

MEMO# 33963

December 17, 2021

SEC Proposes New Share Repurchase Disclosures; Member Call Scheduled for January 6 at 2:00 pm (Eastern)

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TO: ICI Members SUBJECTS: Closed-End Funds

Compliance

Disclosure RE: SEC Proposes New Share Repurchase Disclosures; Member Call Scheduled for January 6 at 2:00 pm (Eastern)

On Wednesday, the Securities and Exchange Commission proposed amendments that would require new disclosures when an issuer repurchases its own equity securities.^[1] The proposed amendments would require an issuer, including certain closed-end funds, to provide more timely disclosure on new Form SR regarding its equity securities purchases for each day that it, or an affiliated purchaser, makes a share repurchase.^[2] The proposed amendments also would enhance the existing periodic disclosure requirements about these purchases, including on Form N-CSR for registered closed-end funds. In addition, the proposed amendments would require an issuer to furnish these disclosures with the Commission in a structured data format.

Comments on the proposed amendments are due 45 days after they are published in the *Federal Register*. ICI will have a call to discuss the proposal and potential comments on **Thursday, January 6 at 2:00 pm (Eastern Time)**. If you would like to participate in the call, please contact Nadia Ishmael at nadia.ishmael@ici.org to receive dial-in information. In the meantime, if you have any questions or comments about the proposal, please contact Ken Fang at kenneth.fang@ici.org.

Below we provide the Commission's rationale for, and a summary of, the proposal:

I. Background and Rationale

The Commission proposes the amendments to improve the quality, relevance, and timeliness of information related to issuer share repurchases. It notes that an issuer typically discloses repurchase plans or programs when the issuer's board of directors authorizes the share repurchase, but that an issuer is not required to, and often does not, disclose the specific dates on which it will execute trades. Instead, an issuer executes the

share repurchases over time through open market purchases, and investors and other market participants normally are unaware of the issuer's actual trading activity until it is reported in the issuer's periodic reports. Registered closed-end funds provide this information on Form N-CSR semi-annually.[\[3\]](#)

The Commission acknowledges that share repurchases may maximize shareholder value[\[4\]](#) but raises concerns about them. It cites studies showing that repurchases can serve as a form of earnings management[\[5\]](#) and that insiders and senior executives of the issuer can use repurchases to extract value from the issuer to maximize their compensation instead of using the funds to invest in the issuer and its employees.[\[6\]](#) Thus, it is 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. It believes that the proposed amendments could help address these asymmetries and allow investors to:

- Better understand the extent of an issuer's activity in the market, including potential impacts on the issuer's share price;
- Better understand an issuer's motivation for its repurchases, and how it is executing its purchase plan; and
- Gain potential insight into any relationship between share repurchase and executive compensation and stock sales.

In addition, it believes the proposed amendments could improve the ability of investors to identify repurchases that are more likely to be driven by managerial self-interest and thereby promote investor protection.

II. Proposed Form SR

The Commission proposes new Rule 13a-21 under the Exchange Act and Form SR, which together will require an issuer, including any exchange-listed closed-end fund, to report any purchase made by or on behalf of the issuer or any affiliated purchaser of shares of any class of the issuer's securities that is registered pursuant to Section 12 under the Exchange Act. 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.[\[7\]](#) The form would require the following disclosure in tabular format, by date, for each class or series of securities:

- Identification of the class of securities purchased;
- The total number of shares (or units) purchased, including all issuer repurchases whether or not made pursuant to publicly announced plans or programs;
- The average price paid per share (or unit);
- The aggregate total number of shares (or units) purchased on the open market;
- The aggregate total number of shares (or units) purchased in reliance on the safe harbor in Rule 10b-18 under the Exchange Act;[\[8\]](#) and
- 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) under the Exchange Act.[\[9\]](#)

The Commission would require the information to be furnished, not filed, so the information would not be deemed incorporated by reference into filings under the Securities Act of 1933 and not subject to registration statement liability under Section 11 of the Securities Act.

III. Proposed Revisions to Forms, Including Form N-CSR

In addition to the new form, the Commission proposes to revise and expand the standard share repurchase disclosure requirements in a number of forms, including Form N-CSR.^[10] These proposed amendments would require an issuer to disclose:

- The objective or rationale for its share repurchases and the process or criteria used to determine the amount of the 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 10b5-1(c) under the Exchange Act, 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.

The Commission also proposes to require that issuers disclose if certain of their officers or directors purchased or sold shares or other units of the class of the issuer's equity securities that is the subject of an issuer share repurchase plan or program within 10 business days before or after the announcement of the issuer purchase plan or program.^[11]

IV. Proposed Structured Data Requirement

The Commission proposes to require issuers to tag the share repurchase information disclosed on both the Form SR and Form N-CSR in a structured, machine-readable data language, using Inline eXtensible Business Reporting Language or XBRL.^[12]

Kenneth Fang
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endnotes

^[1] See Share Repurchase Disclosure Modernization, Securities Exchange Act Rel. No. 93783 (Dec. 15, 2021), *available at* <https://www.sec.gov/rules/proposed/2021/34-93783.pdf>.

^[2] An "affiliated purchaser" is: (i) a person acting, directly or indirectly, in concert with the issuer for purpose of acquiring the issuer's securities; or (ii) an affiliate who, directly or indirectly, controls the issuer's purchases of such securities, whose purchases are controlled by the issuer, or whose purchasers are under common control with those of the issuer. See Rule 10b-18(c)(3) under the Securities Exchange Act of 1934. References to issuer repurchases include purchases by affiliates of the issuer and purchases by any person acting on behalf of the issuer or an affiliated purchaser.

^[3] Business development companies provide this information quarterly on Form 10-K or 10-Q.

^[4] The Commission states that issuers often use repurchases to maximize shareholder value, such as to offset share dilution after new stock is issued, to facilitate stock- and stock

option-based employee compensation programs, to help signal the issuer's view that the stock is undervalued, or because the issuer's board has otherwise determined that a repurchase program is a prudent use of the issuer's excess cash.

[5] Share repurchases decrease the denominator of "earnings-per-share" ("EPS") and thus allow an issuer to more easily meet or beat consensus forecasts.

[6] The SEC notes that EPS-based compensation arrangements could incentivize executives to undertake repurchases to maximize their compensation. In addition, it notes that certain executives could enrich themselves in non-transparent ways (e.g., conducting a repurchase when the issuer's stock price is lower than the "stock's actual value" resulting in a value transfer from selling shareholders to non-selling shareholders pro rata, manipulating the stock price and earnings metrics in compensation arrangements, or boosting the stock price before executive sales).

[7] The Commission recognizes that repurchases may not settle until two business days after the transaction is executed. Nevertheless, it proposes the one-business day period because executed orders typically are confirmed and accurately clear and settle. In addition, the proposed amendments would require an issuer to disclose material errors or changes to information previously reported on an amended Form SR.

[8] Rule 10b-18 provides a voluntary, non-exclusive safe harbor from liability for manipulation under the Exchange Act when an issuer or its affiliated purchaser bids for or purchases shares of the issuer's common stock in accordance with the rule's manner, timing, price, and volume conditions.

[9] Rule 10b5-1(c) provides an affirmative defense to insider trading liability in circumstances where it is apparent that the trading was not made on the basis of material non-public information because the trade was pursuant to a binding contract, an instruction to another person to execute the trade for the instructing person's account, or a written plan adopted when the trader was not aware of material non-public information. The rule also provides an affirmative defense for an entity that demonstrates that the individual making the investment decision on behalf of the entity was not aware of material non-public information, and the entity had implemented reasonable policies and procedures to prevent insider trading.

[10] Currently, registered closed-end funds disclose in tabular form, among other items, the following share repurchase information on Form N-CSR: the total number of shares (units) purchased by the issuer or any affiliated purchaser during the relevant period, reported on a monthly basis and by class, including footnote disclosure regarding the number of shares purchased outside of a publicly announced plan or program; the average price paid per share (unit); the total number of shares (or units) purchased as part of a publicly announced repurchase plan or program; and the maximum number (or approximate dollar value) of share (or units) that may yet be purchased under the plans or programs. See Item 9 of Form N-CSR. BDCs disclose substantially similar information in their periodic reports on Forms 10-K and 10-Q. The Commission also would amend the BDC disclosures in parallel to include the same additional information proposed for Form N-CSR.

[11] The officers and directors subject to the requirement are those that must adhere the reporting requirements under Section 16(a) of the Exchange Act. That section requires officers and directors of public companies to file certain "short-swing profit" reports with the SEC.

[12] BDCs would tag the same information in their Forms SR, 10-K, and 10-Q. The Commission notes that registered closed-end funds and BDCs already will be required to tag certain information in Inline XBRL by February 2023. See Securities Offering Reform for Closed-End Investment Companies, Investment Company Act Rel. No. 33836 (June 1, 2020), available at <https://www.sec.gov/rules/final/2020/33-10771.pdf>.

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