

April 15, 2019

SEC Proposes Extending Securities Offering Reforms to Closed-End Funds and Business Development Companies

On March 20, 2019, the SEC [issued a release](#) containing proposals intended to streamline the registration, communications and offering practices for business development companies (“BDCs”) and registered closed-end investment companies (“registered CEFs”). The release’s proposed rule and form amendments (the “Proposals”) would permit BDCs and registered CEFs (collectively, “Affected Funds”) to use the securities offering and proxy rules that are already available to operating companies.

In particular, if approved, the Proposals would:

- Streamline registration by eligible Affected Funds by introducing a short-form shelf registration statement on Form N-2 to effect securities sales “off the shelf” more quickly.
- Authorize Affected Funds to qualify as “well-known seasoned issuers” (“WKSIs”) under Securities Act Rule 405.
- Permit Affected Funds to satisfy their prospectus delivery requirements in the same manner as operating companies, including filing with the SEC under Securities Act Rules 172 and 173.
- Allow Affected Funds to rely on communications rules currently available only to operating companies, including rules regarding the publication of factual information about the issuer or the offering (Securities Act Rule 134), the publication and dissemination of regularly released factual business and forward-looking information (Securities Act Rules 168 and 169), the use of a “free writing prospectus” (Securities Act Rules 164 and 433), and the publication and distribution of broker-dealer research reports (Securities Act Rule 138).

In addition, the Proposals would harmonize the disclosure and regulatory framework applicable to Affected Funds with the other changes effected by the Proposals. The harmonization includes (i) structured data requirements (such as Inline XBRL) that will permit investors and others to evaluate fund data, (ii) new annual report disclosure requirements and (iii) a new requirement for registered CEFs to file reports on Form 8-K. Separately, the Proposals would change the method that interval funds employ to calculate securities registration fees, permitting interval funds to calculate the fees on a net basis (similar to the method that mutual funds and ETFs now employ).

The Proposals are discussed in detail below. The SEC requested public comments on all elements of the Proposals, which must be received by the SEC no later than June 10, 2019.

I. BACKGROUND

In 2005, the SEC adopted securities offering reforms applicable only to operating companies with the intent of modernizing the securities offering and communication processes. The 2005 reforms expressly excluded all investment companies, including Affected Funds, from changes effected by the reforms.

The Proposals are the SEC’s response to fulfill two Congressional mandates intended to extend the scope of the 2005 reforms to Affected Funds. First, the Small Business Credit Availability Act (the “BDC Act”), enacted in March 2018 (summarized in this Ropes & Gray [Alert](#)), directed the SEC to amend existing rules and forms to permit BDCs to use the securities offering and proxy rules that are available to non-investment company issuers that are required to file reports under Sections 13(a) or 15(d) of the Exchange Act.¹ Second, the Economic Growth, Regulatory Relief, and Consumer

¹ The BDC Act directed the SEC to effect these revisions no later than March 23, 2019. Further, the BDC Act provides that, if the SEC fails to complete the required revisions by that date, a BDC may deem the required revisions to have been made for the period beginning on March 24, 2019 and ending on the day the SEC completes the required revisions. Obviously, the SEC has not

Protection Act (the “Registered CEF Act”), enacted in May 2018 (summarized in this Ropes & Gray [Alert](#)), directed the SEC to propose and finalize rules to permit any registered CEF that is either exchange-listed or that makes periodic repurchase offers pursuant to Rule 23c-3 under the 1940 Act “to use the securities offering and proxy rules . . . that are available to other issuers that are required to file reports under section 13 or section 15(d) of the [Exchange Act].”

The BDC Act applies to both BDCs that are exchange-listed and those that are not. The Registered CEF Act applies to registered CEFs that are exchange-listed and interval funds under Rule 23c-3 of the 1940 Act, but does not apply to unlisted registered CEFs.

While the BDC Act is very specific about required revisions for BDCs, the Registered CEF Act does not identify specific required revisions. The SEC decided to apply the specific requirements of the BDC Act to both BDCs and registered CEFs, subject to certain conditions. The Appendix to this Alert summarizes the Proposals’ application to BDCs and registered CEFs, along with conditions and exceptions that limit the Proposals general applicability.

II. AFFECTED FUNDS’ REGISTRATION REQUIREMENTS – PARITY WITH OPERATING COMPANIES

The Proposals regarding registration requirements would give Affected Funds parity with operating companies. Specifically, the Proposals would permit eligible Affected Funds to:

- File a short-form registration statement on Form N-2 that operates like a Form S-3. This short-form registration statement (i) could be used to register shelf offerings, including shelf registration statements filed by Affected Funds that are WKSIs (which become effective automatically), and (ii) could satisfy Form N-2’s disclosure requirements by incorporating by reference information from the fund’s Exchange Act reports.
- Rely on Rule 430B to omit certain information from their base prospectuses, and use the Rule 424 process, currently used by operating companies, to file prospectus supplements.
- Include additional information in their Exchange Act periodic reports to update their registration statements, subject to the requirement that the information is identified as included in the periodic report for this purpose.

These proposed amendments are described in more detail below.

A. Short-Form Registration on Form N-2

In General. The Proposals contain a new instruction to Form N-2 to permit certain Affected Funds to file a short-form registration statement on Form N-2 (a “short-form registration statement”) that would operate like a Form S-3. The SEC posted the proposed Form N-2, which incorporates the Proposals, on its website (available [here](#)).

Eligibility. Affected Funds may file a short-form registration statement if they satisfy the requirements of proposed General Instruction A.2 to Form N-2 (the “short-form registration instruction”). An Affected Fund would be eligible to file a short-form registration statement if it satisfies the registrant requirements² and transaction requirements³ of Form S-3. If the Affected Fund is a registered CEF, eligibility also requires that the fund (i) has been registered

completed the required revisions, raising a potential dilemma for BDCs that desire to use any of the proposed securities offering and proxy rules before the Proposals are finalized.

² Among other things, the registrant must: (i) have a class of securities registered under Section 12 of the Exchange Act, (ii) have been subject to the requirements of Sections 12 or 15(d) of the Exchange Act and have filed all materials required to be filed pursuant to Sections 13, 14 or 15(d), for at least the twelve months immediately preceding the filing of the registration statement; and (iii) have timely filed all Exchange Act reports (other than certain specified reports on Form 8-K) required to be filed during the twelve months (and any portion of the current month) immediately preceding the filing of the registration statement.

³ Form S-3 specifies certain transaction requirements depending upon the type of the securities being offered and whether the offering is a primary or a secondary offering. Generally, an Affected Fund would satisfy the Form S-3 transaction requirements for a primary offering if the fund has a public float of at least \$75 million.

under the 1940 Act for at least the twelve months immediately preceding the filing of the registration statement and (ii) has timely filed all reports required under Section 30 of the 1940 Act during that period.⁴

Some BDCs and registered CEFs – notably, most interval funds – are not exchange-listed and, therefore, do not have public float. Consequently, there are some Affected Funds that would be ineligible to file a short-form registration statement because they do not satisfy the transaction requirements required to file a short-form registration statement. Interval funds are provided with their own shelf offering provision by Securities Act Rule 415(a)(1)(xi), which may be declared effective immediately under Rule 486(b).

Information Incorporated by Reference. At the present time, Affected Funds have limited ability to incorporate information by reference into their registration statements and cannot forward incorporate information from subsequently-filed Exchange Act reports. Instead, Affected Funds now must file post-effective amendments to their registration statements made for shelf offerings and wait for the SEC staff to declare the amendments effective.

Under the Proposals, the same rules on incorporation by reference that apply to Form S-3 registration statements would apply to a short-form registration statement filed on Form N-2. An Affected Fund relying on the short-form registration instruction would be required to:

1. Specifically incorporate by reference into its prospectus and statement of additional information (“SAI”) (i) its most recent annual report filed pursuant to Exchange Act Section 13(a) or Section 15(d) containing financial statements for the Affected Fund’s latest fiscal year for which either a Form N-CSR or Form 10-K was required to be filed and (ii) all other reports filed pursuant to these sections of the Exchange Act following the end of the fiscal year covered by the annual report (*backward incorporation by reference*).
2. State in its prospectus and SAI that all documents subsequently filed pursuant to Exchange Act Sections 13(a), 13(c), 14 or 15(d) before the termination of the offering shall be deemed to be incorporated by reference into the prospectus and SAI (*forward incorporation by reference*).

Thus, an Affected Fund that files a short-form registration statement could satisfy the disclosure requirements for its prospectus or SAI by incorporating by reference certain past and future Exchange Act reports. This would give the Affected Fund the opportunity to avoid, in most instances, making post-effective amendments.

As described in more detail below, the Proposals also would eliminate a prerequisite to backward incorporation – that the fund deliver to new investors the information that it incorporated by reference into its prospectus or SAI. Instead, the fund would be required only to make its prospectus, SAI and the incorporated materials available and accessible on a website identified in the fund’s prospectus and SAI.

Use of Rule 415(a)(1)(x) and Automatic Shelf Registration Statements. The Proposals would amend Rule 415(a)(1)(x) to indicate that Affected Funds are permitted to rely on the rule. A new general instruction would be added to Form N-2 to allow Affected Funds that are WKSIs to file an automatic shelf registration statement, providing greater flexibility to take advantage of distribution opportunities in real time.

B. Omitting Information from a Base Prospectus and Prospectus Supplements

Reliance on Amended Rule 424. Rule 424(b) works with Rule 415(a)(1)(x) to provide an issuer with more time to file a prospectus. Operating companies currently rely on Rule 424 to file prospectus supplements, while investment companies follow Rule 497. To provide parity with operating companies, the Proposals would amend Rule 424 to permit Affected Funds to file a prospectus under Rule 424, instead of relying on Rule 497. This would permit an

⁴ This would include all annual and semi-annual reports filed on Form N-CSR, as well as Forms N-PORT and N-CEN.

Affected Fund to file any type of prospectus enumerated in Rule 424(b) to update, or to include information omitted from, a prospectus or in connection with a shelf takedown.⁵

Omission of Information from a Prospectus. Rule 430B currently permits an issuer to omit certain information from its base prospectus under two circumstances. First, a WKSI that files an automatic shelf registration statement is permitted to omit the plan of distribution, as well as whether the offering is a primary offering or an offering made on behalf of selling security holders. Once Affected Funds are able to qualify as WKSIs, they will be able to omit such information from their prospectuses. Second, Rule 430B also applies to an issuer eligible to file a registration statement on Form S-3 to register a primary offering, where the issuer is registering securities for selling security holders. In this second case, a prospectus can omit the same information that WKSIs are permitted to omit, as well as the identities of the selling security holders and the amount of securities to be registered on their behalf. The Proposals would amend Rule 430B to permit Affected Funds that are eligible to register a primary offering under the proposed short-form registration instruction to rely on Rule 430B for this second use.⁶

C. Additional Information in Periodic Reports for Updating

As described above, the Proposals would permit eligible Affected Funds to forward incorporate information from their Exchange Act reports (which include, for registered CEFs, annual and semi-annual reports on Form N-CSR). These Affected Funds would have the option of including in their periodic reports information that is not required in the reports for the purpose of updating their short-form registration statements. The Proposals would add a new instruction to Form N-2 that would allow an Affected Fund to include this additional information in its periodic reports, provided the fund also includes a statement in the periodic report identifying information that has been included for this purpose.

III. WKSI STATUS

In General. The Proposals would permit an Affected Fund to qualify as a WKSI, thereby providing the Affected Fund with the maximum flexibility accorded by the SEC to issuers regarding communications and registration. In general, a WKSI's shelf registration statement is automatically effective upon filing, which reduces the offering exposure to market changes, thereby enhancing the WKSI's ability to take advantage of distribution opportunities. WKSIs are also permitted to make oral or written offers without a statutory prospectus, prior to having a registration statement on file.

Eligibility. To qualify as a WKSI, an Affected Fund must be eligible to file a short-form registration statement, have at least \$700 million in public float, and not be an "ineligible issuer." The Proposals would amend Securities Act Rule 405 so that Affected Funds would not be excluded from the WKSI definition. In addition, the definition of "ineligible issuer" would be amended to provide that a registered CEF would be ineligible if it has failed to file all reports and materials required to be filed under Section 30 of the 1940 Act during the preceding twelve months. Furthermore, the Proposals would amend the "ineligible issuer" definition to give effect to the current anti-fraud prong in that definition in the context of Affected Funds.⁷ Under the Proposals, an Affected Fund would be an ineligible issuer if, within the past three

⁵ The Proposals also would amend Rule 497 to indicate that Rule 424 is the exclusive rule for Affected Funds to file a prospectus supplement, with the exception of an advertisement that is deemed to be a prospectus under Rule 482.

⁶ In addition, the Proposals would require Affected Funds relying on Rule 430B to make the same undertakings in Form N-2 as those that are made by operating companies in relying on Rule 430B in Form S-3 with respect to when the information contained in a prospectus supplement would be deemed part of and included in the registration statement and circumstances that would trigger a new effective date of the registration statement for purposes of Section 11(a) of the Securities Act.

⁷ For example, an ineligible issuer includes an issuer that was made the subject of any judicial or administrative decree or order arising out of a governmental action that (i) prohibits certain conduct or activities regarding, including future violations of, the anti-fraud provisions of the federal securities laws, (ii) requires that the person cease and desist from violating the anti-fraud provisions of the federal securities laws or (iii) determines that the person violated the anti-fraud provisions of the federal securities laws.

years, its *investment adviser, including any sub-adviser*,⁸ was the subject of any judicial or administrative decree or order arising out of a governmental action that determines that the investment adviser aided or abetted or caused the Affected Fund to have violated the anti-fraud provisions of the federal securities laws.

IV. COMMUNICATIONS REFORMS

A. Offering Communications

The Securities Act's "gun-jumping" prohibitions limit offering communications that issuers and underwriters may use before a registration statement becomes effective. The SEC has adopted rules (the "communication rules") that provide operating companies and underwriters flexibility with respect to their offering communications. These communication rules are generally unavailable to Affected Funds, which are subject to a separate framework governing communications with investors.

The Proposals would amend various Securities Act rules to remove the exclusions for Affected Funds from the following rules and would permit Affected Funds to:

- Make certain communications prescribed by Rule 134 to publish factual information about the issuer or the offering, including "tombstone ads."
- Rely on Rule 163A, which excludes as "offers" any communication made by or on behalf of issuers more than 30 days before the filing of a registration statement that does not reference a registered securities offering.
- Rely on Rule 168 (if the Affected Fund is a reporting company) to publish or disseminate regularly released factual business information and forward-looking information at any time, including around the time of a registered offering.
- Rely on Rule 169 to continue communication of regularly released factual business information intended for use by persons other than in their capacity as investors or potential investors.
- Rely on Rule 164 and Rule 433 to use a free writing prospectus after a registration statement is filed.
- (Only for Affected Funds that are WKSIs) engage in oral and written communications, including the use of a free writing prospectus at any time, before or after a registration statement is filed, subject to the same conditions applicable to other WKSIs.

B. Broker-Dealer Research Reports

Securities Act Rule 138 permits a broker-dealer that is participating in the distribution of an issuer's common stock and similar securities to communicate its research about the issuer's fixed-income securities and vice versa, provided that the communications are made in the regular course of its business. The Proposals would amend Rule 138's references to shelf registration statements filed on Form S-3 and periodic reports on Forms 10-K and 10-Q to include parallel references to a short-form registration statement on Form N-2 and the reports that registered CEFs are required to file (i.e., Forms N-CSR, N-CEN, and N-PORT).

Securities Act Rule 139 permits a broker-dealer to publish or distribute research reports concerning an issuer or an issuer's securities without such reports constituting "offers" under the Securities Act, if it does so in the regular course of its business, even if it is participating or will participate in the registered offering of the issuer's securities. The SEC did not propose to amend Rule 139 as part of the Proposals because it believed that the recently adopted

⁸ If this change is adopted as proposed, investment advisers would need to ensure that the necessary information about their sub-advisers is available to be used to evaluate an Affected Fund's WSKI status on the relevant determination date.

Rule 139b (summarized in this Ropes & Gray [Alert](#)) satisfies the directives of the BDC Act⁹ and Registered CEF Act and is consistent with Congress's core objective regarding research reports covering these funds.

V. OTHER PROPOSED RULE AMENDMENTS

A. Final Prospectus Delivery Reforms

Securities Act Rule 172 permits issuers and broker-dealers to satisfy final prospectus delivery obligations if a final prospectus is or will be on file with the SEC within a specified time period, subject to additional conditions. Rule 173 mandates a notice stating that a sale of securities has been made pursuant to a registration statement or in a transaction in which, absent Rule 172, a final prospectus would have been required to have been delivered. To implement the BDC Act, and to provide parity for registered CEFs consistent with the Registered CEF Act, the Proposals would amend Rules 172 and 173 to permit Affected Funds to rely on the two rules and thereby would permit Affected Funds to rely on the "access equals delivery" means of satisfying the final prospectus delivery requirements, currently available to operating companies.

B. Rule 418 Supplemental Information

Securities Act Rule 418 provides that the SEC or the SEC staff may request supplemental information concerning a registrant, the registration statement, the distribution of the securities, market activities, and underwriters' activities. Under Rule 418(a)(3), registrants that are eligible to file Form S-3 are exempt from such requests with respect to certain specified information. The Proposals would amend Rule 418(a)(3) to provide that Affected Funds eligible to file a short-form registration statement on Form N-2 have the same exemption.

C. Amendments to Incorporation by Reference into Proxy Statements

Item 13 of Schedule 14A under the Exchange Act requires a registrant to provide financial statements and other information for proxy statements containing certain proposals. However, registrants that meet the requirements of Form S-3 (as defined in Note E to the Schedule) may incorporate this information by reference to previously-filed documents with the SEC without delivering those documents with the proxy statement. The Proposals would amend Item 13(b)(1) and Note E to afford Affected Funds that are eligible to file a short-form registration statement the same treatment as operating companies.

VI. INTERVAL FUNDS – NEW REGISTRATION FEE PAYMENT METHOD

At present, all issuers, including interval funds, must pay Securities Act registration fees to the SEC at the time of filing a registration statement, regardless of whether the issuers sell the securities.¹⁰ The Proposals would amend Rules 23c-3 and 24f-2 under the 1940 Act to permit interval funds to pay registration fees using the annual-net-basis methodology now employed by mutual funds and ETFs.

VII. DISCLOSURE AND REPORTING PARITY PROPOSALS

The Proposals would (i) require Affected Funds to satisfy structured data requirements in their SEC filings, (ii) require Affected Funds to satisfy new annual and current reporting requirements, (iii) provide Affected Funds with greater

⁹ Section 803(b)(2)(F) of the BDC Act directed the SEC to specifically include a BDC as an issuer to which Rules 138 and 139 applied. While Rule 139b generally extends the safe harbor available under Rule 139 to a "covered investment fund research report," Rule 139b also differs from Rule 139 (and Section 803(b)(2)(F) of the BDC Act) to the extent that Rule 139b requires that a covered investment fund research report must be published by an independent broker-dealer (i.e., Rule 139b excludes a research report published or distributed by (i) the BDC or any affiliated person of the BDC or (ii) a broker-dealer that is the investment adviser, or an affiliated person of the investment adviser, for the BDC).

¹⁰ WKSIs using automatic shelf registration statements have additional flexibility to pay filing fees at or prior to the time of a securities offering. Under the Proposals, Affected Funds that become WKSIs would also gain that flexibility.

flexibility to incorporate information by reference and (iv) require registered CEFs to file Form 8-K.

A. Structured Data Requirements

Inline XBRL Requirements for Financial Statements and Notes to Financial Statements. In general, operating companies are required to submit financial statement information in eXtensible Business Reporting Language (“XBRL”) as separate interactive data file exhibits to, and concurrently with, their Exchange Act reports and certain Securities Act registration statements. Open-end investment companies (including ETFs organized as open-end investment companies) are required to submit risk/return summary information in XBRL as exhibits to registration statements on Form N-1A and in prospectuses with risk/return summary information that varies from the effective registration statement. In June 2018, the SEC adopted final rules to require operating companies and open-end investment companies, on a phased-in basis, to use Inline XBRL¹¹ for the submission of financial statement information and fund risk/return summary information to the SEC (summarized in this Ropes & Gray [Alert](#)).

Currently, BDCs are subject to neither the structured data reporting requirements for operating companies nor those for open-end investment companies. The Proposals would, however, amend Item 601 of Regulation S-K to remove the exclusion applicable to BDCs from the Inline XBRL financial statement tagging requirements and thereby subject BDCs to the same requirements applicable to operating companies.

New Check Boxes and Structured Data Format for Form N-2 Cover Page. The Proposals would require all Affected Funds to tag the data points appearing on the cover page of Form N-2 (as modified by the Proposals) using Inline XBRL format. An analogous requirement was adopted by the SEC in a separate release issued on the same day as the Proposals (summarized in this Ropes & Gray [Alert](#)).

The Proposals also would add additional checkboxes on the cover page of Form N-2 to distinguish the type of registration statement being filed and to identify certain characteristics of the fund, including, among other things, whether the fund is a registered CEF, a BDC, a registered CEF that operates as an interval fund, qualified to file a short-form registration statement on Form N-2, a WKSI, or an emerging growth company.

Tagging Prospectus Disclosure Items. The Proposals would require all Affected Funds to tag certain information in their prospectuses using Inline XBRL format. All Affected Funds (like mutual funds and ETFs) would be required to file with the SEC, using Inline XBRL, certain information in registration statements or post-effective amendments filed on Form N-2, as well as in forms of prospectuses filed under Securities Act Rule 424 that include information varying from the registration statement. Specifically, Affected Funds would have to tag the following items using Inline XBRL format: Fee Table, Senior Securities Table, Investment Objectives and Policies, Risk Factors, Share Price Data and Capital Stock, Long-Term Debt and Other Securities.

An Affected Fund that files a short-form registration statement on Form N-2 also must tag information appearing in its Exchange Act reports, including Forms N-CSR, 10-K and 8-K, when the information is required to be tagged in the Affected Fund’s prospectus.

Structured Data Format for Form 24F-2. The Proposals would also require filings on Form 24F-2 to be submitted using a structured XML format.

B. New Periodic Reporting Requirements

Fee and Expense Table, Share Price Data, and Senior Securities Table. The Proposals would mandate that funds (including any BDCs) filing on a short-form registration statement on Form N-2 must include key information in

¹¹ Inline XBRL format permits filers to embed XBRL data directly into an HTML document, which is both human-readable and machine-readable.

their annual reports¹² now contained in the funds' prospectuses: Fee and Expense Table, Share Price Data and Senior Securities Table.

Management's Discussion of Fund Performance. Mutual funds and ETFs are already required to include MDFP disclosure in their annual reports. BDCs, like operating companies, are already required to include a narrative discussion of the BDC's financial statements – management discussion and analysis or “MD&A” – in their annual reports. However, at present, Form N-2 does not include an MDFP or MD&A requirement for registered CEFs. Therefore, the Proposals would amend Form N-2 to extend the MDFP disclosure requirement to all registered CEFs.

Financial Highlights. Registered CEFs are currently required to include financial highlights in their registration statements and annual reports to shareholders. BDCs include their full financial statements in their prospectuses, but are currently allowed to omit financial highlights disclosure summarizing these financial statements. The SEC observed, however, that it is generally market practice for BDCs to include financial highlights. In light of the importance of financial highlights information and to provide consistent requirements for all Affected Funds, the Proposals would require BDCs to include financial highlights in their registration statements and in annual reports to shareholders.

Material Unresolved Staff Comments. The Proposals would require an Affected Fund that has unresolved comments regarding its reports under the Exchange Act, 1940 Act or its registration statement not less than 180 days before the end of its fiscal period to which an annual report relates, the Affected Fund must disclose the substance of the unresolved comments that the Fund believes are material.

C. New Current Reporting Requirements

Form 8-K Reporting by Registered CEFs. The Proposals would amend Form 8-K to add new reporting items for Affected Funds, including registered CEFs, and adapt existing reporting requirements and instructions to Affected Funds. BDCs already must file reports on Form 8-K to provide current information about important events but, currently, the SEC does not require registered CEFs to report current information on Form 8-K.

New Form 8-K Reporting Items for Affected Funds. The Proposals would add new Section 10 to Form 8-K to list two additional reportable events for *all* Affected Funds: (i) a material change to its investment objectives or policies or (ii) a material write-down in fair value of a significant investment.

- Under proposed Item 10.01 of Form 8-K, an Affected Fund must file a Form 8-K if the fund's investment adviser, including any sub-adviser, decides to effect a material change to the fund's investment objectives or policies, and such change has not been approved by shareholders and will not be submitted to shareholders for approval.
- Under proposed Item 10.02, an Affected Fund must file a Form 8-K if the fund concludes that a material write-down in fair value of a significant investment is required under GAAP. Instruction 1 to proposed Item 10.02 would clarify that an investment is deemed to be a significant investment for purposes of the Item if the fund's and its other subsidiaries' investments in a portfolio holding exceed 10% of the total assets of the fund and its consolidated subsidiaries. The Form 8-K would be required to include the date the fund concluded that a material write-down was required, as well as an estimate of the material write-down. The Affected Fund would not be required to provide the basis for the determination that a material write-down was required.

An Affected Fund that elects to file a short-form registration statement would need to be current in its Form 8-K filings with respect to all required items when making a Form N-2 filing. However, Affected Funds will be permitted

¹² For registered CEFs, this key information would be added to annual reports to shareholders on Form N-CSR, and for BDCs, this key information would be added to annual reports on Form 10-K.

to file short-form registration statements, notwithstanding a failure to file timely Form 8-K reports required solely under proposed Items 10.01 or 10.02, in addition to the other Form 8-K items identified in Form S-3.

Rule 103 of Regulation FD. Rule 100 of Regulation FD provides that an issuer must make either simultaneous or prompt public disclosure of any material nonpublic information regarding the issuer that the issuer selectively disclosed to certain persons. Rule 103(a) of Regulation FD provides that, if an issuer fails to make a public disclosure solely required under Rule 100 of Regulation FD, the issuer's eligibility to use Form S-3 is unaffected.

The Proposals would amend Rule 103(a) to provide that, for purposes of Form N-2 (as proposed), an Affected Fund's failure to make a public disclosure solely required under Rule 100 does not affect the fund's ability to file a short-form registration statement or qualify as a WKSI.

D. Online Availability of Information Incorporated by Reference

The Proposals would amend Form N-2's current "General Instruction for Incorporation by Reference," which now allows all BDCs and registered CEFs, including those that would be ineligible to file a short-form registration statement, to backward incorporate financial information into their prospectus or SAI. In particular, the Proposals would eliminate the prerequisite to backward incorporation of financial information that the fund deliver to new investors the information that it incorporated by reference into its prospectus or SAI. Instead, the fund would be required only to make its prospectus, SAI and the incorporated materials available and accessible on a website identified in the fund's prospectus and SAI. In other words, the existing Form N-2 requirement – that a fund provide to new purchasers a copy of all materials that the fund incorporated by reference into the prospectus and/or SAI – would no longer apply. However, Affected Funds would be required to provide incorporated materials upon request free of charge, by mail or electronically.

E. Enhancements to Certain Registered CEFs' Annual Report Disclosure

Registered CEFs may now rely on Rule 8b-16(b) under the 1940 Act to avoid making an annual update to their registration statements. The rule requires that a registered CEF forgoing an annual update must disclose in its annual report certain important changes that transpired during the prior year.

To provide investors in funds that rely on Rule 8b-16 with important information in a readily identifiable manner, the Proposals would amend Rule 8b-16 to require funds to describe the material changes in their annual reports in enhanced detail. This is intended to allow investors to understand what has changed and how it may affect the fund. The Proposals also would require funds to preface such disclosures with a legend.

VIII. CERTAIN STAFF NO-ACTION LETTERS

Rule 486(b) provides that interval funds may file certain post-effective amendments to their registration statements, which become effective automatically. The rule is intended to provide interval funds with continuously effective registration statements. Over the years, the SEC staff has provided no-action letters to specific registered CEFs that conduct delayed or continuous offerings under Rule 415(a)(1)(x) regarding their use of Rule 486(b).

The SEC stated that the Proposals are intended to address how Affected Funds, including registered CEFs offering securities under Rule 415(a)(1)(x), may update their registration statements. Therefore, the SEC noted that the Division of Investment Management would review this series of no-action letters to determine whether the letters should be withdrawn in connection with the adoption of the Proposals.

IX. OBSERVATIONS

If adopted as proposed, the Proposals would streamline the registration, communications and offering practices for many Affected Funds. The Proposals would permit Affected Funds eligible to file a short-form registration statement to satisfy the disclosure requirements by forward incorporation by reference. This would give these Affected Funds the opportunity to avoid, in most instances, making post-effective amendments to update a registration statement. In turn, Affected Funds

would be able to get an offering to market more promptly without risk of delay due to the SEC staff's review and comment process.

The SEC estimated that there are approximately 500 Affected Funds that satisfy the \$75 million public float requirement to be eligible to file a short-form registration statement. Of these Affected Funds, the SEC estimated that there were 97 Affected Funds (14 listed BDCs and 83 listed registered CEFs) that meet the WKSI \$700 million public float requirement. These Affected Funds' WKSI status provides the most flexibility and greatest ability to promptly access markets for additional capital.

The Proposals' communications reforms would also smooth the offering process for Affected Funds. In particular, BDCs would benefit from being able to use Rule 134 communications and free writing prospectuses under Rule 433.

The proposed "ineligible issuer" definition would apply to an Affected Fund where the investment adviser, including any sub-adviser, aided, abetted, or caused the fund to have violated certain anti-fraud provisions within a three-year look-back period. Thus, under the proposed definition, the actions taken by an investment adviser, including any sub-adviser, could cause an Affected Fund to become ineligible for WKSI status.

While the SEC considered alternative eligibility criteria for WKSI status, such as net asset value of a certain size for funds whose shares are not traded on an exchange, the SEC decided to not include such alternatives in the Proposals. As a result, most interval funds as well as non-traded BDCs would be unable to qualify to use the proposed short-form registration statement on Form N-2, unless such funds were to list their shares.

Several of the reforms contained in the Proposals would incrementally increase the compliance burden on Affected Funds. For example, Affected Funds filing a short-form registration statement would be required to disclose fee and expense table, share price data, a senior securities table, and unresolved staff comments in their annual reports. In addition, Affected Funds, especially those with little Inline XBRL experience, could incur significant, initial compliance costs associated with Inline XBRL preparation and incremental, ongoing costs for tagging required information in Inline XBRL.

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For further information about how the issues described in this Alert may impact your interests, please contact your regular Ropes & Gray contact.

Registered Closed-End Funds and BDCs: Proposed Rule and Form Changes

Rule	Summary Description of Rule	Entities Affected by Proposed Changes
REGISTRATION PROVISIONS		
Securities Act Rule 415	Permits registration of securities to be offered on a delayed or a continuous basis.	Seasoned Funds*
Proposed General Instructions A.2 and F.3 of Form N-2	Provide for backward and forward incorporation by reference.	Seasoned Funds
Proposed General Instruction F.4.a	Requires online posting of information incorporated by reference.	Affected Funds
Securities Act Rule 430B	Permits certain issuers to omit certain information from their “base” prospectuses and update the registration statement after effectiveness.	Seasoned Funds
Securities Act Rules 424 and 497	Provide the processes for filing prospectus supplements.	Affected Funds
Securities Act Rule 462	Provides for effectiveness of registration statements immediately upon filing with the SEC.	WKSIs
Securities Act Rule 418	Exempts some registrants from an obligation to furnish certain engineering, management, or similar reports.	Seasoned Funds
1940 Act Rule 22c-3	Subjects interval funds to the registration fee payment system based on annual net sales.	Interval Funds
COMMUNICATIONS PROVISIONS		
Securities Act Rule 134	Permits issuers to publish factual information about the issuer or the offering, including “tombstone ads.”	Affected Funds
Securities Act Rule 163A	Permits issuers to communicate without risk of violating the gun-jumping provisions until 30 days prior to filing a registration statement.	Affected Funds
Securities Act Rules 168 and 169	Permit the publication and dissemination of regularly released factual and forward-looking information.	Affected Funds
Securities Act Rules 164 and 433	Permit use of a “free writing prospectus.”	Affected Funds
Securities Act Rule 163	Permits oral and written communications by WKSIs at any time.	WKSIs
Securities Act Rule 138	Permits a broker or dealer to publish or distribute certain research about securities other than those they are distributing.	Seasoned Funds
PROXY STATEMENT PROVISION		
Item 13 of Schedule 14A	Permits certain registrants to use incorporation by reference to provide information that otherwise must be furnished with certain types of proxy statements.	Seasoned Funds

* Some of the proposed rule changes that are shown above as affecting “seasoned funds” would only affect those seasoned funds that elect to file a short-form registration statement on Form N-2.

Rule	Summary Description of Rule	Entities Affected by Proposed Changes
PROSPECTUS DELIVERY PROVISIONS		
Securities Act Rules 172 and 173	Permit issuers, brokers, and dealers to satisfy final prospectus delivery obligations if certain conditions are satisfied.	Affected Funds
STRUCTURED DATA REPORTING PROVISIONS		
Structured Financial Statement Data	A requirement that BDCs tag their financial statements using Inline extensible Business Reporting Language (“Inline XBRL”) format.	BDCs
Prospectus Structured Data Requirements	A requirement that registrants tag certain information required by Form N-2 using Inline XBRL.	Affected Funds
Form 24F-2 Structured Format	A requirement that filings on Form 24F-2 be submitted in a structured format.	Form 24F-2 Filers
PERIODIC REPORTING PROVISIONS		
1940 Act Rule 8b-16	A requirement that funds that rely on the rule disclose certain enumerated changes in the annual report in enough detail to allow investors to understand each change and how it may affect the fund	Registered CEFs
Proposed Item 24.4.h(2) of Form N-2	A requirement for information about the investor’s costs and expenses in the registrant’s annual report.	Seasoned Funds
Proposed Item 24.4.h(3) of Form N-2	A requirement for information about the share price of the registrant’s stock and any premium or discount in the registrant’s annual report.	Seasoned Funds
Proposed Item 24.4.h(1) of Form N-2	A requirement for information about each of a fund’s classes of senior securities in the registrant’s annual report.	Seasoned Funds
Proposed Item 24.4.g of Form N-2	A requirement for narrative disclosure about the fund’s performance in the fund’s annual report.	Registered CEFs
Item 4 of Form N-2	Requires disclosure of certain financial information	BDCs
Proposed Item 24.4.h(4) of Form N-2	A requirement to disclose outstanding material staff comments that remain unresolved for a substantial period of time.	Seasoned Funds
CURRENT REPORT PROVISIONS		
Exchange Act Rules 13a-11 and 15d-11	Require registered CEFs to file current reports on Form 8-K.	Registered CEFs
Proposed Section 10 of Form 8-K	Requires current reporting of two new events specific to Affected Funds.	Affected Funds
Regulation FD Rule 103	Provides that a failure to make a public disclosure required solely by Rule 100 of Regulation FD will not disqualify a “seasoned” issuer from use of certain forms.	Seasoned Funds