

MEMO# 31695

April 2, 2019

SEC Proposes Amendments to Closed-End Fund Offering and Reporting Requirements; Member Call Scheduled for Tuesday, April 16 at 2 pm (Eastern)

[31695]

April 2, 2019 TO: ICI Members

Closed-End Investment Company Committee SUBJECTS: Closed-End Funds
Compliance

Disclosure RE: SEC Proposes Amendments to Closed-End Fund Offering and Reporting
Requirements; Member Call Scheduled for Tuesday, April 16 at 2 pm (Eastern)

The Securities and Exchange Commission recently proposed amendments that would modify the registration, communications, and offering processes for business development companies (“BDCs”) and registered closed-end funds (collectively, “affected funds”).^[1] The proposed amendments would implement legislation 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.^[2] In addition, the Commission proposed further amendments intended to harmonize the disclosure and regulatory framework of affected funds with other similarly situated issuers. These proposed amendments would modify the registration fee payments for closed-end interval funds in a manner consistent with mutual funds and exchange-traded funds (“ETFs”). The amendments also would place additional requirements on affected funds (and other funds) by, among other things: (i) imposing new structured data reporting requirements, including on annual Form 24F-2 notices on which many investment companies (e.g., mutual funds and ETFs) calculate and pay registration fees; (ii) requiring affected funds to provide new annual report disclosures; and (iii) requiring all registered closed-end funds to file current reports on Form 8-K.

ICI will hold a call on Tuesday, April 16 at 2 pm (Eastern Time) to discuss the proposal and to solicit comments. Please contact Ruth Tadesse at rtadesse@ici.org to receive dial-in information for the call. Comments are due 60 days after the Proposing Release is published in the Federal Register. If you have any questions or comments on the proposal, please contact Ken Fang at kenneth.fang@ici.org. We provide a description of the proposed amendments below.

I. Scope of Proposed Amendments

The proposed amendments impact affected funds and, for purposes of the new structured data reporting requirements, other funds (including open-end funds and ETFs) that pay SEC registration fees on Form 24F-2. Generally speaking, the SEC intends to treat all affected funds, including unlisted BDCs and unlisted registered closed-end funds, in a consistent manner under the proposed amendments.[\[3\]](#)

The proposed amendments would create new categories of affected funds and treat them differently, just as categories of operating companies are treated differently under the securities offering rules. Some of the amendments would apply to all affected funds. Many of the amendments, however, would apply only to “seasoned funds,” which would be funds that generally are current and timely in their reporting and have at least \$75 million in “public float.”[\[4\]](#) Other amendments would apply only to seasoned funds that would qualify as “well-known seasoned issuers” (“WKSI funds”), that is, seasoned funds that generally have at least \$700 million in public float.[\[5\]](#) Under the proposed amendments, many interval funds could not qualify as “seasoned funds” or “WKSI funds” and, therefore, utilize many of the provisions those entities could rely on.[\[6\]](#) The Proposing Release includes a table summarizing the proposed amendments and their impact on these various entities, which is attached as Appendix A.

II. Registration Reforms

The SEC proposes to 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.[\[7\]](#) Specifically, the proposed amendments would permit affected funds that meet certain conditions to:

- File a short-form registration statement on Form N-2 that would allow affected funds to register shelf offerings (including, for WKSI funds, shelf-registration statements that become effective automatically), and satisfy disclosure requirements by incorporating by reference information from the fund’s filed reports.[\[8\]](#)
- Include additional information in periodic reports that update their registration statements, provided the information is identified as being included for that purpose.
- Omit information from their “base” prospectuses and use the process operating companies follow to provide that information in one or more subsequent prospectus supplements.[\[9\]](#)

Short-Form Registration Statement and Incorporation by Reference: The Commission would permit affected funds that qualify as “seasoned funds” to file short-form registration statements and to “forward incorporate” information from reports filed after a registration statement becomes effective.[\[10\]](#) To utilize short-form registration statements, a seasoned fund would be required to:[\[11\]](#)

- 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 of 1934 and prior to the termination of the offering shall be deemed to be incorporated by reference into the prospectus and SAI.

The proposed amendments also would permit affected funds to incorporate by reference additional information that is not required to be included in their periodic reports to update

their registration statements. A statement in the periodic report identifying information that they have included for this purpose must accompany the additional information.[\[12\]](#)

Automatic Shelf Registration Statements: The SEC proposes a new general instruction to Form N-2 that would permit WKSJ funds under the proposed amendments to file shelf registration statements that become effective immediately upon filing. Automatic shelf registration statements would provide WKSJ 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. It also would provide WKSJ 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: Under the proposed amendments, affected funds registering securities in shelf offerings generally could continue to omit information from their base prospectuses that is unknown or not reasonably available to the fund when the registration statement becomes effective.[\[13\]](#) In addition, WKSJ funds and seasoned funds could omit certain additional information relating to the plan of distribution and whether the offering is a primary one or an offering on behalf of selling security holders.[\[14\]](#)

Filing a prospectus supplement is one way to provide information omitted from a base prospectus.[\[15\]](#) The proposed amendments would 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.[\[16\]](#) 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.[\[17\]](#)

III. Prospectus Delivery Reforms

The proposed amendments would 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.[\[18\]](#) In these instances, sales of securities would 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.[\[19\]](#)

IV. Communications Reforms

The proposed amendments would permit affected funds to more flexibly utilize safe harbors when communicating prior to and during an offering period and would permit broker-dealers associated with an affected fund offering to issue reports on various affected fund classes of securities.[\[20\]](#)

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

- 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;”[\[21\]](#)
- 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;[\[22\]](#)

- 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;[\[23\]](#)
- 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;[\[24\]](#)
- Permit affected funds to rely on Rules 164 and 433 under the Securities Act to use a “free writing prospectus;”[\[25\]](#) and
- Permit affected WKSJ 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 WKSJs.[\[26\]](#)

These proposed amendments provide incremental flexibility to affected funds in their communications. Affected funds would be permitted to take advantage of the additional flexibility or continue to rely on Rule 482 under the Securities Act and other rules currently applicable to investment company communications.[\[27\]](#)

Broker-Dealer Research Reports: The proposed amendments would amend 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.[\[28\]](#) Although the SEC 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, the Commission is not doing so in light of recently adopted new Rule 139b.[\[29\]](#) 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 reasons 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. New Registration Fee Payment Method for Interval Funds

The proposed amendments would amend the manner in which interval funds pay SEC registration fees to coincide with the same method that mutual funds and exchange-traded funds use today.[\[30\]](#) 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, no later than 90 days after the fund’s fiscal year end.

VI. Disclosure and Reporting Parity Proposals

The Commission also is proposing amendments to its rules and forms to tailor the disclosure and regulatory framework for affected funds “in light of the proposed amendments to the offerings rules applicable to them.”[\[31\]](#) These changes impose new structured data filings, enhanced periodic reporting, and additional current reporting requirements on funds. Neither the BDC legislation nor the registered closed-end fund legislation directs these regulatory changes, but the Commission believes that the changes would further the goals of providing regulatory parity to affected funds with otherwise similarly-situated issuers.

Structured Data Requirements: The Commission is proposing several new structured data reporting requirements for affected funds. These would 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;[\[32\]](#)
- Affected funds to tag certain required prospectus information using Inline XBRL format;[\[33\]](#) and
- All investment companies to submit Form 24F-2 filings in Extensible Markup Language (“XML”) format.

The Commission is proposing these requirements to allow investors, market participants, and other data users to more easily analyze and automate their use of the filed information. In addition, the Commission proposes to require BDCs submit financial statement information using Inline XBRL to subject BDCs to the structured data reporting requirements for operating companies.

Periodic Reporting: In addition to the structured data requirements, the Commission is proposing the following enhanced annual report requirements:

- For seasoned funds using the proposed short-form registration, the Commission would 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.[\[34\]](#) In addition, the Commission would require seasoned funds using short-form registration to disclose unresolved staff comments that they believe are material.[\[35\]](#)
- For all registered closed-end funds, the Commission would require disclosure of a management’s discussion of fund performance (“MDFP”) in their annual reports, consistent with mutual funds and ETFs;[\[36\]](#) and
- For BDCs, the Commission would require financial highlights in their registration statements and annual reports;[\[37\]](#) and
- For closed-end funds that do not annually update their registration statement in reliance on Rule 8b-16 under the Investment Company Act,[\[38\]](#) the Commission would 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.[\[39\]](#)

The Commission is proposing these requirements because it believes that seasoned issuers that take advantage of filing short-form registration statements would forward incorporate periodic reports into their registration statements, elevating the importance of the periodic reports. Also, it notes that, under the proposed amendments, registered closed-end funds would not be required to deliver final prospectuses but still would be required to deliver shareholder reports at least semi-annually. Thus, the Commission is proposing to include this additional information in light of the importance of the information and the increased prominence of shareholder reports under the proposal.

Current Reports: The proposed amendments would require all registered closed-end funds to report current information on Form 8-K. 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. In addition, the proposed amendments would:

- Add 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;[\[40\]](#) and
- Tailor the existing reporting requirements and instructions to affected funds.[\[41\]](#)

The Commission proposes to require the Form 8-K requirements to standardize the current information that all affected funds must disclose and make this information accessible centrally on the SEC's EDGAR filing system. In addition, it believes that it is appropriate to require registered closed-end funds to provide more timely and current disclosures on those events, which otherwise might be disclosed on an annual or semi-annual basis.

Consistent with provisions for operating companies, the Commission proposes to allow affected funds to continue to be eligible to use short-form registration statements and to have a safe harbor from certain antifraud provisions under the Securities Exchange Act, even if the funds fail to timely file current reports related to certain items (including for the two new Form 8-K reporting items).[\[42\]](#) The Proposing Release clarifies that, like operating companies that use short-form registration, an affected fund would need to be current in its Form 8-K filings with respect to all required items at the time of a Form N-2 filing. In addition, the Proposing Release clarifies that, as with operating companies, the safe harbor from the antifraud provisions of the Securities Exchange Act only extends until the due date of the affected fund's periodic report for the relevant period in which the Form 8-K was not timely filed.

Regulation FD: The proposed amendments would amend Rule 103(a) of Regulation FD to clarify that, as with operating companies, the Commission would 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 on Form 8-K that is solely required by Rule 100 of Regulation FD.[\[43\]](#)

Online Availability of Items Incorporated by Reference: The Commission proposes to eliminate the Form N-2 requirement that funds provide a copy of materials incorporated by reference to new investors, and instead require funds to make the incorporated materials, prospectus and SAI available on a website.[\[44\]](#) It also proposes to streamline the Form N-2 provisions regarding the disclosure requirements for incorporation by reference, which currently are spread across several provisions in General Instruction F to Form N-2.

VII. Certain Staff No-Action Letters

The Commission notes that the proposed amendments are designed to address the process by which affected funds, including listed registered closed-end funds, update their registration statements. It further notes that the amendments would provide a consistent regulatory framework for all affected funds. Therefore, it states that the staff in the SEC's Division of Investment Management is reviewing no-action letters to determine if they should be withdrawn in connection with any final rules and seeks related feedback.[\[45\]](#)

VIII. Form N-2 Conforming Changes

The Commission proposes several other amendments to Form N-2 that are intended to implement the statutory mandates and tailor the disclosure and regulatory framework for affected funds in light of the proposed amendments to the offering rules. It believes that these amendments are non-substantive changes to the form.

IX. Compliance Dates

The Commission proposes to provide the following transition periods to give affected funds sufficient time to comply with certain of the proposed new requirements:

Interval Funds and SEC Registration Fees: The proposed amendments to Rule 23c-3 (Interval Funds) and Rule 24f-2 (SEC Registration Fees) under the Investment Company Act would become effective one year after the publication of a final rule in the Federal Register.

Structured Data Requirements: All affected funds subject to the financial statement or prospectus structured data reporting requirements that would be eligible to file a short-form registration statement would be required to comply with those provisions no later than 18 months after the date of publication of a final rule in the Federal Register. All other affected funds subject to those requirements would be required to comply 24 months after publication of a final rule in the Federal Register. All filers on Form 24F-2 would be required to comply with the proposed structured data format for this form no later than 18 months after the publication of a final rule in the Federal Register.

MDFP: Any annual report that a registered closed-end fund files one year or more after the publication of a final rule in the Federal Register would be required to include the proposed MDFP disclosures.

Form 8-K: All affected funds that would be eligible to file a short-form registration statement would be required to comply with the full scope of Form 8-K as proposed, including the new Form 8-K items for affected funds, by the earlier of: (i) one year after the publication of a final rule in the Federal Register, or (ii) the date a fund first files a short-form registration statement on Form N-2. All other affected funds would be required to comply 18 months after the date of the publication of a final rule in the Federal Register.

Appendix A: SEC Summary Description of Proposed Amendments and Affected Entities

RULE

SUMMARY DESCRIPTION OF RULE

ENTITIES AFFECTED BY PROPOSED CHANGES

REGISTRATION PROVISIONS

Securities Act Rule 415

Permits registration of securities to be offered on a delayed or a continuous basis.

Seasoned Funds*

Proposed General Instructions A.2 and F.3 of Form N-2

Provide for backward and forward incorporation by reference.

Seasoned Funds

Proposed General Instructions F.4.a

Requires online posting of information incorporated by reference.

Affected Funds

Securities Act Rule 430B

Permits certain issuers to omit certain information from their “base” prospectuses and update the registration statement after effectiveness.

Seasoned Funds

Securities Act Rules 424 and 497

Provide the processes for filing prospectus supplements.

Affected Funds

Securities Act Rule 462

Provides for effectiveness of registration statements immediately upon filing with the Commission.

WKSIs

Securities Act Rule 418

Exempts some registrants from an obligation to furnish certain engineering, management, or similar reports.

Seasoned Funds

Investment Company Act Rule 22c-3

Subjects interval funds to the registration fee payment system based on annual net sales.

Interval Funds

COMMUNICATIONS PROVISIONS

Securities Act Rule 134

Permits issuers to publish factual information about the issuer or the offering, including “tombstone ads.”

Affected Funds

Securities Act Rule 163A

Permits issuers to communicate without risk of violating the “gun- jumping” provisions until 30 days prior to filing a registration statement.

Affected Funds

Securities Act Rules 168 and 169

Permit the publication and dissemination of regularly released factual and forward-looking information.

Affected Funds

Securities Act Rules 164 and 433

Permit use of a "free writing prospectus."

Affected Funds

Securities Act Rule 163

Permits oral and written communications by WKSIs at any time.

WKSIs

Securities Act Rule 138

Permits a broker or dealer to publish or distribute certain research about securities other than those they are distributing.

Seasoned Funds

PROXY STATEMENT PROVISION

Item 13 of Schedule 14A

Permits certain registrants to use incorporation by reference to provide information that otherwise must be furnished with certain types of proxy statements.

Seasoned Funds

PROSPECTUS DELIVERY PROVISIONS

Securities Act Rules 172 and 173

Permit issuers, brokers, and dealers to satisfy final prospectus delivery obligations if certain conditions are satisfied.

Affected Funds

STRUCTURED DATA REPORTING PROVISIONS

Structured Financial Statement Data

A requirement that BDCs tag their financial statements using Inline Extensible Business Reporting Language ("Inline XBRL") format.

BDCs

Prospectus Structured Data Requirements

A requirement that registrants tag certain information required by Form N-2 using Inline XBRL.

Affected Funds

Form 24F-2 Structured Format

A requirement that filings on Form 24F-2 be submitted in a structured format.

Form 24F-2 Filers

PERIODIC REPORTING PROVISIONS

Investment Company Act Rule 8b-16

A requirement that funds that rely on the rule disclose certain enumerated changes in the annual report in enough detail to allow investors to understand each change and how it may affect the fund.

Registered Closed-End Funds

Proposed Item 24.4h(2) of Form N-2

A requirement for information about the investor's costs and expenses in the registrant's annual report.

Seasoned Funds

Proposed Item 24.4h(3) of Form N-2

A requirement for information about the share price of the registrant's stock and any premium or discount in the registrant's annual report.

Seasoned Funds

Proposed Item 24.4h(1) of Form N-2

A requirement for information about each of a fund's classes of senior securities in the registrant's annual report.

Seasoned Funds

Proposed Item 24.4g of Form N-2

A requirement for narrative disclosure about the fund's performance in the fund's annual report.

Registered Closed-End Funds

Item 4 of Form N-2

Requires disclosure of certain financial information.

BDCs

Proposed Item 24.4h(4) of Form N-2

A requirement to disclose outstanding material staff comments that remain unresolved for

a substantial period of time.

Seasoned Funds

CURRENT REPORT PROVISIONS

Exchange Act Rules 13a-11 and 15d-11

Require registered closed-end funds to file current reports on Form 8-K.

Registered Closed-End Funds

Proposed Section 10 of Form 8-K

Requires current reporting of two new events specific to affected funds.

Affected Funds

Regulation FD Rule 103

Provides that a failure to make a public disclosure required solely by Rule 100 of Regulation FD will not disqualify a “seasoned” issuer from use of certain forms.

Seasoned Funds

* Some of the proposed rule changes that are shown above as affecting “seasoned funds” only would affect seasoned funds that elect to file a registration statement on Form N-2 using a proposed instruction permitting funds to use the form to file a short-form registration statement.

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endnotes

[1] See Securities Offering Reform for Closed-End Investment Companies, Investment Company Act Release No. 33427 (Mar. 20, 2019) (“Proposing Release”), *available at* <https://www.sec.gov/rules/proposed/2019/33-10619.pdf>.

[2] The SEC is proposing the amendments in response to legislation directing the SEC to adopt rules extending the securities offering reform rules currently available to operating companies to BDCs and closed-end 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 (May 31, 2018), *available at* https://www.ici.org/my_ici/memorandum/memo31228.

[3] The Commission believes that such an approach would benefit unlisted registered closed-end funds and their investors by providing new protections to investors in those funds and could avoid any adverse consequences of treating unlisted registered closed-end

funds differently from unlisted BDCs and registered closed-end funds.

[4] In particular, “seasoned funds” are those that: (a) meet the registrant and transaction requirements of Form S-3, which generally are met for a primary offering if the fund’s public float is \$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. These reports include all annual and semi-annual reports on Form N-CSR and reports on Forms N-CEN and N-PORT.

Form S-3 defines an issuer’s “aggregate market value,” commonly referred to as “public float,” as the “aggregate market value of the voting and non-voting common equity held by non-affiliates.” The determination of public float is based on a public trading market, such as an exchange or certain over-the-counter markets. See Proposing Release at note 12.

[5] In order for an issuer to qualify as a WKSJ, it must be “seasoned” and generally must have at least \$700 million in “public float.” See paragraph (1)(i)(A) of the WKSJ definition in Rule 405 under the Securities Act of 1933. An alternative basis for an issuer to satisfy this requirement is to have issued, for cash, within the last three years, at least \$1 billion in aggregate principal amount of non-convertible securities through primary offerings registered under the Securities Act (paragraph (1)(i)(B) of the WKSJ definition). An issuer is ineligible for WKSJ 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 proposed amendments would make conforming amendments to the “ineligible issuer” definition to reference BDCs and investment companies.

[6] Most interval funds do not list their securities on an exchange and do not have a public float. Therefore, they would not satisfy the “seasoned fund” requirement and could not utilize the short-form registration statement. The Commission notes 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.

[7] Currently, affected funds must include all required information in their registration statement (e.g., current financial information) when they sell securities, including as part of a follow-on offering or “takedown off the shelf.” Affected funds typically file post-effective amendments to their registration statements to include updated financial statements, which involves the expense and potential delay associated with the preparation of the amendment and the staff’s review and comment process.

[8] 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 currently cannot forward incorporate by reference must amend their existing registration statements to specifically reference filings, such as shareholder reports, after they are 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 will review and comment on.

[9] The proposed amendments also would except seasoned funds from certain provisions of Rule 418 under the Securities Act, which provides that the Commission or its staff may request supplemental information concerning the registrant, the registration statement, the distribution of securities, market activities and underwriters' activities. Specifically, the proposed amendments would except seasoned funds from the Rule 418 requirement to furnish recent engineering, management, or similar reports or memoranda relating to broad aspects of the business operations, or products of the registrant.

In addition, the rules would amend proxy statements under Section 14A of the Securities Exchange Act 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.

[10] As noted above, interval funds generally could not utilize the short-form registration statement because they would not meet the definition of "seasoned fund." See supra note 6. The Commission notes 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 reasons that, because interval funds make continuous offerings, they would not be able to file short-form registration statements that omit information required to be in an issuer's prospectus.

[11] The proposed amendments also would make corresponding changes to the Form N-2 and Rule 415(a)(1)(x) under the Securities Act. First, the proposed amendments would modify the Form N-2 undertakings to eliminate the requirement that affected funds file post-effective amendments to cover information that, under the proposed amendments, would be incorporated by reference. Second, the proposed amendments would amend Rule 415(a)(1)(x) to clarify that affected funds may use the shelf registration statement system by adding a reference to closed-end funds utilizing the short-form registration statement on Form N-2. The SEC also considered but did not require that funds incorporate by reference Form N-PORT and N-CEN information into their prospectuses and SAs.

[12] See Proposed Instruction 6.i of Item 24 of Form N-2.

[13] See Rule 409 under the Securities Act.

[14] See Rule 430B under the Securities Act. The proposed amendments also would provide that seasoned funds could register a primary offering where the issuer is registering securities for selling security holders. In this instance, the prospectus, subject to conditions, also can omit the identities of selling security holders and the amount of securities to be registered on their behalf.

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

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

[17] Affected funds relying on Rule 430B, like operating companies, would undertake that for purposes of determining liability under the Securities Act, each prospectus supplement is deemed part of the registration statement containing the base prospectus to which the supplement relates. This is measured as of the earlier of the date the prospectus supplement is first used after effectiveness or the date of the first contract of sale of securities in the offering described in the prospectus.

[18] See Proposed Rule 172 under the Securities Act.

[19] See Proposed Rule 173 under the Securities Act.

[20] 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.

[21] Rule 134 generally provides that the terms “prospectus” as defined in Section 2(a)(10) of the Securities Act or “free writing prospectus” as defined in Rule 405 do not include communications limited to the specific statements required or permitted by Rule 134, provided that the Rule 134 communications are published or transmitted to any person only after a registration statement has been filed that includes a prospectus satisfying the requirement of Section 10 of the Securities Act, except as otherwise provided in the rule.

[22] Rule 163A provides that a communication that meets the rule’s conditions is not an “offer” for purposes of Section 5(c) of the Securities Act. Because Rule 163A provides a safe harbor from the application of Section 5(c), it necessarily applies only prior to the filing of a registration statement. This exclusion will thus not apply to issuers offering securities off a shelf registration statement on file, whether or not effective, as the prohibition in Section 5(c) does not apply to the offering of the securities covered by such shelf registration statement.

[23] Rule 168 is a safe harbor from the definition of “prospectus” in Section 2(a)(10) of the Securities Act and, therefore, prevents the application of the prohibition in Section 5(b)(1) of the Securities Act on the use of a prospectus that is not a statutory prospectus. Rule 168 also is a safe harbor from the prohibitions on pre-filing “offers” in Section 5(c).

[24] Rule 169 is also a safe harbor from the definition of “prospectus” in Section 2(a)(10) of the Securities Act.

[25] 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.

[26] A WSKI 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.

[27] 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. See Rule 482 under the Securities Act.

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

[29] 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>.

[30] See proposed 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.

[31] See Proposing Release at page 10.

[32] The proposed amendments also would amend the Form N-2 cover page to require checkboxes to:

- Indicate that a WKSI fund’s registration statement or post-effective amendment will become effective automatically;
- Indicate that the registration statement is an automatic shelf registration statement that registers additional securities or classes of securities in a post-effective amendment;
- Indicate whether a fund is relying on the proposed short-form registration statement;
- Identify characteristics of a fund, including whether it is: (1) a registered closed-end fund; (2) a BDC; (3) a registered closed-end fund that operates as an interval fund; (4) a seasoned fund; (5) a WKSI; (6) an “emerging growth company” under Rule 12b-2 under the Securities Exchange Act; or (7) a registrant that has been registered or regulated under the Investment Company Act for less than 12 calendar months; and
- Clarify the purpose of the filing, including to indicate that the only securities being registered are being offered pursuant to a dividend reinvestment plan or interest plan, or whether the form is being filed as a post-effective amendment under Rule 462(c) or (d) under the Securities Act.

[33] The proposed amendments would 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.

[34] 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.

[35] This requirement mirrors the requirement for operating companies that utilize the securities offering reform rules.

[36] 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 would require 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.

[37] 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 proposed requirement, the Commission also proposes to eliminate 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.

[38] 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.

[39] The Commission also is proposing that funds 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 also state that the summary may not reflect all of the changes that have occurred since the investor purchased the fund.

[40] 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 specifies that a "significant investment" for these purposes would be greater than 10 percent of the fund's total assets. The Commission also

anticipates that reporting on these two new events will be infrequent, so they will not result in substantial Form 8-K filings.

[41] These modifications would make 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. Similar clarifications would be made on the Form 8-K to clarify that the form applies to registered closed-end funds. These would include clarifications to Items 2.02 (Results of Operations and Financial Condition) and 3.02 (Unregistered Sales of Equity Securities) of Form 8-K.

[42] While operating companies generally must timely file Securities Exchange Act filings to be eligible for using short-form registration, there are exceptions for failing to timely file reports under certain Form 8-K items. These are for Items 1.01, 1.02, 2.03, 2.04, 2.05, 2.06, 4.02(a), 5.02(e), or 6.03 of Form 8-K. See Proposing Release at note 289. In addition, operating companies that are required to file Form 8-K have a limited safe harbor from Section 10(b) and Rule 10b-5 under the Securities Exchange Act if they fail to file many of the same Form 8-K items. See *id.*

[43] 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.

[44] 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 notes 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 and is only delivered upon request.

[45] In particular, the Commission cites letters stating 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). In this regard, the Commission asks whether they should make changes to Rule 486(b) to address any lingering concerns that the funds that sought no-action assurances might have under the proposal.