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

Ms. Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington D.C. 20549-1090

Dear Ms. Countryman:

We are submitting this letter in response to the Commission's request for comments on its Share Repurchase Disclosure Modernization proposal.

Share repurchases serve a range of business purposes—such as returning capital to shareholders, managing dilution from equity compensation programs and maintaining an optimal capital structure in light of changing economic conditions—and are therefore a widely used capital allocation tool for public companies. According to a March 2020 research report by S&P Dow Jones Indices, share repurchases surpassed dividends in 1997 to become the dominant form of corporate payout in the United States,[1] reflecting the reality that repurchase plans can be tailored and modified far more efficiently and with less market disruption than dividend policies.[2] Today, a U.S. public company is required to report its aggregate monthly share repurchases on a quarterly basis in periodic reports on Forms 10-K and 10-Q. A foreign private issuer is required to provide aggregate monthly share repurchase information in its annual report on Form 20-F. Pursuant to these requirements, investors are given regular information about the total number of shares a company purchases each month, the average monthly price paid by the company, the number of monthly share repurchases covered by plans that have been publicly announced by the company, and the amount of shares that may yet be repurchased under such publicly announced plans.

Because share repurchase information is not required to be disclosed to the markets until at least 40 days have elapsed (i.e., the shortest length of time following the end of a quarterly reporting period that a U.S. public company is required to file a periodic report), hedge funds and other professional traders are not privy to a company's real-time share repurchase activity, and therefore cannot use information about company trading strategies in a predatory manner to "front run" or trade against the company and drive up the cost of its repurchases to the detriment of the company and its shareholders generally. In this manner, the current reporting cadence balances investors' interest in a comprehensive understanding of the company's repurchase activity with the interest of the company and its shareholders in effecting repurchases in an economically efficient manner.

[1] S&P Dow Jones Indices, "Examining Share Repurchasing and the S&P Buyback Indices in the U.S. Market" (March 2020), available at https://www.spglobal.com/spdji/en/documents/research/research-sp-examining-share-repurchases-and-the-sp-buyback-indices.pdf.

[2] In fact, following the 2008 financial crisis, certain regulatory regimes implicitly acknowledge the challenges of modifying dividend plans relative to share repurchase plans. For example, applicable banking regulations require large financial institutions to discount planned dividends when calculating certain capital levels in contrast to planned share repurchases. See 85 Fed. Reg. 15576 at 15579.

The Commission has long recognized the need to balance competing transparency and proprietary interests in its rules and regulations focused on open-market trading disclosures. For example, institutional investment managers are permitted a 45-day lag to file stock ownership reports on Form 13F[3] and passive investors are required to file reports on Schedule 13G on an annual basis only. Public disclosure of near real-time trading information in individual stocks is currently required only in cases involving potential changes in corporate control—where the information called for by Schedule 13D is plainly necessary to allow investors to make informed investment decisions—and in cases involving trading by officers, directors and 10% shareholders, whose trading may signal changes in insider sentiment and corporate prospects unknown to the public market. In the absence of evidence (not cited in the proposing release) that would suggest a pattern of companies using share repurchase programs to take advantage of the market's ignorance of undisclosed favorable developments, we do not think corporate repurchase activity carries signaling value comparable to trading by insiders or parties seeking corporate control.

The Commission's proposal would require public companies to report each share repurchase on the following business day, regardless of materiality of the transaction to the company, thereby upsetting the thoughtful approach taken under the existing reporting regime and instead privileging the financial interests of hedge funds and other professional traders. While proposing to give these sophisticated market participants daily insight into a company's proprietary trading strategy, the proposal does not explain what informational benefit this data will yield for ordinary investors—for example, the proposal does not posit concerns that public companies are prone to engage in share repurchase activity on the basis of undisclosed favorable material information. On the other hand, the proposal seems to ignore the risk of unfounded speculation and unnecessary volatility based on daily variations in corporate repurchase activity—for example, what appears to be a sudden halt in share repurchases may reflect nothing more than the company having achieved its corporate finance objectives for the quarter, but could easily be misinterpreted by the markets as a signal that the company has suddenly come into possession of material nonpublic information.

In our view, this latter point is a significant and adverse unintended consequence of the proposal. Large public companies are often in the market on a daily basis to execute their share repurchase programs. If a potentially material public event occurs, it would not be unusual for the company to halt its share repurchases while it assesses the impact of the event. Under today's reporting regime, a halt in share repurchases would not fuel speculation and volatility in the market for the company's stock. Under the proposed daily reporting regime, however, the halt may be misinterpreted as confirmation that the company expects a large impact from an undisclosed event, likely resulting in a significant downward or upward price swing. Then, upon completion of its assessment or further development of the facts, if the company determines that the event will not have a material impact, its re-entry into the market likely would fuel a second round of speculation in the opposite direction. Moreover, given that this information would be disclosed without any context, different market participants may reach opposite conclusions, resulting in needless volatility and some investors being negatively impacted.

Similarly, it would not be unusual for public companies to halt their share repurchases when they are involved in M&A discussions. Under today's reporting regime, companies can engage in such discussions and halt their share repurchases without fueling market speculation. Under the proposed rules, however, if two companies in the same industry have both halted their repurchase programs at the same time, and if

[3] 17 C.F.R. § 240.13f-1. In fact, the Commission recently acknowledged the validity of concerns regarding so-called predatory trading related to reporting on Form 13F, noting that a "key determinant" of costs to investment managers is "whether the disclosure of holdings information enables other market participants to take actions that harm either the beneficial owners of the fund or its manager." Reporting Threshold for Institutional Investment Managers, Exchange Act Release No. 34-89290, 85 FR 46016 (July 10, 2020). In the past the Commission has agreed with concerns about predatory trading and indicated that it "[took] seriously concerns that more frequent portfolio holdings disclosure and/or a shorter delay for release of this information may expand the opportunities for predatory trading that harm fund shareholders." Shareholder Reports and Quarterly Portfolio Disclosure of Registered Management Investment Companies, Exchange Act Release No. 33-8393, 82 SEC Docket 937 (Feb. 27, 2004).

there is no other likely explanation, market volatility based upon a presumed potential M&A transaction should be expected.

In all such cases, investors would be making investment decisions based upon mere speculation. Contrary to the statements in the release about the benefits of the proposal to investors, we believe the proposed rules will inevitably result in investors making investment decisions without the relevant facts, which would be harmful to investors.

In order to avoid the very real prospect of market volatility as a result of speculation about share repurchase reports, we expect that companies will alter their share repurchase practices. Specifically, instead of using conservative daily dollar cost averaging strategies designed to minimize downside price risk, companies will instead effect larger repurchases on fewer days. This will be a riskier strategy for companies and their shareholders from an execution perspective. In addition, even if the share repurchase programs are conducted in accordance with Rule 10b-18, executing larger share repurchases on fewer days will increase the impact of the share repurchases on the price of the company's stock. This result would be contrary to the intent of Rule 10b-18 and detrimental to the efficiency of the capital markets. Public companies are expected by their investors to consider employing share repurchases, like dividends, as a prudent use of excess capital. The Commission should avoid the unintended consequence to investors of forcing companies to conduct share repurchase programs in ways that are riskier, more inefficient and less cost-effective, which would ultimately diminish shareholder value. Furthermore, the Commission should be careful not to inappropriately favor one form of returning capital to shareholders (namely, dividends) versus another (namely, share repurchases).

In summary, we have serious concerns that the proposed rules will increase market manipulation, predatory trading and market volatility. We expect the proposed changes would benefit hedge funds and other professional traders, while harming smaller investors, public companies and the effectiveness of the capital markets in general. In addition, we expect one other unintended consequence of the proposed rules—increased frivolous litigation by the plaintiffs' bar, for whom the detailed information about daily trades and increased disclosure requirements likely will become promising new sources of costly nuisance claims. When taken together with the significant increased costs associated with daily SEC reporting, we believe the detriments of the proposed rules clearly outweigh the anticipated benefits.

Finally, because the proposal would make share repurchases less attractive from a corporate perspective and can therefore be expected to result in reduced corporate repurchase activity, we believe it is essential for the Commission's cost-benefit analysis to take into account the quantifiable benefits that come from share repurchases. To that end, we would suggest that, if it has not already done so, the Commission's Office of Economic and Risk Analysis conduct a study that considers shareholder benefits flowing from both (i) the economic efficiency of returning capital to shareholders via repurchases as compared to dividends (including tax effects of both techniques) and (ii) changes in stock prices that occur when companies publicly commit to share buyback plans. These benefits should be weighed against the costs of the proposal flowing from both (i) the higher cost of conducting buybacks resulting from the inefficiencies and predatory behavior described above and (ii) the likely reduction in buyback activity that the proposal seems designed to encourage, in order to help arrive at an approximation of how substantial the dollar cost of the proposal to shareholders would be. To the extent this exercise demonstrates a net cost to shareholders, we believe it should also be included in the Commission's Paperwork Reduction Act analysis.

Our comments in response to certain of the specific questions raised in the proposal follow.

Proposed Form SR

1. *Should we adopt new Form SR to require daily repurchase disclosure, as proposed? Would less frequent disclosure of daily share repurchases (e.g., weekly, monthly, or quarterly disclosure) provide sufficiently timely information about issuer repurchases? Would less detailed disclosure (e.g., aggregated disclosure of repurchases on a weekly or monthly basis, rather than daily), that is furnished more frequently than under current Item 703, provide sufficiently useful disclosure? Instead of adopting Form SR, should we amend Form 8-K or another existing form to require daily repurchase disclosure?*

The proposal notes several concerns with issuer share repurchase programs, including:

- Research showing that repurchases can serve as a form of earnings management in order to meet or beat consensus forecasts or to maximize executive compensation.
- Commentators positing "opportunistic and harmful" use of company share repurchases "as a tool to raise the price of an issuer's stock in a way that allows insiders and senior executives to extract value from the issuer instead of using the funds to invest in the issuer and its employees."
- The potential for share repurchases to be used by companies as a mechanism to inflate executive compensation in a manner that is not transparent to investors or the market.

In view of these concerns, the proposal states the belief that "investors could benefit from improving the quality, relevance, and timeliness of information related to issuer share repurchases," and expresses the concern that "because issuers are repurchasing their own securities, asymmetries may exist between issuers and affiliated purchasers and investors with regard to information about the issuer and its future prospects," which could "exacerbate some of the potential harms associated with issuer repurchases."

It appears from this framing that the Commission may view share repurchases as an inherently problematic practice, and is therefore proposing to use disclosure mandates to discourage the practice by making it less economically efficient, in view of the lack of Congressional authority to regulate the practice outright. If this is not the Commission's intent, we think it would be useful for the Commission, if it moves forward with the proposal to require daily reporting on Form SR, to explain why daily repurchase disclosure provides better actionable information for investors than the current reporting regime. We think this is necessary for the proposal's cost-benefit analysis, because, as discussed above, publishing this information on a daily basis could well have an adverse impact on investors and companies—not only by spurring predatory trading and frivolous litigation, but by fueling volatility and fact-free market speculation when, for example, a company that purchases regularly but stops due to a potentially material development that is not yet ripe for disclosure effectively tips the market when its Form SR is not filed one day.

On the other hand the value of daily information to most investors seems debatable at best. This is because, even if a company is actually using its share repurchase program in order to meet earnings expectations, or using corporate cash to raise its stock price rather than invest in the business or raise employee salaries, or attempting to justify higher executive compensation, it is not at all clear how providing investors daily information beyond the aggregated monthly information already filed would enhance an investor's ability to detect or curtail these alleged practices. In other words, stock repurchases on any given day would not seem to have much informational value—rather, an investor would need to look at company behavior over a longer timeframe in order to determine whether management is using share repurchase activity in a self-interested way as opposed to engaging in the activity as part of a sound and disciplined capital management strategy for the benefit of its shareholders.

Companies are, of course, already required to provide longer timeframe information today. Without persuasive evidence that daily reporting enhances actual investor decision making ability—as opposed to serving as an indirect means to regulate corporate activity beyond the Commission's statutory authority—we believe the Commission should pause any decision to adopt new Rule 13a-21 and Form SR.

If the Commission nevertheless decides to require disclosure more frequently than under current Item 703, less detailed disclosure (e.g., aggregated disclosure of repurchases on monthly basis, rather than daily, within 4 business days of month-end) would mitigate the unintended consequences described above.

2. *Should we instead require an issuer to disclose its share repurchase program and continue to report actual share repurchases on a periodic basis? If so, should we require the issuer to disclose its planned share repurchases at least 30 days prior to the first repurchase transaction? Would a different disclosure deadline be more appropriate? Should the disclosure specify the amount of securities that may be purchased or any additional information? How would the burden of complying with such requirements compare with the burdens of complying with proposed Form SR? In reporting actual share repurchases under this approach, should we require the periodic disclosure to be broken out on a monthly basis, as currently required under Item 703 of Regulation S-K, Item 16E of Form 20-F, and Item 9 of Form N-CSR, or should we expand the disclosure to require a breakout of repurchase activity on a more frequent basis?*

As discussed above, we agree that companies should continue to be required to report actual share purchases on a periodic basis. We also note that existing law generally prohibits a company from purchasing its securities when in possession of material nonpublic information, which leads companies to publicly disclose repurchase plans in advance of implementation. In light of existing disclosure requirements and practices, we do not see the value in requiring companies to disclose planned share repurchases at least 30 days in advance, as any such disclosure would necessarily be caveated with references to future market conditions and unforeseen company priorities; this language would quickly become uninformative boilerplate. It is also unclear how this proposed information would be more useful to investors compared to the actual repurchase information currently being reported on a periodic basis, which typically follows an announcement of a share repurchase program made in advance according to current law and practice.

3. *Should we amend issuers' exhibit filing requirements to require issuers to provide daily, weekly, or biweekly repurchase disclosure in an exhibit to the issuer's periodic reports? If so, should such an exhibit requirement be in lieu of or in addition to reporting on Form SR?*

As discussed above, we believe the current reporting cadence is sufficient to provide investors with material information about how companies administer share repurchase programs. In addition, we believe that requiring companies to provide daily, weekly or biweekly repurchase disclosure in an exhibit to the company's periodic report could result in the significant and adverse unintended consequences described above. Such information could be reverse-engineered for predatory trading purposes and, if it indicates a halt in trading that is still in place at the end of the period, could fuel speculation and volatility.

Proposed Revisions to Item 703, Form 20-F, and Form N-CSR

13. *Many issuers voluntarily choose to announce their share repurchase plans or programs publicly. Item 703 currently requires disclosure of the date each plan or program was announced if the issuer did publicly announce it. Should we clarify what constitutes an announcement for purposes of the disclosure requirement? For example, should the announcement have to have been made in a Form 8-K, another existing form, or press*

release? Should we require all open market share repurchase plans to be publicly announced?

We do not see a need for prescriptive disclosure requirements around share repurchase programs. As the Commission notes, companies routinely announce their programs in advance, often by press release or in conjunction with an earnings announcement. In our experience, companies disclose their adoption of a share repurchase program both as a means of ensuring that all material information is known to the market before they engage in transactions in their own securities, as required by the antifraud provisions of the federal securities laws, and frankly because the announcement of a share repurchase program is often well received by investors. If a company concludes that information about its share repurchase plans is not material and chooses not to disclose a program in advance, then particularly given the existing ongoing disclosure obligations that have no materiality exceptions and thus ensure that the repurchases will be detected on at least a quarterly basis, we do not see a need to mandate advance disclosure.

14. *We have proposed requiring issuers to 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. How would investors use this information? Would the proposed requirement discourage issuers from publicly announcing plans or programs? Is there other information in combination with, or instead of, this disclosure that could notify investors and help them process information regarding officer and director transactions made close in time to the issuer's share repurchase plan announcement? If an issuer doesn't publicly announce its repurchase plan, should the issuer be required to check the box if there are officer or director transactions within a certain time from the initiation of the repurchase plan or program (for example, within 10 business days of initiation)?*

For publicly announced programs, current Section 16 reporting requirements—which require insiders to file Form 4 transaction reports within two business days—ensure that investors already have the information that the proposed checkbox is designed to elicit. Therefore, unless the proposed checkbox is simply a mechanism to discourage activity that the Commission does not have Congressional authority to ban outright, we do not see the purpose of the proposed checkbox.

17. *Should we require issuers to describe the objective or rationale for their share repurchases and process or criteria used to determine the amount of repurchases, as proposed? How would investors use this information? Should we also require information regarding how share repurchases are financed or their anticipated or actual impact on leverage ratios or the cost of capital? Should we ask issuers to disclose if they specifically considered other uses for the funds being used for the share repurchase? Is there additional disclosure regarding the reasons for, or expected effects of a share repurchase plan that should be required? Would this proposed requirement result in boilerplate disclosure?*

We think it would be reasonable for the Commission to require companies to describe the objective or rationale of their share repurchases and the process used to determine the amount of repurchases. In our experience, companies have sound business reasons for embarking on share repurchases, typically as part of an overall prudent capital management strategy, although the specifics can differ from company to company and from time to time, making it less likely that such a requirement would generate meaningless boilerplate. We believe that such disclosure would further obviate the need for daily reporting of share repurchase activity pursuant to proposed Rule 13a-21 on Form SR.

We do not think it would make sense to ask companies to disclose whether they specifically considered other uses for the funds being used for share repurchases. This sort of requirement would obviously result in boilerplate disclosure because even if we credit the dubious proposition that some companies commit significant corporate resources to share repurchase activity without considering what other alternatives are available, no company would put itself in a position of needing to disclose that.

18. *Proposed Item 703 and proposed Form SR would require issuers to disclose whether repurchases were made pursuant to a plan that is intended to satisfy the affirmative defense conditions of Rule 10b5-1(c). Does the proposal require an appropriate level of detail regarding Rule 10b5-1 plans? Should this disclosure additionally contemplate repurchases made pursuant to "other pre-arranged trading plans" that issuers may seek to rely on in lieu of Rule 10b5-1 plans? How should we define "other pre-arranged trading plans" in this circumstance? How would investors use information regarding these plans?*

The Commission is separately considering enhanced disclosures around Rule 10b5-1 trading plans in the context of its pending *Rule 10b5-1 and Insider Trading* rulemaking proposal (Rel. No. 33-11013 (Jan. 13, 2022)), and we believe that is the appropriate vehicle for examining these issues, rather than through amendments to Item 703 of Regulation S-K. We do not see why investors would otherwise have much interest in the particular method a company uses to ensure that its share repurchase activity is carried out in accordance with applicable law. Similarly, we see no reason to separately disclose which repurchases are carried out under any other pre-arranged trading plan. All company trading activity is carried out under a "pre-arranged" plan—companies do not repurchase their shares without advance planning. In this regard, we find proposed new Item 703(c)(2)(i) quite confusing—despite the implication in the proposed text, a "publicly announced plan or program" would surely include purchases pursuant to an equity tender offer or outstanding put options.

19. *Proposed Item 703, and proposed Form SR would require disclosure of whether shares were purchased in reliance on the safe harbor in Rule 10b-18. How would investors use this information? Is the use of the term "purchased in reliance on the safe harbor" sufficiently clear?*

As we explain in response to question 18, we do not see what interest an investor would have in the particular method a company uses to ensure compliance with applicable law, in this case the antimanipulation provisions of the federal securities laws. Including this as a new disclosure element of Item 703 would merely increase the reporting burden.

If the Commission goes forward with its proposed rules, we think it should consider exempting from such proposed rules share repurchase programs that are conducted under Rule 10b-18. In our experience, public companies who regularly engage in daily share repurchases in the ordinary course of business as a prudent method of returning capital to investors typically conduct their share repurchase programs in accordance with Rule 10b-18. Rule 10b-18 was designed specifically to minimize the impact share repurchases can have on the market, thereby allowing a security's price to be established based on independent market forces without undue influence by the issuer. Removing share repurchase programs conducted in accordance with Rule 10b-18 from the reach of the proposed rules would substantially mitigate some of the harms to investors described in this letter, while perhaps allowing the Commission to focus the proposed rules on share repurchase programs that may present the issues mentioned by the Commission in the release.

20. *How would investors use the proposed disclosure regarding any policies and procedures relating to purchases and sales of the issuer's securities by its officers and directors during a repurchase program, including any restriction on such transactions? Should we require*

disclosure of broader policies and procedures related to a repurchase program, for example, how material nonpublic information is controlled for or potential impacts, if any, on executive compensation metrics? Is there additional information about repurchase plans and trading by insiders that we should require to be disclosed?

In our experience, corporate policies around officer and director trading focus on the individual's possession or potential possession of material nonpublic information, and not on share repurchase activity, and therefore we think proposed Item 703(c)(4) would elicit very little interesting information. If a company is planning to announce a material share repurchase program, under ordinary corporate insider trading policies that development would trigger trading restrictions for directors and officers with knowledge of the plans, to the extent deemed material nonpublic information.

In addition, this disclosure requirement would imply that the policies of companies who do not have restrictions on purchases and sales of the company's securities by its officers and directors during a share repurchase program are somehow deficient. In our experience, most companies who engage in daily share repurchases as an ordinary course capital management strategy do not restrict officers and directors from trading during the share repurchase program since the daily share repurchases are immaterial.

21. *In this release, we are proposing amendments to require an issuer to disclose whether it repurchased its securities pursuant to a Rule 10b5-1 plan, and if so, the date that such a plan was adopted or terminated. We also are proposing amendments to Item 703 to require disclosure of any policies and procedures the issuer has established relating to purchases and sales of its securities by its officers and directors, including any restriction on such transactions. In a separate release described in note 21 above, we are proposing new Item 408 under Regulation S-K and corresponding amendments to Forms 10-Q and 10-K to require: (1) quarterly disclosure of the use of Rule 10b5-1 and other trading arrangements by a registrant, and its directors and officers, for the trading of the issuer's securities; and (2) annual disclosure of an issuer's insider trading policies and procedures. If the Commission adopts both the proposed Item 703 and Item 408 amendments, are there opportunities to streamline or simplify overlapping disclosure requirements that may apply to an issuer's repurchase plan? If so, which provisions should we eliminate or how should we modify the proposed disclosure requirements?*

For the reasons noted in response to question 18, we believe the appropriate matters for disclosure around the use of Rule 10b5-1 trading plans are better left to the Commission's parallel rulemaking project, and need not be covered under a revised Item 703.

* * *

We appreciate the opportunity to participate in the Commission's rulemaking process, and would be pleased to discuss our comments or any questions that the Commission or its staff may have, which may be directed to Joseph A. Hall, Michael Kaplan, Mark M. Mendez or Shane Tintle of this firm at 212-450-4000.

Very truly yours,

Davis Polk & Wardwell LLP