

MEMO# 34797

January 12, 2023

ICI Files Supplemental Comment Letter on the SEC's Share Repurchase Disclosure Modernization Proposal

[34797]

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TO: ICI Members SUBJECTS: Closed-End Funds

Disclosure RE: ICI Files Supplemental Comment Letter on the SEC's Share Repurchase Disclosure Modernization Proposal

Yesterday, ICI filed the attached comment letter supplementing our strong recommendation that the Securities and Exchange Commission exclude exchange-traded closed-end investment companies ("funds")[\[1\]](#) from its amendments to modernize share repurchase disclosure ("proposal").[\[2\]](#) The SEC recently reopened the proposal's comment period after analyzing the potential impact of a new excise tax on share repurchases and allowing interested persons the opportunity to comment on the analysis.[\[3\]](#)

Background

The proposal would require an issuer, including a fund, to provide more frequent disclosure on proposed new Form SR describing its equity securities purchases for each day that the issuer, or an affiliated purchaser, purchases its own shares.[\[4\]](#) In addition, the proposal would enhance the existing periodic disclosure required about these purchases.[\[5\]](#)

Summary of ICI's Supplemental Comment Letter

Although the excise tax would have no impact on the vast majority of funds because they are excluded from its scope, our letter states that the very fact that Congress excluded these funds from the excise tax underscores why the Commission also should exclude funds from its proposal.[\[6\]](#) The letter compares the similar rationales for the excise tax and the proposal—to address concerns that share repurchases can serve as a form of earnings management by helping insiders meet or beat consensus forecasts or to extract value from the issuer to maximize insider compensation. It highlights Congress' determination to exclude regulated investment companies (RICs) from the excise tax, as RICs typically do not have employees and use repurchases for routine business purposes and not to advantage insiders or to meet earnings estimates. It asserts that funds, like RICs, typically do not have employees and use repurchases for routine business purposes and not to advantage insiders or meet earnings estimates.[\[7\]](#) It concludes by noting that the stated

concerns of the proposal are misplaced for funds and urges the Commission to exclude them from the rulemaking.^[8]

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Notes

^[1] For purposes of this memo, the term "funds" refers to exchange-traded closed-end investment companies registered under the Investment Company Act of 1940.

^[2] See Share Repurchase Disclosure Modernization, Securities Exchange Act Release No. 93783 (Dec. 15, 2021), available at <https://www.sec.gov/rules/proposed/2021/34-93783.pdf>. For a summary of the proposal, see ICI Memorandum No. 33963 (Dec. 17, 2021), available at <https://www.ici.org/memo33963>. See also Letter from Dorothy Donohue, Deputy General Counsel, Investment Company Institute, to Vanessa A. Countryman, Secretary, Securities and Exchange Commission, dated April 1, 2022 (explaining why the proposal's stated concerns that issuers and their insiders could engage in abusive trading practices to enhance executive compensation and insider stock values or otherwise to profit from insider trading information are misplaced for funds) ("Initial ICI Letter"), available at <https://www.sec.gov/comments/s7-21-21/s72121-20122898-279268.pdf>. For a summary of the Initial ICI Letter, see ICI Memorandum No. 34092 (Apr. 1, 2022), available at <https://www.ici.org/memo34092>.

^[3] See Reopening of Comment Period for Share Repurchase Disclosure Modernization, Securities Exchange Act Release No. 96458 (Dec. 7, 2022), available at <https://www.sec.gov/rules/proposed/2022/34-96458.pdf>. See also Section 10201 of the Inflation Reduction Act of 2022, Public Law 117-169, 136 Stat. 1818 (2022) (adding new Section 4501 of the Internal Revenue Code of 1986 imposing upon certain "covered corporations" a non-deductible excise tax equal to 1 percent of the fair market value of any stock of the corporation that the company repurchases during the taxable year).

^[4] Issuers would need to file the Form SR before the end of the business day following the day on which the issuer executes a share repurchase. The Form SR would require information about the purchases (e.g., identification of the class of securities purchased, the total number of shares purchased, the average price paid per share, the aggregated amount of shares purchased on the open market, and the aggregate total number of shares purchased in reliance on Rule 10b-18 and Rule 10b5-1 under the Securities Exchange Act of 1934).

^[5] Funds would provide this disclosure on Form N-CSR. Currently, the form requires funds to provide information about fund share purchases over the period (e.g., total number of shares purchased, average price paid, number of shares purchased as part of a publicly announced plan or program, maximum number of shares that may yet be purchased), aggregated and reported on a monthly basis. The proposed Form N-CSR amendments would add requirements for a fund 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 repurchases pursuant to a plan that is intended to satisfy the affirmative defense conditions of Rule 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.

[6] The excise tax does not apply to investment companies that are "regulated investment companies" (RICs) under Section 851 of the Internal Revenue Code. Most investment companies that are registered under the Investment Company Act also qualify as RICs under the Internal Revenue Code.

[7] A closed-end investment company could repurchase shares for various routine business activities, such as when it determines that it is in the closed-end investment company's shareholders' best interest to narrow the discount between the fund's market share price and its net asset value and seeks to narrow that discount through the repurchase of shares. In repurchasing its shares, the closed-end investment company's assets would decrease, reducing its assets under management and decreasing the amount of investment advisory fees received.

[8] The letter adds that, as noted in the Initial ICI Letter, if the Commission ultimately determines to impose new requirements on funds, it should at the very least exclude them from the proposed requirement to provide more frequent disclosure on proposed new Form SR.