

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 No. 34-93783; File No. S7-21-21

Rule 10b5-1 and Insider Trading
Release No. 33-11013; File No. S7-20-21

Dear Ms. Countryman:

This letter is submitted on behalf of Business Roundtable, an organization whose members lead America's largest companies, employing over 20 million workers. Their companies' total value, over \$20 trillion, accounts for half of the value of all publicly traded companies in the United States. They spend and invest over \$7 trillion a year, helping sustain and grow tens of thousands of communities and millions of medium- and small-sized businesses.

We appreciate the opportunity to comment on the proposed rules issued by the Securities and Exchange Commission (the "Commission" or "SEC") that would, if adopted, impose significant new procedural and disclosure requirements on issuer repurchases (or "buybacks") of issuer stock. This letter addresses primarily the proposals entitled Share Repurchase Disclosure Modernization (the "Repurchase Proposals"),¹ issued on December 15, 2021, along with certain aspects of the proposals included in the release entitled Rule 10b5-1 and Insider Trading (the "10b5-1 Proposals" and, together with the "Repurchase Proposals," the "Proposals"),² the latter of which was originally issued on December 15, 2021, and reissued on January 13, 2022.

INTRODUCTION AND SUMMARY

As we explain below, Business Roundtable opposes the Proposals because we believe that they would have significant adverse impacts on efficient capital allocation. We do not believe that the Proposals sufficiently take into account the costs and consequences for issuers, investors

¹ Share Repurchase Disclosure Modernization, Exchange Act Release No. 34-93783 (Dec. 15, 2021), <https://www.sec.gov/rules/proposed/2021/34-93783.pdf> [hereinafter *Repurchase Proposals*].

² Rule 10b5-1 and Insider Trading, Exchange Act Release No 33-11013 (Jan. 13, 2022; replacing publication of Dec. 15, 2021), <https://www.sec.gov/rules/proposed/2022/33-11013.pdf>.

and the capital markets overall that would result from the proposed new disclosure framework and timing requirements for issuer buybacks.

The SEC's rules currently require detailed quarterly disclosure of issuer buyback activity. More frequent disclosures are not only unnecessary, but would also result in extensive burden to issuers and an overwhelming amount of daily information for investors to wade through without a corresponding benefit to justify such burden on both the producers and consumers of such information. Further, Business Roundtable has serious concerns that the daily information about buybacks called for by the Repurchase Proposal could be misconstrued by investors, leading to speculative investment decisions that are harmful to investors, particularly small investors, and unnecessary market volatility. Moreover, such information could be used by opportunistic investors to the detriment of issuers and their long-term stockholders. In addition, the proposed limitations on the structure of Rule 10b5-1 plans would render the affirmative defense provided by such plans unworkable for issuer repurchase programs in many cases and leaves open a number of questions about how such plans would work in many instances.

Overall, if the SEC adopts the Proposals, the SEC's rules would disincentivize the use of stock repurchases as a means of returning capital to stockholders. This would create significant inefficiencies in the capital allocation activities of public companies—negatively impacting issuers, investors, and the economy as a whole. For these reasons, Business Roundtable does not support the Proposals as they relate to issuer repurchases.

ISSUER REPURCHASES SERVE A VALUABLE PURPOSE AND DISINCENTIVIZING REPURCHASES WILL HARM INVESTORS AND THE CAPITAL MARKETS

Issuer repurchases are an important way for issuers to return capital to their stockholders. As the Commission acknowledges in the Repurchase Proposals release, issuers may conduct stock buybacks for any number of reasons, including “in a manner aligned with shareholder value maximization, such as to offset share dilution after new stock is issued, to facilitate stock- and stock option-based employee compensation programs, to help signal the issuer’s view that its stock is undervalued, or because the issuer’s board has otherwise determined that a repurchase program is a prudent use of the issuer’s excess cash.”³

As companies develop their capital allocation strategies, many focus first on allocating capital back into their business to support their operations, grow strategically, and invest in their employees. Only after companies have sufficiently funded their business and operations, do they look to return capital to stockholders. Stock buybacks are an important tool, like dividends, to return capital to investors, including long-term investors, and many issuers look to a combination of regular stock repurchases and dividends as part of a disciplined approach to returning capital to stockholders after investing back into the business. Boards of directors

³ Repurchase Proposals, *supra* note 1, at 7 (describing certain study findings concerning issuers’ use of buybacks).

oversee this activity via their authorization of stock buybacks. As with dividends, strong corporate governance practices are important, and decisions about stock buybacks are subject to state corporate law fiduciary duty standards and other state corporate law requirements.

Money returned to stockholders via stock buybacks or dividends does not disappear from the economy. The cash returned to stockholders is loaned, spent, or reinvested in other businesses including small, growing and innovative companies.⁴ Such reinvestments of stockholder payouts are a normal function of the economy and facilitate positive effects of capital reallocation into consumption and investments.⁵

If issuers limit repurchase activity in response to the proposed reporting requirements, this would remove an important mechanism for returning capital to stockholders and liquidity in the issuer's stock could in many cases be reduced, causing increased volatility and risk for investors.

THE SEC'S PROPOSALS

Overview

The Repurchase Proposals would impose two significant new disclosure requirements concerning an issuer's repurchases of its equity securities: (1) a new Form SR to be furnished the first business day following a stock buyback and (2) amendments to current Regulation S-K Item 703 that would increase issuers' periodic disclosure obligations regarding stock repurchases. The 10b5-1 Proposals would, among other things, impose a 30-day cooling-off period on issuer repurchase programs and limit overlapping trading plans.

Discussion

Daily Reporting

The Proposals raise a number of concerns for issuers; however, Business Roundtable believes the most significant concerns are raised by the proposed daily reporting requirement for issuer repurchases. This obligation would dramatically change the regulatory landscape for issuer repurchases, increasing costs for issuers and potentially resulting in market reactions and abuses that would make repurchases significantly less attractive as a means of returning capital

⁴ By engaging in stock buybacks, issuers free up cash that can be used elsewhere, such as investment in innovative and higher growth firms. See Jesse M. Fried and Charles C.Y. Wang, *Are Buybacks Really Shortchanging Investment?*, Harv. Bus. Rev., March-April 2018, <https://hbr.org/2018/03/are-buybacks-really-shortchanging-investment>.

⁵ Craig M. Lewis, Examining Corporate Priorities: The Impact of Stock Buybacks on Workers, Communities, and Investment, Testimony at Hearing Before the Subcommittee on Investor Protection, Entrepreneurship, and Capital Markets of the Committee on Financial Services of the United States House of Representatives (Oct. 17, 2019), <https://financialservices.house.gov/uploadedfiles/hrg-116-ba16-wstate-lewisc-20191017.pdf>.

to stockholders. Accordingly, Business Roundtable urges the SEC not to adopt the proposed changes in the disclosure requirements around issuer repurchases.

The Proposals could have any number of economic impacts on issuers, depending on the structure and cadence of their stock repurchase programs, effectively hindering an important mechanism for returning capital to stockholders. For example, the requirement to provide daily disclosure on a new Form SR could result in misinterpretation of this information by the market, particularly for issuers that conduct open market repurchases over multiple days on a predictable periodic schedule (such as under a Rule 10b5-1 or similar trading plan) or that conduct recurring trades outside of a trading plan. If an issuer that typically repurchases daily does not file a Form SR at any particular point in time, the market could react in any number of ways based on pure speculation or misread signals about the reason for the change – for example, the issuer’s stock price may rise based on an assumption that the issuer has material positive information, leading it to stop repurchasing, or the price may drop because of concerns that there is negative news that has not been disclosed or that the issuer has somehow lost confidence in the value of its stock. Business Roundtable believes this will lead to significantly increased, and unnecessary, market speculation and volatility that will be harmful to investors, issuers and the capital markets in general.

Similarly, the daily reporting requirement raises the potential unintended consequence of unilaterally strengthening the hands of short-term traders who, armed with daily reporting information, may be able to reverse-engineer significant elements of issuer stock repurchase programs, in particular pricing terms, to determine the amount and timing of future purchases, as the Repurchase Proposals correctly highlight. With that knowledge in hand, predatory market participants could then trade against the company to the detriment of the company and its long-term stockholders, including firefighters, teachers and others with retirement savings.

Further, the proposed daily disclosure of stock repurchase activities, combined with the granular nature of the information required to be disclosed, would add a significant administrative burden on issuers that regularly repurchase their stock. At the same time, the comparative benefit to stockholders of the additional daily disclosures is nominal, considering the overwhelming amount of data such investors would have to analyze to understand issuer repurchase activity.

Rule 10b5-1 Plans

Business Roundtable also is concerned that the proposed changes to Rule 10b5-1 as they relate to issuer repurchases made in reliance on Rule 10b5-1 plans would provide further disincentives for issuers to engage in stock repurchases. This would further limit an important mechanism for issuers to return capital to their stockholders. At a minimum, we believe the 10b5-1 Proposals would limit issuers in their ability to structure and execute repurchase plans in a manner that is most economically beneficial for the issuer and its stockholders, and that is specifically designed to assure that trading takes place in compliance with the federal securities laws.

Concerns about possible abuses of Rule 10b5-1 trading plans that the Commission may be seeking to address with the Proposals do not apply to issuer repurchases. To the contrary, companies using Rule 10b5-1 plans to conduct buybacks do so in order to assure that they are complying with the law.

One of the most concerning aspects of the 10b5-1 Proposals, as applied to issuers, is the proposed cooling-off period. A cooling-off period is not necessary to achieve the Commission's objective as it relates to issuer buybacks. Further, prior to the publication of the Proposals, we do not believe concerns about possible abuses leading to a need for a cooling-off period had been expressed with respect to issuer repurchases. The practical problems associated with a cooling-off period, as discussed below, could well lead issuers to conduct buybacks outside of Rule 10b5-1, which would not appear to benefit issuers or investors.

The Rule 10b5-1 affirmative defense already requires that an issuer enter into a plan in good faith and, importantly, when it is not in possession of material nonpublic information ("MNPI"). Industry participants also in practice have viewed it as necessary for the Rule 10b5-1 affirmative defense that any material modifications to plans not be entered into while the issuer is in possession of MNPI. In fact, to this point, a typical existing practice for many issuers already involves entering into Rule 10b5-1 plans during an open window period two or so days following an earnings announcement, a practice that allows today's efficient capital markets appropriate time to absorb MNPI. Implementing a cooling-off period would have significant consequences for issuers. For instance, keeping in mind issuers already enter into Rule 10b5-1 plans when not in possession of MNPI, a cooling-off period would put issuers at a significant unilateral disadvantage vis-a-vis other market participants, especially short-term traders, who can trade freely without the same restrictions and engage in arbitrage.

To illustrate further using a different example, many companies repurchase their stock pursuant to accelerated share repurchase programs ("ASRs") pursuant to which the issuer purchases a large block of its stock from an investment bank in a single transaction. The investment bank borrows shares from a stock lender for the initial sale to the issuer, and subsequently engages in purchase activity regarding the ASR to "cover" the borrowed shares. At the end of the agreed purchase period, the bank and issuer typically settle up based on the weighted average share price over the purchase period less an agreed discount. Companies generally rely on Rule 10b5-1 plans to conduct their ASRs. Requiring a 30-day cooling-off period for ASR transactions would introduce a level of uncertainty to the overall economics of such structures that could make such transactions unworkable in practice.⁶

The proposed cooling-off period is also overly broad in terms of scope, chilling otherwise legitimate activity. For example, a company may not make changes, not even *de minimis*

⁶ We note that the Repurchase Proposals are unclear with respect to the reporting requirements in connection with an ASR (e.g., whether purchases by a bank after initial execution of the ASR are subject to daily reporting). The approach to ASRs should be clarified in any event.

changes (for example, correcting an error, or changes not affecting pricing or volume terms), to an existing Rule 10b5-1 trading arrangement without triggering a new cooling-off period.

Another important concern for many issuers is the broadly-cast limitation on overlapping Rule 10b5-1 trading arrangements. For instance, for issuers whose typical contract structure involves putting in place individual 10b5-1 contracts at different brokers with staggered effective dates, but only actively executing trades under one contract at a time during each quarter, the proposed rule would have the unintended effect of invalidating a legitimate contractual framework that optimizes efficiency. As applied to issuers, the Commission's concerns about overlapping plans (e.g., the timing of trades or amending of contracts) could not be an issue at all when the respective *actual execution periods* of such contracts, in fact, do not overlap, nor when amendments to one contract are made that do not impact another contract. For that reason, the breadth of the restriction on overlapping plans is concerning in that it has the unintended effect of disrupting existing and valid practices.

The proposed 30-day cooling-off period, when combined with the effects of the proposed requirements for new disclosures and that there not be overlapping plans, adds even more complexity and constraints to the ability of issuers to conduct responsible repurchase activity. For example, it would appear that under this approach, a company that ordinarily would follow its ASR with a traditional Rule 10b5-1 trading plan for repurchases (which would be conducted in compliance with Rule 10b-18) would not be able to establish that approach in advance of completion of the ASR, but instead would need to wait 30 days after the closing out of the ASR. These practical consequences do not appear to be tied to any abuse or concern. But they could lead to the unfortunate result of companies deciding that Rule 10b5-1 is not a practical tool for responsible stock repurchases.

CONCLUSION

For these and numerous other reasons, Business Roundtable believes that the proposed requirements discussed above, if adopted, would undermine the effective execution of corporate stock repurchase programs. Issuers would be required to recalibrate their repurchase activity in a way that would be economically detrimental to themselves, their investors, and the broader market. The additional disclosure of information could result in serious confusion and inaccurate signaling for investors *and* easily lead to trading abuses by third-party firms making the market even less transparent and efficient than it is today.

Business Roundtable appreciates the opportunity to provide our input during this process. We would be happy to discuss these comments or any other matters you believe would be helpful. Please contact Maria Ghazal, Senior Vice President & Counsel of Business Roundtable, at mghazal@brt.org or 202-496-3268.