

April 1, 2022

Via Electronic Submission

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

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

Dear Ms. Countryman:

This letter is a response to the U.S. Securities and Exchange Commission’s (the “Commission”) request for comment regarding its Share Repurchase Disclosure Modernization proposal (the “Proposal”). This letter represents a collaborative effort by a group of financial practitioners—we are both analysts and investors, and we are committed, as is the Commission, to fairness and efficiency in the capital markets.

I. Introduction

In this letter we address only two requirements of the Proposal: (1) “[D]aily repurchase disclosure on a new Form SR . . . one business day after execution of an issuer’s share repurchase order”; and (2) disclosure of “[t]he objective or rationale for [the issuer’s] share repurchases and process or criteria used to determine the amount of repurchases.” Although we agree that these requirements may, in certain circumstances, alleviate *some* informational asymmetries and facilitate *some* identification of managerial opportunism,¹ we believe that universal application of these requirements is unwarranted. In the sections that follow, we explain our views.

As a preliminary matter, we note that issuer share repurchase is one of many tools in the issuer’s toolkit when it comes to maximizing value for investors. In the same way that dividends are used to return value and that strategic investments are used to create additional value, issuer share repurchase is broadly utilized to fulfil both of these objectives.² And while we acknowledge that managerial opportunism is possible, we believe that such misconduct is the exception and not the norm.³ In the absence of demonstrable widespread abuse, we believe that a more tailored approach to regulation is better than one that is universal and onerous. More broadly, we agree with Commissioner Peirce’s sentiments that

¹ We use the term “managerial opportunism” in this letter to refer generally to any opportunistic and harmful use of issuer share repurchases by issuer insiders.

² See *generally* Share Repurchase Disclosure Modernization § I, 87 Fed. Reg. 8443 (proposed February 15, 2022) (to be codified at 17 C.F.R. §§ 229, 232, 240, 249, 274) (“Some studies have found that issuers often use repurchases in a manner aligned with shareholder value maximization, such as to offset share dilution after new stock is issued, to facilitate stock- and stock-option-based employee compensation programs, to help signal the issuer’s view that its stock is undervalued, or because the issuer’s board has otherwise determined that a repurchase program is a prudent use of the issuer’s excess cash.”).

³ See Hester M. Peirce, *Dissenting Statement on Buybacks Disclosure Proposal* (December 15, 2021) <https://www.sec.gov/news/statement/peirce-buyback-20211215> (noting, in regard to opportunistic behavior, that “studies on the issue are decidedly mixed as to whether this is a real issue.”).

there is a troubling trend of politicians and regulators vilifying this important, time-tested mechanism for returning capital to owners of the business, punishing all with burdensome regulation even in the absence of widespread abuse, and ignoring the benefits of more tailored approaches to regulation. Additionally, we offer that, contrary to the Commission’s goals, this proposal will increase information asymmetries in a way that will benefit a few sophisticated investors at the expense of retail investors, long-term shareholders, and issuers.

II. Daily Repurchase Disclosure Requirement

The Proposal requires “daily repurchase disclosure on a new Form SR, which would be furnished to the Commission one business day after execution of an issuer’s share repurchase order.” We believe this requirement imposes costs that far outweigh any benefits.

a. Informational Uncertainty

In addition to the direct costs related to compliance, there are also potentially significant indirect costs associated with daily repurchase disclosure. These indirect costs include potential impacts to an issuer’s strategic flexibility,⁴ which is of particular concern given that these impacts are likely to detrimentally affect the issuer’s long-term investors—a group that the Proposal specifically, and the Commission in general, seeks to protect. In order to minimize both direct and indirect costs, issuers may modify their share repurchase behavior, which in turn may, counter to the goal of increasing informational efficiency, actually make it more difficult for investors to analyze and interpret issuer repurchases. We think it likely that altered repurchase behavior will ultimately increase trading volatility, impede price discovery, and result in inferior overall market quality.

Similarly, signaling issues are likely to arise, where a change in day-over-day issuer behavior is incorrectly or inconsistently interpreted by the market. For example, an abrupt suspension of issuer share repurchases might be interpreted by some investors as confirmation of a significant corporate event (e.g., a merger or divestiture), by other investors as a change in capital allocation policy, and by other investors as simply a discretionary choice made by the third-party responsible for facilitating the issuer’s share repurchase program.⁵ Ultimately, we do not believe the hoped-for benefits that may accompany daily disclosure are worth the potential market disruptions that will likely accompany changes in issuer behavior.

b. Benefits Sophisticated Investors to the Detriment of Retail Investors and Issuers

The Proposal, while pushing the importance of reducing asymmetries, makes no mention of the fact that the proposed changes will likely *increase* asymmetries between sophisticated investors and retail investors. This is because sophisticated investors are far better equipped than are retail investors to analyze and exploit the deluge of information that will result from daily disclosure of issuer share repurchases. Given the costs of compliance,⁶ perhaps the most significant consequence of the daily

⁴ In order to avoid tipping its hand or creating volatility in the market, issuers may restructure or even forego repurchases in favor of other actions (e.g., dividends or investments) that may have a lower expected return for shareholders.

⁵ See 17 C.F.R. § 240.10b5-1(c)(1)(i)(A)(2).

⁶ See *generally* Share Repurchase Disclosure Modernization § IV.C, 87 Fed. Reg. 8443 (proposed February 15, 2022) (to be codified at 17 C.F.R. §§ 229, 232, 240, 249, 274).

disclosure requirement will be a transfer of value from retail investors to sophisticated investors, paid for by the issuer. Such a transaction does not qualify as investor protection and should be avoided.

c. A More Pointed Approach

In contrast to the Proposal's broad disclosure requirements, we believe that a more targeted approach would be better. Specifically, we encourage the Commission to relax the daily repurchase disclosure requirement for share repurchases that carry presumptively less informational value and are prima facie unlikely to be driven by managerial opportunism. For example, the Commission could exempt from daily disclosure (or require less-frequent disclosure of) repurchases made pursuant to a Rule 10b5-1 plan⁷ or repurchases that fall below certain de minimis thresholds.⁸ These types of targeted disclosure requirements would further the Commission's goals while also allowing issuers and the broader market to avoid the costs associated with daily disclosure. Alternatively, we also endorse Commissioner Peirce's suggestion to add disclosure requirements around repurchase authorizations and terminations.⁹

III. Share Repurchase Rationale Requirement

The Proposal requires an issuer to disclose "[t]he objective or rationale for its share repurchases and process or criteria used to determine the amount of repurchases." This requirement is likely to have an adverse impact on issuers and is unlikely to provide any meaningful information to market participants. First, we believe the threat of the disclosure being later used against the issuer will almost certainly result in the disclosure comprising only information that is boilerplate.¹⁰ And second, the issuer may be adversely impacted by being compelled to reveal competitively sensitive information regarding its strategies, policies, or outlook.

IV. Conclusion

We are aligned with the Proposal's goals of alleviating harmful informational asymmetries and facilitating detection of managerial opportunism. The Proposal's chosen methodology for furthering those goals, however, is misaligned when it comes to benefits (which in this case are largely theoretical and limited to specific repurchases¹¹) and costs (which are concrete, significant, and apply ubiquitously). Much like

⁷ Such an exemption might also require (1) Form 8-K disclosure of the repurchase plan; (2) volume limits; (3) a minimum repurchase period; or (4) other conditions the intent of which are to ensure the exemption is not utilized inappropriately. Should the issuer's repurchase policy change in a way that renders the issuer ineligible for the exemption, the issuer could be required to retroactively disclose detailed share repurchase information. Such retroactive disclosure would likely still further the goal of deterring and detecting managerial opportunism.

⁸ If not already priced into the market, it is axiomatic that any relationship between the size of a share repurchase and the incremental informational value of that share repurchase is positive. Accordingly, at some point, a share repurchase becomes small enough that its incremental informational value is effectively zero. An issuer should not be required to furnish a disclosure that has no informational value.

⁹ See Hester M. Peirce, *Dissenting Statement on Buybacks Disclosure Proposal* (December 15, 2021) <https://www.sec.gov/news/statement/peirce-buyback-20211215>.

¹⁰ The Proposal cites several sources concerning risk factor disclosure to support the argument that issuer disclosures are not necessarily boilerplate. We find this argument unpersuasive, however, given the incentive mismatch between risk factor disclosure (identified risk factors that do not come to fruition are simply disregarded) and policy/strategy disclosure (identified policies/strategies that do not come to fruition may be viewed negatively).

¹¹ We see in the Proposal no evidence regarding the extent of the harm arising from any alleged abuse.

dividends (the appropriateness of which is not under attack), share repurchase is a valuable tool for returning capital to shareholders. And absent some empirically demonstrable theory of why the current repurchase disclosure regime is broadly broken, the Commission's proposed broad fix is both unwarranted and harmful to retail investors, long-term shareholders, and issuers.

Respectfully submitted.