

SEC's Securities Offering and Communications Reforms for BDCs and Closed-End Funds

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Introduction

This First Analysis article discusses the final rule amendments adopted by the U.S. Securities and Exchange Commission (SEC) that modernize the offering related provisions of the Securities Act of 1933, as amended (the Securities Act), and the communications safe harbors available to [business development companies](#) (BDCs) and closed-end funds (CEFs), including interval funds but excluding open-end funds, exchange-traded funds and unit investment trusts. This article also discusses the

accompanying amendments to Form N-2. The SEC was required to undertake rulemaking with respect to BDCs by the Small Business Credit Availability Act, and to undertake rulemaking with respect to CEFs by the Economic Growth, Regulatory Relief and Consumer Protection Act. The new rules will allow BDCs and CEFs to use the securities offering and communication rules that are already available to operating companies.

The amendments are designed to streamline the registration, offering and investor communications processes for BDCs and CEFs and will provide important benefits to market participants and investors, including advancing capital formation and modernizing disclosures. Among the most important adopted changes for BDCs and CEFs are: the ability to qualify as [well-known seasoned issuers](#) (WKSIs) to the extent that the entities meet the reporting history and public float requirements; to benefit as WKSIs from the ability to engage in certain communications and rely on expedited shelf registration provisions; the ability for other BDCs and CEFs to use more streamlined shelf registration statement procedures; and the ability to rely on a number of important communications safe harbors. These amendments will likely allow BDCs and CEFs to better respond to market opportunities.

For additional information on BDCs, see [Business Development Company Guide for Capital Markets](#), [Market Trends 2018/19: Business Development Companies](#), [Business Development Companies](#) and, [Top 10 Practice Tips: Business Development Companies](#).

Initial Guidance

Below a few of the principal amendments are summarized.

WKSI Status

A BDC or CEF will be able to qualify as a WKSI and file an automatically effective shelf registration statement on Form N-2 and avail itself of other benefits to which WSIs are entitled. The SEC did not modify or tailor the \$700 million public float WKSI test for BDCs or CEFs as many commenters had suggested to the SEC. Nonetheless, many BDCs and CEFs already have the common equity market value necessary to meet the WKSI criteria. For these entities, once the amendments become effective, raising capital will become much more efficient. Qualifying entities will be able to promptly take advantage of favorable conditions in the public market.

Revised Shelf Offering Process

BDCs and CEFs will be able to engage in a streamlined registration process to sell securities “off the shelf” more quickly and efficiently through the use of a new short-form registration statement. Like operating companies, BDCs and CEFs will generally be eligible to use the short-form registration statement if they meet certain filing and reporting history requirements and have a public float of \$75 million or more. Qualifying BDCs and CEFs will be permitted to use a short-form registration statement on Form N-2 (pursuant to new General Instruction A.2 in Form N-2) that will function like a Form S-3 registration statement. A qualifying BDC or CEF that files this short-form registration statement can use it to register shelf offerings, including shelf registration statements that are filed by entities that qualify as WSIs and become effective automatically, and can satisfy Form N-2’s disclosure requirements by incorporating by reference information from the entity’s periodic public reports. In the case of a CEF, in addition to meeting the eligibility requirements, the CEF must have been registered under the Investment Company Act of 1940, as amended (Investment Company Act), for at least 12 months preceding the filing of the registration statement and also be current in its 1940 Act filings (e.g., Forms N-CEN and N-PORT) during that period. A BDC or CEF that meets the eligibility requirements will be able to use the process operating companies follow to file prospectus supplements pursuant to amended Rule 424(f). Issuers meeting the eligibility requirements will be able to rely on Rule 430B in order to omit certain information from their registration statements and rely on the prospectus to provide the omitted information. These amendments are designed to allow BDCs and CEFs to raise capital more efficiently and costeffectively and provide greater flexibility to manage the timing of their offerings in response to market opportunities.

Access Equals Delivery

Rules 172 and 173, which permit “access equals delivery,” will be applicable to BDCs and CEFs. The prospectus and statement of additional information and incorporated materials will be required to be made available on a website. This eliminates the outdated process of having to print prospectuses and deliver physical copies of prospectuses to investors in BDC and CEF offerings.

Communications Rules

BDCs and CEFs also will be able to rely on various communications safe harbors under the Securities Act.

BDCs and CEFs will be able to rely on:

- Rules 168 and 169 under the Securities Act, which allow Exchange Act reporting and non-reporting companies to disseminate regularly released factual business and forward-looking information even around the time of a securities offering without having such information be considered an “offer,” so long as no reference is made to any potential offering
- Rule 134, which provides a safe harbor that allows issuers to make certain written statements regarding an offer after a prospectus is filed, provided certain conditions are met
- Rule 163A, which provides a safe harbor from the Section 5(c) prohibition on pre-filing offers for communications that do not reference an offering, and that are made more than 30 days prior to the filing of a registration statement, provided certain conditions are met –and–
- Rule 163, which provides a safe harbor from the Section 5(c) prohibition on pre-filing offers for WSIs to engage in unrestricted oral and written communications before the filing of a registration statement, if certain conditions are met

Other Amendments

The final rule sets out a number of additional amendments that were not necessarily contemplated by either the Small Business Credit Availability Act or the Economic Growth, Regulatory Relief and Consumer Protection Act. These are briefly summarized below:

- The amendments expand the scope of Rule 486 under the Securities Act to BDCs or CEFs that conduct continuous offerings of securities, as defined under SEC rules (such as a continuously offered tender offer fund). The amendments permit these funds to make certain changes to their registration statements on

an immediately effective basis or on an automatically effective basis a set period of time after filing.

- BDCs and CEFs that file short-form registration statements will be required to include additional information in their annual reports and will be required to disclose material unresolved staff comments. Registered CEFs also will be required to provide management's discussion of fund performance in their annual reports, similar to requirements that currently apply to mutual funds, exchange traded funds and BDCs.
- BDCs will be required to submit financial statement information in registration statements and Exchange Act reports using Inline XBRL, and BDCs and CEFs will be required to tag certain data on the cover page of Form N-2 using Inline XBRL format.
- CEFs that operate as "interval funds" will be able to register an indefinite number of shares and pay registration fees based on net issuance of shares. This approach is similar to that permitted for mutual funds and exchange-traded funds.

Proposal Not Adopted

The proposing release included a proposed amendment that would have required CEFs to become subject to a

The summary table provided in the SEC's adopting release is below.

| Entity | Summary Definition |
|-----------------------|--|
| Affected funds | Affected funds include all BDCs and registered CEFs, including interval funds. |
| Seasoned funds | Seasoned funds are affected funds that are current and timely in their reporting and therefore generally eligible to file a short-form registration statement if they have at least \$75 million in "public float." <i>Some of the rule changes that are shown below as affecting "seasoned funds" will only affect those seasoned funds that elect to file a registration statement on Form N-2 using an instruction permitting funds to use the form to file a short-form registration statement.</i> |
| WKSIs | WKSIs are seasoned funds that generally have at least \$700 million in "public float." |

Form 8-K requirement (as BDCs currently are), and would have expanded the mandatory Form 8-K filing requirements to include an obligation to report a material change to a fund's investment objective or policy that was not or would not have been submitted to stockholders for their approval unless already disclosed in a post-effective amendment to a registration statement or to a prospectus filed pursuant to Rule 424; and any material write-down in the fair value of a significant investment. However, these proposed Form 8-K requirements were not adopted as part of the final rule.

Looking Ahead

These amendments are welcome given that historically the offering process for these entities has been cumbersome and has affected access to capital formation.

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.

| Rule | Summary Description of Rule | Entities Affected by Changes |
|---------------------------------------|---|------------------------------|
| Affected Funds | | |
| Registration Provisions | | |
| General Instruction F.4.a of Form N-2 | Requires online posting of information incorporated reference by reference. | Affected Funds |
| Securities Act Rules 424 and 497 | Provide the processes for filing prospectus supplements. | Affected Funds |

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| Securities Act Rule 486 | Allows continuously-offered unlisted affected funds to make certain filings that are immediately effective upon filing or automatically effective 60 days after filing. | Continuously-offered unlisted affected funds not relying on rule 23c-3 (tender offer funds) |
| General Instruction G of Form N-14 | Permits certain registrants to incorporate by reference. | BDCs |
| Communication Provisions | | |
| Securities Act Rule 134 | Permits issuers to publish factual information about the issuer or the offering, including "tombstone ads." | Affected Funds |
| Securities Act Rule 163A | Permits issuers to communicate without risk of violating the gun-jumping provisions until 30 days prior to filing a registration statement. | Affected Funds |
| Securities Act Rules 168 and 169 | Permit the publication and dissemination of regularly released factual and forward-looking information. | Affected Funds |
| Securities Act Rules 164 and 433 | Permit use of a "free writing prospectus." | Affected Funds |
| Communication Provisions | | |
| Securities Act Rule 134 | Permits issuers to publish factual information about the issuer or the offering, including "tombstone ads." | Affected Funds |
| Securities Act Rule 163A | Permits issuers to communicate without risk of violating the gun-jumping provisions until 30 days prior to filing a registration statement. | Affected Funds |
| Securities Act Rules 168 and 169 | Permit the publication and dissemination of regularly released factual and forward-looking information. | Affected Funds |
| Securities Act Rules 164 and 433 | Permit use of a "free writing prospectus." | Affected Funds |
| Prospectus Delivery Provisions | | |
| Securities Act Rules 172 and 173 | Permit issuers, brokers, and dealers to satisfy final prospectus delivery obligations if certain conditions are satisfied. | Affected Funds |
| Periodic Reporting Provisions | | |
| Investment Company Act Rule 8b-16 | A requirement that funds that rely on paragraph (b) of the rule describe in the annual report the fund's current investment objectives, policies and risks, and certain key changes in enough detail to allow investors to understand each change and how it may affect the fund. | Registered CEFs |
| Instruction 4.g to Item 24 of Form N-2 | A requirement for narrative disclosure about the fund's performance in the fund's annual report. | Registered CEFs |

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| Item 4 of Form N-2; Instruction 10 to Item 24 of Form N-2 | Requires disclosure of certain financial information. | BDCs |
| Structured Data Reporting Requirements | | |
| Structured Financial Statement Data | A requirement that BDCs tag their financial statements using Inline eXtensible Business Reporting Language (Inline XBRL) format. | BDCs |
| Prospectus Structured Data Requirements | A requirement that registrants tag certain information required by Form N-2 using Inline XBRL. | Affected Funds |
| Seasoned Funds | | |
| Registration Provisions | | |
| Securities Act Rule 415 | Permits registration of securities to be offered on a delayed or a continuous basis. | Seasoned Funds |
| General Instructions A.2 and F.3 of Form N-2 | Provide for backward and forward incorporation by reference. | Seasoned Funds |
| Securities Act Rule 430B | Permits certain issuers to omit certain information from their prospectuses at effectiveness. | Seasoned Funds |
| Securities Act Rule 418 | Exempts some registrants from an obligation to furnish certain engineering, management, or similar reports. | Seasoned Funds |
| 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. | Seasoned Funds |
| Communication Provisions | | |
| Securities Act Rule 138 | Permits a broker or dealer to publish or distribute certain research reports about securities other than those it is distributing. | Seasoned Funds |
| Proxy Statements | | |
| Item 13 of Schedule 14A | Permits certain registrants to use incorporation by reference to provide information that otherwise must be furnished with certain types of proxy statements. | Seasoned Funds |
| Periodic Reporting Provisions | | |
| Instruction 4.h.(2) to Item 24 of Form N-2 | A requirement for information about the investor's costs and expenses in the registrant's annual report. | Seasoned Funds |
| Instruction 4.h.(3) to Item 24 of Form N-2 | A requirement for information about the share price of the registrant's stock and any premium or discount in the registrant's annual report. | Seasoned Funds |

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| Instruction 4.h.(1) to Item 24 of Form N-2 | A requirement for information about each of a fund's classes of senior securities in the registrant's annual report. | Seasoned Funds |
| Instruction 4.h.(4) to Item 24 of Form N-2 | A requirement to disclose outstanding material unresolved staff comments that remain unresolved for a substantial period of time. | Seasoned Funds |
| WKSIs | | |
| Registration Provisions | | |
| Securities Act Rule 462 | Provides for effectiveness of registration statements immediately upon filing with the SEC. | WKSIs |
| Communications Provisions | | |
| Securities Act Rule 163 | Permits oral and written communications by or on behalf of WKSIs at any time. | WKSIs |

J. Paul Forrester, Partner, Mayer Brown LLP

Paul Forrester is a respected corporate finance and securities lawyer whose practice is especially focused on structured credit, including collateralized loan obligations, energy (including oil and gas, utilities, shipping, refinery and pipeline) financings and project development, and financing (especially concerning renewable energy, industrial, petrochemical, power and transportation projects and infrastructure).

Chambers USA 2016 noted "Paul is considered "a true expert" in structured credit, with particular expertise in financing arrangements for energy and utility clients. Clients appreciate that he "understands how changes impact our business," and is "very commercially minded" in his advice." Chambers USA 2012 notes that Paul "has etched out a niche for himself in renewable energy transactions and power project development." Chambers USA 2009 noted that Paul has a "diverse expertise [which] encompasses a variety of derivatives, CLOs, CDOs and bond financing." Chambers USA recently described Paul as "'Outstanding' . . . [he] has a practice split between CDOs, structured credit products and project finance. Clients praised his deep technical knowledge. An 'excellent understanding of where businessmen are coming from' and 'a problem-solving attitude' give Paul . . . a 'critical perspective,' instilling in clients 'a high degree of confidence' in him." He also "produces great work every time." Legal 500 2009 stated that Paul is "always looking for solutions, and generally finds them", and that Paul "has established an interesting niche in securitized products within the environmental sector." The Legal Media Group's Expert Guide series recommends Paul as one of the world's leading lawyers in Project Finance. Paul was named to Legal 500's list of Hall of Fame lawyers in 2017.

Prior to joining Mayer Brown in 1980, Paul was associated with a law firm based in Sydney, Australia. He served as Director of Bildakit Homes, an Australian enterprise, between 1986 and 1987, subsequently resuming his career with Mayer Brown later in 1987.

Adam Kanter, Partner, Mayer Brown LLP

Adam Kanter is a partner in the Corporate & Securities practice of the Washington office. He focuses his practice on counseling domestic and non-US investment advisers, investment companies, and other financial services firms on a variety of regulatory, compliance, enforcement, and transactional matters. Adam has advised clients on a wide range of investment management matters, including formation, registration, and ongoing compliance issues of investment companies and investment advisers. He has also assisted clients in adapting to new regulations, such as the custody rule and pay to play rule under the Investment Advisers Act of 1940, and the amended money market fund rule under the Investment Company Act of 1940. Adam also advises clients on related matters, including the preparation of registration statements, compliance policies and procedures, proxy statements, “no-action” letter requests, exemptive applications, comment letters, and corporate documents.

Recently, Adam has been involved in advising a variety of financial services clients on implications of the “Dodd-Frank Wall Street Reform and Consumer Protection Act,” particularly with respect to its effects on entities with cross-border operations. He joined Mayer Brown in 2008.

Anna T. Pinedo, Partner, Mayer Brown LLP

Anna Pinedo is a partner in Mayer Brown’s New York office and co-leader of the Global Capital Markets practice. She concentrates her practice on securities and derivatives. Anna represents issuers, investment banks/financial intermediaries and investors in financing transactions, including public offerings and private placements of equity and debt securities, as well as structured notes and other hybrid and structured products.

She works closely with financial institutions to create and structure innovative financing techniques, including new securities distribution methodologies and financial products. She has particular financing experience in certain industries, including technology, telecommunications, healthcare, financial institutions, REITs and consumer finance. Anna has worked closely with foreign private issuers in their securities offerings in the United States and in the Euro markets. She also works with financial institutions in connection with international offerings of equity and debt securities, equity- and credit-linked notes, and hybrid and structured products, as well as medium term note and other continuous offering programs.

In the derivatives area, Anna counsels a number of major financial institutions acting as dealers and participants in the commodities and derivatives markets. She advises on structuring issues as well as on regulatory issues, including those arising under the Dodd-Frank Act. Her work focuses on foreign exchange, equity and credit derivatives products, and structured derivatives transactions. Anna has experience with a wide range of transactions and structures, including collars, swaps, forward and accelerated repurchases, forward sales, hybrid preferred stock and off-balance sheet structures. She also has advised derivatives dealers regarding their Internet sites and other Internet and electronic signature/delivery issues, as well as on compliance matters.

Anna regularly speaks at conferences and participates in panel discussions addressing securities law issues, as well as the securities issues arising in connection with derivatives and other financial products. She is the co-author of JOBS Act Quick Start, published by International Financial Law Review (2013; updated 2014, 2016); a contributor to OTC Derivatives Regulation Under Dodd-Frank: A Guide to Registration, Reporting, Business Conduct, and Clearing (Thomson Reuters, first ed. 2014, second ed. 2015, third ed. 2016, fourth ed. 2017); co-author of Considerations for Foreign Banks Financing in the US, published by International Financial Law Review (2012; updated 2014, 2016); Liability Management: An Overview (2011, updated 2015), published by International Financial Law Review; co-author of Structuring Liability Management Transactions (2018), published by International Financial Law Review; co-author of Covered Bonds Handbook, published by Practising Law Institute (2010, updated 2012-2014); co-author of the treatise Exempt and Hybrid Securities Offerings, published by Practising Law Institute (2009, second ed. 2011, updated 2014, third ed. 2017); and co-author of BNA Tax and Accounting Portfolio: SEC Reporting Issues for Foreign Private Issuers (BNA Accounting Policy and Practice Series, 2009, second ed. 2012, updated 2016). Anna is also a contributing author to Broker-Dealer Regulation (2011, second ed. 2012, updated 2019), published by Practising Law Institute. She co-authored “The Approaches to Bank Resolution,” a chapter in Bank Resolution: The European Regime (Oxford University Press, 2016). Anna contributed to The Future of Bank Funding and Capital: Solutions for Issuers, Opportunities for Investors (IFR Market Intelligence, 2009). Additionally, Anna co-authored “The Ties that Bind: The Prime-Brokerage Regulation,” a chapter in Global Financial Crisis (Globe Law and Business, 2009); “The Law: Legal and Regulatory Framework,” a chapter in PIPEs: A Guide to Private Investments in Public Equity (Bloomberg, 2006); and “The Impact Security: Reimagining the Nonprofit Capital Market,” a chapter in What Matters: Investing in Results to Build Strong, Vibrant Communities (Federal Reserve Bank of San Francisco and Nonprofit Finance Fund, 2017). Anna is a contributor to Practising Law Institute’s “BD/IA: Regulation in Focus” blog.

Anna is a member of the American Bar Association’s Committee on the Federal Regulation of Securities, a member of the subcommittee on Disclosure and Continuous Reporting, vice-chair of the subcommittee on Securities Registration and a member of the task force on the future of securities regulation.

She has participated in the drafting committee for the ABA’s comment letters on such topics as securities offering reform, revisions to accelerated filing, smaller public company proposals and various JOBS Act-related matters. Anna also is a member of the ABA Committee on the Regulation of Futures and Derivatives Instruments. Anna is a chair of the Structured Products Association Legal, Regulatory and Compliance Executive Committee. She is a member of the Mortgage Bankers Association’s Mortgage REIT Council and a member of the MBA’s Secondary & Capital Markets Committee.

Anna is an adjunct professor at the George Washington University School of Law and member of the George Washington University Center for Law, Economics & Finance Advisory Board. She is a member of the Visiting Committee of the Law School of the University of Chicago. Anna was a member of the University of Chicago Legal Forum during her time at the University of Chicago Law School.

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