U.S. Chamber of Commerce

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September 20, 2022

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

Re: Proposed Rule, Securities and Exchange Commission; Share Repurchase Disclosure Modernization Supplemental Letter; 87 Fed. Reg. 8443 (April 1, 2022)

Dear Ms. Countryman:

The U.S. Chamber of Commerce's (the Chamber) Center for Capital Markets Competitiveness appreciates the Commission taking the time to meet with us on September 1, 2022, to obtain additional information and comments about its proposed Share Repurchase Disclosure Modernization Rule (Proposed Rule). As discussed at our meeting, we are submitting this supplemental letter to memorialize and expand on two comments we provided verbally.

First, the Commission must redo its cost-benefit analysis of the Proposed Rule in light of the Inflation Reduction Act's new excise tax on buybacks.

"The APA's arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained." *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021). As part of that reasoned-decisionmaking requirement, an agency must take stock of a meaningful intervening event that occurs *after* a rule is proposed but *before* it is finalized—after all, if circumstances have changed, the assumptions and analyses that justified the rule in the first place may no longer hold. *See, e.g., Portland Cement Ass'n v. EPA*, 665 F.3d 177, 187 (D.C. Cir. 2011); *see also API v. Johnson*, 541 F. Supp. 2d 165, 185 (D.D.C. 2008) (finding arbitrary and capricious agency failure to consider intervening change in law). That commonsense requirement applies with particular force where, as here, an agency is charged by statute with "appris[ing] itself" of the "economic consequences of a proposed regulation before it decides whether to adopt the measure." *U.S. Chamber of Com. v. SEC*, 412 F.3d 133, 144 (D.C. Cir. 2005).

Here, there are good reasons to think the Inflation Reduction Act's excise tax will have a material effect on the costs and benefits of the Proposed Rule. To name just a few:

- Much of the Proposed Rule was driven by a perceived "growth" in share buybacks, 87 Fed. Reg. at 8445, and the idea that this increased prevalence would justify the notable "fixed" compliance costs that would come with this new disclosure regime, *id.* at 8459. However, following the excise tax, the volume of buybacks will likely decline. Given that lower volume, it is doubtful this already strained tradeoff will continue to hold together. Rather, the fixed costs of the Proposed Rule will likely dwarf any investor benefits.

- The Proposed Rule acknowledges that it may harm investors because it may deter companies from using buybacks even when it "would otherwise be optimal for shareholder value." *Id.* at 8459. It is likely that these harms will be compounded by the new excise tax, because the cost of that tax *plus* the costs of complying with the Proposed Rule may ultimately price out an even greater number of buybacks that otherwise would have been "optimal" for shareholders.

- One of the principal justifications for adopting the Proposed Rule is the notion companies use buybacks opportunistically—to manage earnings, inflate share prices, and the like. As the Chamber wrote before, that is seriously misguided. In all events, the new tax will change the economic calculus behind *any* buyback program. If the Commission determines that the tax itself will sufficiently deter what it sees as "opportunistic" buybacks (as opposed to "optimal" ones), the Proposed Rule may become even more of a regulation in search of a problem.

Given these possible effects of the new buyback excise tax, the Commission must assess the Proposed Rule's costs and benefits afresh. Anything less would be arbitrary and capricious. The Commission cannot reasonably maintain it has "apprised itself" of the Proposed Rule's real world "economic consequences," as required by law, when its economic analysis was performed against a backdrop that no longer exists. In other words, because there is a strong possibility the Inflation Reduction Act's excise tax may have altered the costs and benefits of the Proposed Rule, the Commission is obliged to analyze the Proposed Rule against the *current* landscape before finalizing any regulation.

Thus, *even if* the Commission thinks its original cost-benefit analysis was sound—although, as the Chamber explained in its April 1, 2022 letter, the Proposed Rule harbors serious flaws—the Commission *still* must redo its analysis given that the facts on the ground have materially changed since the Rule was proposed. Although the Commission may decide to stay the course, under the APA, it cannot simply ignore intervening events and stick to its pre-Inflation Reduction Act analysis without, at minimum, first assessing whether that analysis has become outdated. Reasoned

decision-making requires up-to-date information. The Commission may not blind itself to changed circumstances so as to regulate on yesterday's data.

What's more, if the Commission performs a new cost-benefit analysis, it also must provide an appropriate opportunity for the public to comment on that analysis before the rule is finalized.

Second, the Proposed Rule contravenes the First Amendment.

The Supreme Court has made clear that the First Amendment broadly guards against compelled speech, even in the commercial context. *See, e.g., NIFLA v. Becerra*, 138 S. Ct. 2361, 2372 (2018). As then-Judge Kavanaugh summarized the law: "To justify a compelled commercial disclosure, assuming the Government articulates a substantial governmental interest, the Government must show that the disclosure is purely factual, uncontroversial, not unduly burdensome, and reasonably related to the Government's interest," at the very least. *Am. Meat Inst. v. USDA*, 760 F.3d 18, 34 (D.C. Cir. 2014) (*AMI*) (Kavanaugh, J., concurring in the judgment); *see also NIFLA*, 138 S. Ct. at 2372.

The Proposed Rule runs afoul of this established standard. Foremost, its "rationale or objective" disclosure requirement forces companies to provide something *other* than "purely factual, uncontroversial information about the terms under which services will be available." *NIFLA*, 138 S. Ct. at 2732. A company's *reason* for engaging in buybacks is different in kind from the mundane stuff of such rote disclosures. Rather, "[s]hare buybacks are one of the most controversial corporate decisions today." Alex Edmans, Harv. L. S. Forum on Corp. Governance (Oct. 22, 2020), https://bit.ly/3KHOplf. The First Amendment forbids compelling companies to spell out the "rationale or objective" behind these freighted business decisions. *See Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d 518, 530 (D.C. Cir. 2015) (invalidating "conflict mineral" rule).

The rest of the Proposed Rule is similarly infirm. Even when it comes to "purely factual, uncontroversial information about the terms under which services will be available," the Government may not force businesses to speak when doing so would be unduly burdensome or when the disclosures are not adequately tailored to the governmental interests at stake. Even assuming this standard applies to the remainder of the Proposed Rule, it is a "stringent" test, not to be confused with rational basis review or some other deferential lens. *See AMI*, 760 F.3d at 34 (Kavanaugh, J., concurring in the judgment). As the Chamber explained in its April 1, 2022, letter, the burdens of the Proposed Rule far outweigh its purported benefits. Namely, the Proposed Rule fails to explain why monthly disclosures would not be adequate, and it does not acknowledge the compelled-speech burdens that come with a next-day reporting regime. The First Amendment demands more. At minimum, disclosure rules must be adequately tailored and reduce instances of compelled speech where

possible—the present unjustified insistence on next-day reporting falls far short of that command.

In short, the Proposed Rule suffers from two further defects—one procedural, and the other constitutional. The Chamber appreciates the invitation to add these comments to those that we already raised in our April 1, 2022, letter. As we reiterated in our meeting last week, we remain available to assist the Commission on this important issue.

Sincerely,

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