

# Legal Update

## SEC Adopts Securities Offering and Communications Reforms for BDCs and Closed-End Funds

On April 8, 2020, the Securities and Exchange Commission (SEC) voted to adopt final rule amendments 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.<sup>1</sup> The SEC also adopted accompanying amendments to Form N-2.<sup>2</sup> The SEC was required to undertake rulemaking with respect to BDCs by the Small Business Credit Availability Act,<sup>3</sup> 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. We believe these amendments will allow BDCs and CEFs to better respond to market opportunities.

### Adopted Amendments

Below we summarize a few of the principal amendments.

#### 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 WKSIs 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 WKSIs 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 cost-effectively 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 WKSIs 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. We summarize these briefly 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 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.

## Conclusion

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.

We have included for reference the summary table provided in the SEC's adopting release below.

---

*For more information about the topics raised in this Legal Update, please contact any of the following lawyers.*

**Leslie Cruz**

+1 202 263 3337

[lcruz@mayerbrown.com](mailto:lcruz@mayerbrown.com)

**J. Paul Forrester**

+1 312 701 7366

[jforrester@mayerbrown.com](mailto:jforrester@mayerbrown.com)

**Brian Hirshberg**

+1 212 506 2176

[bhirshberg@mayerbrown.com](mailto:bhirshberg@mayerbrown.com)

**Adam Kanter**

+1 202 263 3164

[akanter@mayerbrown.com](mailto:akanter@mayerbrown.com)

**Anna T. Pinedo**

+1 212 506 2275

[apinedo@mayerbrown.com](mailto:apinedo@mayerbrown.com)

---

## Endnotes

<sup>1</sup> See the final rule: <https://bit.ly/2wzrF5k>.

<sup>2</sup> See: <https://bit.ly/3c5OwVd>.

<sup>3</sup> See our Legal Update relating to the Small Business Credit Availability Act here: <https://bit.ly/3eegTCz>, and a chart summarizing the changes required by the Act here <https://bit.ly/2JV42qL>.

Entity	Summary Definition
<b>Affected funds</b>	Affected funds include all BDCs and registered CEFs, including interval funds.
<b>Seasoned funds<sup>1</sup></b>	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."
<b>WKSIs</b>	WKSIs are seasoned funds that generally have at least \$700 million in "public float."

<sup>1</sup> 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.

Rule	Summary Description of Rule	Entities Affected by Changes
<b>Affected Funds</b>		
<b>Registration Provisions</b>		
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
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

Rule	Summary Description of Rule	Entities Affected by Changes
<b>Communication Provisions</b>		
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
<b>Prospectus Delivery Provisions</b>		
Securities Act Rules 172 and 173	Permit issuers, brokers, and dealers to satisfy final prospectus delivery obligations if certain conditions are satisfied.	Affected Funds
<b>Periodic Reporting Provisions</b>		
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

<b>Rule</b>	<b>Summary Description of Rule</b>	<b>Entities Affected by Changes</b>
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
<b>Structured Data Reporting Requirements</b>		
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
<b>Seasoned Funds</b>		
<b>Registration Provisions</b>		
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

Rule	Summary Description of Rule	Entities Affected by Changes
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
<b>Communication Provisions</b>		
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
<b>Proxy Statements</b>		
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
<b>Periodic Reporting Provisions</b>		
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



<b>Rule</b>	<b>Summary Description of Rule</b>	<b>Entities Affected by Changes</b>
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
<b>WKSIs</b>		
<b>Registration Provisions</b>		
Securities Act Rule 462	Provides for effectiveness of registration statements immediately upon filing with the SEC.	WKSIs
<b>Communications Provisions</b>		
Securities Act Rule 163	Permits oral and written communications by or on behalf of WKSIs at any time.	WKSIs