July 3, 2019

Ms. Vanessa Countryman
Acting Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549-1090

Re: Securities Offering Reform for Closed-End Investment Companies (File No. S7-03-19)

Dear Ms. Countryman:

This letter is submitted on behalf of the Federal Regulation of Securities Committee (the "Committee") of the Business Law Section of the American Bar Association ("ABA"), in response to requests for comment by the Securities and Exchange Commission ("Commission") with respect to the above-referenced proposed rule and form amendments regarding registration, communications, and offering processes for business development companies ("BDCs") and other registered closed-end funds ("registered CEFs", and together with BDCs, "Affected Funds").[1]

The comments expressed in this letter represent the views of the Committee only and have not been approved by the ABA's House of Delegates or Board of Governors and should not be construed as representing the policy of the ABA. Further, this letter does not represent the official position of the ABA Business Law Section and does not necessarily reflect the views of all members of the Committee.

The Committee appreciates the opportunity to comment on the Proposing Release and commends the Commission for its intention to create parity between Affected Funds and operating companies. While the Proposing Release takes many important steps toward achieving this goal, the Committee has several comments and concerns relating to the Proposing Release and its implementation, as briefly described below with more detailed discussions to follow.

- **Definition of Well-Known Seasoned Issuer**. In light of the fundamental differences between operating companies and Affected Funds in terms of business operations, transparency and investor protections, we believe that a substantially lower "size" threshold for well-known seasoned issuer ("WKSI") status is justified for Affected Funds. Moreover, we believe that with respect to a "size" test, the absence of a public float should not disqualify an Affected Fund from becoming a WKSI.

[1] Securities Offering Reform for Closed-End Investment Companies, Release Nos. 33-10619 (March 20, 2019) [84 FR 14448 (April 10, 2019)] ("Proposing Release").

- **Form 8-K Reporting Obligations**. The proposal would extend to registered CEFs the requirements to publicly disclose certain specified events and information on a current basis on Form 8-K. We believe requiring registered CEFs to report current information on Form 8-K is unnecessarily burdensome in light of existing disclosure requirements applicable to registered CEFs. Further, the Committee believes that the two new proposed reporting items, while tailored to Affected Funds, do not provide meaningful additional disclosure to investors and should not be adopted.

- **Interpretive Issues and Implementation Challenges**. Congress directed the Commission to implement certain securities offering reforms, which became self-implementing on March 24, 2019 pending the adoption of final rules. The level of detail necessary to easily navigate the changes that are currently applicable to BDCs, while provided in the Proposing Release, was not provided in the legislative directives. Accordingly, we request that the Commission or its staff provide guidance in the interim to assist BDCs in implementing such changes.

- **Impact on Interval Funds and Tender Offer Funds**. While Congress and the Commission intend to achieve parity with operating companies for registered CEFs, the Committee is concerned that the changes in the Proposing Release would generally impose regulatory burdens—along with corresponding costs of compliance—on tender offer funds and interval funds that would outweigh any benefits resulting from the proposed changes.

- **Discrepancy in Broker-Dealer Safe Harbors**. We believe that Rule 139b of the Securities Act of 1933, as amended (the "Securities Act") does not eliminate the disparities between operating companies and Affected Funds as intended by Congress and accordingly recommend that Rule 139 be amended in a way that eliminates the disparities and that Rule 139b be repealed.

- **Separate Registration Forms**. Rather than revising Form N-2, we recommend that the Commission create a separate short-form registration form for Affected Funds, as this would be more efficient from a practitioner's perspective than revising Form N-2, and would also be aligned with the approach for operating companies (e.g., Form S-3 vs. Form S-1).

- **Management Discussion of Fund Performance ("MDFP")**. We support the MDFP requirements as proposed by the Commission and do not recommend imposing additional or different MDFP requirements for registered CEFs.

I. Definition of Well-Known Seasoned Issuer

In the Proposing Release, the Commission counts among the potential benefits of the proposed rules the facilitation of "capital formation and possibly the lower cost of capital by improving access to the public capital markets for [Affected Funds]."[2] We believe this goal would be greatly advanced by establishing the criteria for WKSI status for Affected Funds in a manner that would benefit a greater portion of the universe of Affected Funds. As the Commission recognized, the "proposed rules would provide the most flexibility under the communications rules and the automatic shelf registration system to eligible WKSIs."[3] Also as noted by the Commission, Affected Funds benefit particularly from the greater flexibility to control the timing of their capital raising because of the need to quickly access the markets when their

[2] Proposing Release, at 151.

[3] Proposing Release, at 151.

shares are trading at a premium.[4] As discussed below, the operations, regulation and oversight of registered investment companies and BDCs are fundamentally different from operating companies and the Committee is of the view that these differences should be taken into account when determining the criteria for WKSI status.

As proposed, a registered CEF or BDC would, among other requirements, need to have a public float[5] of at least $700 million to qualify as a WKSI. The determination of public float is based on a public trading market for an issuer's common stock, such as a securities exchange or over-the-counter market. According to the Commission, there are 97 Affected Funds (14 listed BDCs and 83 listed registered CEFs) that meet the $700 million public float criterion as of June 30, 2018[6] out of an identified universe of 103 BDCs and 704 registered CEFs.[7] Thus, approximately 14% of BDCs and 12% of registered CEFs currently operating could (subject to meeting the other conditions) qualify for WKSI status.

In discussing its reasoning for applying to Affected Funds the same public float threshold for WKSI status as that used for operating companies, the Commission explains that the WKSI definition "is meant to capture issuers that are presumptively the most widely followed in the marketplace and whose disclosures and other communications are subject to market scrutiny by investors, the financial press, analysts, and others."[8] The Commission notes that the wide following of WKSI issuers by market participants supports the communication and registration flexibilities afforded to WKSIs. By contrast, the Commission notes that Affected Funds "have limited analyst coverage relative to operating companies and many have high levels of retail...investors."[9] The Commission further notes that Affected Funds also have relatively modest daily trading volumes and do not account for a significant percentage of capital raised.[10] The Commission found that based on these criteria it does not believe that Affected Funds

> would be likely to have a level of market following at lower levels of public float than operating companies that would justify a lower public float threshold or alternative metric to qualify as a WKSI. We are also not aware of alternative indicia of a market following for [Affected Funds] or any particular type of [Affected Funds] that would suggest a lower public float threshold or alternative metric in lieu of public float, would be appropriate.[11]

While the Committee acknowledges that the proposed minimum float requirement would achieve parity with operating companies regarding WKSI criteria, it urges the Commission to consider a much lower public float requirement for Affected Funds in light of the significant differences between operating companies and Affected Funds, including the substantial protections provided to Affected Fund investors by the Investment Company Act of 1940, as amended (the "Investment Company Act") and the simplicity and transparency of the businesses of Affected Funds as compared to operating companies.

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[4] Proposing Release, at 19 n. 27.

[5] The definition of "public float" for this purpose is the "aggregate market value of the voting and non-voting common equity held by non-affiliates." Proposing Release, at 11 n.12.

[6] Proposing Release, at 152.

[7] Proposing Release, at 145-146 (data as of September 30, 2018).

[8] Proposing Release, at 41 (citations omitted).

[9] Proposing Release, at 42.

[10] Proposing Release, at 42.

[11] Proposing Release, at 42-43.

Affected Funds registering the public offering of their securities with the Commission—like operating companies—are subject to the disclosure requirements of the Securities Act and the public reporting requirements of the Securities Exchange Act of 1934, as amended (the "Exchange Act"). Unlike operating companies, however, Affected Funds, as investment companies registered under the Investment Company Act (in the case of registered CEFs), or electing to be subject to the provisions of Sections 55 through 65 of the Investment Company Act (in the case of BDCs), are subject to the operating limitations, oversight requirements and investor protection provisions of the Investment Company Act and related rules.

The public scrutiny of large public operating companies that may result from having a substantial research analyst following is generally less significant in the context of Affected Funds because they are subject to comprehensive regulation under the Investment Company Act and related rules and have simple and transparent businesses. The incurrence of excessive levels of debt, dilutive equity issuances and internal self-dealing, for example, are subject to statutory prohibitions or limitations under the Investment Company Act. Affected Funds are limited in the amount of debt that they can issue relative to their total assets and are limited in their ability to issue multiple classes of capital stock.[12] Affected Funds are also subject to restrictions on their ability to issue common stock at a price below current NAV per share.[13] In addition, transactions between an Affected Fund and its affiliates are either prohibited or subject to stringent conditions.[14] Moreover, while Affected Funds may not receive the same level of coverage as operating companies from analysts or the financial press, their operations are simple and transparent, and they are subject to oversight by a board, a portion of whose members are statutorily mandated to be independent.[15] These "independent directors" are required to separately approve certain fundamental contractual arrangements—such as agreements between the Affected Fund and its investment adviser or principal underwriter—and are also charged with overseeing certain permitted transactions between the Affected Fund and its affiliates. In the words of the United States Supreme Court, the independent directors serve as "independent watchdogs" of investors' capital.[16] We respectfully submit that these provisions of the Investment Company Act, together with the other investor protection aspects of the statute, more than compensate for Affected Funds' lower level of research analyst coverage relative to large operating companies.

In light of the investor protections in place to govern the operations of Affected Funds, and the simplicity and transparency of their businesses, we believe the Commission should consider adopting a much lower public float threshold that would make WKSI status available to a much greater portion of Affected Funds that have listed securities. In addition, the Committee urges the Commission to consider alternatives to public float in order to allow larger unlisted Affected Funds to qualify as WKSIs.

Applying a large public float threshold to Affected Funds is burdensome because Affected Funds tend to have a relatively fixed asset base—and correspondingly stable public float—that is unlikely to increase significantly over time. Unlike operating companies, which may grow organically through greater sales or expansion into new product lines and thereby increase the value of their public float, Affected Funds generally grow only through returns on their investments. Additionally, in order to obtain pass-through tax treatment under Subchapter M of the Internal Revenue Code of 1986, Affected Funds are required to distribute substantially all of their ordinary income and capital gains to their investors annually.

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[12] *See* 15 U.S.C. 80a-18 (with respect to CEFs) and 15 U.S.C. 80a-60 (with respect to BDCs).

[13] *See* 15 U.S.C. 80a-23(b) (with respect to CEFs) and 15 U.S.C. 80a-62 (with respect to BDCs).

[14] *See* 15 U.S.C. 80a-17 (with respect to CEFs) and 15 U.S.C. 80a-56 (with respect to BDCs).

[15] *See* 15 U.S.C. 80a-10(a) (with respect to CEFs) and 15 U.S.C. 80a-55 (with respect to BDCs). *See also* 15 U.S.C. 80a-2(a)(19) (defining "interested person").

[16] *See Burks v. Lasker*, 441 U.S. 471, 484 (1979).

As a result, even if an Affected Fund is extremely successful in its investment efforts, it is not likely to grow substantially in net assets year-over-year. Because an Affected Fund's market value is generally based on its NAV, an Affected Fund is similarly unlikely to increase the size of its public float over time without issuing additional securities.

Under the Commission's proposals, whether an Affected Fund attains WKSI status is likely to be a function of the success of the fund's initial public offering. Affected Funds with access to larger distribution channels, or that are first to market with an investment strategy currently in high demand, are more likely to achieve and maintain WKSI status than other funds. This dynamic can also have the effect of granting WKSI status to an issuer that is relatively new to the market but has been marketed successfully, while denying WKSI status to a similar fund that may have been operating successfully for decades. Moreover, the Affected Funds obtaining WKSI status will be at a competitive advantage in seeking to access public markets to raise additional capital in follow-on offerings, furthering their scale and competitive advantage. As a result, smaller funds that would benefit from the ability to use automatically effective registration statements to quickly come to market during periods when their shares trade at a premium may miss the opportunities to raise capital that the proposed rules are designed to facilitate. As discussed above, shareholders in these smaller funds are unlikely to be disadvantaged by the lower level of market commentary about those funds relative to their larger peers, given the investor protections afforded them by the Investment Company Act.

The Committee believes that a lower public float amount is justified not only by the comprehensive regulation and other investor protections that benefit investors in Affected Funds, but also by the fact that Affected Funds, in contrast to operating companies, tend to have much simpler businesses and far greater transparency into their operations. Affected Funds generally describe their operations in terms of a stated investment objective and investment strategies that tend to remain constant over time. Thus, an investor is more likely to gain an understanding of both the Affected Fund's operations and its manager's skill in pursuing the investment strategy by reviewing the Affected Fund's performance over time irrespective of the size of the fund. Affected Funds also benefit from greater transparency. Affected Funds publish a schedule of their investments at least quarterly. Affected Funds also publish their NAVs at least quarterly, with many listed registered CEFs publishing their NAV weekly or daily. This level of transparency is vastly different from, and compares very favorably with, the information available for most operating companies, no matter how well followed by analysts or the financial press. We share the belief of the Commission that "the market will analyze this portfolio holdings information in a similar manner to how it analyzes financial statements for operating companies to determine changes in prospects for growth and performance."[17] Accordingly, in the Committee's view, an Affected Fund with a modest history of operations and public reporting (e.g., the 12 months of reporting specified in the registrant requirements for Form S-3) should be sufficiently familiar to investors to warrant the relaxed requirements on registration and communications with the public that are available to WKSIs.

Finally, we believe that with respect to a size threshold for WKSI eligibility of Affected Funds, an Affected Fund's NAV should be considered as an alternative to public float for purposes of determining WKSI status. Reliance on public float for determining WKSI status arbitrarily excludes unlisted or non-traded Affected Funds that have conducted public offerings registered on Form N-2, notwithstanding the substantial reporting and investor protections afforded shareholders of these funds by the Investment Company Act. It also presupposes —incorrectly, we believe, for the reasons discussed below—that the absence of a public trading market necessarily results in a lack of scrutiny of an unlisted fund by knowledgeable market participants. The Commission has expressed its concern that the absence of the market following associated with a large public float may leave investors with insufficient market insight

[17] Proposing Release, at 24.

into Affected Funds. We respectfully disagree. Shares of unlisted funds are rarely sold directly to the public by the fund. Rather, sales of shares of such funds are often made through financial intermediaries, such as financial advisers or brokers, that are likely informed about the fund, including its investment strategies, risks and performance history. Shares of unlisted funds may also be available through "fund supermarkets" or other distribution platforms. It is our understanding that these intermediaries, as well, will evaluate a fund's history and performance before including the fund's shares on their platforms. A fund with a significant operating history or large total NAV is likely to have attracted the attention of financial intermediaries and distribution platforms. Financial intermediaries and distribution platforms may be an additional source of information on the fund, along with the fund's public disclosures and periodic reports. Also, as discussed above, the Investment Company Act regulations applicable to Affected Funds mandate substantial public reporting and provide considerable investor protections that are not available to shareholders of operating companies.

II. Form 8-K Reporting Obligations

a. Proposal to Require Form 8-K Reporting by Registered CEFs

In the Proposing Release, the Commission requested general comment on feasible alternatives to its proposal to require registered CEFs that are reporting companies under Section 13(a) or Section 15(d) of the Exchange Act to report on Form 8-K.[18] Acknowledging the existing reporting regime, the Commission noted that approximately 73% of registered CEFs are listed on an exchange and already subject to exchange rules requiring prompt disclosure of certain information.[19] In addition to exchange-mandated disclosure, registered CEFs may furnish information on Form 8-K to satisfy public disclosure requirements under Regulation FD.[20] Thus, as the Commission points out, certain items in Form 8-K are substantively the same as or similar to existing disclosure requirements for registered CEFs, although the timing of the disclosure obligations differ.[21] The Commission references the comparable disclosure requirements in registered CEFs' semi-annual or annual shareholder reports and notes that Form 8-K would require disclosure within four business days of the relevant event, while the existing regime calls for disclosure on an annual or semi-annual basis.[22]

We respectfully submit that extending Form 8-K reporting requirements to registered CEFs is unnecessary because it is unlikely to result in registered CEFs reporting meaningful new information to shareholders that is not already reported under the existing reporting regime applicable to registered CEFs. For registered CEFs that are listed on a national securities exchange, for example, the proposed Form 8-K reporting obligations are largely duplicative of existing exchange rules that require the public release of any news or information that might reasonably be expected to materially affect the market for their securities.[23] The proposed Form 8-K reporting obligations are similarly duplicative of the obligations of continuously-offered registered CEFs to promptly announce important changes to their disclosure through prospectus supplements or post-effective amendments. We do not believe the proposed reporting obligations would

[18] Proposing Release, at 104.

[19] Proposing Release, at 99.

[20] Proposing Release, at 99.

[21] Proposing Release, at 101. For example, the Commission notes that registered CEFs are generally required to provide information required under Item 4.01 (Changes in Registrant's Certifying Accountant) and Item 5.07 (Submission of Matters to a Vote of Security Holders) of Form 8-K in their semi-annual or annual shareholder reports.

[22] Proposing Release, at 101.

[23] *See, e.g.*, New York Stock Exchange Listed Company Manual Section 202.05.

serve to communicate any meaningful new information to investors in these Affected Funds that such investors do not already receive in a timely manner through press releases or prospectus amendments.

The Commission notes that it believes shareholders would benefit from standardizing the current information that all Affected Funds must disclose and making this information more accessible in a central location on the Commission's Electronic Data Gathering, Analysis and Retrieval system ("EDGAR").[24] However, the Commission does not support this belief by reference to any investor complaints or inadequacies in the current reporting system. In our view, the additional administrative burden and cost to registered CEFs of monitoring and otherwise ensuring compliance with the largely duplicative reporting obligations contemplated by the proposal outweigh any marginal benefit of uniform and centralized reporting, particularly in light of investors' current expectation to be notified of material events through press releases and applicable EDGAR filings. As an alternative, we believe that requiring listed registered CEFs to file press releases containing material information on Form 8-K, similar to how continuously-offered registered CEFs file prospectus supplements on EDGAR, would achieve the Commission's goal of centralized reporting without significant additional burden to listed registered CEFs.

Further, we believe that imposing Form 8-K reporting obligations without further guidance from the Commission on the application of certain reporting items to registered CEFs would lead to inconsistent compliance. The Commission acknowledged that data shows "BDCs did not file any reports under 7 of the 23 mandatory reporting items reflected in Item 1.01 through Item 5.08 over a 3-year review period, and there was a relatively low volume of reporting on several other items."[25] The low frequency at which BDCs report on Form 8-K illustrates that requiring registered CEFs to report on Form 8-K is unlikely to result in shareholders' receiving significant meaningful additional information. We believe that under the existing reporting regime investors in registered CEFs are already adequately and timely informed of material changes that may impact their investment decisions, and so the new Form 8-K reporting obligations would only serve to increase the administrative burden and operating expenses of registered CEFs by imposing duplicative monitoring and filing responsibilities.

b. Proposed Form 8-K Reporting Items

The proposal would also amend Form 8-K to add two new reporting items for Affected Funds:

- Item 10.01: material changes to investment objectives or policies; and
- Item 10.02: material write-downs in fair value of significant investments (an investment would be considered significant if an Affected Fund's investment in a portfolio company exceeds 10% of its total assets).

With respect to Item 10.01, we believe Affected Funds' existing reporting requirements are adequate to ensure timely notification to investors of material changes to investment objectives and policies. Affected Funds currently disclose information about material changes to investment objectives or policies through a post-effective amendment to a registration statement (in the case of a fund that is selling its securities in a delayed or continuous offering) or a periodic report. Listed Affected Funds would also issue a press release as discussed above. We agree with the Commission as to the importance of this information to investors and recognize the difficulty faced by retail investors in ascertaining an Affected Fund's investment objectives and policies between post-effective amendments or periodic reports if there has been a change to such objectives or policies. However, the proposed Form 8-K requirement would not address

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[24] Proposing Release, at 100-01.

[25] Proposing Release, at 105.

the practical difficulties faced by all investors in determining the current investment objective and policies of an Affected Fund that does not make available such information on a voluntary basis. In particular, many Affected Funds were organized many years ago, and since the relevant information may be spread among the prospectus used for the Affected Fund's most recent public offering (which may have taken place years or even decades ago), proxy statements and reports to shareholders spanning many years, it can be a burdensome undertaking to piece such information together. Form 8-K is designed for issuers that file annual reports on Form 10-K that supersede the information in previously filed Forms 8-K, but that would not be the case for Affected Funds that are not BDCs, meaning that issues raised by the current system would soon be exacerbated if the Commission's proposal to require the filing of Forms 8-K by Affected Funds is adopted as proposed.

As an alternative to the new Form 8-K reporting requirement, we suggest the Commission consider requiring any Affected Fund to disclose its current investment objectives and policies on its website, and to update the disclosure of investment objectives and policies in the event of any changes. We believe this approach would more effectively facilitate retail shareholder access to an Affected Fund's current investment objectives and policies than a new Form 8-K reporting requirement, which would suffer from the problems discussed in the preceding paragraph.

With respect to Item 10.02, we also believe the requirement to disclose a material write-down in fair value of a significant investment should not be imposed on Affected Funds. The Commission likens the requirement to an existing requirement in Form 8-K applicable to operating companies to report a material impairment to an asset (such as goodwill, accounts receivable or a long-term asset).[26] The Committee notes that, unlike operating companies, the primary activity of Affected Funds is investing in securities, which frequently change in value, sometimes significantly, in the ordinary course. While a material change in the value of a balance sheet asset of an operating company may be an unusual event for which special disclosure is appropriate, a material change in the value of a portfolio security held by an Affected Fund is not at all unusual and the Committee does not believe such an event should trigger a special filing. The Committee further notes that Affected Funds publicly report their NAVs at regular intervals, and believes that given the businesses of Affected Funds, NAV is the information investors find most relevant. If the Commission nevertheless decides to adopt this proposed new item, the Committee asks that the item be revised to: (A) exempt Affected Funds that publish daily NAV since, as noted above, the Committee believes that investors reasonably focus on NAV rather than a component of NAV; (B) apply only to write-downs in the fair value of investments for which there are no readily available market quotations; and (C) clarify that the point of reference for determining whether the requirement to file an 8-K is triggered by a write-down is the value as reflected in the Affected Fund's most recent publicly disclosed NAV.

III. Interpretive Issues and Implementation Challenges

The Small Business Credit Availability Act (the "SBCAA"), enacted on March 23, 2018, contains Congressional directives aimed at providing parity in securities offering regulation between BDCs and operating companies.[27] Specifically, the SBCAA requires the Commission to make certain revisions described therein to its rules and Form N-2 to permit BDCs to use the securities offerings and registration process reforms made available by the Commission to operating companies in 2005, in each case, no later than one year after the date of enactment of the SBCAA.[28] The SBCAA further provides that if the Commission fails to complete the revisions required therein by the specified time frame, a BDC, "during

[26] Proposing Release, at 106.

[27] Title VIII of the Consolidated Appropriations Act, 2018, Pub. L. 115-141, 132 Stat. 348 (2018).

[28] Sections 803(b) and (c) of the SBCAA.

the period beginning on the date that is 1 day after 1 year after the date of enactment of [the SBCAA] and ending on the date that the Commission completes those revisions," may deem those revisions as having been completed in accordance with the actions required to be taken by the Commission thereunder.[29] The revisions required by the SBCAA became self-implementing as of March 24, 2019 and will remain in effect until the final rules adopted by the Commission thereunder become effective. During this interim period, however, BDCs may face interpretive issues and implementation challenges, which may not be resolved until after the final rule and form amendments become effective. This is because the revisions mandated by the currently effective SBCAA are inherently less detailed and prescriptive than the proposed revisions in the Proposing Release (and presumably the revisions finally adopted by the Commission), and may not contain the level of detail necessary for BDCs to easily navigate the changes to the securities offering and registration process.

Accordingly, the Committee requests that the Commission provide guidance to assist BDCs in navigating the reforms to the securities offering and registration process during the interim period until the adoption of a final rule. For example, under the SBCAA, Congress directed that the Commission revise (1) Rule 405 under the Securities Act "(i) to remove the exclusion of a [BDC] from the definition of the term 'well-known seasoned issuer' under that section; and (ii) to add a registration statement filed on Form N–2 to the definition of the term 'automatic shelf registration statement' under that section"[30] and (2) Rule 415 to allow BDCs to conduct certain offerings on a continuous or delayed basis.[31] In its interim guidance, the Commission should clarify how eligible BDCs should use the current Form N-2 for short-form registration in the context of the more streamlined registration process under the SBCAA, since Form N-2 currently lacks a short-form version.

Of note, the Economic Growth, Regulatory Relief, and Consumer Protection Act (the "EGRRCPA") contains similar Congressional directives for certain types of registered CEFs, with a specified timeline of no later than two years after the date of enactment of the EGRRCPA.[32] Similar to the SBCAA, the EGRRCPA further provides that if the Commission fails to complete the revisions required therein by the specified time frame, registered CEFs "shall be deemed to be an eligible issuer under the final rule of the Commission titled 'Securities Offering Reform' (70 Fed. Reg. 44722; published August 3, 2005)."[33] Thus, if a final rule is not adopted before May 24, 2020, the interpretive issues and implementation challenges faced by BDCs under the SBCAA would also be presented for registered CEFs under the EGRRCPA.

IV. Impact on Interval Funds and Tender Offer Funds – Imposition of Regulation and Costs Without Benefits

a. Benefits and Costs Imposed on Continuously-Offered Funds and Consistency with Expressed Intent of Proposals

The Commission describes certain of its proposed actions as intended to bring parity of treatment for Affected Funds. In significant ways, however, the proposals would create and/or exacerbate unnecessary regulatory distinctions among types of Affected Funds. In this regard, certain of the Commission's proposals, which extend beyond the legislatively mandated changes, would treat

[29] Sections 803(d) of the SBCAA.

[30] Section 803(b)(2)(A) of the SBCAA.

[31] Section 803(b)(2)(J) of the SBCAA.

[32] *See* Section 509(a) of the EGRRCPA.

[33] *See* Section 509(b) of the EGRRCPA.

continuously-offered Affected Funds (both interval funds and tender offer funds) differently. The proposals would also exacerbate regulatory distinctions between tender offer funds and interval funds under the Securities Act without any stated justification. Although interval funds would gain some benefits from the proposals, such as extension of Rule 24F-2 coverage by an amendment to the rule, interval funds' investors would also bear costs from interval funds' becoming subject to new requirements under other proposed changes. Additionally, unlike interval funds, other continuously-offered Affected Funds, principally tender offer funds, would gain no benefits at all from the proposals. Investors in tender offer funds would be forced to absorb additional expense from compliance with new regulation without any ability to benefit from other proposed rule changes.[34] The Commission should consider whether imposing additional regulation and costs, without any benefits in the case of tender offer funds and privately placed Affected Funds, is justified under both the legislative purposes that led to the rulemaking mandate and the Commission's stated goals of creating parity in application of those proposals that extend beyond the legislatively mandated reasons for the overall rulemaking.

b. Extension of Rule 24F-2 to all Continuously-Offered Funds

As noted, although subject to proposed new regulations, interval funds would receive benefits under the proposals. Specifically, the Committee supports the proposal to extend Rule 24F-2 to interval funds by allowing such funds to register an indefinite amount of shares under the Securities Act and to pay for such registration on an annual net basis. These changes would benefit interval fund investors by simplifying legal processes and reducing expenditures and fund administration, and would reduce the potential for inadvertent unregistered sales, as well as reflecting the general similarity under the Securities Act of continuously-offered funds to other funds allowed to rely on the rule.

In addition, in response to the Commission's specific request for comment, the Committee recommends allowing tender offer funds also to rely on Rule 24F-2. There is no practical difference in the offering and sales process of interval funds and tender offer funds under the Securities Act, and so the Committee is aware of no justification to treat interval funds and tender offer funds differently under the Securities Act. All funds must register securities under the Securities Act in order publicly to offer, advertise and sell. Operational distinctions under the Investment Company Act between the different types of continuously-offered investment companies have little to no bearing on the process of registering and selling securities under the Securities Act. In particular, the choice by a fund to rely on Rule 23c-3 as an interval fund or instead to conduct tender offers typically turns on particularities of a fund's investment strategy, which are largely if not entirely irrelevant to whether the fund makes a public offering. For example, tender offer funds that make a public offer but which are partnerships for tax purposes cannot under applicable tax law rely on Rule 23c-3.[35] Such funds, which are precluded from being interval funds, should not for reasons unrelated to the Securities Act (or the Investment Company Act) be in effect penalized and subject to a different burden under the Securities Act.

In response to the request for comment on the definition of a tender offer fund for possible inclusion in such an amended rule, the Committee suggests that the Commission could use "a continuously-offered

[34] In addition, all continuously-offered registered CEFs, whether interval funds or tender offer funds, that choose to make private placements rather than public sales would become subject to new regulation without the benefits offered by the proposed changes, as none of the beneficial proposals would apply to such funds.

[35] Adoption of the fundamental policy on repurchases required by Rule 23c-3, and the resulting "guaranteed liquidity," would in many cases under tax law result in an investment company that is a tax partnership being deemed to be offering the substantial equivalent of a trading market, resulting in treatment of the partnership as a corporation and in double taxation of investors. Such funds in practice may conduct tender offers at the discretion of the fund's board, which in practical effect mirror an interval fund's operation but without the ability to choose to rely on Rule 23c-3.

registered closed-end investment company or business development company relying on Rule 13e-4 under the Exchange Act to repurchase such company's securities."[36]

c. Extension of Rule 486 to All Continuously-Offered Affected Funds

To further the goal of parity, the Committee is of the view that the Commission should, as contemplated in its request for comment in the proposals, permit all types of continuously-offered Affected Funds to rely on Rule 486. The proposals would apply Rule 486(b) to shelf offerings conducted by listed registered CEFs. As noted above, there are no practical or legal differences in the sale under the Securities Act of securities of Affected Funds that continuously offer securities, regardless of their types – the requirements as to registration, offering and public sale of securities under the Securities Act apply equally, so the methods used to register securities of such funds should apply uniformly. The Committee is not aware of any justification for disparate treatment for registration by tender offer funds, which would be the only closed-end funds that conduct a continuous offering that could not rely on Rule 486 under the proposals.[37] Allowing tender offer funds to use Rule 486 would be consistent with the stated goal of parity, and particularly so in light of the lack of benefits applicable to continuously-offered Affected Funds in the proposals relative to the imposition of additional burdens. Specifically, the Commission should extend the Securities Act registration process in Rule 486, currently applicable only to interval funds, to all continuously-offered Affected Funds that make a public offering.

Currently, investors in tender offer funds must bear the significant expense of seeking an annual declaration of effectiveness by the Commission staff of annual update amendments to registration statements, despite offering securities in a manner substantially indistinguishable from interval funds. The Committee suggests that the Securities Act amendment process should not apply differently to similarly or identically situated funds. Applying Rule 486 to tender offer funds would not deprive the Commission staff of the ability to review a fund's registration statement. An initial registration statement on Form N-2 must be declared effective by the staff, and would not become either automatically or immediately effective under Rule 486.[38] Any material amendment thereto also would be subject to staff review, under Rule 486(a), and would not become effective immediately. Tender offer fund investors, however, would benefit substantially from application of Rule 486, and particularly Rule 486(b) in the annual update process where no material changes to a registration statement have occurred. Currently, tender offer funds must take the time and expense of undergoing an annual staff review of a registration statement even where no changes other than immaterial updates and updating of audited financial information are made – these are currently the subject of immediate effectiveness under Rule 486(b) for interval funds.[39] As a safeguard, immediately

[36] The Commission staff commonly uses such a descriptive formulation to describe tender offer funds in notices of exemptive application filed by such funds. Alternatively, a similar definition could be used in such an amended rule, such as "a registered closed-end investment company and business development company making a continuous offering of securities under Rule 415 under the Securities Act and relying on Rule 13e-4 under the Exchange Act to repurchase such company's securities."

[37] As noted above, some tender offer funds may desire to rely on the interval fund rule, but are partnerships and precluded from such reliance. Others may chose not to so rely based on investment strategies that are incompatible with the rule's requirements. Neither cause is cause for disparate legal treatment under the Securities Act.

[38] While an open-end fund may add a series by filing a post-effective amendment that will become effective automatically after 75 days pursuant to Rule 485(a)(2), there is no similar provision under Rule 486 for new BDCs or CEFs to become automatically effective.

[39] The Commission's staff has stated policies allowing a registrant to request limited or no review of amendments that do not make material changes to a registration statement. In the experience of some members of the Committee, such requests have not been treated uniformly, which adds to legal costs of tender offer funds and can create timing and cost disparities among funds.

effective filings under Rule 486(b) are subject to certification by submitting funds/counsel regarding lack of material changes. Under the proposal, other continuously-offered investment companies and shelf offerings conducted by listed funds, but not offerings by tender offer funds, would be able to rely on Rule 486. There is no justification for such differences in registration for funds that otherwise offer and sell in the same manner as tender offer funds under the Securities Act.

V. Discrepancy in Broker-Dealer Safe Harbors

In the SBCAA, Congress directed the Commission to revise Rule 139 so that Rule 139 would apply to BDCs. On November 30, 2018, the Commission adopted Rule 139b of the Securities Act, which creates a safe harbor for the publication of research reports by broker-dealers participating in the securities offerings of registered CEFs, BDCs and certain other funds.[40] Accordingly, in the Proposing Release, the Commission stated that it is not proposing any changes to Rule 139, as the Commission believes Rule 139b "satisfies the directives of the [SBCAA] and [EGRRCPA] by extending [R]ule 139's safe harbor to research reports on Affected Funds and is consistent with Congress's core objective regarding research reports covering these funds."[41] However, Rule 139b contains certain exclusions from the safe harbor that are not present in Rule 139, which applies to BDCs pursuant to the Congressional mandate set forth in the SBCAA until at least publication of a final rule. One such exclusion is the "affiliate exclusion," which prevents the Rule 139b safe harbor from protecting research reports by a broker or dealer that is an investment adviser (or an affiliated person of an investment adviser) for the covered investment fund.[42] As such, the Committee is concerned that the Proposing Release does not eliminate the disparities as intended by Congress, and recommends that Rule 139 be appropriately amended to cover Affected Funds, and that Rule 139b be repealed.

VI. Additional Considerations

Separate Registration Forms. In the Proposing Release, the Commission requested comment on whether it should create a separate registration form specifically for Affected Funds to file a short-form registration statement, rather than amending Form N-2.[43] We acknowledge that Congress specifically directs the Commission to "revise" Form N-2 in accordance with the specified reforms.[44] As practitioners, however, we believe that it would be convenient and appropriate to have a separate short form registration form. Having a separate short form would be consistent with the Commission's longstanding practice for operating companies (see, e.g., Form S-3 vs Form S-1, and Form F-3 vs. Form F-1), and thus consistent with the overarching Congressional objective to attain parity between Affected Funds and operating companies.

Management Discussion of Fund Performance. The Commission proposes that registered CEFs be required to include MDFP in their annual reports, similar to mutual funds and ETFs, and asks for comment on a large number of matters. The Committee supports having the same MDFP requirements for registered CEFs and for registered mutual funds and ETFs, and believes that it would not be appropriate to impose operating company-type management's discussion and analysis requirements upon registered CEFs or that there be special and different MDFP requirements for registered CEFs. The Committee notes that

[40] Covered Investment Fund Research Reports, SEC Rel. Nos. 33-10580; 34-84710; IC-33311 (Nov. 30, 2018) (the "Adopting Release").

[41] Proposing Release, at 58.

[42] Adopting Release, at 8.

[43] Proposing Release, at 30.

[44] Sections 803(c) of the SBCAA.

the MDFP requirements are flexible enough for registered CEFs to highlight any special matters that they believe to be appropriate, and that to the extent the Commission determines to take a fresh look at MDFP requirements, this should not be done in a manner that would initially affect only registered CEFs.

* * *

The Committee appreciates the opportunity to comment on the Proposing Release and respectfully requests that the Commission consider the recommendations set forth above. We are available to meet and discuss these matters and to respond to any questions.

Very truly yours,

Robert E. Buckholz
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