



March 28, 2022

Via electronic submission to rule-comments@sec.gov

Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Share Repurchase Disclosure Modernization, File Number S7-21-21 (the "Release")¹

Dear Sir or Madam:

The Institute for Portfolio Alternatives appreciates the opportunity to comment on the Release. The IPA represents the sponsors of a variety of funds whose securities are registered under the Securities Act of 1933 but are not listed on any exchange, and that engage in the regular, unsolicited repurchase of their shares at a price based upon the net asset value of the underlying assets and liabilities. These funds include NAV real estate investment trusts (REITs) and NAV business development companies (BDCs) (i.e., REITs and BDCs that perpetually offer and periodically redeem their shares at their net asset value), lifecycle REITs and BDCs (i.e., REITs and BDCs that are not continuously offered but do maintain share repurchase programs)², interval funds, and tender-offer funds.³ For purposes of this letter, we will call these together "Nonlisted Funds."

The proposed rule amendments would require an issuer to:

- report its share repurchases on a new Form SR within one business day, disclosing information such as the average price paid per share and the number of shares purchased; and
- periodically disclose the rationale for the repurchases, the process used to determine the amount of repurchases, and whether any of the issuer's officers or directors purchased or sold shares within 10 business days around announcement of the repurchase plan.

¹ <https://www.sec.gov/rules/proposed/2021/34-93783.pdf>.

² While no lifecycle REITs are currently being offered, many are still in an operational phase and continue to be regulated by the Commission.

³ IPA's mission is to ensure that investors have access to alternative investments, with easy-to-understand information about the benefits and the risks, while being well-protected from inappropriate sales practices. Our members include the sponsors of diversifying investments, wirehouse broker-dealers, independent broker-dealers, regional broker-dealers, registered investment advisers, law firms, accounting firms, transfer agents, valuation firms, due diligence firms, and technology firms.

The Commission aims to achieve several laudable objectives. Unfortunately, none of those objectives are relevant to Nonlisted Funds. The proposed rule amendments would apply to Nonlisted Funds that are REITs and BDCs, whose shares are registered under Section 12(g) of the Securities Exchange Act of 1934. The Commission also asks whether they should apply to unlisted closed-end funds, presumably including interval funds and tender-offer funds.⁴

The costs and burdens to Nonlisted Funds of complying with the proposed rule amendments would exceed any benefit to investors and market participants. Because their shares are not listed on any exchange, Nonlisted Funds repurchase their shares solely to provide liquidity to their shareholders. Moreover, they do so at the net asset value per share, which is calculated taking into account the value of each fund's assets and liabilities.

Nonlisted Funds present none of the concerns that the Commission describes in the Release. Indeed, the Commission's economic analysis ignored the potential impact of the proposed rule amendments on Nonlisted Fund investors and issuers. Application of the proposed rule amendments to Nonlisted Funds would not promote capital formation, efficiency, or competition.⁵

We urge the Commission to exclude all Nonlisted Funds from the proposed rule amendments. In order to effect our recommendation the Commission might limit application of the proposed rule amendments to shares registered under Section 12(b) of the Securities Exchange Act.

1. Nonlisted Fund Repurchase Programs Offer Liquidity.

Nonlisted Funds engage in the periodic repurchase of their shares under publicly disclosed share repurchase programs. As there is no public market for their shares, the sole reason for Nonlisted Fund share repurchase programs is to provide shareholders with liquidity.

Nonlisted Funds repurchase their shares daily, monthly or quarterly at a valuation per share, depending upon the type and structure of the Nonlisted Fund, based upon the net asset value of the underlying assets and liabilities.⁶ Nonlisted Funds establish the net asset value through a rigorous valuation process. They retain an independent valuation advisor who provides material assistance in the valuation process by appraising all of the portfolio assets at least once a year and in some cases quarterly. The appraisal and valuation process is subject to the oversight of the Nonlisted Fund's board of directors, including a majority of the independent directors, which has a fiduciary duty to the Nonlisted Fund's shareholders.

⁴ The shares of closed-end interval funds and tender-offer funds are not registered under the Securities Exchange Act of 1934.

⁵ See Section 3(f) of the Securities Exchange Act and Section 2(c) of the Investment Company Act of 1940. See also Section 23(a)(2) of the Securities Exchange Act (prohibiting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Securities Exchange Act).

⁶ Some lifecycle funds repurchase their shares at a discount to net asset value.

The repurchase programs of Nonlisted Funds also meet the following requirements:

- The repurchase price per share is based upon NAV and is not affected by the volume of repurchases or by the supply and demand for the shares.
- Nonlisted Funds periodically repurchase a percentage of their shares and disclose the percentages and calendar periods for repurchase. The percentages and frequency of their repurchases depend upon the type and structure of the Nonlisted Fund.
- A Nonlisted Fund's share repurchase program is intended to remain open indefinitely for the life of the Nonlisted Fund unless modified or suspended by the Nonlisted Fund's board of directors.
- All material information relating to the share repurchase program is fully and timely disclosed to all stockholders, including in the prospectus.
- Nonlisted Fund common shares are not listed on any exchange, so these repurchases afford needed liquidity to their shareholders. Repurchases are made directly from the shareholders.
- Nonlisted Funds disclose their structure, their intention to periodically repurchase shares based on requests received from shareholders, and any limitations on those repurchases in their prospectuses or Form 8-K's and on their website. They periodically disclose the NAV per share for any repurchase in prospectus supplements filed on EDGAR and make the NAV per share available on the Nonlisted Fund's website.
- Nonlisted Funds do not solicit repurchases under the share repurchase programs. Repurchases occur only at the request of shareholders and not at the recommendation, behest, invitation or encouragement of the Nonlisted Fund.
- Shareholders may withdraw their request to repurchase before the date the repurchase is completed.
- All repurchase requests up to the percentage limits are accepted.⁷ If any limit is reached, then all repurchase requests are processed on a pro rata basis.
- Every quarter, NAV REITs and BDCs disclose their repurchases under Item 703 of Regulation S-K.

⁷ The board of directors of some Nonlisted Funds may at their discretion change the percentages or suspend the repurchase program under extraordinary circumstances.

- Rule 23c-3 under the Investment Company Act governs the periodic repurchase of shares by interval funds.
- Section 23(c)(2) of the Investment Company Act and Rule 13e-4 of the Securities Exchange Act govern the repurchase of shares by tender-offer funds.
- The Commission staff has provided no-action relief concerning Nonlisted Fund repurchase programs under Rule 13e-4 of the Securities Exchange Act.⁸
- Nonlisted Funds are exempt from Regulation M under the Securities Exchange Act.⁹

These conditions render inapplicable the concerns that the Commission expressed in the Release.

2. *The Commission's Economic Analysis Did Not Consider the Impact on Nonlisted Funds*

The Release states that the Commission has “considered the economic effects of the proposed amendments, including their effects on competition, efficiency, and capital formation.”¹⁰ Unfortunately, the Commission’s economic analysis did not consider the potential effects of the proposed rule amendments on Nonlisted Fund investors or issuers.

Although the proposed rule amendments would apply to Nonlisted REITs and BDCs, the economic analysis makes no mention of the former and scant reference to the latter. The economic analysis fails to recognize that Nonlisted Fund repurchase programs are unlike a corporate issuer’s undisclosed share repurchases, and that the concerns with corporate repurchases are not present in Nonlisted Fund repurchase programs.

The assumptions upon which the Commission’s economic analysis is founded are not applicable to Nonlisted Funds. For example, the economic analysis says that the proposed rule amendments could help investors identify “short-term attempts to boost the share price”¹¹ and decrease “the information asymmetry between issuers and investors about the value of an issuer’s securities.”¹² Nonlisted Funds engage in share repurchases at a price based upon the NAV of the underlying assets and liabilities, do not

⁸ See, e.g., *Re: Blackstone Real Estate Income Trust, Inc.* (September 12, 2016) (monthly repurchases); *Jones Lang LaSalle Income Property Trust, Inc.* (October 11, 2012) (daily repurchases).

⁹ See, e.g., Regulation M, Rule 102(b)(2) (interval funds and tender offer funds); *Class Exemptive Letter Granted to Alston & Bird LLP* (October 22, 2007) (NAV REITs).

¹⁰ Release at 32.

¹¹ Release at 50.

¹² Release at 52.

list their shares on any exchange and do not “boost their share price” by repurchasing their shares. The valuation of their shares presents no “information asymmetry” since it is derived from the NAV of the underlying assets and liabilities, which the Nonlisted Fund fully discloses to shareholders before each repurchase.

Some Nonlisted Funds repurchase their shares daily at the published NAV in accordance with their share repurchase plans. The proposed rule amendments would burden those issuers with the requirement of filing a proposed Form SR every business day with no benefit to its investors or to market participants.

The economic analysis simply overlooked the potential impact of the proposed rule amendments on Nonlisted Fund investors and issuers. Nevertheless, the proposed rule amendments apply to many of those funds. The Commission has failed to meet its burden of considering the effect of the proposed rule amendments on capital formation, efficiency, and competition.

3. *None of the Proposed Objectives Are Relevant to Nonlisted Funds*

The Commission designed the proposed rule amendments for issuers that engage in the sporadic repurchase of their shares in a secondary market. According to the Commission, these repurchases may be unknown to market participants until the repurchases “are reported in an issuer’s periodic reports, long after the trades have been executed.”¹³ Nonlisted Funds engage in regular, publicly disclosed repurchase programs not on a secondary market, but directly with shareholders, in order to provide those shareholders with liquidity. They establish their repurchase programs at the Nonlisted Fund’s inception and disclose in advance each repurchase and the NAV per share at which the repurchase will occur.¹⁴

The Release discloses that the Commission hopes to achieve the following objectives:

- **Discourage Issuers from “Managing” their Earnings.** The Commission is concerned that “repurchases can serve as a form of real earnings management (through decreasing the denominator of earnings-per-share (“EPS”)) and thus be subject to short-term earnings management objectives of an executive seeking to meet or beat consensus forecasts.”¹⁵
- **Discourage Issuers from Repurchasing to Enhance Executive Compensation.** The Commission also believes that:

¹³ Release at 4.

¹⁴ While most Nonlisted Funds repurchase shares on a monthly or quarterly basis where the repurchase price is published in advance, certain Nonlisted Funds repurchase shares on a daily basis using a forward-pricing mechanism similar to mutual funds.

¹⁵ Release at 7-8 (footnote omitted).

because announcements of repurchases and actual repurchase trades can . . . effect short-term upward price pressure, share price- or EPS-tied compensation arrangements could incentivize executives to undertake repurchases in an attempt to maximize their compensation.¹⁶

- **Prevent Issuers from Manipulating Their Stock.** In requesting comment about the possible application of the proposed rule amendments to closed-end funds, the Commission says:

Abuses can . . . occur when a registered closed-end fund engages in repurchases of its shares, including attempts to create an appearance that the value of the shares was steady or rising in an effort to influence the market to aid in the distribution of new shares or to manipulate the market value of securities involved in exchanges.¹⁷

- **Enhance Investors’ Ability to Value an Issuer’s Stock.** In establishing its baseline, the economic analysis similarly posits that “[i]nformation about recent repurchases is expected to be valuable to investors.” As the Release says:

Generally, a lack of transparency, comprehensive disclosure, and timely information about repurchases may contribute to information asymmetries and thus make it harder for investors to value an issuer’s securities and make informed investment decisions.¹⁸

- **Enhance Investors’ Ability to Evaluate the Optimality of Repurchases.** The economic analysis states that “the proposed periodic disclosure of the reasons for, and the structure of, the issuer’s repurchase program could improve the ability of investors to assess the optimality of the issuer’s repurchase policy.”¹⁹

None of these objectives are relevant to Nonlisted Funds.

- **Nonlisted Funds Cannot “Manage” Earnings, Boost Executive Compensation, or Manipulate Share Value Through Their Repurchase Programs.**

The repurchase price for Nonlisted Fund shares is based upon the NAV of the underlying assets and liabilities. It is not derived from active trading on a stock exchange and the related supply and demand

¹⁶ Release at 8 (footnote omitted).

¹⁷ Release at 62.

¹⁸ Release at 45.

¹⁹ Release at 49.

dynamics, nor is it the subject of speculation based upon expected earnings or other operating metrics. Nonlisted Fund executive compensation is not tied to the Nonlisted Fund’s “earnings-per-share.”

The repurchase of Nonlisted Fund shares has no effect on the repurchase or sales price of those shares, since it is based upon the NAV of the underlying assets and liabilities and does not take into consideration the volume of shares repurchased. These repurchase programs cannot be employed to boost the share price or “manipulate” the value of Nonlisted Fund shares.

- **The Proposal is Unnecessary to Value Nonlisted Fund Shares or Evaluate the Optimality of Repurchases.**

Unlike corporate issuers, Nonlisted Funds present no “information asymmetries” concerning the value of their shares. The value of their shares is based upon the NAV of the underlying assets and liabilities and disclosed to shareholders in advance of each repurchase. Moreover, there is no mystery concerning the purposes of the repurchase program, which is simply to provide liquidity to their shareholders.

* * *

To summarize, the conditions and structure of the repurchase programs of Nonlisted Funds present none of the dangers about which the Commission is concerned. These programs can have no effect on the Nonlisted Fund’s share price, its earnings-per-share, or the compensation paid to executives of its sponsor or other affiliates. The objectives of the proposed rule amendments are irrelevant to Nonlisted Fund repurchase programs.

4. *The Costs and Burdens to Nonlisted Funds Would Exceed Any Possible Benefit*

The costs and burdens on Nonlisted Funds from the proposed rule amendments would exceed any benefit to investors or other market participants. For example, the requirement that issuers disclose in Form SR the average price per share paid and the number of shares purchased on the open market is simply anomalous for Nonlisted Funds. The repurchase price per share is based upon the NAV of the underlying assets and liabilities, and Nonlisted Funds do not purchase shares on a secondary market. Similarly, the proposed requirement to periodically disclose the objective or rationale for the repurchase and the process or criteria used to determine the amount of repurchases is unnecessary when the issuer is a Nonlisted Fund as Nonlisted Fund repurchases are initiated by the Nonlisted Fund’s shareholders. The objective for a Nonlisted Fund repurchase plan is simply to provide liquidity to shareholders.

Yet the costs of complying would be significant. As the Commission admits:

The aggregate direct costs of compliance would be potentially significant and would be largest for issuers that repurchase more frequently and thus have to provide more disclosures . . . The proposed qualitative disclosure requirements would also result in compliance costs for issuers. While issuers are likely to have most of the additional

information readily available, these disclosures would require additional time of counsel and/or management to characterize the rationale for the repurchase program, and the program's structure, in the periodic report. The proposed requirements to disclose whether any Section 16 officer or director purchased or sold securities in the 10 business day *[sic]* before or after a repurchase announcement would involve costs associated with collecting information from Section 16 reporting officers and directors, in reliance on their Section 16 filings and/or representations about their trading activity.²⁰

Those costs would include the costs to compile the information necessary for the disclosure and to report daily repurchase data and other required disclosure.²¹ The burden would be exacerbated by the fact that the daily disclosure would have to occur within one day of trade execution (and before settlement), creating the possibility that material changes would have to be disclosed on amended Form SRs. As the Commission says, "Issuers will likely incur an initial upfront cost to train counsel or retain an outside service provider to assist with the preparation of the new form."²²

The burden to comply with the reporting requirements would be even greater for NAV REITs that have a share repurchase program whereby shares are repurchased each business day during the year. This additional burden could require up to an additional 261 filings in a given year assuming that a repurchase request is made and processed on each business day.

The costs of Nonlisted Fund compliance with the proposed amendments would exceed any benefit to investors or other market participants. We urge the Commission to exclude all Nonlisted Funds from the proposed rule amendments. In order to effect our recommendation the Commission might limit application of the proposed rule amendments to shares registered under Section 12(b) of the Securities Exchange Act.

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²⁰ Release at 53-55.

²¹ Release at 53.

²² Release at 54.

The IPA appreciates the opportunity to comment on the Release. Should any member of the Commission or its staff have any questions about our comments, please feel free to contact Anya Coverman, General Counsel, at (202) 548-7190.

Sincerely,

A handwritten signature in black ink, appearing to read 'A. Chereso', with a horizontal line extending to the left.

Anthony Chereso
President & CEO, Institute for Portfolio Alternatives