

MEMORANDUM

TO: File No. S7-08-19 – Concept Release on Harmonization of Securities Offering Exemptions

FROM: Adam Lovell
Division of Investment Management

RE: Meeting with Drinker Biddle & Reath LLP

DATE: September 18, 2019

On September 13, 2019, Sarah ten Seithoff, Mark Uyeda, Jennifer Songer, Ben Kalish, Jennifer McHugh, and Adam Lovell from the Division of Investment Management met with the following representatives from the law firm of Drinker Biddle & Reath LLP:

- Joshua Deringer, Partner
- Nancy O’Hara, Counsel

The participants discussed the SEC’s concept release relating on the harmonization of securities offering exemptions using the attached slides prepared by Drinker Biddle & Reath LLP.

Drinker Biddle & Reath LLP

Meeting with the Staff of the SEC

Regarding the Concept Release on Harmonization of Securities Offering Exemptions and Related Potential Regulatory Developments For Non-Traded Closed-end Funds

September 13, 2019

Joshua Deringer

Nancy O'Hara

- As the SEC looks at ways to expand access to the private markets to retail investors, interval funds and tender offer funds represent an important source of potential capital.
- While, since its adoption in 1993, use of the interval fund structure has been modest, use has been rapidly increasing year over year.
 - Strategies that require more flexibility with respect to pricing and liquidity make use of the tender offer fund structure.
 - While tender offer funds operate under a different regulatory regime, they are substantially similar to interval funds from an investor viewpoint.

- Non-traded closed-end funds operate under a rule regime designed around a permanent capital structure, without many of the benefits of the regulatory structure built for open-end funds.
 - This resulting asymmetry can make operation of a non-traded closed-end fund, or complex of funds, cumbersome, despite the fact that they operate and are distributed in much the same way as open-end funds.
- We believe that the industry is encouraged by the SEC's apparent recognition of this in this Concept Release.
 - The following slides address some of the Concept Release's questions in this area.

The Concept Release Asks:

- Are there certain measures that can be taken to decrease the compliance costs associated with the interval and tender offer fund structure?
- Should the SEC adopt rules that permit interval and tender offer funds to have multiple share classes?
- Should interval and tender offer funds utilize the series and trust structure used by open-end funds to set up new funds?
 - We believe that the SEC should consider broadening the scope of 18f-2 and 18f-3 to allow multiple series and classes, respectively.
 - Use of a new legal entity for each fund significantly increases the registration time for a new fund.
 - It also makes board meetings more cumbersome for boards overseeing multiple interval funds.
 - Allowing multiple series instead of separate funds is likely to result in increased economies of scale, thus potentially reducing fund expenses paid by shareholders.
 - In concept, a fund family launching a new interval or tender offer fund is no different than a fund family launching a new mutual fund series.
 - Tender offer funds are not permitted to rely on Rule 486. This means that their annual updates do not go effective automatically.
 - The staff issues no-action relief for listed funds, but not non-traded funds, where the relief is arguably more appropriate.

- 18f-3 allows open-end funds to issue multiple classes.
- Non-traded closed-end funds routinely receive exemptive relief that allows them to issue multiple classes and rely on 18f-3.
 - Almost all funds being brought to market operate pursuant to such relief, which is very standard and non-controversial.
 - Extending 18f-3 to non-traded closed-end funds would reduce the burden on registrants and the SEC of processing additional exemptive applications and orders.

The Concept Release asks several questions about Rule 23c-3 and whether its provisions should be liberalized. Among other questions, the SEC asks:

- Should the SEC modify the periodic intervals from the current three-, six-, or twelve-months?
- Should a fund have flexibility to determine the length of its periodic interval?
- To what extent would any changes to the interval fund rule lessen the need for tender offer funds?
 - As noted above, tender offer funds not being permitted to rely on rule 486 is cumbersome and inefficient.
 - Shelf registration statements for tender offer funds expire after 3 years even though continuously offered tender offer funds have to update their registration statements each year.
 - Tender offer funds must make FINRA filing, which interval funds do not.
 - If interval funds had more flexibility with respect to liquidity and pricing, the industry would gladly move away from the tender offer fund structure due to these and other inefficiencies.
 - Having one set of rules for these funds, which most investors view as indistinguishable, makes sense.

The Concept Release also solicits comments about the ways in which the 1940 Act limits the ability of non-traded closed-end funds to invest effectively. The SEC asks:

- What restrictions should there be, if any, on the ability of closed-end funds to invest in private funds?
- Should there be a maximum percentage of assets that closed end funds can invest in private funds?
- Should such closed-end funds be required to diversify their investments across a minimum number of private funds if they are not restricting their offerings to accredited investors?
 - The current law on this is based on unwritten staff policy.
 - There is a lot of variance in how the policy is applied to funds.
 - The percentage limitation varies from 10%-35% and sometimes includes just hedge funds and sometimes includes all private funds.