ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

COMMITTEE ON SECURITIES REGULATION

ROD MILLER
CHAIR
MILBANK LLP
55 HUDSON YARDS
NEW YORK, NY 10001
Phone: (212) 530-5022
RDmiller@milbank.com

EVAN J. CAPPELLI
SECRETARY
MILBANK LLP
55 HUDSON YARDS
NEW YORK, NY 10001
Phone: (212) 530-5632
ECappelli@milbank.com

April 1, 2022

Office of the Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Via email to rule-comments@sec.gov

Re: File No. S7-21-21
Share Repurchase Disclosure Modernization

Dear Ms. Countryman:

This letter is submitted on behalf of the Securities Regulation Committee of the New York City Bar Association (the "**Committee**"). We are responding to the request of the Securities and Exchange Commission (the "**Commission**") for comment on its proposed modernization of issuer share repurchase disclosures (the "**Proposal**").

The Committee includes a wide range of practitioners whose areas of interest and expertise include securities laws and the regulation of the U.S. capital markets and who are employed by or advise public companies, both domestic and foreign private issuers. The Committee does not represent any client and the views expressed by the Committee are those

of the Committee and not necessarily the views of any of its individual members or their respective firms or institutions.

The Committee notes the concerns expressed by other commentators regarding the unusually short comment period for the Proposal and the Commission's unwillingness to extend the comment period for significant rule proposals, consistent with the past practice of the Commission to grant such extensions. These periods are particularly important for commenters, such as the Committee, that seek to provide a balanced and thoughtful comment letter that represents the views of a body of experts in the field.

Substantive Recommendations

The Committee also has several concerns regarding the substantive aspects of the Proposal, which are set forth below, along with certain recommendations of the Committee for addressing such concerns.

The Committee has focused on practical, but significant, implementation concerns with respect to several of the proposals, as drafted, and offers what we believe to be solutions that will address these concerns should the Commission proceed with some form of the Proposal.

Reporting of Share Repurchases. The Committee is concerned that the newly proposed daily reporting obligation under proposed Rule 13a-21 and Form SR would add unnecessary and significant compliance costs and complexity. The rule, as proposed, would require next-business day reporting of repurchases regardless of the amount or value of shares repurchased, which the Committee (and other commentators, including investors) believe would result in an excessive number of reports and detract from the usefulness of such reports for investors. Based on relationships with many current reporting companies and the outside filing services most of these filers rely upon for filing or furnishing required reports with the Commission, the Committee has serious concerns as to the existing ability of filers and these outside services to manage this additional burden without material investment or diversion of resources, including personnel, to the task of daily reporting.

Moreover, a next-business day reporting regime presents the potential for market confusion and unwarranted speculation should a company that routinely repurchases securities, even in small amounts for any reason, pause its repurchases. Investors may interpret that pause as evidence, correctly or incorrectly, as to the existence of material non-public information, resulting in the very danger that commentators, such as Professor Karl Muth, raise in commentary to the Commission's concurrently pending proposal on amendments to Rule 10b5-1[1]. Professor Muth correctly observes the need to consider "how difficult, nuanced, and slippery" the issues are which relate to when and how information and "news" reaches investors and the markets. The Committee believes these concerns are exacerbated by the lack of a materiality threshold for the proposed daily reporting construct and the potential for unnecessary trading volatility fueled by misperceptions and unfounded speculation, and the resulting impact on investors.

[1] *See*, Karl T. Muth, The University of Chicago Booth School of Business, comment to Proposed Rule on 10b5-1 and Insider Trading (Release No. 33-11013; 34-93782), February 22, 2022.

Finally, the Committee is concerned that next business-day reporting of all share repurchase activity could be exploited by a few professional traders to opportunistically trade to the detriment of shareholders. Because of the sheer volume of reports, only a few institutional traders, or professional traders focused solely on "cracking" a company's repurchase formulas, will be able to follow (and profit from) such information, so this reporting regime would only potentially benefit a handful of professional traders, while imposing significant expenses on all registrants to the detriment of companies and other shareholders.

If the Commission elects to adopt the Proposal in some form, the Committee urges the Commission to consider requiring disclosure of share repurchases (i) only upon a reporting company repurchasing a material amount[2] of its traded equity securities, and (ii) utilizing a new item to Current Reports on Form 8-K (or equivalent reports for foreign private issuers and management investment companies) requiring such information to be furnished in the report and on an exhibit in a format consistent with Item 703 of Regulation S-K, Item 16E of Form 20-F[3] and Item 9 of Form N-CSR. As such, a report would require the repurchase information on a furnished basis, so a late or missed submission would not affect eligibility of the registrant to use Form S-3 or N-2, as applicable. We believe such an approach would be more useful to investors by providing only material repurchase information between reports, and in a manner that investors are already accustomed to tracking, while also alleviating unnecessary compliance costs and the need for an entirely new type of reporting form.

The Committee further proposes that the deadline for the proposed reporting obligation be set at four business days.

The Committee does not express a view as to whether the report should identify whether and which of the reported repurchases were conducted in accordance with Rule 10b-18 or pursuant to a 10b5-1 plan.

Inline XBRL. The Committee is also concerned regarding the unnecessary and significant compliance costs and complexity that would result from the proposed Inline XBRL tagging requirements. The Committee would ask the Commission to consider allowing filers to amend their original filings within a limited additional window to address the concern that tagging requirements delay filings. To comply with such requirements, many issuers would be forced to incur the costs of training personnel or hiring new personnel with the specific technical knowledge required to properly complete the Inline XBRL tagging, and issuers unable to complete the Inline XBRL tagging internally would need to outsource such tagging to outside filing vendors, greatly increasing the time and expense for each filing. We believe the approach proposed by the Committee (based upon a materiality threshold and in a format consistent with Item 703 of Regulation S-K, Item 16E of Form 20-F and Item 9 of Form N-CSR, as applicable), would address such concern by greatly reducing the amount of tagging required and the related

[2] The Committee believes a number of existing materiality thresholds could be looked to by analogy, such as 1% of the subject class of security outstanding, as disclosed in its most recent filing which disclosed share repurchases (periodic or current report, whichever is most recent).
[3] To the extent applicable to a foreign private issuer. As noted below, the Committee supports traditional treatment of foreign private issuer reporting only to the extent the filer is required to comply with an equivalent home-country share repurchase reporting requirement.

compliance costs. Moreover, the Committee also proposes that no additional liability be imposed upon issuers who must amend filings to either add or revise Inline XBRL tagging.

Proposed Check Box for Reports. The Committee is also concerned regarding the proposed requirement for issuers to check a box in their reports indicating whether any of the issuer's officers or directors subject to the Exchange Act Section 16 reporting requirements purchased or sold securities of a class that is the subject of an issuer repurchase plan within 10 business days before or after the announcement of such plan. The Committee believes that such information would likely be given too much weight by market participants. In the Committee's view, such information has the potential to be misconstrued as a signal of the existence of material non-public information, resulting in unnecessary trading volatility and a negative impact on investors, which the Committee believes would outweigh the usefulness of such disclosures. If the Commission elects to adopt these proposed disclosure requirements in some form, the Committee urges the Commission to consider adopting requirements that do not include the proposed check box requirement.

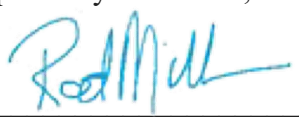
Foreign Private Issuers. The Committee also has concerns regarding the application of the newly proposed share repurchase disclosure obligations to foreign private issuers. While the Committee acknowledges that there are certain foreign jurisdictions which impose similar disclosure obligations on listed companies, the Committee believes that applying such disclosure obligations under U.S. securities regulations would be a departure from the fundamental policy underlying the foreign private issuer disclosure framework, which emphasizes deference to home-country disclosure standards. Moreover, the Committee is concerned that subjecting foreign private issuers to such obligations would add an additional layer of disclosure that could deter such issuers from listing their securities on U.S. exchanges.

Accordingly, the Committee respectfully proposes that foreign private issuers be exempted from the proposed disclosure obligations, except to the extent a foreign private issuer is already subject to equivalent reporting obligations. In the case in which a foreign private issuer is subject to equivalent home-country disclosure standards, the Committee would support requiring such information to be furnished on a Form 6-K.

* * *

We thank you for the opportunity to comment on this important Commission initiative. Members of our Committee would be happy to discuss any aspect of this letter with the Commission staff.

Respectfully submitted,



ROD MILLER
Chair

Securities Regulation Committee
Association of the Bar of the City of New York