

MEMO# 31228

May 31, 2018

Legislation Enacted to Modernize Closed-End Fund Offerings and Communications

[31228]

May 31, 2018 TO: ICI Members SUBJECTS: Closed-End Funds RE: Legislation Enacted to Modernize Closed-End Fund Offerings and Communications

Last week, President Trump signed the “Economic Growth, Regulatory Relief, and Consumer Protection Act” (the “Act”), which, among other things, directs the Securities and Exchange Commission to adopt rules that would allow registered exchange-traded closed-end funds and registered interval funds^[1] (together, “eligible closed-end funds”) to use the more streamlined securities offering and proxy rules that are available to other issuers, subject to appropriate conditions.^[2] The enactment of the Act follows a comprehensive legislative process that included testimony supporting the legislation from ICI President and Chief Executive Officer, Paul Schott Stevens.^[3]

The Act requires the SEC to propose closed-end fund rules by May 24, 2019 and finalize them by May 24, 2020. If the SEC does not meet those deadlines, then eligible closed-end funds would be deemed to be “eligible issuers” under the SEC’s rules, implicitly able to utilize the securities offering and proxy rules on their own.^[4]

Enabling closed-end funds to rely on these securities offering and proxy rules would, among other things:

- permit certain eligible closed-end funds to file automatic shelf registration statements;
- permit certain eligible closed-end funds to forward incorporate future filings by reference;
- permit eligible closed-end funds to rely on additional safe harbors to communicate with the public during a public offering; and
- permit eligible closed-end funds to deliver a written notice in lieu of a final prospectus for shares sold during a public offering.

I. Use of Automatic Shelf Registration Statements

Eligible closed-end funds that otherwise meet the criteria for being deemed a “well-known seasoned issuer” or “WKSI” would have the ability to utilize automatic shelf registration statements.^[5] Automatic shelf registration statements become effective immediately without SEC staff review and comment. This would allow those funds to better time and

more quickly take advantage of changing market environments for fund offerings.

II. Use of Forward Incorporation by Reference

Eligible closed-end funds that otherwise meet the criteria of a “seasoned issuer” would be able to forward incorporate by reference future filings into their registration statements.^[6] This would eliminate the need for those funds to amend their registration statements each time they file new financial statements, saving time and resources.

III. Communication Reforms

Eligible closed-end funds would be able to rely on several safe harbors to communicate with the public during their pre-filing, waiting, and offering periods.^[7] This could facilitate greater availability of information and allow eligible closed-end funds to more freely communicate with shareholders.

IV. Prospectus Delivery

Finally, eligible closed-end funds, through their underwriter or dealer, would be able to deliver written notices, in lieu of final prospectuses, to purchasers during an initial public offering or subsequent offering. The underwriter or dealer only would need to send a written confirmation and notice that includes, among other things, a statement that purchasers may request a final prospectus. This could reduce fund printing and delivery costs.

Kenneth Fang
Assistant General Counsel

endnotes

^[1] An interval fund is a closed-end fund that periodically offers to repurchase its shares from shareholders.

^[2] See Economic Growth, Regulatory Relief, and Consumer Protection Act, Pub. L. No. 115-174, § 509 (Parity for Closed-End Companies Regarding Offering and Proxy Rules) (2018). A copy of the enrolled bill, as passed by the House of Representatives and the Senate, is available at <https://www.congress.gov/bill/115th-congress/senate-bill/2155/text>.

^[3] Mr. Stevens’ written testimony and oral statement are available at <https://financialservices.house.gov/uploadedfiles/hhrg-115-ba16-wstate-pstevens-20171103.pdf> and <https://financialservices.house.gov/calendar/eventsingle.aspx?EventID=402507>, respectively. The Act is an amended version of the “Expanding Investment Opportunities Act” and Section 499A of the “Financial CHOICE Act of 2017.” For summaries of those bills, see ICI Memoranda Nos. 31046 (January 18, 2018), available at https://www.ici.org/my_ici/memorandum/memo31046, and 30774 (July 10, 2017), available at https://www.ici.org/my_ici/memorandum/memo30774.

^[4] The SEC adopted the securities offering and proxy rules in 2005. The term “eligible issuer” technically is not defined in those rules. See Securities Offering Reform, 70 Fed. Reg. 44722 (Aug. 3, 2005), available at <https://www.sec.gov/rules/final/33-8591fr.pdf>.

[5] A “well-known seasoned issuer” is defined in rule 405 under the Securities Act of 1933, available at <https://www.law.cornell.edu/cfr/text/17/230.405>. If rule 405 were applicable to closed-end funds, it generally would require a closed-end fund to:

- have as of a date within 60 days of the determination date, a worldwide market value of outstanding common equity held by non-affiliates of \$700 million or more;
- have made all of its required filings in timely manner for at least 12 calendar months preceding the time the registration statement is filed; and
- have made payments on all of its dividends and not defaulted on any installment of debt or any rental on long-term leases.

[6] “Seasoned Issuers” are those entities that can meet the requirements of filing on Form S-3. This generally would require a closed-end fund to:

- have an aggregate market value of voting and non-voting common equity shares held by non-affiliates of \$75 million or more;
- have made all of its required filings in timely manner for at least 12 calendar months preceding the time the registration statement is filed; and
- have made payments on all of its dividends and not defaulted on any installment of debt or any rental on long-term leases.

See General Instruction I of Form S-3, available at: <https://www.sec.gov/files/forms-3.pdf>.

[7] Importantly, the Act does not impair or limit a closed-end fund’s ability to use its current methods of distributing sales material (*i.e.*, in reliance on Rule 482 under the Securities Act of 1933).