April 1, 2022

Vanessa A. Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20548-1090

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

Dear Ms. Countryman:

The Society for Corporate Governance ("the Society") submits this letter in response to the Commission's rulemaking release on Share Repurchase Disclosure Modernization.[1]

Founded in 1946, the Society is a professional membership association of more than 3,500 corporate and assistant secretaries, in-house counsel, outside counsel, and other governance professionals who serve approximately 1,600 entities, including 1,000 public companies of almost every size and industry. Society members play an important role in engaging with investors on capital allocation issues, including share repurchases.

Share repurchases are a vital component of the capital allocation strategies of public companies, including small and mid-cap issuers. Notwithstanding the criticism voiced by some politicians, repurchases generate many benefits for investors and employees as well as the broader U.S. economy. Share buybacks increase investor returns, improve market liquidity, return funds to shareholders that they can deploy to invest in smaller companies, and allow issuers to obtain shares that can be used for employee incentive compensation without diluting the interests of existing shareholders.[2] The Society is concerned that the overly burdensome rules outlined in the Proposing Release would have the cumulative effect of significantly

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[1] Share Repurchase Disclosure Modernization, Release Nos. 34-93783, IC-34440; File No. S7-21-21, 87 FR 8443 (Dec. 15, 2021) ("Proposing Release").

[2] In a joint 2019 commentary, the chief executives of the Business Roundtable and the Council of Institutional Investors touted the economic benefits of corporate share buybacks. *See* Joshua Bolten and Ken Bertsch, *New York Times*, "Restricting Stock Buybacks Will Hurt the Economy," (March 4, 2019), https://www.nytimes.com/2019/03/04/opinion/sanders-stock-buybacks.html ("Money returned to shareholders through buybacks and dividends does not disappear from the economy. Individual investors can use it to purchase something they've been saving for. The money can be lent to other companies that are hiring and growing. It can be invested in new businesses as seed money for start-ups or financing for emerging technologies.").

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discouraging the use of share repurchases by public companies, which would have a negative impact on both retail and institutional investors.[3]

Public companies are already subject to extensive reporting requirements regarding their share repurchases. Companies are required by exchange listing standards to disclose information surrounding the annual board authorization of buybacks, including the authorization date, the number of shares to be repurchased, and the expiration date of the program. Item 703 of Regulation S-K requires the quarterly retrospective disclosure of the total number of shares that were purchased by a company each month, the average price per share, and the maximum number of shares that may yet be purchased. Many companies also provide public disclosure before starting repurchases.[4] The SEC's Rule 10b-18, which was adopted in 1982 and amended in 2003, prescribes various anti-manipulation standards that corporate repurchase programs must meet to qualify for a voluntary safe harbor. The Division of Trading and Markets has provided additional guidance in this area.[5] Repurchases also are governed by state corporate laws, including the laws of Delaware, which prohibit purchases that "would cause any impairment of the capital of the corporation" and provide for personal director liability for unlawful repurchase transactions.[6] Given this existing regulatory structure and the fact that investors already engage frequently with companies about their share repurchase activities, the Society questions why additional disclosure rules are needed at this time.

Below are our comments for consideration on select questions encompassed in the Proposing Release.

I. Disclosure of Share Repurchases on a Daily Basis Would Not Provide Meaningful New Information to Investors and Would Advantage Short-Term Trading Interests at the Expense of Long-Term Shareholders.

As noted above, public companies currently disclose detailed information regarding their share repurchase programs on both an annual and a quarterly basis in accordance with listing standards and Regulation S-K Item 703. Thus, investors know in advance the amount of capital a company is authorized to use for repurchasing shares and when those board buyback decisions

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[3] The Commission's proposed rules may also have the unintended consequence of reducing expected federal tax revenues. An amendment to the "Build Back Better" legislation in the U.S. House calls for a non-deductible 1% excise tax on repurchases by public companies; such a tax is projected to generate $124 billion in revenue over 10 years, according to the Joint Committee on Taxation. *See* EY, *Tax News Update*, "Excise tax on stock buybacks included in House reconciliation manager's amendment" (Nov. 5, 2021). Other lawmakers, including Senator Sherrod Brown, chair of the Senate Banking Committee, have called for a 2% excise tax. While we do not support a tax on buybacks, we note that the rules in the Proposing Release, which could persuade companies to curtail their buybacks, would likely result in a reduction in any projected tax revenue.

[4] Many companies disclose the following details before buying shares under new plans: the estimated period during which the purchases will be made; the maximum number of shares to be acquired or the maximum amount of funds to be expended; the objective of the acquisition of shares; any plan for the shares to be purchased; and an indication of how the purchases will be made. *See* Skadden Arps, "Share Repurchases" (March 16, 2020).

[5] Division of Trading and Markets: Answers to Frequently Asked Questions Concerning Rule 10b-18 ("Safe Harbor" for Issuer Repurchases), https://www.sec.gov/divisions/marketreg/r10b18faq0504.htm

[6] *See* Delaware General Corporation Law ("DGCL"), Sections 160 and 174.

are typically announced. Investors also know the number of shares purchased during the previous quarter and the number of shares that could still be purchased based on the company's stated intentions. Notwithstanding these disclosures, the Proposing Release posits that the current reporting system results in information asymmetries between companies and investors and seeks to remedy these asymmetries by mandating the disclosure of share repurchases within one business day. However, the Society believes that if companies were required to report repurchases on a daily basis, this additional data would not provide meaningful information for investors.

One of the primary concerns discussed in the Proposing Release is that investors lack specific information about daily share purchase volumes when the investors are also in the market. What the release does not make clear is how investors would benefit from having information about daily purchases on a nearly real-time basis.[7] [8] The Proposing Release presumes that a shareholder's investment decisions may change based on how much stock a company repurchased on the prior day, but the release does not explain the logic of how this information would inform the shareholder's decision making. At best, any such information would likely only be used by sophisticated traders seeking to capitalize on short-term volatility rather than be used to make informed long-term investment decisions by retail or institutional investors.

In addition, reporting on repurchases on a daily basis would create a significant amount of noise in a company's reporting stream. The filings would clutter the company's EDGAR feed, creating data overload for retail investors.[9] Certain sophisticated traders have analytical tools to analyze the granular information provided by daily reporting, but retail investors who do not use these data tools likely would be overwhelmed by the sheer number of filings for a company making daily repurchases. These sophisticated traders would be able to misuse the daily information about a company's share repurchase activity to "front run" or trade against the company and increase the cost of the issuer's repurchases to the detriment of the company and long-term investors.

While the Proposing Release fails to make clear why daily reporting is material to investors, companies have significant concerns about the information that could be inadvertently provided to the market through decisions *not* to make repurchases on certain days or at certain times. If a company has been making repurchases for several days or weeks in a row and then

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[7] The Commission's proposal for nearly real-time disclosure goes beyond what even institutional investors have called for. For instance, the Council of Institutional Investors has supported a two-day reporting period for share repurchase transactions. *See* Council of Institutional Investors, Letter re File No. S7-21-21 (March 31, 2022), https://www.sec.gov/comments/s7-21-21/s72121-20121907-274603.pdf.

[8] Other institutions, including asset manager T. Rowe Price, oppose the proposed rules, concluding: "The near real-time reporting of executed buyback transactions would in all likelihood also negatively impact markets." T. Rowe also questioned the need for one-day disclosure: "It is also not evident to us what justification there would be for reporting buybacks sooner than more significant events such as 13D filings." *See* T. Rowe Price, Letter Re: File No. S7-21-21 (Share Repurchase Disclosure Modernization Proposal)(March 30, 2022), https://www.sec.gov/comments/s7-21-21/s72121-20121714-273813.pdfhttps://www.sec.gov/comments/s7-21-21/s72121-20121714-273813.pdf.

[9] As other commenters have noted, the Proposing Release estimates that this rule would lead to 175,000 Form SR filings each year, which would make it harder for retail investors to find Form 8-Ks and other filings that typically include material information.

stops, a market observer might presume that the reason for halting purchases is that management has come into possession of material non-public information ("MNPI"). This may (or may not) be true, but such a halt would have the potential to cause rumors and speculation in the marketplace. Many times, potentially significant business developments arise that cause a company to decide to halt trading by the company and executives before the development has reached a point of certainty and finality that the company is ready or required to disclose it to the market. This may be because of the company's negotiating position or because the company is investigating a situation to determine facts or materiality. The negative signaling of a company stopping repurchases could create market volatility that may put a company into the position of needing to address rumors, including at a time that could significantly disadvantage the company's negotiating position or other business interests. This would be harmful to investors, who would be making investment decisions based upon speculation about a single data point without the proper context and all the relevant facts. Contrary to the statements in the release about the purported benefits of the proposal to investors, the proposed rules will unnecessarily fuel speculation and volatility that will be harmful to investors and to the efficiency of the capital markets in general.

As discussed in the Economic Analysis section of the Proposing Release, companies that use certain trading practices, particularly those that are periodic or otherwise may be highly predictable, likely will face increased costs for their repurchase programs. Companies that use conservative daily dollar-cost averaging as part of a prudent strategy to return excess capital to their shareholders will be subject to the predatory trading practices of hedge funds, high-frequency traders, and other large data-driven traders. Such short-term, professional traders will use the daily repurchase information to trade against the company to the detriment of the company and its shareholders generally, particularly smaller investors and long-term shareholders. This confluence of effects -- increasing a company's costs for repurchases and benefiting short-term investors who would purchase based on a company's daily disclosures and sell following the ensuing stock price increases – would amount to a wealth transfer to short-term investors at the expense of the company's long-term investors.

The Proposing Release also contends that the amendments could improve the ability of investors to identify repurchases that are likely to be driven by managerial self-interest. While it is unclear exactly how daily reporting would help investors determine the underlying motivations of management, it is concerning that if companies are required to provide daily reporting regarding repurchases, this additional data will likely drive unwarranted litigation based on mere presumptions about the reasons for the repurchases. This additional litigation burden is likely to create a significant distraction and additional costs for public companies, without creating value for long-term shareholders.

In sum, one-day reporting of share repurchases would harm investors, public companies, and the markets in general by unnecessarily fueling speculation, market volatility and market manipulation, while benefiting hedge funds and other predatory traders, as well as plaintiffs' lawyers.

II. One-Day Reporting Would be a Significant Administrative Burden for Companies.

One-day reporting of share repurchases also would create a significant administrative burden and increased costs for companies. Many companies make repurchases on a daily basis at certain times and would need to devote new legal and administrative resources to preparing these Form SR filings. In addition, trades do not settle immediately, so final confirmed data may not be ready by the time the filing is due. If an error is identified or there is a change in the information, the company would be required to file an amendment, further adding to the compliance burden and noise in the company's reporting stream.

Given that some companies are in the market every day and may use multiple brokerage firms to purchase shares each week, the reporting burden and compliance costs for such company under a one-day reporting regime would be significant and we believe would outweigh any informational benefit for investors. For a company that purchases shares every trading day, the proposed disclosures would be more onerous than imposed by other SEC requirements with longer reporting periods, such as Form 4 (two business days), Form 8-K (four business days), Schedule 13D (10 days), and Form 13-F (45 days after the end of a quarter). If the Commission concludes that the current quarterly disclosures under Regulation S-K Item 703 are not sufficient to inform investors, the SEC should consider the possibility of monthly repurchase reports that would provide a more comprehensive look at a company's repurchase programs without cluttering the company's EDGAR feed with daily filings or unduly driving up the cost of administering share repurchase programs.[10]

If a one-day reporting burden is implemented, share purchases made in reliance on the safe harbor of Rule 10b-18 should be exempted from the proposed rules. Rule 10b-18 provides a safe harbor for liability for market manipulation and imposes limitations on manner, timing, price, and volume of repurchases. It 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. Any benefits of real-time information would be substantially mitigated with respect to purchases made in reliance on Rule 10b-18, which already provides protections from manipulation abuses.

III. The Commission Should Not Mandate the Disclosure of Operational Information About Buyback Programs.

Many companies with share repurchase programs describe not only the information about total authorization and monthly purchases specifically prescribed by current rules, but also, broadly speaking, how such authorization fits within the issuer's capital allocation plan and how it impacts the issuer's liquidity needs. Companies often disclose this information, as well as the

[10] If the Commission were to require monthly reports detailing a company's repurchase activity, we would suggest a 14-calendar-day reporting period after the end of each month, consistent with the approach the SEC has taken in its proposed Form SHO rulemaking. *See* Short Position and Short Activity Reporting by Institutional Investment Managers, File No: S7-08-22 (February 25, 2022).

share repurchase activity, in the "Management's Discussion and Analysis of Financial Condition and Results of Operations" section required in periodic reports and also disclose the share repurchase activity in their financial statements and as required by Regulation S-K Item 703. While a requirement to address the objectives of a repurchase program is consistent with existing practices of many companies, the proposed requirement to disclose the process or criteria used to determine the amount of repurchases is not material to investors and could lead to misleading disclosures.

Companies do not typically disclose the process or criteria used to determine the amount of repurchases. A new requirement to provide this information on a quarterly basis would entail the disclosure of significantly more detailed information about operational decision-making and treasury/cash management strategies and processes than is required by the Commission's rules in other contexts. Such information would be overly detailed and operational in nature, subject to change, and not material to investors. As a result of such a requirement, companies with share repurchase plans or programs may face the prospect of inadvertently disclosing sensitive information about planned M&A initiatives or other strategies before they are fully developed. Providing such disclosure could create commercial, competitive, or other strategic harm, and could lead to disclosure that is incomplete or subject to change, which could create risk of litigation and have implications for the issuer's credibility with investors. These results would be harmful not only to the issuer, but also to its investors.

In practice, a prescribed requirement to disclose the objective or rationale for share repurchases may promote more consistent and useful disclosure by companies of why they make use of share repurchases and how repurchase programs impact companies' liquidity needs. On the other hand, a specific requirement to disclose, on a quarterly basis, the process or criteria used to determine the amount of repurchases would be potentially harmful to companies and investors and, as a result, would likely result in boilerplate disclosures.[11]

IV. This Rulemaking Is Not Necessary Given the 2020 SEC Staff Report on Repurchases and Compensation Practices.

This rulemaking appears to be motivated in part by the perception that some companies opportunistically engage in share buyback programs as a means to increase their earnings per share ("EPS") and thus make it easier for their executives to receive additional incentive compensation that is linked to EPS targets. However, the Commission staff has already examined this issue in detail and determined that this concern is not warranted.[12] In a Commission staff report published in December 2020, the staff examined 50 companies with the most active repurchase programs in 2018 and 2019 and found that gaming EPS performance targets was not the primary motivation for repurchases. That report found that "82% of the firms

[11] Mandating more detailed quarterly Item 703 disclosures with operational information about repurchases, together with daily Form SR disclosures, would overwhelm retail investors with immaterial information while adding significant costs for issuers.

[12] SEC Staff, "Response to Congress: Negative Net Equity Issuance" (December 23, 2020), at 42, https://www.sec.gov/files/negative-net-equity-issuance-dec-2020.pdf.

reviewed either did not have EPS-linked compensation targets or had EPS targets but their board considered the impact of repurchases when determining whether performance targets were met or in setting the target." That study further found that "the relatively low incidence of firms having earnings-per-share (EPS)-based performance targets, as well as the rate at which boards of directors consider the impact of repurchases when setting EPS-based performance targets or determining whether they have been met, further supports the conclusion that efforts to increase compensation are unlikely to account for most repurchase activity." This staff report suggests that the Proposing Release is trying to address a perceived problem that does not actually exist.

V. The Proposed Rules Would Significantly Discourage Issuer Share Repurchases and Reduce Investor Returns, Liquidity, and Capital Formation.

The Society is concerned that the onerous requirements (especially the one-day disclosure period) in this rulemaking will significantly discourage share repurchases, which benefit many investors[13] and have tax advantages over dividends.[14] As noted earlier in this letter, both business and investor groups have recognized the significant economic benefits of share repurchases.[15] Buybacks also promote efficient investment in the broader market by returning funds from companies that may lack compelling investment opportunities, or are over-capitalized, to investors who can invest those funds in higher-growth opportunities such as IPOs or small and mid-cap companies.[16] Academic studies have found that corporate share repurchases reduce market volatility and contribute to greater liquidity, which is vital for those investors who prefer to purchase small and mid-cap stocks that often have less liquidity.[17]

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[13] Notwithstanding the Commission's stated goal to "modernize and improve disclosure," the Proposing Release appears to be a part of a multi-pronged campaign to discourage U.S. public companies from repurchasing their shares. As noted earlier, lawmakers have called for imposing a non-deductible excise tax (of 1% or 2%) on share purchases. On March 28, *The New York Times* reported that President Biden's 2023 budget plan calls for prohibiting executives from selling their company shares for three years after a corporate repurchase. *New York Times*, "Biden Renews Pushback Against Stock Buybacks" (March 28, 2022), https://www.nytimes.com/2022/03/28/business/dealbook/biden-stock-buybacks.html. Such a policy change could lead companies to shift a greater portion of senior executives' compensation to cash payouts, which would reduce executives' pay alignment with shareholder returns.

[14] For retail investors, dividend payments are generally taxed as ordinary income, whereas the share price appreciation after a corporate buyback is taxed under a lower capital gains rate (and that tax can be deferred if the investor retains those shares).

[15] In its Rule 10b-18 rulemaking, the Commission itself recognized the benefits of share repurchases, noting that that "undue restriction of these programs is not in the interest of investors, issuers, or the marketplace." Purchases of Certain Equity Securities by the Issuer and Others; Adoption of Safe Harbor, 47 Fed. Reg. 53,333, 53,334 (proposed November 26, 1982).

[16] Jesse M. Fried and Charles C.Y. Wang, *Harvard Business Review*, "Are Buybacks Really Shortchanging Investment? What the argument against stock repurchases gets wrong." (March-April 2018), https://hbr.org/2018/03/are-buybacks-really-shortchanging-investment?autocomplete=true ("One must also recognize that some of the capital flowing to S&P 500 shareholders is then reinvested in smaller public companies and private firms, fueling growth and employment outside the S&P 500.")

[17] *See* Craig M. Lewis and Joshua T. White, Vanderbilt University, Owen Graduate School of Management, *Harvard Law School Forum on Corporate Governance,* "Corporate Liquidity Provision and Share Repurchase Programs," (October 8, 2021), https://corpgov.law.harvard.edu/2021/10/08/corporate-liquidity-provision-and-share-repurchase-programs/ ("Our study shows that stock buybacks enhance liquidity and lower volatility. This allows all investors -- institutional and retail -- to buy and sell without having a large price impact.")

While many mature companies may use regular dividends as a means to return excess cash to their shareholders as one part of their capital allocation strategy, that strategy may not be appropriate for growth-stage and smaller companies that do not have sufficiently predictable cash flow to pay a dividend each quarter. As a result, many companies perceive share repurchases as a more flexible capital allocation tool than dividends that can be used to return capital to investors while avoiding the adverse market reaction that a company would face if it increased its regular dividend instead and was later forced by market conditions to reduce that dividend or not declare a dividend in a subsequent quarter.

Buybacks also can help a company reduce the excess cash on its balance sheet, the presence of which may expose a company to hostile M&A activity or the costly distraction of a proxy contest. Many companies are acutely aware that having an excessive cash position can enable a hostile acquirer to use the target company's own cash reserves to fund an attempted takeover. During a potential proxy contest, one of the most frequent demands of activists is that the company should expand its share repurchase activities.[18] [19]

While some critics of share repurchases assert that they are used to enrich senior executives, many companies use buybacks to support broader-based incentive plans for employees.[20] Buybacks help reduce the dilutive effects of equity compensation programs that companies use to retain employees, an important consideration in today's tight labor market. By raising the cost of buyback programs, this rulemaking could have a disproportionately negative impact on employees at growth-stage and smaller companies that do not generally pay dividends and often compensate their employees with a higher proportion of their compensation as equity-based incentives.

Finally, the Society believes that decisions over capital allocation and compensation should be left to a company's board of directors to determine – with input from the company's long-term investors. We are concerned that the SEC's Proposing Release would undermine the board's authority in this area by prodding companies to abandon their long-standing repurchase programs in favor of dividends or other strategies that may be favored by politicians but not appropriate for the company or its shareholders given its specific circumstances. For all of these reasons, we do not believe the proposed rules should be adopted.

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[18] *See, e.g.,* Martin Lipton, Wachtell, Lipton, Rosen & Katz, *Harvard Law School Forum on Corporate Governance*, "Dealing with Activist Hedge Funds and Other Activist Investors" (January 25, 2019), https://corpgov.law.harvard.edu/2020/01/20/dealing-with-activist-hedge-funds-and-other-activist-investors-3/ (the first item on Lipton's list of typical activist demands was "return of capital to shareholders through share repurchase or special dividend").

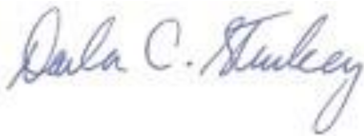
[19] One prominent example of activist demands for repurchases was Carl Icahn's campaign at Apple. After publishing a letter to Apple's CEO, Icahn went on CNBC to make his case for buybacks. "We put this letter out for one purpose . . . to get the company to buy back more stock," Icahn said. "The one thing I disagree with the company on is not buying a great deal more stock here . . . that's all I'm saying." *Business Insider*, "Carl Icahn only wants one thing from Apple" (May 19, 2015), https://www.businessinsider.com/carl-icahn-apple-buybacks-2015-5.

[20] If investors are displeased with a company's use of repurchases to support executive and employee compensation, they can voice that concern through their "Say on Pay" votes. Many companies that routinely employ buybacks continue to receive strong "Say on Pay" support.

Thank you for considering the Society's views on share repurchase disclosure.

Respectfully submitted,

Ted Allen
Vice President, Policy & Advocacy
Society for Corporate Governance



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