Electronically Filed

January 11, 2023

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

Re: Reopening of Comment Period for Share Repurchase Disclosure Modernization (File No. S7-21-21); 87 Fed. Reg. 75,975 (Dec. 12, 2022)

Dear Ms. Countryman:

Better Markets[1] appreciates the opportunity to provide additional comment on the proposal on share repurchases, which was originally published by the Securities and Exchange Commission ("SEC" or "Commission") in the Federal Register on December 15, 2021[2] ("2021 Proposal"). The 2021 Proposal is now being reopened for comment in light of a memorandum issued by the staff of the SEC's Division of Economic and Risk Analysis ("DERA Staff Memo"), released on December 12, 2022.[3]

The DERA Staff Memo provides additional economic analysis of the 2021 Proposal, in light of new taxes levied by Congress on share repurchases since the 2021 Proposal was originally published in the Federal Register. On August 16, 2022, the Inflation Reduction Act of 2022[4] ("IRA") was signed into law by President Biden, which included a provision that imposes a one percent excise tax on the market value of any stock repurchased by a corporation in any given year.[5] The DERA Staff Memo analyzes the potential economic effects of the new one percent tax

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. 8,443 (Dec. 15, 2021).

3 Share Repurchase Disclosure Modernization, 87 Fed. Reg. 75,975 (Dec. 12, 2022).

4 Pub. L. No. 117-169, 136 Stat. 1818 (2022).

5 26 U.S.C. 4501.

on the "current market baseline and also the impact that the new excise tax is expected to have on the potential economic effects of the [2021 Proposal]."[6]

The 2021 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, 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 2021 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.

As we stated in our original letter[7] in response to the 2021 Proposal, which we fully incorporate herein by reference, we believe that the Commission has developed a strong proposal that would provide investors with more complete and more timely information regarding an issuer's use of share repurchases. If adopted, the 2021 Proposal would largely improve the quality, quantity, and timeliness of information regarding an issuer's repurchase of its own shares.

The DERA Staff Memo on the economic effects of the IRA's one percent tax on share repurchases for covered corporations does not fundamentally alter this analysis. It appears the tax could actually lower the aggregate costs of the 2021 Proposal while not altering the benefits to investors on a per issuer basis. Accordingly, we again urge the SEC to complete this rulemaking and refrain from adding unwarranted carve-outs or exceptions to the new reporting requirements.

In short:

- The Inflation Reduction Act's one percent excise tax on share repurchase will have little or no effects on share repurchase activity; therefore, the Commission should not view the new law as having any impact on the 2021 Proposal;
- Even if the new law were to reduce share repurchase activity, it would thereby lead to a decrease in the aggregate costs of the 2021 Proposal, while the benefits to investors would remain the same on a per issuer basis;
- Finally, nothing in the DERA Staff Memo warrants any kind of dilution of the requirements of the 2021 Proposal, especially for small reporting companies, because the new tax law only applies to companies engaged in stock buybacks totaling over $1 million annually, and therefore, will not affect small companies.

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6 Memorandum From the SEC Division of Economic and Risk Analysis Re: Supplemental Analyses of the Potential Implications of the Recently Enacted Excise Tax on Share Repurchases for the Economic Effects of Share Repurchase Disclosure Modernization Amendments ("DERA Staff Memo") 2 (December 7, 2022), https://www.sec.gov/comments/s7-21-21/s72121-20152424-320317.pdf.

7 Better Markets Comment Letter to the SEC on Share Repurchase Disclosure Modernization (April 1, 2022) ("Better Markets 2022 Letter"), https://bettermarkets.org/wp-content/uploads/2022/04/Better_Markets_Comment_Letter_Share_Repurchase_Disclosures.pdf.

The reforms in the 2021 Proposal are important because share repurchases are often used to boost share prices and other metrics used for executive compensation such as earnings per share rather than reinvesting in a company's operations or workforce.[8] The disclosure and reporting requirements in the 2021 Proposal will help shine a light on that activity, giving shareholders better insight into the judgments and priorities of the corporate leaders.

COMMENTS

It is certainly a hallmark of good rulemaking and government transparency to disclose new information, and related analysis, that is relevant to a pending rule proposal, and to allow the public to provide comments on how that new information may or may not impact the proposal. In this case, the information and analysis contained in the DERA Staff Memo on the economic effects of the IRA's one percent tax on share repurchases for covered corporations does not alter the basis or need for the 2021 Proposal. If anything, it appears the tax would actually strengthen the reasons for the 2021 Proposal.

The tax promises to have a minimal impact on repurchases or the economic impact of the Proposal.

First, those in industry make the hyperventilated claim that the new tax adds to the burdens associated with the 2021 Proposal, and they furthermore contend that the tax will inhibit repurchases, rendering the disclosure requirements in the 2021 Proposal essentially unnecessary. For example, they claim that the number of issuers subject to the 2021 Proposal would decrease due to the levy of a one percent excise tax on issuers.[9]

However, the public posture of corporations so far suggests that the change in the law will do very little to alter issuer's use of share repurchases, confirming that the tax will neither add significant burden nor obviate the need for the 2021 Proposal. For example, a recent Wall Street Journal article spotlighted several Chief Financial Officers who disregarded the effects of the new corporate tax on their decisions to repurchase shares in the future, with one CFO stating "'[t]he 1% is not going to make us change our approach in the near term…[f]or us, it's not meaningful.'"[10]

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[8] *See* Speech, Commissioner Robert J. Jackson Jr., *Stock Buybacks and Corporate Cashouts* (June 11, 2018), https://www.sec.gov/news/speech/speech-jackson-061118 ("studying 385 buybacks over the last fifteen months…What did surprise us, however, was how commonplace it is for executives to use buybacks as a chance to cash out. In half of the buybacks we studied, at least one executive sold shares in the month following the buyback announcement. In fact, twice as many companies have insiders selling in the eight days after a buyback announcement as sell on an ordinary day. So right after the company tells the market that the stock is cheap, executives overwhelmingly decide to sell").

[9] *See* Letter from Tom Quaadman, Executive Vice President, Center for Capital Markets Competitiveness, U.S. Chamber of Commerce (September 20, 2022), https://www.sec.gov/comments/s7-21-21/s72121-20143475-308983.pdf.

[10] Jennifer Williams-Alvarez, *New Tax on Buybacks Is Weeks Away, but Finance Chiefs Aren't Too Worried*, WALL ST. J. (Dec. 9, 2022), https://www.wsj.com/articles/new-tax-on-buybacks-is-weeks-away-but-finance-chiefs-arent-too-worried-11670544061#:~:text=A%20new%20corporate%20tax%20on,to%20continue%20repurchasing%20company%20stock.

Wall Street analysts seem to concur with this thinking.[11] In fact, several of the largest companies in the world have already announced new or even expanded share repurchase programs in the face of the one percent excise tax starting in 2023.[12] Thus, while it is still too early to determine the precise economic effects of the IRA's one percent excise tax on share repurchases, the Commission should view the change in the law just as the markets view the change—one that is "not meaningful."

Other evidence supports this view. The Congressional Budget Office ("CBO") studied the economic effects of the one percent excise tax on share repurchases when the IRA was passed into law. In their analysis, they suggest that share repurchase activity in the markets would remain elevated over the next ten years despite the one percent excise tax on share repurchases in the IRA.[13] Their analysis found that the one percent excise tax would raise an estimated $73.686 billion over ten years. See Table 1 from CBO report below:

	By Fiscal Year, Millions of Dollars											
	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	2022-2026	2022-2031
Part 8. Credit Monetization and Appropriations												
Sec. 13802 Appropriations												
Budget Authority	500	0	0	0	0	0	0	0	0	0	500	500
Estimated Outlays	0	55	55	55	55	55	55	55	55	55	220	495
Total Changes in Direct Spending												
Budget Authority	**83,625**	**21,102**	**18,173**	**2,933**	**-7,355**	**-18,587**	**-35,669**	**-37,060**	**-45,943**	**-49,633**	**118,476**	**-68,416**
Estimated Outlays	**0**	**25,387**	**21,377**	**7,890**	**-967**	**-10,311**	**-25,260**	**-24,141**	**-30,572**	**-33,948**	**53,685**	**-70,547**
On-Budget Outlays	*0*	*25,390*	*21,383*	*7,899*	*-957*	*-10,298*	*-25,244*	*-24,124*	*-30,554*	*-33,930*	*53,713*	*-70,437*
Off-Budget Outlays	*0*	*-3*	*-6*	*-9*	*-10*	*-13*	*-16*	*-17*	*-18*	*-18*	*-28*	*-110*
	Increases or Decreases (-) in Revenues											
Subtitle A. Deficit Reduction												
Part 1. Corporate Tax Reform												
Sec. 10101 Corporate Alternative Minimum Tax	0	34,679	34,258	22,039	17,702	18,699	20,798	22,756	24,658	26,659	108,678	222,248
Part 2. Excise Tax on Repurchase of Corporate Stock												
Sec. 10201 Excise Tax on Repurchase of Corporate Stock	0	5,697	7,875	8,070	8,581	8,882	8,838	8,603	8,500	8,641	30,223	73,686

Extrapolating the revenue raised ($73.686 billion) from a one percent excise tax on share repurchases over ten years highlights the still huge volume of anticipated repurchases: CBO

[11] *See* Karen Langley and Gunjan Banerji, *Analysts Shrug at Proposal to Tax Stock Buybacks*, WALL ST. J., (Aug. 5, 2022), https://www.wsj.com/livecoverage/stock-market-news-today-08-05-2022-jobs-report/card/analysts-shrug-at-proposal-to-tax-stock-buybacks-YOWPIs2MJAhh8tqffqWI ("'I do not see the 1% tax inhibiting corporate buybacks,' said Howard Silverblatt, a senior index analyst at S&P Dow Jones Indices"); *see also* Peter Brennan, *US Companies poised to prop up EPS with share buybacks in 2023*, S&P GLOBAL MARKET INTELLIGENCE (Nov. 10, 2022), https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/us-companies-poised-to-prop-up-eps-with-share-buybacks-in-2023-72955469.

[12] *See* Karen Langley and Gunjan Banerji, *Analysts Shrug at Proposal to Tax Stock Buybacks*, WALL ST. J., (Aug. 5, 2022) (In addition to naming several companies that have already announced no changes to their buyback programs despite the one percent excise tax, the article goes on to highlight several companies that announced new or expanded buyback programs, including Exxon Mobil Corp., Lowe's Cos., and Mastercard).

[13] *See* Summary: Estimated Budgetary Effects of Public Law 117-169, to Provide for Reconciliation Pursuant to Title II of S. Con. Res. 14 (Sept. 7, 2022), https://www.cbo.gov/system/files/2022-09/PL117-169_9-7-22.pdf.

expects issuers to repurchase an estimated $7.3686 trillion worth of shares over the next ten years. Hence, the CBO does not appear to give much, if any, weight to the economic effects of the one percent excise tax on share repurchase activity by issuers over the next ten years. Accordingly, the Commission should not be swayed by industry arguments that this new excise tax, coupled with the reforms in the 2021 Proposal, significantly changes the economic analysis already conducted by the Commission in the original 2021 Proposal.

Even if the tax were to significantly decrease repurchases—an unlikely scenario—then the compliance costs to industry would go down while the shareholder benefits would remain intact.

Second, even if industry were correct that the one percent excise tax on share repurchases would decrease the number of issuers subject to the 2021 Proposal, then that only serves to further decrease the aggregate costs of the 2021 Proposal on issuers, while the benefits to shareholders and investors remain the same. The DERA Staff Memo correctly observes that ***if*** the excise tax leads to a decrease in share repurchase activity, which we would not concede as a likely outcome, then it logically follows that "the aggregate economic effects of the Proposing Amendments are expected to be smaller than described in the Proposing Release."[14] It is a logical conclusion that the aggregate costs associated with the new disclosure and reporting requirements under the 2021 Proposal would be reduced if: (1) fewer issuers engage in share repurchases due to the excise tax; or (2) issuers reduced their share repurchase activity.

On the other hand, the DERA Staff Memo correctly observes that the benefits of the 2021 Proposal would likely remain unchanged due to the IRA's one percent excise tax on share repurchases.[15] That is because shareholders and potential investors would still reap the benefit of share repurchase disclosure when that activity occurs regardless of any increase or decrease in the precise level of that activity. Hence, ***if*** the IRA's one percent excise tax on share repurchases were to have any economic effects on the level of repurchase activity, it would likely decrease the aggregate costs of the 2021 Proposal while not affecting the benefits to shareholders and potential investors.

In no event would exemptions for small companies be justified.

Finally, there is nothing in the DERA Staff Memo that should persuade the Commission to water down or dilute the strength of the 2021 Proposal by adding unnecessary 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, the IRA's one percent excise tax on share repurchases specifically exempts an issuer if "the total value of the stock repurchased during the taxable year does not exceed $1,000,000."[16] Therefore, the economic effects of IRA's one percent excise tax would be non-existent for most smaller companies because they would be

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[14] DERA Staff Memo at 10.
[15] DERA Staff Memo at 10.
[16] 26 U.S.C. 4501(e)3.

unlikely to engage in enough stock buybacks for the provision of law to affect them. For those companies, the case for an exemption is even weaker.

CONCLUSION

We hope these comments are helpful as the Commission finalizes the 2021 Proposal.

Sincerely,

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