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SEC Adopts Rules Implementing Offering Reform for Business Development Companies and Registered Closed-End Funds

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On April 8, 2020, the Securities and Exchange Commission (the "SEC") adopted a series of rule and form amendments (the "Final Offering Rules") that will modify the registration, communications and offering processes under the Securities Act of 1933, as amended (the "Securities Act"), for business development companies ("BDCs") and closed-end investment companies ("CEFs" and, together with BDCs, "Affected Funds") registered under the Investment Company Act of 1940, as amended (the "1940 Act").[1] The Final Offering Rules will extend to Affected Funds important aspects of the securities offering framework that have been available to operating companies since 2005,[2] thereby further reducing the disparities between the treatment of Affected Funds and operating companies in the securities offering process. Specifically, the Final Offering Rules will, among other things:

- generally streamline the Securities Act registration process for Affected Funds;
- permit Affected Funds to qualify as well-known seasoned issuers (as defined in Rule 405 under the Securities Act, "WKSIs");
- expressly permit additional communications by and about Affected Funds during a registered public offering, such as certain factual business information, forward-looking information, "free writing prospectuses" and broker-dealer research reports;
- allow non-listed, continuously offered Affected Funds to file and amend their registration statements on an immediately effective basis or on an automatically effective basis, depending on the substance of the disclosure; and
- permit Affected Funds to satisfy their final prospectus delivery requirements by filing the prospectus with the SEC.

In addition, the SEC adopted a further series of rule and form amendments that will modify the broader disclosure and regulatory framework for Affected Funds in light of the modifications to the securities offering framework (together with the Final Offering Rules, the "Final Rules").[3] The Final Rules are generally effective August 1, 2020, but, as described herein, certain amendments are effective August 1, 2021 and certain others have transition periods for compliance.

The Final Offering Rules complete the regulatory implementation of offering reform required by the SBCAA and the Growth Act and will supersede the self-implementing provisions of those statutes once effective. The Final Rules, however, will impose on Affected Funds certain incremental and tailored reporting obligations, including additional annual reporting requirements and "structured data requirements" (i.e., tagging of specified items in Inline XBRL and filing Interactive Data Files), beginning as early as August 1, 2020. In addition, CEFs that operate pursuant to Rule 23c-3 under the 1940 Act ("Interval Funds") will be required to, and certain continuously offered exchange-traded products that are not registered investment companies ("ETPs") will be permitted to, pay securities registration fees using the same method currently used by mutual funds and exchange-traded funds ("ETFs").

The Final Rules largely adopt the rule and form amendments as they had been proposed by the SEC in March 2019.[4] Notably, however, in a departure from the proposed rules, the Final Rules do not include requirements that (1) Affected Funds file Forms 8-K disclosing material changes to their investment objectives or policies or material write-downs of significant investments, (2) CEFs report certain information on Form 8-K or (3) Seasoned Funds (as defined below) that elect to include incremental disclosures in periodic reports in order to satisfy certain requirements under Form N-2 identify in those periodic reports the information included for such purpose.[5] In addition, the Final Rules will allow BDCs to incorporate by reference certain information into their Forms N-14 to the same extent currently permitted for CEFs, which was not contemplated by the proposed rules.

Background

In 2005, investment companies, including Affected Funds, were deemed to be "ineligible issuers" and were explicitly excluded from the Securities Offering Reform. This created meaningful disparities in the offering rules applicable to operating companies and those applicable to BDCs and CEFs, resulting in Affected Funds facing various regulatory impediments to capital raising not experienced by operating companies. Additionally, certain streamlined procedures for registered offerings that are available to operating companies have not been available to BDCs and CEFs. For example, due to the inability to forward incorporate by reference, BDCs (prior to the self-implementation of relevant provisions of the SBCAA in March 2019) and CEFs have been required to file post-effective amendments to update their shelf registration statements and to have those post-effective amendments declared effective by the staff of the SEC ("Staff") in order to comply with Section 10(a)(3) of the Securities Act and for certain other purposes. These and other regulatory impediments have made it more difficult for Affected Funds to strategically access the capital markets during favorable market conditions and benefit from the lower costs of capital and offering costs enjoyed by operating companies.

The Final Offering Rules are a result of the SBCAA and the Growth Act, which generally directed the SEC to eliminate those 2005 exclusions with respect to BDCs and certain CEFs and to permit them, in varying ways, to utilize the Securities Offering Reform rules that have been available to operating companies for over a decade. The SBCAA expressly identified specific revisions to the relevant rules and forms and provided that, in the absence of final rules becoming effective, the changes became self-implementing on March 24, 2019. As a result, many BDCs have relied, to varying extents, on the Securities Offering Reform rules for more than a year, notwithstanding the absence of final rules or modifications to Form N-2.

Similarly, the Growth Act directed the SEC to adopt rules to allow CEFs with securities listed on a national securities exchange ("Listed CEFs") and Interval Funds to use the Securities Offering Reform rules, subject to appropriate conditions. Unlike the SBCAA, however, the Growth Act did not specifically identify required revisions to the applicable rules and forms, nor were all of its provisions self-implementing. However, the Growth Act provided that, in the absence of the SEC's completion of revisions required by the Growth Act by May 24, 2020, Listed CEFs and Interval Funds will be deemed to be eligible issuers for the Securities Offering Reform rules on such date, which will permit certain of such Affected Funds to, among others, incorporate certain information by reference, qualify as WKSIs and utilize more flexible communication provisions prior to the effectiveness of the Final Rules.[6] In connection with the Adopting Release, the Staff confirmed its view that Listed CEFs and Interval Funds will be able to rely on these aspects of Securities Offering Reform in the interim period prior to the effectiveness of the Final Rules.[7]

The SEC's overall approach in the Final Rules is one of general parity concerning the availability and application of the Securities Offering Reform rules to Affected Funds. In addition, the SEC expanded the scope of CEFs covered by the Final Rules to provide for parity between BDCs and CEFs, in that both listed and unlisted BDCs were covered by the SBCAA, whereas unlisted CEFs that did not operate as Interval Funds (e.g., "tender offer" funds and non-continuously offered unlisted CEFs) were not covered by the Growth Act.[8]

The Final Rules will impact categories of Affected Funds differently. As a result, CEFs should carefully review the Final Rules as certain amendments, including the requirements to provide in their annual reports management's discussion of fund performance and enhanced disclosure of their investment objectives and policies and principal risks, and changes thereto, will apply to all CEFs. For ease of reference, simplified versions of the charts provided by the SEC detailing the impact of the Final Rules on various types of Affected Funds are provided in Appendix A.

Summary of Offering Reforms

Incorporation by Reference and Short-Form Registration Statements

Affected Funds Generally

BDCs are permitted to, and commencing on May 24, 2020, Listed CEFs will be permitted to, incorporate by reference into their shelf registration statements certain past and future reports filed under the Securities Exchange Act of 1934, as amended (the "Exchange Act"). In addition, qualifying BDCs may, and commencing on May 24, 2020, qualifying Listed CEFs will be able to, file short-form registration statements on Form N-2 that are the functional equivalent of a registration statement on Form S-3 filed by an operating company.[9] These qualifying Affected Funds will be required to make available their prospectuses or statements of additional information ("SAI") and materials incorporated by reference therein on a website, rather than delivering those materials to investors.

BDCs are permitted to, and commencing on May 24, 2020, Listed CEFs will be permitted to, file a short-form registration statement on Form N-2 that incorporates by reference certain required information if:

- it meets the registrant requirements of General Instruction I.A. of Form S-3, which generally requires, among other items, the registrant to have (1) a class of securities registered pursuant to Section 12(b) of the Exchange Act, a class of equity securities registered under Section 12(g) of the Exchange Act or a requirement to file reports pursuant to Section 15(d) of the Exchange Act, (2) been subject to the requirements of Section 12 or 15(d) of the Exchange Act and filed all material required to be filed under Section 13, 14 or 15(d) for at least the 12 calendar months immediately preceding the filing of the registration statement and (3) timely filed certain reports required under Section 13, 14 or 15(d) of the Exchange Act[10] during the 12 calendar months and any portion of a month immediately preceding the filing of the registration statement, and it meets the transaction requirements of General Instruction I.B or I.C of Form S-3. For primary offerings, the registrant must have greater than $75 million of market value of outstanding common equity held by non-affiliates (i.e., "public float") (Affected Funds that meet such registrant and transaction requirements, "Seasoned Funds"); and
- in the case of a CEF, it must also have been registered under the 1940 Act for at least 12 calendar months immediately preceding the filing of the registration statement and have timely filed all reports required to be filed under Section 30 of the 1940 Act, such as Forms N-CEN and N-PORT, during the 12 calendar months and any portion of a month immediately preceding the filing of the registration statement.

The Final Offering Rules will expand these provisions to all qualifying Affected Funds. However, substantially all existing Interval Funds and all other unlisted CEFs, along with unlisted BDCs, will not qualify to file short-form registration statements on Form N-2 because their common equity securities are not listed on a national securities exchange and therefore such funds do not have a public float.[11]

BDCs may, and commencing on May 24, 2020, Listed CEFs will be able to:

- "backward" incorporate by reference into the prospectus and any SAI (1) the latest annual report filed under Section 13(a) or 15(d) of the Exchange Act that contains financial statements for the Seasoned Fund's latest fiscal year for which a Form 10-K or Form N-CSR was required to be filed, (2) all other reports filed under Section 13(a) or 15(d) of the Exchange Act since the end of the fiscal year covered by such annual report and (3), if the prospectus or SAI relates to the registration of capital stock and securities of the same class are registered under Section 12 of the Exchange Act, the description of such class of capital stock included in a registration statement filed under the Exchange Act, including any amendment or reports filed for the purpose of updating such description; and
- "forward" incorporate by reference into the prospectus and any SAI all documents subsequently filed by the Seasoned Fund under Sections 13(a), 13(c), 14 or 15(d) of the Exchange Act and prior to termination of the offering.

This flexibility will be extended to all Seasoned Funds as a result of the modifications to Form N-2 in the Final Rules, which include the removal of the prohibitions on incorporation by reference in the undertakings of Form N-2 and the adoption of new general instructions to Form N-2.[12] Forward incorporation by reference will replace the no-action relief that had been issued, on a case-by-case basis, to Listed CEFs that have effective shelf registration statements that are updated automatically through post-effective amendments filed under Rule 486(b).[13]

A Seasoned Fund will be allowed to satisfy disclosure requirements either directly in the prospectus or through incorporation by reference, and CEFs will not be required to incorporate by reference Forms N-PORT and N-CEN as such information is not specifically required to be disclosed under Form N-2.

The Final Rules will modify Form N-14 to permit BDCs to incorporate by reference, beginning August 1, 2020, to the same extent currently permitted for CEFs, which is expected to greatly reduce the length of Form N-14 filings by BDCs. In addition, Affected Funds filing a Form N-14 will no longer be required to file with the Form N-14 the documents that contain information that is incorporated by reference into the prospectus or SAI.

Interval Funds and Other Continuously Offered Affected Funds

Interval Funds will remain eligible to file certain post-effective amendments to their registration statements on Form N-2 that are immediately effective under Rule 486(b) under the Securities Act. Under the Final Offering Rules, the ability to rely on Rule 486 will be extended to any continuously offered CEF or BDC in addition to Interval Funds. Accordingly, under the Final Offering Rules, continuously offered unlisted Affected Funds will be able to file post-effective amendments and certain registration statements that become effective immediately upon filing or automatically effective 60 days after filing, depending on the substance of the disclosure changes.[14]

Continuously offered unlisted Affected Funds relying on Rule 486 will continue to be subject to applicable provisions in Rule 415 under the Securities Act. Moreover, these Affected Funds will need to comply with relevant conditions in Rule 486. In addition to allowing a qualifying Affected Fund to rely on Rule 486, the SEC also amended the scope of registration statements that Rule 486 covers. Unlike Interval Funds, other continuously offered Affected Funds that will newly be eligible to rely on Rule 486 generally are required to file new registration statements every three years under Rules 415(a)(5) and (a)(6).[15] Under the Final Offering Rules, Rule 486 is being amended to permit these registration statements to be immediately or automatically effective under the rule, depending on the substance of the disclosure.

Well-Known Seasoned Issuer Status

BDCs can, and commencing on May 24, 2020, Listed CEFs will be able to, qualify as a WKSI. The primary advantages of WKSI status include the ability to (1) file registration statements and amendments that become effective automatically, (2) register an unspecified amount of securities, (3) add additional classes of securities to such registration statements, (4) defer payment of SEC filing fees until the time of takedowns from a shelf registration statement and (5) communicate to the public more freely than a non-WKSI without violating the "gun-jumping" provisions of Section 5 of the Securities Act.

In order to qualify as a WKSI, an Affected Fund generally must:

- ???be a Seasoned Fund;
- ???not be an "ineligible issuer";[16] and
- ???as of a date within 60 days of the latest of (1) the filing of its most recent shelf registration statement, (2) the most recent amendment to a shelf registration statement for purposes of complying with Section 10(a)(3) of the Securities Act (i.e., to add audited financial statements) or (3), if the events described in clauses (1) and (2) have not occurred within the previous 16 months, the filing of the Affected Fund's most recent annual report, have at least $700 million in public float or have issued for cash, within the prior three years, at least $1 billion in aggregate principal amount of non-convertible securities (other than common equity) through primary offerings registered under the Securities Act.[17]

Omission of Information from a Base Prospectus or Prospectus Supplement

BDCs are, and commencing on May 24, 2020, Listed CEFs will be, generally eligible to use Rules 424 and 430B under the Securities Act to file prospectus supplements and to omit certain information from prospectuses to be used in shelf takedowns, in addition to the information historically omitted in reliance on Rule 430C under the Securities Act.

Under Rule 430B(a), BDCs that qualify as WKSIs may, and commencing on May 24, 2020, Listed CEFs that qualify as WKSIs will be able to, omit the plan of distribution from their registration statements as well as information on whether the offering is a primary offering or a secondary offering on behalf of selling securityholders. In addition, under Rule 430B(b), qualifying BDCs may, and commencing on May 24, 2020 qualifying Listed CEFs will be able to, omit information on selling securityholders and the amount of securities registered on their behalf, subject to certain conditions. In each case, these provisions are consistent with the flexibility afforded to operating companies under the Securities Offering Reform.

For purposes of determining liability under the Securities Act to any purchaser of securities, each prospectus supplement filed under Rule 424(b)(2), (b)(5) or (b)(7) as part of a registration statement in reliance on Rule 430B relating to a shelf takedown or offering by an applicable Affected Fund will be deemed part of and included in the registration statement containing the corresponding base prospectus as of the earlier of (1) the first use after effectiveness and (2) the date of the first contract of sale of securities in the offering described in the prospectus.[18] Each prospectus filed pursuant to Rule 424(b)(3) will be deemed to be part of the registration statement as of the date the filed prospectus was deemed part of and included in the registration statement.

The Final Offering Rules will enable all Seasoned Funds to rely on Rules 424 and 430B and will make Rule 424 the exclusive rule pursuant to which all Seasoned Funds file prospectus supplements.[19]

Communications Rules Under the Securities Act

BDCs are, and commencing on May 24, 2020, Listed CEFs and Interval Funds will be, permitted incremental flexibility with respect to the general restrictions on certain communications in connection with proposed registered offerings of securities. This flexibility includes, of particular note, the use of free writing prospectuses in reliance on Rules 164 and 433 under the Securities Act. As a general matter, free writing prospectuses may be used more broadly in a wider number of scenarios than traditional investment company advertisements filed under Rule 482 under the Securities Act, including, in the case of a WKSI, before the filing of a registration statement, which is not permitted for investment company communications subject to Rule 482.

In addition, BDCs are permitted to, and commencing on May 24, 2020, Listed CEFs and Interval Funds will be permitted to:

- publish factual information about the BDC or CEF or proposed offerings, including "tombstone ads," in reliance on Rule 134. These communications are deemed not to be prospectuses;
- communicate without risk of violating of the "gun-jumping" provisions of Section 5 of the Securities Act for a period ending 30 days prior to the filing of a registration statement in reliance on Rule 163A (provided that the communication does not reference the securities offering that is subject to such registration statement, the BDC or CEF takes reasonable steps to prevent further distribution of the communication within the 30-day period prior to the filing of the registration statement and certain other conditions are met);[20]
- publish or disseminate regularly released factual business information and forward-looking information at any time, including around the time of a registered offering, in reliance on Rule 168. These communications are deemed not to be prospectuses or pre-filing "offers" for purposes of Section 5(c) of the Securities Act;
- continue 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 in reliance on Rule 169. Rule 169 communications are deemed not to be prospectuses; and
- if qualified as a WKSI, engage at any time in oral and written communications, including free writing prospectuses, subject to the same conditions applicable to other WKSIs, including Rule 163.

Under the Final Offering Rules, this increased flexibility will be extended to all Affected Funds as of August 1, 2020.[21] Affected Funds will be permitted to take advantage of this flexibility or to continue to rely on Rule 482 and other rules currently applicable to their communications.

Broker-Dealer Research Reports

Broker-dealers participating in a registered offering of a BDC's securities are permitted to publish or distribute research reports about that BDC's securities that are not involved in the offering (and are not convertible into or similar to securities involved in the offering), in reliance on the non-exclusive safe harbor provided by Rule 138 under the Securities Act; provided that the broker-dealer publishes or distributes such research reports in the regular course of its business and the BDC has filed all periodic reports on Form 10-K or Form 10-Q required pursuant to Section 13 of the Exchange Act during the preceding 12 months (or such shorter time that the BDC was required to file such reports. Commencing on May 24, 2020, broker-dealers participating in a registered offering of a Listed CEF's or Interval Fund's securities will be able to rely on the non-exclusive safe harbor provided by Rule 138, subject to the same conditions; provided that the Listed CEF or Interval Fund has filed all periodic reports on Form N-CSR, Form N-Q[22], Form N-PORT or Form N-CEN required pursuant to Section 30 of the 1940 Act during the preceding 12 months (or such shorter time that the Listed CEF or Interval Fund was required to file such reports). Under the Final Offering Rules, as of August 1, 2020, this relief will be extended to the publication of research by participants in offerings by all Affected Funds.

Certain broker-dealers participating in a registered offering of a BDC's securities may publish or distribute issuer-specific research reports in reliance on the non-exclusive safe harbor provided by Rule 139 under the Securities Act through August 1, 2020. Commencing on May 24, 2020, this relief will be available to certain broker-dealers participating in a registered offering of a Listed CEF's securities. Notwithstanding the statutory direction under the SBCAA and Growth Act, the SEC did not amend Rule 139 to apply to BDCs and CEFs. Rather, the SEC has determined that Rule 139b, which was adopted in November 2018, extends Rule 139 to cover certain covered investment fund research reports and satisfies the directives of the SBCAA and the Growth Act. Rule 139b imposes certain incremental exclusions from the safe harbor (such as research reports by a broker-dealer that is affiliated with the investment adviser to an Affected Fund) not currently contemplated by Rule 139. As a result, upon effectiveness of the Final Offering Rules, certain broker-dealers participating in a registered offering of an Affected Fund's securities will only be able to publish or distribute issuer-specific research reports in reliance on the non-exclusive safe harbor provided by Rule 139b and should no longer rely on Rule 139.

Prospectus Delivery Rules

BDCs are, and commencing on May 24, 2020, Listed CEFs and Interval Funds will be, permitted to use Rules 172 and 173 under the Securities Act, which generally allow for the satisfaction of final prospectus delivery obligations through filing the final prospectus with the SEC. Under the Final Offering Rules, all Affected Funds will be permitted to use Rules 172 and 173 as of August 1, 2020.

Other Adopted Rules

In addition to the Final Offering Rules, the SEC adopted a series of amendments to other rules and forms that are intended to tailor the disclosure and regulatory framework for Affected Funds. Many of the adopted amendments are not expressly required by the SBCAA or the Growth Act.

As discussed below, these amendments include:

- ???new annual reporting requirements;
- ???amendments to provide all Affected Funds additional flexibility to incorporate information by reference;
- ???structured data requirements; and
- ???enhancements to the disclosures that all CEFs make to investors when the funds are not updating their registration statements.

Disclosure Changes

Under the Final Rules, Seasoned Funds that file short-form registration statements will be required to include the following information in their annual reports:

- ???the fee and expense table currently required by Item 3 of Form N-2;
- ???share price data currently required by Item 8.5 of Form N-2; and
- ???the senior securities table currently required by Item 4.3 of Form N-2.

The SEC notes that, because the annual report will be forward incorporated by reference by Seasoned Funds into their short-form registration statements, there should be no incremental or duplicative disclosure requirements imposed by these disclosure requirements.

The Final Rules also set forth four new disclosure requirements:

- ???All BDCs will be required to disclose financial highlights currently required by Item 4.1 of Form N-2 for CEFs in their registration statements and annual reports;
- ???All CEFs will be required to provide management's discussion of fund performance in their annual reports, similar to the disclosures provided by mutual funds and ETFs in their annual reports and comparable to the management's discussion and analysis disclosures provided by operating companies and BDCs. This disclosure requirement will not apply until the first annual report filed by a CEF after August 1, 2021;
- ???All CEFs that forgo an annual update to their registration statements, and provide updating disclosures in their annual reports in accordance with Rule 8b-16 under the 1940 Act, must (1) describe the fund's current investment objectives, investment policies and principal risks and (2) disclose not only certain key changes (as currently required), but also the relevant term/objective/policy both before and after the change; and
- ???Seasoned Funds filing short-form registration statements will be required to disclose in their registration statements or annual reports unresolved comments received from the Staff on their periodic or current reports filed under the Exchange Act or the 1940 Act, as applicable, or their registration statements if the applicable Seasoned Fund believes such comments are material, were issued 180 or more days before the end of the fiscal year covered by the annual report and remained unresolved as of the filing of the annual report.[23]

The Final Rules make a number of additional revisions, generally of a technical nature, to disclosure requirements applicable to CEFs to acknowledge the fact that certain filing requirements, as well as the statutory basis for such requirements, differ from those applicable to operating companies and BDCs.

Structured Data Requirements

The Final Rules will impose certain structured data reporting requirements on Affected Funds. Specifically:

- ???BDCs will be required to submit financial statement information in registration statements and Exchange Act reports using Inline XBRL format;
- ???Affected Funds will be required to tag certain data on the cover page of Form N-2 using Inline XBRL format;
- ???Affected Funds will be required to tag certain disclosures included in their prospectuses, including the fee table, senior securities table and risk factors, using Inline XBRL format; and

- Seasoned Funds will be required to tag certain information in their Exchange Act reports using Inline XBRL format to the extent such information is required to be tagged in the prospectus.

Affected Funds will be required to submit Interactive Data Files presenting information in XBRL format with (1) any registration statements or post-effective amendments, (2) any prospectus filed pursuant to Rule 424 and (3), in the case of Seasoned Funds, any Exchange Act report incorporated by reference into any of the foregoing. These requirements are consistent with the requirements currently imposed on operating companies, mutual funds and ETFs.

Affected Funds eligible to file a short-form registration statement will be required to comply with the structured data requirements no later than August 1, 2022 (regardless of whether they actually file a short-form registration statement). All other Affected Funds will be required to comply with the structured data requirements no later than February 1, 2023.

Rule 418(a)

BDCs are, and commencing on May 24, 2020, Listed CEFs will be, exempt from Rule 418(a)(3) under the Securities Act, which generally requires registrants to provide the Staff certain reports or memoranda related to the business or operations of a registrant upon request. Under the Final Rules, all Affected Funds will be exempt from Rule 418(a)(3).

Proxy Statement Disclosures

BDCs, and commencing on May 24, 2020, Listed CEFs, that qualify for the filing of short-form registration statements may incorporate by reference into their proxy statements filed under Schedule 14A certain information[24] that is required to be disclosed in connection with proposals covered by Item 11 (authorization or issuance of any securities otherwise than for exchange) or Item 12 (the modification of any class of securities or the issuance or authorization for issuance of securities of the registrant in exchange for outstanding securities) of such Schedule 14A. Under the Final Rules, all Affected Funds that meet the appropriate criteria will be eligible for such incorporation by reference.

Registration Fees for Interval Funds and Issuers of Certain ETPs

Under the Final Rules, effective August 1, 2021, Interval Funds will be required to pay their registration fees to the SEC on an annual net basis, similar to the manner in which mutual funds and ETFs pay their registration fees. The Final Rules expand the scope of the proposed amendments to extend similar treatment to certain ETPs, permitting them to elect to register an offering of an indeterminate number of securities and to pay registration fees on an annual net basis. These changes will become effective August 1, 2021, and associated filings on Form 24F-2 will be required to be submitted in XML format as of February 1, 2022.

Regulation FD

Under the SBCAA, for purposes of determining eligibility to use a shelf registration statement, BDCs are not, and commencing on May 24, 2020, Listed CEFs will not be, considered to have failed to file required materials under the Exchange Act, or to have filed those materials in a timely manner, if the disclosure was required solely by Rule 100 of Regulation FD. Under the Final Rules, all Affected Funds will benefit from this same revision.

Analysis and Considerations

General

Forward incorporation by reference of each annual report will allow Seasoned Funds to maintain a current prospectus for purposes of Section 10(a)(3) of the Securities Act without the need to file (and have declared effective) annual post-effective amendments to the registration statement as has been the historic practice. From time to time, Staff review of such updates has delayed the effectiveness of the registration statement for purposes of Section 10(a)(3) and affected a BDC's or CEF's ability to complete registered offerings during certain portions of the year. For Seasoned Funds, this streamlined updating procedure provides greater ability to access the public capital markets when conditions are appropriate. In our experience, many BDCs have taken advantage of the flexibility afforded by the self-implementing provisions of the SBCAA in the past year. As part of its review of registration statements of these BDCs (other than for BDCs that qualify as WKSIs), as would be expected, the Staff has routinely reviewed documents incorporated by reference into the registration statement and not just the disclosure in the registration statement itself. In addition, in cooperation with the Staff, BDCs that qualify as WKSIs (and have elected to rely on such status) have included introductory statements to their registration statements to designate that they are automatically effective.

Seasoned Funds, including BDCs that have relied or may rely on the self-implementing provisions of the SBCAA and Listed CEFs and Interval Funds that may rely on eligible issuer status commencing on May 24, 2020, should consider the extent to which their disclosures, particularly those made in anticipation of the effectiveness of the final incorporation by reference rules, should comply with the incremental disclosure requirements set forth in the Final Rules. For example, BDCs with a March 31 fiscal year-end will file their annual reports before the Final Rules become effective. Seasoned Funds filing their annual reports in advance of the effectiveness of the Final Rules could elect to include disclosure that would be required in an annual report incorporated by reference into a shelf registration statement under the Final Rules. Such disclosure would include the fee and expense table, share price data and senior securities table currently required by Items 3, 8.5 and 4.3, respectively, of Form N-2 and, for BDCs, the financial highlights currently required by Item 4.1 of Form N-2 for CEFs. Many BDCs incorporated these disclosures in their most recent annual reports, and Seasoned Funds that have not done so will need to update their disclosure if they have filed or intend to file shelf registration statements in the near term.

In addition, BDCs, Listed CEFs and Interval Funds and their investment advisers in consultation with outside advisers and the Staff will need to consider carefully the appropriate mechanism of implementing the relevant offering reforms directed by statute and adopted in the Final Rules but for which applicable forms have not been updated and may not be updated prior to the effectiveness of the Final Rules. For example, although a BDC can now qualify as a WKSI and a Listed CEF will be able to qualify as a WKSI as of May 24, 2020, the SEC expects it will not complete the modifications necessary for its systems to automatically reflect that automatic shelf registration statements are effective upon filing and process deferred payments of filing fees at the time of shelf takedowns until September 2020.[25] Moreover, BDCs, Listed CEFs, Interval Funds and other offering participants will need to give careful consideration to how to address areas where there are discrepancies between the self-implementing provisions of the SBCAA and Growth Act and the offering and disclosure framework adopted in the Final Rules. For example, although certain broker-dealer communications are permissible with respect to BDCs today, we expect that broker-dealers will cease any reliance on Rule 139 in favor of Rule 139b well in advance of August 1, 2020. This situation, among others, may create unique challenges that will need to be addressed with legal and compliance teams and potentially external advisers.

BDCs that have relied on the self-implementing provisions of the SBCAA appear to have recognized a number of benefits from offering reform. For example, "at-the-market" or "ATM" programs can be more efficiently refreshed each quarter (i.e., without the filing of an updated prospectus supplement) on a more cost-effective basis, and we have seen a modest uptick in the use of ATM programs. More generally, incorporation by reference has shortened the length of shelf registration statements by certain BDCs, which has decreased required resources to file the registration statement and reduced overall offering costs, and BDCs that qualify as WKSIs have benefited from the enhanced flexibility to file automatically effective registration statements to respond quickly to market conditions and opportunities. In addition, lead time for offerings has decreased as inclusion of quarterly (or sometimes annual) financial statements in a prospectus supplement has been supplanted by incorporation by reference of such information. Moreover, most BDCs have realized lower printing costs as a result of the reduced length of shelf registration statements and through satisfaction by offering participants of their final prospectus delivery obligations through filing the final prospectus with the SEC rather than through delivery of printed copies to investors.

Unique Considerations for CEFs

As noted above, the Growth Act provides that Listed CEFs and Interval Funds will be deemed to be eligible issuers for the Securities Offering Reform rules commencing on May 24, 2020. However, unlike the SBCAA, the Growth Act does not expressly or specifically identify required revisions to the applicable rules and forms, nor are all of its provisions self-implementing. With the release of the Final Rules, Listed CEFs and Interval Funds may elect, in consultation with outside advisers, to generally rely on the Growth Act's implementation of eligible issuer status as of that date, and the SEC has stated that it will work with CEFs to help them navigate the ambiguity created by the lack of specificity in the Growth Act.[26]

As a general matter, Listed CEFs will likely view the availability of the Securities Offering Reform regime to be less useful than their listed BDC counterparts. Whereas a BDC may obtain approval to sell or otherwise issue its common shares at a price below its then current net asset value per share, subject to certain limitations and conditions, CEFs generally only have the ability to issue new shares in a secondary offering when their shares are trading at a premium, other than a rights offering to all current shareholders.[27] In addition, the limited trading volume in the CEF secondary market, especially for CEFs with smaller market capitalizations and larger retail investor bases, the lack of analyst coverage for CEFs generally and the non-existent or narrow trading premiums for Listed CEFs may further limit the ability to take advantage of the Securities Offering Reform rules in the short-term.[28] On the upside, the potential for enhanced analyst coverage and communications around offerings, and the reduced costs associated with prospectus delivery, may help re-energize that market and cause CEFs to reconsider secondary offerings, including ATM programs that currently may be viewed as too expensive.

Cost Benefit Analysis

The Final Rules will impose certain meaningful costs upon Affected Funds, particularly with respect to increased disclosure obligations and associated compliance costs. The SEC estimates that the new structured data rules, including the requirements related to Inline XBRL and data tagging, will cost each BDC and CEF approximately $161,000 and $8,900 per year, respectively, in the three years following the adoption of the Final Rules. [29] In the case of externally managed BDCs and CEFs, these expenses would largely be borne directly by the Affected Fund (and, indirectly, by common equityholders), whether through payment to outside advisers or reimbursements under an administration agreement. Notably, the increased costs for each BDC and CEF to monitor and report triggering events under the current reporting requirements and amendments to Form 8-K that were proposed but ultimately not adopted in the Final Rules were estimated by the SEC in the Proposing Release to equal approximately $206,000 and $196,000[30] per year, respectively.

In the case of Affected Funds that routinely access the public capital markets, a portion of these increased costs imposed will be mitigated by cost savings under the Final Offering Rules. In our experience with BDC transactions over the past year, these cost savings include, most significantly, a reduction in legal and printing fees associated with the ability to incorporate by reference, and there are other intangible benefits associated with a streamlined offering process. However, for Affected Funds that do not or cannot access the public capital markets, such as BDCs and CEFs that complete their offerings in reliance on private placement exemptions (and, in particular, CEFs that were not expressly included under the Growth Act), the means through which to offset the increased out-of-pocket expenses implemented under the provisions of the Final Rules that extend beyond granting parity with Securities Offering Reform presently is difficult to identify. As a result, despite industry optimism regarding potential cost savings (and therefore net economic benefits to the industry) at the time the SBCAA and the Growth Act were signed, the net economic effect of the Final Rules to the BDC and CEF industry as a whole may be meaningfully less and potentially represent a net economic loss due to the extension of the Final Rules beyond granting parity with Securities Offering Reform.

Conclusion

Based on the experience of BDCs taking advantage of the self-implementing provisions of the SBCAA since March 2019, the extension of Securities Offering Reform rules will enable BDCs and Listed CEFs to raise capital more efficiently and cost-effectively and provide greater flexibility in timing offerings to coincide with open windows for capital raising. However, the ability for Affected Funds to fully utilize the Securities Offering Reform rules and the full impact of certain of these Final Rules may not be known for some time after the Final Rules become effective. As of June 30, 2019, there were 100 Affected Funds that had a sufficient public float to satisfy that part of the WKSI test, and almost 500 Affected Funds that had a sufficient public float to qualify to file short-form registration statements.[31] However, in light of the market disruption caused by the ongoing COVID-19 pandemic, we believe these figures will decrease meaningfully. Access to the Securities Offering Reform rules may promote consolidation among existing Affected Funds to facilitate qualification as a WKSI (or otherwise to file short-form registration statements), which may result in cost reductions to the benefit of investors. On the flip side, smaller Affected Funds may find it harder to compete given the incremental costs discussed above, and sponsors of new products may find it more difficult to enter the public capital markets. An important dynamic that will need time to play out is whether the extension of Securities Offering Reform to the BDC and CEF industry will result in an increase in interest from investment banks and other distribution channels, in terms of underwritings of initial public offerings and secondary offerings by Affected Funds (including through ATM programs) as well as ongoing research coverage through their analysts.

See Appendix A

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[1] Securities Offering Reform for Closed-End Investment Companies, Securities Act Release No. 33-10771 (April 8, 2020) (the "Adopting Release").

[2] Securities Offering Reform, Securities Act Release No. 33-8591 (July 19, 2005) (the "Securities Offering Reform").

[3] Unlike the Final Offering Rules, these rule and form amendments were not expressly required by either the Small Business Credit Availability Act (the "SBCAA"), which was signed into law by President Trump on March 23, 2018, or the Economic Growth, Regulatory Relief, and Consumer Protection Act (the "Growth Act"), which was signed into law by President Trump on May 24, 2018.

[4] Securities Offering Reform for Closed-End Investment Companies, Securities Act Release No. 33-10619 (March 20, 2019) (the "Proposing Release").

[5] The SEC did note, however, that it will continue to consider current reporting generally as part of its broader review of the effectiveness of investment company disclosure and that a Seasoned Fund that files a short-form registration statement may voluntarily file on Form 8-K, including for purposes of forward incorporating by reference information into its registration statement. *See* Adopting Release at p. 101.

[6] *See* Growth Act, Section 509(b).

[7] Open Meeting of the Securities and Exchange Commission (April 8, 2020) (statement of Director Dalia Blass, Director of the Division of Investment Management) ("Statement of Director Blass").

[8] The SEC acknowledges in the Adopting Release that certain benefits of the Final Rules are less likely to apply to unlisted BDCs and CEFs, similar to the lack of utility of the Securities Offering Reform to unlisted operating companies. For example, Affected Funds without listed common equity (e.g., Interval Funds) do not have a "public float" and therefore will generally not qualify to be WKSIs or to file short-form registration statements. *See*, e.g., Adopting Release at p. 25-26. These CEFs, however, will be able to rely on the relaxed communication rules as well as satisfy prospectus delivery obligations by filing a prospectus with the SEC in compliance with applicable law.

[9] Consistent with the proposed rules, under the Final Offering Rules, there will not be a separate registration form to effect the short-form registration by Affected Funds; rather, qualifying Affected Funds will file their short-form registration statements on Form N-2.

[10] Excluded from this requirement are Form 8-Ks filed solely with respect to Items 1.01 (entry into a material definitive agreement), 1.02 (termination of a material definitive agreement), 1.04 (certain disclosures regarding mine safety), 2.03 (creation of direct financial obligations or an obligation under an off-balance sheet arrangement), 2.04 (acceleration or increases of the same), 2.05 (costs associated with exit and disposal activities), 2.06 (material impairments), 4.02(a) (non-reliance on previously issued financial statements) or 5.02(e) (new compensatory arrangements for executive officers).

[11] By contrast to CEFs that offer their securities through private placements and are required to register under the 1940 Act on Form N-2, which does not provide for automatic effectiveness, BDCs that do not have exchange-listed securities and elect to privately place their securities pursuant to Section 4(a)(2) of the Securities Act, or Regulation D thereunder, do not file a Form N-2. Rather, those BDCs, which are commonly referred to as “private BDCs”, register their equity securities under the Exchange Act using Form 10 to comply with the election requirements of Section 54 of the 1940 Act. Unlike a CEF's filing on Form N-2, a BDC’s filing on Form 10 is automatically effective 60 days after filing.

[12] As part of the Final Rules, the SEC will eliminate the undertaking in current Form N-2 that requires a CEF or BDC to undertake to supplement the prospectus or file a post-effective amendment to disclose certain information if the securities being registered are to be offered to existing shareholders, and if not taken, to be reoffered to the public. This amendment is consistent with recent amendments to the undertakings described in Item 512 of Regulation S-K.

[13] These no-action letters will be withdrawn effective August 1, 2021. *See* IM Information Update, 2020-04 (April 2020) available at https://www.sec.gov/files/im-info-2020-04.pdf.

[14] For example, under Rule 486(a), continuously offered unlisted Affected Funds will be able to make material changes to their registration statements on an automatically effective basis 60 days after filing. In addition, under Rule 486(b), continuously offered unlisted Affected Funds will be able, for example, to update their financial statements for purposes of Section 10(a)(3) of the Securities Act or make non-material changes to their registration statements on an immediately effective basis. These changes will eliminate certain timing pressures previously associated with annual updates to the registration statements of continuously offered unlisted Affected Funds.

[15] Rules 415(a)(5) and (a)(6) provide a mechanism to file a new registration statement to replace an expiring registration statement registering certain securities to be sold on a delayed or continuous basis. Such registration statements expire three years from their initial effective date.

[16] The definition of "ineligible issuer" generally includes, among others, entities (1) that have failed to file all reports required pursuant to Section 13 or 15(d) of the Exchange Act during the preceding 12 months (or such shorter time that the Affected Fund was required to file such reports), with limited exceptions, (2) for which, within the past three years, the investment adviser was made the subject of a judicial or administrative decree or order arising out of a governmental action that determines the investment adviser aided, abetted or caused the Affected Fund to violate the anti-fraud provisions of the federal securities laws or (3) that, in the case of CEFs, have failed to file all reports and materials required to be filed under Section 30 of the 1940 Act during the preceding 12 months (or such shorter time that the CEF was required to file such reports or materials).

[17] Citing its general approach of parity with operating company offering rules, the SEC declined to incorporate commenters' suggested elimination of and modification to the WKSI public float threshold, including a reduction of the public float threshold from $700 million to $480 million. *See* Adopting Release at p. 42, 45.

[18] Rule 430B further provides that the effective date of a shelf registration statement for purposes of liability of the issuer and any underwriter under Section 11 of the Securities Act is the date a prospectus supplement is filed in connection with the takedown or takedowns deemed part of the registration statement. By contrast, under Rule 430C, the rule on which BDCs and CEFs engaged in shelf takedowns have relied since 2005 (prior to the self-implementation of the SBCAA for BDCs), the filing of prospectus supplements does not trigger new effective dates of the registration statement.

[19] Affected Funds will continue to use Rule 497 to file an advertisement that is deemed to be a prospectus under Rule 482 under the Securities Act. The Final Rules do not apply to open-end funds or other registered investment companies, all of which will continue to file prospectuses under Rule 497.

[20] We believe issuers do not elect to rely on Rule 163A where a communication is made publicly available on the Internet.

[21] Affected Funds should take a proactive approach to discussing reliance on these communications rules with counsel and other offering participants.

[22] Form N-Q will be rescinded on May 1, 2020 as Form N-PORT will render it duplicative following the effectiveness of the requirement to submit reports on Form N-PORT.

[23] This revision extends to CEFs a requirement that is currently applicable to BDCs through Item 1B of Form 10-K.

[24] The information that may be incorporated by reference is listed in Item 13 of Schedule 14A and includes (1) financial statements meeting the requirements of Regulation S-X, (2) Item 302 of Regulation S-K (supplementary financial information), (3) Item 303 of Regulation S-K (management's discussion and analysis of financial condition and results of operations), (4) Item 304 of Regulation S-K (changes in and disagreements with accountants on accounting and financial disclosures), (5) Item 305 of Regulation S-K (quantitative and qualitative disclosures about market risk) and (6) certain information with respect to the attendance of the registrant's principal accountants at the shareholder meeting.

[25] In order to address this issue following the self-implementation of the SBCAA, certain BDCs that qualify as WKSIs (and elected to rely on such status) have included an explanatory note in their registration statements to the effect that, in reliance on the SBCAA, the registration statement is being filed on an automatically effective basis using the shelf registration statement process available to WKSIs.

[26] Statement of Director Blass.

[27] Section 63(2) of the 1940 Act extends the limitations applicable to CEFs under Section 23(b) to BDCs but provides a framework excepting the periodic issuance by a BDC of its common stock at less than net asset value, including in connection with the BDC's initial public offering, subject to annual shareholder approval (other than in the initial public offering) and certain required findings by a "required majority" (as defined in Section 57(o) of the 1940 Act) of the BDC's board of directors. Although Section 23(b) provides that CEFs could seek shareholder approval to issue common shares at below net asset value in connection with a particular issuance, this practice is not common.

[28] In the Proposing Release, the SEC cited to third party data that indicated listed BDCs had, on average, six analysts following them as of December 2017. As of the same period, the average number of analysts following listed CEFs was zero. *See* Proposing Release at p. 42, n. 92.

[29] *See* Adopting Release at p. 150-151.

[30] We assume that the $19,553,600 per CEF set forth in the Proposing Release is a typographical error.

[31] *See* Adopting Release at p. 116-118.

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