

MEMO# 35286

May 8, 2023

SEC Adopts Enhanced Share Repurchase Disclosure Requirements

[35286]

May 8, 2023

TO: ICI Members SUBJECTS: Closed-End Funds Compliance
Compliance

Disclosure RE: SEC Adopts Enhanced Share Repurchase Disclosure Requirements

Last week, the Securities and Exchange Commission adopted amendments that will require enhanced disclosure when an issuer repurchases its own equity securities.[\[1\]](#) The amendments will require an issuer, including exchange-traded closed-end funds registered under the Investment Company Act of 1940 (“listed closed-end funds”) and business development companies, to:

- file daily repurchase data either semi-annually (for listed closed-end funds) or quarterly (for BDCs);
- check a box indicating whether certain directors or officers traded in shares of the equity securities shortly before or after the public announcement of the repurchase plan or program;
- provide additional detail regarding the structure of its repurchase program and its share repurchases; and
- for operating company issuers and BDCs, add new quarterly disclosure in certain periodic reports related to an issuer’s adoption and termination of certain trading arrangements.

The amendments also eliminate the requirement for issuers to provide monthly repurchase data in their periodic reports. Issuers will need to furnish the disclosure in a structured, machine-readable data language, using Inline eXtensible Business Reporting Language or XBRL, to make the information readily available for analysis.[\[2\]](#)

Importantly, consistent with ICI’s recommendation, the amendments do not include a proposed requirement that issuers provide quantitative daily repurchase disclosure on a new Form SR within one business day after execution of an issuer’s repurchase.[\[3\]](#)

Listed closed-end funds will be required to comply with the amendments beginning with their semi-annual reports covering the first six-month period that begins on or after January 1, 2024. BDCs will be required to comply with the amendments beginning with their

periodic reports covering the first full fiscal quarter that begins on or after October 1, 2023.

We provide a brief summary of the stated purpose for the amendments and the new disclosure requirements below:

I. Purpose of the Amendments

The SEC adopted the amendments because it believes that the current disclosure regime, which does not require issuers to provide quantitative daily repurchase information or state the objectives or rationales for the repurchases and are reported in the aggregate monthly, does not provide investors with sufficient insight into the efficiency, purposes, and impacts of an issuer's share repurchases. Although the SEC recognizes that the new data provided may not affirmatively establish that a repurchase was undertaken for a particular purpose, it believes the final amendments will promote investor protection by allowing 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 share repurchases, and how it has structured and is executing its purchase plan; and
- Gain potential insight into any relationship between share repurchases and executive compensation and stock sales.

II. Amended Share Repurchase Disclosure Requirements

A. Daily Repurchase Disclosure Made Quarterly

The amendments will require listed closed-end funds to disclose daily repurchase information of their equity securities semi-annually in their semi-annual and annual reports on Form N-CSR. BDCs will disclose such information quarterly in an exhibit to their Forms 10-Q and 10-K (for their fourth fiscal quarter).[\[4\]](#) This information must be disclosed in a table and will include columns for the:

- Date on which the purchases of shares (or units) is executed;
- Class of shares (or units);
- Total number of shares (or units) purchased on this date, regardless of whether made pursuant to publicly announced repurchase plans or programs;
- Average price paid per share (or unit), in US dollars and exclusive of brokerage commission and other execution costs;
- Total number of shares (or units) purchased on this date as part of publicly announced repurchase plans or programs;
- Aggregate maximum number (or approximate dollar value) of shares (or units) that may yet be purchased under the publicly announced repurchase plans or programs;
- Total number of shares (or units) purchased on this date on the open market, which does not include shares (or units) purchased in tender offers, in satisfaction of the registrant's obligations upon exercise of outstanding put options issued by the registrant, or other transactions;
- Total number of shares (or units) purchased on this date that are intended by the registrant to qualify for the safe harbor in Rule 10b-18 under the Securities Exchange Act; and
- Total number of shares (or units) purchased on this date pursuant to a plan that is intended by the registrant to satisfy the affirmative defense conditions of Rule 10b5-1(c) of the Securities Exchange Act.

B. Check-the-Box Disclosure about Director/Officer Transactions

The amendments also will require issuers to check a box if certain of their directors or officers transacted in any class of the issuer's equity securities within four business days before or after the announcement of a share repurchase plan or program or an increase of an existing share repurchase plan or program.^[5]

C. Narrative Disclosure on the Rationale for Repurchases and Policies and Procedures Restricting Insider Transactions

In addition, the amendments will require issuers to provide narrative disclosure regarding: (i) the objectives or rationales for each repurchase plan or program and the process or criteria used to determine the amount of repurchases; and (ii) any policies and procedures relating to officer and director transactions in their securities during a repurchase program, including any restriction on such transactions.^[6]

D. Quarterly Disclosure for BDCs about Rule 10b5-1 Trading Arrangements

In connection with the Commission proposed amendments to Rule 10b5-1 under the Securities Exchange Act, the Commission adopted amendments requiring operating company issuers and BDCs to disclose quarterly whether, during its most recently completed fiscal quarter (the issuer's fourth fiscal quarter in the case of an annual report), the issuer adopted or terminated any contract, instruction, or written plan to purchase or sell its securities intended to satisfy the affirmative defense conditions of Rule 10b5-1(c) under the Securities Exchange Act.^[7] Along with this disclosure, operating company issuers and BDCs must include material terms of the contract, instruction, or written plan (e.g., the date of adoption/termination; the duration of the Rule 10b5-1 trading arrangement; and the aggregate amount of securities to be sold or purchased pursuant to the Rule 10b5-1 trading arrangement).

E. Elimination of Current Monthly Quantitative Repurchase Disclosure

Finally, the amendments eliminate the current requirement that issuers disclose their monthly quantitative repurchase data in their periodic reports.^[8]

Kenneth Fang
Associate General Counsel

Notes

^[1] See Share Repurchase Disclosure Modernization, Securities Exchange Act Rel. No. 97424 (May 3, 2023), available at <https://www.sec.gov/rules/proposed/2021/34-93783.pdf>. References to an issuer repurchase include purchases by affiliates of the issuer and purchases by any person acting on behalf of the issuer or an affiliated purchaser. An "affiliated purchaser" is: (i) a person acting, directly or indirectly, in concert with the issuer for the 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(a)(3) under the Securities Exchange Act of 1934.

^[2] Despite ICI's recommendation to exclude closed-end funds from all of the amendments,

the Commission states that it is subjecting listed closed-end funds to the amendments even though not all of the motivations for corporate issuer share repurchases apply to them. The Commission believes that listed closed-end fund investors will benefit from the opportunity to evaluate the purposes, impacts, and efficiency of share repurchases and to understand the impact of such activity on the value of their investments. ICI expressed our recommendation to exclude closed-end funds from the amendments in two comment letters submitted on the proposal ("ICI Comment Letters"). For a summary of the ICI Comment Letters along with a link to each letter, please see ICI Memorandum No. 34092 and 34797, available at <https://www.ici.org/memo34092> and <https://www.ici.org/memo34797>.

[3] See Share Repurchase Disclosure Modernization, Securities Exchange Act Rel. No. 93783 (Dec. 15, 2021) ("proposing release"), available at <https://www.sec.gov/rules/proposed/2021/34-93783.pdf>. For a summary of the proposing release, please see ICI Memorandum No. 33963, available at <https://www.ici.org/memo33963>. See also ICI Comment Letters.

[4] The Commission believes that providing daily disclosure information on a less frequent than daily basis still will provide investors with important disclosure that address informational deficiencies.

[5] The Commission believes that this "check-the-box" disclosure will assist investors in identifying transactions that warrant closer scrutiny. The officers and directors subject to the requirement are those that are subject to the reporting requirements under Section 16(a) of the Securities Exchange Act. That section requires officers and directors of public companies to file certain "short-swing profit" reports with the SEC.

[6] The Commission believes that the narrative disclosure provides information necessary for investors to understand and evaluate an issuer's share repurchases in a clear and concise manner. It believes that requiring issuers to provide the objective or rationale for a repurchase can provide investors with the proper context to understand the daily quantitative repurchase disclosure and to monitor and evaluate the issuer's share repurchase and its effects on the issuer's securities. It believes that disclosure about the policies and procedures relating to purchases and sales of securities by its directors and officers may aid investors in determining the extent to which an executive's interests may have, at least, in part, motivated repurchases.

The amendments also require disclosure of the number of shares (or units) purchased other than through a publicly announced plan or program, and the nature of such transactions (e.g., whether the purchases were made in open-market transactions, tender offers, etc.), and certain disclosure about publicly announced repurchase plans or programs (e.g., the date each plan or program was announced, the dollar amount approved, and the expiration date of each plan or program). This same information already is required to be disclosed under current rules. See Item 14 of Form N-CSR (for listed closed-end funds) and Item 703 of Regulation S-K (for BDCs).

[7] Rule 10b5-1(c)(1) provides an affirmative defense for insider trading liability when it is apparent that the trading was not made on the basis of material non-public information. The defense applies if a person can demonstrate, among other things, that the trade was made pursuant to a binding contract, an instruction to another person to execute the trade for the instructing person's account, or a written plan for the trading of securities (each, a "trading arrangement"). Rule 10b5-1(c)(2) provides a separate affirmative defense for

entities that demonstrate 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. In December 2021, the Commission proposed new disclosure requirements regarding the adoption, modification, and termination of Rule 10b5-1 trading arrangements. See Rule 10b5-1 and Insider Trading, Securities Exchange Act Rel. No. 93782 (Dec. 15, 2021), available at www.sec.gov/rules/proposed/2021/33-11013.pdf. For a summary of the proposed amendments to Rule 10b5-1, see ICI Memorandum No. 33964, available at <https://www.ici.org/memo33964>. The Commission adopted new Rule 10b5-1 amendments in December 2022. In doing so, the Commission did not adopt proposed amendments to require corresponding disclosure regarding issuer use of such trading arrangements, noting that further consideration of the potential application of the disclosure requirement was warranted. See Insider Trading Arrangements and Related Disclosures, Securities Exchange Act Rel. No. 96492 (Dec. 14, 2022), available at <http://www.sec.gov/rules/final/2022/33-11138.pdf>. For a summary of the adopted Rule 10b5-1 amendments, see ICI Memorandum No. 34823, available at <https://www.ici.org/memo34823>.

[8] The Commission eliminates this requirement in light of the new requirements to disclose daily repurchase data. To the extent that investors, market participants, and others want monthly repurchase data, the Commission reasons that they will be able to collate that data themselves, including by using Inline XBRL.