

Offering and Communications Reforms for BDCs and Closed-End Funds

A Practical Guidance® Article by

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This article discusses the amendments adopted by the Securities and Exchange Commission (SEC) in 2020 that modernize the offering related provisions of the

Securities Act of 1933, as amended (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 now generally allow BDCs and CEFs to benefit from the same securities offering and communication rules that were already available to operating companies.

The amendments streamline the registration and offering processes and the communications safe harbors for BDCs and CEFs and provide important benefits to these issuers, including promoting capital formation. Among the most important changes for BDCs and CEFs are: the ability to qualify as [well-known seasoned issuers](#) (WKSIs) to the extent that these entities meet the reporting history and public float requirements; to benefit as WKSIs from the ability to engage in certain offering related communications and rely on expedited shelf registration provisions; the ability for other BDCs and CEFs that do not qualify as WKSIs to use more streamlined shelf registration statement procedures; and the ability to rely on a number of important communications safe harbors. These amendments now allow BDCs and CEFs to better respond to market opportunities.

For the adopting SEC release, see Securities Offering Reform for Closed-End Investment Companies, Release Nos. 33-10771; 34-88606; IC-33836; (April 8, 2020) (2020 SEC LEXIS 994).

For additional information on BDCs, see [Business Development Company Guide for Capital Markets](#), [Market Trends 2019/20: Business Development Companies](#), [Business Development Companies](#), and [Top 10 Practice Tips: Business Development Companies](#).

Initial Guidance

The principal amendments are summarized below.

WKSI Status

A BDC or CEF can now 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 that do not qualify as WSIs have the common equity market value necessary to meet the WKSI criteria. For these entities, raising capital is now much more efficient. Qualifying entities are now able to promptly take advantage of favorable conditions in the public market.

Revised Shelf Offering Process

The amendments allow BDCs and CEFs to use a more streamlined and cost-effective registration process. BDCs or CEFs can now sell securities “off the shelf” more quickly and efficiently through the use of a new short-form registration statement under Rule 415(a)(1)(x) of the Securities Act (17 C.F.R. § 230.415) and then later, take down securities “off the shelf” for sale in a public offering as market conditions warrant. Like operating companies, BDCs and CEFs are generally 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 are now permitted to use a short-form registration statement on Form N-2 (pursuant to General Instruction A.2 in Form N-2) that functions 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 and can satisfy Form N-2’s disclosure requirements by incorporating by reference information from the entity’s periodic filings. BDCs and CEFs that do not qualify as WSIs are still permitted to use this short-form registration statement if they meet certain registrant and transaction requirements of Form S-3. 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 Investment Company Act filings (e.g., Forms N-CEN and N-PORT) during that period. A

BDC or CEF that meets these eligibility requirements is now able to use the process operating companies follow to file prospectus supplements pursuant to amended Rule 424(f). Issuers meeting the eligibility requirements are also now also able to rely on Rule 430B in order to omit certain information from the registration statements and rely on the prospectus to provide the omitted information.

Access Equals Delivery

Securities Act Rules 172 (17 C.F.R. § 230.172) and 173 (17 C.F.R. § 230.173), which permit “access equals delivery,” are now applicable to BDCs and CEFs. The prospectus and statement of additional information and incorporated materials are required to be made available on the issuer’s website. This eliminates the outdated process of printing and delivering physical copies of prospectuses to investors in BDC and CEF offerings.

Communications Rules

BDCs and CEFs also can now rely on various Securities Act communications safe harbors.

BDCs and CEFs can now rely on:

- Securities Act Rules 168 (17 C.F.R. § 230.168) and 169 (17 C.F.R. § 230.169), 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
- Securities Act Rule 134 (17 C.F.R. § 230.134), 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
- Securities Act Rule 138 (17 C.F.R. § 230.138), which permits a broker-dealer participating in a distribution of securities to publish or distribute research reports about the 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 period reports required during the preceding 12 months on Form 10-K and 10-Q
- Securities Act Rule 139 (17 C.F.R. § 230.139), 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
- Securities Act Rule 163A (17 C.F.R. § 230.163A), 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

- Securities Act Rule 163 (17 C.F.R. § 230.163), which provides a safe harbor from the Section 5(c) prohibition on pre-filing offers for WKSIs to engage in unrestricted oral and written communications before the filing of a registration statement, if certain conditions are met
- BDCs and CEFs that file short-form registration statements are now required to include additional information in their annual reports and are required to disclose material unresolved staff comments. Registered CEFs also are now 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.

Other Rule Amendments

The final rule sets out a number of additional amendments. These are briefly summarized below:

- The amendments expand the scope of Rule 486 under the Securities Act (17 C.F.R. § 230.486) 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 must submit financial statement information in registration statements and Exchange Act reports using Inline XBRL, and BDCs and CEFs are required to tag certain data on the cover page of Form N-2 using Inline XBRL format.
- CEFs that operate as "interval funds" can 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.

Looking Ahead

These amendments help BDCs and CEFs raise capital more efficiently. Previously, the offering process for these entities had been cumbersome, limiting their access to capital.

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

Affected Funds (Including BDCs, Registered CEFs, and Interval Funds)

Rule	Summary Description of Rule	Entities Affected by Changes
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

Investment Company Act Rule 23c-3	Subjects interval funds to the registration fee payment system based on annual net sales.	Interval Funds
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
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
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
Form 24F-2 Structured Format	A requirement that filings on Form 24F-2 be submitted in a structured format.	Form 24F-2 filers, including open-end funds and unit investment trusts.

Seasoned Funds

Rule	Summary Description of Rule	Entities Affected by Changes
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

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

Rule	Summary Description of Rule	Entities Affected by Changes
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.

Brian Hirshberg, Partner, Mayer Brown LLP

Brian Hirshberg is a partner in Mayer Brown's New York office and a member of the Capital Markets practice. He focuses on representing US and foreign private issuers, sponsors, and investment banks in registered and unregistered securities offerings, including initial public offerings, follow-on offerings, private placements (including Rule 144A and PIPE transactions), at-the-market offerings, registered direct offerings, liability management transactions, preferred stock and debt offerings, and secondary offerings on behalf of issuers in a variety of industries. Brian has particular experience working on specialty finance, real estate and real estate investment trusts (REITs), business development companies (BDCs), and life sciences company deals. He also assists public company clients with ongoing securities law compliance requirements, listing standards of the major US stock exchanges, SEC public reporting obligations, shareholder-related disputes, and governance matters.

Brian is a thought leader and frequently authors articles relating to capital markets trends and topics published by *Thomson Reuters' Practical Law Company*, the *Practicing Law Institute*, *Bloomberg* and *LexisNexis*. The *IFLR1000 2022* guide ranks Brian as a "Rising Star Partner" in the United States for Capital Markets: Equity, and he is also a recommended lawyer by *The Legal 500 US*.

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 and specialty 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 the leading capital markets treatise, *Corporate Finance and the Securities Laws*, published by Wolters Kluwer (6th Ed., updated 2020); co-author of *A Deep Dive Into Capital Raising Transactions*, published by the International Financial Law Review (2020); co-author of *JOBS Act Quick Start* (International Financial Law Review, 2013; updated 2014, 2016); 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* (International Financial Law Review, 2012; updated 2014, 2016); co-author of *Liability Management: An Overview* (International Financial Law Review, 2011, updated 2015); co-author of *Structuring Liability Management Transactions* (International Financial Law Review, 2018); 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, third ed. 2016, fourth ed. 2020). Anna is also a contributing author to *Broker-Dealer Regulation* (2011, second ed. 2012, updated 2020), 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 (ABA) Committee on the Federal Regulation of Securities, a member of the subcommittee on Disclosure and Continuous Reporting, chair of the subcommittee on Securities Registration, chair of the subcommittee on Annual Review, 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 the definition of accelerated filer and smaller reporting company, amendments to the accredited investor definition; amendments to the exempt offering framework; and various JOBS Act-related and disclosure effectiveness 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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