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January 11, 2023

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

*Re: Reopening of Comment Period for Share Repurchase Disclosure Modernization (File No. S7-21-21)*

Dear Ms. Countryman:

The Investment Company Institute<sup>1</sup> is writing to provide further support for our recommendation that the Securities and Exchange Commission exclude exchange-traded closed-end investment companies<sup>2</sup> from its proposal to modernize share repurchase disclosure.<sup>3</sup> The Commission recently reopened the proposal's comment period after analyzing the potential impact of a new excise tax on share repurchases to allow interested persons the opportunity to comment on the analysis.<sup>4</sup> Although the excise tax will have no impact on the

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<sup>1</sup> The [Investment Company Institute](https://www.ici.org) (ICI) is the leading association representing regulated investment funds. ICI's mission is to strengthen the foundation of the asset management industry for the ultimate benefit of the long-term individual investor. Its members include mutual funds, exchange-traded funds, closed-end funds, and unit investment trusts in the United States, and UCITS and similar funds offered to investors in Europe, Asia and other jurisdictions. Its members manage total assets of \$29.2 trillion in the United States, serving more than 100 million investors, and an additional \$7.4 trillion in assets outside the United States. ICI has offices in Washington, DC, Brussels, London, and Hong Kong and carries out its international work through [ICI Global](https://www.ici.org/global).

<sup>2</sup> 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.

<sup>3</sup> See *Share Repurchase Disclosure Modernization*, Securities Exchange Act Release No. 93783 (Dec. 15, 2021) ("proposal"), available at <https://www.sec.gov/rules/proposed/2021/34-93783.pdf>. 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 closed-end investment companies) ("Initial ICI Letter"), available at <https://www.sec.gov/comments/s7-21-21/s72121-20122898-279268.pdf>.

<sup>4</sup> 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

*continued*

vast majority of closed-end investment companies because they are excluded from its scope, the very fact that Congress excluded these closed-end investment companies from the excise tax underscores why the Commission also should exclude closed-end investment companies from the scope of its proposal.<sup>5</sup>

The original sponsors of the legislation that created the excise tax have stated that its purpose is to tax corporations that use savings from the 2017 corporate tax rate cut to buy back shares of their own stock, further enriching executives and wealthy shareholders, rather than investing in workers or communities. In excluding regulated investment companies (RICs) from the excise tax, Congress recognized that such entities, which typically do not have employees, use repurchases for routine business purposes and not to advantage insiders or to meet earnings estimates.

Much like the sponsors of the legislation, the Commission's stated rationale for the proposal is to address 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 to extract value from the issuer to maximize insider compensation. As we previously noted and as Congress recognized, these stated concerns are misplaced for closed-end investment companies. Closed-end investment companies, like other RICs, typically do not have employees, and use repurchases for routine business purposes and not to advantage insiders or to meet earnings estimates.<sup>6</sup>

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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).

<sup>5</sup> 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 ("registered investment companies") also qualify as RICs under the Internal Revenue Code, though we understand that there are an extremely limited number that do not, including certain closed-end investment companies. Many of these funds do not qualify as RICs because they invest in master limited partnerships in amounts that exceed the 25 percent limit on investments in publicly traded partnerships that apply to RICs.

We believe that Congress intended to exclude all registered investment companies, like RICs, from the excise tax and have sought clarification from the Treasury Department and the Internal Revenue Service that no registered investment companies are subject to the excise tax on stock repurchases. *See* Letter from Karen Lau Gibian, Associate General Counsel, Investment Company Institute, to Tom West, Deputy Assistant Secretary (Tax Policy), US Department of the Treasury, and William Paul, Acting Chief Counsel, Internal Revenue Service, dated December 9, 2022.

<sup>6</sup> 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. We note that, 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.

Subjecting closed-end investment companies to costly requirements intended to address inapt concerns would provide little benefit to these funds and their investors.<sup>7</sup> We therefore urge the Commission to act consistently with the recent legislation and exclude closed-end investment companies from the proposal.<sup>8</sup>

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We appreciate the opportunity to supplement our initial comment letter. If you have any questions or require any further information, please contact Dorothy Donohue at [REDACTED] or Kenneth Fang at [REDACTED].

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  
The Honorable Caroline A. Crenshaw  
The Honorable Mark T. Uyeda  
The Honorable Jaime Lizárraga

William Birdthistle  
Director, Division of Investment Management

Sarah ten Siethoff  
Deputy Director, Division of Investment Management

Quinn Kane  
Special Counsel, Division of Investment Management

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<sup>7</sup> See also Initial ICI Letter.

<sup>8</sup> As we previously noted, if the Commission ultimately determines to impose new requirements on closed-end investment companies, it should tailor any final rules to account for their unique characteristics and, at the very least, exclude them from the proposed requirement to provide more frequent disclosure on proposed new Form SR. *Id.*