



California Public Employees' Retirement System

Executive Office

400 Q Street, Sacramento, CA 95811 | Phone: (916) 795-3829 | Fax: (916) 795-3410

888 CalPERS (or 888-225-7377) | TTY: (877) 249-7442 | www.calpers.ca.gov

Ms. Vanessa Countryman, Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-0609

Via email: rule-comments@sec.gov

March 30, 2022

Subject: Release Nos. 34-93783; IC-34440; File No. S7-21-21 Share Repurchase Disclosure Modernization

Dear Ms. Countryman,

On behalf of the California Public Employees' Retirement System (CalPERS), I write to express our support for the Securities and Exchange Commission's (SEC or Commission) proposed rule to modernize and improve disclosure about repurchases of an issuer's equity securities that are registered under Section 12 of the Securities and Exchange Act of 1934 (Exchange Act) (Proposed Rule).

As the largest public defined benefit pension fund in the United States, CalPERS manages approximately \$470 billion in global assets on behalf of more than 2 million members. We seek long-term sustainable, risk-adjusted returns through efficient capital allocation and stewardship in line with our fiduciary duty. We are guided by CalPERS' Investment Beliefs¹ which recognize that "Long term value creation requires effective management of three forms of capital: financial, physical and human."² Accordingly, our fiduciary duty requires that we proactively assess whether the companies that we hold in our portfolio are managing capital effectively. We view robust governance practices as critical to long-term performance; therefore, we expect fair, accurate, timely, and assured reporting about how companies manage their financial, physical, and human capital to generate sustainable returns, as well as how they identify, monitor, and mitigate risks to those three forms of capital, as stated in our Governance & Sustainability Principles.³

¹ CalPERS Investment Beliefs, <https://www.calpers.ca.gov/page/about/organization/calpers-story/our-mission-vision#investment-beliefs>.

² Id.

³ CalPERS Sustainability Principles, <https://www.calpers.ca.gov/docs/forms-publications/governance-and-sustainability-principles.pdf>.

CALPERS SUPPORT FOR THE PROPOSED RULE

We support the Commission's efforts to provide more timely disclosure about repurchases of an issuer's equity on Form SR and to enhance the existing periodic disclosure requirements about these purchases. First promulgated by the Commission in 1982, Rule 10b-18 limits share repurchases under certain volume and periods by limiting the amount a company can spend on repurchases on a daily basis. Currently, there is no transparency on the daily trading. Since Rule 10b-18 operates as a "safe harbor" without an SEC enforcement mechanism, it is unclear whether reporting companies adhere to the limits. At a minimum, investors should be provided data on daily share repurchase activity. By enhancing transparency around share repurchases, the Proposed Rule goes a long way in addressing some of the issues with SEC Rule 10b-18.

In this letter, we provide comments on the proposed Form SR reporting obligations; the proposed amendments to Items 703 and 408; and XBRL requirements. We also provide our views on the costs and benefits of the Proposed Rule.

FORM SR REPORTING

Given that the political debate over share repurchase rules ranges from eliminating share repurchases to doing nothing, we welcome the Commission's response, particularly the proposed Form SR reporting requirements. Over the last few years, several bills have been introduced that would substantially limit or even eliminate share repurchases.⁴ Our Principles state that boards of directors are responsible for capital allocation decisions, including decisions to repurchase shares and that the boards should provide shareholders robust disclosures around such capital allocation decisions.⁵ Accordingly, we believe that boards of directors should have options in making allocation decisions and such options should include share repurchases. In 2019, we researched the issues surrounding share repurchases using our Governance & Sustainability Principles as a base. Our research revealed the need for substantially better disclosures surrounding share repurchases.

The Proposed Rule addresses this issue by updating and enhancing disclosure requirements. The Proposed Rule aligns with a recommendation supported by Lenore Palladino and William Lazonick as the "absolute minimum" that should be done to correct what they argue is market

⁴ For example, Senator Baldwin (D-WI) introduced the "Reward Work Act" (S. 915), which would ban buybacks and require that before issuers register securities on a national exchange, at least one-third of the issuer's board of directors be chosen by the company's employees in a one-employee-one-vote process; Sen. Rubio (R-FL) announced that he planned to introduce legislation to "tax corporate buybacks [the] same way as dividends," arguing that there should be "[n]o tax advantage for buybacks over dividends." Legislation has not yet been released. Sens. Schumer (D-NY) and Sanders (I-VT) authored a *New York Times* op-ed in February arguing that companies should be required to pay workers at least \$15/hour before being able to purchase shares back from investors; Sen. Van Hollen (D-MD) has said that the SEC "need[s] to reopen [SEC Rule 10b-18] on stock buybacks and seek public comment. Senator Van Hollen also said that if the SEC did not do so voluntarily, "we intend to introduce legislation directing [the SEC] to reopen the rule and report back to Congress with their findings." Senator Sanders (I-VT) introduced the "Corporate Accountability and Democracy Plan" which would repeal SEC Rule 10b-18. Senator Brown (D-OH) introduced the "Stock Buyback Reform and Worker Dividend Act", which would require companies to pay workers \$1 for every \$1 million in buybacks, lowers permissible levels of buybacks and converts safe harbor to mandatory rule.

⁵ Principles at 13-14.

manipulation.⁶ Real time disclosures as proposed would fill a transparency gap and would directly support active compliance with share repurchase related trading limits.

Moreover, we agree that the Commission should adopt a new Form SR to require daily repurchase disclosure as proposed. We believe issuers will be able to comply because daily reporting is already done in other markets and the report on trading by insiders is done in two days. As discussed in the Proposed Rule, Form SR should require daily reporting of the total number of shares repurchased, the average price paid per share, issuer share repurchases on the open market, shares purchased in reliance on the safe harbor in Rule 10b-18, and shares purchased pursuant to a plan that is intended to satisfy the affirmative defense conditions of securities that trade on an exchange. We reviewed the variations from the proposal and believe that the Proposed Rule works better than the alternatives because the Proposed Rule provides the most transparency and best corrects for the identified information asymmetries.

ITEMS 703 and 408

The Commission should require all open market share repurchase plans to be publicly announced and should standardize the form of announcement. Investors are told that share repurchases are commonly conducted when the company views its shares are undervalued. We currently have a system where there is a disconnect between how a company and its executives approach trading by the company. Insiders actually sell shares looking for a high price and companies are buying shares at relatively high prices when they are supposed to be looking for a low price. Placing requirements to provide transparency is critical. To that end, companies should be required to indicate whether any officers or directors sold shares into a repurchase. In other words, companies should be required to inform investors that the company believes its stock is undervalued while the officers and directors who are selling the stock believe the stock is priced well relative to value.

Additionally, it is important for companies to disclose how the share repurchases are financed. It is true that most firms operate in an appropriate fashion and finance the share repurchases from revenues. However, some firms borrow to fund share repurchases. This can be an appropriate allocation decision in some cases, but in others, it is a sign of problems. Companies should make a clear statement on how the share repurchase is funded. If a company has to borrow to fund the share repurchase, it should explain why such borrowing makes sense for the company.

Investors will use the information to oversee the company's board and decide how to vote on certain directors. They will also use the information in voting on say on pay. It is meaningful information when executives and directors sell interests when the company is buying or when companies' buying activities influence compensation in inappropriate ways. If a company repeatedly borrows to fund share repurchases rather than to enhance company performance, it could be a sign for investors to vote against certain directors or sell. Information produced by the Proposed Rule will be used in determining how investors vote, engage with companies, and allocate funds.

⁶ Palladino, Lenore and Lazonick, William, "*Regulating Stock Buybacks: The \$6.3 Trillion Question*" May 2021, Roosevelt Institute Working Paper.

We urge the Commission to adopt the proposed changes to both Item 703 and Item 408. The priority should be on limiting abuses. Streamlining obligations will likely provide enhanced opportunities for companies to avoid complying and continue the information asymmetries, therefore there is less concern with overlapping requirements.

Form SR and the modified Item 703 provide distinctly valuable information. Form SR directly addresses issues envisioned in the formulation of the safe harbor against stock manipulation by providing daily transparency. Currently, the ultimate insider, the company, discloses trades quarterly without having to disclose daily trade volume when an original element in the safe harbor limits daily trade volume. Additional disclosures, as provided in the Proposed Rule, address the problem. We agree with adding an exhibit to Item 703 and Forms 20-F and N-CSR providing daily detail about share repurchases made during the period covered by the report while maintaining Form SR. Reporting daily trades a quarter late does not adequately address information asymmetries.

XBRL REQUIREMENTS

The Commission should require issuers to include block text tagging of narrative disclosures, as well as detail tagging of quantitative amounts disclosed within the narrative and tabular disclosure required by Item 703 of Regulation S-K, Item 16E of Form 20-F, Item 9 of Form N-CSR, and Form SR in Inline XBRL. This would make the information provided most useful by making the data easier to review and compare electronically.

COSTS AND BENEFITS

There are numerous inefficiencies in the current share purchase disclosure regime. Share repurchases have adopted new purposes including funding executive and director compensation. It is now clear that some companies conduct share repurchases whether the stock is undervalued or not and executives and directors essentially sell into the share repurchases further showing that the stock is not undervalued.

The Proposed Rule directly addresses certain issues that align with the original intent of the safe harbor, including reporting daily trading information. For instance, adopting Form SR should immediately end violations of the daily sales limits and would close the information gap between the company and investors. Shareholders will use the information in making voting decisions, including board votes and say on pay, in engagement activities and in making decisions to buy, hold, or sell.

For many issuers that conduct share repurchases, they will simply need to provide reports on Form SR and provide additional information in enhanced regulatory reports. For others, share repurchase patterns will change to fall in line with the safe harbor. In any event, no changes are being made to existing limits to share repurchases. The only changes are to disclosures. The benefits of the Proposed Rule are that it corrects issues with current practice and aligns with the original intent of the safe harbor.

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Thank you for the opportunity to share our comments. If you have any questions or would like to discuss, please do not hesitate to contact James Andrus at James.Andrus@calpers.ca.gov.

Sincerely,

Marcie Frost
Chief Executive Officer

cc: James Andrus