FUND OF FUNDS RULE ADOPTION—A DEEPER DIVE INTO THE IMPACT OF RULE 12D1-4 ON CLOSED-END FUNDS AND BUSINESS DEVELOPMENT COMPANIES

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Sections:

I. INTRODUCTION

On October 7, 2020, the Securities and Exchange Commission (SEC) adopted new rule 12d1-4 (Rule 12d1-4) and related amendments under the Investment Company Act of 1940 (as amended, the 1940 Act) in an effort to standardize and streamline the regulatory framework applicable to fund of funds arrangements. Rule 12d1-4 will replace the existing approach, which combines statutory exemptions, SEC rules and exemptive orders and, consequently, varies based on an acquiring fund's type. Although Rule 12d1-4 is applicable to all registered investment companies (e.g., closed-end funds (CEFs), exchange-traded funds (ETFs), exchange-traded managed funds (ETMFs), unit investment trusts (UITs) and open-end funds) and business development companies (BDCs), this client alert, which is part of a series of client alerts discussing Rule 12d1-4, will focus on the impact to CEFs and BDCs. For additional information on Rule 12d1-4, please see our previous client alerts providing a general overview of Rule 12d1-4 and discussing the specific impact to ETFs.

II. OVERVIEW

Rule 12d1-4 allows any registered fund or BDC (collectively, acquiring funds) to acquire securities of any other registered investment company or BDC (collectively, acquired funds) in excess of the limits imposed by Section 12(d)(1)[1] without obtaining an individual exemptive order from the SEC, subject to certain conditions.

Rule 12d1-4's more consistent regulatory framework seeks to level the lopsided playing field brought about by the existing web of SEC exemptive orders and staff no-action letters,[2] whereby varied requirements could advantage certain acquiring funds over others. Nonetheless, where an exemptive order that was broader than Rule 12d1-4 was rescinded, some funds and their sponsors may lose much-needed flexibility and, in some cases, be required to restructure to comply with Rule 12d1-4.

Under Rule 12d1-4, CEFs and BDCs (including non-listed CEFs and BDCs) may now serve as acquiring funds to the same extent as open-end funds. Sections 3(c)(1) and 3(c)(7) of the 1940 Act, however, will still limit private fund investments in registered funds and BDCs to 3%.[3] Under the existing compliance regime, acquiring funds cannot invest in other registered funds or BDCs, except for ETFs, above the limits imposed by Section 12(d)(1) of the 1940 Act without an exemptive order from the SEC.[4] Existing exemptive relief generally does not contemplate CEF and BDC investment in other registered funds or BDCs, except for ETFs. Further, existing exemptive relief generally does not contemplate the acquisition of non-listed BDCs and CEFs (beyond the current limits in Section 12(d)(1)(A)).

By standardizing the fund of funds requirements across all registered funds and BDCs, Rule 12d1-4 seeks to eliminate the potentially confusing distinctions caused by the regulatory inconsistencies of the existing approach.[5] Nonetheless, its impact on BDCs as acquiring funds is still limited by the 1940 Act, which prohibits a BDC from making any investment unless, at the time of the investment, at least 70% of the BDC's total assets are invested in securities of certain types of companies (which do not include funds).[6]

III. RULE 12D1-4 CONDITIONS

An acquiring fund must comply with five general conditions in order to utilize Rule 12d1-4: (1) limits on control and voting; (2) required evaluations, findings, and reports; (3) required fund of funds investment agreements; (4) limits on complex structures; and (5) recordkeeping requirements. These are summarized at a high level below for context. Please see our previous client alert on Rule 12d1-4, which goes into greater detail about each of those requirements, as well as the related amendments to the 1940 Act, for more information.

a. Limits on Control and Voting

1. Control Limits

To address the concern that a fund could exert undue influence over another fund, Rule 12d1-4 will prohibit an acquiring fund and its “advisory group” from controlling, individually or in the aggregate, an acquired fund.[7] Rule 12d1-4 requires an acquiring fund to aggregate its investment in an acquired fund with the investment of the acquiring fund's advisory group to assess control.

However, regardless of the type of acquired fund, an acquiring fund and its advisory group's individual or aggregate beneficial ownership of up to 25% of the voting securities of an acquired fund will be presumed not to constitute control over the acquired fund.[8]

2. Voting Requirements

Rule 12d1-4 requires an acquiring fund and its advisory group to mirror vote shares (i.e., cast votes in the same proportion as the other holders of the acquired fund) held in certain acquired funds if ownership of the acquired fund exceeds certain thresholds. An acquiring fund and its advisory group must use mirror voting if they hold more than 10% of the voting securities of an acquired fund that is a CEF or more than 25% of the voting securities of an acquired fund that is an open-end fund or UIT.[9]

3. Exceptions for Affiliated Funds

The control and voting conditions do not apply when: (1) an acquiring fund is within the same "group of investment companies"[10] as an acquired fund; or (2) the acquiring fund's investment sub-adviser or any person controlling, controlled by, or under common control with such investment sub-adviser acts as the acquired fund's investment adviser or depositor (i.e., sub-adviser proprietary funds). The exceptions are designed to include arrangements that are permissible under Section 12(d)(1)(G) of the 1940 Act and prior exemptive orders.

b. Required Evaluations, Findings and Reports

Advisers to both acquiring funds and acquired funds will generally be required to consider specific factors and make specific findings prior to investment to ensure that undue influence concerns associated with the acquiring fund's investment in the acquired fund are reasonably addressed and fees and expenses are not duplicative.

c. Investment Agreements

In lieu of the proposed 3% limitation on redemptions, funds that do not share the same investment adviser will be required to enter into a Fund of Funds Investment Agreement memorializing the terms of the arrangement. Because the SEC considers Fund of Funds Investment Agreements "material contracts not made in the ordinary course of business," such agreements would need to be filed as an exhibit to the registration statement of each fund entering into the agreement.[11]

d. Limits on Complex Structures

To limit overly complex structures, funds will generally be limited to two tiers. However, Rule 12d1-4 allows for a 10% allocation (the 10% Bucket) by acquired funds to investments in other funds (in addition to investments in money market funds pursuant to Rule 12d1-1). Additional carve outs to the 10% Bucket are available with respect to certain master-feeder arrangements, wholly owned subsidiaries, securities received as dividends or pursuant to plans of reorganization, and securities received pursuant to exemptive relief for interfund lending or borrowing.[12]

e. Record Keeping

Rule 12d1-4 requires the acquiring and acquired funds that participate in fund of funds arrangements in accordance with Rule 12d1-4 to maintain and preserve certain written records for a period of not less than five years, the first two years in an easily accessible place.[13]

IV. IMPACT ON CEFS AND BDCS AS ACQUIRING FUNDS

As noted above, Rule 12d1-4's regulatory framework seeks to level the playing field brought about by the existing approach, where varied requirements could advantage certain acquiring funds over others. Acquiring funds may now be able to better plan and implement fund of funds arrangements. Specifically, to the extent consistent with strategies and limitations, acquiring CEFs and BDCs may benefit from Rule 12d1-4 as the scope of their permissible investments widens to match the scope provided to the other types of registered investment companies.

Provided that Rule 12d1-4's conditions are met, acquiring CEFs and BDCs can bypass the exemption application process currently required by the existing approach. According to the SEC, recent data shows that approximately 39% of CEFs, with net assets of $115 billion, are acquiring funds.[14] The SEC estimates that approximately 44% of BDCs are acquiring BDCs.[15] However, it remains to be seen the extent to which CEFs and BDCs will seek to utilize this availability, as the SEC's cited statistics do not indicate the relative sizes of existing acquired fund holdings by CEFs and BDCs, which in many cases are likely small in light of existing limitations. Greater flexibility may provide CEFs and BDCs, which typically maintain low cash levels, with additional liquid investment options. For example, to avoid cash drag arising from any uninvested cash, a CEF or BDC could have a greater ability to gain exposure to complementary strategies to those of the fund without sacrificing returns associated with cash investments. In particular, this may benefit certain continuously-offered CEFs such as interval funds, which must maintain liquid assets during repurchase periods.

V. IMPACT ON CEFS AND BDCS AS ACQUIRED FUNDS

a. Rescission of Exemptive Orders

As previously noted, existing exemptive relief generally does not contemplate the acquisition of BDCs and CEFs (beyond the current limits in Section 12(d)(1)(A)). Further, SEC exemptive orders have typically contained a representation that acquiring funds will not rely on the exemptive order to invest in CEFs or BDCs that are not listed and traded on a national securities exchange. However, under Rule 12d1-4, listed and non-listed CEFs and BDCs may now serve as acquired funds generally to the same extent as other registered funds.

b. Rescission of Rule 12d1-2 and UITs

Rule 12d1-4 will allow UITs to invest in unlisted CEFs and BDCs beyond the limits in section 12(d)(1), with some conditions.[16] Acquiring funds that are UITs are subject to an alternative finding condition. Specifically, on or before the date of initial deposit of portfolio securities into a registered UIT, the UIT's principal underwriter or depositor must find that the fees of the UIT do not duplicate the fees and expenses of the acquired funds that the UIT holds or will hold at the date of deposit. Rule 12d1-4 requires the principal underwriter or depositor to base its finding on an evaluation of the complexity of the structure and the aggregate fees and expenses associated with the UIT's investment in acquired funds.[17]

The rescission of rule 12d1-2 eliminates some of the flexibility of funds relying on section 12(d)(1)(G) to: (i) acquire the securities of other funds that are not part of the same group of investment companies, subject to the limits in section 12(d)(1)(A) or 12(d)(1)(F); and (ii) invest directly in stocks, bonds, and other securities. Accordingly, funds that wish to invest in funds within the same group of investment companies beyond the limits in section 12(d)(1)(A), as well as other securities and the securities of the other funds, will no longer be able to rely on section 12(d)(1)(G) and rule 12d1-2. Instead, acquiring funds will have flexibility to invest in different types of funds and other asset classes under rule 12d1-4's single set of conditions. Nonetheless, the SEC is adopting an amendment to rule 12d1-1 to allow funds relying on section 12(d)(1)(G) to rely on rule 12d1-1. This would allow these funds to invest in money market funds outside of the same group of investment companies despite the rescission of rule 12d1-2.[18]

c. Limits on Voting and Control

As noted above, the SEC attempted to address concerns regarding undue influence or control of acquired CEFs or BDCs by imposing voting conditions that require mirror voting at a lower ownership threshold for CEFs than open-end funds. If the acquired fund is a CEF or BDC, Rule 12d1-4 requires the acquiring fund and its advisory group to use mirror voting if together they hold more than 10% of the voting securities of the acquired CEF or BDC.[19] However, pass-through voting (i.e., voting according to instructions from acquiring fund's own shareholders) may be used where an acquiring fund is the only shareholder of an acquired fund, and it must be used where mirror voting by an acquiring fund is not possible. For example, pass-through voting would be required when an acquired fund is offered only to acquiring funds relying on Rule 12d1-4. In such case, there may be no investors to vote the acquired fund shares, making mirror voting impossible.[20] Notably, acquired funds (particularly listed CEFs) may not know if investors have exceeded any ownership thresholds unless the acquiring fund contacts the acquired fund in advance or such information is reported in Section 13 or 16 filings under the Securities Exchange Act of 1934, as amended.

The SEC believes a 10% ownership threshold (an increase from the proposed 3% threshold) will permit an acquiring fund and its advisory group to gain substantial exposure to such funds with full voting discretion, but will reduce undue influence concerns associated with shareholder votes, which are required on an annual basis for exchange-listed acquired CEFs and BDCs, as opposed to other types of acquired funds which do not conduct annual meetings. The SEC was concerned that a higher threshold for acquiring fund investments in CEFs, such as 15% or 25%, could give an acquiring fund's advisory group the ability to dictate certain fund actions and unduly influence the acquired CEF. This concern is particularly acute with regard to exchange-listed CEFs and BDCs, which are subject to activist investors typically seeking short-term benefits.

d. Investment Agreements

When they apply to CEFs and BDCs, Fund of Funds Investment Agreements could be tailored to address fund specific concerns, such as by requiring voting or ownership limits below those set in Rule 12d1-4, or aggregation of shares with separate accounts or funds (including private funds) that are not covered in the rule. Additionally, such agreements could provide guidelines on when and how the acquiring fund can sell the CEF or BDC shares. Furthermore, such agreements can be terminated by an acquired CEF without penalty, which would result in the acquiring fund being unable to make additional purchases of the acquired CEF beyond the section 12(d)(1)(A) limits.[21] Notably, acquiring funds that do not have an adviser, such as internally managed funds or UITs, are always required to enter into a Fund of Funds Investment Agreement to invest beyond the Section 12(d)(1)(A) limits.[22]

VI. UNADDRESSED CONCERNS

a. Activist Investors

Prior to publication of Rule 12d1-4, CEF industry members, including the Investment Company Institute, voiced concern to the SEC that CEFs were not sufficiently protected from attempted takeovers by activist investors.[23] However, although Rule 12d1-4 was “designed to limit the acquiring funds' undue influence over acquired funds,”[24] as adopted, the rule has not provided as much protection as had been hoped by some sponsors. The rule's requirements do not address the most likely scenarios where CEFs and BDCs raised concerns about control and undue influence from activist investors. For example, the SEC did not explicitly define “advisory group” to include separate accounts or funds advised by the same investment adviser. As a result, the

10% ownership threshold, and related voting requirements, for acquiring funds and their advisory groups is less likely to have a significant impact on the activist investors that frequently seek self-interested voting control of registered funds.[25] In addition, while Fund of Funds Investment Agreements can address many undue influence concerns, they will not have as broad an impact if not used by activist investors in connection with private funds investing in a registered CEF or BDC.

Notwithstanding these potential missed opportunities, it is worth noting that when discussing undue influence, the SEC recognized that a 10% ownership threshold was a level that raised concerns and potential opportunities for activist investors to exert control over an acquired fund. Recognizing that this level of ownership could be problematic for CEFs (and presumably BDCs) and taking some steps to address it is a step forward for funds at risk of undue influence. This recognition, combined with its statement that the SEC believes commenters' additional recommendations with respect to investments in closed-end funds that are within the statutory limitations of Section 12(d)(1) are beyond the scope of Rule 12d1-4, may mean that the SEC is not foreclosing the possibility of taking additional steps to address these concerns in future rulemaking. Therefore, the CEF and BDC industry may wish to continue dialogue with the SEC in this regard.

b. AFFE Fee Disclosure

In 2006, the SEC adopted a rule which requires acquiring funds to include an additional line item, titled “Acquired Fund Fees and Expenses” (AFFE), in its prospectus fee table.[26] The AFFE discloses the acquiring fund's pro rata share of the acquired fund's expenses, and adds those expenses to the acquiring fund's overall expense ratio.[27] AFFE disclosure arguably overstates the costs of a fund investing in a BDC because it essentially requires double-counting of a BDC's operating expenses. Some in the BDC industry believe that, due to the resulting higher expense ratio, acquiring funds have been less willing to acquire BDC shares. Specifically, commentators note that various funds no longer invest in BDCs and several index providers have dropped BDCs from their indexes. As such, some BDC industry members believe the AFFE disclosure requirement has restricted the market for BDCs, limited institutional ownership of BDCs and reduced investor choice.[28]

Although the proposing release sought comment on AFFE Disclosure, the final Rule 12d1-4 does not address the AFFE disclosure requirement.[29] Consequently, if the aforementioned commentators are correct, acquired BDCs may not experience significant additional investment as a result of Rule 12d1-4. Although not changed in the final rule, the SEC is still considering modifications to AFFE disclosure as part of a separate, broader review of how funds disclose fees in their prospectuses.[30] In August 2020, as part of its “Investor Experience Proposal,” the SEC proposed Form N-1A amendments that, if adopted, would not require an open-end mutual fund or ETF to have the separate AFFE line item, provided that no more than 10% of total assets were invested in a an acquired fund.[31] Instead, the disclosure could be in a footnote.[32] Additionally, the AFFE would not have to be separately identified, and instead could be part of the “other expenses” fee table line item, if it does not exceed 0.01% of average net assets.[33] The SEC also requested comment on whether to apply this new provision only to open-end funds or to other types of pooled investments, such as BDCs and CEFs. We note that the Access to Small Business Investor Capital Act pending in Congress would require the SEC to adopt rules relating to fund registration statements to specify that, when calculating the fees and expenses of an acquired fund, the term “acquired fund” does not include a BDC.[34]

c. SEC Initiative to Expand Retail Access to Private Capital Markets

Historically, the SEC has tried to protect retail investors by restricting their investments in the private capital markets. However, dramatic growth in private equity and debt markets[35] and a shrinking range of investment opportunities readily accessible to most retail investors[36] has culminated in the SEC considering an expansion of retail investor access to private capital markets.[37] Fund of funds offerings by registered investment companies would potentially accomplish this goal while offering the regulatory protections provided in the 1940 Act.

Among the different types of acquiring funds, CEFs and BDCs, due to their ability to invest in illiquid and less liquid assets, are well-positioned to invest both in private assets and in private funds. Since open-end funds are required to repurchase their shares on demand,[38] open-end funds must hold a significant portion of their portfolios in liquid assets.[39] In contrast, CEFs and BDCs are not redeemable, and most CEFs and BDCs, including continuously-offered CEFs and BDCs, only offer to repurchase shares from shareholders, if at all, in limited quantities. Thus, portfolio liquidity is either no concern or a minimal concern for the majority of CEFs and BDCs.

To date, CEFs and BDCs have been unable to fully capitalize on their unique advantages with respect to the expansion of retail access to private investments. While CEFs and BDCs may invest in private assets, the majority of managers who focus on such assets receive performance fees, which retail investors may not directly pay except under very restricted conditions unappealing to most private asset managers. This has posed an impediment to many sponsors with expertise in the asset classes to their fully accepting management of CEFs and BDCs. However, CEFs can invest in private funds without restriction, including private equity and venture capital funds. Such CEFs can offer retail exposure to private assets, but despite the regulatory protections inherent in the 1940 Act, the SEC staff has informally[40] taken the position that shares of a registered CEF where more than 15% of assets are invested in private funds can only be sold to accredited investors. While in a public statement earlier this year, the SEC staff expressed openness to reconsidering this position,[41] until the SEC staff's position changes, most retail investors effectively are also prevented from investing indirectly in private funds through a CEF. This appears to be a significant lost opportunity for retail funds, such as retirement path funds, to use a fund of funds structure to invest in a CEF under Rule 12d1-4 and thereby gain exposure to private assets. Because Rule 12d1-4 prevents any fund serving as an acquired fund (e.g. a CEF investing in private funds) from investing more than 10% of its assets in private funds, retail funds cannot get meaningful, targeted exposure to private funds using CEFs. Thus, the SEC seems to have missed an opportunity to utilize fund of funds offerings to expand retail exposure to private capital markets meaningfully.[42]

VII. COMPLIANCE DATES

Rule 12d1-4 will be effective 60 days after publication in the Federal Register. The compliance date for the amendments to Form N-CEN will be 425 days after publication in the Federal Register. The rescission of Rule 12d1-2 and exemptive orders deemed to "fall within the scope of Rule 12d1-4," as well as the withdrawal of no-action letters applicable to specific circumstances related to Section 12(d)(1), will be effective one year after the effective date of Rule 12d1-4.

VIII. CONCLUSION

Rule 12d1-4 has simplified the previous framework of exemptive orders and SEC staff comment letters, but it did not close the gap with respect to activist investors and undue influence as presented by commentators within the CEF industry. Rule 12d1-4 also will not provide the change in AFFE Fee Disclosures sought by some in the BDC industry. Nonetheless, CEFs and BDCs, as both acquiring and acquired funds, will have additional flexibility relative to other registered fund structures under the rule. Overall, Rule 12d1-4 represents a positive step for CEFs and BDCs, but hopefully with more to come.

FOOTNOTES

[1] Section 12(d)(1)(A) prohibits a registered investment company from acquiring shares of an investment company if, immediately after such purchase, the acquiring fund would own more than 3% of the total outstanding voting stock of the acquired company, or more than 5% of the acquiring fund's assets would be invested in the acquired fund or more than 10% of the acquiring fund's assets would be invested in other investment companies in the aggregate. These are commonly referred to as the “3/5/10 Limits.” Section 12(d)(1)(B) places parallel prohibitions on the sales of shares by open-end acquired funds.

[2] The SEC Release rescinds, among others, the following exemptive relief and staff no-action letters: (i) relief permitting fund of funds arrangements that fall within the scope of Rule 12d1-4; (ii) relief from sections 12(d)(1)(A), (B), (C) and (G) of the 1940 Act, other than relief with respect to interfund lending arrangements; (iii) relief that permits investments in funds beyond the limits in 12(d)(1)(A), (B), or (C) of the 1940 Act; (iv) relief under section 12(d)(1)(G) of the 1940 Act that permits an affiliated fund of funds to invest in assets that are beyond the scope of that statutory provision; (v) the Northern Lights Fund Trust, SEC Staff No-Action Letter (June 29, 2015); and (vi) Franklin Templeton Investments, SEC Staff No-Action Letter (Apr. 3, 2015). *See* Fund of Funds Arrangements, SEC Release Nos. 33-10871 & IC-34045, at 136–39, 142 at fn 504, 144 at fn 510 (Oct. 7, 2020) (the SEC Release). A list of Modified or Withdrawn Staff Statements can be found at https://www.sec.gov/divisions/investment/im-modified-withdrawn-staff-statements.

[3] *See* 15 U.S.C. §§ 80a-3(c)(1), 3(c)(7)(D).

[4] SEC Release at 12.

[5] Significantly, BDCs are still prohibited from making any investment unless, at the time of the investment, at least 70% of the BDC's total assets are invested in securities of certain types of companies (of which funds are not included). *See* 15 U.S.C. § 80a-54(a).

[6] *See* 15 U.S.C. 80a-54(a).

[7] SEC Release at 10. An “advisory group” is defined as: (1) An acquiring fund's investment adviser or depositor, and any person
controlling, controlled by, or under common control with such investment adviser or depositor; or (2) An acquiring fund's investment sub-adviser and any person controlling, controlled by, or under common control with such investment sub-adviser. SEC Release at 268.

[8] The 1940 Act creates a rebuttable presumption that any person who, directly or indirectly, beneficially owns more than 25% of the voting securities of a company controls the company and that any person who does not own that amount does not control it.

[9] Because the rule prohibits control of an acquired fund, presumably this situation would only occur due to a decrease in the outstanding securities of an open-end acquired fund. In that situation, the acquiring fund would not have to sell its shares but would need to mirror vote.

[10] The SEC defines the term "group of investment companies" as "any two or more registered investment companies or business development companies that hold themselves out to investors as related companies for investment and investor services." Rule 12d1-4(d).

[11] SEC Release at 102.

[12] *See* 15 U.S.C. 80a-12(d)(1)(E) (permitting certain master-feeder arrangements),

[13] SEC Release at 123.

[14] *Id.* 162.

[15] *Id.* at 163.

[16] *See* SEC Release at 12.

[17] *Id.* at 91.

[18] *Id.* at 125–32.

[19] *Id.* at 162.

[20] *Id.*

[21] *Id.* at 45.

[22] *Id.* at 103.

[23] *See Recommendations Regarding the Availability of Closed-End Fund Takeover Defenses*, Investment Company Institute (Mar. 20), https://www.ici.org/pdf/20_ltr_cef.pdf (the ICI White Paper) (advocating, among other things, for the withdrawal of the Boulder Total Returns Fund, Inc. no-action letter (Boulder Total Return Fund, Inc., SEC No-Action Letter, 2010 WL 4630835 (Nov. 15, 2010)) and that the SEC's guidance that common takeover defenses under state law were inconsistent with the 1940 Act).

[24] SEC Release at 188.

[25] These activist investors frequently use a combination of private funds when attempting to acquire control of a CEF, with each private fund holding less than 3% of a CEF's shares.

[26] Fund of Funds Investments, SEC Release Nos. 33-8713; IC-27399, at 20 (Jun. 20, 2006).

[27] *Id.* at 20–21.

[28] *See* Letter from Joseph Glatt, Chariman, Coal. For Bus. Dev., to Vanessa Countryman, Acting Sec'y, SEC, (May 2, 2019). https://www.sec.gov/comments/s7-27-18/s72718-5441142-184822.pdf.

[29] *Id.*

[30] *See* SEC, 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, Investment Company Act Release No. 33963 (Aug. 5, 2020)

[31] *Id.* at 142.

[32] *Id.*

[33] *Id.* at 293–94.

[34] Access to Small Business Investor Capital Act, H.R.7375, 116th Cong. (2019–2020).

[35] In 2018, the SEC's Division of Economic and Risk Analysis found that registered offerings accounted for $1.4 trillion of new capital compared to approximately $2.9 trillion that was raised through exempt offering channels. Jay Clayton, Chairman, SEC, Remarks to the Economic Club of New York, n. 9 (Sept. 9, 2019), https://www.sec.gov/news/speech/speech-clayton-2019-09-09#_ftn9.

[36] The World Bank states that, from 1996 to 2018, the number of publicly listed companies in the United States decreased by roughly 50%, from 8,090 to 4,397. *See* The World Bank, https://data.worldbank.org/indicator/CM.MKT.LDOM.NO?locations= US&view =chart.

[37] *See* Jay Clayton, Chairman, SEC, Remarks to the Economic Club of New York, n. 9 (Sept. 9, 2019) https://www.sec.gov/news/speech/speech-clayton-2019-09-09#_ftn20.

[38] Rule 22c-1.

[39] In fact, open-end mutual funds and ETFs are subject to a liquidity requirement that prevents aggregate holdings of illiquid assets from exceeding 15% of net assets. Rule 22e-4(b)(1)(iv).

[40] Although the 15% limit is not in any SEC regulation or guidance, it has been invoked during the registration comment process. *See, e.g.*, Wildermuth Endowment Strategy Fund, SEC Comment Response Letter (Dec. 17, 2014).

[41] *See* Dalia Blass, Director, Div. of Investment Management, SEC, Speech: PLI Investment Management Institute (July 28, 2020) https://www.sec.gov/news/speech/blass-speech-pli-investment-management-institute.

[42] The lack of change is particularly noteworthy since, in June 2019, the SEC explicitly considered allowing fund of funds offerings by acquiring CEFs where more than 15% of assets are invested in private funds to non-accredited investors. *See* Concept Release on Harmonization of Securities Offering Exemptions, p. 188.

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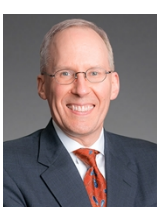

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