

Key considerations to prepare for closed-end fund offering reform

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JUNE 20, 2020

The SEC recently completed its modernization of the registration and offering rules for 1940 Act-registered closed-end funds, as directed by Congress in 2018.

While not as transformative as many had hoped, the reforms will improve the registration and offering process for closed-end funds.

There are a number of key changes that closed-end funds should prepare for in anticipation of, and following, the effective date of August 1, 2020.

LISTED CLOSED-END FUNDS: SHORT-FORM REGISTRATION STATEMENTS AND OTHER ENHANCEMENTS

The reforms will allow “seasoned” funds to utilize short-form registration statements and forward incorporation by reference.

Seasoned funds are listed closed-end funds that are current and timely in their 1934 Act reporting, have been registered under the 1940 Act for at least a year and have at least \$75 million in “public float” (excluding shares held by affiliates).

Once the new rules take effect, seasoned funds can file a short-form registration statement that omits certain information filed in the fund’s 1934 Act reports and forward incorporates by reference information filed in future 1934 Act reports after the registration statement becomes effective.

The short-form registration statement is subject to SEC staff review and comment before the SEC will declare it effective.

Once the short-form registration statement is effective, however, a fund will not have to undertake additional annual reviews by the SEC disclosure staff in order to update its financial statements during the life of the registration statement (for example, a three-year period for a shelf registration statement).

Funds that utilize short-form registration statements must include certain information, such as the senior securities table, fee and expense table and share price data, in their annual reports.

A listed closed-end fund that currently has an effective shelf registration statement will still need to file a new short-form shelf registration statement that is subject to additional SEC staff comments before it can take advantage of the new rules.

These funds may carry any unsold securities or unused registration fees from their current shelf registration statement over to the new short-form shelf registration statement in reliance on 1933 Act Rules 415(a)(6) or 457, respectively.

A subset of listed closed-end funds currently rely upon no-action letters from the SEC staff to file immediately effective post-effective amendments to their shelf registration statements pursuant to 1933 Act Rule 486(b) to update their financial statements and make non-material changes, subject to certain conditions.

The registration statement update process for unlisted closed-end funds will resemble the annual update process for mutual funds.

These staff positions can be relied on solely by the funds listed in each letter until the SEC staff withdraws the letters effective August 1, 2021. It is our understanding that the SEC staff will no longer issue these no-action letters now that the rulemaking is complete.

Finally, a small subset of listed closed-end funds that have at least \$700 million in public float will qualify as “well-known seasoned issuers” or “WKSIs” under the new rules.

WKSIs can file automatically effective registration statements that are not subject to SEC staff review and comment. These funds will have complete flexibility to take advantage of market opportunities without delay.

UNLISTED CLOSED-END FUNDS: AUTOMATIC EFFECTIVENESS OF REGISTRATION STATEMENT UPDATES

The registration statement update process for unlisted closed-end funds will resemble the annual update process for mutual funds.

Under current law “interval closed-end funds” that make periodic repurchase offers pursuant to 1940 Act Rule 23c-3 can use Rule 486 to make certain registration statement filings that become effective automatically, either immediately or after a certain period of time.



The new rules will allow an unlisted closed-end fund that continuously offers its securities in reliance on 1933 Act Rule 415(a)(1)(ix) to also utilize Rule 486. These funds are commonly referred to as “tender offer closed-end funds” because they typically provide liquidity to their investors by making periodic tender offers to repurchase their common shares.

In the future, a tender offer closed-end fund will be able to annually update its disclosure without the stress of this uncertainty.

The improvements are a welcome development. Tender offer closed-end funds currently face uncertainty as to whether their amended registration statements will be declared effective by the SEC in time to avoid suspensions of their continuous offerings, even when no material changes are proposed.

In the future, a tender offer closed-end fund will be able to annually update its disclosure without the stress of this uncertainty.

MODERNIZATION OF THE CLOSED-END FUND OFFERING PROCESS

IPOs and follow-on offerings by closed-end funds will be eligible to rely on rules providing safe harbors from certain “gun jumping” restrictions and allowing final prospectus delivery obligations to be satisfied through SEC filings. These rules have been utilized by operating companies for almost 15 years.

These changes, which include the ability to use “free writing prospectuses” and publish certain factual and forward-looking information, will be a welcome development for closed-end fund IPOs and other offerings.

NEXT STEPS

While there is still room for improvement, these reforms will nonetheless transform the closed-end fund registration and offering process. We expect the streamlined process will lead to an uptick in follow-on offerings over time.

Fund sponsors and underwriters must understand the scope of the changes to fully avail themselves of the benefits under the new rules upon effectiveness.

This article appeared on the Westlaw Practitioner Insights Commentaries web page on June 20, 2020.

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