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April 1, 2022

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

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

Dear Ms. Countryman:

The National Association of Manufacturers ("NAM") appreciates the opportunity to provide comment to the Securities and Exchange Commission ("SEC") on File No. S7-21-21, the Commission's proposed rule on Share Repurchase Disclosure Modernization.[1]

The NAM is the largest manufacturing trade association in the United States, representing manufacturers of all sizes and in all 50 states. Manufacturing is a capital-intensive industry, requiring significant investments for equipment purchases and research and development ("R&D"). Manufacturers often turn to the public capital markets to finance these pro-growth activities, which set the stage for economic expansion, innovation, and job creation. Thus, a vibrant public market that supports capital formation and long-term growth is critical to the sustained success of manufacturing in America.

The NAM is disappointed that the SEC has proposed a rule on share repurchase disclosures that would denigrate and discourage the common practice of stock buybacks by publicly traded companies. Though couched as a new disclosure requirement, the proposed rule is premised on the supposed dangers of stock buybacks to investors—and its intent appears to be to deter companies from repurchasing shares even when economically efficient and appropriate for a business. The NAM is deeply concerned that the rule could make buybacks onerous and unworkable (or at a minimum inefficient), both because of the new costs the rule would impose and because the proposed disclosures would convey valuable information that other market participants can use to their benefit—to the detriment of businesses and their long-term shareholders, including the many retail investors who lack the resources to process the reams of data the rule will generate.

For publicly traded manufacturers, stock buybacks can be an efficient means of capital allocation. Returning capital to shareholders in the form of a buyback is economically similar to returning capital via dividend payments, in that excess capital flows to where it can most efficiently be used—in both cases, to shareholders who can then put those funds to other productive uses. Ultimately, the SEC's skeptical approach to buybacks overstates the potential for manipulation and largely ignores the benefits of return-of-capital transactions—and, as a result, the Commission's proposal could have a damaging impact on companies' ability to efficiently allocate capital. In short, the proposed rule is a solution in search of a problem.

[1] *Share Repurchase Disclosure Modernization*, 87 Fed. Reg. 8443 (15 February 2022). Release Nos. 34-93783, IC-34440; *available at* https://www.govinfo.gov/content/pkg/FR-2022-02-15/pdf/2022-01068.pdf.

Further, the proposed rule does not allow for any reporting flexibility based on the materiality of an issuer's share repurchases, thus creating costs for companies even when a "reasonable investor" would not view the new disclosures as "having significantly altered the 'total mix' of information available" to them.[2] Companies' regular share repurchases often make up a relatively minimal portion of their average daily trading volume ("ADTV")—and must always fall below a 25% ADTV threshold in order to qualify for the Rule 10b-18 safe harbor. Given the immateriality of many of these transactions, the burdens and risks associated with the required disclosures will in many instances exceed any potential benefit for shareholders.

Additionally, the NAM is concerned that the SEC has not fully considered the interactions between the proposed buybacks rule and the Commission's proposal on Rule 10b5-1 and Insider Trading.[3] Given the interrelated nature of the two proposals and companies' usage of both buybacks and Rule 10b5-1 plans, there is significant potential for unintended consequences. Critically, many issuers conduct share repurchases by utilizing corporate Rule 10b5-1 plans. The NAM is hopeful that the SEC will remain mindful of the importance of both share repurchases and equity compensation for publicly traded companies as it considers these two rules—and, as a result, will avoid imposing unnecessary burdens that limit the exercise of either of these commonplace business practices.

The NAM respectfully encourages the SEC to refrain from using its regulatory authority to drive capital allocation away from share repurchases. In particular, the NAM urges the Commission to reconsider its proposed daily reporting requirement for stock buybacks. Manufacturers support appropriate transparency into repurchase activity, including via the existing Item 703 quarterly disclosure requirements—but we do not believe the SEC's proposed rule is appropriately calibrated, and we remain concerned that the rule does not adequately consider the significant benefits of stock buybacks to both issuers and shareholders.

I. Stock buybacks enable public companies to efficiently allocate capital and return value to shareholders.

Stock buybacks are widely utilized by public companies as a vehicle to return capital to shareholders. Investors directly benefit from stock buybacks in the form of a return on investment; they also indirectly benefit even when not selling shares because companies perform better when they efficiently allocate capital. These extremely common transactions are vital to company management teams' ability to run their businesses and create value for shareholders.

Company management has a fiduciary duty to efficiently allocate capital available to the business. When faced with excess capital, management has the choice to invest in internal growth (via R&D, new projects, or equipment purchases), invest in external growth (via mergers, acquisitions, and investments)—or to return capital to shareholders so that *they* can invest in growth elsewhere. These decisions are driven by businesses' circumstances and are economically similar in that capital flows where it is most needed. Critically, management's capital allocation options are not in competition with one another—but rather exist as a portfolio of choices from which management can select the most efficient strategy, often in *combination* with one another. In the case of stock buybacks, these transactions must also be approved by the board of directors, which has its own fiduciary duty to shareholders.

[2] *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438 (1976).

[3] *Rule 10b5-1 and Insider Trading*, 87 Fed. Reg. 8686 (15 February 2022). Release Nos. 33-11013, 34-93782; *available at* https://www.govinfo.gov/content/pkg/FR-2022-02-15/pdf/2022-01140.pdf.

In the manufacturing industry, the data indicate that stock buybacks do not come at the expense of critical investments in workers, R&D, or capital spending. Manufacturing is a capital-intensive industry, and manufacturers routinely allocate resources to productive uses:

- Manufacturers perform 57.9% of all private-sector R&D in the United States, driving more innovation than any other sector. R&D in the manufacturing sector has risen from $132.5 billion in 2000 to $295.7 billion in 2020.[4]
- Manufacturers employ more than 12.5 million people who make things in America. On average, manufacturing workers earned $92,832 annually as of 2020, including pay and benefits—20% more than the average worker in all nonfarm industries ($77,181). Manufacturing wages increased by 4.9% year-over-year in February 2022 for production and nonsupervisory workers, not far from the most significant increase in 40 years (seen in August, December, and January, each of which had wage growth of 5.2% year-over-year).[5]
- Manufacturers invested $258.1 billion in capital expenditures in 2020. Manufacturing capital spending has grown at a historic rate in recent years, increasing by 4.5% and 5.7% in 2018 and 2019, respectively.[6]

These capital spending priorities—critical investments in innovation, skilled workers, and up-to-date machinery—are key to survival and growth in manufacturing. Accordingly, a manufacturer's decision to return capital to shareholders does not conflict with these other productive investments.

With respect to return-of-capital transactions, stock buybacks and dividend payments are economically similar: in either case, funds have moved from the dominion of a business to the control of a shareholder. As such, there is no reason to single out and attempt to restrict buybacks. Unnecessary limitations, like those included in the proposed rule, could have the effect of discouraging efficient capital flow and causing unneeded cash to sit idly in a business, accumulating over time. Any such accumulated capital is by definition not being deployed in the most efficient manner, either by the business (which has already invested in the projects necessary for growth) or by its shareholders (who are prevented from redeploying resources via investments in other areas of the economy). Policies that restrict share repurchases, including the SEC's proposed rule, could provide an incentive for companies to make sub-optimal investment decisions in an attempt to manage their cash balance; such restrictions could also disincentivize investors from providing much-needed capital to the manufacturing sector.

Unfortunately, the proposed rule gives the appearance of ignoring the reality of these commonplace transactions. The proposing release frequently claims that its disclosures will enable investors to spot buybacks that are "driven by managerial self-interest."[7] However, the scenarios in which companies supposedly use share repurchases to "inflate executive compensation and cash out executives' securities"[8] range from ill-defined to impracticable. The NAM would support effective SEC oversight to pursue bad actors, but the proposed rule's disclosure requirements are not reasonably calibrated to achieve this effect—and thus are far-reaching in their impact on law-abiding, well-intentioned companies and management teams, as well as damaging to shareholders.

In overweighting the alleged risks of buybacks while failing to acknowledge their benefits or their utterly commonplace nature, the SEC has proposed a rule that seeks to solve a problem that does not exist. The NAM respectfully encourages the SEC to reconsider the assumptions underpinning

[4] Bureau of Economic Analysis.

[5] Bureau of Economic Analysis and Bureau of Labor Statistics.

[6] U.S. Census Bureau, Annual Capital Expenditures Survey.

[7] *See, e.g.,* Proposed Rule, *supra* note 1, at 8445.

[8] *Id.* at 8449.

the stock buybacks rule and to rescind its proposed reporting requirements. If the SEC does decide to move forward with a buybacks disclosure regime, we encourage the Commission to re-propose a rule that more accurately characterizes the decision to implement a repurchase program and includes requirements that are more reflective of the positive effects that buybacks can have for both businesses and investors.

II. The proposed rule's daily reporting requirement will provide little-to-no useful information to investors—while still creating significant costs for issuers and posing new market risks for long-term shareholders.

The centerpiece of the stock buybacks rule is the proposed Form SR—a new daily reporting requirement for any repurchase activity. Due one day after the execution of any share repurchases, Form SR would require companies to disclose the number of shares purchased, the average price paid per share, and other information about the previous day's buybacks. Unfortunately, the proposed Form SR is unnecessary, costly, and unworkable—and it would ultimately result in the disclosure of information that could be used against a business and its long-term shareholders. Further, it would weaken the materiality standard for public company reporting by requiring the disclosure of immaterial buyback information, undermining the existing requirement to report material events via Form 8-K, sending misleading signals to the market, and confusing shareholders by assigning importance to benign capital allocation decisions. The NAM opposes the Form SR daily reporting requirement, and we respectfully encourage the SEC to reconsider this misguided proposal.

A. The quarterly disclosures required by Item 703 of Regulation S-K already provide sufficient information to investors about public companies' share repurchase activity.

Item 703 of Regulation S-K already requires companies to provide information about stock buybacks to their shareholders. Under Item 703, businesses must report repurchase data—including most of the information that would be required on Form SR—in their quarterly filings, broken down on a monthly basis.[9] Separately, issuers are generally required to disclose information related to their board's authorization of a repurchase program. In short, there is abundant information for shareholders wishing to understand more about an issuer's stock buybacks. The proposing release alleges that there is "public interest" in more information about buybacks,[10] but it is not clear that *investors* want or need additional data beyond what is required by Item 703.

As noted, the SEC appears concerned by a range of potential scenarios related to management utilization of buybacks for self-interested purposes—but these scenarios are so unlikely and far-fetched that they fail to justify the imposition of an onerous and unworkable daily reporting obligation. For example, the SEC's concern that management could deceive investors by using buybacks to meet earnings targets ignores the fact that repurchase data and earnings data are reported at the exact same time on a quarterly basis, providing investors with clear evidence if earnings were to be impacted by increased buyback activity. In such a case, the *existing* reporting requirements for share repurchases would be sufficient to capture any rare cases of potentially manipulative behavior.

[9] 17 CFR 229.703.

[10] Proposed Rule, *supra* note 1, at 8444.

Item 703 provides timely and relevant information about issuers' repurchase activity and is more than sufficient to ensure that investors have the data they need to understand the structure of and justification for companies' efforts to return value to shareholders. Further, companies are required to provide current reports on any material events via Form 8-K—which would be significantly undercut by the flood of new daily reports of immaterial buyback information under the proposed rule. Given the costs for businesses and risks to shareholders posed by the proposed daily reports (as discussed in more detail below), it is all the more notable that Form SR would provide little if any actual benefit to investors.

B. A daily reporting requirement will impose significant cost and administrative burdens.

The proposed next-day reporting requirement could impose significant cost and administrative burdens on publicly traded manufacturers. Public companies with mature stock buyback programs may be in the market repurchasing shares virtually every single trading day. As such, Form SR would truly be a *daily* reporting obligation. The proposed rule could ultimately necessitate roughly *250 new SEC filings* each year by a given company. Each of these reports would add significant cost and administrative burdens as companies work to make the required disclosures by the close of business every day—and their cumulative burden over the course of a year would be substantial. While the NAM appreciates that Form SR would be furnished to rather than filed with the SEC, companies would nevertheless still need to take significant steps to prepare, verify, and report accurate data.

The NAM is also concerned by the likelihood of significant confusion and delays (and thus increased burden and cost) given the necessity for new processes and procedures to comply with the proposed daily reporting requirement. First, the disclosure obligation is triggered when a buyback is "executed" even though most repurchase transactions do not actually settle for an additional day or two after execution. This issue would be exacerbated by the fact that there is often a delay between trades being finalized and companies receiving the relevant information from their broker. Companies would also likely experience delays in working with third-party service providers that produce their final EDGAR filings, which will need to manage the deluge of new daily filings from many of their clients. Finally, companies' internal processes to confirm information and ensure SEC filings are produced in compliance with any applicable internal controls could add further delays. The potential cascading effect of these compliance difficulties and delays could make the proposed daily reporting mandate extremely difficult to comply with—up to 250 times per year.

For shareholders, daily reporting would divorce disclosures of share repurchases from the release of a company's quarterly earnings information, removing necessary context that would enable them to understand and evaluate a business's buyback activity. Additionally, the SEC's focus on stock buybacks as a target for disclosure (even when not material to a business) could mislead investors into placing outsized influence on the new daily reports despite their lack of decision-useful information.

The myriad risks, costs, and burdens associated with the proposed rule would be substantially exacerbated by the daily nature of Form SR. The NAM respectfully encourages the SEC to remain mindful of these consequences and to discard its proposed daily reporting requirement as it works to finalize a rule that is more workable for publicly traded companies.

C. A daily reporting requirement could lead to market manipulation and benefit opportunistic traders rather than long-term shareholders.

Most importantly, a daily reporting requirement will expose sensitive, competitive information to the market, which can then be used against a company and its shareholders. Because many companies could be required to file a Form SR every trading day of the year, outside actors will have regular information about the triggers in issuers' buyback plans. It is not difficult to imagine a hedge fund or an algorithmic trader utilizing the price and volume information on Form SR to create a model based on a company's repurchase targets and make money trading against the business. Understanding this information will allow traders to simply drive up the stock price, increasing the cost of the buyback for the issuer while enriching themselves. Artificially inflating the price of shares in this manner will directly harm the company and its investors. More creative choices would also be available to these third parties, including put options to sell or short based on a strike price determined by analyzing the price of recent buybacks. In short, regular, public reports of specific buyback details will empower and enrich opportunistic traders—to the detriment of businesses and their long-term shareholders. Retail investors in particular will pay a significant price given that they largely lack access to the advanced trading technology and algorithmic automation available to professional traders, and they usually do not have the ability to monitor such frequent filings in real time.

Daily disclosures could have additional unintended consequences related to the information and signals sent to the market. For example, a company "missing" a few days of buybacks after being in the market regularly could erroneously imply that it believes its stock to be overvalued. Investors could also believe the company might be in possession of material non-public information ("MNPI") and incorrectly assume a significant transaction—like a potential merger or acquisition—could be forthcoming. A pause in a company's daily reports will subject the business and its shareholders to rampant market speculation about stock valuations, capital needs, MNPI, potential transactions, and more. These problems could be exacerbated by the SEC's Rule 10b5-1 proposal, which could artificially force pauses in companies' buyback programs if they utilize Rule 10b5-1 plans—which would be subject to new restrictions like cooling off periods and limits on overlapping plans[11]—to execute buybacks.[12] These erroneous signals are smoothed out under the quarterly reporting status quo, but under the proposed daily Form SR requirement they could have an outsized impact on the market's view of a company.

Generally, investors *benefit* from stock buybacks—which, after all, return value to shareholders. The Form SR daily reporting regime, though proposed under the guise of protecting investors, could ultimately harm shareholders. In the aggregate, disincentivizing buybacks could reduce shareholder returns and eliminate exit opportunities; more immediately, the daily reporting requirement would effectively transfer capital directly from companies and their shareholders to hedge funds and algorithmic traders. The true beneficiaries of the proposal will be entities using the disclosed information to trade against an issuer—not the long-term shareholders the SEC is charged with protecting.

The NAM strongly opposes the proposed daily reporting requirement for share repurchase information. Form SR will benefit unaffiliated and opportunistic third parties, to the detriment of businesses and shareholders. The NAM respectfully encourages the SEC to rescind this costly and damaging proposal.

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[11] *See* Proposed 10b5-1 Rule, *supra* note 3, at 8689.

[12] *See* NAM Comments on S7-20-21 (1 April 2022), *available at* https://documents.nam.org/tax/nam_10b5-1_comments.pdf ("Combined with the proposed 30-day cooling off period, [the restrictions on overlapping and consecutive plans] could have the effect of prohibiting buybacks during large swaths of the year.").

D. The SEC should consider alternatives to its proposed daily reporting requirement if it decides to move forward with a share repurchase disclosures rule.

If the SEC is determined to expand buybacks reporting beyond the Item 703 quarterly reporting requirement, the Commission should at least consider monthly—rather than daily—disclosures. Companies already report monthly buyback data at the end of each quarter on their 10-Qs and 10-K; it would be relatively straightforward to report the same information at the end of each month instead. Monthly reporting would lessen the administrative burden of the proposed disclosures while also smoothing buyback data over the course of the month—reducing the risk of it being analyzed and manipulated by other market actors and the possibility of misleading market signals. Additionally, the SEC should allow companies to evaluate their share repurchases through the lens of materiality given that daily repurchase activity is often immaterial to a business's ADTV. The existing Rule 10b-18 safe harbor (equal to 25% of an issuer's ADTV) could provide guidance to the SEC and companies as to the materiality of day's buybacks. Though the NAM continues to believe that the existing quarterly reporting regime is sufficient to provide investors with necessary information about issuers' stock buyback programs, a monthly standard would at least be a sensible compromise—and it is critical that the SEC consider additional options for disclosure given the harm that a daily reporting requirement would impose.

III. The requirement to justify share repurchase activity on a quarterly basis is unnecessary and could lead to the further politicization of stock buybacks.

In addition to the daily Form SR requirement, the proposed rule would institute amendments to companies' existing quarterly Item 703 disclosures. Specifically, companies would be required to disclose the "objective or rationale" for any share repurchases during the preceding quarter, including the "process or criteria" used to determine how many shares were repurchased.[13] The new Item 703 would also require disclosure of any policies related to or restrictions on purchases and sales by officers and directors during a repurchase program.

These proposed disclosures flow from the same assumptions that underpin the entire rule: that buybacks are used to "inflate executive compensation" rather than for legitimate business purposes.[14] As we have noted, businesses use stock buybacks to efficiently allocate capital and return value to shareholders. It is simply not necessary to impose new disclosure obligations requiring companies to justify these extremely commonplace business decisions. Stock buyback plans are approved in advance by the board of directors and then share repurchases are carried out in accordance with the plan's design and limits.

As such, the proposed quarterly justification reports will likely become boilerplate disclosures that speak generally to a company's obligations to manage its balance sheet and return value to investors—or else they will devolve into a convoluted preemptive defense against politicized critiques from activists and politicians (who of course have no fiduciary duty to shareholders) with differing opinions about how the company should have managed its capital. Either way, the disclosures will offer little-to-no useful information for shareholders but will provide new openings for criticism by unaffiliated third parties. Further politicizing stock buybacks could discourage return-of-capital transactions, ultimately harming shareholders. The NAM respectfully encourages the SEC not to attempt to force companies to explain and justify their usage of commonplace capital allocation practices (i.e., stock buybacks), but rather to trust investors to understand the reasoning behind buyback programs based on the quarterly disclosures already required under Item 703.

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[13] Proposed Rule, *supra* note 1, at 8449.

[14] *Ibid.*

IV. The NAM is extremely concerned by the SEC's attempts to mischaracterize and discourage share repurchase activity.

Although the proposed rule is couched as a new reporting requirement, the proposing release does not explain or justify its proposed disclosures beyond repeated inferences about the alleged nefariousness of stock buybacks. The new quarterly reporting obligations, for instance, merit exactly two paragraphs of explanation, restating commentators' "concerns" that "issuer share repurchases may be used to inflate executive compensation and cash out executives' securities" and then echoing these concerns by noting that the proposed disclosures would allow investors to understand "whether [an issuer] has taken steps to prevent officers and directors from potentially benefiting from issuer repurchases in a manner that is not available to regular investors."[15]

The proposed daily Form SR merits a slightly longer justification, but it is filled with descriptions of stock buybacks as potentially "opportunistic" and "harmful."[16] Again and again, the SEC repeats certain observers' "concerns" that buybacks could potentially be "used to increase share prices in order to enhance executive compensation and insider stock value"[17] and be "driven by managerial self-interest."[18] As noted, a company's board and management have a fiduciary duty to shareholders to allocate capital in a prudent manner. Approving and executing a share repurchase program to "enrich themselves at the expense of public investors"[19] would be inconsistent with this duty. Given the rule's sensationalist language, it is difficult to read the proposing release as anything other than an attempt to cast aspersions on share repurchases. Seen through this lens, the proposed disclosure requirements appear designed to discourage buybacks rather than to inform investors.

The NAM is deeply concerned by this approach. Stock buybacks are an economically efficient, legitimate method of allocating capital and returning value to shareholders. They are also extremely commonplace and can benefit companies of all sizes and long-term investors of all kinds. Further, quarterly disclosures already provide shareholders with the information they need to understand businesses' approach to share repurchases. If the SEC determined that an evolving market necessitated additional information about buyback activity, it could have provided a fulsome justification for the specific enhanced disclosures it was considering and proposed a reasonable reporting requirement to provide helpful information to investors while still recognizing share repurchases as fundamentally beneficial to business and investors. Instead, the proposing release goes out of its way to emphasize commentators' critiques of stock buybacks while largely ignoring justifications for and supporters of these commonplace return-of-capital practices. Worse, the proposed reporting obligations (particularly the daily Form SR requirement) are unreasonably burdensome for companies and potentially harmful to the shareholders the rule purports to protect.

The NAM opposes the proposed share repurchase disclosure rule on its merits—but also because the SEC should not be in the business of seeking to impose new limits on legitimate business activity under the auspices of the Commission's disclosure authority. Manufacturers are hopeful that, through the notice-and-comment process, the SEC will take notice of the role that stock buybacks play in companies' and shareholders' capital allocation strategies and abandon its attempt to over-regulate these important and commonplace transactions.

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[15] *Ibid.*

[16] *Id.* at 8445.

[17] *Id.* at 8446.

[18] *Id.* at 8447.

[19] *Id.* at 8445 n. 17.

In attempting to address a problem that does not exist, the SEC's proposed share repurchase disclosure rule would lead to significant unintended consequences. In particular, the NAM is concerned that the daily Form SR reporting requirement would impose substantial costs and expose businesses and their shareholders to significant risk of market manipulation—all without providing useful information to investors. Further, the NAM believes that the SEC should not be proposing new disclosure obligations in an attempt to discourage or disincentivize everyday capital allocation practices by manufacturers across the country. The NAM respectfully encourages the SEC to reconsider the proposing release's mischaracterization of stock buybacks and to withdraw the proposed share repurchase disclosures rule.

Sincerely,

Chris Netram
Managing Vice President, Tax and Domestic Economic Policy