Simpson Thacher

Registered Funds Alert

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The latest edition of Simpson Thacher's Registered Funds Alert discusses suggested areas of focus for the SEC under its new leadership with a review of the significant accomplishments of the SEC under Chair Clayton's term; a summary of the SEC's new rule regarding the use of derivatives and other financial transactions and areas for reconsideration; and our views on the positive and negative impacts of the SEC's new fund-of-funds rule on closed-end funds and BDCs.

The SEC Under New Management—Outlook for 2021 and Beyond

By David Blass, Christopher Healey, Manny Halberstam and Kate O'Neil

The SEC is now under new management. The SEC is operating at the time of this writing under the leadership of Acting Chair and Democratic Commissioner Allison Herren Lee. Gary Gensler, former Chair of the CFTC, has been nominated—but has not yet been confirmed—to become the next permanent Chair of the SEC.

Though we are in early days, there are many indications of the future direction of the SEC, and some clear distinctions with the SEC under Chair Jay Clayton's term.

Looking back: To look forward, sometimes it first helps to look back to where we have been. Under Chair Clayton, the SEC will be remembered by those in the asset management industry for numerous, highly significant rulemakings aimed at that industry. Many of those rulemakings were intended to be business-friendly, although as we point out elsewhere in this Alert, some had negative aspects for the industry. Among the more consequential rulemakings for regulated funds and their sponsors that were adopted during Chair Clayton's tenure were:

1. A long-awaited rule regarding fair value determinations that allows a fund board to delegate such determinations to the fund's investment adviser (summarized here and here);
2. A reformulated derivatives rule that addressed many of the most severe criticisms of the original rule proposed in 2015 (summarized here);
3. A rule permitting fund-of-funds arrangements intended to replace the need for basic fund-of-funds structures to obtain individualized exemptive relief from the SEC (summarized here);
4. A rule package addressing broker-dealer and investment adviser conduct standards, including when recommending regulated fund investments (*i.e.*, Reg BI);
5. A rule providing ETFs the most commonly needed exemptions that previously required new ETF sponsors to apply for exemptive relief; and
6. Offering reforms for closed-end funds and BDCs designed to implement legislation adopted by Congress in 2018 that was designed to allow funds to utilize some of the favorable offering rules available to operating companies (summarized here and here).

In addition, Chair Clayton's Division of Enforcement led a very significant "voluntary" self-reporting initiative for investment advisers with undisclosed conflicts relating to regulated fund share class selection. That initiative, among others, led to a sharp increase in enforcement actions against investment advisers under his watch, at least in number if not scope.

Looking forward: Now, turning the corner, it is very clear that the new SEC will start with almost a complete break from the leadership team under Chair Clayton. Acting Chair Lee has appointed a series of acting leaders for various positions across the SEC, many of which we anticipate becoming permanent upon Mr. Gensler's confirmation. In particular, we expect personnel brought from outside the SEC into acting positions at the SEC are highly likely to be permanently appointed upon Mr. Gensler's confirmation.

What priorities does Mr. Gensler intend to pursue with this new leadership team? Below are a few thoughts, supplemented with some suggestions of our own.

The SEC Will Focus on ESG

It is clear that ESG priorities will rise to the top of the SEC's regulatory agenda under the Biden administration, which has identified climate change in particular as a top policy priority.[1] Indeed, the SEC already has created and staffed a new senior policy advisor position to advise the agency on ESG matters

> *"It is clear that ESG priorities will rise to the top of the SEC's regulatory agenda under the Biden administration, which has identified climate change in particular as a top policy priority."*

1. The Biden administration has also called on the Department of Labor to review its recent "do-good" investing rule, which requires ERISA plan fiduciaries to put financial considerations above all other considerations when making investment decisions, and to assess whether the rule conflicts with the administration's objectives relating to climate change. Fact Sheet: List of Agency Actions for Review (Jan. 20, 2021).

and advance related new initiatives across its offices and divisions.

One potential implication of the SEC becoming more active on ESG is a shift to focus non-financial public company disclosure more on what investors are "interested in knowing," as opposed to the current focus on materiality.[2] This could lead to more public company disclosure not only on environmental matters, but also disclosure about social justice and human rights matters, such as workplace diversity, gender pay ratios and conflict minerals. Increased ESG disclosures by public companies, particularly if standardized and comparable across companies, could facilitate significant innovation in product development for regulated funds. If this shift occurs in corporate issuer filings, however, we should anticipate a similar trend for regulated fund disclosure and regulatory disclosures by asset management firms.

Specific ESG-related regulatory initiatives that the SEC may pursue during the Biden administration could include:

- Amending Rule 35d-1 under the 1940 Act, known as the "Names Rule," to explicitly address the naming of funds that pursue an ESG strategy;
- Establishing mandatory standards for public company disclosures regarding ESG risks, practices and impacts (while several public companies voluntarily align their ESG disclosures with standards published by private organizations, such as the Sustainability Accounting Standards Board (SASB), there remains a lack of uniform ESG disclosure standards for all public companies to follow);
- Publishing best practice guidance for enhancing ESG investment product disclosures to foster comparability; and
- Publishing guidance clarifying the application of fiduciary duty obligations under the Advisers Act to investment advisers that make investment decisions or recommendations for their clients based, in whole or in part, on non-economic considerations, such as ESG factors.

We also expect to see a more active effort by SEC enforcement and examination staff to clamp down on "greenwashing," *i.e.*, asset managers conveying a false impression to investors that a given product or service they offer is environmentally friendly. This could take the form of a "green" sweep by the SEC's examination division focusing on fund managers' ESG disclosures and practices.[3] It would not surprise us if the SEC brings a wave of enforcement actions in the coming years against financial services companies centering on their ESG disclosures.

The Democratization of Alternative Strategies Might Proliferate (With Guardrails)

Mr. Gensler was a co-author of the book "The Great Mutual Fund Trap," a book notable for its argument that actively managed funds perform worse than passive (index) funds that charge lower management fees (a more well-known theory today than when the book was published in 2002). It will be interesting to see how much weight Mr. Gensler gives this perspective today given the significant fee compression that has developed in recent years in the mutual fund industry due to increased competition, and whether this perspective influences his view of management fees charged for private markets investment strategies given that passive management is not an option for private markets investments.

Under Chair Clayton, the SEC laid the groundwork for increasing retail access to private markets, including by including a number of targeted requests for comment on offering such strategies through regulated funds in a concept release in 2019. While some commentators have suggested a Democratic administration might not continue this initiative or may roll back recent progress, we believe there is bipartisan support for increasing fairness in access to investments and addressing the growing wealth divide and retirement savings crisis. A Gensler-led SEC may well view retail access through the lens of economic equality, one of the top priorities of the Biden administration, and is expected to prioritize investor protections in any reform that would expand retail access.

The SEC's recent efforts in the retail space under Chair Clayton focused primarily on direct access to private markets, including expanding the Accredited Investor definition to add new categories for natural persons and simplifying the private offering rules to ease capital raising burdens for small businesses.

2. In its adopting release for recent amendments to Regulation S-K disclosure requirements, the SEC declined to add new requirements with respect to ESG and sustainability matters, opting instead to continue emphasizing the SEC's 2010 guidance on disclosure related to climate change. Management's Discussion and Analysis, Selected Financial Data, and Supplementary Financial Information, Release No. 33-10890; 34-90459; IC-34100; File No. S7-01-20 (Nov. 19, 2020).

3. According to former Chair Clayton, the examination division has already been reviewing disclosures regarding funds and products that pursue ESG investment mandates to ensure investors are receiving accurate and adequate information about the material aspects of those strategies. *See* Public Statement of SEC Chairman Clayton (Jan. 30, 2020). To date, however, the SEC has not announced a formal examination sweep on ESG issues.

In contrast, under a Gensler-led SEC, expansion of retail access could rely much more heavily on gatekeepers, such as a registered investment adviser and the protections under the Investment Company Act of 1940, to protect those investors. We expect regulated funds to play a key role in providing a more level playing field for retail investors because regulated funds invest in a diversified portfolio, are managed by registered investment advisers and are overseen by an independent board, offering fundamental investor protections that counterbalance many of the risks for retail investors compared to direct access to private markets investments. One does not need a partisan lens to see that Main Street investors do not have access to the same opportunity set as institutional and high net worth investors.

Digital currency investments are another investment strategy that could gain steam in a registered fund wrapper under Mr. Gensler's SEC. As a professor at MIT Sloan School of Management, Mr. Gensler taught courses on blockchain and digital currencies. Together with his experience leading the CFTC, Mr. Gensler's familiarity with these issues may offer hope to those advocating for the ability to offer regulated funds that invest in digital assets, which the SEC currently is hesitant to bless due to significant questions regarding the ability to safely custody digital assets.

Mr. Gensler, Please Fix Co-investment Exemptive Orders

It is no overstatement to say that the SEC's co-investment exemptive order framework under the 1940 Act is broken. Exemptive orders are excessively granular and do not contemplate—much less accommodate—the realities of the marketplace, in particular for credit strategies. This is a topic that we have written about several times in prior Alerts (*e.g.*, here and here). As discussed in our May 2019 Alert, the co-investment application filed by FS Global Credit Opportunities Fund presented an opportunity for the SEC to reform some of the most significant issues with the current SEC framework. In particular, the FS Application envisioned a broad, principles-based approach to co-investment relief rather than a detailed and customized application unique to the applicant's business, which we believe would have been a tremendous step forward. Regrettably, the FS Application has languished.

Whether the SEC grants the FS Application or determines to take another route, significant reform is necessary. Under the current framework, for example, every participant must invest in the same securities, and in a transaction that involves multiple securities can force a regulated or private fund to purchase a security that it otherwise might not want to hold because the fund otherwise would be excluded from the co-investment entirely. It would seem that an investment adviser with a fiduciary duty to its clients should be able to make a determination, possibly with approval by a regulated fund's board, that the potential conflicts in having funds invest in different parts of an issuer's capital structure can be managed and that funds should not be put in a situation of choosing between investing in securities that are not part of their core investment strategy or being excluded from an investment opportunity in its entirety.

The current framework also creates some problems for private equity strategies as the exemptive relief might permit a regulated fund to participate in taking a control stake in a portfolio company but does not provide the relief needed under Section 17(a) of the 1940 Act to permit a regulated fund to participate in any subsequent principal transactions with a portfolio company controlled by the sponsor, such as a direct follow-on investment.

We encourage—in the strongest terms—the SEC to develop a new co-investment framework that provides a the flexibility needed for regulated funds to participate in private markets co-investments. We strongly believe that such relief is needed to allow innovation in the regulated funds space and democratize access to private markets strategies.

AFFE Reform for BDCs

Another priority for the SEC's new leadership to take up is a much-needed change to disclosure requirements for acquired fund fees and expenses ("AFFE"). The SEC and Congress have taken initial steps toward reform, but have not yet finalized them.

The SEC requires registered funds that invest in other funds (including BDCs) to include a separate AFFE line item in the "Fees and Expenses" table contained in their SEC disclosure documents. This separate AFFE line item must include the registered fund's pro rata share of the "acquired fund's" expenses (including interest expense), which is then added to the registered fund's overall expense ratio.

The AFFE disclosure disproportionately harms BDCs, which are generally more expensive to operate than other registered investment companies and therefore have higher expense ratios. As a result, sponsors of mutual funds, closed-end funds, ETFs and other registered investment companies generally have avoided investing in BDCs and, as discussed in a prior Alert, major index providers have removed BDCs from their indices (making BDCs ineligible investments for index funds). The SEC included some requests for comment regarding AFFE in the rule proposal for the recently adopted fund of funds rule (but AFFE was not addressed in the final rule) and the SEC is considering modifications to AFFE disclosure as part of its Investor Experience Proposal. Under the Proposal, open-end funds that invest 10% or less of their total assets in other fund could disclose the fees and expenses associated with those investments in a footnote to the fee table, instead of reflecting those expenses as a separate line item in the fee table.

Separately, the U.S. House of Representatives introduced legislation in June 2020 that would require the SEC to adopt rules specifying that, when calculating the fees and expenses of an acquired fund, the term "acquired fund" does not include a BDC. However, the proposed legislation did not receive a vote under the previous Congress. It remains to be seen whether the SEC and/or Congress to finalize efforts to minimize the impact of the AFFE Rule on BDCs either by adopting the Proposal or through legislative efforts. The SEC, nonetheless, could show strong leadership by addressing the AFFE disclosure problems before Congress directs it to do so, either under the current Congress or a future one.

Is the SEC Returning to a "Broken Windows" Enforcement Environment?

In the second half of the Obama administration, the SEC pursued a "broken windows" enforcement philosophy in which it punished minor infractions as a means of deterrence. Under the leadership of former Chair Clayton, SEC enforcement activity remained vigorous but shifted away from this broken windows approach. While the SEC's enforcement division set new records in relation to the amount of disgorgement and penalties it obtained during his tenure, we saw a modest decrease in the number of SEC enforcement actions that involved minor infractions. Along this same line, our sense has been that the enforcement division took fewer referrals from SEC examination staff, based on the view that deterring a minor infraction through a deficiency letter, rather than through an enforcement action, is a more efficient use of the agency's resources.

This is expected to change under the leadership of Mr. Gensler. If confirmed by the Senate, we think Mr. Gensler likely will steer the SEC back in the direction of a broken windows approach to enforcement (though the SEC may avoid re-embracing the term "broken windows"). The SEC enforcement division probably will show a greater willingness to accept referrals from examination staff and to impose hefty penalties, as well as take a more aggressive approach to disgorgement in light of recent legislation extending the statute of limitations to ten years for disgorgement in cases involving intent-based violations. This, coupled with Mr. Gensler's well-known focus on investor protection, could result in increased levels of enforcement activity against managers of regulated funds.

More generally, we expect the SEC, under Mr. Gensler's direction, to move away from the agency's recent focus on retail investors and to prioritize more aggressive oversight of the financial services industry. The asset management unit within the enforcement division probably will see its staffing levels increase and will be given more autonomy to pursue novel theories of potential misconduct, especially with Acting Chair Lee recently restoring the ability of senior enforcement staff to approve formal investigations, a power that was stripped away and limited to the co-directors of the division under the prior administration.

A Gensler-led SEC also likely will show a greater appetite for "sweep" examinations and investigations, *i.e.*, targeted examinations or investigations conducted by the SEC staff for the purpose of evaluating a perceived problem or to educate itself on current industry practices in a particular area. On the examination side, sweeps historically have been an important generator of

SEC enforcement cases, but the SEC under Chair Clayton's leadership generally disfavored sweeps. In all likelihood, some of the sweeps initiated during the Biden administration will focus on compliance issues specific to regulated funds.

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In this Alert we have discussed just a few of the potential regulatory initiatives that might come to pass if Mr. Gensler is confirmed as the next chair of the SEC. We are closely watching to see which individuals end up filling out the SEC's leadership positions, especially in the Division of Investment Management, and will continue to report on potential developments in future Alerts.

SEC Overhauls the Framework Governing the Use of Derivatives by Regulated Funds

By Ryan Brizek, Debbie Sutter and Andy Madore

In a widely anticipated action that was years in the making, the SEC adopted Rule 18f-4 under the 1940 Act prior to the conclusion of former Chair Jay Clayton's tenure. The rule overhauls the regulatory framework for the use of derivatives and similar transactions by regulated funds, which for purposes of the rule includes registered closed-end funds, BDCs and registered open-end funds (including mutual funds and ETFs but excluding money market funds). Importantly, regulated funds can continue to follow the current asset segregation approach when investing in derivatives until the rule's compliance date of August 19, 2022 (the "Compliance Date").

The rule will replace the current asset segregation approach under which regulated funds enter into derivatives and similar transactions based on guidance in SEC Release 10666 and existing staff interpretations with a conditional exemption from the asset coverage requirements under Sections 18 and 61 of the 1940 Act. Regulated funds can voluntarily rely on the rule prior to the Compliance Date, and must rely on the rule following the Compliance Date in order to enter into derivatives and similar transactions without such transactions being subject to the asset coverage requirements under Sections 18 and 61 of the 1940 Act.

This Alert provides an overview of key attributes of the rule. This article then revisits issues that were raised in our prior Alert relating to the proposed rule and examines the changes that were made to the final rule to address those concerns. For background on existing interpretive guidance regarding the use of derivatives and similar transactions by regulated funds, please see our prior Alert. For those who may be wondering, the derivatives rule does fall within the look-back period under the Congressional Review Act that would allow the new Democratic-controlled Congress to overturn the rule, but we do not expect that will occur.

Overview of the Key Attributes of the Rule

In the adopting release, the SEC reiterated its view that all derivatives and similar transactions that create future payment obligations fall within the functional meaning of the term "evidence of indebtedness" and therefore involve the issuance of a senior security for purposes of Section 18 of the 1940 Act. Under the rule, a "derivatives transaction" includes any swap, security-based swap, futures contract, forward contract, option, any combination of the foregoing, short sale borrowings, or any similar instrument (such as to-be-announced investments ("TBAs") or dollar rolls, in either case with a maturity of more than 35 days). In addition, a regulated fund may choose to treat reverse repurchase agreements or similar financing transactions as derivatives transactions for purposes of the rule (which is a change from the proposal, which would have required funds to treat reverse repurchase agreements as borrowings).

"Under the rule, a "derivatives transaction" includes any swap, security-based swap, futures contract, forward contract, option, any combination of the foregoing, short sale borrowings, or any similar instrument (such as to-be-announced investments ("TBAs") or dollar rolls, in either case with a maturity of more than 35 days)."

The most significant attributes of the rule and related requirements include:

1. Derivatives Risk Management Program. All regulated funds that do not qualify as "Limited Derivatives Users" (discussed below) must adopt and implement a written derivatives risk management program, which is administered by a derivatives risk manager ("DRM"). The DRM will be designated by the regulated fund's board, must have relevant experience regarding the management of derivatives risk and may not be a portfolio manager of the regulated fund (or, if the DRM is a group, the majority of the group cannot be composed of portfolio managers). The program must address the following elements, as detailed in the rule: (1) risk identification and assessment; (2) risk guidelines that provide for quantitative and measurable criteria; (3) stress testing to evaluate potential losses to a Regulated Fund's portfolio under stress conditions; (4) backtesting of the VaR calculation model that the regulated fund uses each business day; (5) internal reporting and escalation of certain derivative matters to the fund's portfolio management and board; and (6) a periodic review of the program, at least annually, to evaluate the program's effectiveness.

2. VaR Limit on Fund Leverage Risk. Regulated funds that are not Limited Derivatives Users must comply with a relative VaR test based on either a designated reference index or the regulated fund's securities portfolio (collectively, the "designated reference portfolio"), or, if the DRM reasonably determines in accordance with the rule that the relative VaR test is not appropriate, an absolute VaR test based on the value of the regulated fund's net assets.

   - A regulated fund must determine its compliance with the applicable VaR test at least once each business day and must come back into compliance promptly after a determination of non-compliance. If a regulated fund is not in compliance with the applicable VaR test within five business days, there are additional board reporting requirements and a requirement to report confidentially to the SEC on Form N-RN.

   - Under the relative VaR test, a regulated fund's VaR must not exceed 200% of the VaR of the regulated fund's designated reference portfolio. For closed-end funds and BDCs that have outstanding preferred stock, this limit is increased to 250%.

   - Under the absolute VaR test, a regulated fund's VaR cannot exceed 20% of the value of the regulated fund's net assets. For closed-end funds and BDCs that have outstanding preferred stock, this limit is increased to 25%.

   - The VaR test must (i) take into account and incorporate all significant, identifiable market risk factors associated with a fund's investments, (ii) use a 99% confidence level and a time horizon of 20 trading days and (iii) be based on at least three years of historical data. When calculating the 99% confidence level, the SEC confirmed in the adopting release that a regulated fund may rescale a calculation initially performed at a 95% confidence level.

   The changes to the VaR test and related guidance in the release more closely align the rule's VaR test with the UCITS Guidelines familiar to global asset managers, which were proven to be effective during the market turbulence at the onset of the COVID-19 pandemic.

3. Reverse Repurchase Agreements. A regulated fund is permitted to treat reverse repurchase agreements or similar financing transactions as derivatives transactions for purposes of the rule. Similar financing transactions include tender offer bond ("TOB") financings, the investment of securities lending collateral in securities and the purchase of a security on margin, but do not include TBAs or the investment of securities lending collateral in cash or cash equivalents.

   Alternatively, a regulated fund may choose to treat a reverse repurchase agreement or similar financing transaction as indebtedness subject to the asset coverage requirements of Section 18 of the 1940 Act. A fund's election will apply to all reverse repurchase agreements or similar financing transactions so that all such transactions are subject to consistent treatment under the rule.

4. Unfunded Commitment Agreements. A regulated fund may enter into unfunded commitment agreements if it reasonably believes, at the time it enters into such an agreement, that it will have sufficient cash and cash equivalents to meet its obligations with respect to all of its unfunded commitment agreements, in each case as they come due.[4] In forming the required reasonable belief, a fund may take into account the issuance of debt (*e.g.*, borrowings under a credit facility). This standard is similar to the one that the SEC staff has been requesting registrants adhere to in comment letters related to registration statements for the past several years. However, a regulated fund must take into account its reasonable expectations with respect to other obligations, and may not take into account cash that may become available from the sale or disposition of any investment at a price that deviates significantly from the market value of those investments, or from issuing additional equity.

   A regulated fund must document the basis for its reasonable belief at the time it enters into each unfunded commitment and must maintain such record for at least five years following the date of the agreement. For some regulated funds, this may require a change to current recordkeeping practices. Any regulated fund that historically has not maintained such records will need to develop compliance procedures to ensure it is compliant with the conditions of the rule by the Compliance Date.

5. Delayed Settlement Cycle Securities. The rule provides a conditional exemption from the requirements of Sections 18 and 61 for regulated funds that invest in a security with a delayed settlement cycle (including when-issued and forward-settling transactions such as TBAs and dollar rolls), provided that the fund intends to physically settle the transaction and the transaction will settle within 35 days of its trade date.

6. Board Oversight and Reporting. On or before the implementation of the derivatives risk management program, and at least annually thereafter, the DRM must provide the regulated fund's board with a written report representing that the derivatives risk management program is reasonably designed to manage the regulated fund's derivatives risks and related information required by the rule. The DRM must also provide periodic written reports to the board. The board is responsible for designating the DRM.

7. Limited Derivatives Users Exception. Limited Derivatives Users are not required to adopt a derivatives risk management program, comply with the VaR limit on fund leverage risk or comply with the board oversight and reporting requirements. To qualify as a Limited Derivatives User, a regulated fund's derivatives exposure (as defined under the rule, which is gross notional exposure for most types of derivatives) cannot exceed 10% of its net assets, excluding certain currency or interest rate derivatives used for hedging purposes in accordance with specific requirements set out in the rule. Limited Derivatives Users are required, however, to adopt and implement written policies and procedures reasonably designed to manage the regulated fund's derivatives risk. If a regulated fund exceeds the 10% derivatives exposure threshold and does not reduce its exposure within five business days, the regulated fund's adviser must provide a written report to the fund's board informing it whether the adviser intends to reduce the exposure promptly, but within no more than 30 days, or put in place a derivatives risk management program and comply with the VaR-based limit on fund leverage risk as soon as reasonably practicable.

4. Many industry leaders commented on the potentially problematic treatment of unfunded commitments in the initial derivatives rule proposal in 2015. In response to those comments, the reasonable belief standard was included in the 2019 re-proposal and adopted in the final rule. We suggested a similar standard in our 2016 comment letter to the SEC on the initial proposal.

The rulemaking also included new recordkeeping requirements; amended Form N-CEN, Form N-PORT and Form N-LIQUID (renamed Form N-RN) to enhance disclosures regarding the use of derivatives and compliance with the rule; and amended Rule 6c-11 under the 1940 Act to allow leveraged and inverse ETFs to operate without the need for exemptive relief. The SEC did not adopt the proposed sales practice rules related to leveraged and inverse ETFs.

On the Compliance Date, current SEC interpretive guidance in Release 10666 will be rescinded and staff no-action letters and other guidance addressing derivatives and other transactions covered by the rule will be withdrawn.

Issues We Wanted Reconsidered and the Result in the Final Rule

As we noted in our prior Alert on this topic, we advocated for the changes set out in italics below, which we thought would improve the rule. Many of these changes were incorporated into the final rule.

The DRM should be able to choose which VaR test to comply with regardless of its ability to identify an appropriate "designated reference index."

The final rule partially addresses this concern. The proposed rule required regulated funds to use the relative VaR test unless they were "unable to identify" a designated reference index, which created uncertainty regarding the amount of diligence a DRM was expected to undertake in considering potential indices. While the final rule still states that the relative VaR test is the "default" test, a regulated fund can use the absolute VaR test if the DRM reasonably determines that a designated reference portfolio would not provide an appropriate reference portfolio for purposes of the relative VaR test, taking into account the fund's investments, investment objectives and strategy.

The reasonableness standard in the final rule provides the DRM with much-needed flexibility in being able to determine which VaR test would be most appropriate for the regulated fund. This standard also more clearly states what is expected of the DRM in making this determination.

The proposed leverage limits should be increased to a 200% relative VaR limit and a 20% absolute VaR limit.

This suggested change was incorporated directly into the final rule, and many in the industry provided a similar suggestion. These limits are in line with the UCITS Guidelines, which global asset managers have operated under for many years, including during the current COVID-19 crisis. Such an approach allows global asset managers to streamline their risk management programs in a manner that has proven effective during the current market crisis and can be useful in future market crises.

Related to VaR testing, we also suggested that the final rule allow a DRM to choose a 95% confidence level in order to obtain additional observations to produce a more robust and stable measure of risk, the results of which could then be rescaled to a 99% confidence level equivalent. In the adopting release, the SEC provides interpretive guidance confirming that the 99% confidence level required by the rule may be calculated in this manner.

The "limited derivatives user" definition in the proposed rule should be revised to modify the 10% derivatives exposure limit to allow for currency and interest rate hedging in addition to such limit.

This suggestion was incorporated into the final rule. The proposed rule required that Limited Derivatives Users fall into one of two categories: (1) those that limit their overall use of derivatives to 10% of their net assets with certain limited adjustments or (2) those that exclusively use derivatives for currency hedging. At the urging of commenters, the final rule permits regulated funds to exclude certain currency and interest rate hedging transactions from the 10% threshold, essentially combining the two bases in the proposed rule into one objective standard for Limited Derivatives Users in the final rule.

Reverse repurchase agreements are not analogous to bank borrowings and should not be subject to the 300% asset coverage requirement.

This proposed change was addressed in the final rule. The rule gives regulated funds the choice in determining if they want to treat reverse repurchase agreements as borrowings or as derivatives transactions. This approach provides a regulated fund flexibility to choose an approach that is best suited to the fund's investment strategy and/or operational needs, while still addressing the asset sufficiency and leverage concerns in Section 18.

During the 18-month compliance period, regulated funds should evaluate the two options described above and decide which is the best method for a particular regulated fund to use going forward. Regulated funds should consider that the election will apply to all reverse repurchase agreements and similar financing transactions.

General Reception of the Rule as Adopted

The final rule has generally been received positively, particularly with respect to certain changes in the final rule that address many of the concerns raised during the comment process. Notwithstanding these developments, certain individuals at the SEC have publicly raised concerns about the rule as adopted. Most of these concerns relate to the omission of proposed sales practice rules for leveraged and inverse ETFs that are unrelated to the rule's substantive regulation of the use of derivatives and similar transactions by regulated funds and outside the scope of this article.

Specifically, Commissioner Lee expressed disappointment that the final rule did not include the sales practice rules that were designed to address investor harms arising from unsuitable purchases and sales of leveraged and inverse ETFs, which she says is to the detriment of retail investors. Commissioner Crenshaw also echoed these concerns related to the sales practice rules, and further stated that the final rule "failed to address the significant risk that derivatives can pose to funds and investors." Commissioner Crenshaw cited to evidence suggesting that retail investors buy leveraged and inverse fund products without truly understanding their features, which can lead to significant losses, and believes the rule as adopted does nothing to address this problem.

While the concerns raised by Commissioners Lee and Crenshaw could be addressed by the SEC in subsequent rulemaking or interpretive guidance, we believe the SEC is unlikely to revisit the final set of rules that were adopted. Given the SEC's current set of policy priorities, however, and the disappointment expressed by the Democratic Commissioners regarding the absence of a sales practice rule, we would not be surprised if the SEC chose to make the adoption of a sales practice rule a priority during the new administration's term.

What's Next

The SEC has provided for an 18-month transition period for regulated funds to comply with the rule and related reporting requirements. Regulated funds must be in compliance with the rule by August 19, 2022.

The New Fund-of-Funds Rule: The Good, the Bad and the Ugly for Closed-End Funds and BDCs

By Rajib Chanda, Steven Grigoriou and Patrick Quinn

On October 7, 2020, the SEC adopted Rule 12d1-4 and related amendments, which together will replace the current regulatory patchwork of registered fund-of-funds no-action letters, statutory interpretations and exemptive orders with a rules-based regulatory framework. As discussed in a prior Alert, Rule 12d1-4 was proposed on December 19, 2018 and was subject to substantial industry comment. The final Rule has been fairly widely praised by the industry; however, we think it is more of a mixed bag and has some significant potential negative effects for the democratization of private markets investments.

In broad strokes, Rule 12d1-4 will permit a registered investment company or BDC (an "Acquiring Fund") to acquire the securities of any other registered investment company or BDC (an "Acquired Fund") in excess of the so-called "3/5/10" limits that form the basis of the anti-pyramiding provisions of the 1940 Act, subject to certain limitations on control and voting.[5] Rule 12d1-4 also would require that an Acquiring Fund relying on the Rule, and its investment adviser, make certain evaluations and findings.

The SEC also will rescind, with limited exceptions, current exemptive orders for fund-of-funds arrangements, as well as Rule 12d1-2, which expands the types of instruments that open-end funds and unit investment trusts that primarily invest in funds within the same fund group can invest in when relying on Section 12(d)(1)(G) of the 1940 Act.[6]

5. Specifically, Section 12(d)(1) of the 1940 Act prohibits an Acquiring Fund from acquiring: (i) more than 3% of the voting stock of an Acquired Fund; (ii) securities issued by an Acquired Fund having an aggregate value in excess of 5% of the value of the total assets of the Acquiring Fund; or (iii) securities issued by Acquired Funds having an aggregate value in excess of 10% of the value of the total assets of the Acquiring Fund.

6. In order to continue to invest in the instruments currently permitted by Rule 12d1-2 after the effective date of its rescission, such funds will have to rely on Rule 12d1-4.

In this Alert we discuss certain potential implications of the new rule for closed-end funds and BDCs. Rule 12d1-4 and related amendments to Rule 12d1-1 became effective as of January 19, 2021. The rescission of Rule 12d1-2 and current fund-of-funds exemptive orders will be effective on January 19, 2022. Funds must comply with related changes to Form N-CEN (requiring funds to report whether they relied on Rule 12d1-4 or the statutory exception in Section 12(d)(1)(G) of the 1940 Act during the applicable reporting period) by January 22, 2022.

The Good

Rule 12d1-4 allows for the creation of new products

Because Rule 12d1-4 would permit any type of Acquiring Fund to exceed the 1940 Act's "3/5/10" limits, closed-end funds and BDCs may now exceed the "3/5/10" limits without exemptive relief, which was previously available only to open-end funds and unit investment trusts relying on Rule 12d1-2. By extending fund-of-funds relief to closed-end funds and BDCs, we believe that Rule 12d1-4 could allow for new categories of closed-end products that can provide investors with the benefit of diversified access to other funds. For example, closed-end fund-of-funds could pursue strategies comprised of BDCs, real estate or other closed-end funds, which were previously limited under prior rulemaking or exemptive relief. For retail investors, the benefit of these structures could be to provide indirect access to funds (or share classes) that an individual investor might not be able to purchase on their own due to investment minimums or investor qualifications

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(*e.g.*, a closed-end fund that charges a performance fee is limited to "qualified clients" with $2.1 million in net worth or $1 million in assets managed by the closed-end fund's adviser). Due to regulatory requirements prohibiting BDCs from investing more than 30% of their assets in other funds, BDC's will still be practically limited in their ability to take advantage of some of the fund-of-fund benefits provided by Rule 12d1-4 as Acquiring Funds. While BDCs may face limits in their ability to be Acquiring Funds, BDCs may see increased interest as Acquired Funds from funds-of-funds pursuing a BDC-like investment strategy (especially if the SEC addresses the AFFE issue that artificially curbs the regulated funds' interest in investing in BDCs as discussed earlier in this Alert).

Rule 12d1-4 will also allow fund-of-funds arrangements when: (i) the Acquiring Fund and Acquired Fund hold themselves out to investors as being part of the same group of investment companies; or (ii) the Acquired Fund's investment adviser is affiliated through control with the Acquiring Fund's sub-adviser. This provides an exemption from Section 17 of the 1940 Act, which otherwise would not permit an Acquiring Fund to "seed" affiliated registered funds and BDCs. Funds that comply with the conditions in Rule 12d1-4 may rely upon this exemption from Section 17(a) even if they are not relying upon the Rule for an exemption from the "3/5/10" limits. However, we note that the Rule 17d-1 prohibition on joint transactions could be implicated if one regulated fund seeds an affiliated regulated fund, despite the Section 17(a) exemption. Depending on the facts of a particular arrangement, it is possible that the use of an Acquiring Fund's assets to seed an affiliated Acquired Fund could be viewed as impermissibly disadvantaging the Acquiring Fund for the benefit of the Acquired Fund (or its adviser).

Rule 12d1-4 could impact certain closed-end fund activists that utilize registered funds

The SEC responded to industry comments regarding certain activism risks that could arise under the initial proposal for Rule 12d1-4. The final version of the Rule requires an Acquiring Fund that does not share the same investment adviser as an Acquired Fund to enter into a fund-of-funds investment agreement, similar to participation agreements under current fund-of-funds exemptive orders. In practice, most participation agreements concern ETFs, which do not have the same activist concerns as listed closed-end funds and BDCs. The requirement for an Acquiring Fund to enter into an investment agreement under Rule 12d1-4 provides registered funds and BDCs with a shield against activists who utilize registered funds, as an activist fund could not acquire more than 3% of an Acquired Fund without entering into an investment agreement. **As a result, managers of closed-end funds and BDCs can prevent a true activist from relying on the rule to invest in their funds by refusing to enter into an investment agreement with the activist.**

When a potential Acquired Fund determines to allow an investor to rely on the rule, the Rule lays out certain terms that an investment agreement must contain. However, there is no reason an agreement could not contain additional terms. Potential terms for an Acquired Fund that wants to accept the capital infusion offered by the potential Acquiring Fund, but is nonetheless concerned about potential future activist actions, to consider when approached by an Acquiring Fund include:

- Requiring the Acquiring Fund to vote its shares in accordance with board recommendations;
- Agreeing not to initiate any merger or acquisition activity relating to the Acquired Fund or to propose or vote for other activist ventures (*e.g.*, tender offers, open-ending a closed-end fund);
- Agreeing not to make any public statements related to the Acquired Fund;
- Making the terms of the investment agreement applicable to affiliates/related parties of the Acquiring Fund;
- Requiring the Acquiring Fund to abide by Rule 144A trading restrictions as if it were an affiliate for purposes of the Securities Act of 1933; and
- Ensuring obligations apply to the Acquiring Fund so long as it is invested in Acquired Fund (even if the Acquiring Fund's position drops below 3% of the Acquired Fund's shares or the investment agreement is terminated).

These terms are not typical of current participation agreements and would be appropriate for a potentially hostile or activist Acquiring Fund. It should be noted that a fund-of-funds investment agreement can be terminated by the Acquired Fund without penalty. Upon termination of a fund-of-funds investment agreement, the Acquiring Fund would not be required to divest its interest; accordingly, an Acquired Fund may want to consider which provisions will survive termination. Moreover, upon termination of a fund-of-funds investment agreement, the Acquiring Fund generally would not be able to rely on an exemption from the Section 12(d)(1)(A) limitations and would therefore be prohibited from purchasing additional shares of the Acquired Fund. Thus, even if an Acquired Fund's fund-of-funds investment agreements do not contain shareholder friendly covenants, the power to "freeze" unilaterally an Acquiring Fund's ownership of Acquired Fund shares can provide a modicum of protection if circumstances with a friendly Acquiring Fund should change.

Even if a closed-end fund or BDC that is an Acquired Fund agrees to enter into an investment agreement with a prospective Acquiring Fund without protective terms, the "advisory group" of an activist registered fund will be limited to owning no more than 10% of the Acquired Fund's assets. Under Rule 12d1-4, an "advisory group" that owns greater than 10% of an Acquired Fund's assets would be required to "mirror vote" all of its shares (*i.e.*, in the same proportion as other shares cast), thereby eliminating the voting power of the advisory group. Consistent with prior exemptive orders, an Acquiring Fund must aggregate all securities owned by its "advisory group" in assessing both the control and voting thresholds, which includes an Acquiring Fund's investment adviser (or sub-adviser) or depositor, and any person controlling, controlled by, or under common control with such investment adviser (or sub-adviser) or depositor. An Acquired Fund's advisory group includes private funds and foreign funds controlled by or under common control with the investment adviser. Rule 12d1-4 also prohibits an Acquiring Fund and its advisory group from controlling an Acquired Fund within the meaning of the 1940 Act, which mean the advisory group cannot acquire more than 25% of the Acquired Fund's voting securities. In circumstances where Acquiring Funds are the only shareholders of an Acquired Fund, pass-through voting may be used. An Acquiring Fund that is part of the same fund group as the Acquired Fund and an Acquiring Fund that has a sub-adviser that acts as adviser to the Acquired Fund will not be subject to the control and voting requirements.

Use in friendly fund combinations

In the case of a friendly merger of registered investment funds or BDCs, Rule 12d1-4 would permit the Acquiring Fund to purchase greater than 3% of the target fund's shares to help obtain the requisite shareholder votes for the merger, such as transaction approvals and/or advisory agreement approvals. However, any "toehold" investment would be subject to Schedule 13D/G and Section 16 filings under the Securities and Exchange Act of 1934, as amended, as well as anti-trust filings under the Hart-Scott-Rodino Antitrust Improvements Act and state anti-takeover statutes such as §203 of the Delaware General Corporation Law or Maryland Commercial Law §3-603, as applicable.

The Bad

Failure to extend Rule 12d1-4 relief to private funds

Private funds will continue to be limited to owning no more than 3% of any single registered fund. Several industry commenters suggested that this limitation be softened with regard to private funds.[7] We were disappointed that the SEC did not permit private funds to qualify as Acquiring Funds under Rule 12d1-4, although the adopting release encourages private funds to apply for exemptive orders in order to rely upon similar relief. Expressing an openness to granting private funds exemptive relief on this point is a positive development, but is not necessarily a good use of Staff resources, given the unlikelihood that there will be significant, or any, differences in the framework under which a private fund may be an Acquiring Fund under the Rule. Given that an Acquiring Fund must enter into an investment agreement with an Acquired Fund in order to rely on the Rule, we believe that a more efficient approach would have been to include private fund relief in this Rule and free up Staff resources for other matters.

BDC AFFE relief not addressed

Despite strong industry support for the proposing release's request for comment on potentially excluding BDCs from the acquired funds' fees and expenses ("AFFE") disclosure requirements, the SEC did not adopt any AFFE changes in the final rule. Under Form N-1A and Form N-2, a registered fund or BDC must include in its fees and expense table a separate line item disclosing fees and expenses in connection with investments in other funds, which is also incorporated into the registered fund's total operating expense ratio. The relatively higher operational costs of BDC investment operations typically result in higher AFFEs for funds acquiring BDCs and therefore, higher total expense ratios for an Acquiring Fund. In 2014, in response to industry concerns regarding the impact of BDC AFFEs on total expense ratios, certain index providers removed BDCs as index constituents. In turn, mutual funds and ETFs that track indices were effectively barred from investing in BDCs, resulting in lower market demand for BDCs and corresponding calls for action from the BDC sector. As part of the Rule 12d1-4 proposing release, the SEC solicited comment on fees and expenses, including with respect to AFFE disclosure and whether to exempt BDCs in whole or in part, and received substantive feedback requesting relief. Although the SEC has proposed limited relief to the AFFE disclosure requirements,[8] we believe that Rule 12d1-4 provided a prime opportunity for the SEC to respond to a substantive need of BDCs.

> *"We were disappointed that the SEC did not permit private funds to qualify as Acquiring Funds under Rule 12d1-4, although the adopting release encourages private funds to apply for exemptive orders in order to rely upon similar relief."*

Activist protections could be more meaningful

We believe that Rule 12d1-4 could have included more meaningful activist protections for listed closed-end funds/BDCs, in line with the Staff's recent rescission of the Boulder no-action letter and Staff's statement on control share statutes.[9] Proposed Rule 12d1-4 required mirror voting when an advisory group (which includes private and foreign funds) owned greater than 3% of a closed-end fund's voting securities, whereas the final rule only requires mirror voting at a 10% ownership threshold. Further, the voting restrictions under Rule 12d1-4 only apply to an advisory group that includes a registered fund or BDC relying on Rule 12d1-4. Advisory groups with a registered fund or BDC owning less than 3% of an Acquired Fund or that only include private funds and foreign funds could still in the aggregate own greater than 3% of a registered fund's by splitting each fund's individual allocations to less than 3% of the registered fund's securities. We believe that the SEC missed an opportunity to institute meaningful protections to protect the interests of shareholders of listed closed-end funds and BDCs in light of the multiple recent activist actions in the industry and the growing threat of future activist actions.[10]

7. *See* Comment Letter of Parallax Volatility Advisers (May 1, 2019) (recommending that the SEC exclude private funds from the limits in Section 12(d)(1) with respect to acquiring ETFs, subject to appropriate conditions); Comment Letter of TPG Specialty Lending, Inc. (May 2, 2019) (proposing that the SEC increase the Section 12(d)(1)(A)(i) limit for private funds from 3% to 10%).

8. *See* Tailored Shareholder Reports, Treatment of Annual Prospectus Updates for Existing Investors, and Improved Fee and Risk Disclosure for Mutual Funds and Exchange-Traded Funds; Fee Information in Investment Company Advertisements, 1940 Act Release No. 33963 (Aug. 5, 2020). As proposed, funds that invest 10% or less of total assets in Acquired Funds would be permitted to disclose AFFE information in a footnote to the fees and expenses table instead of a separate line item.

9. *See* Commission Division of Investment Management Staff Statement on Control Share Acquisition Statutes (May 27, 2020) and Boulder Total Return Fund, SEC No-Action Letter, Nov. 15, 2010 (withdrawn).

10. *See, e.g.*, Comment Letter of Advent Capital Management, LLC (May 1, 2019) (encouraging the SEC to state in the Rule 12d1-4 adopting release that it would look through to underlying private fund advisory group holdings when determining Rule 12d1-4 compliance, pursuant to Section 48(a) of the 1940 Act). *See also* Comment Letter of the Asset Management Group of the Securities Industry and Financial Markets Association (May 2, 2019) (noting that activist firms have "taken advantage of an inadequate statutory framework" and requesting that the SEC make private fund investments in closed-end funds and BDCs subject to the same restrictions as in Section 12(d)(1)(C)).

The Ugly

Negative impact on retailization

Rule 12d1-4 will generally prohibit three-tier fund-of-funds structures by imposing certain limitations on the ability of a fund that chooses to be an Acquired Fund to invest in other funds, subject to limited enumerated exceptions that are designed to capture circumstances that do not raise the fee layering and undue influence concerns underlying Section 12(d)(1) of the 1940 Act. Rule 12d1-4 only allows an Acquired Fund to invest up to 10% of its total assets in other registered funds and BDCs *and private funds*, without regard to the purpose of the investment or types of underlying funds.

We believe that Rule 12d1-4 offered the SEC an opportunity to continue the regulatory march towards the democratization of private investments. The practical impact of the three-tier fund-of-funds limit is to cut off at the knees a fast-developing product that is designed to provide retail investors democratized access to private markets—registered funds of private funds. These products have been touted for use specifically for target date funds, which are funds of funds that provide diversified pools for investors, often in retirement plans. As an example of private market democratization, the Department of Labor recently provided ERISA plan sponsors with a road map to properly incorporate private equity investments in defined contribution plans, such as target date funds.[11] However, these funds of private funds will be prohibited from being Acquired Funds under the new construct. Thus, target date funds that would like to invest in such funds will be limited to owning no more than 3% of any such fund. Given the relative size of the target date fund universe (very large) and the fund of private funds universe (nascent), this inclusion of the private funds limitation in the definition of Acquired Funds will be a significant headwind for the growth of this industry, a sentiment shared by other industry participants.[12]

Beyond the unfortunate impact on funds of private funds, there are other funds that may be caught in the cross-fire of this particular provision. For example, certain entities rely on Section 3(c)(1) or 3(c)(7) and are thus private funds for purposes of the limitation on the investments of Acquired Funds, but are not private investment funds in the ordinary sense in which one thinks of private funds, *e.g.*, certain securitization vehicles such as CLOs. Debt funds with fund-of-fund investors relying on Rule 12d1-4 may inadvertently be considered a "middle tier" fund in a three-tier fund structure if they invest substantially in CLOs and other structured finance vehicles that rely on Section 3(c)(1) or 3(c)(7). This may mean, for example, that certain BDCs will be ineligible Acquired Funds, blunting some of the positive impact the Rule could have had.

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While we believe that Rule 12d1-4 is beneficial to the registered fund industry in that it provides a consistent framework for all market participants, we believe there that there are several issues that we hope will be addressed in further SEC or Staff action.

11. U.S. Department of Labor Information Letter from Louis J. Campagna to Jon W. Breyfogle (June 3, 2020).

12. *See, e.g.,* Comment Letter of Fidelity Fixed Income and Asset Allocation Funds (May 2, 2019); Comment Letter of Nuveen, LLC (May 2, 2019); Comment Letter of Federal Regulation of Securities Committee of the Business Law Section of the American Bar Association (June 11, 2019).

M&A Transactions

Acquiror	Acquired or Target Company	Type of Transaction and Status
Barings BDC, Inc., a publicly traded BDC.	**MVC Capital, Inc.**, a publicly traded BDC.	MVC Capital stockholders received 0.94024 Barings BDC shares for each MVC Capital share and Barings LLC paid $7 million directly to MVC Capital stockholders. Barings BDC's adviser also entered into a credit support agreement with Barings BDC, for the benefit of the combined company, to protect against net cumulative unrealized and realized losses of up to $23 million on the acquired MVC investment portfolio over the next 10 years. Barings BDC will provide up to $15 million in secondary-market support via accretive share repurchases over a 12-month period in the event the combined company's shares trade below a specific level of NAV per share following the completion of the first quarterly period ended after the consummation of the transaction.
Blackstone, an asset manager with approximately $584 billion in AUM.	**DCI**, an asset management firm with approximately $7.5 billion in AUM.	Acquisition in which DCI will become part of Blackstone Credit. (terms not disclosed)
CC Capital Partners, a private investment firm and **Motive Partners**, a private equity firm.	**Wilshire Associates**, an investment and advisory firm with more than $1 trillion in assets under advisement and $73 billion in AUM.	Acquisition. (terms not disclosed)
FS KKR Capital Corp., a publicly traded BDC.	**FS KKR Capital Corp. II**, a publicly traded BDC.	NAV-for-NAV merger. In connection with the merger, the board of FSK approved an amended advisory agreement for the combined company that will permanently reduce its income incentive fee to 17.5% and the look back provision in advisory agreement will be removed. At the closing of the merger, the adviser has agreed to waive $90 million of incentive fees spread evenly over the first six quarters following the closing.
Macquarie Asset Management, an asset manager with approximately $554.9 billion in AUM.	**Waddell & Reed Financial, Inc.**, an asset manager with approximately $68 billion in AUM.	Acquisition for $1.7 billion, with Macquarie to sell Waddell & Reed's wealth management business to **LPL Financial Holdings Inc.** for $300 million upon closing of the transaction.
Morgan Stanley, a financial services firm that will have approximately $1.2 trillion in AUM and more than $5 billion following the transaction.	**Eaton Vance Corp.**, an asset management firm that has approximately $507.4 billion in consolidated AUM.	Acquisition for an equity value of approximately $7 billion. (further terms not disclosed)

M&A Transactions *(continued)*

Acquiror	Acquired or Target Company	Type of Transaction and Status
Mount Logan Capital Inc., an asset manager; and **Sierra Crest Investment Management LLC**, a RIA with approximately $4.5 billion in AUM.	**Resource America, Inc.**, an asset management company with approximately $4.3 billion in AUM.	Acquisition of certain assets. Upon closing Sierra Crest will become the investment advisor of Resource's closed-end interval fund, Resource Credit Income Fund. (further terms not disclosed)
North Square Investments, LLC, an investment management firm.	**Stadion Money Management, LLC**, an investment management firm with approximately $2.79 billion in AUM.	Acquisition of mutual funds Stadion Tactical Growth, Tactical Defensive and Triology Alternative Return. (terms not disclosed)
Portman Ridge Finance Corporation, a publicly traded business development company.	**Harvest Capital Credit Corporation**, a business development company.	NAV-for-NAV merger, and **Sierra Crest Investment Management LLC**, the investment adviser to Portman Ridge, will pay $2.15 million directly to HCAP stockholders.
Sun Life Financial Inc., a financial services firm that has $1,122 billion in AUM.	**Crescent Capital Group LP**, a credit investment manager with approximately $28 billion in AUM.	Acquisition of 51% interest, with an upfront payment of $276 million and a future continent payment of $62 million based on certain milestones. The transaction has a put/call option that will allow the transfer of remaining interests approximately five years from closing. (further terms not disclosed)
Victory Capital Holdings, Inc., an asset management firm with approximately $132.7 billion in AUM	**THB Asset Management**, an asset management firm with approximately $435 million in equity assets.	Acquisition. (terms not disclosed)

3rd Quarter 2020
Listed Closed-End Fund Initial Public Offerings

Aberdeen Standard Global Infrastructure Income Fund

Structure:	Non-diversified, closed-end management investment company.
Investment Objectives/Policies:	The Fund's investment objective is to seek to provide a high level of total return with an emphasis on current income. Under normal circumstances, at least 80% of the Fund's net assets (plus the amount of any borrowings for investment purposes) will be invested in U.S. and non-U.S. infrastructure-related issuers. The Fund considers an issuer to be infrastructure-related if (i) at least 50% of the issuer's assets consist of infrastructure assets or (ii) at least 50% of the issuer's gross income or net profits are attributable to or derived, directly or indirectly, from the ownership, management, construction, development, operation, utilization or financing of infrastructure assets.
Investment Adviser:	Aberdeen Standard Investments Inc.
Sub-Adviser:	Aberdeen Asset Managers Limited
Lead Underwriters:	UBS Securities LLC, Wells Fargo Securities, LLC, RBC Capital Markets, LLC and Oppenheimer & Co. Inc.

Nuveen Dynamic Municipal Opportunities Fund

Structure:	Diversified, closed-end management investment company.
Investment Objectives/Policies:	The Fund's investment objective is to seek total return through income exempt from regular federal income taxes and capital appreciation. The Fund seeks to achieve its investment objective by investing, under normal circumstances, at least 80% of its assets in municipal securities, the interest on which is exempt from regular U.S. federal income tax. The Fund's portfolio will be actively managed to invest across the entire municipal securities market, with the ability to allocate opportunistically and without limit to municipal securities of any credit quality (including below investment grade municipal securities) and maturity.
Investment Adviser:	Nuveen Fund Advisors, LLC
Sub-Adviser:	Nuveen Asset Management, LLC
Lead Underwriters:	Morgan Stanley & Co. LLC, BofA Securities, Inc., UBS Securities LLC and Wells Fargo Securities, LLC

3rd Quarter 2020 Listed Closed-End Fund Initial Public Offerings *(continued)*

BlackRock Capital Allocation Trust

Structure:	Non-diversified, closed-end management investment company.
Investment Objectives/Policies:	The Trust's investment objectives are to provide total return and income through a combination of current income, current gains and long-term capital appreciation. The Trust will invest in a portfolio of equity and debt securities. Generally, the Trust's portfolio will include both equity and debt securities. At any given time, however, the Trust may emphasize either debt securities or equity securities. In addition, the Trust may invest without limit in "junk bonds," corporate loans and distressed securities.
Investment Adviser:	BlackRock Advisors, LLC
Lead Underwriters:	BofA Securities, Inc., Morgan Stanley & Co. LLC, UBS Securities LLC, Wells Fargo Securities, LLC and Ameriprise Financial Services, LLC

4th Quarter 2020 Listed Closed-End Fund Initial Public Offerings

Cohen & Steers Tax-Advantaged Preferred Securities and Income Fund

Structure:	Non-diversified, closed-end management investment company.
Investment Objectives/Policies:	The Fund's primary investment objective is high current income. The Fund's secondary investment objective is capital appreciation. The Fund seeks to achieve its investment objectives by investing at least 80% of its managed assets (*i.e.*, net assets plus assets obtained through leverage) in a portfolio of preferred and other income securities issued by U.S. and non-U.S. companies, which may be either exchange-traded or available over-the-counter. In pursuing its investment objectives, the Fund seeks to achieve favorable after-tax returns for its shareholders by seeking to minimize the U.S. federal income tax consequences on income generated by the Fund.
Investment Adviser:	Cohen & Steers Capital Management, Inc.
Lead Underwriters:	Morgan Stanley & Co. LLC, BofA Securities, Inc., RBC Capital Markets, LLC, Stifel, Nicolaus & Company, Incorporated and Oppenheimer & Co. Inc.

4th Quarter 2020 Listed Closed-End Fund Initial Public Offerings *(continued)*

PGIM Short Duration High Yield Opportunities Fund

Structure:	Diversified, closed-end management investment company.
Investment Objectives/Policies:	The Fund's investment objective is to provide total return, through a combination of current income and capital appreciation. The Fund seeks to achieve its objective by investing primarily in a diversified portfolio of high yield fixed income instruments that are rated below investment grade, or considered by the sub-adviser to be of comparable quality. Under normal market conditions and after the initial investment period following this offering, at least 80% of the Fund's investable assets will be invested in a diversified portfolio of high yield fixed income instruments that are rated below investment grade with varying maturities and other investments (including derivatives) with similar economic characteristics. High yield fixed income instruments that are rated below investment grade (commonly referred to as "junk bonds") are regarded as having predominantly speculative characteristics with respect to the issuer's capacity to pay interest and repay principal.
Investment Adviser:	PGIM Investments
Sub-Adviser:	PGIM, Inc.
Lead Underwriters:	Morgan Stanley & Co. LLC, Wells Fargo Securities, LLC, RBC Capital Markets, LLC, Stifel, Nicolaus & Company, Incorporated and Oppenheimer & Co. Inc.

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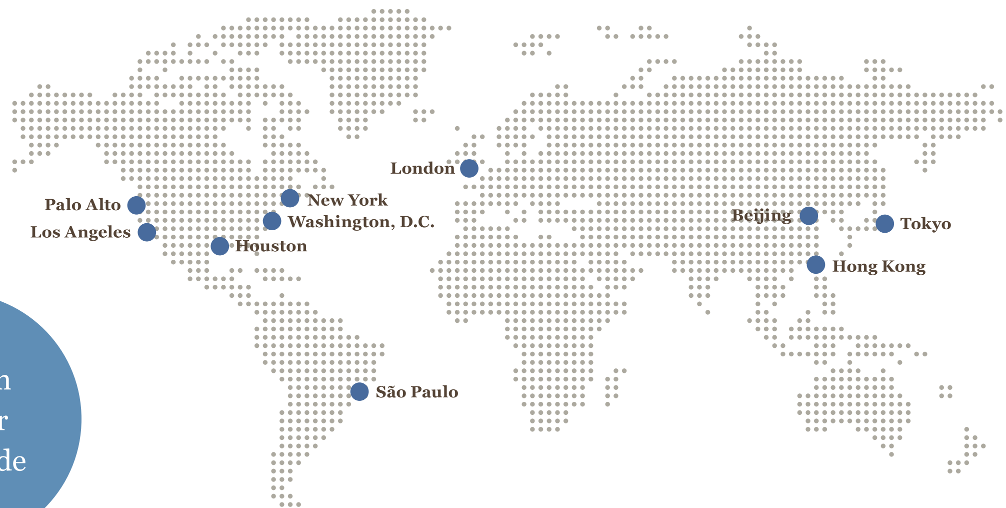

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