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SEC Adopts Closed-End Fund Offering Reform Rules; SEC Staff Withdraws Related Relief

[32418]

April 27, 2020 TO: ICI Members
Closed-End Investment Company Committee SUBJECTS: Advertising
Closed-End Funds
Compliance
Disclosure
Distribution
Fees and Expenses
Fund Accounting & Financial Reporting RE: SEC Adopts Closed-End Fund Offering Reform Rules; SEC Staff Withdraws Related Relief

The Securities and Exchange Commission recently adopted rule and form amendments that modify the registration, communications, and offering processes for business development companies ("BDCs") and registered closed-end funds (collectively, "affected funds").[1]

- The amendments implement legislation[2] mandating the Commission to:
  - streamline the registration process for certain affected funds;
  - permit affected funds to satisfy their final prospectus delivery requirements by filing a prospectus with the Commission; and
  - permit affected funds and others to engage in additional communications prior to and during a registered public offering.
- In addition, the amendments harmonize the regulatory and disclosure framework of affected funds with other similarly situated issuers by:
  - allowing certain continuously offered affected funds (e.g., tender offer funds) to amend their registration statements on an immediately effective or automatically effective basis consistent with interval funds;
  - modifying the registration fee payments for interval funds and certain exchange-traded products consistent with mutual funds and exchange-traded funds; and
  - requiring affected funds (and other funds) to enhance disclosure by, among other things, imposing: (i) new structured data reporting requirements; and (ii) new annual report disclosure requirements.
- Importantly, consistent with ICI's strong recommendation, the Commission did not

adopt proposed rules that would have required all registered closed-end funds to file current reports on Form 8-K.[3]

In connection with the rulemaking, the SEC's Division of Investment Management issued guidance withdrawing several no-action letters that, because of the rulemaking, are no longer necessary.[4] This memorandum summarizes the adopted amendments and SEC staff actions.

I. Scope of Amendments

As proposed, the amendments impact different categories of affected funds differently, just as categories of operating companies are treated differently under the securities offering rules. Some amendments apply to all affected funds. Many amendments apply only to "seasoned funds," which are affected funds that generally are current and timely in their reporting and have at least $75 million in "public float."[5] Other amendments apply only to seasoned funds that qualify as "well-known seasoned issuers" ("WKSI funds")—seasoned funds that generally have at least $700 million in public float.[6]

Contrary to several commenters' recommendations, including from ICI, the Commission retained the public float standard for these determinations and maintained the $700 million threshold for WKSI funds. Those decisions prevent most interval funds and many affected funds from qualifying as "seasoned funds" or "WKSI funds" and, therefore, from using many of the provisions those entities can rely on.[7] In retaining the public float standard, the Commission explained, among other things, its view that using a different standard would be inconsistent with Congress' intent that affected funds and operating companies have the same standard. In retaining the $700 million threshold, the Commission stated that the threshold was not designed to result in a certain percentage of operating companies qualifying as WKSIs, as suggested by a commenter who recommended a lower threshold to match the resulting percentage for operating companies to the percentage of affected funds that could qualify as WKSI funds.

The Adopting Release includes tables describing each of the adopted rules and the categories of entities they affect, which are included in Appendix A.

II. Registration Reforms

The SEC amendments provide affected funds parity with operating companies by permitting them to sell securities "off the shelf" more quickly and efficiently in response to market opportunities.[8] Specifically, the amendments permit affected funds that meet certain conditions to:

- file a short-form registration statement on Form N-2 that will allow affected funds to register shelf offerings (including, for WKSI funds, shelf-registration statements that become effective automatically) and incorporate by reference information from the fund's filed reports to satisfy disclosure requirements;[9]
- include additional information in periodic reports that updates their registration statements; and
- omit information from their "base" prospectuses and use the process operating companies follow to provide that information in subsequent prospectus supplements.[10]

Short-Form Registration Statements and Incorporation by Reference: The amendments permit seasoned funds to file short-form registration statements and to "forward

incorporate" information from reports filed *after* a registration statement becomes effective.[11] To utilize short-form registration statements, a seasoned fund must:[12]

- specifically incorporate by reference into the prospectus and statement of additional information ("SAI") (i) its latest annual report that contains audited financial statements; and (ii) all reports filed since the end of the fiscal year covered by the annual report; and
- state that all documents subsequently filed pursuant to the Securities Exchange Act and prior to the termination of the offering are deemed to be incorporated by reference into the prospectus and SAI.

The amendments permit seasoned funds to incorporate information from periodic reports into their short-form registration statements to satisfy disclosure requirements and update additional information. The Commission declined to adopt a proposed requirement that only would allow a fund to include additional information if the fund included a statement in the periodic report identifying the information that it included for this purpose. The Commission instead determined that requiring an affected fund to highlight information just because it updates the fund's registration statement could unnecessarily emphasize it.

Automatic Shelf Registration Statements: The SEC adopted a new general instruction to Form N-2 that permits WKSI funds to file shelf registration statements that become effective immediately upon filing. Automatic shelf registration statements provide WKSI funds with flexibility to determine and change the plan of distribution in response to changing market conditions without having to go through the SEC review process. They also provide WKSI funds the ability to pay filing fees at any time in advance of a shelf takedown or on a "pay-as-you-go" basis at the time of each takedown.

Omitting Information from a Base Prospectus and Prospectus Supplements: The amendments permit affected funds registering securities in shelf offerings generally to omit information from their base prospectuses that is unknown or not reasonably available to the fund when the registration statement becomes effective.[13]

Filing a prospectus supplement is one way to provide information omitted from a base prospectus.[14] The amendments require affected funds to use Rule 424 under the Securities Act to file prospectus supplements, rather than Rule 497 under the Securities Act, as is currently done.[15] Although similar, Rule 424 works in connection with the shelf offering provisions and provides additional time for an issuer to file a prospectus, whereas Rule 497 does not reference the shelf offering provisions and requires the fund to file a prospectus with the Commission before using it. Rule 424 also requires an issuer to file a prospectus only if the issuer makes substantive changes or additions to a previously filed prospectus, while Rule 497 requires funds to file every prospectus that varies from a previously-filed prospectus.

III. Prospectus Delivery Reforms

As proposed, the amendments permit funds to satisfy their final prospectus delivery obligations by filing their final prospectus with the Commission, consistent with alternative prospectus delivery methods for operating companies.[16] In these instances, sales of securities will require a notice stating that the sale was made pursuant to a registration statement or in a transaction in which a final prospectus would have been required to have been delivered in the absence of the alternative prospectus delivery method.[17]

IV. Communications Reforms

As proposed, the amendments will permit affected funds to use safe harbors to more flexibly communicate prior to and during an offering period.[18] They also will permit broker-dealers associated with an affected fund offering to issue reports on various affected fund classes of securities.

Offering Communications: The amendments provide affected funds with increased flexibility in their offering communications that:

- permit affected funds to use certain communications prescribed by Rule 134 under the Securities Act to publish factual information about the issuer or the offering, including “tombstone ads;”
- permit affected funds to rely on Rule 163A under the Securities Act, which provides issuers a bright-line time period, ending 30 days prior to filing a registration statement, to communicate without violating communications restrictions;
- permit affected funds that are reporting companies to rely on Rule 168 under the Securities Act to publish or disseminate regularly released factual business information and forward-looking information at any time;
- permit affected funds to rely on Rule 169 under the Securities Act to publish or disseminate regulatory released factual business information that is intended for use by persons other than in their capacity as investors or potential investors;
- permit affected funds to rely on Rules 164 and 433 under the Securities Act to use a “free writing prospectus;”[19] and
- permit WKSI funds to engage at any time in oral and written communications, including use at any time of a “free writing prospectus” (before or after a registration statement is filed), subject to the same conditions applicable to other WKSIs.[20]

Affected funds may take advantage of the flexibility in the amendments or continue to rely on Rule 482 under the Securities Act and other rules currently applicable to investment company communications.[21]

Broker-Dealer Research Reports: The Commission amended Rule 138 under the Securities Act to clarify that a broker-dealer participating in the distribution of an affected fund’s common stock and similar securities may publish or distribute research about that affected fund’s fixed-income securities, if it publishes or distributes that research in the regular course of its business.[22] Although the Commission also was directed to revise Rule 139, which provides a safe harbor for a broker-dealer’s publication or distribution of research reports where the broker-dealer is participating in the registered offering of the issuer’s securities and covers any class of the issuer’s securities, to include the affected funds, it did not do so in light of recently adopted new Rule 139b.[23] Rule 139b includes Congressionally-mandated conditions for covered investment fund research reports that differ from the conditions in Rule 139. The Commission believes that the recently adopted rule satisfies the directive from Congress to extend Rule 139 to affected fund research reports. Further, it reasoned that, if it were to allow broker dealers to rely on Rule 139 and Rule 139b, the same conduct would be subject to different standards.

V. Automatic or Immediate Effectiveness for Filings from Certain

Affected Funds

Based on comments received, including from ICI, the Commission expanded the scope of Rule 486 under the Securities Act to cover affected funds conducting continuous offerings under Rule 415(a)(1)(ix) (*e.g.*, tender offer funds).[24] Rule 486 previously permitted only interval funds to file post effective amendments and registration statements that are immediately effective upon filing under Rule 486(b) (*e.g.*, to make non-material changes or to update financial statements) or automatically effective 60 days after filing under Rule 486(a) for material changes. The Commission amended Rule 486 to allow registration statements from these additional affected funds to become effective immediately if they are filed for no purpose other than to comply with the provisions of Rule 415 or for other purposes listed in Rule 486(b). If the filing does not meet such requirements, then the filing could become effective after 60 days pursuant to Rule 486(a).

VI. New Registration Fee Payment Method for Interval Funds and Other Products

The Commission amended the manner in which interval funds and certain continuously offered exchange-traded products[25] to pay SEC registration fees to coincide with the method that mutual funds and exchange-traded funds use today.[26] Under this method, many investment companies, including mutual funds and ETFs, register an indefinite amount of securities upon their registration statements' effectiveness. The funds then pay registration fees based on their net issuance of shares (netting out redeemed or repurchased securities), no later than 90 days after the fund's fiscal year end.

VII. Disclosure and Reporting Parity

The Commission adopted amendments to its rules and forms intended to tailor the disclosure and regulatory framework for affected funds largely as proposed. These changes impose new structured data filings and enhanced periodic reporting disclosure. Neither the BDC legislation nor the registered closed-end fund legislation directs these regulatory changes, but the Commission believes that the changes further the goals of providing regulatory parity to affected funds with otherwise similarly-situated issuers.

Structured Data Requirements: The Commission adopted several new structured data reporting requirements for affected funds. These require:

- BDCs to submit financial statement information using Inline eXtensible Business Reporting Language ("Inline XBRL") format;
- affected funds to include structured cover page information in their registration statement on Form N-2 using Inline XBRL format;[27]
- affected funds to tag certain required prospectus information using Inline XBRL format;[28] and
- all investment companies to submit Form 24F-2 filings in Extensible Markup Language ("XML") format.

The Commission stated that these requirements will allow investors, market participants, and other data users to more easily analyze and automate their use of the filed information.

Periodic Reporting: The Commission also adopted the enhanced annual report requirements as proposed:

- For seasoned funds using the short-form registration statements, the amendments

require disclosure of certain key information in their annual reports that they currently disclose in their prospectuses about fees and expenses, share price data, and outstanding senior securities.[29] In addition, despite recommendations against from ICI and other commenters, the Commission determined to require seasoned funds using short-form registration statements to disclose material, unresolved SEC staff comments.[30] In adopting the requirement, the Commission noted, among other things, that the analysis of whether a particular comment is "material" or "unresolved" involves some subjective judgment but that many disclosure requirements involve subjective judgment and result in disclosure variances. Also, it pushed back against comments that the requirement is at odds with recent statements about the non-binding nature of SEC staff guidance by stating that the requirement will not make the substance of SEC staff statements binding upon the public or Commission.

- For all registered closed-end funds, the amendments require disclosure of a management's discussion of fund performance ("MDFP") in their annual reports, consistent with mutual funds and ETFs;[31]
- For BDCs, the amendments require financial highlights in their registration statements and annual reports;[32] and
- For closed-end funds that do not annually update their registration statement in reliance on Rule 8b-16 under the Investment Company Act,[33] the amendments require a description of any key changes that have occurred during the year (*e.g.*, to investment objectives or policies that shareholders have not approved) in their annual reports in sufficient detail to allow investors to understand each change and how it might affect the fund.[34] In addition, in a change from the proposal, the amendments require those funds to describe the fund's current investment objectives, investment policies, and principal risks in their annual reports. The Commission adopted this change to ensure that investors can access in a single location key aspects of the funds in which they invest.

The Commission adopted these requirements because seasoned issuers that use short-form registration statements will forward incorporate periodic reports into their registration statements, elevating the importance of the periodic reports. Also, under the amendments, registered closed-end funds will not be required to deliver final prospectuses but still will be required to deliver shareholder reports at least semi-annually. Thus, the Commission determined to include the additional information in light of the importance of the information and increased prominence of shareholder reports under the new rules.

Current Reports: Consistent with ICI's recommendations, the Commission declined to require *all* registered closed-end funds to report current information on Form 8-K, as it proposed.[35] The proposal also would have (i) added two new Form 8-K reporting items for affected funds on material changes to investment objectives or policies and material write-downs of significant investments;[36] and (ii) required the tailoring of existing reporting requirements and instructions to affected funds.[37]

The Commission agreed that a new Form 8-K reporting requirement for registered closed-end funds may not substantially improve the flow of important current information to investors and, as a result, would not justify the additional burdens associated with Form 8-K reporting. The Commission noted, however, that it will continue to consider whether more current reporting requirements tailored to registered closed-end funds may be appropriate in connection with its ongoing review of investment company disclosure effectiveness. In

addition, it noted that, although, registered closed-end funds will not be required to file reports on Form 8-K, seasoned issuers using the short-form registration statement may voluntarily file information on Form 8-K to forward incorporate that information into their registration statements or for other purposes.

The Commission did not adopt the other Form 8-K requirements for registered closed-end funds or BDCs relating to material changes and material write-downs of significant investments, as commenters generally opposed the items and argued that existing disclosure is adequate. As with the other Form 8-K requirements, the Commission will continue to consider the adequacy of affected fund disclosure, including the availability and timeliness of information about material changes in investment objectives or policies and material write-downs of significant investments.

Regulation FD: The Commission amended Rule 103(a) of Regulation FD to clarify that, as with operating companies, the Commission will not consider affected funds to have failed to timely file their reports for purposes of determining eligibility as a seasoned fund when those funds do not make a public disclosure that is solely required by Rule 100 of Regulation FD.[38]

Online Availability of Items Incorporated by Reference: As proposed, the Commission eliminated the Form N-2 requirement that funds provide a copy of materials incorporated by reference to new investors, and instead required funds to make the incorporated materials, prospectus and SAI available on a website.[39] Affected funds must also provide the incorporated materials upon request free of charge.

VIII. Staff No-Action Letters and IM Guidance

The Commission determined to withdraw several SEC staff no-action letters permitting certain seasoned funds that conduct delayed or continuous offerings under Rule 415(a)(1)(x) to file post-effective amendments that are immediately effective under Rule 486(b).[40] The SEC believes that the letters are no longer necessary as seasoned funds now may update their registration statements through the forward incorporation by reference process using periodic reports. Shortly following the adoption of the rules, the SEC's Division of Investment Management provided guidance identifying and withdrawing these no-action letters, effective August 1, 2021.[41]

IX. Form N-2 Conforming Changes

The Commission made several other amendments to Form N-2 that are intended to implement the statutory mandates and tailor the disclosure and regulatory framework for affected. It believes that these amendments are non-substantive changes.

X. Effective and Compliance Dates

All aspects of the final rules become effective on August 1, 2020, except for the following:

Interval Funds, Exchange-Traded Products and SEC Registration Fees: The registration fee amendments to Rule 23c-3 (Interval Funds) and Rule 24f-2 (SEC Registration Fees) under the Investment Company Act and Rule 456 and 457 (Exchange-Traded Products) under the Securities Act (and Forms S-1, S-3, F-1, and F-3) will become effective on August 1, 2021.[42] This will provide the Commission sufficient time to modify systems to accept such fee filings.

*Structured Data Requirements:*In response to ICI comments, all affected funds subject to Inline XBRL structured data reporting requirements for financial statement, registration

statement cover page, and prospectus information that use short-form registration statements are required to comply with those provisions 24 months after the effective date, or August 1, 2022. The proposed 18-month compliance period for those funds was extended to align more closely with the Inline XBRL compliance period for other fund registrants. All other affected funds subject to these requirements (*i.e.*, those that do not use short-form registration statements) must comply 30 months after the effective date, or February 1, 2023. All filers on Form 24F-2 are required to comply with the XML structured data format no later than 18 months after the effective date, or February 1, 2022.

MDFP: Any annual report that a registered closed-end fund files will be required to include the MDFP disclosures by August 1, 2021.

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Attachment

endnotes

[1] *See* Securities Offering Reform for Closed-End Investment Companies, Investment Company Act Release No. 33836 (Apr. 8, 2020) ("Adopting Release"), *available at* https://www.sec.gov/rules/final/2020/33-10771.pdf.

[2] The SEC is implementing the amendments in response to legislation that ICI strongly supported directing them to adopt rules extending the securities offering reform rules currently available to operating companies to affected funds. *See* Small Business Credit Availability Act, Pub. L. No. 115-141, 132 Stat. 348 (2018) (legislation related to BDCs); Economic Growth, Regulatory Relief, and Consumer Protection Act, Pub. L. No. 115-174, 132 Stat. 196 (2018) (legislation related to registered closed-end funds). For a summary of the closed-end fund legislation, please see ICI Memorandum 31228, *available at* https://www.ici.org/my_ici/memorandum/memo31228. *See also* Testimony of Paul Stevens, President and CEO, ICI, before the US House of Representatives Subcommittee on Capital Markets, Securities and Investment of the House Financial Services Committee, dated Nov. 3, 2017, *available at* https://financialservices.house.gov/uploadedfiles/hhrg-115-ba16-wstate-pstevens-20171103.pdf.

[3] *See, e.g.*, Letter from Susan Olson, General Counsel, ICI, to Vanessa Countryman, Secretary, SEC, dated June 10, 2019, *available at*https://www.sec.gov/comments/s7-03-19/s70319-5650770-185712.pdf. For a summary of our comment letter, *please see* ICI Memorandum No. 31794, *available at* https://www.ici.org/my_ici/memorandum/memo31794.

[4] *See* IM Information Update, "Division of Investment Management Statement Regarding Withdrawal of Staff Letter Related to Securities Offering Reform for Closed-End Investment Companies Rulemaking" (April 2020), *available at* https://www.sec.gov/files/im-info-2020-04.pdf.

[5] Form S-3 defines an issuer's public float, also referred to as "aggregate market value,"

to be the “aggregate market value of the voting and non-voting common equity held by non-affiliates.” The determination of public float is based on value on a public trading market, such as an exchange or certain over-the-counter markets. *See* Adopting Release at note 101. In particular, “seasoned funds” are affected funds that: (a) meet the Form S-3 registrant and transaction requirements, which generally require a fund to have public float of $75 million or more; and (b) for registered closed-end funds, are registered under the Investment Company Act of 1940 for at least 12 calendar months immediately preceding the filing of the registration statement and have timely filed all reports required to be filed under Section 30 of the Investment Company Act during that time (*e.g.*, annual and semi-annual reports on Form N-CSR and reports on Forms N-CEN and N-PORT).

[6] An issuer is ineligible for WKSI status if, among other bases: (i) it is not current and timely in its periodic reports, or (ii) is the subject of a judicial or administrative decree or order arising out of governmental action involving violations of the anti-fraud provisions of the federal securities laws. The amendments change the “ineligible issuer” definition to reference affected funds and provide a parallel anti-fraud provision for affected funds.

[7] Most interval funds do not list their securities on an exchange and do not have a public float. Therefore, they will not satisfy the “seasoned fund” and “WKSI fund” requirements. The Commission noted that this treatment is similar to the treatment of certain operating companies, such as unlisted real estate investment trusts, that do not have a public float.

[8] In a shelf offering, an issuer registers an unallocated dollar amount of securities for sale at a later time. When affected funds later sell securities “off the shelf,” they must include all required information in their registration statements (*e.g.*, current financial information). Affected funds generally file post-effective amendments to their registration statements to update their financial statements, which involves the expense and potential delay associated with preparing the amendment and the SEC staff’s review process.

[9] “Incorporation by reference” is the act of including a document within another document simply by referencing the additional document. This act, if properly done, makes the entire additional document a part of the main document. “Forward incorporation by reference” simply refers to the incorporation by reference of documents that have yet to be created or filed. Issuers, such as registered closed-end funds, that previously could not forward incorporate by reference would amend their existing registration statements to specifically reference filings, such as shareholder reports, after they were made in order to incorporate information from those filings into the registration statement. This requires an additional filing to amend the registration statement that, unless automatically effective, the SEC staff will review.

[10] The amendments also except seasoned funds from the requirement to furnish recent engineering, management, or similar reports or memoranda relating to broad aspects of the business operations, or products of the registrant. See Amended Rule 418 under the Securities Act. In addition, the Commission amended proxy statements under Section 14A of the Securities Exchange Act of 1934 to allow seasoned funds to be treated as other operating companies that are eligible to use short-form registration statements and generally incorporate financial statements and other information in proxy statements containing specific proposals.

[11] Interval funds generally cannot utilize the short-form registration statement because they will not meet the definition of “seasoned fund.” *See supra* note 7. The Commission noted that interval funds already have their own offering provisions under Rule

415(a)(1)(xi) under the Securities Act and certain post-effective amendments to their registration statements are immediately effective under Rule 486(b) under the Securities Act. In addition, the Commission reasoned that, because interval funds make continuous offerings, they will not be able to file short-form registration statements that omit information required to be in an issuer's prospectus.

[12] The amendments also make corresponding changes to Form N-2 and Rule 415(a)(1)(x) under the Securities Act. First, the amendments modify the Form N-2 undertakings to eliminate the requirement that affected funds file post-effective amendments to cover information that now can be incorporated by reference. Second, the amendments amend Rule 415(a)(1)(x) to clarify that affected funds may use the shelf registration statement process.

[13] *See* Rule 409 under the Securities Act. In addition, WKSI funds can omit certain information relating to the plan of distribution and whether the offering is a primary one or an offering on behalf of selling security holders. *See* Amended Rule 430B under the Securities Act. The amendments also provide that seasoned funds that are registering the resale of securities on behalf of selling security holders can omit the identifies of those selling security holders and the amounts of securities to be registered on their behalf, subject to certain conditions. See Amended Rule 430B(b) under the Securities Act.

[14] Omitted information also may be provided in a post-effective amendment or, where permitted, through filings that are incorporated by reference.

[15] Currently, operating companies utilize Rule 424 to file prospectus supplements, while investment companies utilize Rule 497. These amendments do not apply to open-end funds or other registered investment companies, which will continue to file prospectuses pursuant to Rule 497. In addition, the amendments do not apply to advertisements that are deemed to be prospectuses under Rule 482 under the Securities Act.

[16] *See* Amended Rule 172 under the Securities Act.

[17] *See* Amended Rule 173 under the Securities Act.

[18] Generally, the Securities Act restricts the types of offering communications that issuers and other parties may use in connection with registered public offerings. Unless otherwise permitted:

- Before an issuer files a registration statement, all offers are prohibited;
- After the issuer files a registration statement but before it has become effective, the only written offers permitted are those using a preliminary prospectus that meets the requirements for a statutory prospectus; and
- After the registration statement is declared effective, participants may make written offers only through a statutory prospectus or when a statutory prospectus accompanies or precedes other written materials.

[19] Rules 164 and 433 under the Securities Act provide that a "free writing prospectus" is a permitted prospectus for purposes of the Section 10(b) of the Securities Act and can be used without violating Section 5(b)(1) of the Securities Act.

[20] A WKSI can: (1) rely on the bright-line time period provided by Rule 163A under the Securities Act for communications made more than 30 days before a registration statement is filed and that do not reference a securities offering that is or will be the subject of a

registration statement; (2) subject to specified conditions, rely on the exemption in Rule 163 under the Securities Act from the prohibition on offers before the filing of a registration statement to engage in written or oral communications, including use at any time of a free writing prospectus, made by or on behalf of eligible WKSIs; (3) disseminate regularly released factual and forward-looking information at any time, including around the time of a registered offering, in reliance on Rule 168 under the Securities Act; (4) issue a broader category of routine communications set forth in Rule 134 under the Securities Act regarding issuers, offerings, and procedural matters, that are excluded from the definition of "prospectus," and (5) use a free writing prospectus after a registration statement is filed in reliance on Rules 164 and 433 under the Securities Act.

[21] Investment company communications currently are subject to Rule 482. These communications or "ads" only can be used by a fund selling or proposing to sell its securities pursuant to a filed registration statement.

[22] Although Rule 138 does not exclude affected funds from coverage, the Commission amended the rule to include specific references to affected fund registration statements on Form N-2.

[23] *See* Covered Investment Fund Research Reports, Securities Act Release No. 10580 (Nov. 30, 2018), *available at* https://www.sec.gov/rules/final/2018/33-10580.pdf.

[24] Rule 415(a)(1)(ix) under the Securities Act permits issuers to register securities that are not asset backed securities and whose offerings are commenced promptly and on a continuous basis for a period in excess of 30 days. These funds generally are required to file new registration statements every three years under Rule 415(a)(5) and (6).

[25] The exchange-traded products are from issuers that are not registered investment companies and whose assets consist primarily of commodities, currencies or derivative instruments that reference commodities or currencies; whose securities are listed for trading on a national securities exchange; and that purchase or redeem securities for a ratable share of their assets at net asset value.

[26] *See* amendments to Rule 23c-3 and Rule 24f-2 under the Investment Company Act. Interval funds today are required to pay registration fees at the time they register the securities, regardless of when (or if) they sell them.

[27] This requires tagging of all cover page data points, except the Calculation of Registration Fee table. The Commission also amended the Form N-2 cover page to require additional checkboxes as proposed and a new checkbox for emerging growth companies that have elected not to use an extended transition period for complying with new or revised accounting standards.

[28] The amendments require affected funds to tag the following prospectus disclosure items: Fee Table; Senior Securities Table; Investment Objectives and Policies; Risk Factors; Share Price Data; and Capital Stock, Long-Term Debt, and Other Securities.

[29] Form N-2 currently requires registrants to include information about the costs and expenses that an investor will bear directly or indirectly, using specified captions and a specified tabular format. *See* Item 3.1 of Form N-2. Form N-2 also currently requires registrants to include information about the share price of the registrant's stock, as well as information about any premium or discount that the share price reflects compared to the

registrant's net asset value. *See* Item 8.5 of Form N-2. In addition, Form N-2 currently requires registrants to include information about each of its classes of senior securities, including bank loans. *See* Item 4.3 of Form N-2.

[30] This requirement mirrors the requirement for operating companies that utilize the securities offering reform rules. In adopting requirement, the Commission noted that commenters provided no basis for distinguishing affected funds from operating companies already subject to the requirement.

[31] The MDFP requires narrative disclosure about factors that materially impacted the fund's performance during the most recently completed fiscal year, as well as the impact on a fund and its shareholders of policies and practices that funds may use to maintain a certain level of distributions. This requires that registered funds:

- discuss the factors that materially affected their performance during the most recently completed fiscal year, including the relevant market conditions and the investment strategies and techniques used by the fund;
- provide a line graph comparing the initial and subsequent account values at the end of each of the most recently completed ten fiscal years of the fund and a table of the fund's total returns for the 1-, 5-, and 10-year periods as of the last day of the fund's most recent fiscal year; and
- discuss the effect of any policy or practice of maintaining a specified level of distributions to shareholders on the fund's investment strategies and per share net asset value during the last fiscal year, as well as the extent to which the registrant's distribution policy resulted in a distribution of capital.

BDCs already provide a similar "Management Discussion and Analysis" section in their annual reports.

[32] Registered closed-end funds currently are required to include financial statements in their registration statement and in each annual report to shareholders. The Commission understands that it generally is market practice for BDCs to include financial highlights in their annual reports. In connection with the requirement, the Commission also eliminated the requirement that registered closed-end funds specify the average commission rate paid in their financial highlights, because these rates are technical information that investors are not able to understand.

[33] Rule 8b-16 under the Investment Company Act permits registered closed-end funds to avoid annually updating their registration statements if they disclose in their annual reports certain key changes that have occurred during the prior year.

[34] The Commission also required funds to preface such disclosures with a legend clarifying that the disclosures only provide a summary of certain changes that have occurred during the past year and state that the summary may not reflect all of the changes that have occurred since the investor purchased the fund.

[35] Form 8-K generally requires subject reporting companies, including BDCs, to publicly disclose certain specified events and information on a current basis (within four business days after a determination is made or an event occurs) to provide investors with timely information.

[36] Under the proposal, a material write-down would occur when the fund concludes that there is a material charge for impairment to one or more of its assets under generally

accepted accounting principles. The Commission specified that a “significant investment” for these purposes would be greater than 10 percent of the fund’s total assets.

[37] These modifications would have made it clear that, as with operating companies, registered closed-end funds would not be required to make the Form 8-K disclosure if the fund has previously reported the event or transaction in a publicly-available filing.

[38] Rule 100 of Regulation FD generally requires an issuer to make either simultaneous or prompt public disclosure of any material non-public information regarding the issuer or its securities that the issuer or a person acting on the issuer’s behalf has selectively disclosed to certain parties.

[39] Form N-2 currently requires a fund to provide to new purchasers a copy of all previously-filed materials that the fund incorporates by reference into the registration statement. The Commission noted that this has raised particular challenges for BDCs, which are required to include their financial statements in the prospectus. This means that BDCs that have updated their financial statements must determine whether an investor is new and, if so, deliver the incorporated material. Registered closed-end funds only are minimally affected by this change because their financial statements are not required to be included in the prospectus but in the SAI, which is not required to be sent to new investors, except upon request.

[40] These letters state that the staff of the Division of Investment Management would not recommend enforcement action under Section 5(b) or 6(a) of the Securities Act against specific listed registered closed-end funds conducting shelf offerings under Rule 415(a)(1)(x) under the Securities Act on a case-by-case basis regarding their use of Rule 486(b) under the Securities Act (providing a mechanism for closed-end interval funds to file registration statements and post-effective amendments to registration statements that are automatically effective).

[41] *See supra* note 4.

[42] To facilitate the transition to calculating fees on Form 24F-2, an interval fund’s fee calculation should exclude excess shares that were registered under the fund’s last registration statement on Form N-2 that remain unsold prior to the effectiveness of Rule 24f-2, as applied to interval funds.
