

SEC Proposes Offering Reforms for Business Development Companies and Registered Closed-End Funds

May 2, 2019

On March 20, 2019, the U.S. Securities and Exchange Commission (the SEC), acting pursuant to recent legislation, proposed rule and form amendments (the Proposed Changes) intended to “improve access to capital and facilitate investor communications” by business development companies (BDCs) and closed-end investment companies registered under the Investment Company Act of 1940, as amended (the 1940 Act) (Registered CEFs and, together with BDCs, Affected Funds), comparable to the securities offering reforms adopted in 2005 for other issuers (i.e., operating company issuers) that are required to file reports under Section 13(a) or Section 15(d) of the Securities Exchange Act of 1934, as amended (the Exchange Act).¹ Certain of the Proposed Changes would apply only to BDCs and Registered CEFs that also qualify as “well-known seasoned issuers” (WKSIs) as defined in Rule 405 (as proposed to be amended) under the Securities Act of 1933, as amended (the Securities Act).²

The comment period for the Proposed Changes will remain open until June 10, 2019.

Highlights of Proposed Changes

The Proposed Changes would enable eligible Affected Funds to use securities offering rules that are currently available only to certain operating company issuers, including

¹ See “SEC Proposes Offering Reforms for Business Development Companies and Registered Closed-End Funds,” SEC Press Release, March 20, 2019 (<https://www.sec.gov/rules/proposed/2019/33-10619.pdf>) (the Proposing Release).

² In 2018, Congress passed the Small Business Credit Availability Act (the SBCA Act), which, among other things, directed the SEC to revise certain securities offering and proxy rules to reduce disparities in registration and reporting requirements for BDCs as compared to other issuers, and the Economic Growth, Regulatory Relief and Consumer Protection Act (the Economic Growth Act), which directed the SEC to propose and finalize rules and regulations to allow a Registered CEF listed on a national securities exchange (a Listed Registered CEF) or a Registered CEF that makes periodic repurchase offers pursuant to Rule 23c-2 under the 1940 Act (an Interval Fund) to use the securities offering and proxy rules currently available to other issuers that are required to file reports under Section 13(a) or Section 15(d) of the Exchange Act. The SBCA Act applies to all BDCs, whether listed on an exchange or not. The Economic Growth Act does not mandate rulemaking for unlisted closed-end funds; however, the SEC has proposed to extend the proposed securities offering and communications rules, with some exceptions, to unlisted closed-end funds. The Proposing Release notes that while unlisted Affected Funds (such as Interval Funds) may not qualify to rely on all the rules proposed to be amended, they would be able to rely on some rules that may provide additional flexibility in the offering process.

- Use of Short-Form Registration Statements and Forward Incorporation by *Reference*
- WKSJ Status for Eligible Affected Funds
- Final Prospectus Delivery Reforms: Access Equals Delivery
- Communications Reforms
- New Registration Fee Payment Method for Interval Funds
- Broker-Dealer Research Reports
- Disclosure and Reporting Parity Proposals

The highlighted Proposed Changes are summarized below, followed by a table, adapted from Table 1 in the Proposing Release, outlining the Proposed Changes by affected rule or form.

Short Form Registration/Forward Incorporation by Reference

The Proposed Changes would allow eligible Affected Funds to sell securities more quickly “off the shelf.”³ The Proposed Changes also would clarify and expand the ability of eligible Affected Funds to use rules currently available only to seasoned operating companies: (i) using a “base” prospectus on Form N-2, (ii) relying on Rule 430B under the Securities Act to omit certain information, (iii) incorporating by reference certain *past and future* Exchange Act reports and (iv) using a later prospectus supplement to provide the omitted information.

To be eligible, an Affected Fund would need to meet the registration and transaction requirements of Form S-3. If the Affected Fund is a closed-end fund, it must have been registered under the 1940 Act for at least 12 calendar months preceding the filing of the registration statement and have timely filed all reports required under Section 30 of the 1940 Act during such time.

As most Interval Funds do not list their securities on an exchange and do not have public float, they would not be able to use short-form registration statements that omit information required to be included in the fund’s prospectus when it offers its securities. However, Interval Funds can rely on Rule 415(a)(1)(xi) under the Securities Act, which provides some of the same efficiencies.

The Proposed Changes would (i) amend Rule 415 under the Securities Act to clarify that Affected Funds may use that rule and (ii) add a new general instruction to Form N-2 to permit Affected Funds that would be WKSJs under the Proposed Changes to file an automatic shelf registration statement. A WKSJ can register unspecified amounts of different types or classes of securities on an automatic shelf registration statement.

Use of a short-form registration statement and the incorporation by reference of future reports may provide benefits, including (i) a faster registration process and (ii) incremental lower costs (e.g., by permitting such funds to incorporate by reference certain documents or disclosure).

³ The Proposed Changes would facilitate the ability of an Affected Fund to use Form N-2 to register the same types of offerings that operating companies can register on Form S-3, including offerings by majority-owned subsidiaries that are closed-end funds. An Affected Fund using a short-form registration statement would not need to file an annual posteffective amendment subject to SEC staff review but generally must file a new registration statement every three years. See Rule 415(a)(5).

In addition, the Proposed Changes would remove the requirement that Registered CEFs and BDCs deliver to new investors information that has been incorporated by reference into the fund's prospectus or statement of additional information (SAI) and would instead require the fund to make its prospectus, SAI and the incorporated materials readily available and accessible on a website maintained by or for the fund. The fund would be required to provide, at no charge, any materials incorporated by reference, upon request, to any person to whom a prospectus or SAI which was delivered.

Well-Known Seasoned Issuer WKSJ Status

Under the securities offering reform rules adopted in 2005, an issuer that meets certain requirements qualifies as a WKSJ and is able to benefit from modified rules relating to communications and the securities registration process. The 2005 offering reforms expressly excluded Affected Funds, with such entities being deemed "ineligible issuers." The Proposed Changes would permit an Affected Fund that qualifies as a WKSJ to communicate at any time (including by means of a free writing prospectus) without violating the "gun-jumping" provisions of the Securities Act. To qualify as a WKSJ, an issuer must (i) satisfy the registration requirements of Form S-3 (i.e., it must be "seasoned") and (ii) generally must have at least \$700 million in "public float" (market value of outstanding voting and nonvoting common equity held by nonaffiliates).⁴ Alternatively, an issuer can satisfy this requirement if, as of a date within 60 days of the determination date, it has issued, for cash, within the last three years, at least \$1 billion in aggregate principal amount of nonconvertible securities, other than common equity, through primary offerings that were registered under the Securities Act.⁵

An issuer is ineligible for WKSJ status if, among other factors, (i) it is not current and timely in its Exchange Act reports during the prior 12 months (or such shorter period that the issuer was required to file such reports), or (ii) it is the subject of a judicial or administrative decree or order arising out of a governmental action involving violations of the antifraud provisions of the federal securities laws.⁶ The Proposed Changes would modify the definition of "ineligible issuer" (i) to reflect that a Registered CEF would be ineligible if it has failed to file all reports and materials required to be filed under Section 30 of the 1940 Act during the preceding 12 months and (ii) to provide that an Affected Fund would be ineligible if within the past three years its investment adviser, including any subadviser, was the subject of any judicial or administrative decree or order arising out of a governmental action that determines that the investment adviser aided or abetted or caused the Affected Fund to have violated the antifraud provisions of the federal securities laws.

Final Prospectus Delivery Reforms — Alternative Delivery

The Proposed Changes would amend Rule 172 under the Securities Act to permit an Affected Fund that meets certain requirements to satisfy its final prospectus delivery obligation by filing its final prospectus with the SEC. Currently, Rule 172 allows issuers, brokers and dealers that are permitted to rely on such Rule to satisfy the final prospectus delivery requirement by filing the prospectus within the time required by the rules and the satisfaction of certain other conditions. Rule 173 under the Securities Act requires a notice be provided to purchasers stating that the sale of securities was made pursuant to a registration statement in which a final prospectus would have been required to be delivered in the absence of Rule 172. Affected Funds may not currently rely on Rule 172 or Rule 173; however, the Proposed Changes would permit them to do so.

⁴ The determination of public float is based on a public trading market, such as an exchange or certain over-the-counter markets.

⁵ See paragraph (1)(i)(B) of the definition of WKSJ in Securities Act Rule 405. The Proposing Release asks for comments regarding whether a different level of public float should be used for Affected Funds to qualify as a WKSJ, noting that Interval Funds shares are generally not listed on an exchange, and whether it would be appropriate to allow these funds to use their net asset value rather than public float.

⁶ See the definition of "ineligible issuer" in Rule 405 under the Securities Act.

Communication Reforms

The Proposed Changes would permit Affected Funds to use communications rules that are currently available only to operating companies, including “free writing prospectuses” and forward-looking information. The Proposed Changes would permit Affected Funds to

- rely on Rule 134 under the Securities Act to publish factual information about the issuer or an offering, such as “tombstone ads”
- rely on Rule 163A under the Securities Act, which provides that communications by or on behalf of an issuer more than 30 days before the filing date of a registration statement that does not reference a securities offering that is or would be subject to a registration statement will not be deemed to be an offer to sell, offer for sale or offer to buy the securities being offered under the registration statement for purposes of Section 5(c) of the Securities Act. The proposed amendments to Rules 163 and 433 would permit Affected Funds to rely on such rules to use a free writing prospectus.

In addition, the Proposed Changes would permit Affected Funds that qualify as WKSIs to engage at any time in oral and written communications, including the use of a free writing prospectus (before or after a registration statement is filed), subject to the same conditions applicable to other WKSIs.

Affected Funds that use Rule 482 advertisements would still be required to file them with the SEC, meaning that a Rule 482 advertisement will continue to constitute a prospectus subject to liability under Section 12 of the Securities Act.

New Registration Fee Payment Method for Interval Funds

The Proposed Changes would require Interval Funds to pay securities registration fees on a net basis once a year (the same method currently used by registered open-end funds and exchange-traded funds) rather than having to pay when the fund files its registration statement.

Broker-Dealer Research Reports

Rule 139 under the Securities Act requires that an issuer that is covered in a research report published in reliance on Rule 138 must have filed all required periodic reports during the prior 12-month period on Forms 10-K and 10-Q. Registered CEFs do not file these reports. The Proposed Changes would include references to reports on Forms N-CSR, N-Q, N-CEN and N-PORT in Rule 139, thereby including Registered CEFs in the existing regulatory framework for research reports.

Disclosure and Reporting Parity Proposals

The Proposed Changes would require Affected Funds to provide certain additional disclosures, including

- for Registered CEFs: management’s discussion of fund performance in their annual reports to shareholders⁷

⁷ Form N-2 would be amended to require this disclosure from Registered CEFs. The Proposing Release notes that similar disclosure required by Form N-1A for mutual funds and ETFs was “intended to address our concern that existing disclosure requirements did not provide investors with sufficient information to easily evaluate investment results achieved by mutual funds, or to relate those results to the mutual fund’s investment objective.” The Proposing Release notes that investors in closed-end funds would benefit from the “annual report disclosure that aids them in assessing the

- for BDCs: financial highlights in their registration statements and annual reports
- for Affected Funds filing a short-form registration statement on Form N-2: disclosure of material unresolved SEC staff comments, and, in their annual reports, information regarding (i) fees and expenses, (ii) premiums and discounts and (iii) outstanding securities of the Affected Funds that the Affected Funds currently provide in their prospectuses (without requiring duplicative disclosure)

In addition, Registered CEFs would be required to file current reports on Form 8-K to improve information provided to investors and to provide parity among Registered CEFs, BDCs and operating companies.⁸ The proposed changes to Form 8-K include (i) adding two new reporting items for Affected Funds regarding material changes to investment objectives or policies and material write-downs of significant investments and (ii) tailoring the existing reporting requirements and instructions to Affected Funds.

The Proposed Changes would remove the exclusion for BDCs from the Inline XBRL financial statement tagging requirements so that BDCs, like operating companies, would be required to submit financial statement information using the Inline XBRL format.

The Proposed Changes would also require (i) BDCs to include structured cover page information in their registration statements using Inline XBRL format, (ii) certain information in an Affected Fund's prospectus be tagged using Inline XBRL format and (iii) filings on Form 24F-2 (the annual notice of securities sold) be submitted in Extensible Markup Language (XML) format. The Proposing Release notes that the intended purpose of the use of structured data was "to make financial information easier for investors to analyze and to assist in automating regulatory filings and business information processing."

Other Considerations

- Since the common stock of many Listed Registered CEFs currently trades on exchanges at a discount to net asset value, and most Listed Registered CEFs have not obtained stockholder consent as required by Section 23(b)(2) of the 1940 Act to sell common stock at less than net asset value, the Proposed Changes may be of limited practical utility to Listed Registered CEFs seeking to issue additional common stock. However, the Proposed Changes will allow Listed Registered CEFs to access the public capital markets more quickly in the event that the market discount is eliminated. In addition, Listed Registered CEFs that engage in rights offerings or use leverage by means of issuing preferred stock or debt may find the Proposed Changes helpful in being able to access the public capital markets in a more timely manner.
- The Proposed Changes do not contemplate that Registered CEFs will be required to incorporate by reference reports filed on Form N-PORT or N-CEN because information contained in such forms is not required under Form N-2.
- The Proposed Changes stipulate that Form N-2 be amended to allow a fund to include additional information (not required to be included) in periodic reports in order to update such fund's registration statements so long as such fund also includes a statement in such periodic report identifying the additional information that it has included for this purpose.
- The Proposed Changes would 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, including in advance of a registered offering. In addition, Rule 169 under the Securities Act would permit Affected Funds to continue to

fund's performance over the prior year and that complements other information in the report." See text accompanying note 215 in the Proposing Release.

⁸ Companies subject to the Exchange Act reporting requirements (including BDCs and operating companies) are required to report certain events and information on Form 8-K on a current basis.

publish and disseminate regularly released factual business information that is intended for use by persons other than investors or potential investors.

- The Proposed Changes would amend Rule 156 under the Securities Act to clarify that nothing in that rule should be construed to prevent an Affected Fund from qualifying for an exemption under Rule 168 or 169 under the Securities Act. The contents of any Rule 168 or 169 communication would remain subject to the antifraud provisions of the federal securities laws.
- The Proposed Changes do not include an amendment to Rule 23c-2(b) under the 1940 Act, which currently provides that for a Registered CEF to redeem any of its securities, it must file with the SEC a notice of the intention to redeem such securities at least 30 days prior to the date set for redemption. Shortening the 30-day notice period would be beneficial to Registered CEFs offering securities off a shelf to refinance preferred stock or debt.

TABLE

Rule	Summary Description of Proposed Rule or Form Change	Entities Affected by Proposed Changes
REGISTRATION PROVISIONS		
Securities Act Rule 415	Expands the ability of Affected Funds to register 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 for eligible Affected Funds.	Seasoned Funds
Proposed General Instruction F.4.a	Requires online posting of information incorporated by reference.	Affected Funds
Securities Act Rule 430B	Permits certain issuers (including certain Affected Funds) 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. Under the Proposed Changes, Rule 424 would be the exclusive rule for Affected Funds to file a prospectus supplement (other than an advertisement deemed to be a Rule 482 prospectus).	Affected Funds
Securities Act Rule 462	Provides for effectiveness of registration statements immediately upon filing with the SEC. The Proposed Changes would permit Affected Funds that qualify as WKSIs to rely on Securities Act Rule 462.	WKSIs
Securities Act Rule 418	Exempts some registrants from an obligation to furnish certain engineering, management or similar reports. The Proposed Changes would exempt registrants that are eligible to file a short-form registration statement on Form N-2.	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	The Proposed Changes would allow Affected Funds to rely on Rule 134, which permits issuers to publish factual information about the issuer or the offering, including “tombstone ads.”	Affected Funds
Securities Act Rule 163A	The Proposed Changes would allow Affected Funds to rely on Rule 163A, which permits issuers to communicate without risk of violating the gun-jumping provisions until 30 days prior to filing a registration statement.	Affected Funds

Rule	Summary Description of Proposed Rule or Form Change	Entities Affected by Proposed Changes
Securities Act Rules 168 and 169	Permit the publication and dissemination of regularly released factual and forward-looking information. The Proposed Changes would allow Affected Funds that are reporting companies to rely on Rule 168 and would allow Affected Funds to rely on Rule 169.	Affected Funds
Securities Act Rules 164 and 433	The Proposed Changes would allow Affected Funds to rely on Rules 164 and 433 to use a “free writing prospectus.”	Affected Funds
Securities Act Rule 163	Permits oral and written communications by WKSIs at any time. The Proposed Changes make this available to Registered CEFs that are WKSIs.	WKSIs
Securities Act Rule 138	Permits a broker or dealer to publish or distribute certain research about securities other than those they are distributing. The Proposed Changes would add a reference to Form N-2 to clarify that Affected Funds that are seasoned are covered by this rule.	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. Under the Proposed Changes, Affected Funds that meet the requirements of the proposed short-form registration instruction would be treated the same as registrants meeting the Form S-3 requirements.	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. The Proposed Changes remove the exclusion for Affected Funds.	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 CEFs

Rule	Summary Description of Proposed Rule or Form Change	Entities Affected by Proposed Changes
Proposed Item 24.4.h(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 24.4.h(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 24.4.h(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 24.4.g of Form N-2	A requirement for narrative disclosure about the fund's performance in the fund's annual report.	Registered CEFs
Item 4 of Form N-2	Requires disclosure of certain financial information.	BDCs
Proposed Item 24.4.h(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 CEFs to file current reports on Form 8-K.	Registered CEFs
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" would affect only those 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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