of Institutional Investors, CII Policies, Policies on Other Issues, Statement on Insider Stock Sales (Mar. 10, 2020), https://www.cii.org/insider_stock_sales_statement.

¹⁵ For CII views on 10b5-1 plans generally, see letter from Jeff Mahoney, General Counsel, Council of Institutional Investors on proposed amendments relating to Rule 10b5-1 under the Securities Exchange Act of 1934, (Mar. 24, 2022),

[https://www.cii.org/files/issues_and_advocacy/correspondence/2022/March%2024%202022%20Rule%2010b5-1%20\(final\).pdf](https://www.cii.org/files/issues_and_advocacy/correspondence/2022/March%2024%202022%20Rule%2010b5-1%20(final).pdf).

on Form 4 within two business days of the transaction date. We support parity of turnaround time between Form SR and Form 4.¹⁶

Additional Disclosures under Item 703 of Regulation S-K

We support the Proposal's language to require company disclosure of the rationale for share repurchases. Investors are interested in management views on whether the company's repurchase activity is driven by, for example, conviction that the market is undervaluing the stock; or that prospective internal growth opportunities are not economically viable; or that valuations for attractive targets are frothy. Investors would also be interested in the extent to which replacing perpetual claims on residual earnings with debt financing will change the company's leverage and cost of capital.

We support other additions to Item 703, including requirements to disclose:

- the effect of the reporting period's repurchases on earnings per share;
- policies and procedures relating to purchases and sales of stock by directors and officers during a repurchase program, including any restriction on such transactions;
- whether company share repurchases were made pursuant to a 10b5-1 plan, and if so, the date the plan was adopted or terminated¹⁷;
- any directors, officers and 10% holders who purchased shares 10 or fewer days prior to a buyback program announcement, or who sold shares 10 or fewer days following a buyback announcement.

Thank you for consideration of CII's views. If we can answer any questions or provide additional information, please do not hesitate to contact me.

Sincerely,



Glenn Davis
Deputy Director

¹⁶ Council of Institutional Investors, CII Policies, Policies on Other Issues, Statement on Insider Stock Sales (Mar. 10, 2020), https://www.cii.org/insider_stock_sales_statement. (“Both to improve market efficiency and reduce the likelihood of abuses, companies should disclose share repurchases at a frequency and level of detail on par with their disclosure of insider stock sales.”).

¹⁷For CII views on 10b5-1 plans generally, see letter from Jeff Mahoney, General Counsel, Council of Institutional Investors on proposed amendments relating to Rule 10b5-1 under the Securities Exchange Act of 1934, (Mar. 24, 2022), [https://www.cii.org/files/issues_and_advocacy/correspondence/2022/March%2024%202022%20Rule%2010b5-1%20\(final\).pdf](https://www.cii.org/files/issues_and_advocacy/correspondence/2022/March%2024%202022%20Rule%2010b5-1%20(final).pdf).