



September 14, 2018

Via Electronic Mail (rule-comments@sec.gov)

Mr. Brent J. Fields, Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Covered Investment Fund Research Reports || File Number S7-11-18
Dear Mr. Fields:

The Securities Industry and Financial Markets Association (“SIFMA”)¹ jointly with the Asset Management Group of the Securities Industry and Financial Markets Association (“SIFMA AMG,”² referred to herein together with SIFMA as “SIFMA”) appreciate the opportunity to provide supplemental comments to the U.S. Securities and Exchange Commission (the “SEC” or the “Commission”) on its proposal (the “Proposal”)³ to adopt Rule 139b under the Securities Act of 1933 (the “Securities Act”), which would establish a safe harbor for covered investment fund research. This letter supplements the comment letter submitted by SIFMA for the Proposal on July 9, 2018 (the “July 9 Letter”).

I. INTRODUCTION

Since the submission of the July 9 Letter, SIFMA’s member firms have engaged in efforts to create systems and processes to prepare to issue research in reliance on Rule 139b, in

¹ SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry’s nearly 1 million employees, we advocate on legislation, regulation and business policy, affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit <http://www.sifma.org>.

² SIFMA’s Asset Management Group (SIFMA AMG) brings the asset management community together to provide views on U.S. and global policy and to create industry best practices. SIFMA AMG’s members represent U.S. and global asset management firms whose combined assets under management exceed \$45 trillion. The clients of SIFMA AMG member firms include, among others, tens of millions of individual investors, registered investment companies, endowments, public and private pension funds, UCITS and private funds such as hedge funds and private equity funds. For more information, visit <http://www.sifma.org/amg>.

³ Covered Investment Fund Research Reports, Securities Act Release No. 10498 (May 23, 2018), 83 Fed. Reg. 26788 (June 8, 2018) (the “Proposing Release”).

the form it was proposed. As a result of these efforts, further questions have been raised about the practical ability of firms to meet certain of the conditions to the safe harbor contained in proposed Rule 139b. Specifically, the practical difficulties relate to broker-dealers' ability to meet two of the proposed conditions to the safe harbor with respect to issuer-specific research reports: (1) that the aggregate market value or net asset value of the covered investment fund "held by non-affiliates of the covered investment fund" equal at least \$75 million; and (2) that the covered investment fund have "timely filed" all of its required reports for the prior 12 months. Should the Commission adopt Rule 139b as proposed, SIFMA believes that ensuring compliance with these conditions, in practice, would be impossible or exceedingly burdensome to meet for some covered investment funds.

SIFMA believes that the changes to the Proposal suggested in its July 9 Letter would avoid these concerns. Consequently, SIFMA continues to believe that SIFMA's recommendations in the July 9 Letter should be adopted by the Commission. Alternatively, SIFMA believes that the Commission should otherwise revise proposed Rule 139b to make compliance practical, as described herein.

Lastly, an additional, real-world situation has come to light since the July 9 Letter that SIFMA would like to note in further support of its recommendation that the Commission significantly shorten the proposed 12-month period prior to which broker-dealers may not publish research on covered investment funds. We further describe that situation below.

II. MINIMUM VALUE HELD BY NON-AFFILIATES

Similar to Rule 139, the Proposal would condition the availability of the Rule 139b safe harbor on the covered investment fund having a minimum of \$75 million in public market value (in the case of exchange-traded funds ("ETFs")) or net asset value (in the case of funds registered under the Investment Company Act of 1940 ("**40 Act Funds**")) that are not ETFs).

As discussed in the July 9 Letter, SIFMA believes that this requirement is not necessary or appropriate in the context of covered investment funds. Nonetheless, should the Commission maintain this requirement as proposed, SIFMA believes there are several practical obstacles to calculating the amount of equity of a covered investment fund held by non-affiliates. Specifically, in the case of covered investment funds, particularly '40 Act Funds, it is not clear that third-party data vendors or even the Commission's EDGAR database contains data regarding the value of covered investment funds, net of value held by affiliates. This contrasts with the similar requirement under Rule 139, for which firms have historically looked to data compiled by third-party data vendors, such as Bloomberg (which firms believe is reliable and based on information in the SEC's public EDGAR database) in order to confirm the amount of an issuer's public float (i.e., the value of equity held solely by non-affiliates). As a result, neither firms nor third-party data vendors will be able to compile information necessary to ensure that Rule 139b's proposed conditions are met.

In footnote 85 to the Proposing Release, the Commission suggested that this information could be ascertained by "reference to the security ownership information listed in the covered investment fund's registration statement. See, e.g., Item 11(m) of Form S-1; Item

18 of Form N-1A.” However, it is not clear that these forms make this information available, or that where available, it would be current.

A. '40 Act Funds

The net asset value of a covered investment fund excluding the value of shares held by affiliates is unknowable for '40 Act Funds, and broker-dealers cannot be expected to confirm it prior to issuing research on such funds. Item 18 of Form N-1A, to which the Commission pointed in the Proposing Release, requires disclosure of control persons and their ownership, as well as any 5% owners—not the ownership levels of any affiliates of the fund. We understand that the information required by this item may be updated by '40 Act Funds annually through EDGAR filings. However, as noted below with regard to determining timeliness of filings, due to the typical trust and series legal structure and filing methods of '40 Act Funds, finding the relevant disclosure for a specific fund within a family of funds can be exceedingly difficult. Even where the disclosure can be located, the information disclosed under this item does not provide the information that firms would need to assure themselves that this condition is met.

Disclosure made by the SPDR Series Trust is a representative example.⁴ This trust's disclosure is prefaced by a statement that: “Although the Funds do not have information concerning their beneficial ownership held in the names of DTC Participants, . . . [this disclosure provides] the names, addresses and percentage ownership of each DTC Participant that owned of record 5% or more of the outstanding Shares of the Funds.” This disclaimer is then followed by a list of banks and broker-dealers that act as *record name* holders of 5% or more of the fund. A bank or broker-dealer's status as a record holder, of course, is not indicative of affiliate status of the underlying beneficial owners. In practice, excluding the amount of value outstanding held by significant record holders from the aggregate market value would eliminate the vast majority of the fund's value. For the SPDR Portfolio Total Stock Market ETF, the cumulative ownership of these 5% record owners is 72.94% of the fund. If a firm were to deduct these “affiliates” from the total market value to determine the non-affiliate ownership, almost 73% of the value would be eliminated. This is, of course, because these record owners are not themselves beneficial owners or affiliates, but merely custodians for others.

As noted in the disclaimer cited above, '40 Act Funds typically do not have access to information concerning their beneficial owners. Even if they had such information, they are under no obligation to provide it to authorized participants engaged in distributing the ETF. Further, unlike for research on corporate issuers, firms are unable to look to filings made by beneficial owners under Section 13(d) of the Exchange Act to determine the extent to which any 5% holders exist. Beneficial owners of '40 Act Funds that are not registered under Section 12 of the Exchange Act are not subject to Section 13 and therefore do not file such reports. Further, in reliance on no-action relief granted by the Commission staff, beneficial owners

⁴ SPDR® Series Trust, *Form N1-A Registration Statement*, SEC.GOV 53 (Oct. 27, 2017), available at https://www.sec.gov/Archives/edgar/data/1064642/000119312517323271/d413018d485bpos.htm#sai1413018_10.

of '40 Act Funds that are Exchange Act registered (i.e., ETFs) typically do not report their beneficial ownership under Section 13(d).⁵

As a result, information regarding the holdings of affiliates of '40 Act Funds is therefore not available and including a condition to the Rule 139b safe harbor that broker-dealers calculate value of '40 Act Funds held by non-affiliates would make compliance impossible. The Commission should therefore either eliminate the minimum value requirement altogether, as suggested in our July 9 Letter, or eliminate any deduction to the value for affiliate holdings.

B. '33 Act Funds

In the case of covered investment funds registered under the Securities Act of 1933 (“**'33 Act Funds**”), the Commission’s suggestion to look to Form S-1 is anomalous, as Form S-1 is only filed at the time the fund initially registers, and if (as proposed) Rule 139b is not available until 12 months later, the information provided under Item 11(m) of Form S-1 will be at least a year outdated and is unlikely to contain relevant shareholder information. We note that Item 11(m) of Form S-1 requires the information called for by Item 403 of Regulation S-K. This Item 403 information is also required to be disclosed annually in Form 10-K (or in Schedule 14A if incorporated by reference into Form 10-K). But a '33 Act Fund’s first 10-K is also likely to be filed more than 12 month after its Form S-1 becomes effective.

In any event, even the information required by Item 403 of Regulation S-K is only indirectly relevant to determining the value of shares held by non-affiliates. The more on-point disclosure that '33 Act Funds are required to make is that required on the cover page of Form 10-K: “the aggregate market value of the voting and non-voting common equity held by non-affiliates ... as of the last business day of the registrant’s most recently completed second fiscal quarter.” But again, as Form 10-K is an annual filing, this information would quickly become stale.

Given the substantial difficulty in obtaining timely information regarding value held by non-affiliates, we continue to believe that final Rule 139b should either eliminate the minimum value requirement or eliminate the deduction from the value calculation for shares held by affiliates. To the extent some form of this is retained in the final Rule 139b, we request that the Commission confirm that looking to the cover page disclosure on Form 10-K is sufficient, even though the information may be outdated at the time that firms seek to rely on it.

⁵ See PDR Services Corporation, SEC No-Action Letter (Dec. 14, 1998).

III. REPORTING TIMELINESS

Under the Proposal, in order to rely on the safe harbor, a broker-dealer would need to confirm that a '40 Act Fund has timely filed each of Forms N-CSR, N-SAR, N-Q, N-PORT, N-MFP, and N-CEN, as applicable, during the preceding 12-month period. Determining precisely which forms a particular '40 Act Fund is required to file and when presents significant challenges, requiring that broker-dealers become experts in '40 Act Fund reporting compliance in order to rely on the safe harbor. SIFMA understands that the set of forms and reporting timeframes are being streamlined at some point, possibly as early as April 30, 2019 for larger funds and April 30, 2020 for smaller funds, eventually resulting in only monthly filings on Form N-PORT and annual filings on Form N-CEN for non-money market funds. However, proposed Rule 139b has a 12-month look-back period, so this streamlining would be of little help until at least April 30, 2020 for larger funds and April 30, 2021 for smaller funds.

In addition, confirming the timeliness of reporting is especially complicated for '40 Act Funds because of their typical structure. Many '40 Act funds have a single registrant (e.g., a single trust for a family of funds) with a multitude of series that make up the underlying funds, each of which have a vast number of EDGAR filings.⁶ These filings all appear on a single EDGAR page for the registrant. Even if firms were to determine which fund is required to file what form and when, it would be exceedingly difficult to review each EDGAR filing and confirm whether the particular covered investment fund was included in the filing.

Although we understand that the Commission may have made efforts to improve the public's ability to filter EDGAR by underlying fund, this EDGAR feature does not appear to be functional. For example, the Commission's EDGAR search page that is specific to mutual funds appears as follows:⁷

⁶ The iShares Trust, for example, had 100 filings on EDGAR just during the first two weeks of August 2018. See iShares Trust EDGAR Search Results, SEC.GOV, available at <https://www.sec.gov/cgi-bin/browse-edgar?action=getcompany&CIK=0001100663&type=&dateb=&owner=include&start=80&count=40> (last accessed Aug. 15, 2018).

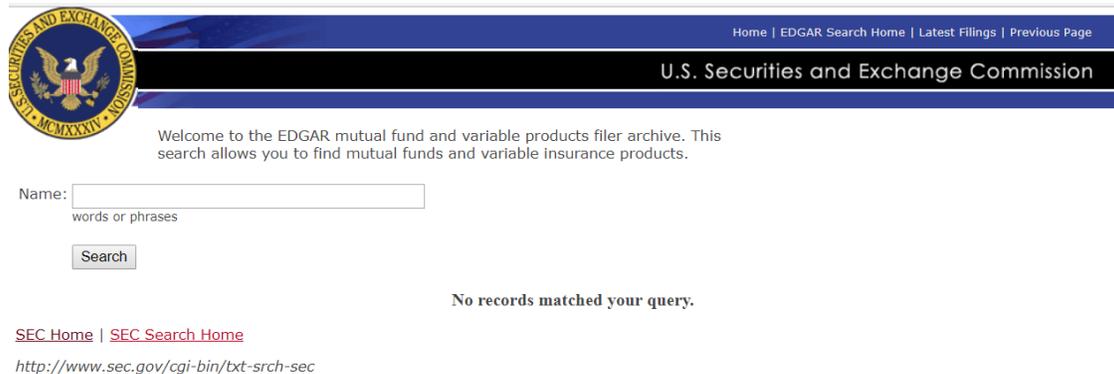
⁷ See EDGAR – Mutual Funds, SEC.GOV, available at <https://www.sec.gov/edgar/searchedgar/mutualsearch.html> (last accessed Sept. 5, 2018).

The “Fast Search” box on this page indicates that a user could search for filings by a fund’s ticker symbol. However, this feature does not appear to function as intended for ETFs. Searching for “SPY,” the largest ETF by assets under management,⁸ returns results for a fund with SPY in its name, but not the SPY ETF itself.⁹

⁸ See ETF Assets under Management, NASDAQ.COM, available at <https://m.nasdaq.com/etfs/etf-list-by-classtype.aspx?type=assetsunder> (last accessed Sept. 5, 2018).

⁹ See SPY EDGAR Mutual Fund Search Results, SEC.GOV, available at <https://www.sec.gov/cgi-bin/series?ticker=spy&CIK=&sc=companyseries&type=N-PX&Find=Search> (last accessed Sept. 5, 2018).

Similar sample searches by ticker for other large ETFs, such as IVV, VTI, VOO, return no results:



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There may be other ways to work through EDGAR to find each of the relevant filings of a particular '40 Act Fund within a family of funds trust, but it is not readily apparent and SIFMA does not believe that seeking to confirm whether a covered investment fund has timely filed its required reports in order to satisfy the conditions of Rule 139b should require extensive research efforts.

SIFMA reiterates its suggestion in its July 9 Letter that, if timeliness of a covered investment fund's filings remains in the final rule, it should be required only at the initiation of coverage, not at the time of issuance of each report. In addition, the Commission should not include a reporting timeliness requirement at all unless and until it has ensured that adequate mechanisms exist to practically allow firms to readily determine whether a particular covered investment fund has met these obligations. As an alternative, the Commission could permit firms to rely on the fact that a covered investment fund has not within the prior 12 months filed a Form 12b-25, indicating that the fund is unable to file a report in a timely manner. Given the infrequency of these filings, firms could likely create processes to determine whether a covered investment fund is part of a fund family that has filed a Form 12b-25.

IV. 12-MONTHS OF REPORTING HISTORY

We noted in our July 9 Letter that “[w]hatever risks the Commission believes are mitigated by imposing a 12-month quiet period must be weighed against the barrier such a rule creates to the free flow of research,” and that the 12-month requirement was more appropriate for corporate issuers than covered investment funds because “[c]overed investment funds themselves derive their value from the other assets that they hold, which in many cases, will be other securities that have been registered with the Commission for a significant length of time.”

In January 2018, the publishers of the Global Industry Classification Standard (“GICS”) announced a realignment of various industry classifications, with certain companies previously categorized as consumer-discretionary and information-technology being shifted

into a new “Communications Services Sector.”¹⁰ In response, the sponsor of the SPDR family of ETFs launched a new ETF, the Communication Services Select Sector SPDR (“**XLC**”), to track the new Communications Services Sector’s components.¹¹ None of the constituent securities within XLC are new; they were previously contained in other indices and other funds. But XLC itself is less than 12 months old, having an inception date of June 18, 2018.¹²

The GICS sector realignment represents the first such change in more than 30 years and is of tremendous interest to market participants. Yet, if Rule 139b were in place today, as proposed, broker-dealers would be unable to rely on the safe harbor to publish research on XLC, even though XLC has received significant market interest. As of August 31, 2018, XLC had already accumulated \$499.20 million dollars in total net assets.¹³ We understand that clients of SIFMA member firms have also been reaching out to dealers for guidance on XLC, primarily to understand how it differs from the pre-existing ETFs that tracked the predecessor GICS sectors. These firms may be interested in publishing research to analyze XLC in light of the GICS sector shift, but cannot rely on Rule 139b today, nor would they have been able to do if Rule 139b were already adopted as proposed.

In the Proposing Release, the Commission suggested that it proposed to require the 12-month reporting history because it “suggests the presence of a sufficiently broad market following ... and, consequently, an adequate mix of information to inform investors as to material risks,” and that requiring 12 months of reports “provide[s] investors with publicly-available information about the issuers included in a research report for a full year.” But because covered investment funds are merely baskets of other assets, a year of reporting history by the covered investment fund itself is less important for investors. The time that research on covered investment funds is most needed and helpful to investors is when the fund is new—the XLC situation clearly exemplifies that. As a result, SIFMA reiterates its recommendation to allow broker-dealers to rely on the safe harbor for issuer-specific research reports where the subject covered investment fund has been subject to the applicable reporting requirements for 25 days, rather than 12 months.

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¹⁰ See, e.g., Press Release, S&P Dow Jones Indices and MSCI, S&P Dow Jones Indices and MSCI Announce Revisions to the Global Industry Classification Standard (GICS) Structure in 2018 (Nov. 15, 2017), available at <https://www.msci.com/documents/10199/d56e739d-4455-4bc1-afdd-d738c2ce5a05>.

¹¹ See Press Release, State Street Global Advisors Launches Communication Services Select Sector SPDR® ETF (June 19, 2018), available at <https://newsroom.statestreet.com/press-release/corporate/state-street-global-advisors-launches-communication-services-select-sector-s>.

¹² Communication Services Select Sector SPDR® Fund, SPDRS.COM, available at <https://us.spdrs.com/en/etf/communication-services-select-sector-spdr-fund-XLC> (last accessed Sept. 5, 2018).

¹³ See *id.*

SIFMA appreciates the opportunity to comment on the Proposal. If you have any questions or would like additional information, please do not hesitate to contact Sean C. Davy, Managing Director, SIFMA, at (212) 313-1118 (sdavy@sifma.org), Timothy Cameron, Managing Director, SIFMA, at (202) 962-7447 (tcameron@sifma.org) or our outside counsel, Annette L. Nazareth, Davis Polk & Wardwell LLP, at (202) 962-7075 (annette.nazareth@davispolk.com).

Very truly yours,



Sean C. Davy
Managing Director, Capital Markets
Securities Industry and Financial Markets Association



Timothy Cameron
Managing Director
Asset Management Group of the Securities Industry
and Financial Markets Association

cc: Annette L. Nazareth, Davis Polk & Wardwell LLP
Zachary J. Zweihorn, Davis Polk & Wardwell LLP