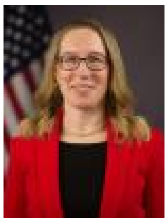
Statement

Dissenting Statement on Buybacks Disclosure Proposal



Commissioner Hester M. Peirce

Dec. 15, 2021

Thank you, Chair Gensler. Both dividends and share repurchases are ways companies return cash to shareholders. Yet, say “dividend,” and nobody gets angry, but say “share buyback,” and the rage boils over. Today’s proposal channels some of that rage against repurchases in a way that only a regulator can—through painfully granular, unnecessarily frequent disclosure obligations. This proposal requires daily repurchase disclosure to be furnished with the Commission one business day after execution. Because I do not support the indirect regulation of corporate activity through disclosure requirements, I respectfully dissent.

Today’s proposal unpersuasively attempts to justify itself by pointing to information asymmetries that may exist between issuers and affiliated purchasers, on the one hand, and investors, on the other. Let me quote from the release here:

> [W]e are concerned that, because issuers are repurchasing their own securities, asymmetries may exist between issuers and affiliated purchasers and investors with regard to information about the issuer and its future prospects. This, in turn, could exacerbate some of the potential harms associated with issuer repurchases.[1]

Why not address such a concern through a more tailored requirement to disclose buyback announcements and terminations?

The release justifies a more burdensome approach by pointing to “opportunistic share repurchases” that may be designed to enhance executive compensation and insider stock value. However, as the footnotes in the economic analysis reveal, studies on the issue are decidedly mixed as to whether this is a real issue. Indeed, as noted in the release, last year the SEC staff reported the results of its study of the 50 firms that repurchased the most stock in 2018 and 2019 and concluded that “82% of the firms reviewed either did not have EPS-linked compensation targets or had EPS targets but their board considered the impact of repurchases when determining whether performance targets were met or in setting the targets.”[2] The staff’s overarching conclusion is also helpful context for today’s proposal:

> [R]easons for repurchases where the connection to efficient investment is less clear are unlikely to motivate the majority of repurchases since stock prices typically increase in response to repurchase announcements, suggesting that, at least on average, repurchases are viewed as having a positive effect on firm value.[3]

Why are we so quick to discount our own staff's recent study on the matter? All data sets and studies have their limitations, and this study is not determinative, but today's proposal might accord it at least as much weight as it accords rumors of opportunism.

Opposition to buybacks is often rooted in the idea that surplus corporate cash ought to be reinvested in the company—in the form of higher salaries for employees, more research and development, new property, plant, and equipment, and so forth—rather than being returned to shareholders. Such an argument assumes that the politician, regulator, or academic making it is in a better position than management to assess corporate opportunities and determine appropriate levels of cash in company coffers. History is replete with examples of central planners allocating resources poorly, and I expect this experiment will end no better.

Thank you to the staff of the Division of Corporation Finance, Division of Economic and Risk Analysis, and Office of General Counsel for your hard work on this release. Although I cannot support it, I greatly appreciate your efforts in preparing it and engaging with my office. I look forward to reviewing comments on the proposal and welcome engagement from the public regardless of your viewpoint.

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[1] Share Repurchase Disclosure Modernization Proposing Release at 10.

[2] SEC Staff Response to Congress: Negative Net Equity Issuance (Dec. 23, 2020), at 42, *available at* https://www.sec.gov/files/negative-net-equity-issuance-dec-2020.pdf.

[3] *Id.* at 6-7.