David A. Bell
dbell@fenwick.com | 650.335.7130

Robert A. Freedman
rfreedman@fenwick.com | 650.335.7292

March 31, 2022

VIA E-MAIL

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

Re: File Number S7-21-21 (Share Repurchase Disclosure Modernization) Comments to SEC Release No. 34-93783

Dear Ms. Countryman:

Fenwick & West is pleased to submit to the Securities and Exchange Commission ("Commission") comments on the proposed rules ("Proposed Rules") under the Securities Exchange Act of 1934 ("Exchange Act") relating to company share repurchases per the Proposing Release referenced above.

We represent and have represented over the years a large number of publicly held technology and life science companies. Many of them operate share repurchase programs regularly, or from time to time as they deem in the best interests of their stockholders. Some have been engaging in share repurchase programs for many years. The comments we provide in this letter are derived from our experience with these companies.

We respond to certain questions contained in the Proposing Release below. However, before doing so, we would like to provide our overarching perspectives on the proposals.

As an initial observation regarding the manner in which share repurchase programs are conducted, in our experience these programs are always approved by a company's Board of Directors or a duly authorized committee of the Board. Boards, or committees, consistently authorize repurchases of up to either a specific dollar amount, or an actual number, of shares. These authorizations typically do not delineate the specific timing or manner of repurchases (other than large scale buy backs of a significant percentage of

shares, such as via an issuer tender offer), and direct management to conduct the programs as it deems to be in the company's best interests. We believe that it is also important to recognize that companies consistently make a public announcement of the approval of (as well as any renewals or expansions of) these programs, including the size of the program, promptly and prior to commencing newly authorized repurchases. As noted below, companies are powerfully inclined to do so by existing securities laws and regulations.

Most companies execute their repurchases through third-party brokers who are instructed to do so in accordance with Rule 10b-18, although management is also frequently afforded the flexibility to cause companies to engage in private repurchase transactions. Share repurchases under these programs appear to us to have little impact on the short-term trading price of the company's stock, as this is one of the goals of Rule 10b-18. It goes without saying that companies provide the share repurchase information required by Regulation S-K item 703 on a quarterly basis as well as the information regarding share repurchases presented in the company's quarterly and annual statements of cash flow and equity.

All of this being the case, we do not appreciate the potentially damaging impact on existing stockholders or the market at large of "asymmetries" between companies and investors in the conduct of share repurchase programs. We believe that the material information about these programs is (i) the potential use of a specified amount of company capital to repurchase outstanding equity, and (ii) follow- up reporting of the execution of an announced program. There appears to be no question that this information is consistently provided.

The premise underlying the reference to "asymmetries", and to the proposed rules themselves, appears to be that the specific manner in which a repurchase program is conducted is material information about the company. We respectfully disagree with this premise. We do however believe that the provision of daily repurchase data would provide information to traders seeking to benefit from trading opportunistically around a company's repurchases. For example, high frequency traders will likely be able to identify patterns in company repurchase activities and seek to front-run future repurchase orders. The likely effect of this front-running would be to increase the price paid by the company for repurchased shares, harming its stockholders. Of course, we do not believe that facilitating this type of trading is the intended purpose of the proposed rules. Further, we do not believe that the administrative burden on companies, of making this disclosure, along with the higher price companies are likely to pay for repurchased shares, is warranted by a corresponding benefit to investors.

The Proposing Release expresses possible concern that buy-back programs may be used to inappropriately influence executive compensation by skewing earnings-per-share results. We note that earnings per share is not a frequently used compensation metric for the technology and life science companies with which we work. More importantly, even if EPS was a common compensation metric, as we noted above, repurchase programs are not created at the discretion of management. These programs are consistently approved by the Board or a duly authorized committee, and the Board or appropriate committee has the ability, indeed the responsibility, to determine how they are taken into account in connection with executive compensation programs. As such, they are not a tool created by management, available to shrink the share count, if needed, to meet EPS targets.

Questions 1, 3, 5, 6, 18, 19 and 21

We do not believe the Commission should adopt Form SR, as we believe that existing disclosure requirements and practice provide investors with the material information about company share repurchase intentions and activities. Similarly, we do not believe that Form 8-K or other forms should be amended, or that exhibits should be added to existing filings, to require daily disclosure, or any additional disclosure beyond that which is currently required.

We strongly disagree with the notion that whether share repurchases are conducted in accordance with the safe harbor provided by Rule 10b-18 or under Rule 10b5-1 repurchase plans is material information for company investors. If Form SR is adopted, or other forms or Item 703 of Regulation S-K are amended to require further disclosure about share repurchases, we believe that no meaningful information would be provided to investors by requiring such disclosure.

If Form SR is adopted, we believe that less frequent disclosure than the daily disclosure contemplated in the Proposed Rules should be required. We note no other filing requirement under the Exchange Act for transactions in registered classes of shares that has as short a filing period as one day after the event. Among other things, it is extremely difficult to reconcile this proposed requirement with the filing requirements of Schedules 13D and 13G. A third party that very likely will not have made any advance announcement of its intent to acquire a company’s shares, including a third party with an intent to change or influence control of the company, need not file its Schedule 13D until 10 days (or potentially reduced to five days per the recent proposal to modernize the beneficial ownership reporting rules; (Release Nos. 33-11030; 34-94211; File No. S7-06-22) after it has exceeded the five percent ownership threshold. Yet per the Proposed Rules, companies,

who are extremely likely to have announced in advance their plans to engage in share repurchases, will be reporting even *de minimis* repurchases on a daily basis.

An additional concern with the one day filing requirement is a company's ability to maintain sufficient disclosure controls and procedures to ensure that accurate Forms SR are timely furnished. Trades that would be subject to the form can occur up until the very end of the trading day. We believe this leaves a shorter window than prudent companies would otherwise implement to gather the required information, resolve any questions regarding the day's trades and subject the draft form to any type of review.

We also address one additional concern regarding more frequent reporting of repurchase transactions. Companies often acquire shares without structuring such purchases under a Rule 10b5-1 plan. These repurchases are, accordingly, limited to the companies' open trading windows. As the Commission appreciates, trading windows may close ahead of the typical quarter-end schedule due to the occurrence, or reasonably likely occurrence, of a material event that has not previously been disclosed. If a company determines that a material event has become likely, but for whatever reason is not yet in a position to disclose this potentiality, it will suspend discretionary repurchase activity until the event is disclosed or ceases to become likely. A third party that is closely monitoring a company's Form SR filings might suspect that a cessation of repurchase activity in an otherwise open trading window is due to the potential occurrence of a material event. Nothing would prevent such a third party from trading in the company's securities based on whatever suspicions it may have (including suspicions that third parties may have leaked into the market) about a potential event. We do not believe that this is the manner in which information about potentially material events should reach investors or that it is in the interests of company investors or the market generally for this type of trading to take place.

In light of the foregoing, and in response to Questions 1 and 5, if Form SR is adopted, we suggest a quarterly furnishing of a Form SR consisting of the information required by Regulation S-K Item 703 within a short period (for example, three business days, which would allow all executed trades to have settled) after the end of the fiscal quarter in which the trades occur. Such a filing requirement would then eliminate the need to include such information in Forms 10-Q and 10-K.

Question 2

We agree with the concept that companies should provide public disclosure of their intent to acquire outstanding shares under a buyback program prior to the repurchase of shares under such a program. However, we do not believe that new rule making is required to achieve this disclosure. In our experience, companies consistently disclose the approval of share repurchase programs, including the size of the program, promptly following the requisite corporate approval and prior to effecting repurchase transactions. Companies are powerfully motivated by existing laws and rules to make this disclosure. They well understand that such disclosure is necessary to avoid potential liability for trading under a repurchase plan that has not been publicly disclosed. The Proposing Release does not suggest that concern exists about companies conducting repurchase programs without announcing their intention to do so. We do not believe there is any reason to require disclosure that is consistently made already to satisfy existing laws and regulations.

As noted above, we believe that the existing disclosure requirements under Regulation S-K Item 703 and in quarterly and annual financial statements provide the material information about repurchase activity needed by investors.

Question 7

We do not believe the Commission should adopt Form SR, as we believe that the existing disclosure requirements and practice provide investors with the material information about company repurchase intentions and activities. If rules requiring the filing of Form SR are adopted, we certainly do not support a requirement to amend a furnished Form SR for immaterial corrections.

Question 10

We do not believe the Commission should adopt Form SR, as we believe that the existing disclosure requirements and practice provide investors with the material information about company repurchase intentions and activities. We agree with the observation in the Proposing Release that non-accelerated filers, smaller reporting companies and emerging growth companies are far less active in repurchasing their shares than larger cap, more established companies, and the reporting burden on these companies is relatively greater. Accordingly, if rules requiring the filing of Form SR are adopted in one form or another, we do not believe that the rationale underlying this filing requirement would be materially compromised by exempting these companies.

Question 11

We do not believe the Commission should adopt Form SR, as we believe that the existing disclosure requirements and practice provide investors with the material information about company repurchase intentions and activities. Similar to our comparison above of proposed Form SR with Schedules 13D and 13G, we find it difficult to reconcile the proposed filing of Form SR for purchases of any amount of shares with the *de minimis* provisions incorporated into Schedule 13D. The change in ownership threshold necessitating an amendment to a Schedule 13D is one percent of a company's outstanding shares. A passive investor that has acquired more than 5% of a company's outstanding shares is not required to file any information about its subsequent transactions until after it has acquired more than 10% of the company's outstanding shares.

All of this being the case, we believe that if rules requiring the filing of Form SR are adopted a meaningful threshold of purchases for the daily, or other applicable reporting period, should apply before a filing is required. While we do not support a daily filing requirement, if such a requirement is implemented, we believe that an appropriate *de minimis* threshold would be repurchases exceeding the daily limits of Rule 10b-18.

Question 12

We do not believe the Commission should adopt Form SR, as we believe that the existing disclosure requirements and practice provide investors with the material information about company repurchase intentions and activities. If rules requiring the form are adopted, we strongly believe that it should be furnished, as proposed, and not filed. It would be a draconian penalty for a company to lose the ability to use Form S-3 because it failed to make a filing that very likely does not provide material information about the company and is required to be filed just one day after the triggering event.

Question 13

As noted in the Proposing Release, Item 703 of Regulation S-K has been in place for 17 years, and its disclosure requirements include the date that the relevant repurchase plan or program was announced. In our experience, companies and investors have had no difficulty making or interpreting this disclosure. Accordingly, we do not believe that any useful purpose would be served by clarifying what constitutes an announcement. As noted above, we also observe that repurchase plans are consistently publicly announced, and existing securities laws provide an appropriate incentive for companies to do so. We do not believe that adding a formal requirement to announce a repurchase program would result in any meaningful new information to investors beyond that which is consistently provided already.

Question 17

Share repurchase plans are consistently adopted to offset dilution from equity compensation and/or because a company has determined that returning excess capital to investors is the optimal use of such capital. We believe that this rationale is well understood by investors and that formal disclosure of these rationales would not provide meaningful additional information. In most instances the source of cash to be used for repurchases is quite evident from a review of the company's balance sheet. In any event, the company will provide a quarterly and annual discussion of its material sources and uses of cash in Management's Discussion and Analysis of Financial Condition and Results of Operations in its periodic reports. There appears to us to be no justification for accelerating the reporting of sources of funds for repurchase activities over the sources of funds for all other manner of uses to which a company may put its capital. In the infrequent instances where companies make a large scale buy back of a significant percentage of their shares, they are powerfully incented to disclose any external source(s) of funds that will be utilized.

If the Commission's Staff would care to discuss any of the comments contained in this letter, please contact David Bell, Co-Chair, Corporate Governance at dbell@fenwick.com, and Robert Freedman, Co-Chair, Capital Markets & Public Companies at refreedman@fenwick.com.

Very truly yours,

FENWICK & WEST LLP

David A. Bell
Partner

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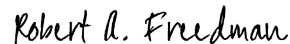
FENWICK & WEST LLP



Robert A. Freedman
Partner