CLOSED-END FUND AND BDC OFFERING, FILING AND DISCLOSURE CHANGES: SOME BENEFITS, SOME BURDENS

Date: 10 April 2020

Investment Management Alert

By: Mark P. Goshko, Jon-Luc Dupuy, Jennifer R. Gonzalez, George Zornada

On April 8, 2020, the Securities and Exchange Commission (the "SEC") adopted final rule and form amendments (the "Final Rules") that modify the registration, offering, and communications processes currently used by registered closed-end management investment companies, including all types of continuously-offered closed-end funds ("Registered CEFs"), and business development companies ("BDCs," and, together with Registered CEFs, the "Affected Funds") under the Securities Act of 1933, as amended (the "Securities Act").[1] The Final Rules allow Affected Funds to rely on more lenient securities offering rules already available to traditional public operating companies.[2]

While the Final Rules closely follow amendments that were originally proposed in March 2019 (the "Proposed Rules"),[3] further refinements clarify or expand the applicability of certain requirements. In addition, certain amendments in the Proposed Rules, such as the Form 8-K filing requirement, were not adopted in the Final Rules.

Most of the amendments will become effective on August 1, 2020, with certain exceptions and additional transition periods, as discussed further below.[4]

SIGNIFICANT CHANGES IMPOSED BY FINAL RULES

The Final Rules adopt a significant number of amendments to rules under the Securities Act, the Securities Exchange Act of 1934, as amended (the "Exchange Act"), and the Investment Company Act of 1940, as amended (the "1940 Act"), as well as a number of related forms. Prominent changes that were introduced in the Proposed Rules and ultimately adopted in the Final Rules include the following:

Streamlined Shelf Offering Process for Certain Exchange-Listed Funds.

"Seasoned Funds"[5] have a faster and more efficient shelf registration process through the use of a new short-form registration statement. Seasoned Funds also may—and in some instances must—forward or backward incorporate by reference information from their Exchange Act reports.

WKSI Status for Certain Exchange-Listed Funds.

Eligible Affected Funds can generally qualify as WKSIs[6] (like operating companies) if they have at least $700 million in "public float", and will benefit from a more flexible registration process, which includes the ability to (i) file automatically effective registration statements and amendments; and (ii) communicate at any time, including through means of a "free writing prospectus," without violating certain "gun-jumping" provisions of the Securities

©2005-2026 K&L Gates LLP. All Rights Reserved.

Act. Despite receiving several comments on this point, the SEC refused to extend the definition of WKSI to account for any measure other than "public float" (e.g., aggregate net asset value).

Prospectus Delivery and Communications Reforms for All Affected Funds.

Affected Funds can satisfy their final prospectus delivery obligations by filing their final prospectuses with the SEC. Affected Funds can also use many of the offering communication rules currently available to operating companies, enabling such funds to use a "free writing prospectus," certain factual business information, forward-looking statements, and certain broker-dealer research reports.

New Method for Interval Funds to Pay Registration Fees.

Interval funds and certain continuously offered exchange-traded products ("ETPs") can register an indefinite number of shares and pay registration fees based on net issuance of shares by filing on Form 24F-2, similar to the method that open-end funds use.

Structured Data Requirements for All Affected Funds.

All Affected Funds must use Inline eXtensible Business Reporting Language ("Inline XBRL") format to tag certain registration statement information, similar to current tagging requirements for open-end funds. BDCs, like operating companies, must submit financial statement information using Inline XBRL format. Affected Funds that file Form 24F-2 in connection with paying their registration fees (e.g., interval funds) must submit the form in eXtensible Markup Language ("XML").

Annual Report Requirements for Seasoned Funds and Registered CEFs.

Seasoned Funds that register using the short-form "shelf" registration statement must disclose material unresolved staff comments and include certain key information in their annual reports, including the fee table, share price data, and senior securities table. Registered CEFs must include MDFP in their annual reports, similar to requirements that currently apply to mutual funds, exchange-traded funds, and BDCs. These requirements reflect the increased prominence of shareholder reports under the Final Rules.

Incorporation by Reference Changes for All Affected Funds.

Affected Funds are no longer required to provide new purchasers with a copy of all previously filed materials that are incorporated by reference into the registration statement. Instead, the incorporated materials must be made readily available and accessible on a website identified in the registration statement.

ADDITIONAL CHANGES REFLECTING KEY DIFFERENCES FROM PROPOSED RULES

The SEC first proposed amendments to modify registration, offering, and communications rules for Affected Funds on March 20, 2019. The key differences between the Proposed Rules and the Final Rules include the following:

Forward Incorporation from Exchange Act Reports for Certain Exchange-Listed Funds Using Shelf Offering Process.

©2005-2026 K&L Gates LLP. All Rights Reserved.

The Proposed Rules would have permitted an Affected Fund to incorporate information by reference in an Exchange Act report only if the information was accompanied by a statement identifying that the information was included for such purpose. The Final Rules did not adopt this requirement and permit the inclusion of such information without any accompanying statement.

Automatic or Immediate Effectiveness for Certain Continuously-Offered Affected Fund Filings and Prospectus Supplements for All Affected Funds.

The Final Rules expand the scope of Rule 486 to permit any Affected Fund that conducts a continuous offering under Rule 415(a)(1)(ix) (e.g., a continuously-offered tender offer fund) to file post-effective amendments and certain registration statements that are either immediately effective or automatically effective 60 days after filing. In addition, the scope of registration statements covered by Rule 486 is expanded by the Final Rules to include registration statements filed for purposes of compliance with Rule 415(a)(5) and (a)(6). Finally, the Final Rules amend Rule 424, making it the exclusive rule for Affected Funds to file a prospectus supplement (other than an advertisement deemed to be a prospectus under Rule 482), and preventing any confusion with Rule 497.

Expansion of Registration Fee Payment Method to Certain ETPs.

The Final Rules expand the applicability of the registration fee payment method for interval funds discussed in the Proposed Rules to certain ETPs that are not registered under the 1940 Act.

Annual Report Disclosure Requirements for Registered CEFs.

Rule 8b-16(b) 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. The Final Rules adopted, as proposed, a new requirement that any changes be described in enough detail to allow investors to understand each change and how it may affect the fund. The Final Rules also impose a new requirement that any Affected Fund that relies on Rule 8b-16(b) must describe the fund's current investment objectives, investment policies, and principal risks in its annual report, even if there were no changes in the preceding year.

No Form 8-K Reporting for Registered CEFs.

The SEC did not adopt the proposed Form 8-K reporting requirements for Registered CEFs or the proposed amendments to Form 8-K (requiring information regarding material changes to investment objectives and material write-downs of significant investments) for any Affected Funds. Although Registered CEFs generally will not be required to file reports on Form 8-K, a Registered CEF that is eligible to file a short-form registration statement may voluntarily file information on Form 8-K to forward incorporate that information into its registration statement or for other purposes (e.g., to publicly disseminate information under exchange rules, as applicable).

COMPLIANCE DATES

The Final Rules will become effective on August 1, 2020, except that the amendments related to registration fee payments by interval funds and certain ETPs will be effective August 1, 2021.[7] In addition, the SEC adopted compliance dates for the following requirements under the Final Rules in order to provide an adequate transition period:

©2005-2026 K&L Gates LLP. All Rights Reserved.

- The requirement for Registered CEFs to include MDFP in their annual reports to shareholders has a compliance date of August 1, 2021.
- Inline XBRL structured data reporting requirements for financial statements, registration statement information, and prospectus information have a compliance date of:
  - August 1, 2022, for Affected Funds that are eligible to file a short-form registration statement; and
  - February 1, 2023, for all other Affected Funds subject to the structured data reporting requirements.
- The requirement that Form 24F-2 filers (including existing filers) file reports on Form 24F-2 in XML format has a compliance date of February 1, 2022.

If you have any questions regarding these matters, please contact any of the authors listed above or one of the K&L Gates lawyers with whom you work.

FOOTNOTES

[1] Securities Offering Reform for Closed-End Investment Companies, SEC Release Nos. 33-10771, 34-88606, IC-33836 (Apr. 8, 2020).

[2] The Final Rules are the SEC's response to recent direction from Congress regarding securities offering reform. The Economic Growth, Regulatory Relief, and Consumer Protection Act, signed into law in May 2018, directed the SEC to adopt rules that would allow any closed-end fund listed on a national securities exchange or that makes periodic repurchase offers under Rule 23c-3 under the 1940 Act, to utilize the securities offering rules available to operating companies. The Small Business Credit Availability Act (the “BDC Act”), signed into law in March 2018, directed the SEC to adopt rules affording the same flexibility to listed and unlisted BDCs.

[3] Securities Offering Reform for Closed-End Investment Companies, SEC Release Nos. 33-10619, 34-85382, IC-33427 (proposed Mar. 20, 2019).

[4] Pursuant to the BDC Act, BDCs were permitted to treat the revisions required by the BDC Act as having been made in accordance with the specifications set out for the SEC within the BDC Act until the adoption of the Final Rules. The adoption of the Final Rules therefore resolves confusion for BDCs previously at risk of noncompliance with the Final Rules while relying on the BDC Act during the rulemaking period.

[5] Seasoned Funds are Affected Funds that are current and timely in their reporting and therefore are generally eligible to file a short-form registration statement if they have at least $75 million in “public float.”

[6] A WKSI, or “well-known seasoned issuer,” is a Seasoned Fund that generally has at least $700 million in “public float.”

[7] Specifically, the amendments to Rules 23c-3, 24f-2, and Form 24F-2 under the 1940 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 not become effective until August 1, 2021.

©2005-2026 K&L Gates LLP. All Rights Reserved.

KEY CONTACTS



MARK P. GOSHKO
PARTNER

BOSTON
+1.617.261.3163
MARK.GOSHKO@KLGATES.COM



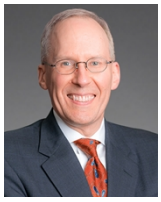
JON-LUC DUPUY
PARTNER

BOSTON
+1.617.261.3146
JON-LUC.DUPUY@KLGATES.COM



JENNIFER R. GONZALEZ
PARTNER

WASHINGTON, DC
+1.202.778.9286
JENNIFER.GONZALEZ@KLGATES.COM



GEORGE ZORNADA
PARTNER

BOSTON
+1.617.261.3231
GEORGE.ZORNADA@KLGATES.COM

This publication/newsletter is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer. Any views expressed herein are those of the author(s) and not necessarily those of the law firm's clients.

©2005-2026 K&L Gates LLP. All Rights Reserved.