

Memorandum

The SEC Adopts Securities Offering and Communications Reforms for Business Development Companies and Closed-End Funds

April 14, 2020

On April 8, 2020, the Securities and Exchange Commission (the “Commission”) voted to adopt [final rule and form amendments](#)¹ to allow business development companies (“BDCs”) and registered closed-end funds (collectively, “affected funds”) to use the modernized registration, offering and communications rules that have been available to operating companies since 2005.

The Commission’s vote to adopt these amendments is the culmination of a multi-year process, which included the Commission putting forth a [rule proposal](#) in March 2019 and Congress passing two pieces of legislation in 2018 that directed the Commission to enact the adopted reforms.² Pursuant to the provisions of the Small Business Credit Availability Act, certain amendments became self-effectuating on March 23, 2019, allowing BDCs to rely on the provisions in the statutory text prior to the Commission formally adopting these amendments to address the same matters.³ Most of the final rule and form amendments will become effective on August 1, 2020,⁴ but certain requirements will have a compliance transition period following the effective date.

The Commission adopted most of the final amendments in substantially similar form to what it proposed in March 2019, but the Form 8-K reporting requirements that were initially proposed by the Commission were excluded from the adopted amendments entirely.⁵ Many industry participants and commenters, including

¹ The adopted amendments modify certain rules and forms promulgated under the Securities Act of 1933 (the “Securities Act”), the Securities Exchange Act of 1934 (“Exchange Act”) and the Investment Company Act of 1940 (“Investment Company Act”), each as amended.

² The Commission was required to undertake rulemaking with respect to BDCs by Section 803(b) of Small Business Credit Availability Act, Pub. L. No. 115–141, 132 Stat. 348 (2018) and to undertake rulemaking with respect to closed-end funds by Section 509(a) of Economic Growth, Regulatory Relief, and Consumer Protection Act, Pub. L. No. 115–174, 132 Stat. 1296 (2018).

³ The statutory directive with respect to closed-end funds was not self-executing, and instead only instructed the Commission to finalize any amended rules within two years.

⁴ The amendments related to registration fee payments by interval funds and certain exchange-traded products will become effective on August 1, 2021.

⁵ Last year’s proposal would have required closed-end funds to file current reports with the Commission on Form 8-K, as is already required of operating companies and BDCs. Additionally, it proposed to add two new items to Form 8-K for both BDCs and registered closed-end funds that would have required a current report in the event of a material change in a fund’s investment strategy or policies or upon a material write-down of a significant investment of the fund.

[Simpson Thacher](#), argued against the inclusion of these provisions as misguided and unduly burdensome. Ultimately, the Commission agreed and did not adopt the proposed Form 8-K reporting requirements.

Many commenters also took issue with the proposed requirement that affected funds have a \$700 million public float before becoming eligible for well-known seasoned issuer (“WKSI”) status, but the Commission did not agree with those comments. The \$700 million public float requirement will effectively exclude all but a small portion of affected funds. As of last June, only approximately 12.5% of affected funds would have met the \$700 million threshold in comparison to almost 30% of operating companies.⁶ Even fewer affected funds would be able to qualify today given the market disruption caused by the coronavirus disease 2019 pandemic. Despite these concerns, the Commission adopted amendments that do not provide for an alternative set of criteria for affected funds that is different than those that apply to operating companies. As a result, a far lower percentage of affected funds will be eligible for WKSI status in comparison to operating companies.

Even though a number of BDCs have already taken advantage of the reforms in reliance on the Congressional legislation, we expect the adopted amendments will have broad application and will benefit the closed-end fund industry. The reforms adopted by the Commission will streamline many cumbersome and tedious aspects of offerings for many affected funds, which will provide cost savings to fund shareholders and potentially stimulate economic growth. Below we summarize key components of the final rule and form amendments.

Immediate or Automatic Effectiveness of Certain Filings

- Registered closed-end funds or BDCs that conduct continuous offerings of securities under Rule 415(a)(1)(ix) under the Securities Act will be able to rely on Rule 486 under the Securities Act to file certain post-effective amendments to their registration statements that are either immediately effective or, for certain material amendments, automatically effective after 60 days.
- Rule 486 currently applies only to closed-end funds that operate as “interval funds,” and these amendments will provide parity for other non-listed closed-end funds that offer their shares on a continuous basis, such as closed-end “tender offer” funds. The amendments also more closely align the registration process for non-listed closed-end funds with the registration process for open-end funds, which rely on Rule 485 under the Securities Act to file post-effective amendments to their registration statements.
- The Rule 486 amendments will not be useful for listed closed-end funds or BDCs. Rule 415(a)(4) under the Securities Act specifically provides that “at the market offerings” must be offered under Rule 415(a)(i)(x) and, therefore, these offerings are not continuous offerings that would be eligible to use amended Rule 486. Rights offerings or other public offerings will typically be eligible to use a short-form registration statement

⁶ See [Statement on Securities Offering Reform for Closed-End Investment Companies](#), Commissioner Hester M. Peirce (April 8, 2020).

that forward incorporates financial statements (which effectively eliminates the need to file a reviewable post-effective amendment for a shelf registration statement solely to update financial statements).⁷

Shelf Offering Process and New Short-Form Registration Statement

- Affected funds that qualify as “seasoned” funds will be able to engage in a streamlined registration process to sell securities “off the shelf” more quickly and efficiently in response to market opportunities through the use of a new short-form registration statement. A key benefit in this context is the ability to satisfy Form N-2’s disclosure requirements by incorporating by reference financial statements and other information found in future Exchange Act reports. To qualify as “seasoned,” a fund must meet the requirements of General Instruction I.A. of Form S-3 and certain other conditions, including:
 - Having timely filed all reports and other materials required under the Exchange Act during the prior year;
 - Having a public float of \$75 million or more;⁸
 - If registered under the 1940 Act, having been registered as an investment company under the 1940 Act for the preceding 12 calendar months; and
 - If registered under the 1940 Act, having timely filed all reports required to be filed under Section 30 of the 1940 Act for the preceding 12 calendar months.

Ability to Qualify for Well-Known Seasoned Issuer Status

- Affected funds that meet certain filing and reporting history requirements and have a public float of \$700 million or more will be able to qualify as WKSIs and benefit from the same processes available to operating companies that qualify as WKSIs. These include a more flexible registration process, including automatic effectiveness of shelf registration statements, and greater latitude to communicate with the market.

Communications and Prospectus Delivery Reforms

- Affected funds will be able to rely on certain safe harbors to make additional communications related to certain factual business information, forward-looking statements, and broker-dealer research reports and

⁷ Closed-end funds with currently effective shelf registration statements that will not qualify as WKSIs under the new rules will still need to rely on no-action letters, if available, to file automatically effective post-effective amendments to their shelf registration statements to update their financial statements. These no-action letters will be withdrawn effective August 1, 2021. Otherwise, a fund with a currently effective shelf registration statement must file a new short-form shelf registration statement that forward incorporates future financial statements by reference and is subject to additional comments from the Commission and its staff. Then the Commission must declare that new short-form shelf registration statement effective. In this situation, the fund would transfer its unused securities or registration fees from its current shelf registration statement to the new short-form shelf registration statement. See Rules 415(a)(6) and 457(p) under the Securities Act.

⁸ Excluding shares held by affiliates based on the definition of “affiliate” in Rule 405 under the Securities Act.

make use of a “free writing prospectus,” notwithstanding other securities law limitations on communications prior to the effectiveness of a registration statement.

- Affected funds will be able to satisfy their final prospectus delivery obligations by filing their prospectuses with the Commission in reliance on the “access equals delivery” framework available to operating companies.

New Method for Interval Funds and Certain Exchange-Traded Products to Pay Registration Fees

- Closed-end funds that operate as “interval funds” will now be able to register an indefinite number of shares and pay registration fees based on net issuance of shares in reliance on Rule 24f-2 under the 1940 Act, as opposed to registering a specific amount of shares and paying registration fees at the time of filing as is the current practice. This approach is the same as that permitted for mutual funds and exchange-traded funds that are organized as open-end management investment companies. In addition, certain exchange-traded products that are not registered under the 1940 Act will now be able to pay registration fees in a manner consistent with Rule 24f-2 under the 1940 Act.

Periodic Reporting Requirements

- Affected funds filing a short-form registration statement will be required to include certain key prospectus disclosure in their annual reports. In addition, affected funds filing a short-form registration statement will be required to disclose material unresolved staff comments.
- Registered closed-end funds will be required to provide management’s discussion of fund performance in their annual reports (which for many funds will not represent a change in practice).
- BDCs will be required to include financial highlights for the most recent ten years in their annual reports.

Incorporation by Reference Changes

- Affected funds will no longer be required to provide new purchasers with a copy of all previously-filed materials that are incorporated by reference into the registration statement. Instead, affected funds must only make incorporated materials readily available on a website.

Structured Data Requirements

- Affected funds will be required to tag certain registration statement information, similar to current tagging requirements for mutual funds and exchange-traded funds. BDCs also will be required to submit financial statement information, as operating companies currently do. Funds that file Form 24F-2 in connection with paying their registration fees, including mutual funds and exchange-traded funds (as well as interval funds under these amendments), will be required to submit the form in XML structured data format.

- Inline XBRL structured data reporting requirements for financial statement, registration statement information and prospectus information will have a compliance date of August 1, 2022, for affected funds eligible to file a short-form registration statement. For all other affected funds subject to these structured data reporting requirements, the compliance date is February 1, 2023.
- The compliance date for the requirement that Form 24F-2 filers, including existing filers, file reports on Form 24F-2 in an XML structured data format is February 1, 2022.

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