October 7, 2022

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

Re: File Numbers S7-21-21 and S7-20-21

Dear Secretary Countryman,

We are writing to provide comments to the U.S. Securities and Exchange Commission ("Commission") on the releases entitled "Share Repurchase Modernization Proposal" (the "Repurchase Proposal") and "Rule 10b5-1 and Insider Trading" (the "10b5-1 Proposal") as published on December 15, 2021.[1] We provide comments primarily to the Repurchase Proposal and only provide feedback on the 10b5-1 Proposal related to cooling-off periods for share repurchases. For the reasons we describe below, we believe that provisions of the proposed rules would induce unjustified burdens on issuers, create unintended consequences for issuers and ordinary investors, and ultimately harm the interests of long-term shareholders.

Our overarching concern is that the Commission fails to demonstrate a market failure that justifies the need to alter current reporting standards yet substantially increases the direct and indirect costs of share repurchase disclosure. These high costs with limited benefits will ultimately decrease the ability of issuers to efficiently return capital to shareholders and adjust their capital structure based on strategic decisions by the board of directors and management.

Under the current rules, issuers must disclose aggregated monthly information on their stock purchases in their quarterly and annual reports. The Repurchase Proposal significantly alters the regulatory landscape for share repurchases by increasing both the speed and granularity of disclosures regarding share repurchase transactions, as well as requiring a description of the repurchase program's objective or rationale, the process or criteria used to determine how many shares it purchased, policies related to the trading of corporate insiders, and whether insiders traded in the ten-day period preceding the repurchase of shares.

In our letter, we highlight specific concerns with the Repurchase Proposal. These include (1) the lack of a demonstrated market failure, (2) the abandonment of the materiality threshold for next-day reporting of repurchases on proposed Form SR, (3) unintended negative consequences of daily reporting for issuers and investors, (4) substantial indirect costs from additional disclosure requirements, (5) the failure to recognize the efficacy of existing mechanisms limiting the link between repurchases and executive compensation, (6) the realities of today's capital markets with

[1] Certain clients of FGS Global have asked Craig Lewis and Josh White to review the proposed SEC rule. The views and opinions expressed in this letter are those of the authors, and do not necessarily reflect the views of FGS Global or its clients. This document does not purport to present the views of Vanderbilt University, the Owen Graduate School of Management, or Vanderbilt Law School, if any.

respect to the proposed 30-day cooling-off period, and (7) the newly enacted excise tax on share repurchases.

We encourage the Commission to consider the adverse effects that the Repurchase Proposal will induce. Share repurchases are an essential means of efficiently returning capital to shareholders, managing dilution stemming from equity compensation plans, limiting agency costs by reducing surplus cash, and providing liquidity to investors. Elements of the proposed revisions will harm issuers' ability to pursue strategic goals through repurchases, and the costs of the additional disclosure requirements outweigh any purported benefits. These outcomes are contrary to the Commission's endeavor to protect investors and facilitate capital formation.

I. Failure to demonstrate a market failure.

The Repurchase Proposal describes two primary economic considerations for potential rulemaking: (1) the opportunistic use of share repurchases by management; and (2) asymmetric information between insiders and external stakeholders. In our comment letter dated April 1, 2022, we identify and demonstrate serious flaws in the Repurchase Proposal, including deficiencies in the Commission's accompanying economic analysis.[2]

In that letter, we note that the economic analysis does not convincingly support the Repurchase Proposal's claims of opportunistic or manipulative use of share repurchases by insiders. We highlight that the Commission's economic analysis ignores empirical evidence refuting the notion that repurchases necessarily harm investment and employees, choosing instead to reference opinions offered by commentators, some of which contain flawed empirical analyses.

We also discuss that asymmetric information between insiders and external investors is present in all market settings and cannot be characterized as a market failure without linking it to a negative outcome. As we note in our April 1 letter, without some level of asymmetric information, market participants would have fewer incentives to invest in information collection, resulting in less price discovery and a corresponding decline in liquidity.[3] The economic analysis underlying the Repurchase Proposal fails to demonstrate how more frequent share repurchase disclosures will have a significantly large and positive effect on liquidity or capital costs that outweigh the direct and indirect costs of the additional disclosure burden. Instead, the Repurchase Proposal simply relies upon qualifying language that more frequent repurchase disclosures *might* reduce information asymmetries between investors and issuers or insiders, which *could* result in greater stock price liquidity and a lower cost of equity capital.

We continue to conclude that the Repurchase Proposal and its accompanying economic analysis fail to identify the existence of a market failure convincingly. We refer the Commission to our April 1 comment letter for additional details.

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[2] *See* addendum by Craig M. Lewis and Joshua T. White, provided in the comment letter by Tom Quaadman, Executive Vice President, Center for Capital Markets Competitiveness, U.S. Chamber of Commerce, April 1, 2022, available at https://www.sec.gov/comments/s7-21-21/s72121-20122665-278649.pdf. The comment letter we furnish today is not submitted on behalf of the U.S. Chamber of Commerce, nor does it necessarily reflect the views of the U.S. Chamber of Commerce or its members.
[3] *See* Grossman, S.J., & Stiglitz, J.E. (1980). On the impossibility of informationally efficient markets. *American Economic Review*, 70(3), 393-408.

II. Unnecessary reporting on Form SR.

Rule 10b-18 provides a safe harbor for share repurchases that meet certain limiting conditions on the manner, timing, price, and volume.[4] Under the current repurchase disclosure rules, the board of directors first authorizes and approves a formal share repurchase program. The issuer then publicly discloses the repurchase program prior to its commencement. This disclosure informs market participants of the timing, size, objective, and method of repurchase. Before transacting, shareholders have complete information about the capital the issuer is authorized to use for repurchasing shares. Under Regulations S-K and S-B, issuers periodically report information on monthly repurchase activity each quarter on Forms 10-Q and 10-K.[5]

The Repurchase Proposal alters issuers' disclosure requirements to include next-day reporting of the number and average price of shares repurchased on the newly proposed Form SR.[6] This information would be furnished to the Commission before the end of the first business day following the execution of a share repurchase.

We are concerned that daily repurchase disclosures will largely be immaterial and result in a substantial burden to issuers. These filings will principally provide unnecessary and unmeaningful information that could overload ordinary investors and disadvantage them versus sophisticated market participants. Daily repurchase disclosures could also result in unintended consequences that exacerbate stock price volatility and attract noise traders that speculate or look for signals in patterns of daily activity.

Informative, clear, and usable disclosures are essential to thriving capital markets. However, actions that strengthen disclosure requirements must be made to provide material information to investors to solve an apparent market failure that cannot be addressed by private or enforcement actions. Immaterial line-item disclosure requirements burden issuers and fail to provide investors with the information necessary to make informed decisions. Immaterial daily disclosures can generate direct costs that far outweigh any perceived benefits, such as diverting resources to compliance personnel to satisfy unnecessary daily reporting requirements. As we discuss below, indirect spillover costs will also arise that cannot be justified by the goal of reducing information

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[4] *See* SEC, Purchases of Certain Equity Securities by the Issuer and Others, Final Rule, November 10, 2003, available at https://www.sec.gov/rules/final/33-8335.htm.

[5] This information includes the monthly number of shares purchased, the average price paid per share, the total number of shares purchased as part of a publicly announced share repurchase plan, the number of shares that may still be purchased under repurchase plans, and several related footnote disclosures describing, for example, the principal terms of public announced share repurchase programs. The current rules also require footnote disclosure of the principal terms of all publicly announced repurchase plans or programs, the number of shares purchased other than through a publicly announced plan or program, and the nature of the transaction.

[6] The proposed Form SR would require the following disclosure: (i) date of the repurchase; (ii) identification of the class of securities purchased; (iii) the total number of shares (or units) purchased, including all issuer repurchases whether made pursuant to publicly announced plans or programs. It also requires the following additional disclosures: (i) the average price paid per share (or unit); (i) the aggregate total number of shares (or units) purchased on the open market; (iii) the aggregate total number of shares (or units) purchased in reliance on the safe harbor in Exchange Act Rule 10b-18; and (iv) the aggregate total number of shares (or units) purchased pursuant to a plan intended to satisfy the affirmative defense conditions of Exchange Act Rule 10b5-1(c). *See* https://www.sec.gov/rules/proposed/2021/34-93783.pdf or the accompanying factsheet at https://www.sec.gov/rules/proposed/2021/34-93783-fact-sheet.pdf.

asymmetries that the Repurchase Proposal claims "may exist." Asymmetric information is a feature of all public markets, and the goal of disclosure is to reduce its level so that all investors will have timely access to material information. The Commission's failure to demonstrate the existence of a material gap in current reporting standards renders the proposed daily disclosure of repurchase activity unnecessary.

II.A. The Repurchase Proposal abandons the materiality threshold for financial reporting

The proposed daily share repurchase disclosure rules are inconsistent with the foundational financial reporting concept of materiality—a universally accepted and generally applied Commission policy that serves investors well and provides management and the board of directors with clear operating guidelines. Indeed, academic scholarship argues that "materiality forms the conceptual bedrock of corporate reporting."[7] Scholars note that the Commission's use of a materiality standard is designed to limit issuer disclosure obligations to information that would be of importance to investors and to prevent the costly overproduction of information.[8]

To understand why most daily repurchase disclosures would be immaterial, it is important to recognize that, historically, 90% of the dollar volume of all announced repurchases is made as part of an open market repurchase ("OMR") program.[9] In an OMR program, issuers engage a financial intermediary to repurchase shares in the open market following their instructions. The market is informed of the OMR's size and duration after the board of directors approves it and prior to its commencement. These announcements typically generate a significant economic benefit to investors due to the efficiency of U.S. equity markets.[10] However, daily repurchase transactions that qualify for a safe harbor under Rule 10b-18 are limited to a fraction of the average daily trading volume ("ADTV") in the issuers' stock.[11] Thus, we posit that under the current rules, the Commission already provides an established and reasonable materiality proxy that limits repurchase transactions at the daily level.

Not only are daily transactions largely immaterial, but we also show below that even when we aggregate repurchases at the quarterly level, the majority of repurchases remain immaterial. For this exercise, we rely upon a threshold of quarterly shares repurchased that constitute 5% of shares

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[7] *See* Eccles, R.G., & Youmans, T. (2016). Materiality in corporate governance: The statement of significant audiences and materiality. *Journal of Applied Corporate Finance*, 28(2), 39-46, ("Eccles and Youmans (2016)").

[8] *See* Georgiev, G.S. (2017). Too big to disclose: Firm size and materiality blindspots in securities regulation. *UCLA Lew Review* 64(3), 602-683, ("Georgiev (2017)"); and Paredes, T.A. (2003). Blinded by the light: Information overload and its consequences for securities regulation, *Washington University Law Quarterly*, 81(2), 417-485, ("Paredes (2003)").

[9] *See* Oded, J. (2005). Why do firms announce open-market repurchase programs? *Review of Financial Studies*, 18(1), 271-300, ("Oded (2005)"); and Farre-Mensa, J., Michaely, R., & Schmalz, M. (2014). Payout policy. *Annual Review of Financial Economics* (A. Lo and R. Merton, eds.), 6(1), 75-134. Issuers also use accelerated share repurchase ("ASR") programs, typically to make large adjustments to its capital structure. Less common methods are tender offers and privately negotiated repurchases. In an ASR program, issuers enter a contract with a financial institution or another party to conduct the repurchase. These programs often involve larger repurchase amounts acquired in a short amount of time, and issuers typically disclose the terms of the repurchase prior to its execution in an 8-K filing.

[10] *See* Oded (2005).

[11] Existing 10b-18 Safe Harbor rules limit daily share purchases up to a maximum of 25% of the prior four-week ADTV. *See* SEC, Purchases of Certain Equity Securities by the Issuer and Others, Final Rule, November 10, 2003, available at https://www.sec.gov/rules/final/33-8335.htm.

outstanding or dollar trading volume. We recognize that the Commission and U.S. Supreme Court do not establish bright-line materiality levels and instead consider how disclosure would influence a reasonable shareholder based on the total mix of available information (e.g., facts, circumstances, and timing).[12] However, the Commission recognizes that issuers utilize heuristics, such as percentage thresholds relative to a reference point, to help determine the materiality of an event under consideration. For example, in the context of financial restatements, the staff of the Commission notes it has no objection to using a rule of thumb such as 5% as an initial step in assessing materiality before conducting a complete analysis of all relevant considerations.[13]

To provide a sense of the materiality of share repurchases across the average quarter, we analyze share repurchase data for U.S. listed issuers over the 2004 to 2020 period.[14] We include all types of repurchase programs (e.g., OMR and ASR programs) and include foreign private issuers ("FPIs") since the Repurchase Proposal does not exclude these issuers. We then examine the fraction of quarterly repurchase volume based on (1) shares outstanding, and (2) dollar trading volume.

Approximately 28% of listed issuers actively repurchase shares in a quarter during this sample period. When conditioning on issuers actively repurchasing shares, the median issuer buys back 0.5% of shares outstanding each quarter[15] The interquartile range (i.e., the 25th to 75th percentiles) is 0.1% to 1.3%, with the 90th percentile repurchasing 2.7% of shares outstanding. Since the aggregate share repurchase volume across the entire quarter is less than 5% of shares outstanding, quarterly repurchases for at least 90% of issuers conducting buybacks would likely be deemed immaterial. It follows that most daily repurchase transactions also entail an immaterial number of shares outstanding on most days.

Turning to the fraction of quarterly dollar trading volume, we find that the median repurchasing issuer accounts for 1.2% of the issuer's trading volume across the entire quarter.[16] The interquartile

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[12] *See* Eccles and Youmans (2016) and Georgiev (2017). Both cite the 1976 U.S. Supreme Court decision (TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976)) that defines materiality in the context of a proxy vote, noting that, "[a]n omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote…[p]ut another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."

[13] *See* SEC Staff Accounting Bulletin: No. 99 – Materiality, August 12, 1999, available at https://www.sec.gov/interps/account/sab99.htm. The staff note that, "The use of a percentage as a numerical threshold, such as 5%, may provide the basis for a preliminary assumption that – without considering all relevant circumstances – a deviation of less than the specified percentage with respect to a particular item on the registrant's financial statements is unlikely to be material. The staff has no objection to such a "rule of thumb" as an initial step in assessing materiality."

[14] The sample is constructed using all issuers in the Center for Research in Security Prices (CRSP) and Compustat database. For details on sample construction, see Lewis, C.M., & White, J.T. (2021). Corporate liquidity provision and share repurchase programs. *U.S. Chamber of Commerce: Center for Capital Markets Competitiveness*, ("Lewis and White, 2021"), available at https://www.centerforcapitalmarkets.com/resource/corporate-liquidity-provision-and-share-repurchase-programs/.

[15] To calculate this statistic, we divide the number of shares repurchased during the quarter by the shares outstanding at the end of the prior quarter using data from the CRSP and Compustat databases.

[16] For this analysis, we define the *quarterly dollar volume of repurchases* as the product of the total shares repurchased and the average per share repurchase price for each quarter using data from Compustat. We then compute the *total quarterly dollar trading volume* as the sum of the daily shares traded multiple by the closing price using data from

range of the percent of dollar volume repurchased is 0.2% to 3.4%. These statistics provide additional evidence that the bulk of quarterly share repurchase transactions are immaterial relative to quarterly dollar trading volume. This finding confirms our earlier assessment that most daily repurchases would likely be deemed immaterial.

By requiring issuers to report a voluminous number of immaterial transactions, the Repurchase Proposal would send a strong signal to issuers that the Commission believes their boards of directors are incapable of making independent materiality determinations. Indeed, Eccles and Youmans (2016) argue that a "materiality determination [of disclosure] must ultimately reflect the judgment of the board of directors." They posit that directors limit reporting to stakeholders of only material information to signal that they can exercise their judgment and govern effectively.[17] By requiring non-material repurchase disclosures, the Commission is effectively telling boards of directors that they lack the ability to determine whether an item is of interest to shareholders.

We also note that many issuers voluntarily disclose the completion or cancellation of OMR programs when issuers view this information as important to investors. Using the sample described above, we count the average yearly number of share repurchase announcements across five categories: authorizations, expansions, updates, cancellations, and closures, along with the total of these categories for the period 2004 to 2020.[18]

Table 1. Share Repurchase Announcements (2004 to 2020)

Topic	*Average per Year*	*Total*
(1) Authorizations	1,453	24,700
(2) Updates	6,377	108,414
(3) Expansions	350	5,958
(4) Closures	824	14,003
(5) Cancellations	4	75

The provision of repurchase updates is consistent with research by Bargeron et al. (2022). They show that voluntary disclosures about the suspension, resumption, and cancellation of repurchase programs are common and value-relevant based on the stock price response to the disclosure.[19] The frequency of these voluntary disclosures indicates that the board of directors actively monitors repurchase programs and determines when it is appropriate to provide material information to

CRSP. The *percent of dollar volume repurchased* is the ratio of *quarterly dollar volume of repurchases* divided by *total quarterly dollar trading volume.*

[17] The International Integrated Reporting Council (IIRC) makes a similar point when it states that, "In determining whether or not a matter is material, senior management and those charged with governance should consider whether the matter substantively affects, or has the potential to substantively affect, the organization's strategy, its business model, or one or more of the capitals it uses or affects." See IIRC, Materiality Background Paper for IR, March 2013, available at https://www.integratedreporting.org/wp-content/uploads/2013/03/IR-Background-Paper-Materiality.pdf.

[18] These data are from the S&P Capital IQ-Key Developments database using the corresponding event identification numbers: authorizations (36, 152, 232), updates (231), expansions (230), closures (234), and cancellations (233).

[19] *See* Bargeron, L., Bonaime, A.A., Docimo, W., Feng, M., & Thomas, S. (2022). Voluntary disclosures regarding open market repurchase programs. Working paper, available at https://ssrn.com/abstract=2486843. Bargeron et al. find the voluntary disclosure of OMR suspensions is met with a –1.35% abnormal stock return, while disclosing the resumption of an OMR program yields a +2.55% abnormal stock return, on average.

investors. Providing this information when it is material and deemed appropriate by the issuer avoids the negative consequences of daily repurchase that we discuss below.

Since we believe that daily repurchase disclosures is unwarranted given the discussion above, the Commission could consider two low-cost alternatives that would achieve many of the goals of the Repurchase Proposal. First, the Commission could consider providing interpretive guidance on when disclosures of the suspension, resumption, or completion of share repurchase programs are warranted. Second, the Commission could also provide interpretive guidance on when share repurchase transactions are large enough to warrant an 8-K disclosure within four business days. For example, the American Bar Association advocates for a 1% materiality threshold based on the total number of outstanding securities of the class being repurchased.[20]

II.B. The Repurchase Proposal imposes a significant burden on issuers

Daily reporting of repurchase activity under the Repurchase Proposal will add a substantial administrative burden to preparing and reviewing each report. The Commission estimates that issuers will furnish 176,800 Form SRs annually under the proposed rules.[21] To put this in context, we tabulate the annual number of SEC filings for domestic issuers and FPIs over the five-year period 2017 to 2021 in Table 2 below.[22]

Table 2. Issuer Filings per Year (2017 to 2021)

Topic	*Forms*	*Filings per Year*
(1) Insider Transactions	3, 4†, 5	431,059
(2) ***Share Repurchases***	***SR (Proposed)***	***176,800***
(3) Securities Offering	424B*, FWP, S-1, S-3	104,776
(4) Ongoing Reports	8-K	72,400
(5) FPI Ongoing Reports	6-K	22,933
(6) Quarterly Reports	10-Q	19,797
(7) Proxy Statements	PRE 14A, DEF 14A, etc.	15,135
(8) Comment Letter Response	CORRESP	11,325
(9) Annual Reports	10-K	8,031
(10) FPI Annual Reports	20-F, 40-F	991

† Note: 90.1% (388,326) of insider transaction filings are on Form 4.

[20] *See* the comment letter by Jay Knight, Chair of the Committee on Federal Regulation of Securities of the Section of Business Law of the American Bar Association ("ABA"), April 13, 2022, available at https://www.sec.gov/comments/s7-21-21/s72121-20123619-279862.pdf. The ABA advocates for 8-K disclosure using a materiality threshold for repurchases that constitute 1% or more of shares outstanding, which they note is consistent with materiality thresholds for reporting requirements under Item 3.02 of Form 8-K for unregistered issuer sales of equity.

[21] *See* SEC, Share Repurchase Disclosure Modernization, Proposed Rule, December 15, 2021, available at https://www.sec.gov/rules/proposed/2021/34-93783.pdf. On page 70, the Commission notes that, "We conservatively estimate that issuers conducting share repurchases would purchase shares one day a week for the entire year, resulting in 52 Form SR filings per year. Based on the staff's findings relating to the number of issuers conducting share repurchases and the estimate of the frequency of repurchases, we estimate 176,800 Form SR filings per year."

[22] These data are tabulated from the WRDS SEC Analytics database. We include amendments in each filing count. Securities offering (Topic 3) includes all prospectus filings, free-writing prospectuses, initial registrations, and shelf registrations. Proxy statements (Topic 7) includes preliminary and final proxy statements as well as forms related to proxy contests. We do not include late filing notices ("NT") for periodic filings.

Table 2 shows that Form SR would constitute the second most frequent filing on an annual basis. Moreover, the Repurchase Proposal would require more Form SR filings than the sum of annual reports, quarterly reports, ongoing reports, proxy statements, and comment letter responses by domestic issuers and FPIs (i.e., the sum of topics 4 to 10 in Table 2 is 150,612 filings). Thus, the Repurchase Proposal will add substantial administrative costs due to the required daily filings of Form SR with little apparent benefit.

The administrative burden of daily repurchase disclosers would impact both large and small issuers. Large issuers will incur a substantial total administrative cost due to the frequency of their repurchase activity. Since Rule 10b-18 has ADTV limitations, issuers that conduct an extensive OMR program are active in the market over many days during the repurchase program. Indeed, many large issuers with long-lasting and broad repurchase programs are in the market on most business days.[23] For these issuers, the Repurchase Proposal could require approximately 250 additional filings with the Commission each year, nearly all of which will contain non-material information, thereby providing little benefit to investors. These issuers would be subject to perpetual reporting of largely immaterial information and would need to become more involved with third-party broker-dealers that execute trades on their behalf without prior consultation under Rule 10b5-1 plans.

Although small issuers likely conduct fewer repurchases than larger ones, they do repurchase their own shares periodically to offset equity dilution from compensation plans or to alter their capital structure. By nature of their size, small issuers incur disproportionate relative compliance costs. Academic research shows that burdensome SEC rules can lead to small issuers exiting public markets or taking costly actions to avail themselves of reporting exemptions.[24]

The speed of disclosure under the Repurchase Proposal also introduces substantial costs. Issuers have four business days to provide information on most current events that trigger a filing requirement on Form 8-K. One exception is 8-K disclosures meant to satisfy Regulation Fair Disclosure provisions that prohibit selective disclosure of material non-public information ("MNPI"). With the proposed rules of furnishing Form SR, the Commission is burdening issuers

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[23] Some commentators note that large issuers are in the market repurchasing shares almost every day in a normal trading year. *See* comment letters by *Richard V. McPhail, Executive Vice President and Chief, Financial Officer, Home Depot*, March 31, 2022, available at https://www.sec.gov/comments/s7-20-21/s72021-20121990-275239.pdf; and *Rick Hansen, Deputy General Counsel, Corporate and Corporate Secretary, HP Inc.*, April 1, 2022, available at https://www.sec.gov/comments/s7-21-21/s72121-20122348-278384.pdf.

[24] *See* Leuz, C., Triantis, A., & Wang, T.Y. (2008). Why do firms go dark? Causes and economic consequences of voluntary SEC deregistrations. *Journal of Accounting and Economics*, 45(2-3), 181-208 ("Leuz et al., 2008"); and Ewens, M., Xiao, K., & Xu, T. (2021). Regulatory costs of being public: Evidence from bunching estimation. Working paper, *National Bureau of Economic Research (NBER)*, ("Ewens et al., 2021"), available at https://www.nber.org/papers/w29143. Leuz et al. (2008) note that many small issuers exited public markets following the passage of Sarbanes-Oxley. Ewens et al. (2021) find that small issuers often reduce their float to "bunch" underneath SEC reporting or compliance exemption thresholds. We note that former SEC Commissioner Robert Jackson, Jr. presented a graph from the year 2017 purporting to show potential evidence that small issuers no longer bunch to avoid compliance costs. *See* Statement on Proposed Amendments to Sarbanes Oxley 404(b) Accelerated Filer Definition, May 9, 2019, available at https://www.sec.gov/news/public-statement/jackson-statement-proposed-amendments-accelerated-filer-definition. However, Ewens et al. (2021) use data from 1994-2018 and provide a rigorous statistical analysis that employs a bunching estimator based on the cumulative distribution function of float around exemptive cutoffs. They conclude that bunching is systematically employed by small issuers to avoid regulatory burdens.

with an increased speed of filing above most material 8-K events, despite the provision of largely immaterial repurchase information.

In addition to providing next-day repurchase executions on Form SR, the Repurchase Proposal would result in numerous amendments and updates if the filings contain material errors or executed orders that fail to settle. Academic studies show that reporting errors are common in other jurisdictions that require next-day reporting of repurchases.[25] Although the Commission's designation of Form SR as "furnished" and not "filed" reduces some of the legal liability arising from inevitable mistakes, issuers will still need to spend time checking and correcting this information on an ongoing basis.[26] The Repurchase Proposal would require issuers to develop internal processes and audit trails, increase legal counsel and consulting fees, and invest in technology to help meet the requirement of nearly real-time disclosures. It would also necessitate similar investments by broker-dealers that execute repurchase programs.

Based on these discussions, we believe that next-day filings on the proposed Form SR would substantially increase issuers' direct monetary and time costs associated with repurchasing shares and introduce new legal and administrative complexity. Moreover, the Repurchase Proposal does not balance the tradeoff between material disclosures and the cost of producing this information, as most Form SR filings would contain limited information value. As proposed, the requirement to provide daily repurchase disclosures could be so unreasonably burdensome as to deter potential capital allocation decisions, which would ultimately harm investors by reducing shareholder value.

II.C. The Repurchase Proposal overloads ordinary investors with information

Issuers currently provide quarterly disclosures regarding monthly repurchase activity for the period, including information about the average repurchase price and the total number of shares purchased and available for repurchase under active programs. This level and cadence of disclosure is appropriate and tracks the reporting of material financial performance data, such as revenue and net income, that an investor only has access to quarterly.

By hypothesizing that daily disclosures of share repurchases will decrease information asymmetries between issuers and investors, the Repurchase Proposal relies on the assumption that more information is better than less. However, by eliciting information not material to investors, daily disclosures can obscure other material information filed with the Commission and potentially harm the information environment. Indeed, academic studies of jurisdictions that require daily repurchase disclosures argue that the flood of immaterial information on buybacks is provided too frequently, is unhelpful, and leads to information overload for investors.[27]

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[25] *See* Mitchell, J.D.M. (2012). On-Market Share Buy-backs: ASX Disclosure. *Abacus*, 48(1), 31-59 ("Mitchell (2012)"). Mitchell (2012) examines issuers listed on the Australian Stock Exchange, which requires daily repurchase disclosures, and observes that, "Errors were frequently noted in daily share buy-back notices."

[26] Although we are opposed to daily reporting of non-material repurchases on Form SR, we agree with the North American Securities Administrators Association (NASAA) that, if adopted, the Commission should set a reasonable materiality threshold for restating errors, such as 5%. *See* comment letter by NASAA, April 1, 2022, available at https://www.sec.gov/comments/s7-21-21/s72121-20122140-275533.pdf.

[27] *See* Mitchell (2012), who argues that, "The daily share buy-back information provided in ASX Appendix 3E is too frequent and unhelpful, as the information does not provide any meaningful insight into the buy-back. It would be

As noted above, if the Repurchase Proposal is adopted with next-day disclosure requirements, issuers are estimated to furnish 176,800 Form SR filings or just under 600 per day. This constant stream of filings would inundate ordinary investors with filings that are difficult to digest and process to determine their value implications. For issuers conducting daily repurchases, investors would need to screen numerous filings to determine if the information is material. Most of the Form SR disclosures would simply add noise to the information environment.

The high frequency of reporting under the Repurchase Proposal would clutter the EDGAR database with immaterial information and increase the burden on ordinary investors for identifying timely and important filings such as 8-K information. Ultimately, we expect Form SRs will clog EDGAR with a constant stream of unimportant filings that impede rather than help investors monitor and evaluate issuer activity. This outcome would defeat the Commission's goal of better-informing investors. While the Commission could add a default filter to exclude repurchase transactions from EDGAR—as it does with insider transaction disclosures—doing so would essentially confirm that Form SR filings primarily provide non-material information to investors.[28]

Daily reporting of granular repurchase information could also mislead investors and generate speculation. Repurchase volume can vary daily as issuers might alter their buyback activity due to volume restrictions, price parameters, or to provide liquidity to their investors depending on market conditions.[29] Investors might misinterpret or speculate that daily ebbs and flows in buyback activity reflect broader changes in capital allocation strategies.

Ultimately, daily disclosure could lead to investment decisions that are harmful to investors. Nobel Laureate Herbert Simon famously observed that a wealth of information consumes attention.[30] Academic studies show that ordinary investors have limited attention, which can lead to incomplete usage of issuer-disclosed information. For example, Hershleifer and Teoh (2003) show that when investors are inundated with less useful information, they are distracted from value-relevant disclosures.[31] Consistent with this point, Paredes (2003) observes that investors are better off with fewer but more effective mandatory disclosures due to the way they use this information.[32]

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more efficient to provide a quarterly or monthly summary containing the original announcement details (restated for clarity), the number of shares currently bought back, the maximum/minimum and average prices paid for the shares bought back, as well as the intention to continue or terminate the buy-back."

[28] When investors access the latest filings or view all filings on the EDGAR database, insider transactions on Forms 3, 4, and 5 are excluded by default. Specifically, the Commission's EDGAR database adds a default search term ("&owner=exclude") to filter out insider transactions when searching for issuer filings here: https://www.sec.gov/edgar/searchedgar/companysearch. For example, searching for Apple Inc.'s filings on EDGAR returns this web address: https://www.sec.gov/edgar/browse/?CIK=320193&owner=exclude.

[29] *See* Lewis and White (2021).

[30] *See* Simon, H. (1971) Designing Organizations for an Information-Rich World. In Computers, Communication, and the Public Interest, ed. M. Greenberger, pp. 37-52, Baltimore, MD: Johns Hopkins University Press. Simon observes that, "What information consumes is rather obvious: it consumes the attention of its recipients. Hence, a wealth of information creates a poverty of attention and a need to allocate that attention efficiently among the overabundance of information sources that might consume it."

[31] *See* Hirshleifer, D., & Teoh, S.H. (2003). Limited attention, information disclosure, and financial reporting. *Journal of Accounting and Economics*, 36(1-3), 337-386.

[32] Paredes (2003) states that, "To the extent that investors, analysts, and other securities market participants are subject to information overload, the model of mandatory disclosure that says more is better than less is incomplete and may be counterproductive. It is incomplete because it ignores how the disclosed information is used. And it is potentially

Requiring next-day disclosure of repurchases is inconsistent with the widely accepted standard of quarterly financial reporting on Form 10-Q and institutional investor transactions on Form 13-F. Diverging from quarterly reporting also sets an inconsistent precedent with analogous transactions, including certain equity offerings that are essentially the opposite of share repurchases.

For example, when an issuer raises large amounts of equity capital in a traditional follow-on equity offering, it must disclose the amount of capital raised and shares issued in a prospectus filed with the Commission near the transaction date. These large equity offerings are, therefore, the opposite of ASR programs, which is why issuers provide timely disclosures of the details of ASR programs.

When an issuer executes an equity distribution agreement for an at-the-market ("ATM") offering, it typically sells small amounts of stock in the open market over an extended period. Thus, an ATM transaction is essentially the opposite of an OMR program. For the ATM, the issuer files a prospectus supplement disclosing the terms of the offering and a press release in an 8-K, and reports quarterly the number of shares sold under the ATM and certain related information through a prospectus supplement or in its periodic filings on Forms 10-Q and 10-K.[33] Therefore, under the current rules, when issuers frequently sell or buy back smaller amounts of equity throughout the quarter, they report these transactions quarterly. Yet, the Repurchase Proposal would require next-day disclosure of buybacks. It is inconsistent to have varying reporting deadlines for transactions that are largely mirror images of one another. The net effect of the Repurchase Proposal in this context would be to strengthen reporting obligations for events that are typically value-adding (repurchasing equity) but not for corporate actions that have a dilutive impact on shareholders (selling equity).

We believe that quarterly reporting of share repurchases presents sufficient insights into how an announced share repurchase program has progressed. At the same time, daily disclosures reveal little valuable information and could overload ordinary investors leading to poorer investment outcomes. Mandating heightened disclosure requirements for discrete components of an issuer's capital allocation strategy without considering how they interact with other aspects of the strategy only distorts the fuller picture and misleads investors. We discuss this point in more detail in Section II.D. below. By providing monthly share repurchase information in a summarized fashion on the same quarterly cadence as earnings information, investors can digest the information in context with other financial results and make investment evaluations based on an issuer's periodic performance.[34]

II.D. The Repurchase Proposal creates unintended incentives for issuers and investors

Daily reporting of share repurchases could mislead investors and further shorten and distort management time horizons. Providing next-day visibility into repurchase volume could give investors the impression that they can glean meaningful insights, or even MNPI, regarding issuers'

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counterproductive because the provocative implication of information overload is that the federal mandatory disclosure system might be more effective if it were scaled back-that is to say, if less were disclosed, not more."

[33] *See* Billett, M.T., Floros, I.V., & Garfinkel, J.A. (2019). At-the-market offerings. *Journal of Financial and Quantitative Analysis*, 54(3), 1263-1283.

[34] Although the Commission could alternatively require quarterly reporting of daily repurchase activity—thereby increasing the granularity from monthly to daily but not the speed of disclosure—it would still lead to the negative consequences described in Section III.B. of this comment letter.

future activities, thereby forming inaccurate views about the issuer's outlook or intentions. Thus, the Repurchase Proposal could mislead investors rather than create greater understanding and clarity about an issuer's prospects. These outcomes are inconsistent with the Commission's disclosure simplification efforts and could engender speculative trading that is the antithesis of the Commission's goal of increasing market transparency.

Providing daily share repurchase information also overstates the perceived importance of this activity on an issuer's overall financial condition and performance. The proposed requirement could skew the attention paid to share repurchase volume when it is only one element of an issuer's capital allocation strategy. Issuers allocate capital to other forms of payout, such as dividends, expenses such as research and development ("R&D"), and investment, such as capital expenditure and mergers and acquisitions, which are not reported daily. All these elements of capital allocation, plus issuers' confidential assessment of their stock's intrinsic value, factor into the level and pace of share repurchase programs.

Arbitrarily compressing reporting time frames from real business and commercial rhythms will likely present distorted information and send inappropriate signals to investors. Like other financial reporting items, such as revenue, share repurchase levels can vary daily to accommodate, for example, liquidity needs, pricing grids, or cash management. Reporting daily repurchases could send misleading messages to the marketplace, possibly induce unwarranted volatility, and only serve to shorten management time horizons. By requiring issuers to focus on daily reporting and near-term transactions, the Commission could encourage management to behave myopically, which academic studies show is detrimental to long-term value creation for investors.[35]

For an issuer with a regular cadence of daily or weekly repurchase activity, the cessation or change of share repurchase levels on a given day or week could send the unintended signal to the market that issuers have come into possession of MNPI, which impedes the safe harbor under Rule 10b-18. Investors might erroneously view a pause in daily repurchase reporting as a clue that a significant event is pending (e.g., due to an acquisition or restricted periods around securities issuances). Indeed, academic literature shows that stopping a regular stream of disclosure signals information to the market, resulting in large stock price movements.[36]

Regardless of whether the issuer came into possession of MNPI, the signal from pausing repurchase disclosures could generate speculation in the market that induces greater stock price volatility and harm price discovery. This signal could harm investors by inducing them to make investment decisions based on speculation about future corporate actions. Management's failure to address this speculation could be interpreted as a confirmation of the rumors, even if the

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[35] *See* Gigler, F., Kanodia, C., Sapra, H., & Venugopalan, R. (2014). How frequent financial reporting can cause managerial short-termism: An analysis of the costs and benefits of increasing reporting frequency. *Journal of Accounting Research*, 52(2), 357-387. Gigler et al. show that more frequent financial reporting leads to myopic management behavior due to market pressure by short-term traders. They note, "frequent reports, combined with shareholder impatience, magnify the attraction of managerial actions that are more likely to produce quick bottom line results. Such pressures disappear when the reporting frequency is decreased. Thus, infrequent reports could provide better incentives for project selection decisions even though they provide less information to the capital market."

[36] *See* Chen, S., Matsumoto, D., & Rajgopal, S. (2011). Is silence golden? An empirical analysis of firms that stop giving quarterly earnings guidance. *Journal of Accounting and Economics*, 51(1-2), 134-150.

cessation was due to factors outside of an issuer's control, such as decisions made by financial intermediaries that facilitate the repurchase program.

Even if the impetus for pausing a repurchase program was due to the exogenous arrival of MNPI, management already has requirements to consider it when determining the appropriate disclosure strategy. Director and executive concerns about the signaling content of pausing daily disclosures could pressure issuers to compress their routine and diligent review of internal developments and result in the premature disclosure of MNPI. Increases in market volatility and near-term distortions in the issuers' share price that pressure management into addressing the rumor could also have anti-competitive effects by revealing information to other issuers operating in the same industry or by reducing bargaining power in a pending transaction. To avoid signaling risk, daily reporting might encourage managers to use repurchases sub-optimally, resulting in less value creation for shareholders.

III. Consequences of disclosing sensitive and strategic information.

In addition to daily reporting of share repurchases on Form SR, the proposed revisions to Item 703 under Regulation S-K would require additional periodic disclosure by issuers about the rationale or objective for their share repurchase programs and the process or criteria used to determine the number of repurchases (hereinafter "ROPC").[37] Requiring companies to provide this type of proprietary information could result in competitive harm. When combined with the daily reporting requirements on Form SR, the Repurchase Proposal will unintentionally provide trading opportunities to sophisticated investors and potentially increase stock price volatility. As discussed more fully below, the net result would be a significant disadvantage to ordinary investors and the issuer's long-term investors.

III.A. The Repurchase Proposal reveals competitive information that harms issuers and their investors

Academic literature has long recognized that one of the largest indirect costs of disclosure is the revelation of proprietary information to outside parties.[38] We believe that ROPC disclosures for a particular repurchase program could have anti-competitive effects that ultimately harm the issuer by indirectly revealing competitive activities regarding strategic investments, such as future acquisitions, R&D, capital expenditures, and other sensitive information that competitors could use. Issuers operating in industries where capital deployment strategies are crucial to value creation

[37] Specifically, the Repurchase Proposal requires issuers to provide these additional periodic disclosures: (i) The objective or rationale for its share repurchases and process or criteria used to determine the amount of repurchases; (ii) 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; (iii) Whether repurchases were made pursuant to a plan that is intended to satisfy the affirmative defense conditions of Exchange Act Rule 10b5-1(c), and if so, the date that the plan was adopted or terminated; and (iv) Whether repurchases were made in reliance on the Exchange Act Rule 10b-18 nonexclusive safe harbor.

[38] *See*, e.g., Verrecchia, R.E. (1983). Discretionary disclosure. *Journal of Accounting and Economics*, 5, 179-194; Dye, R.A. (1986). Proprietary and nonproprietary disclosures. *Journal of Business*, 59(2), 331-366; and Verrecchia, R.E. (2001). Essays on disclosure. *Journal of Accounting and Economics*, 32(1-3), 97-180. These papers show that disclosing proprietary information can reduce the issuer's competitive position in its industry.

(e.g., financial institutions) could be especially vulnerable to the ROPC requirement of the Repurchase Proposal.

Issuers will likely face a dilemma when deciding what and how much to disclose. If the issuer provides highly detailed ROPC disclosures, it could reveal competitive information to its rivals. Suppose ROPC disclosures are instead overly broad. In that case, the resulting boilerplate language will not be helpful to investors in the way the Repurchase Proposal envisions and could potentially result in enforcement actions.

One must recognize that executives and directors do not establish repurchase programs in isolation but as part of an overall strategy of an issuer's broader capital allocation policies. Including disclosure about share repurchases as a standalone item will obscure the complexity of factors that drive corporate decision-making in this area. Thus, we advocate for encouraging issuers whose repurchase programs are material to their overall business strategy to discuss their role in the management discussion and analysis ("MD&A") section of its periodic reports to the Commission.

Providing the information in the MD&A would allow managers to take a principles-based approach to disclosure, reducing the likelihood of prematurely revealing strategic plans that would result in competitive harm and reducing the tendency to use boilerplate language to avoid this outcome. Informative discussions would enhance investors' abilities to digest the factors and decisions of repurchase activity in the larger context of the issuer's capital allocation plans, profitability, and financial condition rather than as a standalone item. The Commission could provide interpretative guidance that describes how issuers should discuss ROPC in the MD&A. We note that investors would also have regular opportunities outside of periodic disclosures to seek additional information about issuers' approaches to share repurchases in public settings, including earnings calls, investor conferences, and shareholder meetings.

III.B. The Repurchase Proposal provides a trading advantage to sophisticated investors

Requiring daily disclosure of repurchases and ROPC information could also provide an advantage to sophisticated investors at the expense of ordinary investors. Although daily repurchase disclosures might not reveal material information about an issuer's earnings or valuation, share repurchase activity could influence an issuer's stock price, assuming that all investors do not understand such information equally.

Since the Repurchase Proposal requires issuers to disclose the ROPC and the number and average price of shares repurchased, sophisticated investors could take advantage of this information to uncover issuers' trading strategies, tactics, pricing grids, and other confidential trading information. Sophisticated investors have better technology and resources than ordinary investors to process and mine a large volume of Form SR daily disclosures to identify any trading opportunities. The net effect is that the Repurchase Proposal will create trading advantages for sophisticated investors while retail and other ordinary investors will be overwhelmed by the volume of these disclosures.

Academic literature shows that sophisticated investors use high-frequency SEC filings to identify and execute trading strategies. In particular, two studies confirm that Form 4 filings—which we identify in Table 2 as the most frequent issuer filing—are mainly accessed and used by sophisticated and algorithmic traders rather than ordinary investors. Both studies use data published by the Commission containing Internet Protocol (IP) addresses of entities that access issuer filings in the EDGAR database to identify patterns in the use of SEC filings.[39]

In the first study, Loughran and McDonald (2016) examine the use of EDGAR filings by partitioning IP addresses based on daily filing accession activity into what they term "robots" and "regular investors."[40] These authors find that regular investors are far less likely to access high-frequency Form 4 filings than robots, likely due to the costs of processing these data. They note that regular investors access 251 annual reports (10-K filings) on the Commission's website for every time they access a single Form 4 filing. Approximately 33.9 regular investors download the average 8-K filing, while the average Form 4 is only accessed by only 0.03 regular investors. Thus, regular investors rarely access high-frequency Form 4 filings as they cannot keep up with the reporting volume, many of which undoubtedly contain immaterial information on trades. Conversely, regular investors frequently access 8-K and 10-K filings because they contain material information reported at the appropriate speed and level of granularity to be helpful.

A second study by Chen et al. (2020) confirms that sophisticated investors use high-frequency information on Form 4 filings to generate trading profits.[41] This study links IP addresses in the Commission's EDGAR weblog dataset to specific institutional investors (13-F filers) and finds that these sophisticated investors closely track insider transaction filings. Sophisticated investors that access Form 4 filings earn substantially abnormal positive returns by identifying trading opportunities that are not possible for ordinary investors due to the high frequency of these filings and their inferior technology and resources to process this information.

As we note in Table 2 and visually depict in Figure 1 below, Form SR disclosures are estimated to be the second most frequent issuer filing behind insider transactions. With an estimated 176,800 Form SR filings per year, the frequency and granularity of information will be challenging for ordinary investors to process. Therefore, it stands to reason that, like insider transaction filings, sophisticated investors will be the primary users of the Form SR disclosures. Their access could then give them the means to reverse-engineer issuers' trading strategies or the parameters of its Rule 10b5-1 trading plan. This information may give sophisticated investors an opportunity to trade against the issuer and other ordinary investors, resulting in greater price volatility and a wealth transfer from retail investors purchasing the stock to sophisticated investors that trade in anticipation of the repurchase.

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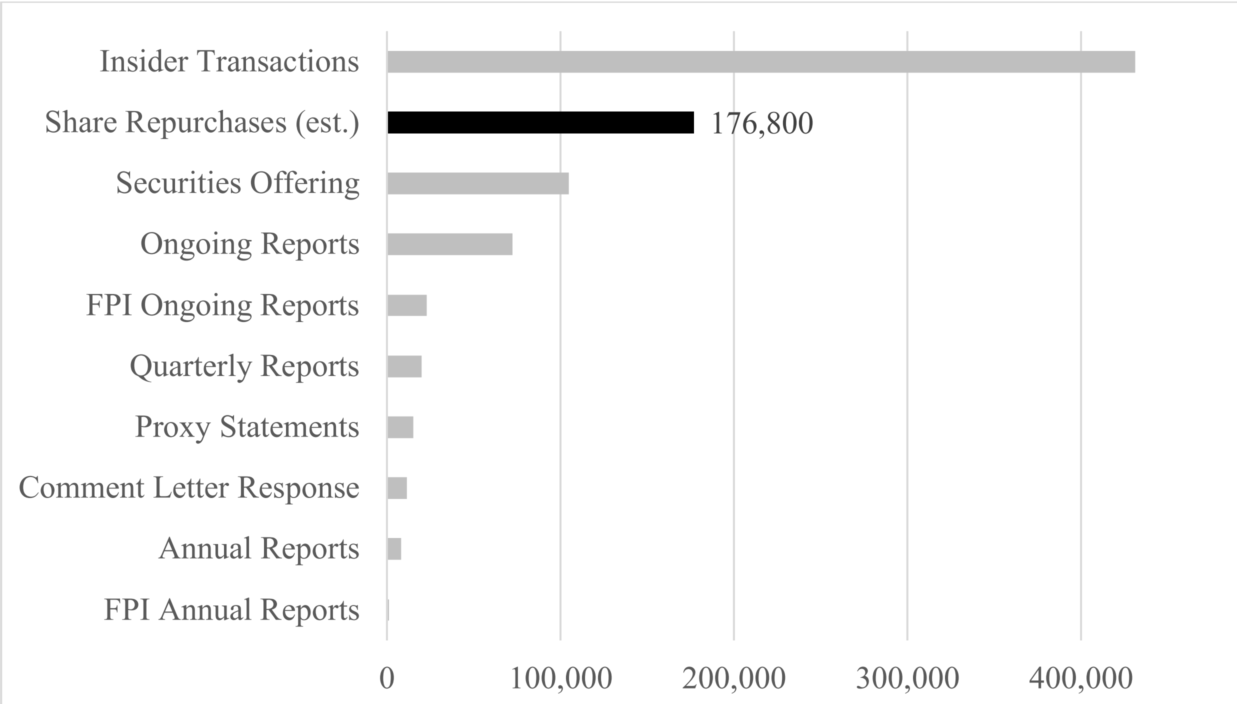
[39] These data are published here on the SEC's website: https://www.sec.gov/about/data/edgar-log-file-data-sets.html.

[40] *See* Loughran, T., & McDonald, B. (2017). The use of EDGAR filings by investors. *Journal of Behavioral Finance*, 18(2), 231-248. Loughran and McDonald define robots as IP addresses that access more than 50 filings in a single day. All others are considered ordinary investors or non-robots.

[41] *See* Chen, H., Cohen, L., Gurun, U., Lou, D., & Malloy, C. (2020). IQ from IP: Simplifying search in portfolio choice. *Journal of Financial Economics*, 138(1), 118-137.

Figure 1. Issuer Filings per Year (2017-2021)



Other academic studies support the notion that daily repurchase disclosure will likely attract short-term volatility traders with the expertise to develop algorithms to trade on high-frequency data. Based on empirical evidence that greater disclosure transparency tends to attract short-term traders and induce near-term volatility, academics argue that "too much disclosure can be as costly as too little disclosure." In this case, excessive repurchase disclosure could diminish the market quality of the issuer's stock.[42]

We do not believe the Commission should use rulemaking to create trading opportunities for a subset of the market at the expense of ordinary investors. The SEC's mission is to protect investors and facilitate capital formation, not to create alpha strategies for hedge funds or transfer wealth to short-term investors. Requiring daily repurchase disclosures can harm ordinary investors and the issuer's investor base and generate costs that we expect to exceed any perceived benefits. Such granular and frequent repurchase disclosures would provide little incremental information to long-term investors versus the status quo of quarterly reporting of monthly repurchase activity. Yet, the Repurchase Proposal would increase information asymmetries between ordinary and sophisticated investors.

[42] *See* Core, J.E. (2001). A review of the empirical disclosure literature: discussion. *Journal of Accounting and Economics*, 31(1-3), 441-456. Core cites research by Bushee and Noe (2000) showing that greater transparency attracts short-term investors that trade around more frequent disclosures, resulting in excess stock price volatility. *See* Bushee, B.J., & Noe, C.F. (2000). Corporate disclosure practices, institutional investors, and stock return volatility. *Journal of Accounting Research*, 38, 171-202.

IV. Concerns about companies' using share repurchases to impact earnings per share ("EPS") or executive compensation are unfounded and ignore existing protections.

In the Repurchase Proposal, the Commission motivates a potential market failure by opining on page 4 that, "because announcements of repurchases and actual repurchase trades can also affect short-term upward price pressure, share price- or EPS-tied compensation arrangements could incentivize executives to undertake repurchases in an attempt to maximize their compensation." This line of reasoning ignores existing protections and low-cost alternatives to the proposed changes to repurchase disclosure. Moreover, the Repurchase Proposal opportunistically cites an academic study with a sample period that pre-dates existing disclosure enhancements and explicitly notes that this behavior is not widespread. The conclusions of the Repurchase Proposal also run counter to the Commission's own study of share repurchases, and the economic analysis underlying the proposal fails to provide quantified support.

To support the claim on page 4 of the Repurchase Proposal, the Commission cites a study by Chan, Ikenberry, and Lee (2010) in footnote 14 as finding "that a limited number of managers may have used repurchases in a misleading way as 'cheap talk'."[43] The referenced study examines share repurchase programs that were announced but not completed as potentially misleading investors. The underlying premise is that managers could announce the approval of a stock buyback plan and generate the typical positive market response. Managers could then sell their stock at a higher price without ever completing the buyback transaction.

We note several limitations of citing the Chan et al. (2010) study as evidence of a market failure since its sample period is 1980-2000. This paper's evidence of cheap talk actions pre-dates updates to the Commission's disclosure regime and substantial improvements in corporate governance in the past two decades. For example, the sample period ends before the Commission began requiring periodic disclosure of repurchases in 2004 regardless of whether they were affected per Rule 10b-18. Citing this paper also ignores the realities of market efficiency and how rational economic actors would respond to this behavior. If an issuer announces a cheap talk repurchase once and an insider sells their shares, the market will learn of this fact due to existing disclosure requirements for share repurchases and insider transactions. An issuer would quickly develop a reputation for this action, and the market would respond less to the cheap talk. The notion that managers would cheap talk a share repurchase to boost their pay also ignores the realities of corporate governance mechanisms to deter these outcomes. For this outcome to occur, management must also cheap talk the board of directors since the latter must approve share repurchase programs.

This reality likely explains why the Chan et al. (2010) paper concludes that "the total number of buybacks where managers may have been intending to mislead investors, while non-zero, also appears to be limited." This study does not present evidence of a widespread market failure. At most, these limited number of abuses would justify lower-cost enforcement actions, not the imposition of an estimated 176,800 annual Form SR disclosures by all issuers repurchasing shares.

The Commission also posits that managers conduct share repurchases to obtain EPS-based bonuses. However, the SEC's own staff report to Congress on share repurchases examines the link

[43] *See* Chan, K., Ikenberry, D.L., Lee, I., & Wang, Y. (2010). Share repurchases as a potential tool to mislead investors. *Journal of Corporate Finance*, 16(2), 137-158

between repurchases and EPS incentives and concludes that, of the 50 issuers that repurchased the most stock in 2018 and 2019, "82% of the firms 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 targets."[44] Moreover, nothing suggests that the remaining 18% (9 issuers) would have needed to repurchase shares to achieve an earnings bonus threshold.

Confirmatory evidence on the scarcity of repurchases to obtain EPS bonuses is provided in a 2019 study from PricewaterhouseCoopers ("PwC") and Professor Alex Edmans of the London Business School, which the U.K. government commissioned to examine whether buybacks were used to inflate executive pay in the U.K. from 2007 to 2017.[45] The authors found that over the ten years studied, not a single FTSE 350 issuer used share buybacks to meet an EPS target that it would have otherwise missed. The authors also found that executives with EPS targets did not undertake more repurchases than those without targets. As we have commented previously, the Commission should replicate the analysis of the PwC study for SEC reporting issuers and provide a full quantification of the fraction and transaction value of repurchases that successfully resulted in meeting an EPS target to achieve an executive bonus.

More recently, a study by Guest, Kothari, and Venkat (2022), which was made public after the Repurchase Proposal, examines a large sample of share repurchases by U.S. issuers over three decades and finds no evidence that CEOs of repurchasing issuers earned excessive compensation.[46] This study provides empirical evidence indicating that compensation-related incentives to repurchase shares are not a significant concern for investors or regulators. As such, it is incumbent upon the Commission to rigorously evaluate in the economic analysis section of the Repurchase Proposal whether repurchase-induced increases in EPS were necessary to achieve earnings-based bonus targets. Failure to conduct this quantification deviates from the Commission's current guidance on economic analysis.[47]

The idea that in some cases management could use share repurchases to "meet" earnings compensation targets assumes that the compensation committee—who designs their pay

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[44] *See* SEC, Response to Congress: Negative net equity issuance as directed by the House Committee on Appropriations, H.R. Rept. No. 116-111, December 23, 2020, available at https://www.sec.gov/files/negative-net-equity-issuance-dec-2020.pdf.

[45] *See* PwC, Share repurchases, executive pay and investment, Report to Department for Business, Energy & Industrial Strategy, BEIS Research Paper Number 2019/011 (July 2019). Available at https://www.pwc.co.uk/services/economics/insights/share-repurchases-executive-pay-and-investment.html.

[46] *See* Guest, N.M., Kothari, S.P., & Venkat, P. (2022). Share repurchases on trial: large-sample evidence on market outcomes, executive compensation, and corporate finances. Working paper, Cornell University, available at https://ssrn.com/abstract=4149796. The authors report, "no evidence that CEOs of repurchasing firms are paid excessively or that repurchases crowd out valuable investment opportunities," and conclude that, "[b]ecause repurchases do not appear to be systematically abusive, [SEC] enforcement action should be sufficient to deal with any bad actors, and significant regulation seems unwarranted."

[47] *See* Memorandum from the Division of Risk, Strategy, and Financial Innovation and the Office of the General Counsel of the SEC to the Staff of the Rulewriting Divisions and Offices of the SEC, March 16, 2012, available at https://www.sec.gov/divisions/riskfin/rsfi_guidance_econ_analy_secrulemaking.pdf. In related work, one of the authors of this comment letter argues that regulators must clearly elucidate the market failure so that the public can determine if there is a compelling public need for action versus the status quo. *See* White, J.T. (2015). The evolving role of economic analysis in SEC rulemaking. *Georgia Law Review*, 50, 293-325.

program—and investors—who provide a periodic advisory vote on executive compensation packages and elect directors—are either unknowledgeable about the mechanical relation between share repurchases and the denominator in the EPS calculation, or that they do not have sufficient information about share repurchase during a quarter. It is, therefore, unclear how increasing the speed and granularity of issuer disclosures deters managerial incentives to use share repurchases to influence executive compensation and quarterly or annual EPS-based bonuses.

Since investors only observe earnings quarterly, any deterrence benefits associated with the disclosure of share repurchase activity is fully captured by current quarterly disclosure requirements. As a result, managerial attempts to use share repurchases to influence executive compensation can only be detected at the quarterly level, regardless of how frequently firms disclose share repurchase activity. Moreover, requiring additional disclosure obligations to limit executive compensation could backfire. For example, academic studies show that excessive disclosure intended to address potential agency problems can result in an increase in managerial compensation, which is the opposite of what the Repurchase Proposal intends to achieve.[48]

An issuer's board of directors is responsible for setting and adjusting management's compensation and incentive structure. In its governance role, the board of directors can approve and oversee share repurchase programs and make any necessary adjustments to the planned activity. Investors and the public rely on the directors' oversight and decision-making authority. Additionally, investors have established mechanisms (including proxy voting abilities, shareholder meeting forums, and advisory votes on compensation through the Commission's Say-On-Pay rule) to express their opinions and hold directors and executives accountable.[49]

Even had the Commission provided convincing empirical evidence that some issuers use share repurchases to boost compensation or achieve earnings-based bonuses that would not be possible otherwise, a much lower cost and less burdensome approach would be to require the board of directors to discuss the link between compensation and EPS-based bonuses in the Compensation Discussion and Analysis ("CD&A") section of the proxy statement. The Commission could provide interpretive guidance to compensation committee members that instructs them to comment in the CD&A on whether the compensation package considers when share repurchase results in management achieving an earnings bonus. Compared to daily disclosure requirements that will not deter this behavior, our suggestion is a low-cost and reasonable alternative that would have the deterrence benefits that the Repurchase Proposal seeks to achieve. Additionally, the Commission could consider the additional deterrence benefit associated with enforcement actions related to any instances of manipulative behavior.

[48] *See* Hermalin, B.E., & Weisbach, M.S. (2012). Information disclosure and corporate governance. *Journal of Finance*, 67(1), 195-233. This study argues that although regulators typically favor greater issuer disclosure to ostensibly attenuate agency problems, public policy often overlooks that such disclosure requirements can exacerbate agency problems and related costs, including executive compensation, thereby harming shareholders. The authors show that increases in disclosure obligations also increase career risks to managers, resulting in lower risk-taking. To overcome this disincentive, shareholders must increase managerial compensation.

[49] *See* SEC, Shareholder Approval of Executive Compensation and Golden Parachute Compensation ("Say-On-Pay"), Final Rule, February 12, 2011, available at https://www.sec.gov/rules/final/2011/33-9178.pdf.

V. The 30-day cooling off period for issuers and the prohibition on overlapping 10b5-1 programs ignore the realities of today's capital markets.

This section discusses our comments related to the sections of the 10b5-1 Proposal that would require a 30-day cooling-off period for issuers that design a share repurchase plan as a Rule 10b5-1(c) trading arrangement. The 10b5-1 Proposal adds to existing disclosure requirements and restrictions on issuer activities to the availability of the affirmative defense under the Securities and Exchange Act Rule 10b5-1(c).[50] Under the 10b5-1 Proposal, issuers seeking a 10b5-1(c) affirmative defense must adhere to a 30-day cooling-off period before any trading can commence.

In the 10b5-1 Proposal, the Commission describes a potential market failure related to the opportunistic trading of directors and officers. To support its argument, it primarily relies upon studies, such as Larcker et al. (2021), showing that a subset of executives uses 10b5-1 plans to engage in opportunistic sales of large amounts of equity.[51] This empirical evidence motivates, among other things, a 30-day issuer cooling-off period following the adoption of or modification to a 10b5-1 repurchase plan.

Based on the economic analysis presented in the 10b5-1 Proposal, we have no objections to imposing a cooling-off period as it relates to trading by directors and officers. However, neither the empirical record nor the 10b5-1 Proposal itself provides an adequate economic justification for an issuer cooling-off period. The 10b5-1 Proposal expressly notes in footnote 117 of its economic analysis that "Data on Rule 10b5-1 trades by issuers is not available." Imposing this cooling-off period without quantified support for abuse is problematic.

The Repurchase Proposal fails to cite any peer-reviewed academic evidence or introduce its own quantified economic analysis to support the Commission's presumption that issuer-specific 10b5-1 repurchase activity has harmed shareholders, nor does the proposal provide adequate discussions related to opportunistic insider trading. The only substantive discussion of the need for an issuer cooling-off period is on page 9 of the 10b5-1 Proposal: "In addition, concerns have been raised about issuers abusing Rule 10b5-1(c)(1) plans to conduct share repurchases to boost the price of the issuer's stock before sales by corporate insiders."

The only source the 10b5-1 Proposal cites to support this concern is Congressional testimony by Professor Jesse Fried.[52] His testimony discusses the potential to use share repurchases to create short-term boosts in stock price. Although Professor Fried does not explicitly link buyback-induced price increases to opportunistic insider trading, this is the connection that the Repurchase Proposal attempts to make.

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[50] *See* SEC, Rule 10b5-1 and Insider Trading, Proposed Rule, January 13, 2022, available at https://www.sec.gov/rules/proposed/2022/33-11013.pdf.

[51] *See* Larcker, D.F., Lynch, B., Quinn, P., Tayan, B., & Taylor, D.J. (2021). Gaming the System: Three "Red Flags" of Potential 10b5-1 Abuse. *Stanford Closer Look Series*, available at https://www.gsb.stanford.edu/faculty-research/publications/gaming-system-three-red-flags-potential-10b5-1-abuse. Larcker et al. examine over 20,000 10b5-1 plans to show that, "a subset of executives use these plans to engage in opportunistic, large-scale selling that appears to undermine the purpose of Rule 10b5-1." They note that short cooling-off periods are a red flag of abuse.

[52] *See* Jesse M. Fried, Testimony before the Investor Protection, Entrepreneurship, and Capital Markets Subcommittee, U.S. House Committee on Financial Services, October 17, 2019, available at https://ssrn.com/abstract=3474175.

This link is problematic for two principal reasons. First, while the typical announcement of a share repurchase plan is viewed positively by investors, there is no empirical evidence to suggest that price increases are temporary. In fact, the Commission's own 2020 staff study shows that the price response to announced repurchases does not reverse.[53] Specifically, the staff study notes that "Prices typically increase by 1–2% when repurchases are announced. This announcement effect does not dissipate over time, as one would expect if repurchases were based on efforts to manipulate share prices."

Second, the 10b5-1 Proposal conflates investor announcement date reactions with potential investor reactions to subsequent repurchase activity. Since investors react to the approval of a share repurchase plan on the announcement date, it is unclear how a cooling-off period would have any incremental impact on the share price. The Commission also fails to demonstrate how the cooling-off period would successfully mitigate alleged managerial attempts to manipulate share prices.

Under existing rules, a Rule 10b5-1 plan provides an affirmative defense if it was entered into in good faith and not as part of a plan or scheme to evade the prohibitions of Rule 10b5-1, provided it was adopted at a time when the issuer was unaware of any MNPI. The absence of evidence of issuer malfeasance indicates that the current rule provides sufficient investor protections and does not require an issuer cooling-off period.

Taken together, we believe the proposed 30-day cooling-off period does not address the Commission's stated concerns about issuer opportunism related to executing 10b5-1(c) repurchase plans. The cooling-off period would, however, reduce the discretion of the board of directors and management to alter capital allocation decisions due to changing market conditions, financial performance, and the availability of and access to capital. A 30-day cooling-off period would reduce issuer flexibility and make it harder to use these plans.

Another potential economic cost associated with the 30-day issuer cooling-off period relates to ASR plans. As discussed in Section II.C., ASR plans allow firms to repurchase significant blocks of shares efficiently with minimal price impact. In a typical ASR, an investment bank agrees to buy shares at a negotiated price (typically an average market price over a fixed period) at a discount that reflects the bank's fee. A cooling-off period creates an unnecessary delay and forces the issuer to negotiate a forward contract. Since financial intermediaries are typically risk averse, the increased uncertainty associated with the share price during the 30-day cooling-off period would result in the bank charging a higher discount, making ASR programs more expensive to execute and ultimately harming the issuer's long-term shareholders.

VI. The Commission should consider how the enactment of a 1% excise tax on share repurchases impacts the Repurchase Proposal.

On August 16, 2022, President Biden signed into law the Inflation Reduction Act. For covered corporations (i.e., public companies), the law imposes a 1% excise tax on the fair market value of any share repurchases less the fair market value of stock issued after December 31, 2022. This law

[53] *See* SEC, Response to Congress: Negative net equity issuance as directed by the House Committee on Appropriations, H.R. Rept. No. 116-111, December 23, 2020, available at https://www.sec.gov/files/negative-net-equity-issuance-dec-2020.pdf.

is the first tax on stock buybacks and has the potential to change the facts and circumstances around share repurchases dramatically. Moreover, there are several unresolved questions as to its application and practical effect on issuers.[54]

Since the Repurchase Proposal pre-dates the passage of a tax on share repurchases, we believe the Commission's proposal and economic analysis should consider the effects of the tax on the proposed changes. Although we believe the Repurchase Proposal fails to demonstrate the widespread use of share repurchases in an opportunistic or manipulative way, the Commission should fully consider the possible deterrent effect of the new tax on this alleged behavior and quantify its economic consequences.

Such a dramatic change in corporate tax policy also necessitates the re-opening of the comment period to provide issuers and stakeholders with an opportunity to provide valuable feedback on how the new tax could influence share repurchase behavior.

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In closing, we believe the Commission has failed to robustly demonstrate a market failure that necessitates the Repurchase Proposal and certain aspects of the 10b5-1 Proposal. Moreover, we are concerned that both proposals will generate direct and indirect costs that substantially outweigh the purported benefits. These costs are paramount to issuers and investors.

It is important for the Commission to recognize that investors provide capital to U.S. public issuers to generate a source of investment income, to save for retirement, and to pay for important expenses such as a down payment on a home or a child's college education. Imposing unnecessary burdens on public companies—such as reducing their ability to return cash efficiently to shareholders—leads to fewer issuers going and staying public, which, in turn, negatively impacts the ability to raise capital and invest in employees and R&D.[55]

Overly burdensome and unnecessary regulation ultimately harms investors by reducing their opportunity set of investments that offer a reasonable rate of return. The net effect is fewer investor choices, slower economic growth, and a less competitive economy.

If there are any questions about any of our comments, we would welcome an opportunity for further discussion with the Commission. Please do not hesitate to contact us at your convenience.

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[54] *See*, e.g., the blog post by Solis, J., Stansbury, C., & Scarborough, R. (2022). *Stock Buyback Tax Raises Questions as to Application and Practical Effect*, Harvard Law School Forum on Corporate Governance (October 1, 2022), available at https://corpgov.law.harvard.edu/2022/10/01/stock-buyback-tax-raises-questions-as-to-application-and-practical-effect/#more-149817. These authors note that there are numerous uncertainties how the tax on share repurchases will apply in various scenarios and what effect it will have on market activity.

[55] For example, academic studies link the de-burdening provisions of the JOBS Act to a greater volume of initial public offerings, investment in R&D, and better innovation and investor outcomes. *See*, e.g., Dambra, M., Field, L.C., & Gustafson, M.T. (2015). The JOBS Act and IPO volume: Evidence that disclosure costs affect the IPO decision. *Journal of Financial Economics*, 116(1), 121-143; and Lewis, C.M. & White, J.T. (2022). Deregulating innovation capital: The effects of the JOBS Act on biotech startups. Vanderbilt Owen Graduate School of Management Research Paper, available at https://ssrn.com/abstract=3640852.

Sincerely,

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