

SEC Proposes Significant Amendments to Enhance Retail Exposure to Private Markets

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On September 30, 2026, the Securities and Exchange Commission (SEC) proposed several amendments to existing rules in a package (collectively, the Proposal) that would, if adopted as proposed, significantly expand retail investor access to private markets through regulated fund structures. This Proposal includes a significant relaxation on the use of performance fees with respect to Regulated Funds (defined below), increased flexibility for interval funds (particularly for less liquid, private-market investment strategies), and the codification of the multi-class exemptive relief structure.

I. Relaxation of the Use of Performance Fees

The Proposal would amend Rule 205-3 under the Investment Advisers Act of 1940 (the Advisers Act) to, for the first time, permit advisers to registered investment companies and business development companies (BDCs, and together with registered investment companies, collectively, Regulated Funds) to charge performance-based compensation calculated on the basis of capital gains in or capital appreciation of a Regulated Fund's account, without regard to investor qualifications. The Proposal would also broaden the "qualified client" definition under Rule 205-3 to include accredited investors, in lieu of applying the current higher threshold.

Under current law, a Regulated Fund other than a BDC may pay its adviser a performance fee based on capital gains or capital appreciation only if (i) the arrangement is a symmetrical "fulcrum fee", or (ii) each of the Regulated Fund's shareholders independently qualifies as a "qualified client". The Proposal would add a new

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exception to Rule 205-3 permitting investment advisers to Regulated Funds to receive performance-based compensation without any shareholder-level eligibility requirement, provided that:

- (i) the compensation does not exceed 20% of the fund's net capital gains or net capital appreciation, whether realized or unrealized, over a specified period;
- (ii) the fund satisfies the "fund governance standards" of Rule 0-1(a)(7) under the Investment Company Act of 1940 (the Investment Company Act); and
- (iii) the fund's board, including a majority of independent directors, determines that the arrangement is in the best interests of the fund and its shareholders and makes specific written findings on its appropriateness, the measurement period, and investor protection features such as hurdles, high-water marks, or loss carryforward mechanisms.

Notably, mutual funds and ETFs would, for the first time, be able to charge a performance fee tied to capital gains or capital appreciation rather than relying on the largely unused symmetrical fulcrum fee structure. Similarly, publicly-listed registered closed-end funds would have the ability to charge performance fees tied to capital gains or capital appreciation, rather than being limited to charging performance fees based solely on net investment income. In addition, while BDCs have historically enjoyed the ability to charge capital gains-based incentive fees, the methodology for calculating such capital gains-based incentive fees specifically excludes unrealized capital appreciation, but includes unrealized capital depreciation, thus limiting the utility of the use of such an incentive fee structure. Under the Proposal, BDCs would instead be permitted to charge performance-based compensation on the basis of capital appreciation in a manner that more closely mirrors fees charged by private funds with similar investment mandates.

The Proposal would require Regulated Funds to provide additional disclosures regarding any performance-based compensation, including:

- (a) an additional "performance fees" line item in the fee table disclosing any performance-based compensation payable to the investment adviser along with an expense example reflecting any performance fees;
- (b) a detailed description of the performance fee arrangement, including a graphical representation illustrating the calculation of the performance fee across a range of hypothetical scenarios; and
- (c) a more particularized Form N-CSR disclosure regarding the basis of the approval of performance fees.

The SEC has proposed a 12-month compliance period for the related form amendments, although any fund relying on the new performance fee exception would need to comply immediately upon first relying on it.

The Proposal additionally broadens the "qualified client" definition to include any natural person or entity that meets the "accredited investor" definition under Regulation D, and would eliminate the "qualified client" definition's separate net worth and assets-under-management tests. The accredited investor standard for natural persons (i.e., \$1 million net worth or \$200,000 (single) or \$300,000 (joint) income) is materially lower as compared to the current "qualified client" thresholds (\$1.4 million in assets under management with the investment adviser or \$2.7 million net worth) and, unlike the "qualified client" threshold, not required to be adjusted for inflation. In addition, the definition of "accredited investor" has been expanded to reach persons who qualify solely through certain professional licenses or certification and the SEC has proposed to include additional professional licenses and certification as well as allow anyone to take an exam to be administered by FINRA to qualify as an "accredited investor." As a practical matter, in the fund space, this change would primarily matter to Section 3(c)(1) funds relying on Regulation D which will not be able to rely on the new

exception to Rule 205-3 permitting performance-based compensation for Regulated Funds (while Section 3(c)(7) funds already are exempted from the requirement).

II. Changes to the Interval Fund Rule

The Proposal would also amend Rule 23c-3 under the Investment Company Act to modernize the structure in several key respects intended to give interval funds more flexibility to accommodate less liquid, private-market investment strategies, including:

- (i) Permitting interval funds to offer repurchases on a monthly basis, in addition to the current quarterly, semi-annual, and annual options, without the expense and delay of first obtaining exemptive relief from the SEC. Interval funds relying on a monthly interval could more closely resemble the redemption cadence that non-traded REITs commonly offer.
- (ii) Extending the period during which an interval fund may defer its first repurchase offer from the current limit of two periodic intervals (which, for example, is only six months for a fund with a quarterly interval) to a flat two years from the effective date of the fund's registration statement, regardless of the length of the fund's periodic interval. This will give interval funds more time to deploy capital and build a diversified portfolio, which will be particularly helpful for strategies investing in less liquid assets.
- (iii) Removing the current requirement that an interval fund must hold 100% of the repurchase offer amount in liquid assets while a repurchase offer is outstanding. The Proposal would instead adopt a principles-based standard which requires the fund to manage its portfolio's liquidity such that it can satisfy repurchase requests without a sale or disposition of portfolio investments at a price that deviates significantly from their value. The goal is to reduce "cash drag" from funds over-holding liquid assets to meet the current

requirements, while ensuring funds can still meet their repurchase obligations.

- (iv) Permitting regulated closed-end funds (interval and non-interval alike) to make discretionary repurchase offers once every 12 months rather than once every two years.

Many of the proposed changes to Rule 23c-3 respond to key friction points around the use of interval funds, including market developments focused on increasing opportunities for investor liquidity and the need for greater flexibility in managing liquidity at the fund level. Accordingly, we expect these changes to incentivize managers to favor interval funds, including BDCs using the interval fund structure, as a vehicle to tap into private wealth channels, as the modernized structure would allow interval funds to more closely align with the liquidity demands of that investor base.

III. Codifying the Multi-Class Exemptive Relief Structure

The Proposal would also amend certain rules under the Investment Company Act to permit certain registered closed-end funds and BDCs to issue multiple classes of shares without the cost and delay associated with individual exemptive applications. This change will extend to regulated closed-end funds (including BDCs as well as traditional registered closed-end funds) the same multi-class relief currently available to registered open-end funds.

The Proposal would require any registered closed-end fund or BDC relying on the amended rule to meet the same requirements as those currently in Rule 18f-3 for registered open-end funds, such that such registered closed-end funds and BDCs would need to adopt a board-approved written plan addressing expense allocation and distribution arrangements applicable to each class. In addition to the existing requirements for registered open-end funds, registered closed-end funds and BDCs relying on the rule would also need to meet a number of conditions specific to such funds, such as:

- (i) common stock must be offered on a continuous basis and not be listed or traded on a secondary market;

- (ii) offers to sell its common stock at a price other than the current NAV of such stock must be made to all classes of common stock;
- (iii) any asset-based distribution or service fee must comply with Rule 12b-1 as if the fund were a registered open-end fund;
- (iv) any repurchase offer for common stock must be made equally to all classes of common stock, and the percentage paid for in any repurchase offer must be allocated on a fund-wide basis (i.e., not on a class basis);
- (v) any exchange offer involving a class of common stock must be made in a manner that complies with Rule 11a-3 as if the fund were a registered open-end fund.

Notably, the expansion of Rule 18f-3 to include registered closed-end funds and BDCs within its scope would effectively replace the current need for SEC exemptive relief to permit the use of multi-class structures. Among other things, such multi-class exemptive relief has contained specific requirements with respect to applying FINRA-mandated compensation caps under FINRA Rule 2310 applicable to public offerings to even private offerings of any funds relying on such multi-class exemptive relief. The revised Rule 18f-3, however, would permit private offerings of registered closed-end funds and BDCs without applying the compensation limits imposed under FINRA Rule 2310.

IV. Key Takeaways

1. The expansion of the availability of performance-based fees to all Regulated Funds (including open-end funds such as mutual funds and ETFs), without regard to investor qualifications, will likely cause an uptick in new product development in both private wealth channels and the mutual fund and ETF spaces, as asset managers and distribution participants seek new investment strategies to package within retail-focused Regulated Fund structures. Notably, existing private wealth channel-focused registered closed-end funds with “qualified client” restrictions will likely seek to remove those investor restrictions, to the extent the proposals are adopted as proposed. In addition, managers with equity-focused strategies may be more willing to enter into the regulated fund space given the availability of performance fees on asset appreciation and realized capital gains.
2. The replacement of the current “qualified client” definition with the “accredited investor” requirement may have less of an immediate impact on traditional private fund structures, given that the change will not apply to traditional private funds relying on the Section 3(c)(7) exception from the definition of investment company under the 1940 Act. However, the change could be meaningful for privately-offered private wealth channel products, including non-traded business development companies, that utilize Regulation D private placements rather than conducting a traditional continuous registered public offering of their shares, and smaller private funds relying on Section 3(c)(1) of the 1940 Act, including, for example, smaller vehicles often pursuing venture capital or real estate strategies with respect to a single company or asset or a small number of companies or assets.
3. The proposed changes to Rule 23c-3 under the 1940 Act applicable to interval funds will, if adopted as proposed, likely result in an increasing number of interval fund products entering the private wealth channels. Notably, the proposed changes to Rule 23c-3 help mitigate many of the friction points interval funds have faced within those channels by aligning repurchase offer timing with the monthly liquidity expectations of those channels, allowing a larger gap in time before initial repurchase offers commence, and providing interval funds with greater flexibility in managing liquidity requirements around repurchase offers. BDCs structured as

interval funds could also take advantage of the monthly option for investor liquidity, while relying on their greater capacity for leverage to fund repurchases without the need for a separate liquid “sleeve”.

4. The adoption of an exemptive rule for the use of multiple classes by registered closed-end funds and BDCs aligns with SEC efforts to streamline routine exemptive relief into exemptive rules, where such relief has become generally consistent among applicants. The new exemptive rule will more easily allow new asset managers to launch private wealth channel-focused products without the need to obtain separate multi-class exemptive relief. Notably, the revised Rule 18f-3 does not require that a fund’s shares be publicly offered, and would not impose any requirement to comply with a specific FINRA rule in connection with fees charged to investors relating to specific classes. As a result, BDCs that continuously offer shares via private placements rather than through public offerings would no longer be subject to the compensation “caps” imposed under FINRA Rule 2310 applicable to public offerings of such vehicles.
5. The proposed changes to the accredited investor definition do not go as far as some industry participants had wanted. In particular, recently proposed legislation around the accredited investor definition had sought to expand its scope to any individuals who were advised by a registered investment adviser or broker-dealer in connection with their investment. In addition, there has been support by certain SEC commissioners for a “sliding scale” approach that would allow non-accredited investors to invest in Rule 506 offerings subject to investment limits (as a percentage of income and/or net worth). As a result, we expect some may push for a further expansion of the definition and/or more flexibility in allowing limited participation of

non-accredited investors during the comment process on the proposed rule. While the proposed FINRA test for accredited investor status could provide a pathway to expand certainty regarding status, the exam has not been prepared, so there remains tremendous uncertainty about the time commitment and costs that will be involved in preparing for and taking the test, which may limit its use from a practical perspective.

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