SIMPSON THACHER & BARTLETT LLP
900 G STREET, N.W.
WASHINGTON, DC 20001
(202) 636-5500

FACSIMILE (202) 636-5502

January 14, 2016

Mr. Brent J. Fields
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: File No. S7-16-15
Open-End Fund Liquidity Risk Management Programs; Swing Pricing; Re-Opening of Comment Period for Investment Company Reporting Modernization Release
Release Nos. 33-9922; IC-31835 (the "Release")

Dear Secretary Fields:

We welcome the opportunity to comment on the new rule and amendments proposed by the U.S. Securities and Exchange Commission (the "Commission") with respect to liquidity risk management. Simpson Thacher & Bartlett LLP has significant experience advising registered closed-end investment companies ("closed-end funds") and their sponsors, advisers and underwriters. While our comments are informed by our experience representing closed-end funds, we are submitting these comments on our own behalf, and the views contained herein do not necessarily reflect the views of any of our clients.

Overview

In the Release, the Commission appropriately acknowledges the differing liquidity needs of open-end and closed-end funds. We wish to address two specific items as to which comments were solicited by the Commission regarding closed-end funds. First, we support the Commission's proposal to keep closed-end funds outside of the scope of proposed rule 22e-4, a new rule proposed under the Investment Company Act of 1940, as amended (the "1940 Act"), as closed-end funds do not have the same liquidity needs as other forms of investment companies. Second, we recommend that the Commission allow closed-end funds the option of utilizing swing pricing, as it is possible that swing pricing could benefit certain closed-end funds, and hence the investors in such funds, and the Commission should not foreclose this option. In addition to responding to two comments solicited by the Commission, we address the guidance regarding cross-trades pursuant to rule 17a-7 under the 1940 Act included in the Release and note that in finalizing this guidance the Commission should consider that closed-end funds may engage in cross-trades.

Closed-end funds, including closed-end interval funds and unlisted closed-end funds, should not be included within the scope of proposed rule 22e-4.

We agree that closed-end funds should not fall within the scope of proposed rule 22e-4. As the Commission discussed in the Release, closed-end funds do not issue redeemable securities and are not subject to Section 22(e) of the 1940 Act. The closed-end structure for investment companies predates the 1940 Act by almost fifty years, and the Congressional determination to exclude closed-end investment companies from Section 22(e) reflects an understanding that the closed-end structure is in many instances predicated on the more long-term nature of the investments that may be held in such funds. The Commission has long recognized that closed-end funds typically invest in longer-term investments than open-end funds, as discussed in the initial study of the industry that the Commission submitted to Congress in 1938.[1]

Closed-end funds serve an important role in providing investors with access to investments and investment strategies that are shielded from the necessity of entering or exiting an investment, or augmenting or reducing the size of a position in an investment, as a result of daily inflows and outflows of other investors in a fund. As a result, closed-end funds can pursue strategies that are unavailable to open-end funds, although some strategies that might be accomplished in an open-end structure are also often pursued in a closed-end structure. In addition, investors in publicly-traded closed-end funds benefit from intra-day liquidity associated with exchange trading. Put another way, the very fact that closed-end funds do not have to manage to particular liquidity targets is a key reason why such funds are created in the first place, and why investors seek to purchase them. Thus, it is our view that the imposition of any liquidity determination requirement on a closed-end fund would be unduly burdensome, as it would be contrary to the very *raison d'être* of a closed-end fund.

We note that there exist two other types of closed-end funds, other than the more familiar exchange-traded closed-end funds: (i) so-called "interval" funds that periodically repurchase shares from investors and (ii) closed-end funds that are unlisted and continuously offer on a subscription basis (often to investors that meet certain levels of sophistication), usually providing liquidity through periodic tender offers. While exchange-traded funds are the paradigm upon which regulation of closed-end funds is based, we do not believe that either of these other types of closed-end funds should be subject to rule 22e-4.

With respect to interval funds, a limited set of standards with respect to liquidity is appropriate, as those funds periodically offer to repurchase their shares. These requirements, however, are already in place through rule 23c-3 under the 1940 Act. This rule requires interval funds to maintain sufficient liquid assets to meet 100% of the repurchase offer amount as the fund approaches the repurchase payment date. Given the limited and pre-determined liquidity needs of such funds, there is no need to impose any additional liquidity requirements.

With respect to unlisted closed-end funds, we note that most such funds tender their shares from time to time, but do not offer "redeemable securities." These periodic tender offers

[1] SEC, REPORT ON THE STUDY OF INVESTMENT TRUSTS AND INVESTMENT COMPANIES, Part One, pp. 31-32 (1938).

are structured and disclosed in advance, and are often limited to certain percentages of the overall fund and subject to other limitations. Much like interval funds, such funds have more limited liquidity needs than open-end funds and are structured accordingly to meet those limited liquidity needs. In addition, because in most instances such tender offers are not mandatory on the part of a fund, the fund and its board can determine the circumstances under which a tender offer should or should not be made (a determination that will no doubt factor in liquidity, but not requiring an analysis regarding liquidity of the scale or scope contemplated for open-end funds).

It is possible that investors who seek to take activist positions with respect to closed-end funds may seek to have the proposed rule apply to closed-end funds. They may argue that such liquidity information would provide them information as to whether a closed-end fund is an attractive target to “open-end” or liquidate. We would disagree with any such argument for two reasons. First, as a result of other disclosure obligations there is no shortage of information available about the portfolio composition of closed-end funds, and the fact that one set of investors with a particular agenda may wish to have access to such information does not mean that more information would generally provide useful information to the typical shareholder. Second, even if we were to assume *arguendo* that such information provided marginal benefit to shareholders, given the purposes of the closed-end fund structure discussed above, the benefits of subjecting closed-end funds to rule 22e-4 would be significantly outweighed by the costs.[2]

As you are aware and as noted in the Release, the Commission and its Staff historically have recognized that the liquidity needs of closed-end funds are significantly different from open-end investment companies. We agree with the Commission and the Staff that closed-end funds should be excluded from the scope of rule 22e-4.

While the risk of investor dilution is low for closed-end investment companies, such funds should be included within the scope of proposed rule 22c-1(a)(3).

We agree with the Commission’s statement in the Release that the risk of investor dilution in connection with any offering or tender process is low for closed-end funds. In part, this risk is low because closed-end funds do not, as a matter of practice and fiduciary obligation, offer or seek tenders of shares in situations where existing shareholders would be diluted. Offerings that result in dilution to existing investors are also proscribed by Section 23(b) of the 1940 Act, although that section does not require that expenses associated with investing in new assets be considered. In a broad sense, nonetheless, the goals of the “swing-pricing” option for open-end funds are already met for closed-end funds through existing mechanisms designed to prevent dilution of shareholder interests.

[2] As there is no apparent basis in Section 22(e) for application of proposed rule 22e-4 to closed-end funds, we have assumed that any change in the Commission’s position on the applicability of the rule to closed-end funds would require a re-proposal of the rule, at least in part, for further comment. Accordingly, we have not addressed the Commission’s authority to subject closed-end funds to rule 22e-4. See generally our client alert on the topic of the Commission’s statutory authority with respect to the proposed rules: *SEC Proposes Minimum Liquidity Requirement for Open-End Funds; Raises Questions Regarding the Relationship Between Liquidity and Valuation*, Simpson Thacher & Bartlett LLP (November 2015), www.stblaw.com/docs/default-source/Publications/registeredfundsalert_november2015.pdf.

That said, there may be circumstances in which interval funds and unlisted closed-end funds may wish to avail themselves of the swing pricing mechanism. It is possible, for example, that an interval fund may seek to structure repurchase offers, particularly those that are fully subscribed, to account for the portfolio transaction costs associated with generating sufficient liquid assets to conduct the repurchase offer. While these funds obviously have notice of each repurchase and are able to manage their portfolios accordingly, there are inevitably some transaction costs associated with positioning a portfolio for repurchases that, over time, could have a material impact on the investment return of a long-term shareholder who remains invested in the fund. Similarly, a closed-end fund that continuously offers its shares may determine that the subscribing shareholders should bear the costs of the fund investing the new cash. In such situations, a fund and its board may determine that the use of the swing-pricing mechanism is appropriate. Accordingly, there may be potential benefits in allowing closed-end funds the option to use swing pricing. We would not expect that many closed-end funds would avail themselves of the opportunity, and also note that the universe of closed-end funds that rely on the interval fund rules is relatively small. It may also be the case that closed-end funds might determine that the potential benefits for shareholders would be offset by the resources and expenses needed to comply with the requirements of proposed rule 22c-1(a)(3), such as recordkeeping expenses. Nonetheless, we recommend that the Commission allow all funds to make their own determination as to whether swing pricing would benefit their shareholders, instead of adopting a rule that provides the option only to open-end funds.[3]

The Commission should not link the requirements of rule 17a-7 cross-trades to the proposed liquidity categories.

In the Release, the Commission requested comment regarding the role of liquidity in determining whether a security should be eligible to be cross-traded using rule 17a-7 under the 1940 Act. We note that rule 17a-7 broadly requires the availability of accurate valuation information with respect to any security proposed to be traded from one adviser-directed account to another. This effectively requires such securities to be relatively liquid. The Release does not propose expressly that the liquidity categorizations that may become applicable to open-end fund portfolios be used in determining whether a security may be cross-traded. We strongly urge, in finalizing any proposed guidance applicable to use of rule 17a-7, that the Commission bear in mind that closed-end funds are eligible to use rule 17a-7 to conduct cross-trades in circumstances that meet the requirements of that rule. Because closed-end funds are not proposed to be subject to such liquidity determinations, we note that any linkage between those determinations and the use of rule 17a-7 would have a burdensome effect on closed-end funds and their ability to use rule 17a-7. While we do not believe that an explicit liquidity test need be added to rule 17a-7 for the regulatory purposes of that rule to be satisfied, if one were to be added, we respectfully submit that it should not be based on proposed rule 22e-4.

[3] As the rule would be optional, we do not believe that any lack of statutory authority for the application of the rule to closed-end funds should be viewed as an impediment.

Conclusion

We support the Commission's proposal to keep closed-end funds outside the scope of proposed rule 22e-4, but request that the Commission carefully consider whether to allow closed-end funds to make their own determination of whether to use swing pricing. Additionally, the Commission should consider that closed-end funds may engage in cross-trades in reliance on rule 17a-7 when finalizing its guidance on how liquidity impacts such cross-trades. We appreciate the opportunity to submit, and the Commission's consideration of, our comments. Should the Commission have any questions regarding these comments, please feel free to contact Rajib Chanda at [redacted] or [redacted].

Sincerely,

Simpson Thacher & Bartlett LLP

Simpson Thacher & Bartlett LLP

cc: Sarah E. Cogan, Esq.
Rafael Vasquez, Esq.
Benjamin Wells, Esq.
Christopher P. Healey, Esq.