DR. EDWIN HU, PROFESSOR ROBERT J. JACKSON, JR. AND DR. JONATHON ZYTNICK

June 27, 2022

Vanessa A. Countryman
Secretary, U.S. Securities and Exchange Commission
100 F Street, Northeast
Washington, D.C. 20549-1090
VIA ELECTRONIC DELIVERY; FILE NO. S7-21-21

Dear Ms. Countryman:

We write regarding the Commission's proposal related to modernization of disclosures in connection with issuer repurchases (the "Proposal").[1] We write to make clear the academic consensus regarding evidence of insider sales in connection with repurchase announcements.

We are academics whose research emphasizes empirical study of corporate law and finance.[2] Professor Jackson is Pierrepont Professor of Law at New York University School of Law; in 2017, the President nominated him, and the Senate unanimously confirmed him, as an SEC Commissioner. Dr. Edwin Hu is Postdoctoral Fellow at NYU Law's Institute for Corporate Governance and Finance; he served as Counsel to Commissioner Jackson and on the Staff of the Division of Economic and Risk Analysis. Dr. Jonathon Zytnick was Counsel to Commissioner Jackson and, as of July 2022, will be appointed Associate Professor of Law at Georgetown Law.

We generally support the Proposal, which would significantly strengthen transparency around share repurchases. The Proposal is motivated by serious engagement with longstanding academic literature arguing that enhanced transparency could help investors better assess issuers' repurchase activity.[3] We commend the Commission on that engagement. And we do not here advocate for the SEC to adopt, or not to adopt, particular aspects of the Proposal.

Instead, we write to note that a letter advocating against the Proposal from the U.S. Chamber of Commerce purporting to identify flaws in empirical work referred to in the Proposal does not reflect analysis of the kind that can, or should, guide the Commission's consideration. The letter is based on a Chamber-funded white paper (the "Chamber's Paper") so lacking in rigor that any reliance on it would endanger the credibility of the Commission's economic analysis.[4]

[1] SEC, Proposed Rule, Share Repurchase Disclosure Modernization, Release No. 34-93773, 87 Fed. Reg. 8443 (Feb. 15, 2022) [hereinafter, the "Proposal"].

[2] We write in our individual capacities; institutional affiliations are given for identification purposes only.

[3] *See, e.g.*, Proposal, *supra* note 1, at 8445 n. 15 (citing Testimony of Jesse M. Fried of the Harvard Law School before the U.S. House of Representatives Subcommittee on Investor Protection, Entrepreneurship and Capital Markets (Oct. 17, 2019)); *id.* at 8455 n. 81 (citing Alex Edmans, Vivian W. Fang & Allen H. Huang, *The Long-Term Consequences of Short Term Incentives*, 60 J. ACCT. RSCH. 1007 (2022)).

[4] *Compare* Letter to Vanessa Countryman, Sec'y, U.S. Sec. & Exch. Comm. from Tom Quaadman, Executive Vice President, U.S. Chamber of Commerce Center for Capital Markets Competitiveness (April 1, 2022) (citing Craig Lewis & Joshua White, *Corporate Liquidity Provision & Share Repurchase Programs Addendum*, U.S. Chamber of Commerce Center for Capital Markets Competitiveness (March 22, 2022) [hereinafter the "Chamber's Paper"]) *with* SEC Commissioner Robert J. Jackson, Jr., *Stock Buybacks and Corporate Cashouts* (remarks at the Center for American Progress, June 11, 2018) [hereinafter, the "Analysis"].

The authors of the Chamber's Paper have before worked with advocates to write papers consistent with the advocate's preferred regulatory outcome, which are then cited heavily in the advocate's comment letters to the SEC.[5] We are academics who focus on publishing in peer-reviewed scholarly journals; none of us accepts pay from corporate lobbyists for papers.

The Chamber's Paper makes two claims regarding evidence Commissioner Jackson's Office produced on insiders' propensity to sell their own shares when announcing repurchases (the "Analysis"). First, the paper claims, through "visually striking" figures, that the Analysis and its results were "created by a small number of outlier observations." Second, the paper speculates that "insider sales [are] mechanically driven by issuer blackout periods." We consider each claim below. Neither reflects rigorous analysis.

I. Evidence of Insider Sales in Connection with Repurchase Announcements

The Analysis considered 385 repurchase announcements, studying whether insiders sold significant amounts of their personal shares at the time of those announcements. The Analysis reports a spike in insider sales following a buyback announcement: during the eight days after an announcement, the Analysis shows, executives sell five times as much stock as they usually do.

Consistent with Commissioner Jackson's practice, his Office invited engagement with this research, publicly releasing the data used in the Analysis along with a Data Appendix. Using those data, the Chamber's Paper first argues that the Analysis is largely driven by outliers. The authors "remove 11 observations" they deem, for unreported reasons, to be outliers. Rather than replicate the Analysis excluding those observations, the authors compare a figure drawn from the Analysis (presented on the left below) with a new figure (on the right below), declaring the difference between the two "visually striking":

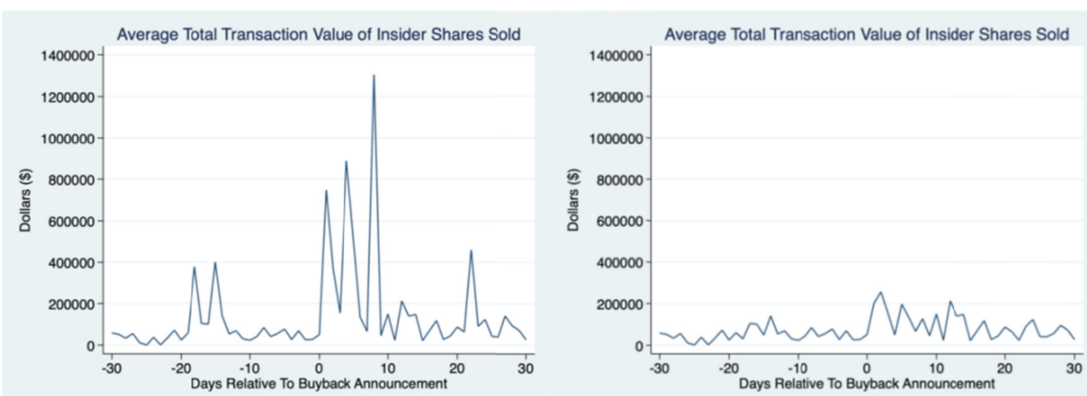

Figure 1. Figures from the Chamber's Paper.

Visually comparing the figure on the left with the figure on the right is all the Chamber's Paper needs to "conclude that one of the key analyses underlying the Proposal does not present

[5] *Compare* Craig Lewis & Joshua T. White, *Science or Compliance: Will Section 404(b) Compliance Impede Innovation by Emerging Growth Companies in the Biotech Industry?* (2019) (using a literature review and survey evidence to claim that the Sarbanes-Oxley Act impedes productive scientific research in a piece prepared for the Biotechnology Innovation Organization ("BIO")) *with* Letter from BIO to Vanessa Countryman (July 29, 2019), at 5 n.13 (describing that paper as a "study" and citing the authors' academic appointments but not their funding).

robust evidence that insiders opportunistically sell, or 'cash out,' their shares after a buyback announcement." For four reasons, this unserious claim does not warrant the SEC's attention.

First, the visual difference in Figure 1 comes from manipulation of vertical axes.[6] The chart on the left has a vertical axis with a maximum value of $1,400,000, scaled to accommodate all observations; the one on the right retains that axis while removing the largest observations. Figure 2 below shows the same figure, with the same omitted observations, on the left as the Chamber's Paper did and on the right with an appropriate vertical axis:

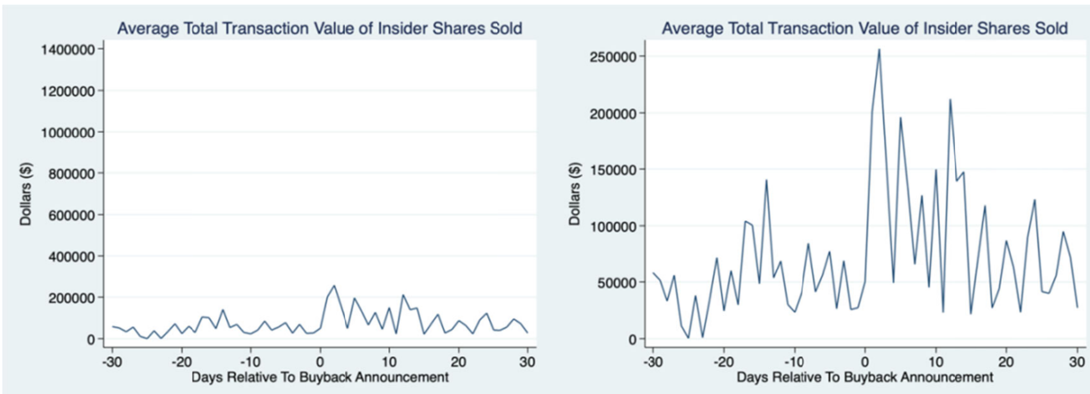

FIGURE 2. RESCALED FIGURES FROM THE CHAMBER'S PAPER.

As the graph on the right shows, simply scaling the vertical axis to reflect the authors' data choices produces a figure making the same point as the Analysis: at the time of a repurchase announcement, there is a jump in insider sales. By leaving the original axis in place but removing data it once accommodated, the Chamber's Paper compares large insider sales to removed, even-larger sales, making the former look small.

Manipulation of vertical axes like that in the Chamber's Paper is well-known to produce misleading results. Consider Figure 3 below, describing our Nation's historical levels of debt, with an appropriate vertical axis on the left and a manipulated one on the right:

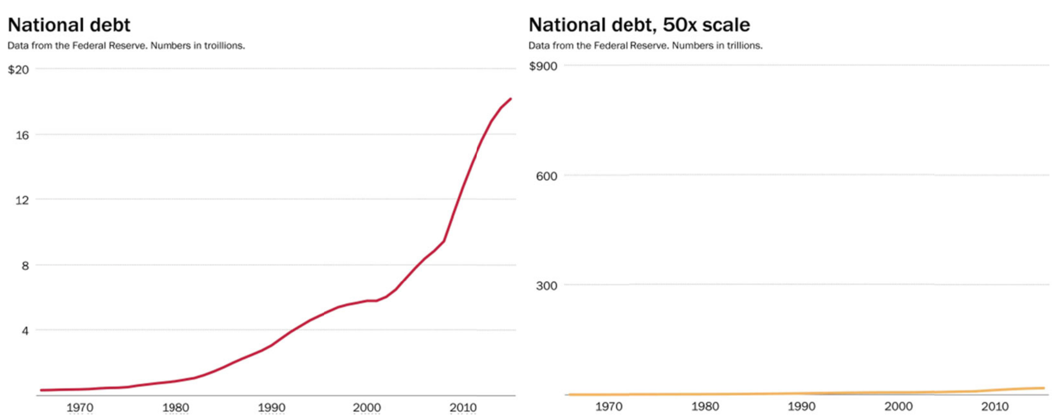

FIGURE 3. HISTORICAL NATIONAL DEBT USING THE METHODS IN THE CHAMBER'S PAPER.

[6] The graph on the left side of Figure 1, which we reproduce here directly from the Chamber's Paper, was not in fact drawn directly from the Analysis but rather reproduces a figure in the Analysis without smoothing the data over time. The choice not to smooth the data allows the authors to increase the maximum value on the y-axis from $500,000 to $1,400,000; retaining that maximum axis value produces their manipulated figure.

As Figure 3 shows, the approach in the Chamber's Paper leads one to the incorrect inference that the national debt has not meaningfully increased since 1970.[7] That is why serious scholars, and certainly federal rulemaking processes, do not and should not use vertical-axis manipulation of the kind performed in the Chamber's Paper in actual economic analysis.

Second, the reason manipulated vertical axes were necessary for the Chamber's purposes is that the fact that insiders sell substantial shares at the time of repurchase announcements has been established in the finance literature for years.[8] A better critique of the Analysis, and one that could be advanced by more serious scholars, is that the Analysis is unoriginal.[9] Even the Chamber's Paper, by speculating that sales are driven by issuer-imposed blackout periods, acknowledges that sales frequently follow repurchase announcements. As Commissioner Jackson explained, the "implication of this evidence for the SEC's work is debatable; the fact that many executives sell significant amounts of stock immediately after they announce a buyback is not."[10]

Third, calling selected observations in the Analysis "outliers" forgets that SEC rules are designed to give investors tools to address unusual but costly practices that depart from prevailing market standards—like fraud. The observations excluded in the Chamber's Paper involve 11 insider sales worth $1.2 billion around repurchase announcements. The notion that the existence of these observations counsels *against* additional transparency in this area is risible. As in other areas, such as executive pay, SEC disclosure rules are appropriately designed to give markets necessary information to constrain insider behavior that departs from market norms.

Fourth, even accepting that the SEC should disregard these observations, doing so doesn't change the results. The Chamber's Paper provides no statistics—only "visually striking" figures—but there is a rigorous way to see whether the Analysis results are sensitive to outliers: analyzing whether the increase in insider selling is statistically and economically significant regardless whether those 11 observations are included. Figure 4 below reproduces both the value of insider transactions (on the left) and a binary variable measuring whether insider sales occur on a given day (on the right),[11] in each case excluding the Chamber's chosen 11 observations:

---

[7] Philip Bump, *The Fix*, WASHINGTON POST (Dec. 14, 2015) (providing data from the Federal Reserve). The *Post* conducted this analysis only for entertainment and illustrative purposes; until reading the Chamber's Paper, we would not have thought anyone would present this kind of exercise in a federal rulemaking proceeding. *Id.* (describing the method used in the Chamber's Paper as "akin to suggesting that Shaquille O'Neal and Mini-Me (aka Verne Troyer) are the same height because they're both small compared to the planet Jupiter").

[8] *See, e.g.*, Alice A. Bonaime & Michael D. Ryngaert, *Insider Trading and Share Repurchases: Do Insiders and Firms Trade in the Same Direction?*, 22 J. CORP. FIN. 35, 36 (2013) ("[S]hare repurchases are most frequently observed conditional on insiders being net *sellers*."); Edmans et al., *supra* note 3, at 1 (providing evidence "consistent with [repurchases] being used to boost the short-term equity price and thus [insiders'] equity sale proceeds"). All of these papers are cited in the Proposal; none is cited in the Chamber's Paper.

[9] *See, e.g.*, Jesse M. Fried, *Insider Signaling and Insider Trading with Repurchase Tender Offers*, 67 U. CHI. L. REV. 421, 471 (2000) (proposing a six-month prohibition on insider selling after buybacks two decades ago).

[10] Letter to Senator Chris Van Hollen from Commissioner Robert J. Jackson, Jr., U.S. Sec. & Exch. Comm'n (March 6, 2019) [hereinafter the "Additional Analysis"].

[11] The Analysis included this separate binary variable, indicating whether insider selling occurred on any given day, expressly to address the possibility of outliers. *See* Office of Commissioner Robert J. Jackson, Jr., Data Appendix to *Stock Buybacks and Corporate Cashouts*, *supra* note 4, at 11 fig. A.4. The Chamber's Paper says nothing about that measure.

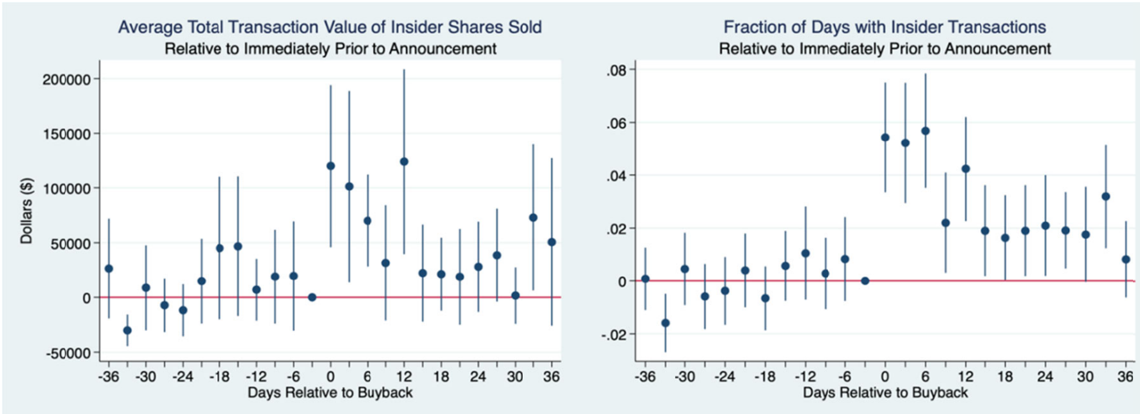

FIGURE 4. REPRODUCED ANALYSIS EXCLUDING CHAMBER-CHOSEN OBSERVATIONS.[12]

Figure 4 shows why the Chamber's Paper includes no analysis of statistical significance. Any way you slice the data, consistent with decades of peer-reviewed finance research, one sees a statistically and economically significant increase in insider sales activity around repurchase announcements. The Chamber's Paper provides no reason to doubt that.

II. EVIDENCE ON INSIDER SALES AND ISSUER BLACKOUT PERIODS

The Chamber's Paper also claims that "insider sales [are] mechanically driven by issuer blackout periods." This claim has been repeated by former Trump Administration officials, along with an author of the Chamber's Paper, for years.[13] Neither those officials, nor the authors of the Chamber's Paper, have offered meaningful empirical evidence for this contention. For three reasons, the Commission should give the claim little weight in its deliberations.

First, Commissioner Jackson's Office studied whether blackout periods fully drove the results (the "Additional Analysis"). Consistent with prior peer-reviewed work, the Additional Analysis showed that over half of the firms in the sample had insider trading during the days before repurchase announcements, making blackouts unlikely at many firms.[14] The Additional Analysis also empirically estimated blackout windows and, controlling for those windows, found the residual amount of insider sales unchanged. And the Additional Analysis removed earnings announcements, which follow blackout periods, from the sample—and confirmed that insider selling is still economically and statistically significantly higher in the remaining sample. The Chamber's Paper does not mention, let alone address, any of that evidence.

---

[12] The confidence intervals provided in Figure 4 are based on standard errors clustered at the firm level. As Figure 4 shows, both average insider sales value and the percentage of observed days with insider sales increase in economically and statistically significant fashion upon a repurchase announcement.

[13] That author also made the claim in Congressional testimony that was, according to its footnotes, "derived from" a white paper funded by the Association of Mature American Citizens, a conservative advocacy organization. Hearing of House Fin. Servs. Subcomm. on Investor Protection, Entrepreneurship and Capital Markets on Examining Corporate Priorities: The Impact of Stock Buybacks on Workers, Communities and Investment (2019), at 2 n.2 & 6 n.12 (Testimony of Craig M. Lewis); *see also* CNBC, SQUAWK BOX, *Former SEC Chair: Restricting Buybacks Does Not Make a Whole Lot of Sense*, Youtube (March 29, 2022) (repeating this claim without evidence).

[14] Additional Analysis, *supra* note 10, at 3 n. 6 (citing D. Scott Lee, Wayne H. Mikkelson & M. Margaret Partch, *Managers' Trading Around Stock Repurchases*, 47 J. FIN. 1947 (1992); Ilona Babenko, Yuri Tserlukevich & Alexander Vedrashko, *The Credibility of Open Market Share Repurchases*, 47 J. FIN. & Q. ANAL. 1059 (2012)).

Second, recent peer-reviewed work has also separately addressed this possibility. Using insiders' vesting schedules as an instrument, Alex Edmans and his coauthors "find that CEOs sell significantly more equity shortly after repurchase announcements than before, consistent with an independent analysis by former SEC Commissioner Robert Jackson, Jr."[15] That study "explicitly recognized the existence of blackout periods," finding that "repurchase announcements are timed (either intentionally or unintentionally) on dates at which the CEO is able to cash out afterwards, due to the absence of a blackout period afterwards."[16]

Third, the Chamber's Paper offers one citation for its assertion—an unpublished paper that begins by "corroborating earlier reports that insiders sell more stock at the start of a repurchase program," citing the Analysis and peer-reviewed work establishing that proposition.[17] The authors then observe, consistent with prior literature, that "CEOs generally sell more shares after earnings announcements." Finding evidence consistent with that work, the authors then state their "*conjecture* that CEOs sell more stock after buyback announcements merely because they largely coincide with earnings announcements," and "confirm the results of [the prior peer-reviewed work], *but do not find them to be convincing evidence of stock-price manipulation*."[18]

The authors of this paper carefully note both their conjecture and their claim: that the Analysis and the prior literature does not provide convincing evidence of market manipulation. And for good reason: neither the Analysis, nor the prior literature, nor the Proposal says it does. As Professor Edmans recently explained in a letter to the Commission, his peer-reviewed work, like the Analysis, "never claim[ed] that our results are evidence of manipulation." Instead, the "hypothesis is that, when considering whether to undertake a stock buyback, *one* factor that may influence a CEO's decision is whether she personally benefits."[19]

Of course that hypothesis is, in Professor Edmans's words, "fully consistent" with the findings of this working paper. To the degree the working paper addresses any hypothesis, it is a claim that neither the Proposal, nor Professor Edmans, nor the Analysis made: that insider sales in connection with buyback announcements reflect illegal market manipulation.[20]

---

[15] Letter to Vanessa Countryman, Sec'y, U.S. Sec. & Exch. Comm. from Alex Edmans, Professor of Finance, London Business School (May 9, 2022), at 2 (citing Edmans et al., *supra* note 3, at 1022).

[16] Letter from Alex Edmans, *supra* note 15, at 3. Moreover, Professor Edmans explained, it "*does not matter* if [CEO] equity sales are 'mechanical' due to occurring after the end of a blackout period," since "[i]f the CEO knows that she will be able to sell equity due to the blackout period ending, this may still influence her buyback decision." *Id.* (emphasis in original).

[17] Ingolf Dittman, Amy Yazhu Li, Stefan Obernberger & Jiaqi Zheng, *The Corporate Calendar and the Timing of Share Repurchases and Equity Compensation* (Tinbergen Institute Discussion Paper 2022), at 3, 33.

[18] *Id.* at 3, 19, 33 (emphases added).

[19] Letter from Alex Edmans, *supra* note 15 (emphasis in original). As Professor Edmans explained, his work includes extensive "pro-buyback writing[]," including peer-reviewed empirical work, but he nevertheless supports the Proposal's requirement that issuers make disclosures related to insider transactions around buybacks, because the empirical evidence supports such a requirement. *Id.* at 2.

[20] *See, e.g.*, Dittman et al., *supra* note 17, at 40 Appendix A.1 (purporting to provide "commentaries linking share repurchases to stock price manipulation" from, among others, Commissioner Jackson and Professor Jesse Fried of Harvard Law School; in fact, neither commentary refers to or uses the word manipulation). We note that market manipulation is legally defined conduct requiring a showing, among other things, of the actor's state of mind, *see* ATSI Communications v. Sha'ar Fund, Ltd., 493 F.3d 87, 101 (2d Cir. 2007), which of course is difficult to ascertain through data analysis alone. Neither this working paper, nor the Analysis, nor the SEC's Proposal makes any reference to that legal standard.

In sum, there is little evidence for the claim that the insider selling long observed after repurchase announcements is fully explained by blackout windows. The Additional Analysis answered this claim years ago, the peer-reviewed work published since concurs, the Chamber's Paper does not respond to either, and more recent study, by its own terms, reflects conjecture focused on a claim the Analysis did not make. Like its manipulation of vertical axes, the Chamber's Paper's invocation of this study does not reflect scholarly standards.

* * * *

The Commission has not updated its rules governing share repurchases for nearly two decades, and the Proposal reflects the Staff's deep engagement with a long literature documenting how those rules could be improved to reflect the realities of today's markets. Nothing in the Chamber's Paper provides any basis to depart from that literature. We hope these comments are helpful as the Commission considers finalization of the Proposal. Should you have any questions, or if we can be of any assistance to the Commission or its Staff, please do not hesitate to contact us at your convenience.

Very truly yours,

Dr. Edwin Hu

Professor Robert J. Jackson, Jr.

Dr. Jonathan Zytnick