

MEMO# 30943

November 8, 2017

SEC Proposes Disclosure and Reporting Changes Related to Incorporation by Reference, Hyperlinking, and Use of HTML Format for Funds and Advisers

[30943]

November 8, 2017 TO: Accounting/Treasurers Committee
Chief Compliance Officer Committee
Closed-End Investment Company Committee
Compliance Advisory Committee
ETF (Exchange-Traded Funds) Committee
Investment Advisers Committee
Operations Committee
SEC Rules Committee
Small Funds Committee
Unit Investment Trust Committee RE: SEC Proposes Disclosure and Reporting Changes Related to Incorporation by Reference, Hyperlinking, and Use of HTML Format for Funds and Advisers

On October 11, the SEC proposed amendments to modernize and simplify certain disclosure requirements in Regulation S-K and related rules and forms, pursuant to Section 72003 of the Fixing America's Surface Transportation Act (FAST Act).^[1] Some of these proposed changes would affect investment companies and investment advisers.

Comments are due by January 2, 2018. ICI intends to submit a comment letter, a draft of which will be circulated to members for review and comment prior to filing. If you have comments on the Proposal, please feel free to reach out to me (matt.thornton@ici.org or 202-371-5406) at your earliest convenience. We would particularly be interested in your views on the following (these proposed changes are described below):

- **Should ICI support the proposed changes to the incorporation by reference provisions? Are these problematic in any way? If so, which, and why?**
- **Should ICI support the proposed hyperlinking requirements? Are these problematic in any way? If so, which, and why?**

- **Would the proposed requirement that registration statements and reports be filed in HTML format be problematic? If so, why?**
- **In areas where the SEC is proposing relief for operating companies only, should ICI seek similar relief for investment companies and advisers? If so, which, and on what grounds?**

Background

Section 72003 of the FAST Act requires the SEC to study and produce a report on Regulation S-K's requirements, with the report including recommendations on (i) modernizing and simplifying Regulation S-K's reporting requirements in a manner that reduces the costs and burdens on issuers while still providing all material information, and (ii) improving the readability and navigability of disclosure documents and discouraging repetition and the disclosure of immaterial information. It also requires the SEC to "issue a proposed rule to implement the recommendations of the report...." The SEC issued the required report in November 2016,[\[2\]](#) and this Proposal fulfills this second statutory mandate.

Many of the proposed amendments apply only to operating companies. To provide for a consistent set of rules to govern incorporation by reference and hyperlinking, however, the SEC has proposed parallel amendments to several rules and forms applicable to investment companies and investment advisers. These are briefly summarized below.

Proposed Changes Related to Incorporation by Reference

To reduce duplicative disclosure, the SEC permits registrants to incorporate by reference previously filed information into their filings, subject to a number of conditions and limitations. The SEC's proposed amendments would revise Item 10(d) of Regulation S-K, Rule 411 under the Securities Act, Rule 12b-23 under the Exchange Act, and a number of forms to simplify and modernize these rules while still providing all material information. To provide for consistency, the SEC has proposed parallel amendments to Rule 0-4 under the Investment Company Act[\[3\]](#) and a number of Investment Company Act forms; parallel amendments to Rule 0-6 under the Investment Advisers Act;[\[4\]](#) and rescission of Investment Company Act Rules 8b-23, 8b-24, and 8b-32 (certain provisions of which would be consolidated into proposed new Rule 0-4).[\[5\]](#)

More specifically, the proposed amendments would:

- Eliminate Item 10(d)'s prohibition on incorporating documents by reference if they have been on file with the SEC for more than five years.
- Consolidate Item 10(d)'s other procedural rules in Rule 0-4 (for investment companies) and Rule 0-6 (for investment advisers).
- Eliminate Rule 8b-23's requirement that investment company registrants file with a registration statement or report a copy of any registration statement, report, or prospectus from which information is incorporated by reference, except in cases where the registration statement, report, or prospectus was filed electronically.
- Amend Rule 411, Rule 12b-23, and Rule 0-4 to require hyperlinks to information that is incorporated by reference if that information is available on EDGAR, to facilitate greater investor access to disclosure.
- Amend Rule 0-4 to restrict the incorporation of financial information required to be

given in comparative form for two or more fiscal years or periods, unless the information incorporated by reference includes the entire period for which the comparative data is given (this would provide for consistency with similar restrictions under both current and proposed Rule 411 and Rule 12b-23).

- Move the provisions relating to incorporating exhibits by reference from Rule 8b-32 into Rule 0-4, except that one provision (*i.e.*, that an investment company may only incorporate by reference into a registration statement or report required to be filed electronically an exhibit that was filed in electronic format, unless the exhibit was filed in paper under a hardship exemption and any required confirming copy has been submitted) would be eliminated, as it is obsolete.
- Eliminate the requirements in Rule 0-4 and Rule 0-6 that if a certificate of an independent public accountant previously or concurrently filed is incorporated by reference by an investment company (with respect to the filing of a registration statement, application, or report) or an investment adviser (with respect to the filing of an application) a written consent of the accountant must be filed with the filing.
- Eliminate the restrictions currently contained in Rule 0-4(d) and Rule 0-6(d) on incorporating by reference exhibits or financial statements made in certain filings.[\[6\]](#)
- Eliminate the provisions currently contained in Rule 0-4(e) and Rule 0-6(e) (which provide that the SEC may refuse to permit incorporation by reference in any case in which, in its judgment, such incorporation would render a registration statement or report of an investment company or an application filed by an investment adviser incomplete, unclear, or confusing) and instead include a general requirement that information must not be incorporated by reference in any case where such information would render the disclosure incomplete, unclear, or confusing.

The SEC also proposes a number of corresponding changes to the incorporation by reference instructions to several investment company forms (*e.g.*, Form N-1A).

Exhibit Hyperlinks and HTML Format for Investment Companies

Under the proposed amendments, affected registrants generally would be required to include a hyperlink to each exhibit identified in a filing's exhibit index. This requirement would apply to registration statements on Form S-6, Form N-1A, Form N-2, Form N-3, Form N-4, Form N-5, Form N-6, and Form N-14, and to reports on Form N-CSR. Registrants would not be required to refile electronically any exhibits filed only in paper. An electronic filer also would also be required to correct an inaccurate or nonfunctioning link or hyperlink to an exhibit.[\[7\]](#)

Proposed amendments to Rule 105 of Regulation S-T would require investment company registrants to file registration statements and reports that include exhibits in HTML format, in order to make the proposed hyperlinking requirements feasible.

Matthew Thornton
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endnotes

[1] *FAST Act Modernization and Simplification of Regulation S-K*, SEC Release No. IC-32858, 82 Fed. Reg. 50988 (Nov. 2, 2017) (“Proposal”), available at www.gpo.gov/fdsys/pkg/FR-2017-11-02/pdf/2017-22374.pdf.

[2] Available at: www.sec.gov/reportspubs/sec-fast-act-report-2016.pdf.

[3] Rule 0-4 provides general incorporation by reference rules for investment company registration statements, applications, and reports filed with the SEC.

[4] Rule 0-6 governs incorporation by reference for investment adviser applications for SEC orders under the Investment Advisers Act other than applications for registration as an investment adviser.

[5] Rule 8b-23 provides additional incorporation by reference rules for registration statements and reports. Rule 8b-24 sets forth rules regarding summaries or outlines of documents. Rule 8b-32 applies to incorporating exhibits by reference.

[6] Specifically, these Rules currently restrict the incorporation by reference of exhibits or financial statements which (1) have been withdrawn, (2) were filed in connection with certain registration statements that have ceased to be effective, (3) are contained in filings subject to pending proceedings under (i) Section 8(b) or 8(d) of the Securities Act, (ii) Section 8(e) of the Investment Company Act, (iii) in the case of applications under Rule 0-6, Section 203(e)(1) of the Investment Advisers Act, or (iv) orders under any of the foregoing, and (4) in the case of investment companies, were documents filed in paper and with respect to an electronic filer under a temporary hardship exemption under Rule 201 of Regulation S-T and an electronic copy has not been submitted.

[7] In the case of a registration statement that is not yet effective, the filer would be required to file an amendment to the registration statement containing the inaccurate or nonfunctioning link or hyperlink. In the case of a report on Form N-CSR, the filer would be required to correct the inaccurate or nonfunctioning link or hyperlink in its next report on Form N-CSR. In the case of a registration statement on Form S-6, Form N-14, Form N-5, Form N-1A, Form N-2, Form N-3, Form N-4, or Form N-6 that has become effective, the filer would be required to correct an inaccurate or nonfunctioning link or hyperlink in the next post-effective amendment, if any, to the registration statement.