

United States Senate
WASHINGTON, DC 20510-0908

March 18, 2022

The Honorable Gary Gensler
Chair
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549

Dear Chair Gensler:

We write to provide comment on the Commission's proposed rule, Share Repurchase Disclosure Modernization (File No. S7-21-21). As the sponsors of the provision of the Joint Explanatory Statement accompanying the Fiscal Year 2020 Financial Services and General Government Appropriations Act requiring the Commission to report on the effect of share repurchases on investment, corporate leverage, and economic growth,^[1] we are pleased to see the Commission propose exercising its authority in this area.

As the report published by the Commission staff pursuant to that Act found, share repurchases have risen to eclipse total capital raised by public companies, and coincided with a period of relative decline in investment in tangible assets.^[2] This is an inversion of the conventional role that Congress and the public have long expected securities markets to perform.

The established role of our capital markets is to provide the means by which companies raise capital and invest it productively for the good of their investors, workers, communities, and, ultimately, our country as a whole. The mission of the Commission to "protect investors, facilitate capital formation, and maintain fair, orderly, and efficient markets" therefore requires attention to market practices that suggest the use of capital markets for other purposes. The unprecedented magnitude of share repurchases occurring in capital markets today represents a shift in capital markets toward transactions in securities for the purposes of financial engineering over raising capital to invest productively in trade and industry.^[3]

As such, we believe it appropriate that the Commission exercise its authority to ensure that share repurchases do not interfere with the proper functioning of the securities markets. We support the Commission's efforts to increase the disclosure of share repurchases and ensure that

^[1] See S. Rept. 116-111 at 95; Markup of the Financial Services and General Government Appropriations Act, 2020: Hearing Before the Senate Committee on Appropriations, at 1:51:46 <https://www.appropriations.senate.gov/hearings/full-committee-markup-of-fy2020-t-hud-agriculture-fsgg-funding-bills>.

^[2] SEC Staff Response to Congress: Negative Net Equity Issuance at 13, 25 (Dec. 2020).

^[3] Cf. Securities Exchange Act of 1934 § 2, 15 U.S.C. § 78b(3) (2018) (justifying the regulation of capital markets on the basis that "manipulation and control . . . [and] excessive speculation . . . cause alternately unreasonable contraction of the volume of credit available for trade, transportation, and industry in interstate commerce.").

share repurchases are not used unlawfully by company insiders. In response to the Commission's request for comments on its proposal, we submit the following:

1. We support the proposal that issuers should describe the objective or rationale for their share repurchases. However, in order to avoid vague or boilerplate disclosure, we encourage the Commission to consider incorporating in the disclosure of objectives or rationale for share repurchases any consideration by the issuer of share repurchases relative to other possible uses of capital. Because it is already the case that any business judgment consistent with the state law fiduciary duties of most issuers must have a rational basis, the issuer's rationale for share repurchases would be more useful to investors in comparison to other possible uses of capital, rather than as a standalone basis. Specifically, the issuer's rationale for share repurchases should be compared with other investment opportunities ordinarily considered by the issuer, including capital expenditures and other uses of capital which would generate financial returns by the means of investing in the issuer's line of business, rather than the market for its stock.
2. We support the proposal that issuers disclose how share repurchases are financed, and urge specific attention to whether a share repurchase is financed by additional debt. The disclosure of the means of financing would provide valuable information not presently available to public markets that would suggest helpful context for an issuer's objective in repurchasing its stock. For example, in combination with the disclosure of the rationale for share repurchases, the use of debt financing could belie the claim by an issuer that it had no other productive use of capital.

We believe that these disclosures would significantly improve the effectiveness of Regulation S-K in preserving the proper functioning of the securities markets by improving the quality of information provided to investors and orienting issuers' disclosures further toward the public interest that capital markets facilitate investment in trade and industry.

Thank you for your consideration of these comments.

Sincerely,



Marco Rubio
U.S. Senator



Tammy Baldwin
U.S. Senator

CC:
Commissioner Hester M. Peirce

Commissioner Allison Herren Lee
Commissioner Caroline A. Crenshaw