April 1, 2022

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

Re: Share Repurchase Disclosure Modernization (Release Nos. 34-93783, IC-34440; File No. S7-21-21); Rule 10b5-1 and Insider Trading (Release Nos. 33-11013, 34-93782; File No. S7-20-21)

Dear Ms. Countryman:

The undersigned organizations appreciate the opportunity to comment on the recent and interrelated rule proposals issued by the Securities and Exchange Commission ("SEC") regarding stock buybacks ("Share Repurchase Proposal") and Rule 10b5-1 plans ("Rule 10b5-1 Proposal").

Our organizations support efforts by Congress and the SEC to ensure that America's capital markets maintain their status as the most competitive, transparent, and liquid in the world. Investors in the U.S. capital markets must have confidence that bad actors are held accountable and that corporate insiders are not able to game the system or bend the rules in their own favor.

At the same time, regulations must be properly calibrated in a way that guards against such abuses without disincentivizing market participants from engaging in legitimate activities that benefit investors. Complex, prescriptive regulations can often impose costs on shareholders that vastly outweigh their purported benefits.

It is with these principles in mind that we offer our perspectives on the Share Repurchase Proposal and the Rule 10b5-1 Proposal. As explained throughout this letter, we are concerned that as drafted these proposals could negatively impact long-term shareholders and undermine past actions the SEC has taken to increase transparency surrounding stock buybacks and 10b5-1 plans.

Share Repurchase Proposal

Over 50% of the American public is invested in the stock market, either through direct ownership of shares or through mutual funds or retirement vehicles such as a 401(k) plan. These investors depend on companies to deliver long-term financial returns in order to have a dignified retirement, send a child off to college, or to save for any other life goal.

Public companies and their boards have a responsibility to allocate capital in a manner that furthers the best interests of these investors. Sometimes that means investing in new and existing projects, in hiring and retaining employees, or in research and development ("R&D"). Other times – for example when a company has excess cash – that can mean returning profits to shareholders in the form of dividends or share buybacks. Each of these major capital allocation decisions are undertaken pursuant to management's and the board's fiduciary duty to shareholders and are subject to rigorous discussion and analysis by companies and review and approval by a company's board of directors.

Share buybacks are a well-established and well-understood strategy that helps shareholders earn a return on their investment. Repurchases give shareholders an opportunity to reinvest back into the underlying company or use these gains to create new businesses or invest elsewhere. In other words, share buybacks contribute positively to the economic cycle in the United States.

Issuers are currently subject to a host of reporting requirements regarding share buybacks. Item 703 of Regulation S-K mandates that issuers disclose on their Form 10-K information about the total number of shares purchased and the average price per share in a buyback. Exchange listing standards also generally require that issuers disclose information surrounding board authorization of a buyback.

Regrettably, the debate surrounding share buybacks over the last several years has been defined more by conjecture and hyperbole than it has been by evidence and facts. The most common argument in opposition to stock buybacks is that buybacks divert capital away from other purposes, such as R&D or workforce investments. This argument has been soundly refuted by recent research.[1] Further, R&D spending has reached historic highs,[2] and companies are planning wage increases for 2022 that outpace increases from 2020 and 2021.[3]

Another critique of stock buybacks is that they are used by companies to inflate share prices which, in turn, increases executive compensation. However, the Share Repurchase Proposal offers little research or evidence to support this claim. In fact, the SEC's own staff stated in a 2020 study their conclusion that, based on the research available, there is likely no correlation between repurchase activity and efforts to "artificially" inflate stock prices.[4]

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[1] See e.g. Edmans, A. "The Case for Stock Buybacks" Harvard Business Review (September 15, 2017) ("A comprehensive survey of financial executives concluded that "repurchases are made out of the residual cash flow after investment spending."). Other studies find that CEOs repurchase more stock when growth opportunities are poor, and when they have excess capital. Asness, C., Hazelkorn, T., & Richardson, S. Buyback derangement syndrome. Journal of Portfolio Management, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3082460

[2] The Economics of Stock Buybacks | Tax Foundation

[3] Willis Towers Watson employer survey (July 2021), available at: https://www.wtwco.com/en-US/News/2021/07/us-employers-planning-larger-pay-raises-for-2022-willis-towers-watson-survey-finds

[4] SEC staff report "Response to Congress: Negative Net Equity Issuance" at 45 ("Three facts suggest that the theories inconsistent with firm value maximization cannot account for the majority of

The Share Repurchase Proposal unfortunately relies on misconceptions about buybacks and does not properly consider the benefits that share buybacks provide for shareholders. It also neglects to consider the impact and efficacy of existing disclosure requirements and whether they are truly failing to provide investors with material information.

The Share Repurchase Proposal contains prescriptive next-day reporting requirements that will fundamentally alter issuers' compliance obligations and significantly increase costs. Next-day reporting after an issuer "executes" a buyback could also have disruptive market implications and costs that are not fully explored in the proposal. For example, an issuer that conducts a buyback over the period of several consecutive days may see the cost of those repurchases rise as the market becomes aware the company is buying back its stock. Ultimately, the main beneficiaries of the next-day reporting requirement could be sophisticated traders that can use the new disclosures to their advantage—not the long-term shareholders the proposed rule purports to protect. This proposed reporting requirement would thus be contrary to the "information symmetry" that Chair Gary Gensler has supported in public statements, as sophisticated investors are permitted longer time frames to report their equity holdings under the current disclosure regime.

We are also concerned by the proposed amendments to Item 703 of Regulation S-K, which would require issuers to explain their "objective or rationale" for share repurchases. This new disclosure will provide little-to-no useful information to investors beyond what is already required.

Accordingly, we urge the SEC to reconsider the assumptions underpinning its Share Repurchase Proposal and to delay further consideration of the proposed rule until it has conducted further economic analysis of its potential impact, including its relation to the Rule 10b5-1 Proposal, as described in more detail below.

Rule 10b5-1 Proposal

We appreciate the SEC's efforts to ensure regulations governing executive trading plans under Rule 10b5-1 do not contain loopholes and that investors are provided with adequate disclosure regarding these plans. Corporate executives are often in possession of material nonpublic

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repurchase activity. First, repurchase announcements are accompanied by stock price increases. This announcement effect does not dissipate over time, as one would expect if repurchases were based on efforts to manipulate share prices. Second, most of the money spent on repurchases over the past two years was at companies that either do not link managerial compensation to EPS-based performance targets or whose boards considered the impact of repurchases when determining whether EPS-based performance targets were met or in setting the targets, suggesting that other rationales motivated the repurchases. Third, option-based managerial compensation cannot account for the increased substitution from dividends to repurchases, since option pay has declined over the past 20 years. Collectively, these findings potentially suggest that most repurchase activity does not represent an effort to artificially inflate stock prices or influence the value of option-based or EPS-linked compensation.")

information ("MNPI") regarding their company. It is critical for investors to have confidence in SEC rules that are designed to prohibit insider trading based off MNPI.

Rule 10b5-1 provides an affirmative defense for an individual that, prior to becoming aware of MNPI, enters into a binding contract to purchase or sell the company's shares at a predetermined amount, price, and date. Since the SEC's adoption of Rule 10b5-1 in 2000, these plans have been an effective tool to guard against perceptions that insiders are regularly using their knowledge of MNPI to trade.

In seeking to update Rule 10b5-1, the SEC should be careful that any new requirements do not make operating a plan so cost-prohibitive that insiders refrain from establishing a plan in the first place. We also urge the SEC to consider the wide universe of individuals at many companies that enter into 10b5-1 plans. It is not just named executive officers ("NEOs") of large public companies that rely on Rule 10b5-1. In many cases mid-level executives at smaller issuers – whose net worth may be completely tied up in the company's stock – rely on 10b5-1 plans to sell company stock over a set period of time. We also encourage the SEC to remain mindful of corporate uses of Rule 10b5-1 plans – namely, to effectuate share repurchases. The affirmative defense endemic to Rule 10b5-1 enables company employees to realize their compensation and companies to effectively manage capital reserves, and we are concerned that the SEC's proposed rule could disincentivize the usage of 10b5-1 plans.

While we understand in principle the desire for a "cooling off" period to begin trading once a 10b5-1 plan is adopted, we question whether 120 days is appropriate or whether the period should be shorter. Since 120 days would always extend beyond the quarterly reporting period when a plan is first established, the underlying issuer will have released the most recent quarterly financial results before that cooling off period is over. We believe the SEC should explore whether a shorter time frame would achieve the same goal without mandating a long delay for the commencement of trading under a 10b5-1 plan.

We also echo Commissioner Peirce's concern that the "good faith" requirement will create an "unintended incentive for directors or officers to consider their Rule 10b5-1 plans in connection with corporate actions long after establishing their plans" and that the safe harbor under 10b5-1 could be contingent upon a retroactive subjective judgement as to whether certain aspects of the plan were operated in "good faith."[5] As noted above and when considered along with other aspects of the Rule 10b5-1 Proposal, we are concerned these provisions as currently written could be a major disincentive for individuals to adopt a 10b5-1 plan.

Finally, we believe that the SEC should consider the interrelated nature of the Share Repurchase Proposal and the Rule 10b5-1 Proposal and conduct a further analysis as to the impact of having both of those rules in effect. Unfortunately, the economic analysis contained in each rule does

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[5] Commissioner Hester Peirce - Statement on Rule 10b5-1 and Insider Trading Proposing Release (Dec. 15, 2021)

not appropriately consider the potential effect of the other and how, for example, daily disclosure of share buybacks implemented pursuant to a 10b5-1 plan could impact the repurchase cost for the issuer or how new limitations on 10b5-1 plans could impact companies' repurchase programs. We implore the SEC to consider these rules together rather than in isolation.

Conclusion

We appreciate the opportunity to comment on these proposals. We look forward to being a resource for the SEC and to working with commissioners and staff on these critical issues.

Sincerely,

American Property Casualty Insurance Association

American Securities Association

Center On Executive Compensation

U.S. Chamber of Commerce

Nareit

National Association of Manufacturers

NIRI: The Association for Investor Relations