

OCTOBER 6, 2026

SEC PROPOSES AMENDMENTS ADDRESSING RETAILIZATION; MODERNIZING REGULATED FUNDS AND PERFORMANCE-BASED COMPENSATION

On September 30, 2026, the Securities and Exchange Commission (the “SEC”) issued two proposing releases containing amendments that would materially affect how business development companies that have elected to be regulated under the Investment Company Act of 1940 (the “1940 Act,” and “BDCs,” respectively), interval funds and other registered funds are structured, as well as their compensation and distribution models.

The proposals would modernize the interval fund framework, permit certain registered closed-end funds (“CEFs”) and BDCs (collectively referred to herein as “regulated CEFs”) to offer multiple share classes without individual exemptive relief and amend Rule 205-3 under the Investment Advisers Act of 1940 (the “Advisers Act”) to expand the circumstances in which SEC-registered investment advisers may receive performance-based compensation, both from regulated funds (through a new “fund board channel”) and from accredited investors and funds whose investors are all accredited investors (through a new “accredited investor channel”).¹

Taken together, the proposals would facilitate retail access to private markets by providing greater flexibility for funds and their investment advisers. For sponsors of BDCs and other private asset CEFs, the proposals will have significant practical implications for portfolio construction, liquidity management and adviser compensation. The proposals also would narrow the commercial gap between interval funds and tender offer funds, and may be of interest to lenders and other counterparties to regulated funds.

We discuss the most significant proposed changes in this Legal Update.

¹ We note that the SEC separately published a release requesting public comment as it considers providing individual investors with additional ways to qualify as an accredited investor by holding in good standing certain professional certifications, designations, or credentials to be developed by the Financial Industry Regulatory Authority, Inc. as qualifying natural persons for accredited investor status. See Securities Act Release No. 11445 (September 30, 2026). Under the proposed accredited investor channel, these adjustments, along with any future expansions or contractions of the “accredited investor” definition would effectively be incorporated automatically into Rule 205-3.

PERFORMANCE-BASED COMPENSATION

In its release proposing amendments² to Rule 205-3, the SEC framed the proposal as a response to the growth of the private markets, where private fund assets rose from \$11.9 trillion to \$36.8 trillion over the ten years ended 2025, and to a regulatory framework that conditions the use of performance fees on a client's legal classification rather than on an investor's ability to evaluate and bear the associated risks.

In the SEC's view, that framework has confined strategies associated with performance fees largely to the private fund industry and created a structural disadvantage for retail investors.

BACKGROUND

Section 205(a)(1) of the Advisers Act generally prohibits a registered investment adviser from receiving compensation based on a share of the capital gains in, or capital appreciation of, a client's account. Relief is available through statutory exceptions in Section 205(b) (including for fulcrum fees, performance fees charged to BDCs subject to conditions, Section 3(c)(7) funds and non-U.S. resident clients) and through Rule 205-3, which permits performance fees for "qualified clients." Currently, a client is a qualified client if it has at least \$1.4 million under management with the adviser, has a net worth the adviser reasonably believes exceeds \$2.7 million, is a "qualified purchaser" or is a knowledgeable employee of the adviser. Where the client is a regulated fund or a Section 3(c)(1) fund, the rule "looks through" to each equity owner charged a performance fee, each of which must itself be a qualified client.

THE FUND BOARD CHANNEL

Under the proposed fund board channel, a regulated fund would itself be a qualified client, without regard to the eligibility of its shareholders, if: (i) the performance fee does not exceed 20% of the fund's net capital gains or net capital appreciation³ over a specified period or as of definite dates; (ii) the fund's board satisfies the fund governance standards in Rule 0-1(a)(7) under the 1940 Act;⁴ and (iii) as part of the annual Section 15(c) contract review, the board, including a majority of independent directors, determines that the arrangement is in the best interests of the fund and its shareholders. Notably, unlike the Section 205(b)(3) exception for BDCs, which limits the fee to realized gains, the fee could be calculated on both net realized and net unrealized capital appreciation.

² SEC, *Investment Adviser Performance-Based Compensation Modernization*, Advisers Act Rel. No. 7022 (Sept. 30, 2026).

³ The SEC has requested comment on whether to provide guidance on "capital gains" or "capital appreciation" or define them by rule.

⁴ Those standards address board composition and the independence of the board's processes, requiring among other things that a majority of the board be independent directors, that the independent directors select and nominate any other independent directors, that any person acting as legal counsel to the independent directors be an independent legal counsel as defined in those standards, that the independent directors meet at least quarterly outside the presence of interested directors, that they be authorized to hire employees and retain advisers and experts necessary to carry out their duties, and that the board evaluate the performance of the board and its committees at least annually.

The board's best interests determination⁵ would need to be supported by written findings addressing the appropriateness of the arrangement in light of the fund's investment strategy⁶ and valuation practices,⁷ the basis on which the fee is calculated (including the measurement period and whether it reflects realized gains, unrealized gains or both)⁸ and the adequacy of any investor protection features, such as a hurdle, high water mark or loss carryforward.⁹ The SEC indicated that performance fees may be reasonably justified for skill-dependent strategies such as private equity and private credit, but would generally seem unjustifiable for a passive index-tracking fund. Where a fund holds assets without readily available market quotations, the SEC stated that the board would need to assess the fee in light of the inherently subjective valuation of those assets, and that such funds should demand more intensive board oversight of the valuation process.¹⁰

⁵ The SEC states that these findings are designed to operate independently of, and in addition to, the board's existing duties under 1940 Act Sections 15(c) and 36(b).

⁶ With respect to a fund's investment strategy, a board would generally need to consider whether the adviser is managing the fund's assets in a manner consistent with the fund's stated strategies, and should be attentive to whether the compensation structure may be incentivizing the adviser to take on excessive risk in pursuit of higher fees to the detriment of fund shareholders. Boards generally also would need to consider whether an adviser may be increasing the volatility of the fund's portfolio beyond what is consistent with the fund's stated investment objectives and strategies, whether to enhance the prospect of exceeding a performance threshold or to influence the timing of when performance fees are earned or crystallized, and whether the arrangement could harm shareholders by exposing them to risks that may not be reflected in the fund's disclosures (but see below regarding new disclosure requirements). Under the proposed best interests finding, a board would need to consider, for example, whether the adviser's portfolio construction, use of leverage, or concentration of positions has materially shifted in a manner that appears inconsistent with the fund's investment strategy, particularly during periods proximate to performance fee measurement dates. In this regard, the SEC indicated that a performance fee arrangement associated with investment strategies that aim to generate risk-adjusted outperformance and rely heavily on manager skill (e.g., private equity/credit and others), compensation contingent on investment results may be reasonably justified. However, in contrast, the SEC stated that fund board approval of a performance fee arrangement in connection with the fund tracking a broad-based securities market index, where the investment strategy is passive or formulaic in nature and where excess returns above a market benchmark are neither the stated objective nor a realistic expectation, would generally seem *unjustifiable*.

⁷ In this regard, the SEC stated that, where a fund holds assets for which there are no readily available market quotations, such as many private market investments, the risk that performance based compensation would be calculated on valuations that depend on subjective inputs is elevated, and the board would need to assess the appropriateness of a performance fee, or the design of any proposed performance fee, given the inherently subjective nature of the valuation of such private market portfolio securities. The SEC also provided guidance on fair valuation practices, stating that a regulated fund that invests primarily in private market assets for which no readily available market quotation exists should demand more intensive board oversight of the valuation process relative to a fund whose portfolio consists principally of exchange-traded or other readily marketable securities. See also Statement on Fair Valuation Measurement and Disclosure Considerations for Private Assets dated September 28, 2026.

⁸ The SEC stated that this distinction is of material significance to fund shareholders and implicates fairness considerations that the board should evaluate with reference to the particular structural characteristics of the fund. On the one hand, the SEC observes that charging on unrealized appreciation may better align the adviser's compensation with the experience of shareholders who transact at net asset value, and that a realized-gains-only fee may encourage premature disposition of appreciating positions. On the other hand, including unrealized appreciation can inflate the fee base without economic realization where assets lack readily available market quotations, and shareholders may bear fees on appreciation that is later reversed absent contractual protections—the SEC cites as an example the acquisition of private fund interests at a discount followed by an immediate mark to full net asset value, a practice it refers to as "NAV squeezing." The SEC adds that the board must also account for any divergence between net asset value and the price at which shareholders actually transact, noting that for exchange-listed funds trading at a persistent discount a fee calculated on net asset value may be disconnected from shareholders' secondary market experience, such that the board should consider whether protections such as a discount-adjusted fee calculation or an enhanced hurdle rate are warranted.

⁹ The SEC commented that these features would directly counteract the most acute forms of investment adviser overreach that performance-based compensation can generate (e.g., payment of performance fees attributable to unrealized gains that are never realized, fee layering across volatile performance cycles, and the misalignment of adviser compensation with shareholder capital accumulation over time).

¹⁰ See the SEC's Statement on Fair Valuation Measurement and Disclosure Considerations for Private Assets dated September 28, 2026.

The fund board channel would be available to all management investment companies, including open-end funds and ETFs, registered CEFs (including interval funds and tender offer funds), whether or not listed, and BDCs, whether or not listed, but not to unit investment trusts or separate accounts registered on Form N-3.

THE ACCREDITED INVESTOR CHANNEL

Separately, the qualified client definition would be amended to include any natural person or company (other than a private investment company) that the adviser reasonably believes is an accredited investor under Rule 501(a) of Regulation D when entering into the advisory contract, and funds each of whose equity owners is an accredited investor. The \$2.7 million net worth and \$1.4 million assets-under-management tests, and the related inflation adjustment mechanism, would be removed, while the qualified purchaser and knowledgeable employee prongs would be retained. The SEC describes the principal effect as harmonization: Section 3(c)(1) funds relying on Regulation D would no longer need to apply a separate qualified client standard. No conditions other than accredited investor status would apply, although the adviser's fiduciary obligations would continue to apply.

DISCLOSURE AMENDMENTS

The proposal would amend Forms N-1A, N-2 and N-CSR to require separate disclosure of performance-based compensation paid by regulated funds, including a description of how the fee is calculated and an illustration of its operation across hypothetical performance scenarios. These requirements would reach all performance-based compensation, including income-based incentive fees not prohibited by Section 205(a)(1), so a regulated fund that already pays an income-based fee would become subject to them even if it never relies on either channel. A 12-month compliance period is proposed, although a fund relying on the fund board channel would need to comply as soon as it first relies on that channel.

INTERVAL FUND REPURCHASE CHANGES

The SEC's proposal would substantially revise Rule 23c-3 under the 1940 Act, which governs periodic repurchase offers by interval funds. The proposed amendments are intended to provide interval funds with greater flexibility to align repurchase obligations with the liquidity characteristics of their underlying portfolios, and would narrow the commercial gap between interval funds and tender offer funds.

REPURCHASE OFFER TIMING

Currently, Rule 23c-3 permits an interval fund to establish periodic repurchase intervals of three, six or 12 months. The SEC proposes to add a one-month interval, allowing interval funds to offer monthly repurchase opportunities without first obtaining individual exemptive relief. The proposal is intended to provide greater flexibility for funds pursuing investment strategies that can accommodate more frequent liquidity and to give investors more liquidity opportunities. The SEC has already granted exemptive relief to several interval funds to permit monthly repurchases but the amendment would incorporate that flexibility directly into Rule 23c-3, subject to certain conditions.

The proposal also would permit a newly established interval fund to defer its first repurchase offer for up to two years following the effective date of its initial registration statement or, in the case of an existing fund, following the first shareholder vote adopting a fundamental policy specifying the fund's periodic interval. A fund that later changes its periodic interval would not receive a new two-year ramp-up period. Under the current rule, the amount of time before the first repurchase offer depends on the selected repurchase interval and generally is often significantly shorter for funds offering more frequent liquidity.

The proposed two-year ramp-up period would provide sponsors with additional time to build and season a portfolio before commencing periodic repurchases. This flexibility may be particularly relevant for funds investing in private credit, private equity, infrastructure and other illiquid assets that often require longer investment and realization periods.

The SEC also proposes to permit discretionary repurchase offers by regulated CEFs (including both interval funds and funds that do not operate as interval funds) once every 12 months, rather than once every two years, and would make related changes to the mechanics of repurchase offers and oversubscribed requests. Unlike the periodic repurchase offers made by interval funds, discretionary repurchases generally are initiated without requiring the fund to have adopted a fundamental policy committing it to make repurchase offers at specified intervals. The proposed change would give regulated CEFs greater flexibility to provide liquidity to shareholders in response to market events or other circumstances.

OTHER REPURCHASE MECHANIC PROPOSALS

For all interval funds, the shareholder notification window would be 14 to 42 days before the repurchase request deadline, rather than the current 21 to 42 days. This would replace the seven to 14-day window used under the current exemptive orders permitting monthly repurchases.

The repurchase payment deadline would be no later than seven days after the repurchase pricing date. For offers made under a fundamental policy (periodic rather than discretionary), payment would be due at least one business day before notice of the next repurchase offer, preventing monthly cycles from overlapping.

Monthly interval funds would remain subject to the 5%-25% repurchase offer amount. The SEC requests comment on whether a lower 2% monthly minimum (as provided for in some exemptive orders) should be permitted.

The proposal also would permit interval funds to deduct deferred sales loads from repurchase proceeds, subject to conditions; currently, Rule 23c-3 permits only a repurchase fee of up to 2%.

LIQUIDITY REQUIREMENTS

The SEC also proposes to replace the current prescriptive liquidity requirement for interval funds with a principles-based standard.

Under the current rule, an interval fund generally must maintain liquid assets equal to at least 100% of its repurchase offer amount during the repurchase offer period. The SEC notes that, in practice, many interval

funds maintain liquidity buffers on a relatively continuous basis, which can result in cash drag and limit the portion of the portfolio invested in less liquid, potentially higher-yielding assets.

The proposed rule would eliminate the requirement to maintain liquid assets equal to 100% of the repurchase offer amount. Instead, an interval fund would be required to manage its portfolio liquidity so that it can satisfy repurchase requests without requiring a sale or disposition of portfolio investments at a price that deviates significantly from the value of those investments.¹

The proposed principles-based approach would allow funds to consider a broader range of liquidity management tools and portfolio characteristics rather than relying on a prescribed amount of liquid assets. The SEC noted the potential for funds to use a “multi-layered” approach that may include a liquidity reserve, portfolio assets with predictable cash flows, and committed credit facilities. The availability of committed credit facilities as a liquidity tool may be of particular interest to lenders and other counterparties to interval funds.

For private asset funds, this change may be particularly significant. The ability to reduce cash drag while maintaining sufficient liquidity to meet repurchase obligations would provide greater flexibility in allocating capital to less liquid investments. At the same time, the principles-based standard would place greater responsibility on fund boards, advisers and compliance personnel to develop and monitor liquidity policies and procedures appropriate for the fund’s investment strategy.

The proposal would implement the new standard principally through the fund’s compliance program under Rule 38a-1, which requires a fund to adopt and implement, and its board to approve, written policies and procedures reasonably designed to prevent violations of the federal securities laws. If the amendments are adopted as proposed, an interval fund’s Rule 38a-1 policies and procedures would need to include policies and procedures reasonably designed to ensure that the fund manages its portfolio liquidity so that it can satisfy repurchase requests without a sale or disposition of portfolio investments at a price that deviates significantly from their value. The SEC emphasized that these policies and procedures should be tailored to each fund’s particular circumstances and investment strategy. For funds investing in private markets, the SEC indicated that relevant policies and procedures might address, among other things, monitoring of portfolio company investments and the valuation of illiquid and hard-to-value securities, including the use of third-party valuation agents and fair value methodologies.

The proposal would eliminate both the existing procedures-drafting and periodic review requirements in Rule 23c-3 and the provision requiring the board to take appropriate action if the fund fails to comply with the liquidity requirement. The SEC noted, however, that the board would continue to exercise oversight of liquidity management through its approval and oversight of the fund’s compliance policies and procedures under Rule 38a-1. Funds also would remain free to continue to maintain policies requiring liquid assets equal to 100% of the repurchase offer amount during the repurchase offer period. The SEC requested comment on, among other things, the mechanisms or strategies a fund could include in its policies and procedures to ensure it can meet repurchase offers, and on whether the liquidity amendments should apply to non-interval funds making discretionary repurchase offers.

MULTIPLE SHARE CLASSES

The SEC also proposes to expand the existing Rule 18f-3 framework (which currently applies only to open-end funds) to permit regulated CEFs, including BDCs, to issue multiple classes of shares without first obtaining individual exemptive relief.

Multiple share class structures have become increasingly common among continuously offered regulated CEFs, including interval funds, tender offer funds and unlisted BDCs, but thus far individual exemptive relief has been required. According to the SEC, it has issued approximately 230 exemptive orders since 2007 permitting unlisted continuously offered regulated CEFs to maintain multiple share class structures. The SEC's proposal would codify the conditions developed through that exemptive process.

Under the proposed framework, a regulated CEF would be permitted to offer multiple classes of shares, subject to conditions generally based on the existing requirements of Rule 18f-3 for registered open-end funds and adapted for regulated CEFs.

Among other things, a fund relying on the proposed rule would be required to adopt a written multiple share class plan approved by the fund's board, including a majority of directors who are not interested persons. Expenses directly attributable to a particular class generally would be allocated to that class, while expenses not attributable to a particular class would be allocated in a manner the board determines to be fair and equitable. Class specific distribution or service expenses also would not be allocated to other classes.

The proposal also would expand Rule 17d-3 (which currently applies only to open-end funds) to permit regulated CEFs and their affiliates to enter into arrangements for payment of asset-based distribution and service fees in connection with multiple share class structures. This change would provide greater flexibility for funds to compensate intermediaries and other service providers across different share classes without requiring individualized exemptive relief under Section 17(d) and Rule 17d-1. The proposal would align the treatment of these arrangements more closely with the framework applicable to open-end funds.

The SEC is proposing corresponding amendments to Form N-2, Form N-CEN and shareholder reports to provide enhanced disclosure regarding multiple share classes, expenses, distribution arrangements and other class specific information. The Form N-2 amendments also would require enhanced shareholder report expense disclosure, a prospectus legend and an increase in the dollar amount used in the prospectus expense example.

Importantly, the SEC also proposes to rescind all but one of the exemptive orders relating to multiple share classes. The one exception is for a recent SEC order permitting the ARK Venture Fund to offer multiple share classes that include classes traded on a securities exchange and in tokenized form using distributed ledger technology. The proposal would otherwise eliminate the need for most regulated CEFs to rely on individual exemptive relief to offer multiple share classes, replacing the existing order-based framework with a rules-based framework.

Notably, the proposed rules would not apply to every type of regulated CEF. Among other things, the SEC proposes to retain existing restrictions for regulated CEFs the common stock of which is listed, offered or traded on an exchange or other secondary market, while requesting comment on whether additional circumstances should be accommodated.

SIGNIFICANCE FOR REGULATED FUND SPONSORS

Multiple share classes would provide greater distribution flexibility. For regulated fund sponsors, the ability to establish multiple share classes through a standardized regulatory framework, without the need for individual exemptive relief, would make it easier to tailor economics to different distribution channels and investor segments. Depending on the final rules, sponsors may have greater flexibility to structure classes with different sales loads, distribution or servicing arrangements and other economics for the same investment portfolio. This may be particularly relevant as regulated funds seek to expand distribution through wealth management platforms, registered investment advisers, broker-dealers and retirement channels.

The proposal would reduce friction in regulated fund structuring. Eliminating the need for individualized exemptive relief for multiple share classes would reduce the time, expense and uncertainty associated with launching new share classes or modifying existing distribution structures. For sponsors developing new BDC or interval fund vehicles, the standardized framework would make structuring more predictable and facilitate the use of established distribution models.

The proposed liquidity framework would affect portfolio construction. Replacing the 100% liquid-assets requirement with a principles-based standard would allow interval funds to deploy more capital into less liquid investments. Sponsors would have greater discretion to determine how liquidity is generated and maintained but would also need to demonstrate that their liquidity management framework can satisfy repurchase obligations without forcing sales at materially unfavorable prices.

Performance fees would become more widely available. The fund board channel would allow advisers to registered funds, including interval funds, tender offer funds and BDCs, to charge performance fees on net realized and unrealized capital appreciation without looking through to shareholders, subject to board findings and governance conditions. The accredited investor channel would harmonize performance fee eligibility with Regulation D for private funds and separately managed accounts. Sponsors should consider the enhanced disclosure requirements, which would apply to any regulated fund paying a performance fee, including an income-based incentive fee.

Monthly liquidity may become a more important fund feature. The proposed addition of a monthly repurchase interval would increase the range of liquidity profiles available to investors outside the traditional open-end context. For sponsors, monthly liquidity may become a differentiating feature in the increasingly competitive market for retail private credit vehicles. At the same time, more frequent liquidity would require careful alignment among fundraising, portfolio deployment, expected portfolio cash flows and liquidity resources.

The proposals would further facilitate retail access to private assets, including private credit. The SEC's economic analysis notes that private credit-oriented strategies represent approximately 55% of aggregate interval fund net assets and identifies direct lending, private equity secondaries and infrastructure as examples of private market strategies being offered through interval funds. The proposed changes would give sponsors additional flexibility to design registered products around the liquidity characteristics of these strategies.

Existing exemptive relief should be reviewed. The SEC proposes to rescind existing exemptive orders relating to matters addressed by the new rules, subject to a proposed one-year compliance period. Sponsors that currently rely on exemptive orders for multiple share class structures or interval fund arrangements should evaluate how their existing structures would operate under the proposed rules and whether any provisions of their existing orders provide flexibility that would not be replicated under the proposed framework.

BROADER MARKET IMPLICATIONS

The proposal comes as regulated funds investing in private market assets have become an increasingly important component of the asset management sector. The SEC reports that the number of interval funds increased from 58 in 2020 to 139 in 2025, while aggregate assets increased from approximately \$38 billion to \$101 billion during the same period.

The SEC's economic analysis also identifies recent developments in the non-traded BDC market, including increased investor repurchase demand in early 2026. For the five non-traded BDCs that capped and prorated repurchase requests during the first quarter of 2026, the SEC reports approximately \$6.9 billion of completed repurchase requests compared with approximately \$4.9 billion of capital inflows. The SEC also notes that interval funds experienced net inflows during the same period.

These developments highlight the importance of aligning liquidity with portfolio construction as private market strategies become more available through registered vehicles. The proposed amendments would give sponsors additional tools to manage that alignment while preserving a defined liquidity mechanism for investors.

The multiple share class proposal also may have broader implications for the distribution capabilities of BDCs and other continuously offered CEFs. A standardized multiple share class framework would facilitate greater customization of distribution economics across investor channels and minimize the need to develop separate products to accommodate different intermediary distribution arrangements.

For private credit sponsors in particular, the combination of these proposals may be more significant than any individual amendment. Greater flexibility regarding liquidity, distribution, share class economics and adviser compensation would make regulated funds more adaptable to the customary operational and economic characteristics of longstanding private credit strategies.

NEXT STEPS

The proposed amendments are subject to public comment and may be modified before the SEC considers final rules. The proposal contemplates a one-year compliance period following the effective date of any final amendments. The SEC also proposes to provide a corresponding one-year transition period before rescinding existing exemptive orders that address matters covered by the new rules.

BDCs, interval funds and other regulated CEF sponsors may wish to consider the potential effects of the proposals on their existing and planned fund structures, including liquidity policies, repurchase programs, distribution arrangements, share class structures, advisory fee arrangements and reliance on existing exemptive relief. Sponsors considering new private asset products also may wish to evaluate whether the proposed framework may affect the appropriate choice among BDC, interval fund, tender offer fund and other registered structures. For the performance-based compensation proposal, a 12-month compliance period is proposed for the new disclosure requirements, although a fund relying on the fund board channel would need to comply as soon as it first relies on that channel.

We will continue to monitor developments relating to the proposed amendments and their potential implications for BDCs, interval funds and other registered funds investing in private market assets.

COMMENTS

The proposals contain numerous requests for comment spanning all aspects of the proposed amendments, including the appropriate length of the proposed two-year ramp-up period, whether monthly repurchase intervals should be subject to different minimum repurchase amounts, the proposed principles-based liquidity standard, the scope and conditions of the multiple share class framework, the proposed treatment of existing exemptive orders and whether to provide guidance on, or define by rule, “capital gains” and “capital appreciation” for purposes of performance fees.

Comments are due 60 days after publication of the respective proposing release in the Federal Register. Access the SEC’s [press release](#), [fact sheet](#) and [proposing release](#) for the interval fund and multiple share class proposals and the SEC’s [proposing release](#) for the performance-based compensation proposal, through the links.



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