



April 1, 2022

Ms. Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

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

Dear Ms. Countryman:

The U.S. Chamber of Commerce’s (“the Chamber”) Center for Capital Markets Competitiveness (“CCMC”) writes regarding the Securities and Exchange Commission’s (“SEC”) February 15, 2022, proposed rule regarding disclosures about repurchases of an issuer’s equity securities that are registered under Section 12 of the Securities Exchange Act of 1934 (“Proposed Rule” or “Proposal”).¹ The Chamber appreciates the opportunity to comment on this consequential proposal.

The Chamber supports efforts by Congress and the SEC to ensure that America’s capital markets maintain their status as the most competitive, transparent, and liquid in the world, which includes holding those who choose to engage in illegal behavior accountable. While the Chamber supports efforts to ensure that corporate insiders cannot game the system or bend the rules in their own favor, we are concerned that the approach the SEC has proposed toward these ends rests on inconclusive evidence, creates unnecessary burdens, is ultimately impractical, and imposes costs on and risks to the economy that the SEC has not adequately considered.

The Chamber is also concerned that the SEC is increasingly allowing insufficient time for the public to comment on significant and substantive changes in regulation. The SEC provided a 45-day comment period on this updated – and increasingly burdensome – framework for share repurchase disclosures. That length of time is not conducive for developing meaningful analysis to be able to provide meaningful feedback. As we wrote in an unheeded request for extension of the comment period,² this truncated timeline does not allow for the collection and development of the kind

¹ Share Repurchase Disclosure Modernization, 87 Fed. Reg. 8443 (Feb. 15, 2022) (hereinafter, “Proposed Rule”).

² Available at <https://www.sec.gov/comments/s7-21-21/s72121-20117648-270467.pdf>

of empirical data and analysis that the SEC is requesting, which is essential to the SEC performing an adequate cost-benefit analysis as required by law. In addition, given the Commission's robust and fast-moving agenda, we are becoming increasingly concerned about the extensive compliance changes that our member firms will have to make concurrently to implement the universe of new rules that are part of the Commission's agenda. It is critical that the SEC consider in any rulemaking the impacts of new rules and other proposed rules under consideration. Specific to this Proposal, it is imperative that the SEC consider the implications or interrelatedness of its recently-proposed Rule 10b5-1 and Insider Trading release.³

As the SEC weighs whether and how to move forward with the Proposal, we encourage the Commission to consider the following:

1. The Proposal fails to adequately explain whether and how the new requirements will promote efficiency, competition, and capital formation.
2. The Proposal does not adequately consider the next-day reporting requirement's costs, including additional market volatility, and it does not adequately weigh those costs against the Proposal's purported benefits.
3. The periodic "objective or rationale" disclosure will not promote efficiency, competition, or capital formation.
4. The Proposal's economic baseline analysis does not sufficiently consider that share repurchase programs create substantial benefits for market participants and investors – including retail investors – and should not be unduly deterred.
5. The Commission should quantify the Proposal's costs, and if it relies on commenters' submissions for that quantification, it must give adequate time for further comment.

The CCMC stands ready to provide additional feedback and analysis on these concerns on behalf of its members.

ANALYSIS

The Commission, in exercising its rulemaking authority, has the statutory obligation to "consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation." 15 U.S.C. § 78c(f); *id.* §§ 78w(a)(2), 80a-2(c). The Commission also must "*apprise itself*—and hence the public and the Congress—of the economic consequences of a proposed regulation before it decides whether to adopt the measure." *Chamber of Com. of U.S. v. SEC*, 412 F.3d 133, 144

³ Release Nos. 33-11013, 34-93782; File No. S7-20-21

(D.C. Cir. 2005) (emphasis added). Failure to do so “makes promulgation of the rule arbitrary and capricious and not in accordance with law.” *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1148 (D.C. Cir. 2011); *see also Am. Equity Inv. Life Ins. Co. v. SEC*, 613 F.3d 166, 177 (D.C. Cir. 2010).

1. The Proposal fails to identify a market failure that justifies the increased need for regulation as conceived.

Under current rules, issuers are required to periodically disclose aggregated information about share purchases on a quarterly basis in Form 10-Q and annually in Form 10-K. 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 publicly announced share repurchase programs. 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.

The Commission’s Proposal as conceived would principally require next day reporting of the number and average price of share repurchased on new Form SR. Additional requirements include a description of the repurchase program’s rationale, the criteria used to determine how many shares it purchased, policies related to the trading activities of corporate insiders, and whether insiders traded in the ten-day period preceding the repurchase of shares. As an addendum to the Chamber’s Fall 2021⁴ white paper finds, the Commission’s rationale for these additions makes several observations about the benefits associated with the proposed amendments, but does not explicitly articulate whether these new requirements will promote efficiency, competition, and capital formation. The Commission’s economic analysis cites two economic considerations as justifications for the rule: (1) asymmetric information between insiders and external stakeholders; and (2) the opportunistic use of share repurchases by management. An independent analysis of these economic

⁴ See Lewis, C., White, J. Corporate Liquidity Provision and Share Repurchase Programs. October 2021. Attached. Also available at https://www.centerforcapitalmarkets.com/wp-content/uploads/2021/09/CCMC_Stock-Buybacks_WhitePaper_10.2.21.pdf

considerations commissioned by the Chamber⁵ finds these justifications do not sufficiently support the rule as proposed.

1.A The Proposal touts increased transparency but does not explain how increased transparency will promote efficiency, competition, and capital formation.

While some degree of information asymmetry may exist between issuers and investors, the SEC's economic analysis does not demonstrate that more frequent disclosure will have a large enough effect on capital costs or liquidity to outweigh any direct or indirect costs of additional disclosure burdens. Reducing asymmetric information will promote efficiency, competition, and capital formation only if the Commission establishes that insiders act in their own self-interest to produce an outcome that is economically harmful to other stakeholders but fails to do so. To the extent that an asymmetry exists, the Proposal fails to explain how reducing the asymmetry will, in aggregate, promote efficiency, competition, and capital formation.

The Commission points to three studies (Easley and O'Hara, 2004; Botosan, 2006, and Lambert, Luez, and Verrecchia, 2007) related to information asymmetries, but those studies do not address the question of whether the links they find to reductions in asymmetric information are associated with more frequent and timely repurchase disclosure. The SEC could have conducted myriad alternative analyses to address the purported necessity of more frequent disclosure of share repurchase activity that would have shown that the proposed disclosure may not result in better information for market participants.⁶

The Commission's analysis on information asymmetries also fails to consider whether daily disclosure could result in such frequent repurchase filings that it essentially creates "noise" in the disclosure regime. Indeed, prior academic work notes that "too much disclosure can be as costly as too little disclosure."⁷

Furthermore, the Commission's analysis also does not sufficiently explain its apparent reversal of the prior position that the appropriate way to promote efficiency, competition, and capital formation is to "minimize the market impact of the issuer's repurchases, thereby allowing the market to establish a security's price based on

⁵ See Lewis, C., White, J. (March 2022). Addendum to U.S. Chamber of Commerce Fall 2021 white paper on share repurchases. *Attached and available at* https://www.centerforcapitalmarkets.com/resource/addendum_stockbuy-back/.

⁶ *Id.*, p. 2

⁷ See Core, J. E. (2001). A review of the empirical disclosure literature: discussion. *Journal of Accounting and Economics*, 31(1-3), 441-456.

independent market forces without undue influence by the issuer.” *Purchases of Certain Equity Securities by the Issuer and Others*, 68 Fed. Reg. 64,952, 64,953 (Nov. 17, 2003). Indeed, the Proposal’s “transparency” rationale appears to directly conflict with the Commission’s prior position that efficiency, competition, and capital formation are best served by “minimizing” the impact of repurchases—not highlighting them in daily disclosures. The Proposal does not adequately explain this reversal in position.

Finally, the Commission’s analysis of market transparency does not sufficiently consider whether “under the existing regime, sufficient protections existed to enable investors to make informed investment decisions and sellers to make suitable recommendations to investors.” *Am. Equity Inv. Life Ins. Co.*, 613 F.3d at 179. The current disclosure regime, including repurchase announcements, already provides significant transparency regarding repurchases. Too much transparency can reach the point of diminishing—or even negative—returns. In analyzing the Proposal’s costs and benefits regarding transparency, then, the Commission must compare the new requirements to the existing regime, not to a regime in which transparency is altogether absent.

1.B The Proposal fails to support claims of opportunistic or manipulative use of share repurchases by insiders and does not consider empirical evidence refuting the notion that repurchases necessarily harm investment and employees.

The Proposal aims to reduce opportunistic use of repurchases based on a conjecture that managers might opportunistically use repurchases to manage earnings, inflate the stock price, or hit earnings per share (“EPS”) targets to boost the realized value of their compensation. The Commission relies heavily on a June 2018 speech and empirical research presented by then-Commissioner Robert Jackson Jr. as justification for the Proposal. The Commission’s “heav[y]” reliance on this single “relatively unpersuasive stud[y]” shows that the Proposal is based on “insufficient empirical data,” and therefore unlawful. *Bus. Roundtable*, 647 F.3d at 1151.

During the speech, Commissioner Jackson introduced a new data analysis on how executives potentially use repurchases to “cash out” by selling their shares after the buyback announcement. Commissioner Jackson and his staff analyzed 385 issuers that announced repurchases over 2017 and the first three months of 2018 and interpreted the data as evidence that after a company tells the market that the stock is undervalued, executives overwhelmingly decide to sell. A broader analysis of that data, however, offers a different conclusion: that a slight uptick in insider sales

following a buyback announcement is largely mechanically driven by issuers' blackout periods, where both insider sales and repurchases are prohibited ahead of key information releases.

Here again, an independent analysis shows that the Commission's justification is insufficient. When the dataset presented by Commissioner Jackson is analyzed in full, it suggests that the post-buyback announcement increases cited by Commissioner Jackson's study could actually be driven by large outliers. Commissioner Jackson's conclusion that executives' sales of stock increase fivefold following an announcement might be better explained by a few large insider sales, and the data do not reflect systematic evidence of widespread insider trading around buyback announcements. Indeed, once 11 outliers were removed, an analysis of the remaining 16,264 observations in the dataset show that the Commissioner's conclusion that executives personally capture the benefit of the short-term increase in stock price following a buyback announcement is based on data and analysis that significantly overestimates the extent of insider selling due to the bias created by a small number of outlier observations that represent 0.07% of the Commissioner's data sample and does not represent a fivefold increase in selling as the Commissioner found. Thus, independent analysis of this data posits that the slight uptick in insider sales following a buyback announcement is actually the result of pre-set plans to execute sales after company blackout periods rather than opportunistic selling.⁸

Indeed, the Commission's Staff Study agrees with this conclusion, stating that: "There are a number of reasons why insider sales may coincide with repurchase program announcements, making it difficult to ascertain the motivations underlying insider sales. For example, because repurchase program announcements often coincide with earnings announcements and companies often prohibit insiders from trading in the period leading up to earnings announcements, insider sales activity may be the result of pent-up demand."⁹ By neglecting this alternative explanation, the Proposal fails to adequately explain how the new requirements will overall promote efficiency, competition, and capital formation.

The Commission's economic analysis also fails to consider a new study from Dittmann, Li, Obernberger, and Zheng (2022) in which the authors examine whether insiders use share buybacks to sell equity at inflated stock prices around a stock

⁸ *Supra* note 5, p. 3

⁹ SEC Staff Response to Congress: Negative Net Equity Issuance (Dec. 23, 2020), p. 11, *available at* <https://www.sec.gov/files/negative-net-equity-issuance-dec-2020.pdf>.

buyback.¹⁰ The authors find that the timing of both buyback programs and insider sales is largely determined by the issuer’s corporate calendar through blackout periods and earnings announcement dates – times when both repurchases and insider sales are restricted. The authors conclude that any positive correlation between share repurchases and insider selling is likely driven by blackout periods and not opportunistic insider trading around repurchases.

Similarly, the SEC did not consider a 2019 study from PWC and Professor Alex Edmans of the London Business School, commissioned by the UK government, which examined whether buybacks were used to inflate executive pay in the UK from 2007-2017.¹¹ The authors found that, over the 10 years studied, not a single FTSE 350 firm used share buybacks to meet an EPS target that it would have otherwise missed. The authors further found that executives with EPS targets did not undertake more repurchases than those without.

The PWC/Edmans study also examined whether buybacks are undertaken at the expense of company investments. The authors found no relationship between share buybacks and investment, inconsistent with concerns that executives were funding repurchases in lieu of investment projects.

The Commission cannot “completely discount[] studies that “reach[] the opposite result” of the Commission’s own conclusions. *Bus. Roundtable*, 647 F.3d at 1151.

1.C. Evidence cited around repurchases to achieve EPS-linked bonuses, repurchases and investment, and repurchases to manipulate markets is incomplete and inconclusive.

The Chamber has additional concerns around the integrity of cited references that the Proposal cites, and it is also concerned by the Commission’s failure to consider less costly alternatives for promoting efficiency, competition, and capital formation by reducing any problems related to sections on EPS-linked bonuses,¹² repurchases and investment,¹³ and repurchases to manipulate markets.¹⁴

¹⁰ See Dittmann, I., Li, A. Y., Obernberger, S., & Zheng, J. (2022). The impact of the corporate calendar on the timing of share repurchases and equity grants (January 21, 2022). Available at SSRN: <https://ssrn.com/abstract=4004098>.

¹¹ See Edmans, A. (2019). Share Repurchases, Executive Pay and Investment. Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/817978/share-repurchases-executive-pay-investment.pdf

¹² *Supra* note 5, p. 7

¹³ *Supra* note 5, p.10

¹⁴ *Supra* note 5, p. 12

For instance, as the attached addendum notes, the Proposal does not discuss the Commission's 2020 Staff Study, which concludes: "[M]ost of the money spent on repurchases over the past two years was at companies that either do not link managerial compensation to EPS-based performance targets or whose boards considered the impact of repurchases when determining whether EPS-based performance targets were met or in setting the targets, suggesting that other rationales motivated the repurchases."¹⁵

Relatedly, the Proposal does not reflect the reality that many companies' compensation plans adjust for any impact of share repurchases beyond what was in the board-approved plan to begin with. Moreover, compensation committees review all the impacts of EPS growth, including on share repurchases, and take that into account when exercising discretion over how much is ultimately paid to management.

In sum, the Proposal fails to identify how increased disclosures of share repurchases will promote efficiency, competition, and capital formation. Moreover, the Commission's own 2020 Staff Study provides quantification that would refute some of the economic concerns that the Proposal references. Taken together, the Proposal and accompanying economic analysis do not present robust evidence of harms to investors and the securities market attributable to the current disclosure requirements for share repurchases.

The Chamber supports efforts to root out illegal behavior in the market but encourages the Commission to better analyze available evidence and adjust accordingly as it weighs how to proceed on subsequent rulemaking.

2. The proposal does not adequately consider the next-day reporting requirement's costs, including additional market volatility, and it does not adequately weigh those costs against the Proposal's purported benefits.

The Chamber is deeply concerned about the Commission's proposed next-day reporting requirement for share repurchase activity. As referenced in the discussion of information asymmetry above (2.A), the SEC has not offered compelling evidence that a next-day reporting requirement would create the benefit the Proposal purports it would. Instead, next-day reporting risks greater market volatility and imposes unnecessary burdens, both substantial harms that have not been thoroughly contemplated.

¹⁵ *Supra* note 9, p.45.

An effective disclosure regime provides investors with the material information they need to make objective decisions regarding the value of an investment but does not overwhelm them with peripheral information that can obscure what is material and distract from what matters about a company.¹⁶ The competitiveness of the U.S. capital markets depends on getting the balance of information right, including the frequency with which that information is provided. As Justice Thurgood Marshall explained in *TSC Industries v. Northway*, providing investors with “an avalanche of trivial information ... is hardly conducive to informed decisionmaking.”¹⁷ Just as the SEC has a responsibility to protect investors from receiving too little information, so too does the SEC have a responsibility to protect investors from too much information. The SEC’s proposed rule inadequately explains how it believes this rule strikes the correct balance.

As part of a comprehensive management strategy, some companies engage in stock buyback activity 250 days a year. Under the Proposal as conceived, that would lead to an additional 250 yearly disclosures that have not been demonstrated to be readily actionable or useful to the average investor. Providing information about repurchases on a next-day cadence risks providing just such “an avalanche of trivial information” to investors, potentially resulting in confusion rather than protection.

Providing too much information to investors also risks misinterpretation and, ultimately, increased market volatility. A next-day reporting cadence is divorced from other business and commercial reporting rhythms and is likely to present distorted information to the market. On a next-day frequency, Form SR would provide information to market participants that could give investors the impression they can glean meaningful insights about a company’s intended activities based on an increase or decrease in share repurchase volume or cessation of a buyback plan altogether. Investors may be led to inaccurate views about a company’s outlook or intentions and could ultimately promote speculative trading based on next-day information. Although produced in aggregate numbers and in average price paid per share, the amount of granular historical record companies would ultimately produce would be voluminous and mineable and could lead to incorrect conclusions about company practices and methodology.

Therefore, to the extent the Commission requires more information about share repurchase activity, it should do so with a frequency no less than once a month and in

¹⁶ See Center for Capital Markets Competitiveness (2017). Essential Information: Modernizing Our Corporate Disclosure System. Available at http://www.centerforcapitalmarkets.com/wp-content/uploads/2013/08/U.S.-Chamber-Essential-Information-Materiality-Report-W_FINAL.pdf?x48633

¹⁷ 426 U.S. 438, 448-49 (1976)

backward-looking, aggregate terms. A monthly cadence would provide more focused information, limiting the likelihood of misinterpretation while providing sufficient information to the market and its regulator about company activity.

Moving Form SR to a once-a-month frequency would also cut down on the internal compliance challenges of next-day reporting. Disclosure of any kind poses logistical and mechanical challenges for companies. Next-day disclosure would exacerbate these challenges such that the force of disclosure would likely alter some companies' share repurchase practices, threatening the benefits that repurchases present, including to retail investors focused on returns in the long-term, as discussed in Section 4 below.

In addition, the SEC should provide greater clarification around disclosure related to Accelerated Share Repurchase ("ASR") transactions. The Proposal should clarify that any reporting requirements applicable to ASR transactions should apply only to the initial purchase by a company and to any additional shares acquired by the company at final settlement of the transaction period.

Should the SEC move forward with Form SR, it should take these consequences of next-day reporting into account and should strongly consider moving to a once-a-month frequency, and should thoroughly explain any analysis, including the cost-benefit analysis, that justifies a daily disclosure requirement as opposed to a monthly or less frequent alternative.

3. The periodic "objective or rationale" disclosure requirement will not promote efficiency, competition, or capital formation.

The Chamber is also concerned about the SEC's proposed Item 703 periodic disclosure requirements and corresponding changes to Forms 20-F and N-CSR. The SEC has proposed to require companies to disclose the 'objective or rationale' for its share repurchases and the process or criteria used to determine the amount of repurchases. Disclosures such as these are worrisome because they border on interfering with company governance, planning, and decisionmaking and again risk misinterpretation.

Companies use *surplus* capital for repurchases. Using this capital in this manner gives companies an efficient means of attenuating the temptation to invest in negative net present value projects that sub-optimally grow the size of a company's assets. Prior to the SEC's safe harbor for share repurchases, there was considerable evidence that

some managers would use surplus cash for projects or acquisitions that increased the size of assets under their control, aiming to boost managerial prestige and compensation and thereby destroying firm value.¹⁸ Repurchasing shares limits the resources under management control, thereby requiring firms to engage with capital market participants to fund new investment. Stock buybacks are a valuable management tool that allows companies to better manage value and make healthy decisions.

The benefits of stock buybacks are abundant and clear; moreover, as discussed below and in the attached addendum, there is little evidence to show that executives and management are opportunistically structuring share repurchase programs for personal gain. The SEC, however, has predicated its proposed amendments around Item 703 on this very principle. The SEC's own economic analysis in the Proposal admits that "The benefits of the information about the rationale for repurchases could be limited ... if investors are able to infer the purpose of repurchases from other public information."¹⁹ Further, the economic analysis goes on to say: "The benefits of the information about the rationale for repurchases could be limited if such disclosure is boilerplate and provides relatively little specificity to investors."²⁰ Companies engage in buybacks for purposes of corporate efficiency and, upon an explicit authorization and approval for a share repurchase program, already publicly disclose their intent to move forward with a repurchase program, including information such as: timing; size; features designed to achieve a specified objective; and method of repurchase. Investors thus have significant information about a repurchase program and an understanding of the program's mechanics and purpose. Additional disclosure in this manner would be superfluous and is likely to be boilerplate, and therefore – by the Commission's analysis – of little to no use to investors.

The costs of a "rationale or objective" disclosure, on the other hand, are significant. Companies that choose to comply with this disclosure requirement using something other than boilerplate language will incur costs to ensure that the language is holistic, does not create unnecessary litigation risk, and otherwise in compliance with regulatory requirements. The Proposal does not adequately quantify, analyze, or weigh these costs. On the other hand, boilerplate is unlikely to provide any new information to investors, and it is therefore unlikely to create any market benefits. Additional "rationale or objective" disclosures are thus unlikely to promote efficiency, competition, or capital formation.

¹⁸ See Jensen, M. (1986). Agency costs of free cash flow. *American Economic Review*, 76, 323–329.

¹⁹ At p. 49

²⁰ *Id.*

Beyond “rationale and objective” disclosures, the Chamber also has concerns about new requirements pertaining to shares sold by executives during buyback periods. As explained above, any positive correlation between share repurchases and insider selling is likely driven by blackout periods and not opportunistic insider trading around repurchases. Despite this fact, the Commission has moved toward requiring new disclosures for directors’ and officers’ trading activity happening concurrently with a share repurchase program – based upon the unjustified assumption that nefarious activity is occurring. Additional disclosure in this regard could well lead investors to confuse correlation for causation of inappropriate company behavior (where there is none). This would undermine efficiency, not promote it. CCMC supports efforts to root out bad behavior, but encourages the SEC to consider the likelihood that proposed transparency measures could mislead investors, especially because many company repurchase programs operate almost every trading day of the calendar year and are often in compliance with Rule 10b-18 and current 10b5-1(c) practices.

While it is imperative that bad behavior be identified and stopped, disclosures should be designed to provide meaningful protections to investors and not unduly mislead them. As a result, the Chamber encourages the SEC to reconsider its periodic disclosure proposals or at a minimum to explain how those proposals will promote efficiency, competition, or capital formation.

4. The Proposal’s economic baseline analysis does not sufficiently consider that share repurchase programs create substantial benefits for market participants and investors – including retail investors – and should not be unduly deterred.

Shareholders rightly expect companies to act as prudent stewards of their capital. Specifically, to the extent that companies generate capital that they cannot reinvest consistent with their strategic objectives, share repurchase programs present an efficient way to manage value and make smart business decisions.

Share repurchases contribute to stronger capital markets. A Fall 2021 white paper published by the Chamber found that corporate share repurchase programs are an important management tool for companies that have significant benefits for capital markets, particularly retail investors.²¹ The Chamber’s report identified a few key areas of economic benefit for share repurchases, including many benefits for retail investors:

²¹ *Supra* note 4

1. **Greater liquidity:** Share repurchase programs provide substantial market liquidity, which facilitates orderly trading and reduces transaction costs for investors, including retail investors;
2. **Reduced volatility:** Share repurchases significantly reduce realized and anticipated return volatility. Imposing limitations on repurchase activity would increase stock market volatility and force investors, including retail investors, to bear greater amounts of downside risk;
3. **Benefit to retail investors:** Share repurchases generate an economically large benefit for retail investors. Since 2004, buybacks have saved retail investors between \$2.1 – 4.2 billion in transaction and price impact costs;

Managers strategically use share repurchase programs during periods of uncertainty. These effects help mitigate risks, allow institutional and retail investors alike to buy and sell shares without having a large price impact, and stabilize trading markets. Thus, repurchases help to reduce volatility, which presents a benefit to all shareholders, including retail investors, regardless of whether investors buy and sell shares in their own accounts or participate indirectly through investment in retirement accounts. Company shareholders view share repurchases as an important element of value creation.

These benefits, including an estimated \$4.1 billion savings to retail investors, must not be overlooked as the SEC contemplates moving forward with a rulemaking. In her statement supporting the proposed rule, Commissioner Allison Herren Lee characterized increased disclosure around repurchases, including the next-day reporting requirement and periodic rationale requirement, as a method to increase transparency that would benefit companies making “smart and thoughtful” choices and that, alternatively, “if anticipated disclosure operates to dampen enthusiasm for buybacks, that may well arise from flaws in the strategy behind the practice at certain companies.”²² What this view does not acknowledge, however, is that increased disclosure also presents an increased compliance burden and thus increased costs for companies that choose to engage in share repurchase programs. Although the Commission’s proposed approach may seek to deter bad actors from gaming repurchase activity, the increased costs imposed on both small and large companies will deter them from making “smart and thoughtful” choices, and to reconsider engaging repurchases. Thus, the additional costs imposed by the Proposal would ultimately deprive investors, markets, and the public of those important benefits of share repurchase programs.

²² Available at <https://www.sec.gov/news/statement/lee-statement-corporate-share-repurchase-proposal-121521>

The Commission should consider the effects that these benefits have on efficiency, competition, and capital formation as part of the Proposal's baseline analysis. The Commission should also consider whether the proposal will suppress repurchases, thereby suppressing the benefits discussed above, and it should quantify that suppression as one of the Proposal's costs. In other words, the Commission must be circumspect that it is not unduly deterring buybacks for all public companies based on perceived flaws in the strategy of a few. Indeed, the Commission's own 2020 Staff Report covering share repurchases concludes that, "... on average, repurchases are viewed as having a positive effect on firm value."²³ In effect, the Commission's Proposal embraces a dramatic shift in viewpoint on repurchases, which would require a substantial shift in facts in the past two years sufficient to justify such a changed worldview.

5. The Commission must quantify the Proposal's costs, and if it relies on commenters' submissions for that quantification, it must give adequate time for further comment.

The Commission has the statutory obligation "*apprise itself* . . . of the economic consequences of a proposed regulation before it decides whether to adopt the measure." *Chamber of Com. Of U.S.*, 412 F.3d at 144 (emphasis added); *see Bus. Roundtable*, 647 F.3d at 1150. The Proposal states that many costs and other effects of the Proposal "cannot be quantified." 87 Fed. Reg. at 8,451. Yet, even if some of the Proposal's effects cannot be quantified, the Commission must try to quantify those costs and effects that are quantifiable. For example, even where the Commission cannot quantify market-wide costs, it must "estimate[] the cost to an individual [company]" when such estimate is possible. *Chamber of Com. of U.S.*, 412 F.3d at 144.

The Proposal also "encourage[s] commenters to provide data and information that would help quantify the benefits, costs, and the potential impacts of the proposed amendments on efficiency, competition, and capital formation." 87 Fed. Reg. at 8,451. Yet, the Proposal does not explain the dissonance between the Commission's position that some effects cannot be quantified and the invitation for commenters to quantify the Proposal's effects. If the Commission is to rely on commenters to help discharge the Commission's duty to quantify costs and other effects, the Commission must, at minimum, provide the public with an explanation of which costs effects it believes to be quantifiable in the first instance.

²³ *Supra* note 15, p 42

Likewise, if the Commission is to rely on the public to quantify the Proposal's costs and other effects, then the Commission must give the public sufficient time to comment on that quantification. As explained in the Chamber's prior letter, 45 days is not nearly enough. In other words, the Proposal relies on the public for quantification, yet it denies the public sufficient time to do so. These aspects of the Proposal reflect a strategy by which the Commission can attempt to avoid its duty to "appraise itself" of a regulation's costs. *Chamber of Com. Of U.S.*, 412 F.3d at 144. While the truncated comment period is concerning in and of itself, it is especially concerning given the Commission's invitation for the public to quantify costs—an assessment that is the Commission's own responsibility. To the extent that this strategy allows the Commission to avoid that duty, it embodies unlawful arbitrary and capricious rulemaking.

Conclusion

The Chamber appreciates the opportunity to weigh in on these important matters. Share repurchases provide important benefits to investors, companies, the capital markets, and the economy overall. Although the Chamber supports efforts to hold specific bad actors accountable through transparency, regulation must be constructed in a manner that is practical, does not deter positive market benefits, and is well-supported.

The Chamber and its members stand ready to assist the SEC toward these goals.

Sincerely,

A handwritten signature in black ink, appearing to read 'TK' with a long horizontal flourish extending to the right.

Tom Quaadman
Executive Vice President
Center for Capital Markets Competitiveness
U.S. Chamber of Commerce