INVESTMENT MANAGEMENT CLIENT ALERT

BY JOHN HUNT AND MICHAEL DAVALLA

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SULLIVAN & WORCESTER

If Adopted, Proposed SEC Rules Should Make it Easier for More Closed-End Funds and BDCs to Register and Offer their Securities

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The SEC has proposed amendments to its current rules under the Securities Act of 1933 (the "Securities Act") relating to the registration, communication, and offering process for certain business development companies ("BDCs") and registered closed-end funds (together with BDCs, "Affected Funds"). The proposed amendments would primarily (a) make "Short-Form N-2" available to significantly more exchange-listed Affected Funds, and (b) extend to a larger set of Affected Funds certain benefits currently reserved for Affected Funds that are "well-known seasoned issuers," including automatic shelf registration and pre-filing and post-filing communication flexibility.

These amendments have been proposed concurrently with similar amendments relating to certain operating companies using Form S-3. Sullivan's client alert on the proposed amendments as they relate to operating company issuers may be found here.

The proposed amendments are now available for public comment. Public comments are due July 27, 2026.

Proposed Amendments

1. Delayed Shelf Offerings

Short-Form N-2 currently allows "seasoned" Affected Funds, when conducting delayed shelf offerings, to omit certain information from their base prospectus and later provide that information in a post-effective amendment or, more commonly, in a subsequent report filed under the Securities Exchange Act of 1934 (the "Exchange Act")/the Investment Company Act of 1940 (the "1940 Act") and incorporated by reference into the Affected Fund's prospectus or statement of additional information. Currently, a seasoned Affected Fund may rely on Short-Form N-2 only if its public float is at least $75,000,000, it has been registered as an "investment company" under the 1940 Act during the immediately preceding 12 calendar months, and it has filed all required Exchange Act/1940 Act reports during that time.

The proposed amendments, if adopted as proposed, would expand eligibility for use of the Short-Form N-2 to a newly created category of issuers, "Eligible Listed Issuers." An "Eligible Listed Issuer" (which also includes a "Seasoned Eligible Listed Issuer" described more fully below) is an Affected Fund that is exchange-listed and has timely filed all required Exchange Act/1940 Act reports during the preceding 12 calendar months, or for as long as the Affected Fund has been required to file such reports, if shorter. Thus, an Eligible Listed Issuer is not subject to the $75,000,000 float minimum requirement or the 12-month Exchange Act/1940 Act reporting requirement.

2. Shelf-Offerings of Well-Known Seasoned Issuers

Affected Funds that currently are "well-known seasoned issuers" ("WKSI") may take advantage of a more flexible offering process than Affected Funds that are only seasoned Affected Funds. Among other things, a WKSI Affected Fund may register an unspecified amount of different types or classes of securities on an automatic shelf registration statement (i.e., effectively immediately upon filing) without specifying a total dollar amount to be allocated among various types or classes of securities. It also may pay registration filings fees in advance or on a "pay-as-you-go" basis each time there is a takedown from the shelf registration amount. It also may omit certain additional information from its base prospectus and exercise greater flexibility with respect to pre-filing and post-filing communications. Currently, a WKSI Affected Fund must have a public float of at least $700,000,000, it must be current with, and have timely filed, its 1940 Act reports, and it may not be subject to a judicial or administrative order arising out of a government action involving an anti-fraud provision of the federal securities laws.

The proposed amendments, if adopted as proposed, would expand the shelf-registration process currently available to WKSI Affected Funds to Seasoned Eligible Listed Issuers, which are Eligible Listed Issuers that have been subject to the Exchange Act/1940 Act reporting requirements for a period of at least 12 months.

Some Observations

We note the following:

- The proposed amendments maintain the current offering framework for unlisted closed-end funds and BDCs, that is, most interval funds, tender-offer funds, and non-traded BDCs. Those types of funds rely on rules specific to those fund types that are intended to accommodate their offering structures. The SEC notes that unlisted closed-end funds and BDCs currently benefit from self-registration provisions similar to the provisions of the proposed amendments applicable to Affected Funds.

- The proposed amendments would preempt state securities law registration and qualification requirements for all registered offerings, not just registered offerings of listed securities or registered offerings of investment company securities. Thus, registered offerings of unlisted securities, such as shares of unlisted BDCs, will be exempt from state securities law registration and qualification requirements as "covered securities," provided that they are sold to "qualified purchasers." As proposed, a "qualified purchaser" is any person to whom securities are offered or sold pursuant to an offering registered under the Securities Act.

- As part of the proposing release, the SEC also requested industry comments on a number of issues, including whether the proposed expansion of access to the Short-Form N-2 is appropriate and whether additional categories of funds should be permitted to pay registration fees on annual net basis as under Rule 24f-2 (which applies to mutual funds, ETFs and interval funds).

For More Information

This Client Alert has been prepared by John Hunt, Partner, and Mike Davalla, Counsel, in the Investment Management practice group of the international law firm of Sullivan & Worcester LLP.

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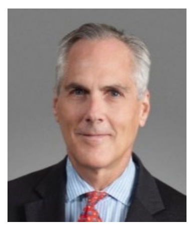

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