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April 1, 2022

Via E-mail: rule-comments@sec.gov

Securities and Exchange Commission,
100 F Street, N.E.,
Washington, DC 20549-1090.

Attention: Vanessa A. Countryman

Re: Share Repurchase Disclosure Modernization – File No. S7-21-21

Ladies and Gentlemen:

We appreciate the opportunity to comment on the Share Repurchase Disclosure Modernization proposal[1] of the Securities and Exchange Commission (the "SEC"). We are supportive of the SEC's initiative to enhance disclosures regarding issuer share repurchases. However, we have significant concerns regarding proposed Form SR, which we discuss in Part II below. In Part III, we note that Canadian issuers reporting under the multi-jurisdictional disclosure system ("MJDS") between Canada and the United States are deemed to comply with Schedule 13A (including the proposed Form SR requirements) and recommend a conforming amendment to Rule 13a-3 of the Securities Exchange Act of 1934 (the "Exchange Act"). As discussed in Part IV, we are supportive of the proposed amendments to Item 703 of Regulation S-K, subject to certain clarifications. We discuss applicability of the proposed rules to foreign private issuers ("FPIs") in Part V. Finally, as discussed in Part VI, if the proposed rules are adopted, we urge the SEC to provide for at least a 12-month transition period between adoption and effectiveness of final rules.

I. Background

Issuers rely on share repurchases to achieve multiple and varied commercial and financial goals, and a variety of share repurchase structures have developed over time to provide issuers with flexibility to achieve these goals. Share repurchase programs allow issuers to return capital to shareholders in a tax efficient manner and to reduce dilution associated with employee equity incentive plans. Shareholders often publicly support buyback programs. In addition, in times of market stress, share repurchases can dampen volatility in stock prices. The SEC has historically

[1] Share Repurchase Disclosure Modernization, 87 Fed. Reg. 8443 (proposed Feb. 15, 2022) (the "Share Repurchase Release").

recognized the low level of potential abuse associated with issuer share repurchase programs and the potential benefits of such programs to shareholders,[2] and, consequently, has declined to unduly restrict share repurchases.[3]

In adopting new disclosure requirements relating to issuer share repurchases, we urge the SEC to carefully consider the impacts, both on issuers as well as investors, of the new requirements. For example, as discussed further below, certain of the new reporting requirements will significantly increase costs for issuers, as well as create the potential for new informational asymmetries that benefit sophisticated, technical and short-term investors at the expense of other investors, particularly retail investors.

Moreover, we note that disclosures pursuant to existing Item 703 of Regulation S-K already provide investors with information quarterly as to whether, and to what extent, and at what average price per share, the issuer has repurchased shares under previously announced plans on a monthly basis. These disclosures have enhanced transparency around issuer share repurchases and provide meaningful information to investors that allows them to analyze the possible impacts of issuer share repurchases. In considering additional, or more frequent disclosures, we urge the SEC to look to Item 703 as a framework that provides meaningful disclosure to investors, while at the same time imposing a manageable burden on issuers.

II. Form SR

We have significant concerns regarding the SEC's proposal to require daily disclosure of share repurchases on Form SR.

We do not support daily reporting of issuer share repurchases on Form SR. Detailed daily disclosures could have significant adverse consequences not only for issuers, but also for market participants, and we do not believe such disclosures will serve to protect investors. As discussed in more detail below, disclosing share repurchases within one business day on Form SR would substantially increase issuers' costs and adversely affect their trading execution. At the same time, such disclosures would create

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2 For example, in connection with the adoption of Rule 10b-18, the SEC noted that "issuer repurchase programs are seldom undertaken with improper intent" and may "frequently be of substantial economic benefit to investors." Purchases of Certain Equity Securities by the Issuer and Others; Adoption of Safe Harbor, 47 Fed. Reg. 53,333, 53,334 (proposed Nov. 26, 1982).

3 *Id*. ("[An] undue restriction of [share repurchase] programs is not in the interest of investors, issuers, or the marketplace.").

asymmetries among categories of investors, create opportunities for front-running and lead to market signaling.

Cost / Burden. Requiring Form SR to be filed within one business day of a share repurchase would impose a significant burden on issuers. On the one hand, large issuers may be in the market frequently and, as a result, required to file Form SRs on nearly a daily basis. On the other hand, smaller issuers who may make less frequent purchases may still incur significant, and potentially outsized, costs in order to comply with this requirement. In addition, as proposed, the rules would apply to closed-end funds, some of which are not large and are frequently in the market to moderate the trading discount and for whom daily reporting would be a significant burden. Reporting on a next-day basis is simply not practicable for any type of issuer.

Front-Running. Daily reporting would result in a significant volume of data being reported, which will be most advantageous to sophisticated, well-resourced technical traders who have the ability to analyze such data and develop algorithms enabling them to predict the undisclosed terms of a plan. Daily reporting of issuer share repurchase activity will create an unintended informational asymmetry between such investors and other investors, especially retail investors. Sophisticated, technical traders could use the algorithms developed based on the information gleaned from daily Form SRs to potentially front-run future orders or manipulate underlying security prices.

Market Signaling. There are many times when an issuer may choose to, or may be required to, cease share repurchases. For example, an issuer may cease share repurchases ahead of a significant acquisition, or an issuer seeking to access the capital markets may cease purchases in advance of a proposed offering in order to comply with the "restricted period" under Regulation M of the Exchange Act. Requiring daily reporting of issuer share repurchases could immediately send a signal—whether correct or not—to the market that an issuer has MNPI, even if the MNPI is not yet ripe for disclosure, or required to be disclosed, thereby sparking speculation or rumors. Any such speculation could in turn lead to distortions in issuers' stock prices.

To the extent that the SEC is concerned about informational asymmetries between issuers and affiliated purchasers, on the one hand, and investors, on the other hand, the existing anti-fraud provisions of the Exchange Act already prohibit issuers and insiders from trading on the basis of MNPI.

Finally, we note that market practice outside of the United States demonstrates certain unintended adverse consequences for both issuers and shareholders arising from required daily reporting of share repurchases. In the Share Repurchase Release, the SEC noted that a limited number of foreign jurisdictions require next-day reporting of repurchase activity. However, as the SEC has acknowledged, issuers in such

jurisdictions only file such reports on Form 6-K when the issuer deems disclosure of share repurchases material to investors. Not all share repurchases rise to the level of needing to be reported on Form 6-K, whereas Form SR would require reporting of *all* share repurchases, regardless of materiality. In addition, we understand that certain issuers in jurisdictions that require daily reporting, such as the United Kingdom, continue repurchasing shares, even when repurchases may not be the most beneficial economic decision for shareholders, merely to avoid the market signaling that could result from suddenly ceasing repurchases. Similarly, issuers in the United Kingdom sometimes purposefully limit their average daily trading volume, even if a larger trading volume could potentially be more beneficial to shareholders, in order to try to ensure that technical traders view the daily share repurchases as immaterial.

As an alternative to daily reporting, the SEC should consider aggregated monthly reporting of share repurchase activity when unreported share repurchases become significant, consistent with the framework in existing Item 703 of Regulation S-K.

We encourage the SEC to use the existing Item 703 framework for reporting share repurchases in lieu of the new proposed daily reporting on Form SR and recommend that issuers be required to report aggregated share repurchase activity for each month based on the existing disclosure framework in Item 703 when unreported share repurchase activity becomes significant. Not only would monthly reporting accelerate the current quarterly requirement for issuers to make disclosures regarding share repurchases, but it would also produce more meaningful data to a broader range of investors, rather than just the sophisticated, technical traders who would be in the best position to analyze daily disclosures. Moreover, monthly disclosures would also be consistent with the current requirement to disclose repurchases for each month within a quarter.

In terms of measuring significance, we believe the disclosure threshold for reporting unregistered sales of equity securities under Item 3.02 of Form 8-K provides the correct framework. Item 3.02 provides that a report needs to be filed if equity securities sold, in the aggregate since the last report filed under Item 3.02 or the last periodic report, whichever is more recent, constitute 1% or more of the shares outstanding of the same class. We believe that the share repurchase framework should provide for the filing of a report including the Item 703 information for any completed month if the shares purchased since the last share repurchase report or the last quarter end covered by a periodic report constitute 1% or more of the shares outstanding.

Accordingly, to the extent the SEC adopts accelerated reporting requirements, we strongly encourage the SEC to model those new reporting requirements on the requirements in existing Item 703, with significance modeled on the reporting requirements in Item 3.02 of Form 8-K.

To the extent the SEC determines to adopt the new Form SR, we strongly urge the SEC to make several clarifications.

To the extent the new Form SR is adopted, we believe the SEC should consider the following clarifications:

- We urge the SEC to consider removing the requirement to identify the total number of shares purchased in reliance on the Rule 10b-18 safe harbor. We encourage the SEC to clarify that issuers should only be required to disclose whether a purchase "was intended to comply" with the Rule 10b-18 safe harbor. For a number of reasons, including interpretive legal questions and the speed at which market quotations of stock prices can change, the determination of whether a purchase in fact complied with the Rule 10-18 safe harbor may be particularly subjective.

- Sections II(b) and (c) of Form SR, which would require disclosures of the total number of shares purchased and the average price paid per share, should be limited in scope. As noted above, we suggest that repurchase disclosure be made no more frequently than on a monthly basis. To the extent the SEC determines to require reporting on a more frequent basis, the SEC should be mindful of the risk that more detailed disclosure of the average price paid per share or daily totals of shares repurchased will create front-running and other risks.

III. Conforming Amendment to Rule 13a-3

The MJDS allows eligible Canadian issuers to register securities under the Securities Act of 1933 and to register securities and satisfy reporting obligations under the Exchange Act by using documents generally prepared in accordance with Canadian law. Although the SEC did not specifically discuss MJDS registrants in the Share Repurchase Proposal, we believe that this is because, since the adoption of the MJDS, Canadian issuers have been deemed to satisfy the requirements of Regulation 13A pursuant to Rule 13a-3. Specifically, Rule 13a-3 provides 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."

The proposed Form SR disclosure requirement, if adopted, would be added as a new Rule 13a-21 under the Exchange Act. Accordingly, if the SEC determines to adopt the proposed Form SR requirement, we would request that the SEC adopt amendments to Rule 13a-3 clarifying that MJDS registrants would continue to remain exempt from Regulation 13A requirements, either by (1) including an express reference to Rule 13a-21 in Rule 13a-3 (*i.e.*, updating the parenthetical in Rule 13a-3 to

read "(§§240.13a-1 through 240.13a-21)") or (2) deleting altogether the parenthetical in Rule 13a-3.[4]

IV. Proposed Amendments to Item 703 of Regulation S-K

We are supportive of the proposed amendments to Item 703 of Regulation S-K, subject to certain modifications.

We support the SEC's proposed amendments to Item 703 of Regulation S-K, but encourage the SEC to consider several important modifications in the final rules.

Checkbox for Officer and Director Sales. The proposed rules would require issuers to indicate by checkbox whether officers or directors have purchased or sold equity securities within ten business days before or after the announcement of the applicable repurchase plan or program. This requirement will result in additional efforts by an issuer to inquire of its officers and directors, on a quarterly basis, whether any such purchases or sales have occurred, as well as require issuers to establish disclosure controls and procedures around that information. The disclosure requirement applies to Section 16 officers and directors, and, accordingly, we respectfully submit that investors will already have access to this information if they would like to determine whether any such purchases or sales have occurred. Accordingly, we urge the SEC to eliminate this requirement in the final rules. If the SEC does choose to retain the requirement, the SEC should add language to the final rule permitting issuers to rely solely on Section 16 reports to determine whether any such purchases or sales have occurred.[5]

Disclosure of Objectives and Rationales for Repurchase Plans. Proposed Item 703(c)(1) would require disclosure of the "objective or rationale for each repurchase plan or program" as well as the "process or criteria" for determining the amount of share repurchases. We urge the SEC to eliminate this requirement. We do not believe that disclosure of objectives or rationales will result in meaningful disclosure for investors, and would only increase the burden on issuers or result in boilerplate disclosures. It also is not clear what sort of disclosures the SEC contemplates in response to this requirement—for example, would issuers need to show financial analyses in order to show their "objective" or "process" or "criteria"? Would issuers be required to disclose their strategic plans? To the extent the intent is to require detailed disclosures of

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[4] We note that this parenthetical has been out-of-date for some time.

[5] We note that the reference in the checkbox to "any officer or director reporting pursuant to Section 16(a) of the Exchange Act (15 U.S.C. 78p(a))" in amended Item 16E of Form 20-F should also be removed to avoid confusion, as FPIs are not subject to Section 16.

processes or criteria, that could enable sophisticated technical investors to analyze and predict the issuer's target pricing information, which would contribute to potential front-running and market manipulation. In addition, requiring issuers to disclosure the criteria for share repurchases could inadvertently result in issuers being required to disclose strategic information regarding significant transactions, such as mergers and acquisitions activity, expected capital expenditures and other competitively-sensitive matters that could be used by competitors. On the other hand, if such detailed disclosures are not required, the remaining disclosure may be little more than boilerplate, which will not be meaningful for investors. We would note that many issuers disclose details regarding their share repurchase plans in the liquidity and capital resources section of their "Management's Discussion and Analysis of Financial Condition and Results of Operations" in their quarterly and annual reports.

Disclosure of Shares Purchased in Reliance on the Rule 10b-18 Safe Harbor. Proposed Item 703(c)(2)(ii) would require disclosure of the number of shares purchased in "reliance on" the Rule 10b-18 safe harbor. We encourage the SEC to clarify that issuers should only be required to disclose whether a purchase "was intended to comply" with the Rule 10b-18 safe harbor. For a number of reasons, including interpretive legal questions and the speed at which market quotations of stock prices can change, the determination of whether a purchase in fact complied with the Rule 10-18 safe harbor may be particularly subjective.[6]

Disclosure of Termination of Rule 10b5-1 Trading Plans. Proposed Item 703(c)(2)(iii) and (3)(v) would require disclosure of the terminations of Rule 10b5-1 trading plans, or determinations not to make further purchases under a plan. Disclosure of termination of a Rule 10b5-1 trading plan could result in investor speculation as to the reasons for any termination and could lead to market speculation regarding mergers and acquisitions or other activity. As a result, we urge the SEC to remove this requirement in the final rules.

V. Applicability of Proposed Rules to Foreign Private Issuers

We urge the SEC to exempt FPIs from the proposed new requirement to furnish Form SR.

We urge the SEC to exempt FPIs from the proposed new requirement to furnish Form SR. Rather, we believe the SEC should retain its historic approach of

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[6] To the extent the final rules subject to FPIs to enhanced annual disclosure requirements for share repurchases under amended Item 16E of Form 20-F, the same change should be made to Item 16E. In addition, as discussed in Part V below, the Rule 10b-18 safe harbor is explicitly not available for purchases by FPIs outside the United States.

permitting FPIs to comply with the more tailored disclosure requirements established by their home country regulators, and to then promptly provide any such material disclosures to U.S. investors on a Form 6-K. Subjecting FPIs to the Form SR disclosure requirement would be inconsistent with the SEC's historical treatment of FPIs and is not necessary for ensuring that U.S. investors receive material information regarding share repurchases by FPIs.

Historically, the SEC's regulation of FPIs' share repurchases has favored allowing FPIs' home countries to regulate how such purchases can be conducted and how such purchases are required to be disclosed. Given the differences in market structures across jurisdictions, allowing home country regulators to determine disclosure standards for share repurchases is particularly important. The SEC has itself in the past noted that FPIs are often subject to home country rules and disclosure requirements regarding issuer share repurchase activity and often conduct share repurchases while benefiting from safe harbors available to them under the rules of their home country or other non-U.S. markets on which their shares trade.[7] Many countries already subject FPIs to regulations intended to prevent market manipulation and insider trading and to requirements to disclose information material to investors in the markets of those countries. Moreover, we note that proposed Form SR would only permit FPIs to indicate whether share repurchases were intended to comply with the Rule 10b-5 affirmative defense or were made pursuant to the Rule 10b-18 safe harbor; however, the Rule 10b-18 safe harbor was intentionally designed to limit its reach into the non-U.S. markets on which FPIs' shares primarily trade.

Requiring FPIs to furnish a Form SR could be particularly burdensome, as many FPIs, including those subject to United Kingdom and European Union listing standards, are already subject to daily home country disclosure requirements. Accordingly, requiring FPIs to furnish Form SRs would result in some FPIs being subject to two different share repurchase disclosure regimes—one in the United States and one in their home country.

Moreover, we do not believe that subjecting FPIs to Form SR disclosure requirements would be useful to U.S. investors, as existing rules already require FPIs to promptly file on Form 6-K material information regarding share repurchases that is disclosed under their home country requirements. In addition, FPIs already disclose their share repurchases on an annual basis under Item 16E of Form 20-F.

To the extent the SEC determines to require FPIs to furnish Form SRs, the SEC should, at a minimum, exempt from this requirement any FPI that already has a

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7 *See* Purchases of Certain Equity Securities by the Issuer and Others; Adoption of Safe Harbor, 47 Fed. Reg. 53,333 (proposed Nov. 26, 1982).

home-country disclosure requirement to report any share repurchase that it would also be required to report on Form SR. In addition, the requirement for an FPI to furnish a Form SR should be limited to reporting of transactions that were executed in the United States.

VI. Transition Period

The SEC should provide for at least a 12-month period between adoption and effectiveness of the rules.

The rules, if adopted, would represent a significant expansion of the disclosure requirements relating to share repurchases. As a result, we think the SEC should provide for at least a 12-month transition period between adoption and effectiveness of the rules, if adopted. If adopted, the proposed rules will require modifications to existing, or adoption of new, policies and procedures, internal reporting processes and disclosure controls and procedures, all of which will require feedback from numerous stakeholders, including internal and external counsel, and possibly require approval by an issuer's board of directors or a committee thereof. Implementation of the Inline XBRL reporting will require development of new taxonomies, which will also take substantial time to implement.

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If you would like to discuss our letter, please feel free to contact Robert W. Reeder III or Catherine M. Clarkin at (212) 558-4000, or Sarah P. Payne at (650) 461-5600.

Very truly yours,

Sullivan & Cromwell LLP