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

On April 8, 2020, the SEC [issued a release](#) (the “Release”) containing amended rules and forms intended to streamline the registration, communications and offering practices for business development companies (“BDCs”) and registered closed-end investment companies (“registered CEFs”), including interval funds and tender offer funds (collectively, “Affected Funds”). The Release’s rule and form amendments will permit Affected Funds, subject to limitations described below, to use the securities offering rules that are already available to operating companies.

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In particular, once effective, the Release:

- Streamlines 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.
- Expands the scope of Rule 486 to permit Affected Funds that conduct continuous offerings under Securities Act Rule 415(a)(1)(ix) to rely on Rule 486 to make certain changes to their registration statements.
- Authorizes eligible Affected Funds to qualify as “well-known seasoned issuers” (“**WKSIs**”) under Securities Act Rule 405.
- Permits eligible 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.
- Allows eligible 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) (*i.e.*, “tombstone ads”), 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 Release harmonizes the disclosure and regulatory framework applicable to Affected Funds with the other changes effected by the Release. The harmonization includes (i) structured data requirements (such as Inline XBRL) that will facilitate the evaluation of fund data by investors and others and (ii) new annual report disclosure requirements. Separately, the Release changes 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 SEC adopted most of the proposals substantially in the form that they were proposed in its March 2019 [proposing release](#). The principal differences from the proposing release are that the Release:

- Does *not* adopt a proposal that would have required registered CEFs to file Form 8-K.
- Expands the scope of Rule 486 to permit any Affected Fund that conducts continuous offerings under Rule 415(a)(1)(ix) to rely on Rule 486 to make certain changes to its registration statements on an immediately effective basis or on an automatically effective basis a set period of time after filing.
- Requires Affected Funds that rely on Rule 8b-16(b) to describe the fund’s current investment objectives, investment policies and principal risks in its annual report, even if there were no changes in the past year.

- Eliminates certain undertakings within Form N-2 for eligible Affected Funds.
- Does not require an eligible Affected Fund that “forward incorporates” non-required information from its periodic reports to update its short-form registration statement to also include a statement in the periodic report, identifying the additional information that was included for updating purposes.
- Modifies Form N-14 to permit BDCs to incorporate by reference to the same extent as registered CEFs.
- Changes the method that issuers of certain continuously offered, exchange-traded products (“ETPs”) employ to calculate securities registration fees, permitting these issuers to calculate the fees on a net basis (similar to the method that mutual funds and ETFs now employ).

The Release’s amended rules and forms, including their effective dates, are discussed in detail below.

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 Release is 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 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].”²

¹ The BDC Act directed the SEC to effect these revisions no later than March 23, 2019. Further, the BDC Act provides: If the Commission fails to complete the revisions [by March 23, 2019], a business development company, during the period beginning [March 24, 2019] and ending on the date that the Commission completes those revisions, may deem those revisions to have been completed in accordance with the actions required to be taken by the Commission.

The Release, once effective, eliminates the interpretive ambiguity for BDCs that desire to use any of the securities offering and proxy rules. The Release does not discuss (i) the fact that the SEC did not effect the required revisions by March 23, 2019 or (ii) the application of the BDC Act prior to the effective date of Release’s provisions. However, at the SEC meeting at which the Release was adopted, the Director of the Division of Investment Management stated that the BDC Act was “self-effectuating” and that BDCs can rely on the statute until the Release’s effective date of August 1, 2020.

² The Registered CEF Act directed the SEC to propose these revisions by May 24, 2019 and to finalize such revisions no later than May 24, 2020. Further, the Registered CEF Act provides:

If the Commission fails to complete the revisions . . . by [May 24, 2020], any registered closed-end company that is listed on a national securities exchange or that makes periodic repurchase offers pursuant to section [Rule 23c-3 under the 1940 Act], shall be deemed to be an eligible issuer under the final rule of the Commission titled “Securities Offering Reform.”

The Release, once effective, eliminates the interpretive ambiguity for registered CEFs that desire to use any of the securities offering and proxy rules. The Release does not discuss (i) the fact that the SEC did not effect the required revisions by May 24, 2020 or (ii) the application of the Registered CEF Act prior to the effective date of Release’s provisions. However, at the SEC meeting at which the Release was adopted, the Director of the Division of Investment Management stated that the Registered CEF Act was “self-effectuating” and that registered CEFs can rely on the statute beginning in May 2020.

The BDC Act applies to both listed and unlisted BDCs. 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 that are not interval funds.

While the BDC Act is specific about required revisions for BDCs, the Registered CEF Act does not identify specific required revisions. In the March 2019 proposing release and in the Release, the SEC decided to apply the specific requirements of the BDC Act to both BDCs and registered CEFs, subject to certain conditions.

The Release affects different categories of Affected Funds in different ways.

- Some of the Release’s changes apply to all Affected Funds.
- Many of the changes effected by the Release apply only to “Seasoned Funds,” which, generally, are exchange-listed Affected Funds that are current and timely in their reporting and, therefore, generally eligible to file a short-form registration statement if they have at least \$75 million in “public float.”
- Some of the Release’s provisions apply only to Seasoned Funds that also qualify as WKSIs – exchange-listed Affected Funds that qualify as Seasoned Funds and generally have at least \$700 million in public float.
- The Release also authorizes *unlisted* Affected Funds, such as closed-end tender offer funds, to make certain filings that become effective either immediately upon filing or automatically a set period of time after filing.

The [Appendix](#) to this Alert summarizes the Release’s application to Affected Funds in the relevant category, along with conditions and exceptions that limit the Release’s general applicability. In addition, the Appendix is marked to show differences between the Release and the proposing release.

II. REGISTRATION REQUIREMENTS – PARITY WITH OPERATING COMPANIES

The Release’s amended rules and forms regarding registration requirements give eligible Affected Funds parity with operating companies. Specifically, the Release permits 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) can be used to register shelf offerings, including shelf registration statements filed by eligible Affected Funds that are WKSIs (which become effective automatically), and (ii) can 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 requires them to 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.

These changes are described in more detail below.

A. Short-Form Registration on Form N-2

In General. The Release includes a new instruction to Form N-2 to permit eligible Affected Funds to file a short-form registration statement on Form N-2 (a “short-form registration statement”) that operates like a Form S-3. The SEC posted the amended Form N-2, which incorporates the Release’s changes, on its website (available [here](#)).

Eligibility. Affected Funds may file a short-form registration statement if they satisfy the requirements of General Instruction A.2 to Form N-2 (the “short-form registration instruction”). An Affected Fund is eligible to file a short-form

registration statement if it satisfies the registrant requirements³ and transaction requirements⁴ of Form S-3 (a “Seasoned Fund”). If the Affected Fund is a registered CEF, eligibility also requires that the fund (i) has been registered 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 period⁵ (also, a “**Seasoned Fund**”).

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 currently are generally required to file post-effective amendments to their registration statements and wait for the SEC staff to declare the amendments effective.

Under the Release, the same rules on incorporation by reference that apply to Form S-3 registration statements apply to a short-form registration statement filed on Form N-2. A Seasoned Fund relying on the short-form registration instruction is 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 previously 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**).

The Release includes conforming changes to Form N-2’s undertakings. At present, Form N-2 requires an undertaking that would prevent Seasoned Funds that file a short-form shelf registration statement from incorporating information by reference.⁶ To provide parity with S-3 registrants for Seasoned Funds filing a short-form registration statement on Form N-2, the Release conforms Form N-2’s undertakings to permit Seasoned Funds to incorporate information by reference. Thus, a Seasoned 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 gives the Seasoned Funds the opportunity to avoid, in most instances, making post-effective amendments. The Release includes other changes to Form N-2 undertakings in response to comments received to the proposing release.⁷

³ 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.

⁴ 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, a Seasoned Fund satisfies the Form S-3 transaction requirements for a primary offering if the fund has a public float of at least \$75 million.

⁵ This includes all annual and semi-annual reports filed on Form N-CSR, as well as Forms N-PORT and N-CEN.

⁶ For example, Item 34.4.a of Form N-2 currently requires an Affected Fund registering an offering under Rule 415 to undertake to file a post-effective amendment to the registration statement under certain circumstances, including to provide any prospectus required by section 10(a)(3) of the Securities Act.

⁷ For example, the undertaking in Item 34.1 – to suspend the offering of shares until the prospectus is amended if the registrant’s NAV increases or decreases by specified amounts subsequent to the effective date of its registration statement – does not apply to Seasoned Funds registering an offering in reliance on Rule 415 to conduct continuous or delayed shelf offerings. The undertaking in Item 34.3 of current Form N-2 – requiring Affected Funds to undertake to supplement the prospectus or file a post-effective

As described in more detail below, the Release also eliminates a prerequisite to backward incorporation in Form N-2 for Seasoned Funds – that the fund deliver to new investors the information that it incorporated by reference into its prospectus or SAI. Instead, the fund is 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 Release amends Rule 415(a)(1)(x) to indicate that Seasoned Funds are permitted to rely on the rule. A new general instruction is added to Form N-2 to allow Seasoned 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. Operating companies currently rely on Rule 424 to file prospectus supplements, but registered investment companies rely on Rule 497. While broadly similar, the two rules have certain important differences. For example, Rule 424(b) is designed to work together with Rule 415(a)(1)(x), and provides additional time for an issuer to file a prospectus. Rule 497 (i) does not contain provisions specifically tailored to Rule 415(a)(1)(x) offerings and (ii) requires a fund to file a prospectus with the SEC before the prospectus is used. In addition, Rule 424 requires an issuer to file a prospectus when the issuer makes substantive changes to a previously filed prospectus, while Rule 497 requires funds to file any revised prospectus that varies from a previously filed prospectus.

To provide parity with operating companies, the Release amends Rule 424 to require Affected Funds to file a prospectus under Rule 424, instead of relying on Rule 497. This permits a Seasoned 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.⁸

Omission of Information from a Prospectus. In two circumstances, Rule 430B currently permits an issuer to omit certain information from its base prospectus and later provide that information in a subsequent Exchange Act report incorporated by reference, a prospectus supplement, or a post-effective amendment. 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 Seasoned 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 Release amends Rule 430B to permit Seasoned Funds to rely on Rule 430B in this second circumstance.⁹

C. Additional Information in Periodic Reports for Updating

As described above, the Release permits Seasoned 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 Seasoned Funds 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 Release adds a new instruction to Form N-2 that allows a Seasoned

amendment if the securities being registered are to be offered to existing shareholders, and if not taken, to be reoffered to the public – is eliminated.

⁸ The Release also amends 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.

⁹ In addition, the Release requires Seasoned 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 be deemed part of and included in the registration statement and circumstances that trigger a new effective date of the registration statement for purposes of Section 11(a) of the Securities Act.

Fund to include this additional information in its periodic reports. The proposing release also would have required a Seasoned Fund that included the additional information to include a statement in the periodic report that identified the information included for such purposes. In a change from the proposing release, a Seasoned Fund will not be required to include this statement in the periodic report.

D. Registration Changes for Continuously Offered Funds That Are Not Seasoned Funds

Some BDCs and registered CEFs – notably, most interval funds – are not exchange-listed and, therefore, do not have a public float. Consequently, there are some Affected Funds that are not Seasoned Funds and, therefore, cannot 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 already provided with their own shelf offering provision by Securities Act Rule 415(a)(1)(xi). Rule 486 permits interval funds to file post-effective amendments and certain registration statements that are either immediately effective upon filing under Rule 486(b) or automatically effective 60 days after (or up to 80 days after if the fund so chooses) filing under Rule 486(a). In contrast, while Rule 415(a)(1)(ix) allows unlisted Affected Funds (*e.g.*, a registered CEF that is a continuously offered tender offer fund) to engage in continuous offerings, such funds are not currently able to rely on Rule 486 and do not otherwise have a mechanism that allows them to file post-effective amendments that become automatically effective.

In a change from the proposing release, the Release expands the scope of Rule 486 to permit any Affected Fund that conducts continuous offerings under Rule 415(a)(1)(ix) to rely on Rule 486 to make certain changes to its registration statements on an immediately effective basis or on an automatically effective basis a set period of time after filing.

III. WKSI STATUS

A. In General

The Release permits a Seasoned Fund to qualify as a WKSI, thereby providing 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. WSIs are also permitted to make oral or written offers without a statutory prospectus, prior to having a registration statement on file.

B. Eligibility

To qualify as a WKSI, a Seasoned Fund must have at least \$700 million in public float,¹⁰ and not be an "ineligible issuer." The Release amends Securities Act Rule 405 so that Affected Funds are not excluded from the WKSI definition. In addition, the Release amends the "ineligible issuer" definition to give effect to the current anti-fraud prong in that

¹⁰ "Public float" refers to the aggregate market value of the voting and non-voting common equity held by non-affiliates of a registrant. In the Release, the SEC acknowledged that its WKSI framework, which was originally designed specifically for operating companies, "is not well-tailored to the specific characteristics of affected funds." Notwithstanding commenters' suggestions that SEC adopt alternative eligibility criteria for Affected Funds to qualify as WSIs, the SEC stated that it was "not eliminating or modifying the \$700 million public float requirement for affected funds, or permitting affected funds to qualify as WSIs based on their aggregate NAVs." As a result, unless the SEC provides additional guidance, the calculations of an Affected Fund's public float for the purpose of determining an Affected Fund's WKSI status under Rule 405 (as amended) would be the same as for an operating company under current Rule 405.

definition in the context of Affected Funds.¹¹ Under the Release, an Affected Fund is an ineligible issuer if, within the past three years, its *investment adviser, including any sub-adviser*,¹² 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. Until recently, these communication rules were generally unavailable to Affected Funds, which are subject to a separate framework governing communications with investors.

The Release amends various Securities Act rules to remove the exclusions for Affected Funds from the following rules and permits 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 from the term “offer” 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 Release amends 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

¹¹ 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.

¹² An Affected Fund will need to ensure that the necessary information about its sub-adviser(s) is available to be used to evaluate its WKSI status on the relevant determination date.

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 Release because it believed that Rule 139b (which was adopted in November 2018 and summarized in this Ropes & Gray [Alert](#)) satisfies the directives of the BDC Act¹³ and Registered CEF Act and is consistent with Congress's core objective regarding research reports covering these funds.

V. OTHER 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 is required to have been delivered. To implement the BDC Act, and to provide parity for registered CEFs consistent with the Registered CEF Act, the Release amends Rules 172 and 173 to permit Affected Funds to rely on the two rules and thereby 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 Release amends 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. Incorporation by Reference into Proxy Statements and Form N-14

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 Release amends 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.

Form N-14. Form N-14 is the form used by all registered investment companies and BDCs to register securities under the Securities Act that are to be issued in a business combination, merger or an exchange offer. Form N-14 currently permits a registered CEF – but not a BDC – to incorporate by reference certain required information about the registrant and the company being acquired from its prospectus, SAI or 1940 Act reports into the Form N-14 prospectus. The

¹³ 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).

proposing release requested comment on whether the SEC should modify incorporation-by-reference provisions in other registration forms filed by Affected Funds. In response to comments received by the SEC, the Release modifies Form N-14 to permit BDCs to incorporate by reference to the same extent as registered CEFs.

VI. INTERVAL FUNDS & ETPs – 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.¹⁴ The Release amends 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.

In response to comments received on the proposing release, the Release also contains amendments to permit certain ETPs, which are not registered under the 1940 Act, to elect to register an offering of an indeterminate number of securities and to pay registration fees for the offering in the same way permitted for mutual funds and ETFs.¹⁵

VII. DISCLOSURE AND REPORTING PARITY CHANGES

The Release (i) requires Affected Funds to satisfy structured data requirements in their SEC filings, (ii) requires Affected Funds to satisfy new annual and current reporting requirements and (iii) provides Affected Funds with greater flexibility to incorporate information by reference. However, the SEC did not adopt its proposal in the proposing release to 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 XBRL¹⁶ 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 Release amends Item 601 of Regulation S-K to remove the exclusion applicable to BDCs from the Inline XBRL financial statement tagging requirements and thereby subjects BDCs to the same requirements applicable to operating companies.

New Checkboxes and Structured Data Format for Form N-2 Cover Page. The Release requires all Affected Funds to tag the data points appearing on the cover page of Form N-2 (as modified by the Release and excluding the Calculation

¹⁴ 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 Release, Affected Funds that become WKSIs also gain that flexibility.

¹⁵ Exchange-traded funds or ETFs are registered under the 1940 Act. ETPs, as contemplated by the Release, have assets that consist primarily of commodities, currencies, or derivative instruments that reference commodities or currencies, or interests in the foregoing.

¹⁶ Inline XBRL format permits filers to embed XBRL data directly into an HTML document, which is both human-readable and machine-readable.

of Registration Fee table) using Inline XBRL format. An analogous requirement was adopted by the SEC in a separate release issued on the same day as the proposing release (summarized in this Ropes & Gray [Alert](#)).

The Release also adds 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 Release requires all Affected Funds to tag certain information in their prospectuses using Inline XBRL format. All Affected Funds (like mutual funds and ETFs) are 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 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 Release also requires 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 Release mandates that funds (including any BDCs) filing a short-form registration statement on Form N-2 must include key information in their annual reports¹⁷ 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, although many registered CEFs choose to include the equivalent. Therefore, the Release amends 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 Release requires BDCs to include financial highlights in their registration statements and in annual reports to shareholders.

Material Unresolved Staff Comments. The Release requires 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

¹⁷ For registered CEFs, this key information must be added to annual reports to shareholders on Form N-CSR, and for BDCs, this key information must be added to annual reports on Form 10-K.

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. The Release did *not* adopt provisions in the proposing release that would have required (i) Form 8-K reporting by registered CEFs and (ii) added two new Form 8-K reporting items for all Affected Funds.

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 Release amends Rule 103(a) to provide that, for purposes of Form N-2, 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 Release amends Form N-2's current "General Instruction for Incorporation by Reference," which will now allow all BDCs and registered CEFs, including those that are not Seasoned Funds, to backward incorporate financial information into their prospectus or SAI. In particular, the Release eliminates 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 is 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 – no longer applies. However, Affected Funds are 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 (*e.g.*, changes in principal investment objectives, investment policies or principal risks) that transpired during the prior year. The Release amends 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 Release also requires funds to preface such disclosures with a legend.

In a change from the proposing release, the Release requires Affected Funds that rely on Rule 8b-16(b) to describe the fund's current investment objectives, investment policies and principal risks in its annual report, even if there were no changes in the past year. The Release encourages funds "to tailor their disclosures to how the fund operates rather than rely on generic, standard disclosures about the fund's investment policies and risks" and to describe "principal risks in order of importance, with most significant risks appearing first (*i.e.*, not listing risks in alphabetical order)."

VIII. CERTAIN STAFF NO-ACTION LETTERS

Over the years, the SEC staff has provided no-action letters to specific listed registered CEFs that conduct delayed or continuous offerings under Rule 415(a)(1)(x) regarding their use of Rule 486(b). The Release states that various no-action letters – permitting a specific listed, registered CEF that conducts delayed or continuous offerings under Rule

415(a)(1)(x) to file post-effective amendments that are immediately effective under rule 486(b) – will be withdrawn effective August 1, 2021.¹⁸

IX. EFFECTIVE AND COMPLIANCE DATES¹⁹

Effective Dates. Other than the exceptions noted below, the Release’s rule and form amendments will become effective on August 1, 2020.

- The amendments to Rules 23c-3, 24f-2, and Form 24F-23 become effective August 1, 2021 to provide sufficient time to modify the SEC’s systems to accept such filings from interval funds.
- The amendments to Rules 456 and 457 and Forms S-1, S-3, F-1 and F-3 under the Securities Act become effective August 1, 2021.

Compliance Dates.

- **MDFP.** Beginning August 1, 2021, any annual report filed by a registered CEF will be required to include the MDFP disclosures.
- **Structured Data Requirements (Financial Statement, Cover Page, and Prospectus Information).** All Affected Funds subject to the Inline XBRL structured data reporting requirements for financial statement, registration statement cover page, and prospectus information that are eligible to file a short-form registration statement will be required to comply with these provisions beginning August 1, 2022. All other Affected Funds subject to these requirements must comply by February 1, 2023.
- **Structured Data Requirements (Form 24F-2).** All filers on Form 24F-2 (including existing Form 24F-2 filers, such as open-end funds and unit investment trusts, as well as interval funds) will be required to file reports on the form in an XML structured data format beginning February 1, 2022.

X. OBSERVATIONS

The Release streamlines the registration, communications and offering practices for many Affected Funds. The Release permits Affected Funds eligible to file a short-form registration statement to satisfy the disclosure requirements by forward incorporation by reference. This gives these Affected Funds the opportunity to avoid, in most instances, making post-effective amendments to update a registration statement. In turn, Affected Funds will be able to get an offering to market more promptly without risk of delay due to the SEC staff’s review and comment process.

In 2019, the SEC estimated that there were approximately 500 Affected Funds that could 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 100 Affected Funds (15 listed BDCs and 85 listed registered CEFs) that could meet the WKSI \$700 million public float requirement, although, due to recent market volatility, these numbers may be lower. These Affected Funds’ WKSI status provides the most flexibility and greatest ability to promptly access markets for additional capital.

¹⁸ See Division of Investment Management, Staff Statement Regarding Withdrawal of Staff Letters Related to Securities Offering Reform for Closed-End Investment Companies Rulemaking (April 2020) (available [here](#)).

¹⁹ The Release states that amended Form N-2 will become effective on August 1, 2020. It goes on to state that the SEC: also will need time to modify its systems to automatically reflect that automatic shelf registration statements are effective upon filing and process “pay-as-you-go” payments for affected funds that are WKSIs . . . Until such modifications are complete, which is anticipated to be September 2020, affected funds should contact the staff of the Division of Investment Management’s Disclosure Review and Accounting Office **if they are filing an automatic shelf registration statement.** (Emphasis added).

The Release's communications reforms also smooth the offering process for Affected Funds. In particular, Affected Funds benefit from being able to use Rule 134 to publish factual information about the Affected Fund or the offering, and being able to use free writing prospectuses under Rule 433.

The "ineligible issuer" definition applies 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 definition, the actions taken by an investment adviser, including any sub-adviser, could cause an Affected Fund to become ineligible for WKSI status. Therefore, an Affected Fund will need to ensure that the necessary information about its sub-adviser(s) is available to be used to evaluate its WKSI status on the relevant determination date.

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 Release. As a result, most interval funds and tender offer funds, as well as unlisted BDCs, are ineligible to use the short-form registration statement on Form N-2, unless such funds list their shares and otherwise satisfy the eligibility requirements. However, the Release expands the scope of Rule 486 to permit any Affected Fund that conducts continuous offerings under Rule 415(a)(1)(ix) to make certain changes to their registration statements on an immediately effective basis or on an automatically effective basis a set period of time after filing.

Several of the reforms contained in the Release incrementally increase the compliance burden on Affected Funds. For example, Affected Funds filing a short-form registration statement are 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.

* * *

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: Rule and Form Changes

Differences from the proposing release are marked

Rule	Summary Description of Rule	Entities Affected by Changes
REGISTRATION PROVISIONS		
Securities Act Rule 415	Permits registration of securities to be offered on a delayed or a continuous basis.	Seasoned Funds*
General Instructions A.2 and F.3 of Form N-2	Provide for backward and forward incorporation by reference.	Seasoned Funds
General Instruction F.4.a of Form N-2	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 23c-3	Subjects interval funds to the registration fee payment system based on annual net sales.	Interval Funds
Securities Act Rule 486	Allows continuously offered unlisted Affected Funds to make certain filings that are immediately effective upon filing or automatically effective 60 days after filing.	Continuously offered unlisted Affected Funds not relying on Rule 23c-3
Securities Act Rules 415, 424, 456 and 457; Forms S-1, S-3, F-1 and F-3	Permits ETPs to register an indeterminate amount of certain securities and pay registration fees based on annual net sales.	ETPs
General Instruction G of Form N-14	Permits certain registrants to incorporate by reference.	BDCs
COMMUNICATIONS PROVISIONS		
Securities Act Rule 134	Permits issuers to publish factual information about the issuer or the offering, including “tombstone ads.”	Affected Funds

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

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

Rule	Summary Description of Rule	Entities Affected by 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 paragraph (b) of the Rule describe in the annual report the fund’s current investment objectives, policies and risks, and certain key changes in enough detail to allow investors to understand each change and how it may affect the fund.	Registered CEFs

Instruction 4.h(2) to Item 24 of Form N-2	A requirement for information about the investor's costs and expenses in the registrant's annual report.	Seasoned Funds
Instruction 4.h(3) to Item 24 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
Instruction 4.h(1) to Item 24 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
Instruction 4.g to Item 24 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; Instruction 10 to Item 24 of Form N-2	Requires disclosure of certain financial information.	BDCs
Instruction 4.h.(4) to Item 24 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