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Via Electronic Submission

April 13, 2022

Ms. Vanessa A. Countryman
Secretary
United States Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

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

Dear Ms. Countryman:

This letter is submitted on behalf of the Federal Regulation of Securities Committee (the "**Committee**" or "**we**") of the Business Law Section of the American Bar Association (the "**ABA**"), on the above-referenced proposing release issued by the Securities and Exchange Commission (the "**Commission**") related to the proposed amendments to the disclosures about repurchases of an issuer's equity securities that are registered under Section 12 of the Securities Exchange Act of 1934 (the "**Proposing Release**"). We appreciate the opportunity to comment on the proposals.

The comments expressed in this letter represent the views of the Committee only and have not been approved by the ABA's House of Delegates or Board of Governors and, therefore, do not represent the official position of the ABA. In addition, this letter does not represent the official position of the Business Law Section of the ABA nor does it necessarily reflect the views of all members of the Committee.

Overview

We support the Commission's goal of improving the quality, relevance, and timeliness of information related to issuer share repurchases. However, several of the Commission's proposals could have the unintended effect of both increasing compliance costs for issuers and requiring the presentation of information that would be either immaterial or redundant without any commensurate investor protection benefits. As discussed in more detail below, we recommend that the Commission adopt a monthly (rather than daily) reporting requirement and more streamlined changes to the quarterly disclosure requirements under Item 703 of Regulation S-K. We believe our recommended approach would appropriately balance investors' need for more timely

information about share repurchases with issuers' compliance costs in providing this information.

Recommendations

Frequency and Form of Disclosure

The Commission has proposed new Rule 13a-21 under the Securities Exchange Act of 1934, as amended ("**Exchange Act**"), which would require an issuer, including a foreign private issuer and certain registered closed-end funds, to report any purchase made by or on behalf of the issuer or any affiliated purchaser of any class of the issuer's equity securities that is registered by the issuer pursuant to Section 12 of the Exchange Act. An issuer would be required to report such purchases on a new Form SR before the end of the first business day following the day on which the issuer executes a share repurchase. The Form SR would include tabular disclosure of, among other things, the total number of shares purchased, the average price paid per share, the aggregate total number of shares purchased in reliance on Rule 10b-18, and the aggregate total number of shares purchased pursuant to a plan that is intended to satisfy the affirmative defense conditions of Rule 10b5-1(c).[1]

Although the Commission acknowledges legitimate business reasons for issuers to repurchase securities, the Proposing Release reflects the view, based on certain commentators' observations and opinions, that issuer repurchases are being used to increase share prices in order to enhance executive compensation and insider stock value. Members of this Committee who are securities counsel to issuers of all sizes have advised us that they have not observed this inappropriate behavior in the market. Moreover, we believe that quarterly reporting of issuer share repurchases under Item 703 of Regulation S-K, broken down by month, provides appropriate transparency with respect to these transactions. In our view, more granular, daily reporting of issuer repurchases on proposed Form SR would provide little, if any, additional deterrent to inappropriate behavior.[2]

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[1] We acknowledge that proposed Rule 13a-21 would apply to purchases of "shares or other units of any class of the issuer's equity securities." Throughout this comment letter, unless otherwise noted, we use the term "shares" to refer to all equity securities that would be subject to the proposed rule.

[2] The Proposing Release notes that Rule 10b-18, which was adopted in 1982 and amended in 2003, provides a voluntary, non-exclusive "safe harbor" from liability for manipulation under Sections 9(a)(2) and 10(b) of the Exchange Act, and Rule 10b-5, when an issuer or its affiliated purchaser bids for or purchases shares of the issuer's common stock in accordance with the Rule 10b-18's manner, timing, price, and volume limitations. *See* Proposing Release at note 33.

If the Commission concludes that enhanced reporting of issuer repurchases would be beneficial, we believe a more appropriate balance would be to require monthly reporting on Form SR with earlier disclosure on Form 8-K for any material repurchase activity (as described below). Monthly reporting would align with the current disclosures required on a quarterly basis under Item 703 and would avoid a deluge of daily reports that in many cases would be individually insignificant. At the same time, monthly reporting combined with current reporting of significant purchases would alleviate concerns about "information asymmetries" between issuers and investors.

We believe an additional requirement to report significant repurchases on a real-time basis on Form 8-K would allow investors to focus more readily on issuer repurchases that reach a meaningful volume during a calendar month. Specifically, we recommend that the Commission consider a new Item under Form 8-K that would require issuers to report equity repurchases made by or on behalf of the issuer and any affiliated purchaser if the amount purchased in the aggregate is 1% or more of the total number of outstanding securities of that class. Issuers and investors are already familiar with the reporting structure and triggering events specified in Form 8-K.[3] Reporting significant share repurchases on Form 8-K could be incorporated into an issuer's process and procedures for current reporting and would highlight such repurchases for investors. We also recommend that reports under the new Item be filed within four business days after execution of the share repurchase, consistent with the four business day timeframe for filing reports under Form 8-K.

The recommended reporting threshold of 1% is consistent with the current requirement for reporting unregistered issuer **sales** of equity securities under Item 3.02 of Form 8-K, which is informative by analogy. In general, under Item 3.02, an issuer that sells more than 1% of its total number of shares of that class outstanding in a transaction that is not registered under the Securities Act of 1933, as amended ("**Securities Act**") must provide certain information about such sales within four business days after the issuer enters into an enforceable agreement to sell the securities. Since a *dilutive* issuance in a private transaction is reportable at the 1% threshold, we believe it is reasonable to apply the same concept to share repurchases, which are *anti-dilutive* to investors. In other words, Form 8-K would require repurchase disclosure to the extent an issuer repurchases equity securities in an amount greater than 1% of the total number of shares outstanding, with the number of shares outstanding (denominator) measured as of its last monthly Form SR report, its last report under this new Item under Form 8-K, or its last periodic

[3] We do not recommend replacing daily Form SR reporting with daily Form 8-K reporting, as this would dilute the information value of Form 8-K reports, which investors view as reporting more significant transactions and other events.

report, whichever is most recent. To assist the Commission, we have included as Appendix A draft regulatory text implementing this new Item of Form 8-K. Since we believe the disclosure item is similar in concept to Item 3.02, we have structured new Item 3.04 of Form 8-K to be similar in design.

We believe a daily reporting requirement without any *de minimis* thresholds would create significant compliance costs for issuers, particularly those with daily repurchase programs.[4] Moreover, a daily filing requirement would be contrary to the Commission's general approach of requiring disclosure of material information and could also undermine the Commission's objective of providing useful information to investors, who would be faced with sifting through countless Forms SR to determine when an issuer has made a significant repurchase. It is likely that only large, sophisticated investors would be able to parse the daily disclosures, and for retail investors the daily reports would not be meaningful. The compliance burden of the proposed requirement for daily reporting could also discourage issuers from making share repurchases when it is economically beneficial to do so.

Therefore, to the extent the Commission determines to increase the frequency of repurchase disclosures, we recommend monthly Form SR reporting of shares repurchased in a given month, supplemented by Form 8-K disclosure during the month to the extent such repurchases exceed 1% of the total number of shares outstanding, as previously discussed. We believe this framework would provide more decision-useful information to investors without imposing on issuers the burden of daily reporting.

Considering the increased compliance burden applicable to smaller reporting companies and emerging growth companies, we recommend increasing the new Form 8-K disclosure threshold to 5% of the total shares outstanding for those companies. Setting the Form 8-K threshold at 5% of the total shares outstanding would be consistent with how smaller reporting companies are treated with respect to disclosures under current Item 3.02 for dilutive issuances in private transactions. We believe this accommodation would not result in a meaningful loss of information to investors.

Exemptions for Foreign Private Issuers

The Commission has proposed that foreign private issuers (other than Canadian foreign private issuers that file reports under the Multi-jurisdictional Disclosure System ("MJDS") between Canada and the United States, which are discussed further below) would be subject to the same Form SR filing

[4] Companies will often make smaller and more frequent purchases of their stock in order to stay within the volume limitations in the Rule 10b-18 safe harbor.

obligations as domestic issuers. As the Commission observed in the Proposing Release, some foreign private issuers already are required to provide detailed repurchase disclosures pursuant to their home country requirements and at varying frequencies, and some file those reports under Form 6-K where the issuer deems those reports material to investors. In light of these potentially duplicative (and perhaps inconsistent) disclosure obligations, we recommend the Commission exempt foreign private issuers from any Form SR repurchase disclosure requirements. Similar to quarterly disclosures by domestic issuers under Item 703, we believe that annual disclosure by foreign private issuers of issuer share repurchases under Item 16E of Form 20-F, broken down by month and supplemented with disclosure on Form 6-K, provides appropriate transparency about these transactions.

To encourage more comparable disclosures by foreign private issuers, we recommend that the Commission consider amending Form 6-K to reference repurchases of equity securities among the items that may trigger a current report on Form 6-K. In this way, a foreign private issuer would provide in a Form 6-K information relating to share repurchases to the extent such information (i) is made public pursuant to the law of the issuer's domicile, incorporation or organization, (ii) is filed with and made public by a stock exchange on which the issuer's securities are traded or (iii) is distributed to the issuer's security holders. This approach would align with the Commission's recent proposal relating to disclosure of cybersecurity incidents by foreign private issuers.[5] As noted by the Commission in that release, such a change to Form 6-K would provide timely disclosure of repurchases in a manner that is consistent with the general purpose and use of Form 6-K.[6]

Alternatively, if the Commission determines to require disclosure of securities repurchases by foreign private issuers on Form SR or another similar form, we recommend that the Commission consider a conditional exemption for foreign private issuers. Specifically, we recommend that a foreign private issuer would be exempt from filing Form SR if (1) it is subject to disclosure requirements relating to repurchases of equity securities under non-U.S. law or non-U.S. stock exchange requirements, (2) it files on Form 6-K any reports prepared in accordance with such law or requirements, and (3) it discloses in its Form 20-F annual report that it is exempt from filing Form SR and that information relating to its repurchases of equity securities is available in its reports on Form 6-K. This approach would significantly relieve the duplicative

[5] *Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure*, SEC Release No 33-11038 (March 9, 2022).

[6] *Id.* at Section II.B.4.

reporting burden on foreign private issuers that are already subject to a separate disclosure obligation.

We support the Commission's approach of not proposing amendments to Form 40-F. Accordingly, we recommend that the final rules clarify that Rule 13a-21 would not apply to MJDS issuers by either: (1) including an express reference to Rule 13a-21 in the parenthetical to Rule 13a-3 (*i.e.*, updating the parenthetical in Rule 13a-3 so that it reads "§§240.13a-1 through 240.13a-21)" or (2) deleting altogether the parenthetical in Rule 13a-3.

Proposed Revisions to Item 703 of Regulation S-K

We support a number of the Commission's proposed amendments to Item 703 of Regulation S-K. However, we believe that certain of the proposed disclosures would be more appropriately provided on an annual basis on Form 10-K and Schedule 14A, rather than quarterly on Form 10-Q. We also believe that some of the proposed disclosures are duplicative of other requirements and should not be included in the final rules.

Objective or rationale for share repurchases and process or criteria used to determine the amount of repurchases. We do not object to the proposed requirement to disclose the objective or rationale for each repurchase plan or program. However, if this disclosure is required, we believe it would be more appropriate in the context of Item 303 of Regulation S-K, Management's Discussion and Analysis of Financial Condition and Results of Operations ("**MD&A**"). The primary objective of the MD&A disclosure requirements is to "better allow investors to view the registrant from management's perspective." Additionally, Item 303 requires an issuer to disclose its material cash requirements and "the general purpose of such requirements." The proposed requirement to disclose the issuer's objective or rationale for each repurchase plan or program is consistent with the objectives and requirements of MD&A and could provide more meaningful information in the context of the issuer's overall liquidity discussion.

In response to question 17 of the Proposing Release, we do not support further requirements for an issuer to disclose if it specifically considered other uses for funds used for share repurchases. Issuers routinely evaluate their capital allocation strategies, considering a host of options. We believe that requiring issuers to disclose if they considered other uses for the funds would inevitably result in boilerplate language consisting of a litany of all the alternative uses that are routinely considered. Additionally, we do not support additional disclosure under Item 703 regarding how share repurchases were financed. That information is readily available in an issuer's cash flow

statement and, to the extent material, may be discussed in the MD&A. Any new disclosure requirements should be additive rather than duplicative.

Policies and procedures relating to purchases and sales of the issuer's securities by its officers and directors during a repurchase program. While we support the additional disclosure contemplated by new Item 703(c)(4), we believe the information about policies and procedures pertaining to officers and directors is corporate governance disclosure and therefore should be disclosed pursuant to Item 407 of Regulation S-K instead of Item 703. We believe this type of information is similar to disclosure about an issuer's hedging policies required by Item 407(i), which also promotes transparency of officers' and directors' permitted trading activities. Moreover, we believe that investors are most likely to consider these policies and procedures in connection with voting decisions, and therefore the disclosure, like other Item 407 disclosures, should be included in an issuer's proxy statement on Schedule 14A or information statement on Schedule 14C rather than Form 10-Q. Further, we believe most issuers adjust these types of policies infrequently, so this approach would avoid repeating generally static disclosure each quarter.

Our suggested approach would be consistent with the Commission's recent proposal related to disclosure of an issuer's insider trading policies and procedures under a new Item 408(b) of Regulation S-K.[7] Under new Item 408(b), as proposed, an issuer would provide annual disclosure of its insider trading policies and procedures on Form 10-K and Schedule 14A or Schedule 14C. We believe that disclosure regarding an issuer's policies and procedures relating to insider transactions during a repurchase program should be provided in the same manner as disclosure of an issuer's insider trading policies. Both requirements should be included in the 400 series of Regulation S-K and should apply only to an issuer's Form 10-K and Schedule 14A or Schedule 14C. Repeating the disclosure in each Form 10-Q would not provide meaningful additional information to investors.

Repurchases made in reliance on Rule 10b5-1(c) or Rule 10b-18. We do not support proposed Items 703(c)(2)(ii) and (iii) because the disclosure would be duplicative of proposed Form SR. As proposed, the new provisions in Item 703 would require disclosure of the number of shares purchased in reliance on Rule 10b-18 and the number of shares purchased pursuant to a Rule 10b5-1 plan. Proposed Form SR would require disclosure of the same information. Under our recommendation for monthly reporting on Form SR, issuers would provide the same information as would be required under amended Item 703, as

[7] *See Rule 10b5-1 and Insider Trading*, SEC Release No. 33-11013 (Jan. 13, 2022) at pp. 30-33.

proposed. Duplicative disclosure in Form SR and Form 10-Q does not seem useful and would add unnecessarily to an issuer's compliance costs.

Checkbox to reflect if any Section 16 directors or officers transacted in applicable securities within 10 business days of the issuer's announcement of a share repurchase plan. We do not support the new checkbox requirement in proposed Item 703(a) because it is duplicative of otherwise publicly available information. The existing disclosure regime of Section 16 reporting is sufficient for investors and market participants to see the trading activity of insiders, making any check-the-box reporting redundant. Additionally, a checkbox would not provide any relevant context and could be misconstrued as an indication that the issuer's announcement was in some way connected to the insider's trading activity and decision-making, when in fact the insider's transaction may have been part of a trading plan arranged well before the issuer considered a new share repurchase plan.

We also note that the proposed amendments do not provide an end date for inclusion of the checkbox for a given plan. The checkbox would become repetitive and of no further informational value beginning with the second periodic report after announcement of the repurchase plan. However, under the requirement as proposed, an issuer using the same share repurchase plan for an extended period of time (possibly years) would continue including the disclosure until the termination or expiration of that plan. Further, it is unclear how the checkbox would be implemented for an issuer with multiple classes of stock and a separate repurchase plan for each class or for an issuer that completes one repurchase plan and begins a new repurchase plan during a quarter. To which plan does the checkbox apply? Ultimately, the checkbox is an overly blunt approach that may lead to investor confusion and is unnecessary given existing Section 16 reporting requirements.

If the Commission decides to adopt checkbox disclosure for Item 703, we recommend a more focused requirement, similar to the approach under Item 405 of Regulation S-K regarding compliance with Section 16(a) of the Exchange Act. Item 405 requires an issuer to disclose each Section 16 reporting person that failed to timely file reports required by Section 16(a) during the most recent fiscal year or prior fiscal years. This disclosure, which is required in Form 10-K and Schedule 14A, typically is based in part on representations obtained in connection with the annual director and officer questionnaire process. The disclosure generally is limited to transactions in the prior year because the issuer is only required to provide the disclosure once. Similarly, we recommend that the proposed checkbox disclosure be provided on Form 10-K and Schedule 14A, rather than Form 10-Q, and limited to transactions within 10 days of plans announced in the prior fiscal year. This approach would allow issuers to gather the necessary insider representations as part of the annual

questionnaire process and would avoid redundant disclosure of limited informational value appearing in multiple periodic reports.

We also recommend that the Commission make several clarifications to any checkbox requirement to facilitate issuer compliance. The Commission should include instructions on the scope of the inquiry, similar to Item 405(b), to clarify that the issuer may rely on Forms 3, 4 and 5 filed with the Commission. Additionally, we recommend clarifying whether announcing the increase of an existing share repurchase plan would constitute the announcement of a new repurchase plan for purposes of the requirement. Further, if the disclosure is required, issuers should be expressly permitted to include any applicable context so that insiders' trading activities are not misconstrued. For example, issuers should be permitted to explain if transactions were made pursuant a prearranged trading plan or contractual obligation (such as an obligation to maintain ownership below a certain threshold).

* * *

We appreciate the opportunity to participate in this process and respectfully request that the Commission consider our recommendations and suggestions. We are available to meet and discuss these comments or any questions the Commission and its staff may have, which may be directed to the individuals listed below.

Very truly yours,

_____

Jay H. Knight
Chair of the Federal Regulation of
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Appendix A

Item 3.04 Registrant Repurchases of Equity Securities.

(a) If purchases are made by or on behalf of the registrant or any "affiliated purchaser," as defined in Exchange Act Rule 10b-18(a)(3) (17 CFR 240.10b-18(a)(3)), of shares or other units of any class of the issuer's equity securities that is registered pursuant to section 12 of the Exchange Act, disclose the information set forth in Form SR with respect to all purchases made by or on behalf of the registrant or any "affiliated purchaser" since the registrant's last monthly Form SR report, its last report under this Item 3.04, or its last periodic report, whichever is more recent. For purposes of determining the deadline for submitting the Form 8-K under this Item 3.04(a), the registrant must provide the disclosure within four business days after the share repurchase order has been executed.

(b) No report need be filed under this Item 3.04 if the equity securities purchased, in the aggregate since its last Form SR, its last report filed under this Item 3.04, or its last periodic report, whichever is more recent, constitute less than 1% of the number of shares outstanding of the class of equity securities purchased. In the case of a smaller reporting company or emerging growth company, no report need be filed if the equity securities purchased, in the aggregate since its last report Form SR, its last report filed under this Item 3.04, or its last periodic report, whichever is more recent, constitute less than 5% of the number of shares outstanding of the class of equity securities purchased.

Instructions.
1. For purposes of this Item 3.04, "the number of shares outstanding" refers to the actual number of shares of equity securities of the class outstanding and does not include outstanding securities convertible into or exchangeable for such equity securities.

2. A smaller reporting company is defined under Item 10(f)(1) of Regulation S-K (17 CFR 229.10(f)(1)). An emerging growth company is defined in Rule 12b-2 of the Exchange Act.