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January 4, 2021

Via Email to rule-comments@sec.gov

Ms. Vanessa A. Countryman
Acting Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: **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**
Release Nos. 33-10814; 34-89478; IC-33963 (the "Proposing Release")
File No. S7-09-20

Dear Ms. Countryman:

We are submitting this letter in response to the rule proposal referenced above. Our comments reflect our experience representing public companies, registered investment companies and business development companies ("BDCs") with respect to their capital raising activities and public reporting obligations. While we have discussed the Proposing Release with certain of our clients, our comments reflect only the views of those attorneys at our firm who regularly represent BDCs and not those of any client.

Proskauer has an interdisciplinary BDC practice, and we regularly advise clients on all aspects of BDCs, including on regulatory, financing, capital markets, tax, governance and other transactional matters. Our clients include BDCs, their investment advisers, underwriters and independent directors. Over the past five years, Proskauer has represented approximately half of the public BDCs and has been a key player in a majority of the initial public offerings by BDCs since 2015.

We appreciate the efforts of the U.S. Securities and Exchange Commission (the "Commission") to comprehensively modify the mutual fund and exchange-traded fund ("ETF") disclosure framework in order to better serve the needs of retail investors. In particular, we support the Commission's proposal to amend the disclosure requirements under Form N-1A for Acquired Fund Fees and Expenses ("AFFE") in mutual fund and ETF prospectuses by permitting mutual funds and ETFs that invest 10% or less of their total assets in acquired funds to omit the AFFE line item in the fees and expenses table and instead disclose the amount of the fund's AFFE in a footnote to that table.

If adopted, those proposed amendments would represent a significant step towards addressing certain undesirable and, we believe, disproportionate and unintended impacts of the current AFFE disclosure requirements on investments in BDCs by mutual funds and ETFs. As the Commission is aware, the current disclosure requirements inappropriately inflate the expense ratios of mutual funds and ETFs that are disclosed in their prospectuses through what effectively amounts to double-counting of a

BDC's operating expenses. This required disclosure led certain index providers, such as Standard & Poor's and FTSE Russell, to exclude BDCs from their indices starting in 2014.

The Proposed Approach

The proposed AFFE amendments would eliminate this disincentive and encourage the BDC industry to approach the index providers to discuss revisions to their inclusion criteria. Obvious benefits could ensue. For example, if BDCs were again included in the indices, we believe trading volumes in the common stock of BDCs would increase, which could decrease the discounts to net asset value at which many BDCs trade. This, in turn, may lead to greater investments in BDCs, especially by institutional investors, including mutual funds and ETFs that track those indices, and improve BDCs' ability to raise equity capital in the public markets. This result would be consistent with the SEC's stated objective in adopting the AFFE disclosure requirement in 2006, namely to not have an "adverse impact on capital formation."[1] It also would be consistent with the efforts behind the Commission's rulemaking last year with respect to offering reform to provide equal access to the capital markets for BDCs (as well as registered closed-end investment companies) alongside operating companies.[2]

Alternative Approach

Alternatively, the Commission could amend the AFFE provisions of Form N-1A to permit a mutual fund or ETF whose investment objective is to replicate a securities index (with respect to all or a portion of its portfolio) to omit from the AFFE the expenses of BDCs if a minor portion of the securities index consists of BDCs. In such cases, the index fund should be viewed as investing in a security that happens to be a BDC rather than seeking to sub-contract a portion of its investment responsibilities. The BDC expenses may be viewed as analogous to the cost of goods sold of an operating company and thus not considered an expense of the mutual fund or ETF. This approach would/could eliminate the need for footnote disclosure and for investment advisers to continually monitor the 10% threshold. In addition, it would eliminate the possibility that fund expenses vary widely from year to year if/when the 10% threshold is crossed or uncrossed. This alternative approach is more precise than the proposed approach because it would not permit an actively managed fund to ignore the AFFE of an acquired fund through which it sought investment exposure (regardless of whether it is a BDC) as long as it limits itself to no more than 10%.

We do not believe the proposed rulemaking with respect to AFFE disclosures (or the alternative approach) will result in mutual fund and ETF shareholder confusion regarding the fees that they are paying on their investment in a particular mutual fund or ETF. We note that the AFFE disclosure requirements do not impact the financial statements of mutual funds or ETFs, including their net asset value per share calculations. The required inclusion of the pro rata expense of investing in a BDC (or any other acquired fund) only impacts the disclosure in the fees and expenses table in a fund's prospectus. Mutual funds and ETFs often disclose, by a footnote to the fees and expenses table, the difference as the total expense ratio shown in the table will not align with the total expense ratio that appears in the

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[1] Fund of Funds Investments, Investment Company Act Rel. No. 27399 (June 20, 2006) at pg. 48.

[2] Securities Offering Reform for Closed-End Investment Companies, Investment Company Act Rel. No. 33836 (April 8, 2020).

financial statements of the mutual fund or ETF. Permitting mutual funds and ETFs that do not invest material assets in BDCs (or other acquired funds) to footnote those expenses should better align the bottom line disclosure in the fees and expenses table to the financial statements of those mutual funds and ETFs.

The Commission has requested comment as to whether AFFE disclosure requirements should also be amended in Forms N-2, N-3, N-4 and N-6 for other types of investment companies. We recommend that the Commission modify the AFFE disclosure requirements in these forms in the same manner as the proposed amendments to Form N-1A, so as to create parity among all types of investment companies and their filings. For example, interval funds, subject to receipt of exemptive relief from the Commission, may continuously offer multiple classes of shares through similar distribution channels used by mutual funds. It would serve no public policy purpose and would be a disparate outcome for an interval fund to be subject to different AFFE disclosure obligations than a mutual fund solely because it is a Form N-2 registrant.

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We appreciate the opportunity to comment on this important proposal. In the event the Commission or the staff has any questions about our comments, please do not hesitate to contact William J. Tuttle, Nicole M. Runyan or Robert E. Plaze of this firm at

Very truly yours,

Proskauer Rose LLP

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