

CLIENT ALERT

SEC Proposes to Expand Retail Access to Private Markets

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On September 30, 2026, the Securities and Exchange Commission (the “SEC”) issued two releases proposing rule amendments to further enhance retail investors’ access to private market investments. The first set of proposed rule amendments would amend Rule 205-3 under the Investment Advisers Act of 1940 (the “Advisers Act”) to expand the ability of SEC-registered investment advisers to receive performance-based compensation that is calculated on the basis of capital gains or capital appreciation from certain categories of clients, including registered funds and business development companies (“BDCs”).¹ The second set of proposed rule amendments would amend Rule 23c-3 under the Investment Company Act of 1940 (the “Investment Company Act”) to increase flexibility for repurchase offers by interval funds and codify exemptive relief granted under the Investment Company Act that

¹ Investment Adviser Performance-Based Compensation Modernization, 91 Fed. Reg. 63676 (proposed Oct. 6, 2026) (to be codified at 17 C.F.R. pts. 239, 249, 274, 275) (the “Performance Compensation Release”).

permits registered closed-end funds and BDCs to issue multiple share classes.² The SEC also issued five notices stating that the SEC is considering additional certifications, designations and credentials that would qualify natural persons as “accredited investors” under Rule 501(a)(10) of Regulation D, including a new exam to be developed by the Financial Industry Regulatory Authority (“FINRA”).³

The SEC held an open meeting on September 30, 2026 to consider these proposals. Opening remarks at the meeting framed the agenda around a common theme: expanding investor access to private markets through “responsible retailization.”⁴ The Fact Sheet accompanying the proposals highlighted growing investor demand for access to private market opportunities and the benefits that investments in private securities can provide to investors, and stated that the proposals are intended to expand retail investor choice by providing more investing strategies involving private securities within regulated fund structures.⁵ The Fact Sheet also noted that the designations described in the notices related to accredited investor status would broaden the nonfinancial pathways for natural persons to qualify as accredited investors.⁶

Performance-Based Compensation Proposal

Section 205(a)(1) of the Advisers Act generally prohibits a registered investment adviser from entering into, extending or performing any advisory contract that provides for compensation to the adviser on the basis of a share of capital gains upon, or the capital appreciation of, the funds of the client.⁷ The SEC is proposing to expand the exemption provided by Rule 205-3 under the Advisers Act which permits investment advisers to receive such performance-based compensation, by broadening the definition of a “qualified client” to whom a performance fee can be charged.

A. Natural Person or Company Amendments

The proposed amendments would replace the current definition of “qualified client” in Rule 205-3 and instead designate a natural person or company (other than private investment companies) as a qualified client if the adviser

² Interval Fund Modernization; Expansion of Multiple Share Class to Registered Closed-End Management Investment Companies and Business Development Companies, 91 Fed. Reg. 63,388 (proposed Oct. 5, 2026) (to be codified at 17 C.F.R. pts. 239, 249, 270, 274) (the “Interval Fund Release”).

³ Potential Designation of Passage of an Accredited Investor Exam to Be Developed by FINRA as Qualifying Natural Persons for Accredited Investor Status, 91 Fed. Reg. 63,335 (Oct. 5, 2026) (the “FINRA Exam Notice”); Potential Designation of U.S. Certified Public Accountant License as Qualifying Natural Persons for Accredited Investor Status, 91 Fed. Reg. 63,368 (Oct. 5, 2026) (the “CPA Notice”); Potential Designation of Chartered Financial Analyst Designation as Qualifying Natural Persons for Accredited Investor Status, 91 Fed. Reg. 63,314 (Oct. 5, 2026) (the “CFA Notice”); Potential Designation of Certified Financial Planner Certification as Qualifying Natural Persons for Accredited Investor Status, Securities Act Release No. 33-11448, File No. 4-934 (the “CFP Notice”); Potential Designations of the Investment Banking Representative License (Series 79) and the Research Analyst License (Series 86 and Series 87) as Qualifying Natural Persons for Accredited Investor Status, 91 Fed. Reg. 63,357 (Oct. 5, 2026) (the “FINRA License Notice”).

⁴ Paul S. Atkins, Chairman, U.S. Sec. & Exch. Comm’n, Statement at Open Meeting on Proposals to Expand Responsible Retailization of Private Markets (Sept. 30, 2026), <https://www.sec.gov/newsroom/speeches-statements/atkins-statement-open-meeting-093026>.

⁵ SEC, Fact Sheet: Expanding Retail Investor Choice and Promoting Innovation in Regulated Fund Structures (Sept. 30, 2026), available at <https://www.sec.gov/files/33-11443-fact-sheet.pdf>.

⁶ *Id.*

⁷ See 15 U.S.C. § 80b-5(a)(1); 17 C.F.R. § 275.205-3.

reasonably believes such person is an accredited investor at the time of entering into the contract.⁸ The current net worth and assets-under-management tests in the rule would be eliminated, along with the existing inflation adjustment provision in the rule.

B. Regulated Funds Proposal

The proposed amendments would also allow investment advisers to most types of registered management investment companies and BDCs (collectively, “regulated funds”)⁹ to receive compensation on the basis of a share of capital gains upon, or the capital appreciation of, such funds, subject to specified conditions.

Investment advisers to BDCs are already permitted under Section 205(b)(3) of the Advisers Act to receive compensation of up to 20% of realized capital gains over a specified period or as of definite dates, computed net of realized capital losses and unrealized capital depreciation. If the proposal is adopted, an adviser to a BDC would alternatively be able to rely on Rule 205-3 to receive up to 20% of the BDC’s net capital gains or net capital appreciation over a specified period, if the other conditions of the proposed amended rule were met.

- **Conditions.** A regulated fund would be a qualified client under amended Rule 205-3 if each of its equity owners meets the definition of a qualified client or the fund satisfies the following conditions:
 - *Condition 1 – 20% Cap.* The performance-based compensation may not exceed 20% of the regulated fund’s net capital gains or net capital appreciation over a specified period. The advisory contract would be required to specify a particular measurement period or reference dates by which net capital appreciation would be calculated, but no minimum measurement period would be required.
 - *Condition 2 – Fund Governance Standards.* The regulated fund’s board would be required to comply with the fund governance standards set out under Rule 0-1(a)(7) under the Investment Company Act.¹⁰ The governance standards include a requirement that the regulated fund’s board consist of a majority of independent directors.¹¹
 - *Condition 3 – Board Determination.* The regulated fund’s board, including a majority of the independent directors, would be required to determine that the performance fee arrangement is in the best interest of the fund and its shareholders. The board also would be required to make written findings addressing:

⁸ 17 C.F.R. § 275.205-3(d)(1) (definition of Qualified Client under Rule 205-3).

⁹ Unit investment trusts and separate accounts that are registered management investment companies offering variable annuity contracts on Form N-3 are excluded from the proposal.

¹⁰ 17 C.F.R. § 270.0-1(a)(7).

¹¹ Under Rule 0-1(a)(7) (17 C.F.R. § 270.0-1(a)(7)), (1) a majority of the regulated fund’s board consists of independent directors; (2) the independent directors of the regulated fund select and nominate any other independent directors; (3) any person who acts as legal counsel for the independent directors of the regulated fund is an independent legal counsel as defined in the fund governance standards; (4) the board of directors evaluates at least once annually the performance of the board of directors and the committees of the board of directors, which evaluation must include a consideration of the effectiveness of the committee structure of the fund board and the number of funds on whose boards each director serves; (5) the independent directors meet at least once quarterly in a session at which no directors who are interested persons of the fund are present; and (6) the independent directors have been authorized to hire employees and to retain advisers and experts necessary to carry out their duties.

(1) the appropriateness of the arrangement in light of the fund's investment strategy and valuation practices; (2) the basis on which the fee is calculated, including the measurement period over which performance is assessed, and specifically whether fees are determined with reference to realized gains, unrealized gains, or both; and (3) the adequacy of investor protection features, such as a hurdle or preferred return, or a high-water mark or loss carryforward, including, where no such investor protection features are present, the basis for concluding that the fee arrangement is adequate to protect the interests of shareholders. These findings are intended to be in addition to the board's existing statutory obligations under Sections 15(c) and 36(b) of the Investment Company Act, which already require boards to consider performance fees as part of their review of an adviser's compensation.¹²

The Performance Compensation Release includes guidance concerning both the types of strategies that are most closely associated with performance-based compensation, including private market-oriented strategies or other complex or differentiated strategies, and types of strategies that may make it difficult to justify a performance-based fee, including a strategy that tracks a broad-based securities market index with a passive or formulaic strategy. The Performance Compensation Release also emphasizes the importance of a regulated fund's valuation practices and board oversight of valuation.

- **Prospectus Disclosure.** Proposed amendments to Forms N-1A and N-2 would require additional disclosures for all regulated funds that pay any performance fee under the proposed rule amendments. In the prospectus fee table, a new "Performance Fees" line item would be required, with a brief explanation of the fee's basis and a cross-reference to more detailed disclosure later in the prospectus. In addition, the expense example would be required to reflect any performance fees. The later disclosure in the prospectus would need to describe the arrangement in detail, including a graphical illustration of the fee calculation across hypothetical performance scenarios.
- **Form N-CSR.** Item 11 of Form N-CSR would be amended to require funds to disclose information regarding board approval of the performance-based compensation arrangement.

II. Interval Fund Modernization

Rule 23c-3 under the Investment Company Act permits registered closed-end funds and BDCs to make periodic repurchase offers to shareholders at net asset value ("NAV") at set intervals, subject to certain conditions.¹³ These funds are referred to as interval funds. The proposal would amend Rule 23c-3 to add flexibility to the repurchase framework and liquidity requirements for interval funds to better match the liquidity profile of certain assets in which they might invest. The proposed amendments reflect certain practices currently permitted by individual exemptive orders granted by the SEC. Key elements of the proposed interval fund rule amendments include:

¹² Under the proposal, materials the board considers in making requisite findings would be subject to existing recordkeeping requirements.

¹³ See 17 C.F.R. § 270.23c-3.

- **Periodic Repurchase Intervals.** The proposal would permit periodic intervals of one month, in addition to the current repurchase intervals of three, six or twelve months. Monthly offers would still need to be for between 5% and 25% of outstanding common shares.
- **Repurchase Payment Deadline.** The proposal would require payment to be due no later than seven days after the repurchase pricing date and at least one business day before notice of the next repurchase offer is sent, though the one-business-day condition does not apply to discretionary repurchase offers.
- **Fundamental Policy Content.** The proposal would eliminate the requirement that the fund's fundamental policy state the maximum number of days between the repurchase request deadline and the repurchase pricing date, but the repurchase pricing date still must occur no later than 14 days after the repurchase request deadline.
- **Deferral of First Repurchase Offer.** The proposal would permit a new interval fund to defer its first repurchase offer for up to two years after the later of the effective date of its registration statement or the first shareholder vote adopting the fundamental policy, regardless of the length of its periodic interval.
- **Deferred Sales Loads.** The proposal would permit all interval funds (and non-interval funds making discretionary repurchase offers pursuant to Rule 23c-3) to deduct a deferred sales load from repurchase proceeds. The deferred sales load would have to comply with Rule 6c-10, Rule 11a-3 and, if the load is waived, varied or eliminated, Rule 22d-1 under the Investment Company Act, as if the fund were a registered open-end fund.
- **Shareholder Notice Timing.** The proposal would require interval funds (and non-interval funds making discretionary repurchase offers pursuant to Rule 23c-3) to send repurchase notices 14 to 42 days before the repurchase request deadline for every interval length, compared with the current 21 to 42 days, and funds operating under exemptive orders that permit sending notices 7 to 14 days in advance would need to move to the 14-day minimum.
- **Liquidity Management (Rule 23c-3(b)(10)).** The proposal would replace the current liquidity management requirements (including a related requirement for the board to take corrective action in the event that the fund's assets fail to comply with the rule's liquidity requirements) with a principles-based standard. Under the proposal, a fund would be required to manage its portfolio's liquidity so that it can satisfy repurchase requests without selling investments at a price that deviates significantly from their value.
- **Discretionary Repurchases (Rule 23c-3(c)).** The proposal would permit all registered closed-end funds and BDCs to offer a discretionary repurchase pursuant to Rule 23c-3 once every year. Non-interval funds would be subject to the proposed amendments if they elected to offer a discretionary repurchase pursuant to Rule 23c-3.

III. Multiple Share Classes and Affiliated Distribution Arrangements for Unlisted Closed-End Funds and BDCs

Rule 18f-3 permits registered open-end funds to issue more than one class of shares without obtaining individual exemptive orders, subject to specific conditions.¹⁴

As proposed, amended Rules 18f-3 and 17d-3 would permit unlisted, continuously offered registered closed-end funds and BDCs to issue multiple classes of shares and permit these funds and their affiliates to enter into arrangements for the payment of asset-based distribution and service fees. To date, these funds have had to seek individualized exemptive relief from the SEC in order to do so. The Interval Fund Release states that the SEC intends to rescind all but one of the relevant exemptive orders if the proposal is adopted.

- **General Requirements.** The proposal would be available to unlisted, continuously offered registered closed-end funds and BDCs. The proposal would subject these continuously offered funds to the existing requirements of Rule 18f-3, and certain additional conditions to account for regulated closed-end funds as described further below, including a written plan approved by the board, including a majority of independent directors, setting out each class's arrangements and expense allocations; a board finding that any material amendment to the plan is in the best interests of each class and the fund as a whole; allocation of class-specific expenses to the relevant class and of fund-wide expenses (such as advisory fees) by relative net assets or another reasonable and equitable method; and class voting on class-specific matters.¹⁵
- **Additional Conditions.** The proposal is subject to additional conditions, including, without limitation:
 - Any offer to sell the fund's common shares at a price other than NAV would have to be made to all classes;
 - Asset-based distribution or service fees must be charged under a written plan complying with Rule 12b-1 under the Investment Company Act;
 - Shares could not be listed, offered or traded on a secondary market;
 - Repurchase offers would have to be made equally to holders of all classes of common shares (and the percentage taken up and paid for in any repurchase offer would be required to be allocated on a fund, not class, basis); and
 - Exchange offers would be required to comply with Rule 11a-3 under the Investment Company Act.
- **Differences from Current Multi-Class Orders.** Under the proposal, continuously offered funds proposing to have a listed share class would still need to seek individualized exemptive relief. In addition, unlike the current orders, the proposal would not condition multi-class relief on compliance with FINRA Rule 2341, with

¹⁴ 17 C.F.R. § 270.18f-3.

¹⁵ See Interval Fund Release, at section II.D.1.

respect to registered closed-end funds, or FINRA Rule 2310, with respect to BDCs. As noted in the Interval Fund Release, these rules by their terms only apply to the activities of FINRA members in connection with the securities of interval funds and BDCs engaged in public offerings. While tender offer funds (i.e., registered closed-end funds that engage in periodic tender offers rather than repurchase offers under Rule 23c-3) generally are not subject to FINRA Rule 2341, those tender offer funds seeking to rely on an exemption from FINRA Rule 5110 would, as a practical matter, still need to comply with the sales charge limits of FINRA Rule 2341, notwithstanding the proposal.

- **Affiliated Distribution Arrangements.** The proposal would allow multi-class registered closed-end funds and BDCs and their affiliates and principal underwriters to enter into written distribution payment agreements without an SEC order, provided the agreement complies with Rule 12b-1 and does not permit joint sharing of distribution costs with affiliated registered funds or BDCs.

IV. Accredited Investor Designations

The SEC issued notices stating that it is considering designating by order, after an opportunity for public comment, certain certifications, designations and credentials that would allow certain natural persons to qualify as accredited investors under Rule 501(a)(10) of Regulation D. The notices follow the SEC's 2020 amendments to the accredited investor definition and related order, which recognized holders in good standing of the FINRA Series 7, 65 and 82 licenses as accredited investors.¹⁶ The additional designations are intended to create nonfinancial pathways for individuals to demonstrate the requisite financial sophistication to invest in privately offered securities.

The most novel of the notices is the FINRA Exam Notice, which would create a new accredited investor exam as a knowledge-based path to accredited investor status. FINRA would develop and administer an exam, modeled largely on the Securities Industry Essentials ("SIE") exam, and would create a process for issuers and others to verify exam holders' status. The exam would be open to anyone age 18 or older, would not require association with a FINRA member firm, and would cover six areas—Definitions and Structures of Securities, Investment Risks, Disclosures and Regulatory Requirements, Financial Statements, Conflicts of Interest and Corporate Governance. FINRA currently contemplates 75 multiple-choice questions in English that would be answered in person within two hours. The exam fee would be similar to the SIE exam's current \$100 fee, and the exam would need to be taken within 120 days following enrollment. A passing result would be valid for ten years, after which the exam would need to be retaken, with no anticipated waivers, and candidates who fail would be required to wait 30 days before they could retake the exam (180 days after three consecutive failures within two years).¹⁷

The SEC is also considering designating as accredited investors persons holding the following designations:

- U.S. certified public accountant license in good standing.¹⁸

¹⁶ See Order Designating Certain Professional Licenses as Qualifying Natural Persons for Accredited Investor Status, Securities Act Release No. 33-10823, 85 Fed. Reg. 64,234 (Oct. 9, 2020).

¹⁷ See FINRA Exam Notice, at section II.A.

¹⁸ See CPA Notice.

- Chartered Financial Analyst charter in good standing.¹⁹
- Certified Financial Planner certification in the United States in good standing.²⁰
- Investment Banking Representative license (Series 79) in good standing.²¹
- Research Analyst license (Series 86 and 87) in good standing.²²

V. Comments

Comments on the Interval Fund Release and all five notices are due December 4, 2026. Comments on the Performance Compensation Release are due December 7, 2026. Comments may be submitted through the SEC's internet comment form or by email to rule-comments@sec.gov, in each case referencing the applicable file number: S7-2026-28, S7-2026-34, 4-931, 4-932, 4-933, 4-934 and 4-935.

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¹⁹ See CFA Notice.

²⁰ See CFP Notice.

²¹ See FINRA License Notice.

²² See FINRA License Notice.

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If you have any questions regarding this client alert or would like assistance in preparing comments, please contact one of the authors or the Willkie attorney with whom you regularly work.

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