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Financial CHOICE Act Includes Provisions Modernizing Registered Closed-End Fund Offerings and Communications

[30774]

July 10, 2017 TO: ICI Members SUBJECTS: Closed-End Funds RE: Financial CHOICE Act Includes Provisions Modernizing Registered Closed-End Fund Offerings and Communications

In June, the US House of Representatives approved H.R. 10, the "Financial CHOICE Act of 2017" (the "CHOICE Act").[1] The CHOICE Act contains provisions that would require the SEC to act within one year of the bill's enactment to amend rules to provide several benefits to closed-end funds, including:[2]

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

Section 499A of the CHOICE Act 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.[3] Automatic shelf registration statements become effective immediately without SEC staff review and comment.

II. Use of Forward Incorporation by Reference

Section 499A 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.[4] This would eliminate the need for certain closed-end funds to amend their registration statements each time they file new financial statements.

III. Communication Reforms

In addition, Section 499A would provide closed-end funds with the ability to rely on several safe harbors to communicate with the public during their pre-filing, waiting, and offering periods.[5]

IV. Prospectus Delivery

Finally, Section 499A 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 highly uncertain.

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endnotes

[1] "CHOICE" is an acronym for Creating Hope and Opportunity for Investors, Consumers, and Entrepreneurs. For a summary of the CHOICE Act, *see* ICI Memoradum No. 30751 (June 22, 2017), *available at* https://www.ici.org/my_ici/memorandum/memo30751.

[2] The provisions were introduced as an amendment Representative Trey Hollingsworth offered. For text of the amendment and a transcript of the House floor discussion, see163 Cong. Rec. H4791-93 (daily ed. June 8, 2017), *available at* https://www.congress.gov/crec/2017/06/08/CREC-2017-06-08.pdf.

[3] 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.

[4] "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.

[5] Importantly, the section 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).
