

related to electronic messaging.⁶⁹ It urges firms to proactively inform employees that violations of digital communications rules may result in discipline or dismissal.⁷⁰ The OCIE also advises firms to provide regular reminders to employees of what is permitted and prohibited under the firm’s policies and procedures with respect to electronic messaging.⁷¹ Finally, the OCIE recommends soliciting feedback from firm employees as to what forms of messaging are requested by clients;⁷² this may better allow compliance folks to assess their risks and how those forms of communication may be incorporated into firm policies.⁷³

E. Conclusion

The SEC and CFTC’s investigation and prosecution of J.P. Morgan puts the complex world of federal securities regulation into the spotlight. The Pandemic has only increased the need for broker-dealer firms to adapt and strengthen their policies around their employees’ electronic communications. Constant vigilance is required by compliance functions if a firm hopes to remain in compliance with its federal securities recordkeeping requirements.

Although the SEC and CFTC’s charges against J.P. Morgan represent the latest move in a fierce and ongoing battle between regulators and registrants, firms should not fear for their own compliance.⁷⁴ Instead, the J.P. Morgan scandal should be leveraged as an important case study that firms can use to re-evaluate and strengthen their own recordkeeping compliance functions.

Margaux Arnston⁷⁵

⁶⁹ John Manganaro, *Texting Your Clients? Don’t Overlook SEC Communication Rules*, PLANADVISER (Dec. 18, 2018), <https://www.planadviser.com/texting-clients-dont-overlook-sec-communication-rules/> (“OCIO further encourages firms to proactively consider ‘improvements to their compliance programs that would help them comply with applicable regulatory requirements.’”).

⁷⁰ *Id.*

⁷¹ *Id.* (addressing the various problems that arise under rules that govern communications in electronic times).

⁷² *Id.* (“OCIE recommends soliciting feedback from personnel as to what forms of messaging are requested by clients and service providers in order for advisers to assess their risks...”).

⁷³ *Id.* (“how those forms of communication may be incorporated into their policies.”).

⁷⁴ Franck & Son, *supra* note 5.

⁷⁵ Student, Boston University School of Law (J.D. 2023).

II. *Stock Buybacks: The SEC's Proposed Amendments on Share Repurchase Disclosure*

A. Introduction

On December 15, 2021, the Securities and Exchange Commission (SEC) issued proposed rules to its amendments regarding stock buybacks.¹ The proposed rules were passed by the SEC by a three-to-two majority.² Buybacks, as they are commonly referred to, are an issuer's repurchases of its own equity securities, which are registered under Section 12 of the Securities Exchange Act of 1934 (Exchange Act).³ Essentially, publicly-held companies repurchase their own stock, or repurchases are made on behalf of these issuers by affiliated purchasers.⁴ Companies have spent an increasing amount of money repurchasing their own stock. In 2020, companies spent approximately

¹ NICOLAS GRABAR & LILLIAN TSU, CLEARY GOTTlieb, SEC PROPOSES MAJOR RULE CHANGES ON TRADING PLANS AND CORPORATE BUYBACKS 1, 6-7 (2021), <https://www.clearygottlieb.com/-/media/files/alert-memos-2021/sec-proposes-major-rule-changes-on-trading-plans-and-corporate-buybacks.pdf> [<https://perma.cc/S49D-FJNF>] (“On December 15, 2021, the SEC issued for public comment two separate proposals that will, if adopted, significantly affect how . . . companies repurchase their own shares.”).

² *Proposed SEC Rules Would Require More Detailed, Next-Business-Day Disclosure of Corporate Buybacks*, SIDLEY AUSTIN LLP (Dec. 20, 2021), <https://www.sidley.com/en/insights/newsupdates/2021/11/proposed-sec-rules-would-require-more-detailed-next-business-day-disclosure-of-corporate-buybacks> [<https://perma.cc/SD3S-YV64>] (“On December 15, 2021, the U.S. Securities and Exchange Commission (SEC), by a 3-2 vote, proposed amendments to require more frequent and detailed disclosure surrounding repurchases of an issuer's registered equity securities, often called buybacks.”).

³ Justin Chairman & Celia Soehner, *How SEC Proposal Would Change Stock Buyback Landscape*, LAW360 (Dec. 22, 2021), <https://www-law360-com.ezproxy.bu.edu/articles/1450881/how-sec-proposal-would-change-stock-buyback-landscape> (noting that the SEC's proposed amendments would enhance companies' disclosures of “repurchases of their own equity securities that are registered under Section 12 of the Exchange Act.”).

⁴ SEC, FACT SHEET: SHARE REPURCHASE DISCLOSURE MODERNIZATION: PROPOSED RULES (2021), <https://www.sec.gov/rules/proposed/2021/34-93783-fact-sheet.pdf>. [<https://perma.cc/CN9U-S6P3>] (“The proposed amendments would require an issuer to provide more timely disclosure on a new Form SR regarding purchases of its equity securities for each day that it, or an affiliated purchaser, makes a share repurchase.”).

\$700 billion on stock buybacks.⁵ Buybacks enable companies to return capital to their shareholders by repurchasing their own equity securities.⁶

At the forefront of the justifications for stock buybacks lies the theory of “shareholder primacy.”⁷ Shareholder primacy theorizes that shareholders are essentially the owners of the firm, as well as the primary risk-takers, and are therefore owed the profits.⁸ Shareholders are thought to assume most of a company’s risk because they invest capital without guaranteed returns, and thus are entitled to returns.⁹ This justifying theory has catapulted the widespread use of stock buybacks that is prevalent today. However, because of the current inadequacy of buyback disclosures, there exist information asymmetries between issuers of stock and investors.¹⁰ As a result, the SEC’s proposed amendments intend to improve the disclosure of stock buybacks by enhancing transparency surrounding companies’ stock repurchases.¹¹

B. Issues Associated with Stock Buybacks

⁵ Cydney Posner, *SEC Proposes New Rules on Stock Buybacks*, JD SUPRA (Dec. 23, 2021), <https://www.jdsupra.com/legalnews/sec-proposes-new-rules-on-stock-8524327/#:~:text=The%20proposal%20would%20enhance%20transparency,for%20use%20of%20Inline%20XBRL> [<https://perma.cc/E5KD-G74R>] (“The amount that companies have spent on stock repurchases has generally increased substantially over the years—in 2020, companies spent almost \$700 billion to repurchase their own shares.”).

⁶ *Id.* (SEC Chair Gary Gensler notes that, “Share buybacks have become a significant component of how public issuers return capital to shareholders”).

⁷ Lenore Palladino, *The \$1 Trillion Question: New Approaches to Regulating Stock Buybacks*, 36 YALE J. ON REGUL. BULL. 89, 91 (2018) (“Driving the practice of stock buybacks is the ‘shareholder primacy’ corporate legal framework.”).

⁸ *Id.* (“This theory claims that shareholders are the ‘owners’ of a firm and due the profits that the firm does not require for contractual obligations to other shareholders”).

⁹ *Id.* at 92 (“The idea that that shareholders are a firm’s owners – the primary risk-takers because they invest capital with no guarantee of return, and thus the residual claimants of its wealth ...”).

¹⁰ Posner, *supra* note 5 (Discussing how the lack of disclosure as it relates to stock buyback leads to information asymmetry between issuers and investors.).

¹¹ *See generally* Share Repurchase Disclosure Modernization, 87 Fed. Reg. 8443 (proposed Dec. 15, 2021).

While stock buybacks have been justified by the shareholder primacy theory, there are several drawbacks to these repurchases including information asymmetries, stock price manipulation, and perverse incentives created for executives and insiders.¹² As a result of current, inadequate buyback disclosures, information asymmetries exist between issuers of stock and investors.¹³ As the disclosure requirements currently stand, “[i]ssuers are not required to, and typically do not, disclose the specific dates on which they will execute trades.”¹⁴ Because issuers are not required to disclose the specific dates on which they repurchase their equity shares, investors are not aware of the issuer’s stock buybacks until they are disclosed in an issuer’s periodic reports.¹⁵ Under the Exchange Act, issuers are required to file certain periodic reports with the SEC.¹⁶ Financial periodic reports can be issued by companies monthly, quarterly, semi-annually, or annually.¹⁷ With regard to the disclosure of share repurchases specifically, issuers are required to disclose these stock buybacks via periodic reports on a quarterly basis.¹⁸ This means that information about a company’s share repurchases is being made publicly available only four times a year, or in other words, approximately every three months. Resultingly, the dissemination of financial information regarding buybacks is slow and intermittent. By the time this periodic report *is* released and investors

¹² Palladino, *supra* note 7 at 94 (Noting several problems associated with stock buybacks, including, “their potential to manipulate stock price ... [and] the perverse incentives on executives and insiders who are compensated in stock ...”).

¹³ Posner, *supra* note 5.

¹⁴ 87 Fed. Reg. 8443, *supra* note 11, at 4.

¹⁵ Posner, *supra* note 5 (“...[I]nvestors usually don’t find out about a company’s actual trading activity until it files its periodic reports, leading to information asymmetries.”).

¹⁶ SEC, REVIEW OF PERIODIC REPORTS (2000), <https://www.sec.gov/about/oig/audit/298fin.pdf> [<https://perma.cc/LPL2-6W28>] (“Public companies registered with the Commission must file periodic reports under the Exchange Act of 1934...”).

¹⁷ *Periodic and Interim Reporting*, TOPPAN MERRILL, <https://www.toppanmerrill.com/glossary/periodic-and-interim-reporting/> [<https://perma.cc/BU4S-MXG4>] (last visited Mar. 14, 2022) (“Periodic and interim reporting is the practice of providing company performance reports for periods shorter than a fiscal year, such as monthly quarterly or semi-annual reports.”); see SEC, *supra* note 16 (discussing the various reports that must be filed at different times throughout the fiscal year.”).

¹⁸ 87 Fed. Reg. 8443, *supra* note 11, at 44 (“Presently, information about repurchases, aggregated at the monthly level, is provided in periodic reports (quarterly for most filers.”).

are informed, the stock repurchases have long been executed and the market has already been affected.¹⁹ Thus, information asymmetry can create advantages for issuers and insiders and enable them to profit inappropriately.²⁰

Moreover, issuers and insiders may engage in opportunistic uses of stock buybacks by manipulating stock prices.²¹ As a practical matter, “repurchases may be used to manipulate stock prices because the very nature of buying back stock means that the remaining shares rise in value...[L]arge volumes of stock buybacks undoubtedly move security prices.”²² In the short term, stock prices increase as share volume decreases.²³ The immediate effect of stock buybacks is a reduction of the number of shares available for trading on the market, and this in turn increases the price of each remaining share left on the market.²⁴

Further, stock buybacks create opportunity costs whereby corporate profits are diverted away from long-term corporate investments and into the pockets of insiders and executives.²⁵ Stock repurchases can be used by company insiders and executives to extract funds from the company, instead of using the funds to further invest in the company and redistribute money to its employees.²⁶ Similarly, stock repurchases can potentially be used to non-transparently inflate executives’ compensation.²⁷ Many executives and corporate insiders

¹⁹ Posner, *supra* note 5

²⁰ *See Id.*

²¹ Palladino, *supra* note 7, at 94 (“[R]epurchases may be used to manipulate stock prices because the very nature of buying back stock means that the remaining shares rise in value.”).

²² *Id.*

²³ *Id.* at 94-95 (“... [T]he main effect of repurchases in the short term is to reduce the number of shares available on the open market for trading, meaning that the value of each remaining share goes up in value.”).

²⁴ *Id.* at 94.

²⁵ *Id.* (Noting harms created by stock buybacks include, “the opportunity cost

that they represent for other uses of corporate profits, from long-term investment to improvements in employee compensation.”).

²⁶ 87 Fed. Reg. 8443, *supra* note 11, at 8 (“Some of these commentators view issuer share repurchases as a tool to raise the price of an issuer’s stock in a way that allows insiders and senior executives to extract value from the issuer instead of using the funds to invest in the issuer and its employees.”).

²⁷ *Id.* at 8-9 (“A further concern raised by some commentators is the potential for share repurchases to be used by issuers as a mechanism to inflate the compensation of their executives in a manner that is not transparent to investors or the market.”).

“hold large amounts of stock and their compensation is often tied to an increase in the company’s earnings per share”²⁸ As a result, stock buybacks create incentives for executives and insiders to engage in these repurchases as a means of bolstering their compensation in exorbitant amounts.²⁹

C. Current Disclosure Requirements

In 2003, the SEC adopted disclosure requirements for purchases of equity securities registered under Section 12 of the Exchange Act; these are the current requirements governing stock buybacks.³⁰ Generally, Section 12 of the Exchange Act requires that issuers register their traded securities with the SEC.³¹ The specific requirements vary depending on the total assets held by the issuer as well as the class of shares held.³² The SEC’s adopted stock buyback disclosure requirements apply to shares traded in both the open and private market.³³ Under the current requirements, issuers are required to

²⁸ Palladino, *supra* note 7, at 95.

²⁹ *Id.* at 95-96 (Noting that issuers’ inside knowledge on stock buybacks, “gives executives a personal incentive to time buybacks so that they can profit off of a rising share price. That means that the decision of whether and when to execute a stock buyback can affect his or her compensation by tens of millions of dollars.”).

³⁰ SEC, FACT SHEET, *supra* note 4, at 1 (“In In 2003, the Commission adopted disclosure requirements for any purchase made by or on behalf of the issuer or any affiliated purchaser of shares or other units of any class of the issuer’s equity securities registered under Section 12 of the Exchange Act.”).

³¹ Paul J. Galanti, 19 Ind. Practice Series *Registration Requirements Under Section 12 of the Securities Exchange Act of 1934* § 35.2, Westlaw (database updated Oct. 2021) (“Section 12 requires the registration of securities traded on a national securities exchange, and classes of securities of corporations or other issuers with total assets in excess of \$5,000,000 which are held of record by 500 or more persons at the end of any fiscal year.”).

³² *See generally* Paul J. Galanti, 19 Ind. Practice Series *Registration Requirements Under Section 12 of the Securities Exchange Act of 1934* § 34.2, Westlaw (database updated Oct. 2021) (noting disclosure requirements for issuers with total assets in excess of \$5,000,000 and \$1,000,000 respectively.).

³³ SEC, FACT SHEET, *supra* note 4, at 1 (“The required disclosure applies to both open market and private transactions and is included in an issuer’s periodic reports.”).

disclose, “the total number of shares (or units) purchased by the issuer or any affiliated purchaser during the relevant period, reported on a monthly basis and by class,” along with the average price of each share.³⁴ Issuers are also required to report, “the total number of shares (or units) purchased as part of a publicly announced repurchase plan or program” and the maximum amount of shares that may be purchased as part of such plan.³⁵ These disclosures are to be made in a company’s periodic reports under Regulation S-K Item 703.³⁶

In addition to these disclosures, the SEC also requires “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.”³⁷ Under the current disclosure requirements, companies are not required to disclose the specific dates of their repurchase plans or programs on which trades will be executed.³⁸ Lacking this requirement, companies typically do not disclose these specific dates.³⁹ This practice, in turn, creates information asymmetries between issuers and investors.⁴⁰

D. SEC’s Proposed Amendments

The current stock buyback disclosure requirements lack transparency, timely reporting of information, and comprehensive disclosures.⁴¹ As a result, information asymmetries are created between issuers and investors, making it difficult for investors to accurately value stock and precluding them from making optimally informed

³⁴ *Id.*

³⁵ *Id.*

³⁶ Posner, *supra* note 5 (“Under current rules adopted in 2003, a company is required to disclose in its periodic reports (including, for foreign private issuers, in Form 20-F) under Reg S-K Item 703...”).

³⁷ SEC, FACT SHEET, *supra* note 4, at 1.

³⁸ Posner, *supra* note 5 (“...companies typically disclose repurchase plans or programs when they are authorized by the board, but ‘are not required to, and typically do not, disclose the specific dates on which they will execute trades.’”).

³⁹ *Id.*

⁴⁰ *Id.* (Noting that issuers’ omission of specific dates repurchases are made creates information asymmetries between issuers and investors.)

⁴¹ 87 Fed. Reg. 8443, *supra* note 11, at 4 (“The proposed amendments are intended to improve the quality, relevance, and timeliness of information related to issuer share repurchases.”).

investments.⁴² Realizing current disclosure requirements were insufficient, the SEC proposed amendments on stock buyback disclosures.⁴³ These proposed amendments, which passed at the end of 2021, increase the detail and frequency required in issuers' disclosures of share repurchases.⁴⁴ In support of the proposal, SEC Chairman Gary Gensler stated that the amendments, "can lessen the information asymmetries between issuers and investors through the timeliness of the disclosures...[and] investors would benefit from the timelines and granularities that [the] proposal would provide."⁴⁵ The proposed amendments include two main changes: daily reports of stock buybacks and enhanced periodic disclosures.⁴⁶

1. Daily Reports of Stock Buybacks

The proposed Exchange Act Rule 13a-21 would require an issuer to report purchases of shares registered under Section 12 of the Exchange Act on a new Form SR each day the issuer makes a stock repurchase.⁴⁷ The issuer would be required to report the purchase on

⁴² *Id.* at 45 ("Generally, a lack of transparency, comprehensive disclosure, and timely information about repurchases may contribute to information asymmetries and thus make it harder for investors to value an issuer's securities and make informed investment decisions.").

⁴³ *Id.* at 1 ("The Securities and Exchange Commission is proposing amendments to modernize and improve disclosure about repurchases of an issuer's equity securities that are registered under Section 12 of the Securities Exchange Act of 1934.").

⁴⁴ SIDLEY AUSTIN LLP, *supra* note 2 ("On December 15, 2021, the U.S. Securities and Exchange Commission (SEC), by a 3-2 vote, proposed amendments to require more frequent and detailed disclosure surrounding repurchases of ... buybacks.").

⁴⁵ Statement, Gary Gensler, Chair, SEC, Statement on Share Repurchase Disclosure Modernization (Dec. 15, 2021), <https://www.sec.gov/news/statement/gensler-share-repurchase-20211215>.

⁴⁶ 87 Fed. Reg. 8443, *supra* note 11, at 1 ("Specifically, the proposed amendments would require an issuer to provide more timely disclosure ... The proposed amendments would also enhance the existing periodic disclosure requirements about these purchases.").

⁴⁷ 87 Fed. Reg. 8443, *supra* note 11, at 11 ("[The SEC is] proposing new Exchange Act Rule 13a-21 and Form SR that would require an issuer ... to report any purchase made by or on behalf of the issuer ... of shares ... of the issuer's equity securities..."); SEC, FACT SHEET, *supra* note 4, at 2 ("The issuer would have to furnish a new Form SR before the end of the first business day following the day on which the issuer executes a share repurchase.").

the Form SR by the very next business day following the day of the share repurchase.⁴⁸ This could potentially amount to daily disclosures if issuers repurchase equity shares on a daily basis.⁴⁹ This proposed rule applies to foreign private issuers and some registered closed-end funds and includes purchases made on behalf of the issuer or by an affiliated purchaser of equity securities.⁵⁰ This newly proposed Form SR would require the disclosure of the following information:

- (1) Identification of the class of securities purchased;
- (2) The total number of shares (or units) purchased, including all issuer repurchases whether or not made pursuant to publicly announced plans or programs;
- (3) The average price paid per share (or unit);
- (4) The aggregate total number of shares (or units) purchased on the open market;
- (5) The aggregate total number of shares (or units) purchased in reliance on the safe harbor in 17 CFR 240.10b-18 (“Rule 10b-18”); and
- (6) The aggregate total number of shares (or units) purchased pursuant to a plan that is intended to satisfy the affirmative defense conditions of Rule 10b5-1(c).⁵¹

All the above information on the new Form SR would be disclosed, for each series or class of securities, in a tabular format organized by date.⁵² The proposed submission deadline of one business day following a share repurchase is aimed at reducing information asymmetries and enabling investors to make informed decisions with

⁴⁸ 87 Fed. Reg. 8443, *supra* note 11, at 11 (“The issuer would have to furnish a new Form SR before the end of the first business day following the day on which the issuer executes a share repurchase.”).

⁴⁹ SIDLEY AUSTIN LLP, *supra* note 2 (“The proposed submission deadline is one business day after execution, potentially triggering daily form submissions when repurchases are made on a daily basis over a period of time.”).

⁵⁰ 87 Fed. Reg. 8443, *supra* note 11, at 11 (Noting how the SEC’s proposed rule would, “require an issuer, including a foreign private issuer and certain registered closed-end funds...” to report stock buybacks).

⁵¹ *Id.* at 12.

⁵² *Id.* (“The Form SR would require the following disclosure in tabular format, by date, for each class or series of securities.”)

respect to their transactions.⁵³ The idea is that the daily reporting of stock buybacks would increase the granularity of information disclosed and close prevalent information gaps.⁵⁴ This increased granularity and detail from the daily disclosures would “enable [investors] to better evaluate the market for the issuer’s securities and the actions of the issuer’s insiders.”⁵⁵ The SEC posits that its proposed daily stock buyback reports may even enable investors to identify opportunistic share repurchases, such as those used by company managers and investors to inflate stock prices.⁵⁶

2. *Enhanced Periodic Disclosures*

The SEC’s proposed rules would also amend Item 703 of Regulation S-K to mandate disclosures of share repurchases in periodic reports.⁵⁷ The proposal would also require changes to Form 20-F and Form N-CSR, requiring additional disclosures about firms’ stock buybacks. Specifically, the proposal would require issuers to disclose:

The objective or rationale for its share repurchases and process or criteria used to determine the amount of repurchases; 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; Whether it made its repurchases pursuant to a plan that is intended to satisfy the affirmative defense conditions of Rule

⁵³ *Id.* at 15 (“The proposed requirement to furnish the daily detail in Form SR ...no later than one business day after execution of the share repurchase order could help alleviate information asymmetries and promote more informed investment decisions.”).

⁵⁴ *Id.* (“The proposed daily detail would provide more granular information to investors that could enable them to better evaluate the market for the issuer’s securities and the actions of the issuer’s insiders.”)

⁵⁵ *Id.*

⁵⁶ *Id.* (Noting that the proposed daily submission deadline “may improve the ability of investors to identify issuer repurchases potentially driven by managerial self-interest, such as seeking to increase the share price prior to an insider sale or to change the value of an option or other form of executive compensation.”).

⁵⁷ Chairman & Soehner, *supra* note 3 (“Through revisions to Regulation S-K Item 703, significantly expand the content of existing periodic disclosures applicable to share repurchases made by companies under the Exchange Act...”).

10b5-1(c), and if so, the date that the plan was adopted or terminated; and Whether purchases were made in reliance on the Rule 10b-18 non-exclusive safe harbor.⁵⁸

As part of the SEC's proposed amendments to Item 703 of Regulation S-K, issuers will also be required to tag information regarding stock buybacks in Inline XBRL.⁵⁹ According to the SEC, Inline XBRL tagging would make disclosures significantly more accessible and available to investors and allow them to make any comparisons or analysis necessary for informed transactions.⁶⁰

E. Effects of the SEC's Proposed Amendments

The SEC's proposed rules affect stock buyback issuers, including domestic issuers, foreign issuers, and registered closed-end funds.⁶¹ According to EDGAR filings and Morningstar Direct data for 2020, the SEC's proposed amendments would affect approximately 5,900 filers of Forms 10-Q and 10-K (domestic issuers); 700 filers of Form 20-F (foreign filers); and 500 Form N-CSR filers (registered closed-end funds).⁶² Additionally, shareholders and investors would be affected by the amendments because they would be privy to more detailed and more timely information regarding issuers' share repurchases, as opposed to waiting for this information via the public

⁵⁸ 87 Fed. Reg. 8443, *supra* note 11, at 22.

⁵⁹ GRABAR & TSU, *supra* note 1, at 8 ("Proposed amendments to Item 703 also require an issuer to tag information disclosed pursuant to Item 703 of Regulation S-K, Item 16E of Form 20-F and Form SR in Inline XBRL...").

⁶⁰ *Id.* ("The SEC claims that Inline XBRL tagging would benefit investors by making these disclosures more readily available and easily accessible to investors for aggregation, comparison, filtering and other analysis.").

⁶¹ SEC, FACT SHEET, *supra* note 4, at 1 ("The proposed amendments would also enhance the existing periodic disclosure requirements about these purchases required to be provided in Form 10-K and Form 10-Q for domestic issuers, Form 20-F for foreign filers, and Form N-CSR for registered closed-end funds."); 87 Fed. Reg. 8443, *supra* note 11, at 34-35.

⁶² 87 Fed. Reg. 8443, *supra* note 11, at 34 ("Based on staff analysis of EDGAR filings for 2020, the proposed amendments would affect the same categories of filers, including approximately 5,900 filers of Forms 10-Q and 10-K and approximately 700 filers of Form 20-F ... approximately 500 registered closed-end funds are expected to be affected by the proposed amendments to Form N-CSR.").

release of companies' periodic reports.⁶³ Timely information about recent stock buybacks is valuable to investors because of the trends in share price that follow directly after a repurchase (with a tendency to increase in price).⁶⁴ Accordingly, "[t]imely disclosure about recent actual repurchases can thus contain valuable information about the future movement of the share price that is not revealed to the market otherwise..."⁶⁵

In addition to daily disclosures and enhanced periodic disclosures, the SEC's proposals would require the use of Inline XBRL to tag information relating to share repurchases.⁶⁶ Inline XBRL is

a structured data language that allows filers to prepare a single document that is both human-readable and machine-readable, so that filers need only prepare one Inline XBRL document rather than generate an HTML document of their financial statement information or risk/return summary information and then tag a copy of the data to create a separate XBRL exhibit.⁶⁷

Inline XBRL tagging would allow investors to perform faster and more efficient analyses and comparisons of various share repurchases on a large-scale through an "automated extraction of granular data" on stock buybacks.⁶⁸

⁶³ *Id.* at 35 ("Shareholders and prospective investors would also be affected by the proposed amendments to the extent that they receive additional and more timely insight into an issuer's repurchase activity.").

⁶⁴ *Id.* at 37-38 ("Information about recent repurchases is expected to be valuable to investors. Various studies argue that an issuer conducts repurchases when it believes its securities to be undervalued ... managers can use increases in distributions, such as new repurchase programs, to signal their view that the stock is undervalued and is expected to increase in the future.").

⁶⁵ *Id.* at 39.

⁶⁶ GRABAR & TSU, *supra* note 1, at 8 ("Proposed amendments to Item 703 also require an issuer to tag information ... in Inline XBRL...").

⁶⁷ *Inline XBRL*, SEC, <https://www.sec.gov/structureddata/osd-inline-xbrl.html> [<https://perma.cc/9MLB-VA48>] (last visited March 14, 2022).

⁶⁸ 87 Fed. Reg. 8443, *supra* note 11, at 50 ("The use of a structured data language (specifically, Inline XBRL) for the repurchase disclosures under the proposed amendments would enable automated extraction of granular data on issuers' repurchase programs and actual repurchases, which could allow investors, information intermediaries, and other market participants to

Proponents of the proposed amendments seek to reduce information asymmetries by providing investors and the public with more timely and detailed information on stock repurchases by issuers.⁶⁹ The proposed amendments would enable investors to more accurately value issuers' securities and make more fully informed investments.⁷⁰ The proposed daily disclosures of issuers' stock buybacks would provide investors with information about a company's expected future share price in a timely manner, as opposed to learning about the repurchase after the transaction has been completed.⁷¹ According to the SEC, the daily disclosures, "could reveal time sensitive information about the issuer's evolving outlook on its future share price to investors in a much timelier manner."⁷² Additionally, the enhanced periodic disclosures detailing the issuers' rationale for, and structure of, repurchases would enable investors to better assess the issuers' stock repurchase program.⁷³ This additional transparency would better enable investors to identify share repurchases that are opportunistic or inefficient.⁷⁴

However, opponents of the proposed rules believe that the amendments are overly burdensome and that supposed problems of opportunistic share repurchases are not actually a significant issue.⁷⁵ Dissenting Commissioner Hester M. Peirce described the proposed amendments as "painfully granular" and as "unnecessarily frequent disclosure obligations."⁷⁶ For example, some issuers use financial

efficiently perform large-scale analyses and comparisons of repurchases across issuers and time periods.").

⁶⁹ *Id.* at 47-48.

⁷⁰ *Id.* at 47 ("The proposed disclosure could benefit investors ... by enabling them to value the issuer's securities more accurately, resulting in better informed investment decisions.").

⁷¹ *Id.* at 48 ("Specifically, the proposed daily disclosure of repurchases ... could reveal time-sensitive information about the issuer's evolving outlook on its future share price to investors in a much timelier manner.").

⁷² *Id.*

⁷³ *Id.* at 49 ("[T]he proposed periodic disclosure of the reasons for, and the structure of, the issuer's repurchase program could improve the ability of investors to assess the optimality of the issuer's repurchase policy.").

⁷⁴ *Id.*

⁷⁵ SIDLEY AUSTIN LLP, *supra* note 2 (Noting that a dissenting Commissioner said that the proposed rules were "overly burdensome."); Statement, Hester M. Peirce, Commissioner, SEC, Dissenting Statement on Buybacks Disclosure Proposal (Dec. 15, 2021) (on file with author).

⁷⁶ Statement, Hester M. Peirce, Commissioner, SEC, Dissenting Statement on Buybacks Disclosure Proposal (Dec. 15, 2021), <https://www.sec.gov/news/statement/peirce-buyback-20211215> ("[The

intermediaries to execute their share repurchases.⁷⁷ With the implementation of the SEC's proposed amendments, financial intermediaries will have to prepare larger amounts of information on behalf of issuers, as mandated by these pending disclosure requirements.⁷⁸ This influx of work will be especially apparent with the daily report proposal. Commissioner Peirce also pushes against the existence of the problem of opportunistic share repurchases, noting that, "studies on the issue are decidedly mixed as to whether this is a real issue."⁷⁹

Moreover, opponents believe that the problem of asymmetric information can be solved through a less burdensome alternative, and that the proposed amendments may even create new problems.⁸⁰ Commissioner Peirce rejects the SEC's proposed amendments and instead suggests limiting information asymmetries "through a more tailored requirement to disclose buyback announcements and terminations."⁸¹ Further, dissenting Commissioner Elad L. Roisman worries that the proposed daily disclosures could enable investors to determine the issuer's upcoming trades, allowing them to trade in advance and potentially drive up stock prices and reduce market efficiency.⁸² As these are still merely proposed amendments, affected

buybacks disclosure] proposal channels some of that rage against repurchases in a way that only a regulator can—through painfully granular, unnecessarily frequent disclosure obligations.”).

⁷⁷ 87 Fed. Reg. 8443, *supra* note 11, at 35.

⁷⁸ *Id.* (“Financial intermediaries that execute repurchases at the issuer’s instruction would also be affected by the proposed amendments to the extent that they have to prepare the information necessary for an issuer’s responsive disclosure, and indirectly, to the extent that the amendments affect the incidence of repurchases and thus demand for financial intermediaries’ services in connection with executing repurchases.”).

⁷⁹ Peirce, *supra* note 76.

⁸⁰ SIDLEY AUSTIN LLP, *supra* note 2 [“[The dissenters] also suggested that any information asymmetries could be addressed with a more tailored and less burdensome approach.”).

⁸¹ Peirce, *supra* note 76.

⁸² Statement, Elad L. Roisman, Commissioner, SEC, Dissenting Statement on Buybacks Disclosure Proposal (Dec. 15, 2021), <https://www.sec.gov/news/statement/roisman-buybacks-20211215> (“I also worry that the proposed daily activity reports could provide a roadmap for traders to figure out the company’s upcoming trades and trade ahead of them. This would artificially raise the stock price for everyone and reduce market efficiency.”).

companies may discuss the proposals with their boards of directors and can even submit comments to the SEC.⁸³

F. Conclusion

Should the SEC's proposed amendments on stock buybacks be adopted, both the frequency with which companies are required to make disclosures and the level of detail of these disclosures would increase. As the disclosure requirements currently stand, inadequate levels of transparency, conformity, and detail have resulted in both information asymmetries between investors and issuers and opportunistic stock repurchases by insiders and executives. While dissenting Commissioners argue that the proposal is overly burdensome and could lead to reduced levels of market efficiency, a majority of the Commissioners support the amendments.

Proponents believe that the SEC's amendments would enable investors to make better informed investments by providing them with more detailed information on issuers' share repurchases. Additionally, by requiring more frequent and timely buyback disclosures, the proposed amendments would reduce information asymmetries between issuers and investors. In light of the three-to-two majority approval of the SEC's proposal, companies should begin considering the disclosures and procedures necessary for their compliance with the proposed rules.

Natalie Ballesteros⁸⁴

⁸³ SIDLEY AUSTIN LLP, *supra* note 2 (“Companies may wish to discuss the proposed rules with their boards and their officers who are responsible for execution and disclosure of corporate buybacks, in order to start considering the processes and disclosures that would be necessary to comply with the proposed rules in the event the SEC adopts them.”).

⁸⁴ Student, Boston University School of Law (J.D. 2023).