Vereniging Effecten Uitgevende Ondernemingen

Via Email

Ms. Vanessa Countryman, Secretary,
U.S. Securities and Exchange Commission,
100 F Street,
Washington, DC 20549-1090,
United States.

30 March 2022

Re: **Share Repurchase Disclosure Modernization (File No. S7-21-21)**

I am contacting you on behalf of the *Vereniging Effecten Uitgevende Ondernemingen* ("VEUO"). VEUO is a Dutch representative organization for companies listed on the Euronext Amsterdam. On behalf of our members, VEUO monitors potential regulatory developments in order to ensure that proposed laws and regulations are aligned with the practical needs of the market, and that companies listed on Euronext Amsterdam are not placed at a disadvantage. A number of our members are also foreign private issuers ("FPIs") listed on exchanges in the United States and subject to U.S. periodic reporting requirements under the Securities Exchange Act of 1934, as amended (the "Exchange Act").

This letter provides our view on the SEC's recently proposed rules on Share Repurchase Disclosure Modernization (Release Nos. 34-93783; IC-34440; File No. S7-21-21) (the "Proposed Rules").

Our understanding is that the Proposed Rules would, among other things, require issuers, including FPIs, to report repurchases of any equity securities registered pursuant to Section 12 of the Exchange Act. Such issuers would be required 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 (the "Form SR Requirement"). We have focused primarily on the potential impact of the Form SR Requirement of the Proposed Rules on FPIs.

For the reasons discussed below, we believe the Form SR Requirement should not apply to FPIs. Rather, home country requirements, coupled with annual disclosure of share repurchases pursuant to Item 16E of Form 20-F, have been and will continue to be sufficient to inform the market of any material information with respect to an FPI's share repurchases. We believe that these existing disclosure requirements for FPIs are sufficient to enable U.S. investors to make informed investment decisions with respect to the equity securities of FPIs. Extending the Form SR Requirements to FPIs may also expose many of them to unnecessary and onerous administrative burdens if forced to comply with multiple different share repurchase disclosure regimes (potentially in the United States, as well as under their home country corporate law and governance requirements and pursuant to any other applicable non-US listing requirements).

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Background on the European Regulatory Framework

In the European Union, the Market Abuse Regulation ("EU MAR")[1] has provided a common framework for addressing potential market abuse since it became effective in July 2016.[2] For example, EU MAR contains provisions prohibiting insider dealing and the unlawful disclosure of inside information,[3] as well as prohibitions on market manipulation.[4] However, in recognition of the importance of share repurchases, EU MAR also provides a safe harbor for issuers to establish and implement share repurchase programs without breaching insider dealing, unlawful disclosure or market manipulation rules.[5]

EU MAR imposes a number of conditions for the availability of the safe harbor for issuer share repurchase programs,[6] including:

- The share repurchase program must have as its sole purpose reducing the capital of the issuer, meeting obligations arising under outstanding convertible or exchangeable debt and/or meeting obligations arising under share options programs.

- The issuer cannot repurchase shares while in possession of "inside information".[7]

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1 Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse.

2 Following the end of the Brexit transition period on 31 December 2020, EU MAR was onshored in the United Kingdom and has continued to apply in the United Kingdom in substantially the same manner as in the European Union, including with respect to the safe harbor for share repurchases by issuers. This retained portion of EU law is commonly referred to as "UK MAR" to distinguish it from EU MAR (which remains directly effective in EU jurisdictions).

3 Article 14 of EU MAR.

4 Article 15 of EU MAR.

5 Article 5(1) of EU MAR and Commission Delegated Regulation (EU) 2016/1052 of 8 March 2016 supplementing Regulation (EU) No 596/2014 of the European Parliament and of the Council with regard to regulatory technical standards for the conditions applicable to buy-back programmes and stabilisation measures.

6 The conditions to the EU MAR safe harbor for share repurchases are similar in many respects to the safe harbor provided by Rule 10b-18 under the Exchange Act. Under Rule 10b-18, an issuer (and its affiliated purchasers) may take advantage of a non-exclusive safe harbor from liability if the repurchases satisfy, on a daily basis, each of the rule's four conditions (subject to certain exceptions): (1) one broker or dealer, (2) no opening purchases or purchases shortly prior to scheduled close, (3) no purchases above highest independent bid or last transaction price and (4) cannot exceed 25% of ADTV in the United States for the preceding four weeks. In addition to EU MAR or UK MAR, foreign listing rules or corporate law requirements may impose additional obligations on issuers in connection with share repurchases. For example, in the United Kingdom, UK-incorporated companies are subject to various statutory restrictions and procedural requirements and UK listed companies are subject to various regulatory and other requirements in connection with the purchase of own shares. FPIs with listings in multiple non-US jurisdictions (e.g., listings in both the UK and an EU jurisdiction) may already be subject to the administrative burden of overlapping jurisdiction-specific filing or other administrative requirements.

7 Under EU MAR, "inside information" is defined as information which is non-public, precise, relating directly or indirectly to one or more issuers or to one or more financial instruments and, if it were made public, would be likely to have a significant effect on the price of the issuer's financial instruments or related financial instruments. So long as an issuer has a share repurchase program in effect, the issuer cannot engage in certain activities, including selling shares, trading during a closed period or trading where they have decided to delay public disclosure of inside information (unless the issuer has in place a time-

- Prior to executing any repurchases, the issuer must publish full details of the program, including information regarding the terms of the program, including the purpose of the program, the maximum aggregate purchase price for the repurchases, the maximum number of shares to be repurchased and the duration of the program.

- Repurchases can only be executed on trading venues where the shares are admitted to trading or traded.

- Repurchases cannot be made at a price higher than the higher of the last independent trade and the highest independent bid on the trading venue where the repurchase is executed.

- Repurchases on any trading day may not exceed 25% of the ADTV on the trading venue where the repurchase is executed.

Following any repurchase transaction, issuers are required to disclose information on any repurchases related to the program (i.e., details on the transactions, aggregate number of shares repurchased and weighted average purchase price) both to the relevant regulatory authorities and to the public no later than the end of the seventh trading day following the date of the repurchase transaction. That is, if the issuer carries out share repurchases on a daily basis during the period of program, the issuer will be required to publicly disclose information on the repurchases at least every seventh trading day.

While the format for such disclosures is flexible, the date, time, volume, purchase price and trading venue for each repurchase must be disclosed, typically in tabular format. The public disclosure is required to be included in a press release broadly disseminated through the EU media, and remain available on the issuer's website for a period of five years. As a result, the safe harbor requires an issuer to ensure it has in place disclosure controls and procedures to allow it to fulfill its reporting obligations to the relevant regulatory authorities and the public, and to properly record each transaction and the relevant information.

Responses to Requests for Comment

We very much appreciate the SEC's focus on understanding the potential impact of the Proposed Rules, including the Form SR Requirement, on FPIs, and note the specific requests for comment on FPIs issues in the Proposing Release. Please see below for our responses to these particular items, noting that we have not repeated all of the relevant questions in full, and have split certain questions for convenience.

8A. We have proposed that foreign private issuers would have the same Form SR filing obligations as domestic issuers. Should we exempt all foreign private issuers from the requirement to file a Form SR or provide different requirements?

Yes, all FPIs should be exempt from the Form SR Requirement. We believe that the Form SR Requirement would impose unnecessary and onerous administrative burdens on FPIs by subjecting them to multiple different share repurchase disclosure regimes. Absent an exemption, such FPIs could potentially be subject to disclosure, filing or other obligations in

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scheduled buy-back programme or the buy-back programme is lead managed by an investment firm making independent decisions on timing of purchases).

the United States, as well as under their home country corporate law and governance requirements and pursuant to any other applicable non-US listing requirements.

8B. We note that some foreign private issuers are required to provide daily detailed disclosure in their home jurisdictions. To the extent these issuers file public reports pursuant to their home country requirements with respect to share repurchases, some also file those reports under Form 6-K where the issuer deems those reports material to investors. Should we exempt these foreign private issuers from the Form SR requirement?

Yes, at a minimum, FPIs already subject to a home country share repurchase disclosure regime should be exempt from the Form SR Requirement. As described in detail above, issuers listed in the European Union and the United Kingdom are already subject to disclosure requirements with respect to share repurchases in connection with the safe harbors provided under EU MAR and UK MAR, respectively. We note that the safe harbor contains a number of conditions designed to mitigate the risk of insider dealing or market manipulation in connection with such share repurchases.

As a result, extending the Form SR Requirement to these FPIs would not provide any additional meaningful information regarding the issuer's activities in the market or the execution of the repurchase plan, or provide any meaningful incremental investor protection.

In particular, we would note that the Form SR Requirement would require disclosure of, among other things, the total number of shares purchased in reliance on the safe harbor in Rule 10b-18 and the total number of share purchased pursuant to a plan that is intended to satisfy the affirmative defense conditions of Rule 10b5-1(c). However, these categories are unlikely to be relevant to FPIs repurchasing shares in their home country market and therefore are unlikely to provide any meaningful information to U.S. investors. The SEC has expressly declined to extend the application of the Rule 10b-18 safe harbor to issuer repurchases effected in markets outside of the United States, noting that:

> *The safe harbor was crafted based on the manner in which the securities markets operate in United States. We do not believe currently that a workable rule could be created for universal application both inside and outside the United States, without unnecessarily complicating or undermining the utility of the safe harbor. Nor is there currently a practical way for us to adequately monitor the impact of an issuer's repurchase activity outside the United States. Moreover, many of the non-U.S. markets have their own rules and disclosure requirements regarding issuer repurchase activity, some of which also provide a safe harbor, which should provide issuers with sufficient guidance and protection when repurchasing their securities outside the United States.*[8]

The same principles described above with respect to the application of Rule 10b-18 to share repurchases outside of the United States militate against the extension of the Form SR Requirement to FPIs.

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[8] *Purchases of Certain Equity Securities by the Issuer and Others*, Release No. 33-8335 (Nov. 10, 2003) [68 FR 64952 (Nov. 17, 2003)].

In addition, extending the Form SR Requirement to these FPIs would impose a significant administrative burden on issuers, who would then be forced to comply in full with two (or more) overlapping and inconsistent disclosure regimes, with the accompanying risk that this complexity results in inadvertent non-compliance with the requirements of the various regimes. We expect this development would be viewed very negatively by the FPI community, particularly in light of the SEC's recent (and well-received) efforts on modernization and simplification of disclosure requirements. This also represents a departure from historic deference to home country practice in such matters and a special compliance burden for issuers now forced to monitor this exceptional requirement.

In the event that the SEC nevertheless determines to extend the Form SR Requirement to FPIs, there should be an exemption from the Form SR Requirement for all FPIs which are already subject to a share repurchase disclosure regime (such as those with listings in the European Union or the United Kingdom).

28. We have not proposed exemptions or different requirements from the proposed structured data requirement for foreign private issuers. Should we exempt or provide different requirements from some or all of the proposed amendments for these or other classes of issuers?

Yes, to the extent that the SEC determines to extend the Form SR Requirement to FPIs, it should exempt FPIs from the structured data requirement. As described above, FPIs may already be subject to home country requirements with respect to disclosure of share repurchases. Such home country requirements will almost certainly not require preparation of structured data with the same content and format as the Form SR Requirement. As a result, the structured data requirement would represent an additional and unnecessary administrative burden on FPIs.

33A. Would investors benefit from alternative disclosure and reporting frequencies? For example, would the disclosure remain beneficial to investors if the daily repurchase filing were allowed to be made with a longer time lag, such as one or more business days after settlement? Alternatively, would reporting a summary of daily repurchase activity on a weekly, monthly, or quarterly basis provide valuable information to investors? Further, would reporting repurchase activity on a weekly or monthly basis still be beneficial to investors?

While we believe that FPIs should be exempt from the Form SR Requirement, we would also note that EU MAR provides for disclosure of repurchase transactions no later than the end of the seventh trading day following the date of the relevant transaction. We do not believe that reporting on a more frequent basis would give U.S. investors in FPIs meaningful information.

33B. Which alternative reporting frequency would be most beneficial in the case of foreign private issuers that presently report repurchases on an annual basis on Form 20-F and registered closed-end funds that presently report repurchases on a semi-annual basis on Form N-CSR?

For the purposes of complying with reporting obligations under the Exchange Act, we believe that disclosure of share repurchases on an annual basis pursuant to Item 16E of Form 20-F is sufficient for FPIs. We would note that the information required in response to Item 16E is typically not required in the same format under home country requirements, and therefore

already represents an incremental burden undertaken on an annual basis solely for the purposes of SEC reporting.

40A. Would the proposed disclosure requirements have disproportionate effects on certain categories of issuers? How could such effects be mitigated? Should we exempt some issuers–for example, smaller reporting companies, issuers with few repurchases, registered closed-end funds, foreign private issuers–from all or some of the proposed requirements?

As described above, we believe that the Form SR Requirement would impose a disproportionate burden on FPIs, particularly those already subject to home country share repurchase disclosure requirements. U.S. domestic registrants would not be similarly forced to comply with overlapping and inconsistent disclosure requirements. All FPIs should therefore be exempt from the Form SR Requirement.

40B. What would be the effects of such exemptions on investors' ability to make informed investment decisions?

Many of the SEC's disclosure and periodic reporting requirements acknowledge that home country practice provides an appropriate basis for an investment decision by U.S. investors, particularly in the area of corporate governance and corporate actions. And as noted in the Proposed Rules, certain FPIs already file public reports pursuant to home country requirements with respect to share repurchases, and furnish these reports on Form 6-K where the issuer deems those reports material to investors. We believe that this approach, coupled with annual disclosure of share repurchases pursuant to Item 16E of Form 20-F, is sufficient to inform the market of any material information with respect to an FPI's share repurchases. We therefore do not believe that exempting FPIs from the Form SR Requirement would have a negative effect on the ability of U.S. investors to make informed investment decisions with respect to equity securities of FPIs.

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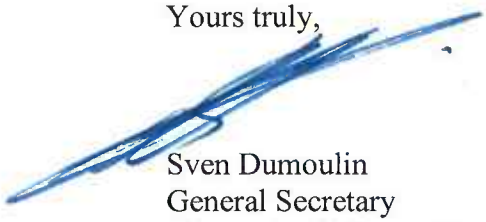
We thank you for the opportunity to provide our view on the Proposed Rules, and would be very happy to discuss our comments or any questions that the SEC may have with respect to the matters addressed in this letter. I can be contacted at +31 20 577 1530.

Yours truly,



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