

MEMO# 31046

January 23, 2018

House Passes Bill to Modernize Certain Registered Closed-End Fund Offerings and Communications

[31046]

January 23, 2018 TO: ICI Members SUBJECTS: Closed-End Funds RE: House Passes Bill to Modernize Certain Registered Closed-End Fund Offerings and Communications

Last week, the US House of Representatives approved H.R. 4279, the “Expanding Investment Opportunities Act,” with significant bi-partisan support by a vote of 418 to 2.[\[1\]](#) The approval followed testimony supporting the bill from ICI President and Chief Executive Officer, Paul Schott Stevens, and consideration from the House Financial Services Committee where it was reported out by 58 to 2 margin.[\[2\]](#)

The bill contains provisions that would require the SEC to propose rules within 180 days of enactment and finalize rules within one year of enactment to allow registered exchange-traded closed-end funds or registered interval funds[\[3\]](#) to use the securities offering and proxy rules that are available to other issuers, subject to appropriate conditions.[\[4\]](#) If the SEC does not adopt the revisions within those time frames, then such closed-end funds would be permitted to utilize the securities offering and proxy rules on their own.

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

- permit certain closed-end funds to file automatic shelf registration statements;
- permit certain closed-end funds to forward incorporate future filings by reference;
- permit closed-end funds to rely on additional safe harbors to communicate with the public during a public offering; and
- permit 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

Permitting closed-end funds to rely on the securities offering and proxy rules would provide closed-end funds that otherwise meet the criteria for being deemed a “well-known seasoned issuer” or “WKSI” with the ability to utilize automatic shelf registration statements.[\[5\]](#) Automatic shelf registration statements become effective immediately without SEC staff review and comment.

II. Use of Forward Incorporation by Reference

Permitting closed-end funds to rely on the securities offering and proxy rules also would provide closed-end funds that otherwise meet the criteria of a “seasoned issuer” with the ability to forward incorporate by reference future filings into their registration statements.^[6] This would eliminate the need for these closed-end funds to amend their registration statements each time they file new financial statements.

III. Communication Reforms

In addition, permitting closed-end funds to rely on the securities offering and proxy rules would give closed-end funds the ability to rely on several safe harbors to communicate with the public during their pre-filing, waiting, and offering periods.^[7]

IV. Prospectus Delivery

Finally, permitting closed-end funds to rely on the securities offering and proxy rules would permit closed-end funds, through their underwriter or dealer, to deliver written notices in lieu of final prospectuses to purchasers during an IPO 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 have the opportunity to request a final prospectus.

The bill has been referred to the Senate Banking Committee, where its prospects are uncertain.

Kenneth Fang
Assistant General Counsel

endnotes

^[1] Representative Trey Hollingsworth (R-IN) introduced the bill, which was later co-sponsored by Representative Randy Hultgren (R-IL), Representative Bill Foster (D-IL) and Representative Josh Gottheimer (D-NJ).

^[2] 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.

^[3] An interval fund is a closed-end fund that periodically offers to repurchase its shares from shareholders.

^[4] The securities offering and proxy rules were adopted in 2005. See Securities Offering Reform, 70 Fed. Reg. 44722 (Aug. 3, 2005), *available* at <https://www.sec.gov/rules/final/33-8591fr.pdf>. The bill is an amended version of Section 499A of the “Financial CHOICE Act of 2017.” For a summary of that section, see ICI memorandum 30774 (July 10, 2017), *available* at https://www.ici.org/my_ici/memorandum/memo30774.

^[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 bill would 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).