ASSOCIATION DES BANQUIERS CANADIENS
CANADIAN BANKERS ASSOCIATION

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CONFIDENTIAL

Via Email

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

March 31, 2022

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

The Canadian Bankers Association ("CBA") welcomes the opportunity to comment 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").

The CBA is a professional industry association that provides information, advocacy education and operational support services to its membership of more than 60 domestic and foreign banks operating in Canada. The CBA provides governments and others with a centralized contact for matters relating to banking in Canada, and advocates for public policies that contribute to a sound, thriving banking system to ensure Canadians can succeed in their financial goals. A number of the CBA's members are also foreign private issuers ("FPIs") listed on national securities 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"). The SEC's multijurisdictional disclosure system ("MJDS") for Canadian issuers allows eligible Canadian issuers to register securities under the U.S. Securities Act of 1933, as amended (the "Securities Act") and to register securities and satisfy their reporting obligations under the Exchange Act by use of documents prepared largely in accordance with Canadian requirements.

Because we note that the relevant release did not specifically address Canadian MJDS registrants, our submission is focused on requesting clarification that, consistent with the existing approach to disclosure requirements, the Proposed Rules are not intended to encompass MJDS registrants.

We note that the Proposed Rules would require all in-scope issuers (including FPIs, other than MJDS FPIs, we believe) to report repurchases of any equity securities registered pursuant to Section 12 of the Exchange Act, by furnishing a new daily "Form SR" (which would be a public filing) following any share repurchases (the "Form SR Requirement"). We believe that home country requirements and existing annual and interim disclosure requirements are sufficient to ensure investors receive material information regarding share repurchases. As discussed under "Background on the Canadian Regulatory Framework" below, this is the case for MJDS registrants. As a result, FPIs generally, and in any case

MJDS registrants specifically, should be exempt from the Form SR Requirement in all circumstances.

Clarification Regarding MJDS Registrants

We note that the SEC did not specifically discuss MJDS registrants in the Proposed Rules. We are confident that this is because, since the adoption by the SEC of the MJDS, such registrants are deemed to satisfy the requirements of Regulation 13A pursuant to Rule 13a-3 (§ 240.13a-3 Reporting by Form 40-F registrant), which has been effective since July 1, 1991 as a fundamental part of the MJDS framework. Such Rule specifies that "[a] registrant that is eligible to use Forms 40-F and 6-K and files reports in accordance therewith shall be deemed to satisfy the requirements of Regulation 13A (§§ 240.13a-1 through 240.13a-17 of this chapter)."

The Form SR Requirement is proposed to be added as a new Rule 13a-21 under the Exchange Act. We would request that in the event the SEC adopts Rule 13a-21 that it simultaneously adopts amendments to Rule 13a-3 making clear that MJDS registrants would continue to remain exempt from Regulation 13A requirements, including either: an express reference to Rule 13a-21 (i.e. updating the parenthetical in Rule 13a-3 so that it reads "(§§240.13a-1 through 240.13a-21)"; or simply deleting the parenthetical altogether as unnecessary (we note that it has been out of date for quite some time).

Background on the Canadian Regulatory Framework

We note that the policy considerations underlying the proposed Form SR Requirement are frequently addressed under home country corporate, stock exchange or other requirements. This is certainly the case with respect to MJDS registrants, as Canadian securities laws and stock exchange rules impose a number of requirements in connection with issuer share repurchases.

In the case of "substantial issuer bids" for their own securities (i.e. an issuer self-tender offer for purposes of U.S. rules), issuers may be required to prepare and file a bid circular, keep an offer to repurchase open for a minimum period of time and update the bid circular with any additional material information.[1] The information contained in the bid circular is subject to Chief Executive Officer, Chief Financial Officer and director certification as to the absence of material misstatements or omissions, and any material misstatements would give rise to a statutory right of rescission or damages for the relevant security holders.[2]

There is an exemption from the foregoing requirements if the issuer share repurchases are made in the normal course through the facilities of a designated exchange (e.g., the Toronto Stock Exchange ("TSX") or the TSX Venture Exchange) in accordance with the relevant rules, regulations and policies of such exchange, commonly referred to as a "normal course issuer bid" or "NCIB."[3] In the case of NCIB repurchases executed through the TSX, the relevant rules, regulations and policies impose a number of procedural and substantive requirements,[4] including requiring:

1 Part 2 of National Instrument 62-104 – Take-over Bids and Issuer Bids (NI 62-104).
2 Section 3.3, NI 62-104, Item 31, Form 62-104F2 and section 131(3), Securities Act, R.S.O. 1990, c. S.5).
3 Section 4.1, NI 62-104.
4 Section 628 and section 629 of the TSX Company Manual.

- Notice to the TSX at least two trading days prior to the commencement of repurchases under an NCIB plan.

- Pre-approval of the NCIB plan by the TSX.[5]

- Press release regarding the issuer's intention to commence NCIB repurchases, including the number of securities to be repurchased, the reason for the repurchases, any repurchases by the issuer in the previous 12 months, and whether an automatic securities purchase plan ("ASPP") has been adopted concurrently with the NCIB plan.

- Aggregate limits on the number of securities that may be subject to the NCIB plan (greater of 10% of public float or 5% of outstanding).

- Daily limits on the number of securities repurchased under the NCIB plan (greater of 25% of average daily trading volume and 1,000 securities).

- Designation of a single qualifying broker (i.e., a market participant granted access to TSX's trading system in accordance with TSX's rules) to make all repurchases under the NCIB plan.

- Price for each repurchase cannot exceed the price of the last independent trade.

In addition to these requirements, issuers are required to prepare a monthly report with the details of all repurchase transactions and submit the report to the TSX within 10 days of the end of each month in which repurchase transactions occur.[6] The TSX then publishes lists of securities repurchased under NCIB plans on a periodic basis. An issuer that acquires its own securities under an NCIB is also required to file an insider report for each acquisition of securities via the System for Electronic Disclosure by Insiders (SEDI) within 10 days of the end of each month in which the acquisition occurred.[7] The TSX rules also prohibit any repurchases pursuant to NCIB plans while an issuer is in possession of any undisclosed material information. However, issuers may establish ASPPs to effect scheduled repurchases at times when they ordinarily would not be active in the market due to insider trading rules and their own internal trading blackout periods. ASPPs must be documented by formal written agreements between each issuer and its broker complying with applicable Canadian securities laws,[8] and such agreements are subject to pre-clearance by the TSX and must be publicly disclosed.[9]

Exemption for Foreign Private Issuers

The Proposed Rules requests comments on the potential implications of the Proposed Rules, including the Form SR Requirement, with respect to FPIs. As described above, Canadian issuers are already subject to home country requirements with respect to share repurchases, and we understand that this is also frequently the case for FPIs in other jurisdictions. In our

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5 In addition, Canadian chartered banks and other Canadian financial institutions regulated by the Office of the Superintendent of Financial Institutions ("OSFI") must obtain OSFI's approval before repurchasing any of their outstanding securities or implementing a NCIB plan.

6 TSX Reporting Form 14 — NCIB Monthly Reporting Form.

7 Section 7.1 and 7.2 of National Instrument 55-104 – *Insider Reporting Requirements and Exemptions*.

8 Ontario Securities Commission Staff Notice 55-701.

9 TSX Staff Notice 2016-0001, published January 15, 2016.

view, all FPIs, and certainly MJDS registrants, should be exempt from the Form SR Requirement.

First, we believe that the Form SR Requirement risks imposing significant incremental costs on FPIs subject to multiple different share repurchase disclosure regimes. Deference to home country practice in respect of such corporate and governance matters has historically been viewed by FPIs as minimizing the risk of such overlapping requirements. Extension of the Form SR Requirement to issuers already subject to similar requirements would be viewed as a step in the wrong direction for the efficiency of global capital markets.

Second, even for issuers already subject to home country reporting regimes for share repurchases, the frequency, content and structured data format under the Form SR Requirement will inevitably result in unnecessary duplication of administrative effort.

Third, extending the Form SR Requirement to these FPIs is not likely to 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, the Form SR Requirement purports to require disclosure of, among other things, shares purchased in reliance on the safe harbor in Rule 10b-18 and shares purchased pursuant to a plan that is intended to satisfy the affirmative defense conditions of Rule 10b5-1(c). In our experience, neither of these concepts is relevant to share repurchases outside of the United States, and 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. Rather, the current framework for FPIs (other than MJDS FPIs), providing for annual disclosure of share repurchases pursuant to Item 16E of Form 20-F, coupled with required disclosure (including for MJDS FPIs) of any additional material information with respect to share repurchases on Form 6-K as and when required, is sufficient to inform investors about the nature and magnitude of issuer share repurchases.

In addition, we believe that the SEC has inadvertently included reference to "any officer or director reporting pursuant to Section 16(a) of the Exchange Act (15 U.S.C. 78p(a))" in the instructions to amended Item 16E of Form 20-F. We note that, pursuant to Rule 13a12-3(b) under the Exchange Act, securities of FPIs are exempt from Section 16 of the Exchange Act. As a result, insiders of FPIs are not subject to Section 16 of the Exchange Act, and do not file any reports which would be included in response to amended Item 16E of Form 20-F.

Conclusions

We thank you for the opportunity to provide our view on the Proposed Rules. For the reasons discussed above, we respectfully request that the SEC update Rule 13a-3 to clarify that MJDS registrants are deemed to comply with the Form SR Requirement that would be imposed by proposed Rule 13a-21 and exempt FPIs from the Form SR Requirement in all circumstances.

Yours truly,

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