



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

1. Introduction

Background

On April 8, 2020, the Securities and Exchange Commission (SEC) adopted rules that will modify the registration, communications and offering processes for registered closed-end investment companies (Registered CEFs), including interval funds, and business development companies (BDCs) under the Securities Act of 1933 (the Securities Act).¹ As directed by Congress, the rules will allow these investment companies to use the securities offering rules that are already available to operating companies.

In 2005 the SEC adopted securities offering reforms for operating companies to modernize the securities offering and communication processes while maintaining investor protections under the Securities Act.² At that time, the SEC specifically excluded all investment companies from the scope of these reforms.

The Economic Growth, Regulatory Relief, and Consumer Protection Act (the Registered CEF Act) directed the SEC to adopt rules to allow any registered CEF with securities listed for trading on a national securities exchange (a Listed Registered CEF), or that is an Interval Fund to use the securities offering rules available to other issuers that are required to file reports under Section 13(a) or Section 15(d) of the Securities Exchange Act of 1934 (the Exchange Act), subject to appropriate conditions.³ The Small Business Credit Availability Act (the BDC Act) directed the SEC to allow a BDC to use the securities offering rules available to other issuers required to file reports under Section 13(a) or Section 15(d) of the Exchange Act.⁴

As discussed more fully below under “Scope of Closed-End Investment Companies Affected,” the Final Rule applies to all Registered CEFs and all BDCs (collectively, Affected Funds). The Final Rule is effective Aug. 1, 2020, except that the amendments to rules 23c-3, 24f-2 and Form 24F-2 under the Investment Company Act and the amendments to rules 456 and 457 and Forms S-1, S-3, F-1 and F-3 under the Securities Act will become effective Aug. 1, 2021. See “Effective and Compliance Dates” below.

Highlights

The Final Rule reflects the SEC’s attempt to tailor the reforms to different types of Registered CEFs and BDCs. Highlights of the Final Rule include allowing eligible funds to:

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- ¹ Securities Offering Reform for Closed-End Investment Companies, Release No. 33-10771 (April 8, 2020), <https://www.sec.gov/rules/final/2020/33-10771.pdf> (Adopting Release).
- BDCs are a category of closed-end investment companies that do not register under the Investment Company Act of 1940 (the “Investment Company Act”), but rather elect to be subject to the provisions of Sections 55 through 65 of the Investment Company Act. “Interval Funds” are a type of registered CEF or BDC that make periodic repurchase offers pursuant to rule 23c-3 under the Investment Company Act (Rule 23c-3).
- ² Securities Offering Reform, Securities Act Release No. 8591 (July 19, 2005) [70 FR 44721 (Aug. 3, 2005)] (Securities Offering Reform Adopting Release). In this Client Alert, we generally use the term “operating company” to refer to issuers that are not investment companies and that are currently eligible to rely on the rules described herein.
- ³ Section 509(a) of Economic Growth, Regulatory Relief, and Consumer Protection Act, Pub. L. No. 115-174, 132 Stat. 1296 (2018).
- ⁴ Section 803(b) of Small Business Credit Availability Act, Pub. L. No. 115-141, 132 Stat. 348 (2018).

- use a streamlined registration process based on a short-form registration statement to sell securities “off the shelf” more quickly and efficiently;
- qualify as “well-known seasoned issuers” (WKSI) under rule 405 under the Securities Act;
- satisfy final prospectus delivery requirements by filing the prospectus with the SEC instead of mailing copies to shareholders;
- use certain securities offering communications rules currently available to operating companies, such as communications safe harbors for certain factual business information and forward-looking information, “free writing prospectuses,” and broker-dealer research reports (referred to in this Client Alert as the “Communications Rules”); and
- make certain changes to their registration statements on an immediately-effective basis or on an automatically effective basis a set period of time after filing.

In addition, the Final Rule tailors the disclosure and regulatory framework for Affected Funds in light of the amendments to the offering rules applicable to them. These amendments include structured data requirements to allow investors to more easily analyze fund data, new annual report disclosure requirements and a requirement that both Interval Funds and certain exchange-traded products (ETPs) pay securities registration fees on a “pay-as-you-go” basis.

The SEC declined to adopt the initial proposal to extend current reporting obligations on Form 8-K to certain Affected Funds.

2. Scope of Closed-End Investment Companies Affected by the Final Rule

The Final Rule will affect different categories of Affected Funds differently. For example, some of the provisions will apply to all Affected Funds (i.e., all Registered CEFs and BDCs). Many of the provisions, however, will apply only to “Seasoned Funds.” These are defined as Affected Funds that are current and timely in their periodic reporting obligations, and therefore generally eligible to file a short-form registration statement if they have at least \$75 million in “public float.”⁵ Additionally, the Final Rule provides unlisted Affected Funds with the flexibility to make certain filings that become effective either immediately upon filing with the SEC or automatically after 60 days. See “Registration Process” below.

Although the Registered CEF Act only required the SEC to allow Interval Funds and listed Registered CEFs to use the securities offering reform rules applicable to operating companies, the statute did not preclude the SEC from exercising discretion to extend those rules to all Registered CEFs. After considering comments on the scope of the Final Rule’s coverage, the SEC extended its application to all Registered CEFs, including unlisted Registered CEFs.

EXHIBIT 1 summarizes the various categories of Affected Funds:

EXHIBIT 1 – Categories of Affected Funds		
Entity	Public Float Required	Description
<i>Affected Funds</i>	n/a	<ul style="list-style-type: none"> • All BDCs • All Registered CEFs • Interval Funds

⁵ “Public float” refers to the aggregate market value of the voting and non-voting common equity held by non-affiliates of the registrant.

EXHIBIT 1 – Categories of Affected Funds		
Entity	Public Float Required	Description
<i>Seasoned Funds</i>	\$75 million ⁶	<ul style="list-style-type: none"> • Affected Funds that are current and timely in periodic reporting
<i>WKSIs</i>	\$700 million	<ul style="list-style-type: none"> • Seasoned Funds that satisfy the public float requirement
<i>ETPs</i>	n/a	<ul style="list-style-type: none"> • Not registered investment companies • Assets consist primarily of commodities, currencies or derivatives that reference commodities or currencies • Securities not listed on a national securities exchange • Purchase or redeem their securities for a ratable share of their assets at NAV

EXHIBIT 2 summarizes, by category of Affected Fund, the rule changes and impact of the various provisions of the Final Rule as follows:

- EXHIBIT 2A – Affected Funds
- EXHIBIT 2B – Seasoned Funds
- EXHIBIT 2C – WKSIs
- EXHIBIT 2D – ETPs

EXHIBIT 2A – Summary of New Provisions by Entity Type: Affected Funds		
AFFECTED FUNDS (includes BDCs, Registered CEFs and Interval Funds)		
a. Registration Provisions		
Rule	Entities Affected	Summary Description
General Instruction F.4.a of Form N-2	Affected Funds	Requires online posting of information incorporated by reference
Securities Act Rules 424 and 497	Affected Funds	Provide the processes for filing prospectus supplements
Investment Company Act Rule 23c-3	Interval Funds	Subjects interval funds to registration fee payment system based on annual net sales (“pay-as-you-go”)
Securities Act Rule 486	Continuously-offered unlisted Affected Funds not relying on Rule 23c-3	Allows these funds to make certain filings that are immediately effective upon filing or automatically effective 60 days after filing
General Instruction G of Form N-14	BDCs	Permits certain registrants to incorporate by reference

EXHIBIT 2A – Summary of New Provisions by Entity Type: Affected Funds		
b. Communications Provisions		
Rule	Entities Affected	Summary Description
Securities Act Rule 134	Affected Funds	Permits issuers to publish limited factual information about the issuer and the offering, including “tombstone ads”
Securities Act Rule 163A	Affected Funds	Permits issuers to communicate without risk of violating “gun-jumping” provisions until 30 days prior to filing a registration statement
Securities Act Rules 168 and 169	Affected Funds	Permit publication and dissemination of regularly released factual and forward-looking information
Securities Act Rules 164 and 433	Affected Funds	Permit use of a “free-writing prospectus”

⁶ Seasoned Funds are eligible to file short-form registration statements if they have at least \$75 million in public float.

EXHIBIT 2A – Summary of New Provisions by Entity Type: Affected Funds		
<i>c. Prospectus Delivery Provisions</i>		
Rule	Entities Affected	Summary Description
Securities Act Rules 172 and 173	Affected Funds	Permit issuers, brokers and dealers to satisfy final prospectus delivery obligations by filing with SEC if certain conditions are satisfied

EXHIBIT 2A – Summary of New Provisions by Entity Type: Affected Funds		
<i>d. Periodic Reporting Provisions</i>		
Rule	Entities Affected	Summary Description
Investment Company Act Rule 8b-16	Registered CEFs	Funds that rely on paragraph (b) of the Rule must describe in the annual report the fund’s current investment objectives, policies and risks, and certain key changes in enough detail to allow investors to understand each change and how it may affect the fund
Instruction 4.g to Item 24 of Form N-2	Registered CEFs	Requires narrative disclosure about the fund’s performance in the annual report
Item 4 of Form N-2; Instruction 10 to Item 24 of Form N-2	BDCs	Requires disclosure of certain financial information

EXHIBIT 2A – Summary of New Provisions by Entity Type: Affected Funds		
<i>e. Structured Data Reporting Requirements</i>		
Requirement	Entities Affected	Summary Description
Structured Financial Statement Data	BDCs	Requires BDCs to tag financial statements using Inline eXtensible Business Reporting Language (Inline XBRL” format
Prospectus Structured Data Requirements	Affected Funds	Requires registrants to tag certain information required by Form N-2 using Inline XBRL
Form 24F-2 Structured Format	Form 24F-2 Filers, including open-end funds and unit investment trusts	Requires that Form 24F-2 filings be submitted in a structured format

EXHIBIT 2B
Summary of New Provisions by Entity Type: Seasoned Funds

SEASONED FUNDS (Affected Funds that are current and timely in periodic reporting obligations and therefore eligible to file a short-form registration statement if they have at least \$75 million in public float)

EXHIBIT 2B – Summary of New Provisions by Entity Type: Seasoned Funds		
<i>a. Registration Provisions</i>		
Rule	Entities Affected	Summary Description
Securities Act Rule 415	Seasoned Funds	Permits registration of securities to be offered on a delayed or continuous basis
General Instructions A.2 and F.3 of Form N-2	Seasoned Funds	Provide for backward and forward incorporation by reference
Securities Act Rule 430B	Seasoned Funds	Permits certain issuers to omit certain information from their prospectuses at effectiveness
Securities Act Rule 418	Seasoned Funds	Exempts some registrants from an obligation to furnish certain engineering, management or similar reports

EXHIBIT 2B – Summary of New Provisions by Entity Type: Seasoned Funds		
<i>a. Registration Provisions</i>		
Rule	Entities Affected	Summary Description
Regulation FD Rule 103	Seasoned Funds	Provides that a failure to make a public disclosure required solely by Rule 100 of Regulation FD will not disqualify a Seasoned Fund from use of certain forms

EXHIBIT 2B – Summary of New Provisions by Entity Type: Seasoned Funds		
<i>b. Communications Provisions</i>		
Rule	Entities Affected	Summary Description
Securities Act Rule 138	Seasoned Funds	Permits a broker or dealer to publish or distribute certain research reports about securities other than those it is distributing

EXHIBIT 2B – Summary of New Provisions by Entity Type: Seasoned Funds		
<i>c. Proxy Statements</i>		
Rule	Entities Affected	Summary Description
Item 13 of Schedule 14A	Seasoned Funds	Permits incorporation by reference to provide information that otherwise must be furnished with certain types of proxy statements

EXHIBIT 2B – Summary of New Provisions by Entity Type: Seasoned Funds		
<i>d. Periodic Reporting Provisions</i>		
Rule	Entities Affected	Summary Description
Instruction 4.h.(1) to Item 24 of Form N-2	Seasoned Funds	Requires information about each of a Seasoned Fund’s classes of senior securities to be included in the annual report
Instruction 4.h.(2) to Item 24 of Form N-2	Seasoned Funds	Requires information about investor costs and expenses to be included in the annual report
Instruction 4.h.(3) to Item 24 of Form N-2	Seasoned Funds	Requires information about the share price of the Seasoned Fund’s stock and any premium or discount to be included in the annual report
Instruction 4.h.(4) to Item 24 of Form N-2	Seasoned Funds	Requires disclosure of outstanding material unresolved SEC staff comments that remain unresolved for a substantial period of time

EXHIBIT 2C
Summary of New Provisions by Entity Type: WKSIs

WKSIs (Seasoned Funds with at least \$700 million in public float)

EXHIBIT 2C – Summary of New Provisions by Entity Type: WKSIs		
<i>a. Registration Provisions</i>		
Rule	Entities Affected	Summary Description
Securities Act Rule 462	WKSIs	Provides for effectiveness of registration statements immediately upon filing with the SEC

EXHIBIT 2C – Summary of New Provisions by Entity Type: WKSIs		
<i>b. Communications Provisions</i>		
Rule	Entities Affected	Summary Description
Securities Act Rule 163	WKSIs	Permits oral and written communications by or on behalf of WKSIs at any time

EXHIBIT 2D
Summary of New Provisions by Entity Type: ETPs

ETPs = Issuers that:

- **are not registered investment companies;**
- **whose assets consist primarily of commodities, currencies or derivatives that reference commodities or currencies;**
- **whose securities are listed for trading on a national securities exchange; and**
- **that purchase or redeem securities for a ratable share of their assets at NAV**

EXHIBIT 2D – Summary of New Provisions by Entity Type: ETPs		
<i>a. Registration Provisions</i>		
Rule	Entities Affected	Summary Description
Securities Act Rules 415, 424, 456 and 457; Forms S-1, S-3, F-1 and F-3	ETPs	Permit ETPs to register an indeterminate amount of certain securities and pay registration fees based on annual net sales (“pay-as-you-go”)

3. Registration Process

The Final Rule allows certain Affected Funds to utilize the flexible registration process that is available to operating companies. This is intended to facilitate these Affected Funds’ ability to offer and sell securities “off the shelf” in a quick and efficient manner.

Current Shelf Offering Process for Affected Funds

Currently, shelf offerings conducted under Rule 415(a)(1)(x) under the Securities Act, which provides for delayed or continuous offerings, can be made by Affected Funds that meet the eligibility requirements for Form S-3. Such Affected Funds currently register these offerings on the existing (long-form) Form N-2. To satisfy Section 10(a) of the Securities Act, the registration statement of an Affected Fund selling securities, including as part of a takedown, must contain all required information (including current financial information as required by Section 10(a)(3) of the Securities Act). Currently, Affected Funds accomplish these updates by filing post-effective amendments, the process of which involves expense, preparation time, and time for SEC staff review. Additionally, under the current framework, Affected Funds cannot rely on Rule 430B, which permits certain issuers to omit information from a prospectus. The present framework outlined above stands in contrast to the flexible registration process that is available to operating companies on Form S-3.

Amendments to the Registration Process for Affected Funds

The Final Rule seeks to streamline the registration process for certain Affected Funds and align the process with that of operating companies. The amendments allow certain Affected Funds to raise capital in a more efficient and cost-effective manner that provides greater flexibility to manage the timing of a fund’s offerings as market opportunities arise. The Final Rule includes the provisions discussed in detail below.

Short-Form Registration on Form N-2

The Final Rule includes a new General Instruction A.2 to Form N-2 that allows Affected Funds to file a short-form registration statement on Form N-2 (to function like a Form S-3 registration statement) that will incorporate certain past and future Exchange Act reports by reference. Under these provisions, certain Affected Funds will avoid the need to make post-effective amendments in most cases. The new instruction enables Affected Funds to register any of the securities offerings that operating companies can register on Form S-3, including shelf offerings under Rule 415(a)(1)(x).

a. Eligibility to File a Short-Form Registration Statement

Under the Final Rule, an Affected Fund can file a short-form registration statement (1) if it is a BDC or Registered CEF that meets both the registrant and transaction requirements of Form S-3; and (2) if the fund is a Registered CEF, it has been registered under the Investment Company Act for at least the 12 calendar months prior to the filing and has timely filed its required reports under Section 30 of the Investment Company Act during that time period (*e.g.*, annual and semi-annual reports, Form N-CEN, and Form N-PORT).

The registrant requirement is generally satisfied if, during the prior year, the Affected Fund timely filed all of its required reports and materials under the Exchange Act. The transaction requirement is generally satisfied if the Affected Fund's public float is at least \$75 million.

b. Information Incorporated by Reference

Under the Final Rule, the same incorporation by reference rules that apply to Form S-3 will apply to short-form registration statements filed on N-2. This framework includes both backward and forward incorporation by reference. Affected Funds utilizing the short-form registration statement must: (1) incorporate by reference into the registration statement their latest annual report containing financial statements for the fund's latest fiscal year; (2) incorporate all other reports filed under Sections 13(a) or 15(d) of the Exchange Act since the end of the fiscal year to which the annual report pertains; and (3) state that all documents subsequently filed under Sections 13(a), 13(c), 14, or 15(d) of the Exchange Act before the end of the offering shall be deemed to be incorporated by reference into the registration statement. Clauses (1) and (2) refer to "backwards incorporation by reference" (looking "back" in time from the filing of the registration statement) and clause (3) refers to "forward incorporation by reference" (looking "forward" to documents to be filed in the future).

The Final Rule also modifies Form N-14 to permit BDCs to incorporate by reference in the same manner that Registered CEFs can. Currently, BDCs cannot incorporate by reference and thus are subject to the cumbersome requirement to include in their Form N-14 filings certain information about the registrant and the company being acquired. The Final Rule addresses this incongruity and levels the playing field in this regard for BDCs.

c. Affected Funds' Use of Rule 415(a)(1)(x) & Automatic Shelf Registration Statements

The Final Rules conforms the shelf registration process for Affected Funds to the process allowed for operating companies. Amended Rule 415(a)(1)(x) clarifies that Affected Funds that file short-form registration statements on Form N-2 may use Rule 415(a)(1)(x) to engage in delayed or continuous offerings. Also, a new general instruction permits Affected Funds that qualify as WKSIs to file an automatic shelf registration statement. These changes are expected to provide greater flexibility for such funds to take advantage of market opportunities.

d. Omitting Information from a Base Prospectus and Prospectus Supplements

The Final Rule amends Rule 424(f) to allow Affected Funds to file any type of prospectus under Rule 424(b) to update, or to supply information omitted from, a prospectus or in connection with a takedown.

This is significant because, under Section 10(a) of the Securities Act, a base prospectus is not a final prospectus unless it contains all statutorily-required information. WKSIs and other issuers eligible to use Form S-3 for primary offerings are able to omit certain required information from a base prospectus under Rule 430B. To meet the prospectus requirements of Section 10(a), these Form S-3 eligible issuers can file a prospectus supplement under Rule 424, file a post-effective amendment, or in certain circumstances, incorporate by reference to an Exchange Act filing. However, the Rule 424 mechanism was not previously available to investment companies, which instead follow a much different rubric under Rule 497. While Rule 424(b) is specifically designed to work in conjunction with Rule 415(a)(1)(x), Rule 497 does not include any provisions geared towards Rule 415(a)(1)(x) and Rule 497 requires that a fund file a prospectus with the SEC before using it. Additionally, Rule 424 requires that an issuer file a prospectus when it makes substantive changes to a previously-filed prospectus. In contrast, Rule 497 requires that funds file with the SEC every prospectus that varies from a previously-filed prospectus. The Final Rule overhauls the process applicable to Affected Funds, by providing that Rule 424 will be the exclusive rule for Affected Funds to file a prospectus supplement (except for advertisements deemed to be a prospectus under Rule 482).

The Final Rule also permits Affected Funds to use Rule 430B like operating companies to omit specified information from their base prospectuses in certain circumstances. First, an Affected Fund that qualifies as a WKSI and is filing an automatic shelf registration statement can omit the plan of distribution as well as whether the offering is a primary one or an offering on behalf of selling security holders. Second, an Affected Fund that is eligible to register a primary offering under the short-form registration statement and is registering the resale of securities on behalf of selling security holders can rely on Rule 430B to omit the identities of selling security holders and the amount of securities to be registered on their behalf, subject to conditions.

4. Well-Known Seasoned Issuer Status

In the Final Rule, the SEC adopted, as proposed, amendments to allow certain Affected Funds to qualify as WKSIs. Under the amendments, Affected Funds that qualify as WKSIs stand to reap the biggest benefits⁷ from the Final Rule. Generally, to qualify as a WKSI, the issuer: (1) must be a Seasoned Fund;⁸ and (2) generally must have at least \$700 million in public float.⁹ In addition, an issuer is not eligible for WKSI status if, among other bases: (1) it is not current and timely in its Exchange Act reports;¹⁰ or (2) it is the subject of a judicial or administrative decree or order arising out of a governmental action involving violations of the anti-fraud provisions of the federal securities laws.

WKSI Eligibility

The securities offering rules provide WKSIs with certain registration and communication flexibilities because, among other reasons, they have a demonstrated market following (i.e., they are “well-known”). The SEC has,

⁷ A WKSI, for example, can file a registration statement or amendment that becomes effective automatically in a broader variety of contexts than a non-WKSI. In addition, subject to certain conditions, a WKSI may communicate at any time, including through a free writing prospectus, without violating the “gun-jumping” provisions of the Securities Act.

⁸ For a definition of “Seasoned Fund,” see the “Scope of Closed-End Investment Companies Affected by the Final Rule” Section or EXHIBIT 2B above.

⁹ Certain issuers with less than \$75 million in public float also are eligible to use Form S-3 to register a primary offering but are limited as to the amount of securities they can register. See General Instruction I.B.6 of Form S-3.

¹⁰ 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 Investment Company Act, such as reports on Forms N-CEN and N-PORT, during the preceding 12 months.

for many years, used public float as an approximate measure of an issuer's market following and the extent to which the market absorbs information about the issuer that is ultimately reflected in the price of the issuer's securities. The \$700 million public float requirement is meant to encompass issuers that are presumptively the most widely followed in the marketplace and whose disclosures and other communications, therefore, are subject to market scrutiny by investors, the financial press, analysts and others. The Final Rule allows Affected Funds to qualify as WKSIs if they satisfy the same \$700 million public float requirement applicable to operating companies.¹¹

Despite receiving a number of pointed comments proposing changes to the \$700 million public float threshold for Affected Funds and to the definition of "ineligible issuer," described below, the SEC adopted these amendments as proposed.¹²

Ineligible Issuer Definition

The SEC also adopted, as proposed, amendments to the definition of "ineligible issuer" in Rule 405. The definition of "ineligible issuer" was amended to provide that a Registered CEF would be ineligible for WKSI status if it has failed to file all reports and materials required to be filed under Section 30 of the Investment Company Act during the preceding 12 months.¹³ In addition, the definition of "ineligible issuer" was amended to include an anti-fraud prong tailored for Affected Funds. This amendment provides that an Affected Fund is an ineligible issuer if within the past three years its investment adviser, including any sub-adviser, was the subject of any judicial or administrative decree or order arising out of a governmental action that determines the investment adviser aided or abetted or caused the Affected Fund to have violated the antifraud provisions of the federal securities laws.

5. Automatic or Immediate Effectiveness for Filings by Affected Funds Conducting Certain Continuous Offerings

The Final Rule expands the scope of Rule 486 under the Securities Act to allow any Registered CEF or BDC that conducts a continuous offering under Rule 415(a)(1)(ix) (including unlisted, continuously-offered Affected Funds) to rely on Rule 486. This change is intended to make it more efficient and cost-effective for continuously-offered Affected Funds to maintain effective registration statements. Affected Funds that will be newly-eligible to rely on Rule 486 generally are required to file new registration statements every three years under Rule 415. The Final Rule permits such funds to file post-effective amendments and registration statements that, depending on the substance of the changes contained therein, would either become immediately effective or automatically effective 60 days after filing.

Under the Final Rule, registration statements filed for the sole purpose of complying with Rule 415 could be immediately effective upon filing. Additionally, registration statements filed for other purposes listed in Rule 486(b), for example, to make non-material changes or to update financial statements, could also be effective immediately upon filing. However, if the registration statement includes material changes, it could be automatically effective 60 days after filing under Rule 486(a).

The SEC staff has previously granted no-action relief to a series of closed-end funds to allow these registrants to conduct offerings under Rule 415(a)(1)(x) using Rule 486(b) to file certain post-effective amendments that

¹¹ To implement the changes to allow certain Affected Funds to qualify as WKSIs, the SEC also amended Rule 405 to delete the exclusion of Affected Funds from the definition of WKSI. In addition, the SEC adopted, as proposed, an additional amendment to the WKSI definition to include a reference to the registration requirements of the proposed short-form registration instruction on Form N-2 described above.

¹² While the SEC did not adjust the public float requirement in response to the comments it received, it noted that it believes that the particular characteristics of registered funds, including affected funds, may be appropriate for the Commission to examine as part of a more comprehensive consideration of whether the securities offering rules for funds should be modified rather than in this rulemaking related to affected funds specifically.

¹³ This provision is consistent with the proposed short-form registration instruction and would mirror the current Exchange Act reporting provision in the definition of "ineligible issuer."

are immediately effective upon filing.¹⁴ As a result of the Final Rule provisions providing a mechanism for Affected Funds to efficiently update their registration statements for such offerings, the SEC announced in the Final Rule that these no-action letters will be withdrawn effective Aug. 1, 2021.

6. Final Prospectus Delivery Reforms

The Securities Act requires registrants to deliver to each investor in a registered offering a prospectus meeting the requirements of Section 10(a) (known as a “final prospectus”).¹⁵ Section 5(b)(2) makes it unlawful to deliver a security for the purpose of sale or for delivery after sale unless accompanied or preceded by a final prospectus. After the effectiveness of a registration statement, a written communication that offers a security for sale or confirms the sale of a security may be provided to investors if a final prospectus is sent or given previously or at the same time. Otherwise, such a communication may not be provided unless it is otherwise permitted under SEC rules or meets the requirements of Section 10(a).¹⁶

Securities Act Rule 172 allows issuers, brokers, and dealers to satisfy final prospectus delivery obligations if a final prospectus is or will be on file with the SEC within the time required by the rules and other conditions are satisfied.¹⁷ Rule 173 requires the delivery of a copy of the final prospectus or, in lieu of a final prospectus, a notice to purchasers stating that a sale of securities 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 Rule 172.¹⁸

Currently, offerings of Affected Funds are expressly excluded from both Rule 172 and Rule 173.¹⁹ The Final Rule amended Rules 172 and 173 to remove the exclusion for offerings of all Affected Funds. As a result, the SEC adopted, as proposed, rule amendments to allow an Affected Fund to satisfy its final prospectus delivery obligations by filing its final prospectus with the SEC.²⁰ This will result in significant savings on printing and mailing costs for Affected Funds.

7. Communications Reforms

Offering Communications

The Final Rule extended to Affected Funds the rules that currently provide operating companies, and other parties (such as underwriters) increased flexibility in their communications made in connection with securities offerings. The relevant provisions permit these communications notwithstanding the Securities Act’s “gun-jumping” prohibitions, which restrict the timing and types of communications that issuers or other parties may use in connection with a registered public offering of securities. The primary aim of the gun-jumping

¹⁴ See, e.g., Nuveen California Select Tax-Free Income Portfolio, SEC Staff No-Action Letter (Nov. 21, 2017); PIMCO Dynamic Income Fund, SEC Staff No-Action Letter (Dec. 12, 2017); Eagle Point Credit Company, Inc., SEC Staff No-Action Letter (Feb. 14, 2018); PIMCO Corporate & Income Opportunity Fund and PIMCO Income Opportunity Fund, SEC Staff No-Action Letter (Sep. 13, 2018); and DNP Select Income Fund, Inc., SEC Staff No-Action Letter (Oct. 4, 2018).

¹⁵ 15 U.S.C. 77j(a).

¹⁶ 15 U.S.C. 77e(b)(2).

¹⁷ 17 CFR 230.172 (Securities Act rule 172).

¹⁸ 17 CFR 230.173 (Securities Act rule 173).

¹⁹ See Securities Act rule 172(d)(1)–(2); Securities Act rule 173(f)(2)–(3).

²⁰ The SEC recently took the position that it would not provide a basis for an SEC enforcement action if a registered fund does not deliver to investors the current prospectus of the registered fund where the prospectus is not able to be timely delivered because of circumstances related to COVID-19, provided that the sale of shares to the investor was not an initial purchase by the investor of shares of the registered fund and certain other conditions are met. See Order Under Section 6(c) and Section 38(a) of the Investment Company Act of 1940 Granting Exemptions from Specified Provisions of the Investment Company Act and Certain Rules Thereunder; Commission Statement Regarding Prospectus Delivery, Release No. IC-33824 (March 25, 2020).

prohibitions is to make the statutory prospectus the primary means for investors to obtain information regarding a registered securities offering. These provisions currently govern the type and timing of offering communications as follows:

- ***Pre-Filing Period*** (*before an issuer files a registration statement*)
All offers, in whatever form, are prohibited
- ***Waiting Period*** (*after registration statement filed, but before it has become effective*)
Only written offers permitted are those made via a statutory prospectus that is filed with the SEC²¹
- ***Post-Effective Period*** (*after the registration statement has been declared effective*)
Offering participants still may make written offers only through a statutory prospectus, except that they may use additional offering materials if a final prospectus that meets the requirements of Section 10(a) of the Securities Act is sent or given prior to or with those materials.

To implement the specific requirements of the BDC Act, and to provide parity for Registered CEFs consistent with the Registered CEF Act with respect to offering communications, the Final Rule extends the communications rules currently available to operating companies to Affected Funds by removing the exclusions for Affected Funds and making other conforming changes. Specifically, the Final Rule will permit:

- Affected Funds to use Rule 134 under the Securities Act to publish limited factual information about the issuer or the offering, including “tombstone ads.”
- Affected Funds to rely on Rule 163A, which provides issuers a bright-line time period ending 30 days prior to filing a registration statement, during which they may communicate without risk of violating the gun-jumping prohibitions.
- Affected Funds that are reporting companies to rely on Rule 168 to publish or disseminate regularly released factual business information and forward-looking information at any time, including around the time of a registered offering. Affected Funds’ continued publication or dissemination of regularly released factual business information that is intended for use by persons other than in their capacity as investors or potential investors under Rule 169.²²
- Affected Funds to rely on Rules 163 and 433 to use a “free writing prospectus.”
- Affected Funds that are WKSIs to engage at any time in oral and written communications, including the use at any time of a free writing prospectus (before or after a registration statement is filed), subject to certain conditions.

The Final Rule does not alter an Affected Fund’s ability to rely on the safe harbor contained in Rule 482 under the Securities Act. Registered CEFs conducting an initial public offering (IPO) frequently utilize a fund marketing brochure, along with the preliminary prospectus, to market the IPO. The brochure is designed to comply with Rule 482 and thus not be considered a “nonconforming prospectus.”²³ The Final Rule notes that,

²¹ After the filing of the registration statement, but before its effectiveness, written offers are limited to a “statutory prospectus” (a “preliminary prospectus” because the registration statement of which it is a part is not yet effective) that satisfies the information requirements of Section 10 of the Securities Act. *See* Sections 5(b)(1) and 10 of the Securities Act [15 U.S.C. 77e(b)(1) and 77(j)].

²² Rule 169 is also a safe harbor from the definition of “prospectus” in Section 2(a)(10) of the Securities Act. Note that Rule 168 and Rule 169 communications remain subject to the anti-fraud provisions of the federal securities laws.

²³ “Nonconforming” in the sense that it does not satisfy the requirements of Section 10. Generally, in the IPO context, Rule 482 requires that an issuer already have a registration statement on file before using the material, that certain legends be prominently displayed on the material, and that the material be filed with either the SEC or the Financial Industry Regulatory Authority. Rule 482 does not provide a safe harbor from the anti-fraud provisions of the federal securities laws, and Rule 482 materials are subject to prospectus liability under Section 12 of the Securities Act. *See* 17 CFR 230.482 (Securities Act rule 482).

in contrast to Rule 482, its provisions allow communications prior to the filing of a registration statement, and communications described in the Final Rule are not subject to prospectus liability under Section 12 of the Securities Act.

Broker-Dealer Research Reports

Currently, Securities Act Rule 138 permits a broker-dealer participating in the registered offering of an eligible issuer's common stock and similar securities to publish or distribute research reports covering that issuer's fixed income securities, and *vice versa*, if it publishes or distributes that research in the regular course of its business.

Although Rule 138 does not currently exclude Affected Funds from coverage, it does include references to Form S-3 and omits any reference to Form N-2. As a result, the SEC amended the rule's references to shelf registration statements to include parallel references to short-form registration statements filed on Form N-2, as described above. The Final Rule also clarified the "reporting company" provisions in the rule to include parallel references to the reports that Registered CEFs are required to file (*i.e.*, Forms N-CSR, N-Q, N-CEN, and N-PORT).

The Final Rule does not contain any changes to Securities Act 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, unlike Rule 138, permits the research report to cover any class of the issuer's securities. In 2018 the SEC adopted new Rule 139b to implement the Fair Access to Investment Research Act of 2017 (the "FAIR Act").²⁴ The FAIR Act directed the SEC to extend Rule 139 to cover broker-dealers' publication or distribution of "covered investment fund research reports," which include research reports about Affected Funds. Rule 139b currently includes specific provisions mandated by Congress for covered investment fund research reports. As a result, the SEC did not propose changes to Rule 139 because it believed that Rule 139b satisfies the "parity" directives of the Registered CEF Act and the BDC Act and because Rule 139b is consistent with Congress's core objective regarding research reports covering these funds.

8. Other Rule Amendments

Rule 418 Supplemental Information

The SEC adopted amendments, as proposed, to Rule 418 to exempt Affected Funds that are eligible to file a short-form registration statement on Form N-2 from the requirement to furnish certain supplemental information to the SEC or staff on request under paragraph (a)(3) of the rule. Under amended Rule 418(a)(3), similar to operating companies that are eligible to use Form S-3, Affected Funds that are eligible to file a short-form registration statement on Form N-2 will not be required to furnish, on request, recent engineering, management, or similar reports or memoranda relating to broad aspects of the business, operations, or products of the registrant.

Amendments to Incorporation by Reference into Proxy Statements

The SEC adopted, as proposed, amendments to allow Affected Funds that meet the requirements of the short-form registration instruction in Form N-2, as described above, to incorporate certain information by reference to previously-filed documents for proxy statements containing specific proposals under Item 13 of Schedule 14A.²⁵ The Final Rule allows eligible funds to incorporate by reference certain required information for

²⁴ See Fair Access to Investment Research Act of 2017, Public Law No. 115-66, 131 Stat. 1196 (2017).

²⁵ Item 13 applies to proxy statements seeking security holder approval to authorize, issue, modify, or exchange securities as described in Items 11 or 12 of Schedule 14A.

relevant proxy proposals to the same extent that operating companies meeting the requirements of Form S-3 may use incorporation by reference under the same circumstances.

Rule 103 of Regulation FD

The SEC adopted, as proposed, amendments to Rule 103(a) of Regulation FD, to provide that an Affected Fund's failure to make public disclosure required solely by Rule 100 of Regulation FD (with respect to material non-public information, requiring simultaneous public disclosure in the case of an intentional selective disclosure or prompt public disclosure in the case of a nonintentional selective disclosure) will not affect the fund's eligibility under the short-form registration instruction of Form N-2. This amendment will further enhance parity between Affected Funds and operating companies, as Rule 103(a) already provides that an operating company's failure to make a public disclosure required solely by Rule 100 of Regulation FD will not affect its eligibility to use Form S-3.

9. New Registration Fee Payment Method for Interval Funds and Issuers of Certain Exchange-Traded Products

Interval Funds

In the Final Rule, the SEC adopted a modernized approach to registration fee payment that will require Interval Funds to pay securities registration fees using the same method currently used by mutual funds and exchange-traded funds (ETFs). Currently, Interval Funds are required to pay, upfront, securities registration fees to the SEC at the time of filing a registration statement, regardless of when – or if – they ever sell those securities. Under the Final Rule, Interval Funds will register an indefinite amount of securities upon the effectiveness of their registration statements, and be required to pay registration fees annually based on their net issuance of shares.²⁶ Interval Funds will use Form 24F-2 under the Investment Company Act to file information about the computation of this registration fee and other information.

Certain ETPs That Are Not Registered Under the Investment Company Act

In response to comments received, the SEC is extending similar treatment to certain ETPs that are not registered under the Investment Company Act. Like Interval Funds, these issuers will be permitted to register offerings of an indefinite number of securities and pay registration fees on the same basis as Interval Funds described above. This provision in the Final Rule applies to issuers that offer exchange-traded vehicle securities, as that term will now be defined in Securities Act Rule 405. See EXHIBIT 2D for a description of the issuers covered by these provisions.

10. Disclosure and Reporting Parity Proposals

The Final Rule amends several rules and forms to tailor the disclosure and regulatory framework for Affected Funds in light of the amendments to the offering rules applicable to and to increase regulatory parity of Affected Funds with operating companies.

Structured Data Requirements

The Final Rule sets forth new structured data reporting requirements for Registered CEFs and BDCs. The new requirements include:

²⁶ See Section 24(f)(2) of the Investment Company Act [15 U.S.C. 80a-24(f)(2)]. The fee is calculated based upon the sales price for securities sold during the fiscal year and reduced based on the price of shares redeemed or repurchased that year. The registration fees are payable no later than 90 days after the end of the fiscal year.

a. Inline XBRL Requirements for Financial Statements and Notes to Financial Statements

To provide parity with the financial information that is accessible for operating companies, the Final Rule amends Item 601 of Regulation S-K to subject BDCs to the Inline XBRL financial statement tagging requirements, which are applicable to operating companies. The change is intended to make it easier for investors to analyze financial information.

b. New Checkboxes and Structured Data Format for Form N-2 Cover Page Information

The Final Rule requires that Affected Funds tag the data points appearing on the cover page of Form N-2 using Inline XBRL format, except for the table relating to the calculation of registration fees. Among the covered data points required: company name, the Act or Acts under which the registration statement is filed, and checkboxes pertaining to the effectiveness of the registration statement.

c. Tagging of Prospectus Disclosure Items

The Final Rule requires Affected Funds to tag specific prospectus information using Inline XBRL format. A Seasoned Fund filing a short-form registration statement will also be required to tag information that appears in its Exchange Act reports if such information would be required to be tagged in the fund's prospectus. Inline XBRL format tagging will be required for the following prospectus disclosures: fee tables, senior securities tables and investment objectives information. The SEC believes these disclosures are useful for investors seeking to compare funds and that this type of structured reporting facilitates comparison of key fund information, such as features, costs and risks.

Affected Funds will be required to submit Interactive Data Files that present information in XBRL format for registration statements, post-effective amendments, prospectuses filed under Rule 424, and Exchange Act reports for Seasoned Funds filing a short-form registration statement on Form N-2.

d. Structured Data Format for Form 24F-2

Under the Final Rule, submission of filings on Form 24F-2 must be in structured XML format.

11. Periodic Reporting Requirements

Many of the reforms adopted in the Final Rule heighten the importance of periodic reporting. Thus, the Final Rule also contains several new annual report requirements. These changes are intended to address the increased importance of periodic reporting and harmonize the periodic report disclosure requirements for Affected Funds with those of operating companies, mutual funds and ETFs.

First, funds that file a short-form registration statement on Form N-2 will be required to include in their annual reports certain information that is currently disclosed in prospectuses, such as, fee and expense tables, share price data (including information on premiums and discounts), and outstanding senior securities tables.

Second, Registered CEFs, like mutual funds and ETFs, will now be required to include management's discussion of fund performance (MDFP) in their annual reports. The MDFP must include: a discussion of factors materially affecting performance during the fiscal year (including market conditions and fund investment strategies); a discussion of any distribution policies or practices and their impact on the fund's investment strategies, per share NAV, and distributions of capital; a line graph comparing initial and subsequent account values at the end of each of the most recently completed 10 fiscal years; and a table showing the fund's total returns for 1-, 5-, and 10-year periods.

Third, BDCs will be required to include financial highlights disclosure summarizing their financial statements in both their registration statements and annual reports. Currently, BDC prospectuses include full financial statements, but are not required to present such a summary. However, as a matter of industry practice, many BDCs currently presently include such summaries. The Final Rule makes this mandatory.

Fourth, Affected Funds filing a short-form registration statement on Form N-2 will be required to disclose, in their annual report, outstanding, material staff comments that remain unresolved for a substantial period of time. The relevant time period for the disclosure requirement is comments that were received not less than 180 days before the end of the fiscal period to which the annual report pertains. Such disclosure must include the substance of the comment that the fund believes to be material. This disclosure requirement is intended to encourage Affected Funds to resolve staff comments promptly and to provide investors with information about areas of disagreement that the fund believes to be material.

12. Current Reporting Requirements for Affected Funds

The SEC proposed to require Registered CEFs to report information about certain events on Form 8-K in order to promote parity with operating companies. However, after digesting a high volume of comments on this proposal, the SEC decided not to adopt these provisions. The comments highlighted the burdens that such a requirement would present and pointed out that closed-end funds presently disclose substantially similar information through other means, such as prospectus supplements, post-effective amendments, and press releases.

13. Online Availability of Information Incorporated by Reference

The SEC adopted, as proposed, amendments to the General Instruction for Incorporation by Reference for Form N-2. All Registered CEFs and BDCs currently can backward incorporate their financial information from previously-filed Exchange Act reports into the prospectus or SAI. However, Form N-2 currently requires that a fund provide to new purchasers a copy of all previously-filed materials that the fund incorporated by reference into the prospectus and/or SAI. Under the Final Rule, the SEC removed the requirement that a fund deliver to new investors information that it has incorporated by reference into the prospectus or SAI. These amendments will allow the fund to make its prospectus, SAI, and the incorporated materials readily available and accessible on a website identified in the fund's prospectus and SAI. Affected Funds will also be required to provide incorporated materials upon request free of charge.

14. Amendments to Certain Closed-End Funds' Annual Report Disclosure

In the Final Rule, the SEC adopted amendments to Investment Company Act Rule 8b-16(b) that are designed to allow investors in Registered CEFs that rely on the rule to more easily identify and understand key information about their investments. Although Rule 8b-16(a) generally requires registered investment companies to update their registration statements annually, subsection (b) of the rule currently allows Registered CEFs to forgo an annual update provided that they disclose in their annual reports certain key changes that have occurred during the prior year. However, the SEC noted in the Final Rule that such disclosure on its own may not provide sufficient context to investors and that investors may be required to look at a number of documents, some of which might be dated, to understand such disclosure. Under the amendments to Rule 8b-16(b), funds that rely on the rule must describe certain key changes in enough detail to allow investors to understand each change and how it may affect the fund. In addition, such disclosures must be prefaced with a legend clarifying that the disclosures provide only a summary of certain changes that have occurred in the past year, which may not reflect all of the changes that have occurred since the investor purchased the fund.

In a change from the original proposal, the SEC also adopted provisions that require any Affected Fund that relies on Rule 8b-16(b) to describe the fund's current investment objectives, investment policies, and principal risks in its annual report. These key disclosures must be provided, even if there were no changes in the past year. These requirements are designed to ensure that investors can access in a single location current

information about key aspects of the fund in which they invest. Further, in the Final Rule, the SEC encouraged funds to tailor their disclosures to how the fund operates rather than rely on generic, standard disclosures about the fund’s investment policies and risks and encouraged funds to describe principal risks in order of importance, with most significant risks appearing first (i.e., not listing risks in alphabetical order).

15. Effective and Compliance Dates

Effective Dates

The Final Rule will become effective on Aug. 1, 2020, and this date will apply to all aspects of the Final Rule, except as follows:

Rule/Form	Description	Effective Date
Rules 23c-3, 24f-2 and Form 24F-2	Requires Interval Funds to register an indeterminate number of shares and pay registration fees annually on a net issuance basis	Aug. 1, 2021
Rules 456 and 457 Forms S-1, S-3, F-1 and F-3	Allows ETPs to elect to register an indeterminate number of shares and pay registration fees annually on a net issuance basis	Aug. 1, 2021

Compliance Dates

The SEC adopted compliance dates for certain new requirements to provide a transition period after the effective date of the Final Rule and to allow for technical implementation of structured data requirements as follows:

Form/Item	Description	Compliance Date
Annual report filed by a Registered CEF will be required to include MDFP disclosures	Management’s Discussion of Fund Performance – see Section 11 above	Annual reports filed on or after Aug. 1, 2021
Structured data requirements: Financial Statement Cover Page and Prospectus Information	Affected Funds subject to the Inline XBRL structured data reporting requirements (See Section 10 above) must comply with these provisions by the Compliance Date	<ul style="list-style-type: none"> • Affected Funds eligible to file a short-form registration statement: Aug. 1, 2022 • All other Affected Funds subject to these requirements: Feb. 1, 2023
Structured data requirements: Form 24F-2	All filers of Form 24F-2 (including existing filers, as well as Interval Funds) will be required to file these reports in an XML structured data format	Feb. 1, 2022

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