

Investment Management Alert

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

On April 8, 2020, the Securities and Exchange Commission (SEC) voted to adopt a series of rule and form amendments that are intended to modernize the registration, communication and offering processes for business development companies (BDCs) and registered closed-end investment companies (CEFs) under the Securities Act of 1933 (Securities Act).¹ (CEFs and BDCs are collectively defined in the Adopting Release and referred to herein as the “affected funds.”) The amendments allow affected funds to use the securities offering rules that have been available to operating companies since 2005. The amendments were approved substantially in the form in which they were proposed in March 2019.² Notably, however, the final amendments differ from the proposed amendments in several ways, including by incorporating changes that eliminate proposed Form 8-K filing requirements and expand the scope of Rule 486 under the Securities Act.

The amendments are intended to, among other things:

- streamline the registration process for eligible affected funds, including by allowing eligible affected funds to use a short-form shelf registration statement on Form N-2;
- permit eligible affected funds to qualify as “well-known seasoned issuers” (WKSI) under Rule 405 of the Securities Act;
- permit affected funds to satisfy final prospectus delivery requirements by using the same method as operating companies; and
- harmonize the public communication rules applicable to affected funds with those applicable to operating companies, which would provide affected funds with greater flexibility to communicate with investors, including through the use of “free writing prospectuses.”

The Adopting Release also includes amendments intended to further harmonize the existing disclosure and regulatory framework for affected funds with that of operating companies. In particular, the amendments impose on affected funds structured data requirements (*i.e.*, a requirement to tag certain information using Inline eXtensible

¹ Securities Offering Reform for Closed-End Investment Companies, Securities Act Release No. 33-10771 (April 8, 2020) (Adopting Release). The amendments were adopted pursuant to the direction of Congress under the Small Business Credit Availability Act (SBCA) and the Economic Growth, Regulatory Relief, and Consumer Protection Act (Consumer Protection Act). For additional information regarding the SBCA and the Consumer Protection Act, please refer to our [April 9, 2018](#), and [November 1, 2018](#), articles.

² Securities Offering Reform for Closed-End Investment Companies, Securities Act Release No. 33-10619 (March 20, 2019) (Proposing Release).

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Business Reporting Language (Inline XBRL)) and new annual reporting disclosure requirements. Additionally, CEFs that make periodic repurchase offers pursuant to Rule 23c-3 under the Investment Company Act of 1940 (1940 Act), commonly referred to as interval funds, will be permitted to pay securities registration fees using the same method currently used by mutual funds and exchange-traded funds (ETFs).

These amendments will have broad application in the closed-end fund and BDC³ industries, impacting funds in varying degrees depending on size and type. The rule and form amendments will become effective on August 1, 2020, except for the amendments related to registration fee payments by interval funds and certain exchange-traded products, which will become effective on August 1, 2021.

An annotated chart detailing impacts of the amendments on affected funds is provided in Appendix A.

Background

In 2005, the SEC adopted sweeping reforms of its rules governing the registration, communications and offering processes under the Securities Act (2005 Reforms).⁴ At the time, investment companies were specifically excluded from the scope of the 2005 Reforms, with the SEC in the adopting rule release stating, “[I]t would be more appropriate to consider changes to [its] requirements as they apply to registered investment companies and business development companies in the context of a broader reconsideration of the separate framework applicable to such issuers.” However, for over 12 years, similar reforms were not proposed for investment companies.

The amendments are a result of the SBCA and the Consumer Protection Act, which generally directed the SEC to propose rules that would permit affected funds to use the securities offering rules available to operating companies. For BDCs, Section 803 of the SBCA required the SEC, no later than one year after the date of the enactment, to revise Form N-2, as well as numerous specific rules under the Securities Act, the Securities Exchange Act of 1934 (Exchange Act) and Regulation FD, to allow BDCs to rely on the offering, proxy and communication rules previously available only to operating companies.

For CEFs, Section 509 of the Consumer Protection Act instructed the SEC to propose rules that would permit any

CEF that is listed on a national securities exchange or that is an interval fund to “use the securities offering and proxy rules, subject to conditions the Commission determines appropriate, that are available to other issuers that are required to file reports under Section 13 or Section 15(d) of the Securities Exchange Act of 1934.” Unlike the SBCA, the Consumer Protection Act did not specifically identify required revisions with respect to CEFs, but instead imposed a broader principles-based mandate on the SEC, reserving for the SEC the authority to impose conditions that it determined to be appropriate to securities offering and proxy rules for CEFs. In the Adopting Release, the SEC noted that while the Consumer Protection Act only required the SEC to consider interval funds and listed CEFs, the agency determined to exercise its discretion to extend the proposed amendments to all CEFs, as applicable.

Summary of Amendments

Registration Process: Short-Form Registration Statement and Incorporation by Reference

The amendments will allow eligible affected funds to use the more streamlined and cost-effective registration process currently available to operating companies. Notably, eligible affected funds are less likely to experience gaps between the expiration of one registration statement and the effectiveness of a new shelf registration statement, which could require untimely suspensions of their offerings. In addition, eligible affected funds will benefit from reduced costs associated with updating their prospectuses. Under existing Securities Act rules and applicable SEC staff guidance,⁵ issuers (including affected funds) that meet the eligibility requirements of Form S-3⁶ may conduct primary “off-the-shelf” offerings under Rule 415(a)(1)(x) of the Securities Act and then later take down securities “off the shelf” for sale in a public offering as market conditions warrant. The existing offering rules for operating companies, however, are more flexible than those for affected funds. Eligible operating companies are permitted to use a short-form registration statement on Form S-3. They also may rely on Rule 430B of the Securities Act to omit certain information from the base prospectus when the registration statement is declared effective and later provide such information in a subsequent Exchange Act report incorporated by reference, a prospectus supplement or a post-effective amendment. Affected funds, however, currently are not permitted to use a short-form registration statement or forward incorporate information from

³ Section 803 of the SBCA provided that if the SEC did not revise its rules and forms by the one-year anniversary of the SBCA, BDCs would be entitled to treat such provisions as self-implementing until such revisions were completed by the SEC. Accordingly, reliance on Section 803 has been available to BDCs since March 23, 2019. However, the adopting of the amendments will provide BDCs with important regulatory clarity.

⁴ Securities Offering Reform (70 Fed. Reg. 44722; published August 3, 2005).

⁵ See Nuveen Virginia Premium Income Municipal Fund, SEC Staff No-Action Letter (Oct. 6, 2006); Pilgrim America Prime Rate Trust, SEC Staff No-Action Letter (May 1, 1998).

⁶ Form S-3 is a short-form registration statement that allows an issuer to register and conduct primary offerings “off the shelf” under Rule 415 of the Securities Act. It permits issuers to update disclosure prospectively by incorporating by reference into the registration statement subsequently filed reports of the issuer on Form 8-K, Form 10-Q and Form 10-K.

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subsequently filed Exchange Act reports. When an affected fund sells securities, including as part of an off-the-shelf offering, its registration statement must include all required information.

The amendments will permit eligible affected funds to:

- file short-form registration statements on Form N-2 that will function like Form S-3 registration statements;
- rely on Rule 430B to omit information from a base prospectus to be used in shelf takedowns and to use the process operating companies follow to file prospectus supplements; and
- include additional information in periodic reports to update their registration statements.

Short-Form Registration Statement. Under the amendments, an affected fund will be permitted to file a short-form registration statement on Form N-2 if it meets the registrant and transaction requirements of Form S-3 (an affected fund that meets such requirements is referred to herein as a “seasoned fund”). An affected fund would meet the registrant and transaction requirements if it has:

- a class of securities registered pursuant to Section 12(b) of the Exchange Act or a class of equity securities registered under Section 12(g) of the Exchange Act or is required to file reports pursuant to Section 15(d) of the Exchange Act (which would generally include all affected funds with shares listed on a national securities exchange);
- 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;
- filed in a timely manner certain reports required under Section 13, 14 or 15(d) of the Exchange Act during the 12 calendar months and any portion of a month immediately preceding the filing of the registration statement; and
- a common share public float (*i.e.*, market capitalization less shares held by affiliates) of at least \$75 million.

Additionally, for a CEF, the fund also must have been registered under the 1940 Act for at least 12 calendar months immediately preceding the filing of the registration statement and have filed all reports required to be filed under Section 30 of the 1940 Act in a timely manner.

A seasoned fund relying on the short-form registration instructions will be required to:

- backward incorporate by reference into the prospectus and statement of additional information (SAI) (1) its latest annual report filed pursuant to 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 N-CSR or Form 10-K was required to be filed; and (2) all other reports filed pursuant to Section 13(a) or 15(d) of the Exchange Act since the end of the fiscal year covered by the annual report (*e.g.*, reports on Form 8-K, Form 10-Q, Form N-CSR and Form 10-K); and

- forward incorporate by reference into the prospectus and SAI all documents subsequently filed pursuant to Sections 13(a), 13(c), 14 or 15(d) of the Exchange Act prior to the termination of the offering (*e.g.*, any subsequently filed reports on Form 8-K, Form 10-Q, Form N-CSR and Form 10-K, and proxy statements).

The ability to backward and forward incorporate information by reference will allow seasoned funds using a short-form registration statement to avoid the need to file a post-effective amendment in connection with annual updates or a lengthy prospectus supplement in connection with takedowns. However, affected funds should consider that the amendments could increase their liability with respect to information contained in such reports that has not previously been incorporated into their registration statements.

Certain affected funds, including unlisted interval funds and unlisted BDCs, that do not list their securities on a national securities exchange, and therefore do not have a “public float,” will not be able to satisfy the transaction requirement necessary to file a short-form registration statement, and therefore would not be able to qualify as seasoned funds. Such affected funds, however, may find some relief under amended Rule 486(b).

Registration Statements Filed Pursuant to Rule 486. Rule 486 under the Securities Act currently permits interval funds to file post-effective amendments that are immediately effective upon filing under Rule 486(b) and certain new registration statements that are automatically effective 60 days after filing under Rule 486(a). Through no-action letters, the SEC staff has historically provided relief to BDCs and certain CEFs conducting offerings under Rule 415(a)(1)(x) to make filings under Rule 486(b). No such relief, however, has been provided under Rule 486(a), so such affected funds still needed to file new registration statements on Form N-2 in order to make material changes to the funds’ disclosure or to register additional shares. In response to comments on the Proposing Release, the SEC adopted amendments to Rule 486 to memorialize such no-action letters into rules and allow any registered CEF or BDC that conducts a continuous offering under Rule 415(a)(1)(ix) to rely on Rule 486, and to expand the scope of registration statements that Rule 486 covers. In the Adopting Release, the SEC declared that such no-action letters will be withdrawn effective August 1, 2021 (one year from the effective date of the final rule). On April 9, 2020, the SEC Division of Investment Management issued an information update listing the specific no-action letters that

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will be withdrawn consistent with the amendments.⁷ Funds with existing 486(b) or shelf offering no-action relief should review their no-action letters and the amendments to determine whether any negative or disruptive impacts may occur as a result of the withdrawal of the letters.

Affected funds that will newly be eligible to rely on Rule 486 generally are currently required to file new registration statements every three years under Rule 415(a)(5) and (a)(6). The amendments to Rule 486 will allow these registration statements to be immediately or automatically effective under Rule 486, depending on the substance of the disclosure. Specifically, a registration statement a fund files to comply with Rule 415(a)(5) and (a)(6) will be immediately effective upon filing if it is filed for no purpose other than to comply with those provisions of Rule 415 or for other purposes listed in Rule 486(b), such as making non-material changes or updating the fund's financial statements under Section 10(a)(3) of the Securities Act. If the registration statement does not qualify under Rule 486(b) because, for example, it includes material changes to the fund's disclosure, the registration statement could be automatically effective 60 days after filing under Rule 486(a). As a result of the amendments, affected funds that make continuous offerings under Rule 415(a)(1)(ix) will be able to rely on Rule 486 for registration statements filed to comply with Rule 415(a)(5) and (a)(6).

Incorporating Information by Reference Into Registration Statements on Form N-14. In the Proposing Release, the SEC requested comment on whether it should modify incorporation by reference provisions in other registration forms filed by affected funds to provide parity or consistency across registration statements. In response to comments supporting the approach, the amendments will modify Form N-14 to allow BDCs to incorporate by reference into their registration statements on Form N-14 to the same extent as registered CEFs. Additionally, the amendments will eliminate the requirement that registrants file documents that contain information that is incorporated by reference into the prospectus or SAI with their registration statements on Form N-14.

Omitting Information From a Base Prospectus and Filing Prospectus Supplements. As previously noted, Rule 430B of the Securities Act permits WKSIs and certain issuers eligible to use Form S-3 to omit specified information from its base prospectus and later provide such information in a subsequent Exchange Act report incorporated by reference, a prospectus supplement or

a post-effective amendment.⁸ Under the amendments, seasoned funds will be permitted to use Rule 430B in parity with operating companies. By relying on Rule 430B, seasoned funds that qualify as WKSIs will be permitted to omit the plan of distribution and information regarding whether the offering is a primary one or an offering on behalf of selling security holders from their registration statements. Additionally, all seasoned funds will be permitted to omit the identities of selling security holders and the amount of securities to be registered on their behalf, subject to certain conditions.

Rules 424 and 497 of the Securities Act currently provide different processes for operating companies and investment companies to file prospectuses. Operating companies follow Rule 424, which requires companies to file only a prospectus that makes substantive changes from, or additions to, a previously filed prospectus and provides companies additional time to do so. In contrast, Rule 497 currently requires funds to file every prospectus that varies from a previously filed prospectus before it is first used or given to any person, regardless of the substance of the changes. Under the amendments, all affected funds will be able to rely on Rule 424 to file any type of prospectus enumerated in Rule 424(b) to update or to include information omitted from a prospectus (including information omitted from an initial public offering (IPO) prospectus pursuant to Rule 430A)⁹ or in connection with a shelf takedown, which will reduce the number of prospectus filings that a fund will be required to make.¹⁰ The SEC also adopted an amendment to Rule 497 to provide that Rule 424 will be the exclusive rule for affected funds to file a prospectus or prospectus supplement other than an advertisement that is deemed to be a prospectus under Rule 482 of the Securities Act.

Under the amendments, affected funds relying on Rule 430B — similar to operating companies — will undertake that, for purposes of determining liability under the Securities Act with respect to any purchaser, each prospectus supplement is deemed part of the corresponding base prospectus as of the earlier of the date of first use after effectiveness or the date of the first contract of sale of securities in the offering described in the prospectus.

⁸ Under Rule 430B, a prospectus filed as part of an automatic shelf registration statement may omit the following: information that is unknown or not reasonably available to the issuer; whether the offering is a primary or secondary offering or a combination of the two; the plan of distribution for the securities; a description of the securities registered other than an identification of the name or class of such securities; the identity of other issuers; and the names of any selling security holders and amounts of securities to be registered on their behalf.

⁹ Rule 430A of the Securities Act permits, if specified conditions are met, a registration statement to be declared effective without containing final pricing information.

¹⁰ The Adopting Release noted that the amendments to Rule 424(f) will not apply to open-end or other registered companies. Those investment companies will continue to file prospectuses pursuant to Rule 497.

⁷ Division of Investment Management Staff Statement Regarding Withdrawal of Staff Letters Related to Securities Offering Reform for Closed-End Investment Companies Rulemaking, IM-INFO-2020-04 (April 9, 2020).

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Additional Information in Periodic Reports. Under the amendments, seasoned funds will be permitted to forward incorporate information from their Exchange Act reports. The SEC noted that these funds may wish to include information in their periodic reports that is not required to be included in order to update their registration statements. The amendments include a new instruction to Form N-2 that will allow a fund to provide such additional information in their Exchange Act reports.

Well-Known Seasoned Issuer Status

The SEC's offering rules provide WKSIs with certain registration and communication flexibilities because, among other reasons, they have a demonstrated market following, which contributes to the greater extent to which the market absorbs information about WKSIs that is ultimately reflected in the price of WKSIs' securities. Pursuant to the amendments, affected funds are now eligible to qualify as WKSIs. When an issuer qualifies as a WKSI, it can register an unspecified amount of different types of securities under the Securities Act on a shelf registration statement that becomes effective automatically upon filing. The ability to use an automatic shelf registration statement means that such registration statement will not be subject to review by the SEC staff prior to becoming effective and will be available for use immediately upon filing. This streamlined registration process provides flexibility for WKSIs to time securities sales to meet market conditions without waiting for the SEC staff to review and comment on a registration statement and declare it effective. Additionally, subject to certain conditions, a WKSI also can communicate at any time, including through a free writing prospectus, without violating the gun-jumping provisions of the Securities Act.

To qualify as a WKSI, an affected fund is required to file Exchange Act reports with the SEC and meet the following requirements: (1) it must be a seasoned fund; (2) it must, as of a date within 60 days of filing its shelf registration statement, either (a) have a worldwide market value of its outstanding common stock held by nonaffiliates of at least \$700 million or (b) have issued in the last three years at least \$1 billion aggregate principal amount of nonconvertible securities, other than common equity, in registered primary offerings for cash; and (3) it is not an "ineligible issuer."¹¹

¹¹ Rule 405 of the Securities Act defines an "ineligible issuer" as, among other things, an issuer that has not filed all required reports during the preceding 12 months (or for such shorter period that the issuer was required to file such reports); an issuer that has (or whose subsidiary has) been convicted of a felony or misdemeanor; or an issuer that has violated (or whose subsidiary has violated) the anti-fraud provisions of the federal securities laws. The amendments expand the anti-fraud prong for affected funds to provide that an affected fund would be 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 that the investment adviser aided, abetted or caused the affected fund to have violated the anti-fraud provisions of the federal securities law.

Final Prospectus Delivery Reforms

Under Rule 172 of the Securities Act, issuers, brokers and dealers are permitted to satisfy final prospectus delivery obligations if a final prospectus is filed with the SEC within the time required and other conditions are satisfied. Rule 173 of the Securities Act requires a notice 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. Currently, affected funds are specifically excluded from the group of issuers that may rely on these rules, which means issuers and their distributors are required to deliver prospectuses. To implement the SBCA and to provide parity for CEFs consistent with the Consumer Protection Act, the amendments remove the exclusion for offerings by affected funds in Rules 172 and 173. This means that physical or electronic copies of an affected fund's final prospectus will no longer be required to be delivered to investors in IPO transactions and other registered offerings, provided the conditions of these rules are met.

Communication Rules

Offering Communications: Overview. The gun-jumping provisions of the Securities Act restrict the types of offering communications that issuers or other parties subject to the Securities Act's provisions may use in connection with a proposed registered offering of securities. As part of its 2005 Reforms, the SEC adopted rules that provided operating companies and other parties increased flexibility in their communications with the public in connection with an offering. The applicability of the gun-jumping provisions is determined based on the stage of the offering process during which the communications are made:

- the "pre-filing period," the time a company is first "in registration" until the initial filing of a registration statement with the SEC;
- the "waiting period," the time a registration statement is filed with the SEC until it is declared effective; and
- the "post-effective period," typically up to 25 days after a registration statement has been declared effective.

Pre-Filing Period Restrictions and Safe Harbors¹²

Publicity about a company or its business during the pre-filing period may be deemed to constitute an unlawful offering if the SEC or a court were to determine that such publicity was

¹² On September 26, 2019, the SEC adopted Rule 163B under the Securities Act, which permits all prospective issuers, including registered investment companies and BDCs, to engage in "test the waters" communications with prospective investors that the issuer reasonably believes are qualified institutional buyers and/or institutional accredited investors prior to, or following, the filing of a registration statement. For additional information, please refer to our [September 27, 2019](#) article.

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designed to stimulate interest in the securities to be offered, even absent a specific reference to any proposed offering. The SEC has adopted a number of safe harbors applicable to pre-filing communications that specify the types of communications and information that are permitted to be distributed without being considered “gun-jumping,” including, for example:

- **Rule 163A**, which provides that communications made by or on behalf of a company more than 30 days prior to filing a registration statement are excluded from the gun-jumping restrictions so long as such communications do not reference a securities offering that is or will be the subject of a registration statement, and the company takes reasonable steps within its control to prevent further dissemination of the communication during the 30-day period immediately before the registration statement is filed. This bright-line exclusion applies only to communications by or on behalf of an issuer and may not be used by potential offering participants who are underwriters or dealers.
- **Rule 163**, which permits communications, including certain offers to sell or buy securities, during the pre-filing period by issuers that qualify as WKSIs. Rule 163 communications can be made by or on behalf of a WKSI, but they cannot be made by offering participants, such as prospective underwriters. Written communications issued under Rule 163 are required to include a legend and are treated as issuer free writing prospectuses, which, subject to certain exceptions, must be filed with the SEC promptly upon the filing of the registration statement, if one is filed, covering the securities that were offered in reliance on Rule 163.
- **Rule 168**, which establishes a safe harbor for reporting issuers for communications issued by or on behalf of an issuer of regularly released factual business information or, unlike Rule 169, forward-looking information. Examples include factual information about the issuer, its business or financial developments, advertisements or other information regarding the issuer’s products or services and dividend notices. To rely on the Rule 168 safe harbor, the issuer must have previously released or disseminated the information or the information must be released in the ordinary course of its business, and the timing, manner and form of the release must be consistent with similar past releases.
- **Rule 169**, which provides a safe harbor for continued communications at any time by or on behalf of a non-reporting issuer (an issuer that is not required to file periodic reports under the Exchange Act and that does not file such reports voluntarily) of regularly released factual business information by the same employees who historically have been responsible for providing such information to persons other than investors or potential investors. For purposes of Rule 169, “factual business information” is defined as (1) factual information about the

issuer, its business or financial developments, or other aspects of its business; and (2) advertisements of, or other information about, the issuer’s products or services.

Waiting Period Restrictions and Safe Harbors

During the waiting period, other than for the delivery of a preliminary prospectus, issuers, underwriters and dealers are permitted to engage only in limited written communications with prospective investors, including soliciting offers, without violating the gun-jumping rules. The following is a summary of communications with security holders and the general public that are permitted during the waiting period:

- **Rule 134** permits a company to publish limited advertisements of a security offering after a registration statement has been filed (*i.e.*, “tombstone ads”); these communications are deemed not to be prospectuses.
- **Rules 168 and 169** permit ongoing communications by reporting or non-reporting issuers before and after the filing of a registration statement so long as those communications are limited to factual business information in the case of Rules 168 and 169 and certain forward-looking information in the case of Rule 168.
- **Rule 433/Free Writing Prospectus:** A free writing prospectus is a written communication that constitutes an offer to sell, or a solicitation of an offer to buy, securities that are or will be the subject of a registration statement. It may take any form and is not required to meet the informational requirements applicable to statutory prospectuses. Although it may include information that is different from, or supplemental to, the information included in the registration statement, such information may not conflict with the registration statement. Issuers using a free writing prospectus must comply with applicable prospectus delivery, SEC filing and legend requirements. WKSIs are permitted to use a free writing prospectus during any stage of the offering process. In contrast, the free writing prospectus of a non-reporting issuer must be accompanied or preceded by the prospectus filed with the registration statement.

Offering Communications: Amendments. The amendments will extend flexibility to the affected funds. Specifically, the amendments will permit affected funds to:

- publish factual information about the issuer or the offering during the waiting period, including “tombstone ads,” in reliance on Rule 134;
- rely on the Rule 163A safe harbor for communications that do not refer to the registered offering made more than 30 days prior to the filing of a registration statement;
- publish or disseminate regularly released factual business information and forward-looking information at any time,

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including around the time of a registered offering, in reliance on Rule 168. Rule 169 also will permit affected funds' continued publication or dissemination of such information that is intended for use by persons other than in their capacity as investors or potential investors;

- rely on Rules 164 and 433 to use a free writing prospectus; and
- if qualified as a WKSI, engage at any time in oral and written communications, including the use at any time of a free writing prospectus, subject to the same conditions applicable to other WKSIs.

The amendments to the communication rules will provide affected funds with incremental flexibility in their communications. Affected funds will be permitted to take advantage of this additional flexibility or continue to rely on Rule 482, the primary advertising rule for investment companies, and other rules currently applicable to their communications. For example, small affected funds will be able to take advantage of new communication options not previously afforded to them, including Rule 163A and Rule 169. Additionally, the amendments to the free writing prospectus rules will permit broker-dealers to engage in such communications on behalf of the affected fund issuer. Accordingly, broker-dealers that once used Rule 482 ads may rely on the amended Rule 433 to publish and distribute similar communications, and will no longer be required to file these communications with the Financial Industry Regulatory Authority.

Broker-Dealer Research Reports. Rule 138 permits a broker-dealer participating in a distribution of securities to publish or distribute research reports about that issuer if the broker-dealer publishes or distributes such research reports in the regular course of its business and if the issuer has filed all periodic reports required during the preceding 12 months on Forms 10-K and 10-Q. The amendments will amend Rule 138's references to shelf registration statements filed on Form S-3 to include a parallel reference to registration statements filed on Form N-2 under the new short-form registration statement instruction. The amendments also will amend Rule 138 to include parallel references to the reports that registered CEFs are required to file (*i.e.*, reports on Forms N-CSR, N-Q, N-CEN and N-PORT). Broker-dealers that once used Rule 482 advertisements styled as research reports, may instead rely on amended Rule 138, as adopted, to publish or distribute similar communications without being subject to filing requirements for these communications.

The SEC did not adopt any amendments to 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. Instead, the SEC determined that newly adopted Rule 139b satisfied the directives of the SB

CA and the Consumer Protection Act by extending Rule 139's safe harbor to research reports on affected funds.¹³ It is important to note, however, Rule 139b imposes certain exclusions not contemplated by Rule 139, including that research reports published or distributed by a broker-dealer that is affiliated with an investment adviser to an affected fund are not covered under the safe harbor contained in Rule 139b.

Other Rule Amendments

Registration Fee Payment Method for Interval Funds. Currently, interval funds are required to pay a registration fee to the SEC at the time of filing a registration statement, regardless of when or if they sell the securities being registered. In contrast, as provided by Section 24(f)(2) of the 1940 Act, mutual funds and ETFs pay registration fees based on their net issuance of shares, no later than 90 days after the fund's fiscal year end. Under the amendments, interval funds will be permitted to pay registration fees on the same annual net issuance basis as mutual funds and ETFs. Interval funds also will be required to submit information regarding the computation of the fee and other incorporation on Form 24F-2 in a structured data format.

Registration Fee Payment Method for WKSIs. Under Rule 456(b) of the Securities Act, WKSIs using automatic shelf registration statements are permitted to pay filing fees on a "pay as you go" basis. Affected funds that qualify as WKSIs as a result of the amendments will gain this payment flexibility.

Registration Fee Payment Method for Continuously Offered Exchange-Traded Products. Similar to interval funds, issuers that offer exchange-traded vehicle securities (exchange traded products, or ETPs) that are not registered under the 1940 Act currently are required to pay a registration fee to the SEC at the time of filing a registration statement, regardless of when or if they sell the securities being registered. In response to comments received on the Proposing Release, the amendments will permit certain ETPs to register an indefinite number of securities and pay registration fees on the same annual net issuance basis as mutual funds and ETFs.

Disclosure and Reporting

The SEC adopted amendments to its rules and forms that are intended to tailor the disclosure and regulatory framework for affected funds in light of the amendments to the offering rules. Although many of these amendments are not expressly required by the SBCA or the Consumer Protection Act, the SEC stated in its Adopting Release that it believes such amendments "are consistent

¹³ Covered Investment Fund Research Reports, Securities Act Release No. 33-10580 (Nov. 30, 2018).

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with the respective Acts' requirements to increase regulatory parity of affected funds with otherwise similarly-situated issuers."

The amendments include:

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

Structured Data Requirements. Under the amendments, affected funds will be required to report certain information in a structured data format. The SEC amended:

- Item 601 of Regulation S-K, such that BDCs, similar to operating companies, will be required to tag financial statement information in registration statements and Exchange Act reports using Inline XBRL format;
- the Form N-2 cover page, such that affected funds will be required to tag the data points that appear on the cover page using Inline XBRL format, including, for example, the fund name, the statutes to which the registration statement relates and check boxes relating to the effectiveness of the registration statement;
- Rule 405 of Regulation S-T and General Instruction H (renumbered as General Instruction I) of Form N-2, such that an affected fund will be required to tag certain items in its prospectus using Inline XBRL format, including the fee table; the senior securities table; investment objectives and policies; risk factors; share price data; and capital stock, long-term debt and other securities; and
- the EDGAR Filer Manual, such that Form 24F-2 filings by mutual funds, ETFs and interval funds will be submitted in Extensible Markup Language.

Under the amendments, affected funds will be required to submit "Interactive Data Files" (*i.e.*, machine-readable computer code that presents information in XBRL format) with (1) any registration statements and post-effective amendments; (2) any prospectus filed pursuant to Rule 424; and (3) for seasoned funds, any Exchange Act report that a seasoned fund filing a short-form registration statement on Form N-2 is required to tag using Inline XBRL format.

New Annual Reporting Requirements. The Adopting Release includes new annual report requirements applicable to all affected funds. Under the amendments, seasoned funds that file short-form registration statements will be required to include

key information in their annual reports that is currently disclosed in their prospectuses, including the fee and expense table, share price data and the senior securities table. Additionally, a seasoned fund that files short-form registration statements will be required to forward incorporate all Exchange Act reports into its registration statement.

The amendments also set forth other disclosure requirements, including, among other things:

- CEFs will be required to include a management's discussion of fund performance (MDFP) in their annual reports to shareholders, similar to the MDFP disclosures that mutual funds and ETFs include in their annual reports, and to the "management's discussion and analysis" that operating companies and BDCs include in their annual reports;
- BDCs will be required to disclose financial highlights in their registration statements and annual reports; and
- affected funds filing short-form registration statements will be required to disclose, in their registration statements or shareholder reports, material unresolved comments received from the SEC on their current or periodic reports or registration statements.

On extending MDFP disclosure requirements to CEFs, the SEC staff noted in the Adopting Release that investors in these funds, like investors in mutual funds, ETFs, BDCs and operating companies, similarly would benefit from annual report disclosures that aid investors in assessing a fund's performance over the prior fiscal year and complement other information in the report, which may make the annual report disclosure more understandable as a whole. Under the amendments, Form N-2 will be amended to require CEFs to provide a narrative description of the factors that materially affected their performance during the most recently completed fiscal year. CEFs also will be required to include a line graph comparing the initial and subsequent account values at the end of each of the most recently completed 10 fiscal years of the fund against an appropriate broad-based securities market index for the same period, and a table of the fund's average annual returns for the one-, five-, and 10-year periods as of the last day of the fund's most recent fiscal year. The final account values for listed CEFs will be shown based on the market price per share, whereas unlisted CEFs will provide such information based on net asset value (NAV). **We note that while market value is an important performance metric, discounts to NAV often are out of a fund's control, and, therefore, listed CEFs may wish to show NAV performance supplementally.** Finally, CEFs will be required to discuss in their annual reports the effect of any policy or practice of maintaining a specified level of distributions to shareholders on the fund's investment strategies and NAV per share during the last fiscal

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year, as well as the extent to which the registrant's distribution policy resulted in distributions of capital.

Proposed Form 8-K Reporting Requirement for CEFs Not Adopted. Form 8-K under the Exchange Act generally requires reporting companies subject to the periodic reporting requirements of the Exchange Act, including BDCs, to publicly disclose major events relevant to shareholders on a timely basis. The Proposing Release proposed amendments that would have required CEFs that are reporting companies under Section 13(a) or 15(d) of the Exchange Act to respond to reporting items on Form 8-K. However, in response to comments opposing this new requirement for CEFs in light of the differences between the types of events that are important to CEFs and those that are important to operating companies, and the fact that CEFs currently may disclose substantially similar information through other mechanisms, such as prospectus supplements, post-effective amendments and press releases, the SEC did not adopt the proposed new Form 8-K reporting requirement for CEFs. In the Adopting Release, the SEC noted that adopting the new Form 8-K reporting requirement "may not substantially improve the flow of important current information to investors and the market and, as a result, would not justify the additional burdens associated with Form 8-K reporting."

Online Availability of Incorporation by Reference. Form N-2's current General Instruction for Incorporation by Reference permits affected funds to backward incorporate their financial information into the prospectus or SAI, but requires the funds to provide new investors with copies of all previously filed materials that the funds incorporated by reference into the prospectus and/or SAI. Under the amendments, affected funds will no longer be required to deliver such information to new investors. Instead, affected funds will be required to make their prospectuses, their SAIs and the incorporated materials readily available and accessible on a website.

Enhancements to Certain CEFs' Annual Report Disclosure. Rule 8b-16 under the 1940 Act requires all registered investment companies to update their 1940 Act registration statements on an annual basis. CEFs, however, may rely on Rule 8b-16(b) to forgo an annual update provided that they disclose certain key changes that occurred during the prior year in their annual reports. The SEC proposed amending Rule 8b-16, noting its concern that "funds disclosing important changes may not always provide enough context for investors to understand the implications of those changes." Accordingly, under the amendments, Rule 8b-16 will be amended to require CEFs to describe such key changes in enough detail to allow investors to understand each

change and how it may affect the fund. Such disclosures must be prefaced with a legend clarifying that the disclosures provide only a summary of certain changes that have occurred over the past year and may not reflect all of the changes that have occurred since the investor purchased the fund. For example, to the extent a fund's principal investment objectives and policies or principal risk factors have changed, the fund should describe its investment objectives or principal risk factors before and after the change. Additionally, the amendments will 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, even if there were no changes in the past year. In the Adopting Release, the SEC stated that it believes that funds could increase the effectiveness of this disclosure by presenting it concisely, in accordance with "plain English" principles for organization, wording and design. The SEC encourages funds to tailor their disclosures to how the fund operates rather than relying on generic, standard disclosures about the fund's investment policies and risks. Finally, the SEC encourages funds to describe principal risks in order of importance, with most significant risks appearing first (*i.e.*, not listing risks in alphabetical order).

Compliance Dates

The final rule will be effective August 1, 2020. However, the SEC adopted a transition period after the publication of a final rule in the Federal Register to allow affected funds sufficient time to comply with the following three requirements:

- *MDFP.* Any annual report that a CEF files one year or more after the publication of a final rule in the Federal Register will be required to include the proposed MDFP disclosures. Affected funds must comply with this requirement by August 1, 2021.
- *Structured Data Requirements.* Affected funds eligible to file a short-form registration statement will be required to comply with structured data requirements no later than 24 months after the date of publication of a final rule in the Federal Register, or August 1, 2022. All other affected funds must comply with these requirements 30 months after publication of a final rule in the Federal Register, or February 1, 2023. Filers on Form 24F-2 must comply with the structured data format for Form 24F-2 no later than 18 months after the publication of a final rule in the Federal Register, or February 1, 2022.
- *Rule 24f-2.* The amendments to Rules 23c-3 and 24f-2 applicable to interval funds will become effective one year after the publication of a final rule in the Federal Register, or August 1, 2021.

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Appendix A

This table has been adapted from the summary table provided by the SEC in the Adopting Release.

Rule	Summary Description of the Current Rule	Summary Description of the Change as Adopted	Entities Affected by the Change*
Registration Provisions			
Securities Act Rule 405	Generally excludes affected funds from the definition of "Well-Known Seasoned Issuer" and related concepts.	Will allow certain eligible affected funds to qualify as WKSIs. Will define "exchange-traded vehicle security" to allow certain ETPs to qualify under new rules permitting them to pay their registration fees on the same annual net basis as mutual funds and ETFs.	Affected funds
Securities Act Rule 415	Permits issuers to register securities to be offered on a delayed or continuous basis pursuant to Rule 415(a)(1)(x).	Will include Form N-2, which will allow for affected funds to offer securities on a delayed and continuous basis.	Seasoned funds
Cover Page to Form N-2	N/A	Will include several new checkboxes indicating, among other things, whether the form is a registration statement or post-effective amendment filed by a WKSI that will become effective upon filing with the SEC, whether a fund is relying on the short-form registration instruction, and the characteristics of the fund.	Affected funds
General Instruction A.2 of Form N-2	N/A	Will allow eligible affected funds to file a short form registration statement on Form N-2.	Seasoned funds
General Instruction B of Form N-2	N/A	Will allow affected funds that qualify as WKSIs to use a short-form registration statement on Form N-2 as an automatic shelf registration statement.	WKSIs
General Instruction F.3 of Form N-2	Requires material incorporated by reference to be provided with the prospectus and/or SAI to each person to whom the prospectus and/or SAI is sent, unless the person holds securities of the registrant and otherwise has received a copy of the material.	Replaces Instruction F.3 in its entirety with General Instruction F.3 that addresses backward and forward incorporation by reference. New Instruction F.4 addresses delivery requirements (see below).	Seasoned funds

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Rule	Summary Description of the Current Rule	Summary Description of the Change as Adopted	Entities Affected by the Change*
General Instruction F.4.a. of Form N-2	N/A	<p>Will require the registrant to post online its prospectus, SAI, and any periodic and current reports filed pursuant to Section 13 or 15(d) of the Exchange Act that are incorporated by reference.</p> <p>A seasoned fund will not have an affirmative obligation to send copies of any or all of the information that has been incorporated by reference absent a written or oral request from an investor.</p>	Affected funds
Securities Act Rule 430A	Permits a registration statement to be declared effective without containing final pricing information.	Will require affected funds relying on the rule to provide the undertaking required by Item 34.4 of Form N-2.	Affected funds
Securities Act Rule 430B	Permits operating companies to omit certain information from the “base” prospectus and update the registration statement after effectiveness.	Will allow affected funds to use the rule in parity with operating companies.	Seasoned funds
Securities Act Rules 424 and 497	Operating companies follow Rule 424 to file prospectus supplements; investment companies follow Rule 497 to file prospectus supplements.	<p>Rule 424 will require all affected funds to file any type of prospectus enumerated in Rule 424(b) to update, or to include information omitted from, a prospectus (including information omitted from an IPO prospectus pursuant to Rule 430A) or in connection with a shelf takedown.</p> <p>Rule 497 will provide that Rule 424 is the exclusive rule for affected funds to file a prospectus or prospectus supplement other than an advertisement that is deemed to be a prospectus under Rule 482.</p>	Affected funds
Securities Act Rule 462	Provides for effectiveness of registration statements immediately upon filing with the SEC.	Rule 462(f) will include parallel references to Form N-2.	WKSIs

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Rule	Summary Description of the Current Rule	Summary Description of the Change as Adopted	Entities Affected by the Change*
Securities Act Rule 418	Exempts registrants that meet the eligibility requirements of Form S-3 from an obligation to furnish recent engineering, management or similar reports, or memoranda relating to the broad aspects of the business, operations or products of the registrants.	Rule 418(a)(3) will provide that registrants that are eligible to file a short-form registration statement on Form N-2 also are excepted from the requirement to furnish such information.	Seasoned funds
1940 Act Rules 23c-3 and 24f-2	N/A (interval funds are not currently permitted to pay registration fees on an annual "net" basis and must pay the registration fee at the time of filing).	Rule 23c-3 will include new section (e), which provides that an interval fund will be deemed to have registered an indefinite amount of securities pursuant to Section 24(f) of the 1940 Act upon the effective date of its registration statement. This change will subject interval funds to the registration fee payment system used by mutual funds and ETFs. Rule 24f-2 will require interval funds to pay their registration fees on the same annual net basis as mutual funds and ETFs.	Interval funds
Securities Act Rule 456	Permits WKSIs and asset-backed issuers to pay registration fees for certain offerings of securities on a "pay-as-you-go" basis.	Rule 456 will include new section (d), which enables certain ETPs that are not registered under the 1940 Act to elect to register an offering of an indeterminate number of securities and to pay registration fees for such an offering in a manner equivalent to that for mutual funds and ETFs (<i>i.e.</i> , in arrears on an annual net basis).	ETPs
Securities Act Rule 457	Sets forth methods for calculating registration fees.	Rule 457 will include new section (u), which sets forth the calculation method for paying registration fees in the manner permitted by Rule 456(d) and is consistent with the fee calculation provisions of Form 24F-2.	ETPs

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Rule	Summary Description of the Current Rule	Summary Description of the Change as Adopted	Entities Affected by the Change*
Securities Act Rule 424	Requires that prospectuses and prospectus supplements for various offerings of securities be filed with the SEC.	Rule 424 will include new section (i), which requires issuers that elect to register an offering of an indeterminate amount of securities pursuant to Rule 456(d) to file a prospectus supplement when paying registration fees on an annual net basis.	ETPs
Securities Act Rule 486	Permits interval funds to file post-effective amendments and certain registration statements that are either immediately effective upon filing under Rule 486(b) or automatically effective 60 days after filing under Rule 486(a).	Rule 486 will allow tender offer funds and unlisted BDCs, which conduct continuous offerings under Rule 415(a)(1)(ix), to rely on Rule 486. In addition, Rule 486 will allow registration statements filed every three years under Rules 415(a)(5) and (a)(6) to be immediately effective upon filing if filed to comply with Rule 415 or Rule 486(b). If the registration statement would not qualify for Rule 486(b), the filing could be automatically effective 60 days after filing under Rule 486(a).	Affected funds that make continuous offerings under Rule 415(a)(1)(ix)
General Instruction G of Form N-14	Permits registered investment companies to incorporate by reference the prospectus, the corresponding SAI or reports, or any information in the prospectus, the corresponding SAI or reports, which satisfies certain disclosure requirements of Form N-14. Requires that registrants file with the Form N-14 registration statement the documents that contain information that is incorporated by reference into the prospectus or SAI.	Will allow BDCs to incorporate information by reference to the same extent as registered CEFs and will eliminate the requirement that registrants file with the Form N-14 registration statement the documents that contain information that is incorporated by reference into the prospectus or SAI.	BDCs
Communications Provisions			
Securities Act Rule 134	Permits operating companies to engage in limited written communication related to a securities offering during the waiting period (<i>i.e.</i> , the period after filing the registration statement), including publishing “tombstone ads.”	Will apply to affected funds.	Affected funds

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Rule	Summary Description of the Current Rule	Summary Description of the Change as Adopted	Entities Affected by the Change*
Securities Act Rule 163A	Permits operating companies to communicate without risk of violating gun-jumping provisions until 30 days prior to the filing of a registration statement.	Will apply to affected funds.	Affected funds
Securities Act Rules 168 and 169	Permit operating companies to publish and disseminate regularly released factual and forward-looking information.	Will apply to affected funds.	Affected funds
Securities Act Rules 164 and 433	Permit operating companies to use a "free writing prospectus" after a registration statement is filed.	Will apply to affected funds.	Affected funds
Securities Act Rule 163	Permits operating companies that qualify as WKSIs to engage in oral and written communications at any time.	Will apply to affected funds that qualify as WKSIs.	WKSIs
Securities Act Rule 138	Permits a broker or dealer to publish or distribute certain research about the securities of the issuer other than those they are distributing.	Will include a parallel reference to Form N-2 and parallel references to the reports that CEFs are required to file. (The SEC did not amend 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, because the SEC believed that the recently adopted Rule 139b satisfied the directives of the SBCA and the Consumer Protection Act by extending Rule 139's safe harbor to research reports on affected funds.)	Seasoned funds
Securities Act Rule 156	Prevents registered investment companies from using sales literature that is materially misleading in connection with the offer and sale of securities.	Will clarify that nothing in that rule may be construed to prevent an affected fund from qualifying for an exemption under Rules 168 or 169.	Affected funds

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Rule	Summary Description of the Current Rule	Summary Description of the Change as Adopted	Entities Affected by the Change*
Proxy Statement Provisions			
Item 13 of Schedule 14A	Requires a registrant to furnish financial statements and other information for proxy statements containing specific proposals; however, a registrant that meets the requirements of Form S-3 generally may incorporate the information by reference to previously filed documents without having to deliver them to securities holders along with the proxy statement.	Item 13(b)(1) and Note E will be amended so that affected funds that meet the requirements of the short-form registration instructions will have the same treatment under Item 13 as registrants that meet the requirements of Form S-3.	Seasoned funds
Prospectus Delivery Provisions			
Securities Act Rules 172 and 173	Under Rule 172, issuers, brokers and dealers are permitted to satisfy final prospectus delivery obligations if a final prospectus is filed with the SEC within the time required and other conditions are satisfied. Rule 173 requires a notice 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.	Will remove the exclusion for offerings by affected funds.	Affected funds
Structured Data Reporting Provisions			
Structured Financial Statement Data: Regulation S-T, Item 405; Regulation S-K, Item 601(b)(1)	N/A	Will require tagging financial statements using Inline XBRL.	BDCs
Prospectus Structured Data Requirements	N/A	Will require tagging certain information required by Form N-2 using Inline XBRL.	Affected funds

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Rule	Summary Description of the Current Rule	Summary Description of the Change as Adopted	Entities Affected by the Change*
General Instruction I of Form N-2	N/A	Will require submission of interactive data files with (1) any registration statements and post-effective amendments; (2) any prospectus filed pursuant to Rule 424; and (3) for seasoned funds, any Exchange Act report that a seasoned fund filing a short-form registration statement on Form N-2 is required to tag using Inline XBRL format.	Affected funds
EDGAR Manual, Form 24F-2 Structured Format	N/A	Interval funds paying registration fees on an annual net basis, pursuant to Rule 23c-3 and Section 24(f) of the 1940 Act will be required to file Form 24F-2. Filings on Form 24F-2 will be required to be submitted in a structured format.	Form 24F-2 Filers
Periodic Reporting Provisions			
1940 Act Rule 8b-16	Requires all registered investment companies to update their 1940 Act registration statements with the SEC on an annual basis; however, CEFs may rely on Rule 8b-16(b) to forgo an annual update provided that they disclose in their annual reports certain key changes that occurred over the prior year.	Will include new paragraph (e) to require CEFs to describe such key changes in enough detail to allow investors to understand each change and how it may affect the fund and to disclose a legend clarifying that the disclosures provide only a summary of certain changes that have occurred over the past year and may not reflect all of the changes that have occurred since the investor purchased the fund. Additionally, will require funds to disclose in annual reports their current investment objectives, investment policies and principal risks, even if there were no changes in the past year.	CEFs
Item 24.4.h(2) of Form N-2	N/A	Will require inclusion of a fee and expenses table in annual reports, which will include information also required by Item 3.1 (<i>i.e.</i> , fees and expenses).	Seasoned funds

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Rule	Summary Description of the Current Rule	Summary Description of the Change as Adopted	Entities Affected by the Change*
Item 24.4.h(3) of Form N-2	N/A	Will require information about the share price of stock and any premium or discount in annual reports, which will include information also required by Item 8.5 (i.e., share price data).	Seasoned funds
Item 24.4.h(1) of Form N-2	N/A	Will require information about each of the seasoned fund's classes of senior securities in its annual report, which would include information also required by Item 4.3 (i.e., senior securities).	Seasoned funds
Item 24.4.g of Form N-2	N/A	Will require inclusion of management's discussion of fund performance in annual reports, including a 10-year line graph of performance compared against an appropriate broad-based securities market index for the same period and a table of standardized 1-, 5- and 10-year average annual total return. (BDCs and operating companies currently provide such information in their annual reports filed on Form 10-K, and mutual funds and ETFs currently provide such information in their annual reports filed on Form N-CSR).	CEFs
Item 4.1 of Form N-2	BDCs are currently permitted to omit financial highlights disclosure summarizing their financial statements.	Will require BDCs to provide financial highlights.	BDCs
Item 24.4.h(4) of Form N-2	N/A	Will require disclosure of unresolved material staff comments.	Seasoned funds
Current Report Provisions			
Regulation FD Rule 103	Provides that a failure to make a public disclosure required solely by Rule 100 of Regulation FD will not disqualify a "seasoned" issuer from use of certain forms.	Will extend the protection under Rule 103 to seasoned funds.	Seasoned funds

* Some of the rule changes that are shown as affecting seasoned funds will affect only those that elect to file a registration statement on Form N-2 using a new instruction permitting funds to use the form to file a short-form registration statement.