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April 1, 2022

Ms. Vanessa A. Countryman
Secretary
US Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Share Repurchase Disclosure Modernization (File No. S7-21-21) and Rule 10b5-1 and Insider Trading (File No. S7-20-21)

Dear Ms. Countryman:

The Investment Company Institute¹ strongly recommends that the Securities and Exchange Commission exclude exchange-traded closed-end investment companies² (“funds”) from its proposals to: modernize share repurchase disclosure;³ and update conditions to the affirmative defense from insider trading for certain trading arrangements, grants of options, and gifts of securities.⁴ With the proposals, the Commission intends to address concerns that issuers and their “insiders”⁵ could engage in abusive trading tactics either to increase company share prices to enhance executive compensation and insider stock values or otherwise to profit from insider trading information.

¹ The [Investment Company Institute](http://www.ici.org) (“ICI”) is the leading association representing regulated funds globally, including mutual funds, exchange-traded funds, closed-end funds, and unit investment trusts in the United States, and similar funds offered to investors in jurisdictions worldwide. ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. ICI’s members manage total assets of \$31.0 trillion in the United States, serving more than 100 million US shareholders, and \$10.0 trillion in assets in other jurisdictions. ICI carries out its international work through [ICI Global](http://www.ici.org), with offices in Washington, DC, London, Brussels, and Hong Kong.

² A closed-end investment company generally issues a fixed number of shares that are listed on a national securities exchange or traded in the over-the-counter market. The assets of a closed-end investment company are professionally managed in accordance with its investment objectives and policies, and may be invested in stocks, bonds, and other securities. We use the term “closed-end investment company” in this letter to refer to closed-end investment companies registered under the Investment Company Act of 1940.

³ See *Share Repurchase Disclosure Modernization*, Securities Exchange Act Release No. 93783 (Dec. 15, 2021) (“Share Repurchase Proposal”), available at <https://www.sec.gov/rules/proposed/2021/34-93783.pdf>.

⁴ See *Rule 10b5-1 and Insider Trading*, Securities Exchange Act Release No. 93782 (Jan. 13, 2022) (“Trading Arrangements Proposal”), available at <https://www.sec.gov/rules/proposed/2022/33-11013.pdf>.

⁵ We use the term “insiders” to refer to officers and directors of an issuer.

These stated concerns, however, are misplaced for funds.⁶ Fund insiders have little to no ability or incentive to engage in these practices. Funds are pass-through investment vehicles that, by their nature, inhibit a fund insider's ability to engage in the abusive trading tactics described. Fund market share prices are based primarily on a fund's NAV, which is transparent, computed pursuant to strict pricing requirements, and promptly reflects share repurchases.⁷ The transparency provides fund shareholders with the requisite information to assess the impact that a share repurchase might have on fund share values and neutralizes any information asymmetries that fund insiders otherwise might have over fund shareholders, eliminating the need for funds to separately report repurchases.⁸ Also, fund compensation arrangements generally are not tied to fund market share prices or earnings per share⁹ directly, and we are unaware of any fund insiders who are directly compensated in fund shares or options, giving them little to no incentive to manipulate fund share prices. Accordingly, as we discuss further below, we strongly recommend that the Commission exclude funds from each proposal.

If the Commission ultimately determines to impose the new requirements on funds, at the very least, it should tailor any final rules to account for their unique characteristics.

Below we provide a brief background on funds, fund share repurchases, and fund use of Rule 10b5-1 trading arrangements ("trading arrangements"), then separately discuss each proposal and our corresponding recommendations.

⁶ For purposes of this letter, the term "funds" excludes closed-end investment companies that are not traded on a national securities exchange (*e.g.*, interval funds and tender offer funds) and other investment companies registered under the Investment Company Act. The Share Repurchase Proposal appropriately would not apply to those issuers. We support excluding unlisted entities, such as those issuers, that transact at the shares' net asset value ("NAV") because they repurchase or redeem their shares solely to provide their shareholders with liquidity, leaving no room for manipulation. In addition, we understand that those entities do not implement the types of trading arrangements that are the subject of the Trading Arrangements Proposal.

⁷ Unlike operating companies, which report results quarterly, a fund's share repurchase would be reflected in the fund's NAV calculation generally by the next business day and is refreshed continuously.

⁸ In addition, funds must adopt and implement compliance programs to prevent violations of the federal securities laws that fund chief compliance officers oversee, and fund insiders must adhere to strong fiduciary duties to act in the best interests of the fund and make investment decisions free from conflict. Investment advisers to funds and their employees also are subject to the antifraud provisions of the Investment Advisers Act of 1940 and must adhere to fund and investment adviser codes of ethics. Together, these requirements operate to provide little ability for fund insiders to engage in manipulative practices with respect to the fund.

⁹ Funds do not calculate or disclose earnings per share. Instead, they disclose "Net Investment Income (Loss)" per share and "Net Realized/Unrealized Gain (Loss)" per share. *See* Item 4 of Form N-2. These amounts represent, on a per share basis, investment income after deduction of expenses and the change in value of the fund's investments over the reporting period.

I. Background

Funds are created when they issue a fixed number of common shares to investors during an initial public offering.¹⁰ The market price of the issued shares fluctuates like those of other publicly traded securities based on supply and demand in the marketplace. Once issued, shares of a fund generally are bought and sold by investors in the open market and are not purchased or redeemed directly by the fund—although some funds may adopt stock repurchase programs or periodically tender for shares.

More than 95 percent of funds calculate the value of their portfolios every business day.¹¹ A fund's NAV is calculated by subtracting the fund's liabilities (*e.g.*, accrued fund expenses payable) from the current market value of its assets and dividing by the total number of shares outstanding.¹² The NAV changes as the total value of the underlying portfolio securities rises or falls, or the fund's liabilities change.

Fund market share prices are based primarily on the fund's NAV but, because a fund's shares trade in the stock market based on investor demand, the fund shares may trade at a price higher or lower than its NAV.¹³

A. Fund Share Repurchases

Funds currently repurchase shares for a number of reasons. These could include instances when a fund determines that is in the fund's best interest to narrow the discount between the fund's market share price and its NAV, and seeks to narrow that discount through the repurchase of shares. It also could include instances in which the fund buys shares from existing shareholders to provide additional shares to investors that have opted into a dividend reinvestment plan.¹⁴

A fund seeking to repurchase shares must do so consistent with existing SEC requirements. Before a fund engages in a share repurchase, it must provide advance notice of its intention within the preceding six months by letter or report addressed to shareholders or do so pursuant to a tender offer

¹⁰ Subsequent issuance of common shares can occur through secondary or follow-on offerings, at-the-market offerings, rights offerings, or dividend reinvestments.

¹¹ See ICI, Investment Company Fact Book (2021) at 126, available at https://www.ici.org/system/files/2021-05/2021_factbook.pdf. Others may provide them at weekly intervals.

¹² When market values of an asset are not available, the fund must use "fair value" as determined in good faith by the fund's board of directors. See Section 2(a)(41) under the Investment Company Act. The SEC recently adopted Rule 2a-5 under the Investment Company Act strengthening the process for funds to make fair value determinations.

¹³ A fund market share price that is higher than its NAV is said to be trading at a "premium" to the NAV, while a fund market share price that is lower than its NAV is said to be trading at a "discount" to the NAV.

¹⁴ When a fund's market share price is below its NAV, funds typically purchase shares at market prices to finance the dividend reinvestments. When a fund's share price is trading above its NAV, many funds issue new shares to finance the dividend reinvestments. Funds must describe the material terms of a dividend reinvestment plan in their registration statements and must file the documents setting forth the terms of the dividend reinvestment plan as exhibits to the registration statements. See Item 10.1.e and Item 25.2.e of Form N-2.

submitted to all shareholders of the class to be purchased.¹⁵ For non-tender offer repurchases, the advance notice typically sets forth general information about planned share repurchases. The fund must then repurchase its shares at the lower of the fund's market share price or NAV.¹⁶

In addition, we understand that fund insiders often are not actively engaged in the actual share repurchase process. Instead, they frequently delegate this task to third-party service providers that make such repurchases around certain established parameters.¹⁷

B. Funds' Use of Rule 10b5-1 Trading Arrangements

Rule 10b5-1(c)(1) under the Securities Exchange Act establishes an affirmative defense to liability under Rule 10b-5 thereunder, for insider trading when the trade was pursuant to a trading arrangement (*i.e.*, a binding contract, an instruction to another person to execute the trade for the person's account, or a written plan adopted when the trader was not aware of material non-public information).¹⁸ Funds rarely purchase shares in reliance on Rule 10b5-1(c)(1).¹⁹ The funds that do so may use a trading arrangement as a tool to ensure that the market price of fund shares does not fall too far below the fund's NAV. In these instances, the fund may use a third-party service provider to manage the trading arrangement to maintain the market price of shares, imposing automatic repurchases upon certain conditions (*e.g.*, a fund will repurchase x number of shares if more than y number of shares trade below a set minimum market price during any trading day of a month).

II. Share Repurchase Proposal

The Share Repurchase 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 it, or an affiliated purchaser, purchases its own shares.²⁰ In addition, the proposal would enhance the

¹⁵ See Section 23(c) of the Investment Company Act and Rule 23c-1 thereunder. Rule 13e-4 under the Securities Exchange Act of 1934 sets forth requirements on funds conducting tender offers, including requiring the delivery of detailed notices to fund shareholders about the tender offers.

¹⁶ See Rule 23c-1 under the Investment Company Act.

¹⁷ We note, however, that some smaller fund complexes may handle share repurchases themselves.

¹⁸ In these instances, the SEC reasons that it is apparent that the trading was not made on the basis of material non-public information. Rule 10b5-1(c)(2) under the Securities Exchange Act provides a separate defense for non-natural persons 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.

¹⁹ We understand that funds more commonly rely on the safe harbor in Rule 10b-18 under the Securities Exchange Act. Rule 10b-18 provides a "safe harbor" from liability for manipulation under Sections 9(a)(2) and 10(b) of the Securities Exchange Act and Rule 10b-5 thereunder, when an issuer or its affiliated purchaser bids for or purchases shares of the issuer's common stock in accordance with Rule 10b-18's manner, timing, price, and volume conditions.

²⁰ 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

existing periodic disclosure required about these purchases.²¹ The Commission cites concerns that share repurchases can serve as a form of earnings management by boosting earnings per share to help insiders meet or beat consensus forecasts or use them to extract value from the issuer to maximize their compensation instead of investing in the issuer and its employees.

The Commission proposes the enhanced and more frequent disclosure to address information asymmetries between insiders and investors, enabling investors to:

- better assess the impact of an issuer's share repurchases on the issuer's stock price;
- better understand an issuer's motivation for repurchases and how it is executing its plan; and
- gain potential insight into the relationship between the repurchase and executive compensation and stock sales.

A. Exclude Funds from the Share Repurchase Proposal

We strongly recommend that the Commission exclude funds from any final share repurchase rules, because new requirements are unnecessary to achieve the Commission's policy objectives. The Commission highlights two related concerns for the proposal—that insiders can engage in share repurchases to manage earnings or to enhance executive compensation, each for their own self-interest. The Commission notes that insiders may try to manage earnings to either hit target bonuses through executive compensation or engage in more frequent selling when a share repurchase is

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).

²¹ 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) under the Securities 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.

occurring.²² These concerns do not apply to funds because fund insiders have little to no ability or incentive to use share repurchases for their own benefit.

i. Fund Insiders Have Little to No Ability to Misuse Share Repurchases

Fund insiders have little to no ability to misuse share repurchases for their own self-interest. Unlike operating companies whose inherent values are opaque,²³ funds are pass-through investment vehicles whose market share prices and NAV are based on the values of their underlying assets.²⁴ These values are transparent and would promptly reflect any share repurchases. This transparency provides fund shareholders with timely information to assess the impact that any share repurchase might have on fund share values and determine whether a market share price presents what they believe is a good value. With added information about a fund's NAV to compare market prices to, fund investors have an additional input to consider, neutralizing information asymmetries that fund insiders might have over fund shareholders and eliminating the need for funds to separately report repurchases.

In addition, funds already must comply with strict restrictions on their repurchases, including providing advance notice within the preceding six months before engaging in any repurchases or providing the detailed tender offer information required under the Securities Exchange Act. These requirements serve to better inform shareholders about share repurchases and again address information asymmetries between fund insiders and fund shareholders.

Moreover, like operating companies, fund insiders must adhere to fiduciary duties requiring them to act with a duty of care that is in the fund's best interest and with a duty of loyalty to avoid conflicts of

²² See e.g., Share Repurchase Proposal at nn. 13-19; n. 15 (citing a study showing increased insider selling in quarters where share repurchases were occurring.); cf. n. 17 (citing testimony noting that insiders may use repurchases to enrich themselves at the expense of public investors by conducting a share repurchase when the issuer's stock price is lower than the "stock's actual stock value," resulting in a value transfer from selling shareholders to non-selling shareholders *pro rata*).

²³ Operating companies typically engage in a multitude of activities, and the fundamental value and transaction prices of operating company shares often depend on more variables than a simpler calculation of the value of a fund's portfolio holdings. These variables include a market's assessment of the company's business, management, earnings, cash flows, and the market's perception of its future success. Operating companies are not subject to the same valuation requirements as investment companies, often valuing their assets such as property, plant, and equipment at cost, rather than the current market or fair value. Operating companies also may have intangible assets (e.g., intellectual property or goodwill) and liabilities (e.g., pension plan obligations) that involve estimates and assumptions resulting in highly subjective valuations. Further, they do not compute or disclose NAVs.

²⁴ Funds are subject to important requirements under the Investment Company Act, including valuing their investments under board-approved valuation procedures and ongoing board oversight. Funds generally use market values to value portfolio securities for which market quotations are readily available. When market quotations are not readily available, funds must value portfolio securities and all other assets using "fair value" as determined in good faith by a fund's board. See Section 2(a)(41) and Rule 2a-5 under the Investment Company Act. Funds periodically, often daily, disclose their NAVs and provide fund holdings at least quarterly, to provide an updated picture of their investments and associated values.

interest when making investment decisions.²⁵ In addition, funds must adopt and implement compliance policies and procedures that are reasonably designed to prevent violation of the federal securities laws by the fund that provide for the oversight of compliance by each investment adviser of the fund.²⁶ A fund chief compliance officer, who is approved by and overseen by the fund's board, is responsible for overseeing a fund's compliance program and its effectiveness. In combination, these requirements are designed to prevent fund insiders from engaging in share repurchases to manage a fund's earnings to enhance their compensation or from selling their shares back to a fund during a share repurchase in a manner that fraudulently disadvantages other investors.

Further, fund insiders often are restricted in their ability to commence share repurchases, because they have delegated those responsibilities to service providers who have the discretion to repurchase fund shares when they want, pursuant to established limitations. Outside of the established limitations, fund insiders, like other fund shareholders, typically do not know when these service providers will enter the market and repurchase shares. Without the ability to control the timing of share repurchases, fund insiders have no ability to misuse them for their own benefit.

ii. Fund Insiders Have Little to No Incentive to Misuse Share Repurchases

Fund insiders also have little to no incentive to adjust the market price of their shares through share repurchases. First, fund insider compensation arrangements generally are not tied to fund market share prices or earnings per share directly. In addition, we are unaware of any fund insiders who are compensated in fund shares or stock options. Further, funds do not receive "earnings estimates" from research analysts and, accordingly, fund insiders do not feel pressure to meet those estimates. Instead, funds focus on total return or returns relative to peers or a benchmark and not earnings per share. With compensation that is not directly tied to fund market share prices or earnings per share, no earnings estimates to meet, and share prices that are a function of NAV, which value is updated promptly to reflect the effects of share repurchases, fund insiders have little to no incentive to manipulate either fund market share prices or earnings per share.

Moreover, fund NAVs are transparent and often would reflect a prompt accretion to fund shareholders who do not sell their shares during a fund repurchase, giving fund insiders, unlike other company insiders, an incentive not to sell their shares during such time. This would occur because funds must purchase their shares in accordance with strict requirements under the Investment Company Act, including the requirement that funds purchase shares at the lower of fund market share price or NAV.²⁷ When a fund purchases its shares at a market share price that is lower than NAV,

²⁵ See, e.g., Section 206 of the Investment Advisers Act. See also *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180 (1963). Investment advisers to funds and their employees also must comply with the strong antifraud provisions of the Investment Advisers Act and fund and adviser codes of ethics, which restrict them from employing any device, scheme, or artifice to defraud the fund when buying or selling any security held or to be acquired by the fund, including the fund's shares. See, e.g., Rule 17j-1 under the Investment Company Act; Rule 204A-1 under the Investment Advisers Act.

²⁶ See Rule 38a-1 under the Investment Company Act.

²⁷ See Section 23(c) and Rule 23c-1 under the Investment Company Act. Funds may also purchase their shares through a tender offer offered to all shareholders under the strict requirements of the tender offer rules.

those shares are retired, leaving the fund with fewer outstanding shares but more assets on a per share basis. As a result, remaining shareholders would see a prompt increase or “accretion” to their NAV, and there may be a countervailing incentive for fund insiders and others *not* to sell shares during a share repurchase.

iii. Fund Shareholders Do Not Need Enhanced or More Frequent Disclosure

In addition to preventing insiders from engaging in share repurchases to manage earnings or to enhance executive compensation, the Commission states that the enhanced and more frequent disclosure in the Share Repurchase Proposal would enable investors to better assess the impact of an issuer’s share repurchases on the issuer’s stock price, better understand an issuer’s motivation for repurchases and how it is executing its plan, and gain potential insight into the relationship between the repurchase and executive compensation and stock sales.

Increased disclosure arguably may help interested investors better understand certain aspects of share repurchase plans but, without the overarching concerns of earnings management and executive compensation, the Commission has not demonstrated a need for fund investors or a desire from fund investors to have more frequent or detailed information. Further, funds already provide fund shareholders with fund NAVs, which reflect share repurchases promptly, along with advance notice and information about their share repurchases prior to engaging in them.²⁸ Thus, the Share Repurchase Proposal, as applied to funds, would result in enhanced costs and burdens with little corresponding benefit.²⁹

B. If Funds are Included in the Final Rule, Exclude Them from the Form SR Requirement

If the Commission determines to apply any final requirements to funds, we strongly recommend that it exclude them from the Form SR reporting requirements and, instead, require funds to provide the daily information less frequently in their Form N-CSRs.³⁰ Given the unique characteristics of funds, including their status as pass-through investment vehicles with disclosed NAVs that promptly reflect the effects of share repurchases, and the diminished concerns that fund insiders will misuse share repurchases for their own self-interest, more frequent investor disclosure is unnecessary.

Further, imposing these requirements could exact heavy compliance costs on funds and their shareholders with little corresponding benefit. As noted above, funds engage in share repurchases for

²⁸ See *supra* Section I.A; Section 23(c) of the Investment Company Act and Rule 23c-1 thereunder.

²⁹ Immediately disclosing fund share repurchases also may cause unique harm to funds, due to the prevalence of activist investors. Activist investors may use knowledge of a fund’s share repurchases to further their plans to acquire fund shares at a discount, consistent with their campaigns to extract short-term profits from funds. These campaigns cause significant harm to funds and their long-term shareholders. See, e.g., ICI, Recommendations Regarding the Availability of Closed-End Fund Takeover Defenses (March 2020), available at www.ici.org/system/files/attachments/20_ltr_cef.pdf.

³⁰ Currently, funds provide information about their repurchases on Form N-CSR. This disclosure is aggregated and reported on a monthly basis for each month of the six-month period covered by the Form N-CSR. See *supra* note 21.

a number of reasons, some of which could extend over several consecutive days and which could last over the course of several weeks or months. Under the requirements, many funds would be forced to make constant filings to report their repurchases, increasing costs for their shareholders. For larger fund complexes, multiple funds may engage in repurchases at the same time and each would have a separate obligation to file, increasing the number of filings for the complex by multiples. The sheer number of filings could inundate a fund complex, and investors and others would be given information that over the course of one day would not yield much meaningful insight. Instead, investors and others would need to aggregate the information themselves to achieve any understanding of how share repurchases are being implemented.

Moreover, requiring funds to report their repurchases within one business day after a repurchase currently would not be possible for many funds. It often takes funds that delegate the share repurchase function approximately one business day to receive and verify the information about the repurchases from their service providers. Even funds that don't delegate this function could take the same amount of time for one department (*e.g.*, the portfolio management or capital markets department) to aggregate and verify the repurchases before sending them to another department at the fund adviser (*e.g.*, the operations department). It could then take another day to prepare and file the report.

If the Commission believes that detailed daily information about fund repurchases is necessary, we strongly recommend that it amend the Form N-CSR to require detailed information for each day a repurchase occurred over the period, instead of the current data aggregated for each month over the six-month period covered by the Form N-CSR. Fund investors and others then would be able to review detailed daily transactions over the period to analyze and better assess a fund's share repurchase program.³¹

III. Trading Arrangements Proposal

The Trading Arrangements Proposal would require a person, including a fund, that is using Rule 10b5-1(c)(1) as an affirmative defense to an insider trading charge to adhere to several additional conditions before relying on the defense.³² The proposed conditions would include, among other things, a "cooling-off" period of 30 days after the adoption or modification of a trading arrangement for issuers before any trading can commence.³³ In addition, the proposal would require operating

³¹ If, however, the SEC determines to apply the Form SR requirements to funds, we strongly recommend that it at least apply a *de minimis* repurchase threshold under which a fund would not be required to file the form (*e.g.*, applying a threshold that permits a fund that purchases less than one percent of its total number of shares of that class outstanding not to file the form). A fund's daily repurchases often would not materially impact its NAV. In these instances, disclosure of daily repurchases would provide little relevant information to investors and should not be required.

³² As noted above, Rule 10b5-1(c)(1) provides an affirmative defense to Rule 10b-5 thereunder, for insider trading charges when trades are 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, subject to several conditions. *See supra* note 18 and surrounding text.

³³ Other proposed conditions would:

companies, business development companies, and corporate insiders to provide several additional disclosures. The Commission proposes amending the rule to address regulatory gaps and concerns that corporate insiders and issuers have abused the rule to trade on material non-public information. It cites examples of potentially abusive practices to include the use of multiple overlapping trading arrangements with selective cancellation of certain arrangements or trades on the basis of material non-public information, as well as the initiation or resumption of trading close in time to the adoption or modification of a trading arrangement. In addition, it cites concerns about using trading arrangements to conduct share repurchases to boost the price of the issuer's stock before corporate insider sales.

The Commission proposes the 30-day cooling-off period to address concerns that issuers could misuse the rule to set up trading arrangements that take advantage of material non-public information about an issuer prior to the disclosure of such information.

A. Exclude Funds from the Trading Arrangements Proposal

As with the Share Repurchase Proposal, fund insiders in charge of creating fund trading arrangements have little to no ability or incentive to misuse them. Therefore, it is unnecessary to subject funds to the additional new requirements, and we recommend that the Commission exclude them from any final rules related to the Trading Arrangements Proposal.³⁴

If fund insiders wanted to misuse a fund trading arrangement to boost fund market share prices for their own self-interest, they would have little ability to do so. Fund share values are transparent and are based on the fund's underlying NAVs, which are computed pursuant to strict valuation policies and procedures and disclosed promptly. Further, funds and their insiders are bound by enhanced regulatory requirements and duties that work together to restrict fund insiders from misusing fund trading arrangements in ways that are not in the best interests of the fund.

In addition, as discussed above, fund insider compensation arrangements generally are not tied to share prices or earnings per share directly. Thus, fund insiders would have little to no incentive to use

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- Require a "cooling-off" period of 120 days after the adoption or modification of a trading arrangement for directors or officers;
 - Require a certification from directors and officers that they are not aware of any material non-public information about the issuer or the security when they adopt a trading arrangement and that they are adopting the contract, instruction, or plan in good faith and not to evade insider trading prohibitions;
 - Provide that the affirmative defense does not apply to multiple overlapping Rule 10b5-1 trading arrangements for open market trades in the same class of securities;
 - Limit the availability of the affirmative defense for a single-trade plan to one single-trade plan during any consecutive 12-month period; and
 - Require that a person asserting the affirmative defense to enter the trading arrangement in good faith and not as a plan to evade insider trading prohibitions.

³⁴ Note that our recommendation only is to exclude *funds*, not fund insiders, from any additional conditions related to the Trading Arrangements Proposal.

a trading arrangement to inflate fund share prices or earnings per share to enhance their compensation.³⁵

B. If Funds are Included in the Final Rule, Exclude Them From the 30-Day Cooling-Off Period Requirement

If the Commission determines to subject funds to the enhanced conditions of any final rules related to the Trading Arrangements Proposal, it should at least exclude them from the 30-day cooling-off period for issuers. The Commission proposes the 30-day cooling-off period to address concerns that traders could misuse the rule to set up trading arrangements that immediately use material non-public information. As previously noted, fund insiders would have little to no ability or incentive to cause a fund to use material non-public information for their own self-interest. With little to no ability or incentive for fund insiders to cause a fund to use material non-public information to trade securities, the cooling-off period is unnecessary for funds.

Imposing the requirement would inhibit funds needlessly from quickly creating, adopting, and implementing a legitimate share repurchase plan under a fund trading arrangement that takes advantage of then-current market conditions. For example, a fund may have a market share price that drops significantly below its NAV. Having to wait 30 days to conduct a repurchase could cause the fund's share price to drop even more precipitously during that period and render the trading arrangement under Rule 10b5-1 practically unusable for no good reason.

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³⁵ Also, as discussed above, if the concern is that fund insiders might attempt to boost a fund's market share price before selling their own shares, the generally accretive nature of fund repurchases provides counterincentives to these actions, instead incentivizing fund insiders to *retain* their shares during a fund repurchase.

Ms. Vanessa A. Countryman

April 1, 2022

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ICI and its members appreciate the opportunity to comment on the Share Repurchase Proposal and the Trading Arrangements Proposal. If you have any questions or require any further information, please contact Dorothy Donohue at 202-218-3563 or Kenneth Fang at 202-371-5430.

Sincerely,

/x/ Dorothy Donohue

Dorothy Donohue
Deputy General Counsel

/x/ Kenneth Fang

Kenneth Fang
Associate General Counsel

cc: The Honorable Gary Gensler
The Honorable Hester M. Peirce
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