April 1, 2022

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

Re: Share Repurchase Disclosure Modernization (File No. S7-21-21, RIN 3235-AM94)

Dear Ms. Countryman:

Better Markets[1] appreciates the opportunity to provide comments on the above-captioned proposed rule (the "Proposal"), which was published by the Securities and Exchange Commission ("SEC" or "Commission") in the Federal Register on February 15, 2022 (the "Release").[2] The Proposal would improve the quality, quantity, and timeliness of information regarding an issuer's repurchase of its own shares. Those transactions are increasingly viewed as a strategy that corporate insiders use to line their pockets at the expense of the long-term financial health of the company, its employees, and its shareholders. We, therefore, support the Proposal and encourage the SEC to retain its beneficial provisions, while we also identify a number of enhancements the Commission should implement in the final rule.

BACKGROUND

For years, stock repurchases were relatively rare because of the potential liability under the anti-fraud and anti-manipulation provisions in the Exchange Act.[3] After several failed rulemaking attempts to *prohibit* stock repurchases, Rule 10b-18 was promulgated in 1982. Rule 10b-18 provides an issuer and its affiliated purchasers with a non-exclusive safe harbor from liability for

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1 Better Markets is a non-profit, non-partisan, and independent organization founded in the wake of the 2008 financial crisis to promote the public interest in the financial markets, support the financial reform of Wall Street, and make our financial system work for all Americans again. Better Markets works with allies—including many in finance—to promote pro-market, pro-business, and pro-growth policies that help build a stronger, safer financial system that protects and promotes Americans' jobs, savings, retirements, and more.

2 Share Repurchase Disclosure Modernization, 87 Fed. Reg. 31, 8443 (Feb. 15, 2022).

3 *See* Lenore Palladino & William Lazonick, *Regulating Stock Buybacks: The $6.3 Trillion Question*, 11, ROOSEVELT INSTITUTE (May 2021), https://rooseveltinstitute.org/wp-content/uploads/2021/04/RI_Stock-Buybacks_Working-Paper_202105.pdf; *see also* Lenore Palladino, *The $1 Trillion Dollar Question: New Approaches to Regulating Stock Buybacks*, YALE J. ON REG., Vol. 36 (Oct. 17, 2018).

manipulation in connection with repurchases. Because the requirements for the safe harbor leave issuers wide latitude, repurchase programs have greatly increased, in recent years. As the Commission notes, in 2019, issuers repurchased approximately $1 trillion dollars in shares. In 2020, approximately $670 billion dollars of stock was repurchased, in line with the effects of the COVID-19 crisis.[4]

Unfortunately, it has become clear that repurchase programs create enormous opportunities for insider manipulation.[5] Indeed, the current system is a flawed one that allows corporate executives and board members, using their control of a corporation's finances, to repurchase stock primarily for their personal benefit, not for the benefit of the company and its shareholders for which they act as fiduciaries.

As the Release notes, there may be legitimate reasons for a public company to engage in buybacks, including a desire to offset share dilution after new stock is issued or to facilitate stock or stock-option employee compensation plans. However, a growing concern has centered on management's use of stock repurchase programs to benefit the executives while sidelining capital that could be used to enhance long-term productivity, profitability, and employee and community welfare.[6] For example, announcements of repurchases, along with the repurchases themselves, tend to exert short-term upward price pressure. This creates opportunities for management to directly increase their own profits from repurchases of their stock. It also may enable management to artificially increase earnings per share thus triggering compensation metrics and boosting executive compensation, or at least burnishing management's performance by meeting or exceeding forecasts or targets.[7] Share buybacks can be used not only to justify inflated compensation awards but also to disguise dilutive corporate events such as declining earnings.

The capital expended on stock repurchases is diverted from other uses that might better serve the long-term interests of the company and its shareholders in any number of ways: upgrading equipment; acquiring new technology; conducting research and development; expanding operations; improving the safety and quality of working conditions; increasing the compensation and other benefits for employees; and devoting more resources to public goods such as environmental stewardship and racial and gender justice goals. Indeed, some critics argue that stock repurchases are at best a tacit admission that management is incapable of prudently and productively deploying its excess capital; at worst they represent a strategy used by senior executives to personally profit at the expense of other stakeholders.

Increasing transparency around the use of repurchases is an important regulatory remedy for mitigating any harms associated with repurchases. The Commission implemented a limited

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4 Release at 8444, 8452.

5 *See* Mitch Goldberg, *Investors should be furious: 3 stock buybacks that went horribly wrong*, CNBC ETF INVESTOR SPOTLIGHT (Dec. 11, 2018), https://www.cnbc.com/2018/12/11/investors-should-be-furious-3-stock-buybacks-that-went-horribly-wrong.html.

6 Release at 8444.

7 *See* Release at 8454.

disclosure regime with the adoption of Item 703 in 2003. It requires the disclosure of rudimentary information, on just a quarterly basis, about purchases made by an issuer or any affiliated purchaser of the shares of any class of registered securities. Those disclosures were focused on enabling investors to determine whether and to what extent issuers were following through on publicly announced repurchase programs, which tend to boost stock prices. They were also intended to help investors assess the impact of an issuer's share repurchases on the issuer's stock price. The Commission is now proposing to enhance the level of transparency surrounding stock repurchases with more timely and complete disclosure requirements.

SUMMARY OF PROPOSAL

The Proposal would modernize and improve disclosure about repurchases of an issuer's equity securities that are registered under the Securities Exchange Act of 1934 by requiring an issuer to provide more timely disclosure regarding purchases of its equity securities for each day that it, or an affiliated purchaser,[8] makes a share repurchase. The issuer would have to furnish a new Form SR before the end of the first business day following the day on which the issuer executes a share repurchase. The Proposal would also enhance the existing periodic disclosure requirements about these purchases through Forms 10-Q and 10-K as well as Form 20-F for foreign private issuers and Form N-CSR for certain closed-end funds.

The Proposal includes essentially three core provisions. First, it would provide for much more timely disclosure about share repurchases by requiring issuers to "furnish" a new Form SR before the end of the first day following the day on which the issuer executes a share repurchase. The form would contain basic data about the repurchasing activity, including the following information:

- the date of repurchase;
- identification of the class of securities repurchased (*i.e.*, common or preferred stock and series);
- the total number of shares repurchased, including all issuer repurchases whether or not made pursuant to publicly announced plans or programs;
- the average price per share;
- the aggregate total number of shares purchased in the open market;
- the aggregate total number of shares purchased in reliance on the safe harbor in Exchange Act Rule 10b-18; and

[8] The term "affiliated purchaser" as used in Item 703 is defined in 17 CFR 10b-18(a)(3).

- the aggregate total number of shares purchased pursuant to a plan intended to satisfy the affirmative defense conditions of Exchange Act Rule 10b5-1(c).

Second, the Proposal would require an issuer to disclose on Forms 10-Q, 10-K, 20-F, and N-CSR additional information that provides insight into the reasons for the repurchases and the processes relating to them, including:

- the objective or rationale for its share repurchases;
- its process or criteria to determine the amount of repurchases;
- any policies and procedures relating to purchases and sales of the issuer's securities by its officers and directors during a repurchase program;
- any restrictions on purchases and sales of the issuer's securities by its officers and directors during a repurchase program;
- whether repurchases were made pursuant to a plan that is intended to satisfy the affirmative defense conditions of Exchange Act Rule 10b5-1(c), and if so, the date that the plan was adopted or terminated; and
- whether repurchases were made in reliance on the Exchange Act Rule 10b-18's non-exclusive safe harbor.
- whether any of the issuer's officers or directors subject to the reporting requirements under Exchange Act Section 16(a) purchased or sold shares of the class of the issuer's equity securities that is the subject of an issuer share repurchase plan within 10 business days before or after the announcement of such plan.

Third and finally, the Proposal would require issuers to present the disclosure about issuer share repurchases using a structured data language, specifically Inline eXtensible Business Reporting Language or "Inline XBRL") in accordance with Rule 405 of Regulation S-T and the Electronic Data Gathering, Analysis, and Retrieval ("EDGAR") system Filer Manual.

COMMENTS

I. THE COMMISSION MUST RETAIN THE MANY POSITIVE FEATURES OF THE PROPOSAL.

The Proposal will provide investors with more complete and more timely information regarding share repurchases. In general terms, these disclosures will help reduce the informational asymmetries that exist between issuers and investors with respect to the issuer, its prospects, and its management's performance. In particular, the disclosures will help investors better understand the extent of an issuer's repurchase activity and its impact on share price. In addition, those

disclosures will help investors identify "opportunistic" share repurchases designed primarily to benefit management, not the company.

The Proposal includes several requirements that are especially important. First, it would require reporting no later than one business day following the execution of the share repurchase, on Form SR, via the Commission's publicly accessible EDGAR system. This is a vast improvement over the current quarterly reporting requirement. As the Release explains, Item 703 of Regulation S–K (on Forms 10–Q and 10–K), offers a "general" understanding of an issuer's repurchases over time, a kind of slow-motion depiction that means the information is stale by the time it is finally revealed. Reporting within one business day means the data will be much more useful and meaningful, allowing investors to more immediately assess the impact of a share repurchase on share pricing, as well as management's motives in effecting repurchases. As stated in the Release, "[t]imely disclosure about recent actual repurchases can thus contain valuable information about the future movement of the share price that is not revealed to the market otherwise, and a lack of timely disclosure could contribute to information asymmetries between investors and issuers/insiders."[9] Moreover, this reporting timeline is feasible and in line with the requirements that have been adopted in a number of prominent foreign jurisdictions.[10]

Another critical enhancement is the Proposal's requirement that issuers disclose qualitative descriptions, including:

- the objective or rationale for its share repurchases;
- its process or criteria to determine the amount of repurchases;
- any policies and procedures relating to purchases and sales of the issuer's securities by its officers and directors during a repurchase program;
- any restrictions on purchases and sales of the issuer's securities by its officers and directors during a repurchase program.
- whether any of the issuer's officers or directors subject to the reporting requirements under Exchange Act Section 16(a) purchased or sold shares of the class of the issuer's equity securities that is the subject of an issuer share repurchase plan within 10 business days before or after the announcement of such plan.

All this information will provide investors with valuable insight into the purposes underlying share repurchases and the measures, if any, the issuer has adopted to regulate repurchases by its officers and directors and to prevent self-interested or opportunistic purchases by those executives.

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9 Release at 8453 and 8457.
10 Release at 8447.

We certainly support the requirement that issuers indicate via the proposed checkbox if any officer or director reporting pursuant to Section 16(a) of the Exchange Act purchased or sold the issuer's equity securities that are the subject of an issuer share repurchase plan or program within 10 business days before or after any announcement of an issuer purchase plan or program. This information would allow investors to determine whether corporate insiders are potentially benefiting unfairly from knowledge asymmetry by, for example, purchasing shares ahead of an issuer's repurchase plan announcement, knowing that share prices usually rise with such an announcement.

With respect to format, we agree with the Commission's assessment that the obligation to tag the additional disclosure information in XBRL would imposes minimal burdens, as issuers subject to the proposed tagging requirements are, or in the near future will be, subject to similar Inline XBRL requirements in other Commission filings.[11] The benefits of the Inline XBRL disclosure requirement, however, would be great, as it would allow automated extraction of granular data on repurchases, giving market participants the ability to evaluate repurchase programs across time and issuers and to more readily identify potential manipulative behavior.

The proposed requirement that share repurchase information be provided on a new Form SR is also important. Allowing issuers to in effect bury the disclosures on an amended 8-K or other existing forms would undermine their accessibility, as many investors would not be looking for repurchase program disclosures on those pre-existing forms. Rather, the Commission should follow through with the new Form SR, a unique form that will benefit investors by allowing them to easily discern the information most useful in evaluating share repurchases.

As proposed, foreign private issuers should have the same Form SR filing obligations as domestic issuers. As the Commission notes, some foreign private issuers are required to provide daily detailed disclosure in their home jurisdictions.[12] Indeed, it is telling that nations such as the United Kingdom, Canada, and Australia already require the disclosures in the Proposal, further evidence that such disclosure is long overdue in the United States.[13]

Finally, we urge the Commission to refrain from adding unwarranted carve-outs or exceptions to the new reporting requirements. For example, an exemption for the benefit of smaller companies would not be justified, given the value of the information to investors in all-sized issuers and the comparatively low cost of compliance. Moreover, while smaller issuers may

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11 Release at 8451

12 Release at 8448 and 8456.

13 *See* Palladino, *The $1 Trillion Dollar Question: New Approaches to Regulating Stock Buybacks*, YALE J. ON REG., Vol. 36 (Oct. 17, 2018) ("Internationally, most countries with robust capital markets have some regulation in place for curbing stock buybacks, including both disclosure and substantive limitations. . . among the ten countries with the largest capital markets, all others place clear limits on repurchase activity, and most have more specific repurchase requirements.").

engage in fewer share repurchases, those they do implement often have a more pronounced impact since those issuers typically trade in less liquid markets.[14]

II. THE COMMISSION SHOULD STRENGTHEN THE PROPOSAL BY REQUIRING ADDITIONAL DISCLOSURES, FURTHER INCENTIVIZING ACCURATE REPORTING, AND LIMITING THE PARTICIPATION OF EXECUTIVES DURING CERTAIN PERIODS.

The Commission should require the disclosure of additional information that would help investors understand the true scope, impact, and motivations underlying share repurchases. In response to questions raised in the Release, the final rule should require the disclosure of information about how the share repurchases are financed as well as their impact on the cost of capital. This information would elucidate the potential impact of share repurchases on the company's credit quality, which is, in turn, an indicator of managerial judgment. In addition, the final rule should require issuers to disclose what other uses, if any, were considered for the funds being spent on the share repurchase. This level of transparency would be of enormous value to shareholders seeking to understand the true costs and purposes of the transactions. More specifically, it would shed light on the extent to which management chose to forego reinvesting capital in the enterprise and its workforce and instead elected to enrich executives through short-term boosts in share price, possibly at the expense of long-term company health. The relative size of the repurchase program disclosed through data regarding the ratio of shares repurchased to outstanding shares, would also be of value to investors and should be required.

We further urge the Commission to reconsider its decision to require issuers to "furnish" rather than "file" Form SR. The enhanced potential liability that comes with "filed" status serves as a powerful incentive that helps ensure honesty and accuracy in the disclosures. Such safeguards are especially appropriate where there is a conflict of interest in play, one that could induce management to distort or falsify reported information. That conflict is present with respect to share repurchases, where management may seek to obscure the true purposes motivating share repurchases that are, in effect, instances of manipulation, self-serving strategies that ill-serve the company, or sheer mismanagement. Moreover, there are no special or inherent challenges surrounding an issuer's ability to gather and report the required information accurately and in a timely fashion that might counsel against elevating the Form SR to "filed" status.

Finally, corporate executives and board members should be prohibited from trading stock in the ten days before and after share repurchase announcements and executions. This restriction would align with the approach adopted by a number of international jurisdictions.[15] This is an instance where disclosure would not be sufficient to prevent abusive conduct or mitigate the inherent conflicts associated with such activity. A ban on such activity would more effectively

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14 *See* Release at 8448.

15 Lenore Palladino & William Lazonick, *Regulating Stock Buybacks: The $6.3 Trillion Question*, 11, ROOSEVELT INSTITUTE (May 2021), https://rooseveltinstitute.org/wp-content/uploads/2021/04/RI_Stock- Buybacks_Working-Paper_202105.pdf.

reduce management's incentive to launch repurchases that are not in the long-term interest of the issuer.

III. THE COMMISSION SHOULD REFRAIN FROM UNNECESSARY, BURDENSOME, BIASED, AND POTENTIALLY HARMFUL QUANTITATIVE COST-BENEFIT ANALYSIS.

Better Markets has for years fought against the industry's attempt to foist quantitative cost-benefit analysis requirements on the SEC, and it has done so in its comment letters, special reports, and amicus briefs.[16] This is because (1) a comprehensive quantitative cost-benefit analysis is not required of the SEC under the securities laws; (2) such analyses are notoriously imprecise, unreliable, and industry-biased; and (3) the process not only unduly burdens the agency but also lays the foundation for court challenges to the SEC's meritorious rules that could serve the public interest well but for all too frequent judicial nullification. We, therefore, reiterate all our concerns regarding the peril of undertaking and relying upon quantitative cost-benefit analysis as the Commission develops its final rule.

We especially caution against placing undue weight on the industry's complaints about the costs of the Proposal, in its original form or as it may be strengthened in accordance with the input from commenters. With respect to costs associated with the Proposal, we note that they are not only relatively minimal but also entirely voluntary. An issuer need not incur any costs at all unless it chooses to engage in repurchases. We finally note that in this case, the Commission has appropriately "considered the economic effects" of the Proposal, including its effects on competition, efficiency, and capital formation, largely through a qualitative assessment, as many of the effects of the Proposal cannot be quantified.[17] Above all, and whatever form of cost-benefit analysis it undertakes, the Commission must be sure to properly account for the considerable public benefits that increased disclosure of repurchase programs would confer.[18]

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16 Better Markets, SETTING THE RECORD STRAIGHT ON COST-BENEFIT ANALYSIS AND FINANCIAL REFORM AT THE SEC (July 30, 2012), https://bettermarkets.com/sites/default/files/Setting%20The%20Record%20Straight.pdf; BETTER MARKETS, COST-BENEFIT ANALYSIS IN CONSUMER AND INVESTOR PROTECTION REGULATION: AN OVERVIEW AND UPDATE (Dec. 8, 2020), https://bettermarkets.org/sites/default/files/Better_Markets_WhitePaper_CBA_Consumer_Investor_Investor_Protection_Dec-2020.pdf; Brief Amicus Curiae of Better Markets, Inc. in Support of Respondent at 15-25, *N.Y.S.E v. SEC*, 2020 WL 3248902 (D.C. Cir. 2020) (No. 19-1042), https://bettermarkets.com/resources/court-filing-sec-attempts-protect-investors-and-market-integrity-exposing-exchange-pricing; Better Markets Comment Letter to the FSOC on Authority to Require Supervision and Regulation of Certain Nonbank Financial Companies at 5-6, 14-19 (May 24, 2019), https://bettermarkets.com/rulemaking/better-markets-comment-letter-fsoc-authority-require-supervision-and-regulation-certain.

17 Release at 8451.

18 *Cf.* BETTER MARKETS, THE COST OF THE CRISIS: $20 TRILLION AND COUNTING 66-69 (2015), https://bettermarkets.com/sites/default/files/Better%20Markets%20-

CONCLUSION

We hope these comments are helpful as the Commission finalizes the Proposal.

Sincerely,

Stephen W. Hall
Legal Director and Securities Specialist

Jason Grimes
Senior Counsel

Better Markets, Inc.
1825 K Street, NW
Suite 1080
Washington, DC 20006
(202) 618-6464

shall@bettermarkets.org
jgrimes@bettermarkets.org

http://www.bettermarkets.org/

%20Cost%20of%20the%20Crisis.pdf (explaining the huge costs of the 2008 financial crisis and highlighting the need for a holistic approach to the benefits of regulation).