

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 10774 / April 17, 2020

In the Matter of

**Certain Investment
Advisers Participating
in the Share Class
Selection
Disclosure Initiative,**

Respondents.

**ORDER UNDER RULES 262(b)(2),
405, 506(d)(2)(ii), AND 602(e) OF THE
SECURITIES ACT OF 1933 AND RULE
503(b)(2) OF REGULATION
CROWDFUNDING GRANTING WAIVERS
OF THE DISQUALIFICATION
PROVISIONS OF RULES 262(b)(3),
506(d)(1)(iv), AND 602(c)(3) OF THE
SECURITIES ACT OF 1933, RULE
503(a)(4)(ii) OF REGULATION
CROWDFUNDING, AND GRANTING
WAIVERS FROM BEING INELIGIBLE
ISSUERS**

I.

In February 2018, the Division of Enforcement (the “Division”) announced the Share Class Selection Disclosure Initiative (the “SCSD Initiative”), a self-reporting program designed to address potentially widespread violations of the federal securities laws resulting from investment advisers failing to make required disclosures relating to their selection of mutual fund share classes that paid the advisers (as dually registered broker-dealers) or their related entities or individuals a fee pursuant to Rule 12b-1 of the Investment Company Act of 1940 (“12b-1” fee) when a lower-cost share class for the same fund was available to clients.¹

Pursuant to the SCSD Initiative, the Division determined to recommend that the Securities and Exchange Commission (“Commission”) accept settlement offers from investment advisers that self-reported certain violations and that agreed to consent to certain standardized settlement terms.

¹ See Division of Enforcement, Securities and Exchange Commission, *Share Class Selection Disclosure Initiative*, (February 12, 2018), available at <https://www.sec.gov/enforce/announcement/scsd-initiative>.

II.

The Commission has issued separate orders (“SCSD Orders”) instituting administrative and cease-and-desist proceedings against certain SEC-registered investment advisers that self-reported in the SCSD Initiative (the “SCSD Investment Advisers”).² These proceedings are consistent with the previously-announced terms of the SCSD Initiative and are brought pursuant to Sections 203(e) and 203(k) of the Investment Advisers Act of 1940 (“Advisers Act”) for willful violations of Section 206(2) of the Advisers Act for failure to disclose in Form ADV or otherwise the conflicts of interest related to (a) the receipt of 12b-1 fees, and/or (b) the selection of mutual fund share classes that pay such fees. Specifically, the SCSD Investment Advisers failed to give their clients sufficient information so that the client could understand the conflicts of interest the adviser had concerning its advice about investing in the different classes of mutual funds and have a basis on which they could consent to or reject such conflicted transactions.³ The SCSD Orders, which state that they are being issued pursuant to the SCSD Initiative, will require that all respondents cease and desist from committing or causing any violations and any future violations of Sections 206(2) of the Advisers Act and undertake to review and correct (if necessary) all relevant disclosure documents concerning mutual fund share class disclosure, among other things. The SCSD Orders will trigger a number of disqualifications from exemptions available under the Securities Act of 1933 (“Securities Act”) for the SCSD Investment Advisers, and, for Bank of America Corporation, a public issuer which has a certain SCSD Investment Adviser as a subsidiary, and BofA Finance LLC (together, the “SCSD Issuers”), will make them ineligible issuers under Rule 405 of the Securities Act.

III.

Waivers of Disqualification Under Regulation A, Regulation D, and Regulation Crowdfunding

Rule 262(a) of Regulation A provides for disqualification from the Regulation A exemption from registration under the Securities Act for offerings if, among other things, the relevant entity is subject to a Commission order pursuant to Sections 203(e) or (f) of the Advisers Act that places limitations on that entity’s activities, functions, or operations. *See* 17 C.F.R. § 230.262(a)(4)(ii). Similarly, Rules 506(d) of Regulation D and 503(a) of Regulation Crowdfunding provide for disqualification from the Regulation D and Regulation Crowdfunding exemptions from registration under the Securities Act for certain offerings if, among other things, the relevant entity is subject to a Commission order pursuant to Sections 203(e) or (f) of the Advisers Act that places limitations on that entity’s activities, functions, or operations. *See* 17 C.F.R. §§ 230.506(d)(1)(iv)(B) and 227.503(a)(4)(ii).

The Commission has the authority to waive the disqualifications of Regulations A, D, and Crowdfunding upon a showing of good cause and without prejudice to any other action by the Commission, if the Commission determines that it is not necessary under the circumstances

² The list of SCSD Investment Advisers subject to this Order is included in Appendix A to this Order.

³ “12b-1 fees” are recurring fees paid by a mutual fund out of fund assets to cover distribution expenses and sometimes shareholder service expenses.

that an exemption be denied. *See* 17 C.F.R. §§ 230.262(b)(2), 230.506(d)(2)(ii), and 227.503(b)(2).

Ineligible Issuer Waivers

Under clause (1)(vi) of the definition of ineligible issuer in Rule 405 of the Securities Act, an issuer becomes an ineligible issuer and thus unable to avail itself of well-known seasoned issuer status, if “[w]ithin the past three years (but in the case of a decree or order agreed to in a settlement, not before December 1, 2005), the issuer or any entity that at the time was a subsidiary of the issuer was made the subject of any judicial or administrative decree or order arising out of a governmental action that: (A) Prohibits certain conduct or activities regarding, including future violations of, the anti-fraud provisions of the federal securities laws . . .” *See* 17 C.F.R. §§ 230.405(1)(vi).

Under the second paragraph of the definition of ineligible issuer in Rule 405 of the Securities Act, an issuer shall not be an ineligible issuer if the Commission determines, upon a showing of good cause, that it is not necessary under the circumstances that the issuer be considered an ineligible issuer. *See* 17 C.F.R. § 230.405(2).

Waiver from Regulation E Disqualification

Regulation E provides an exemption from registration under the Securities Act, subject to certain conditions, for securities issued by certain small business investment companies and business development companies. Rule 602(c)(3) makes this exemption unavailable for the securities of an issuer if, among other things, any investment adviser or any underwriter of the securities to be offered is subject to an order of the Commission entered pursuant to Section 203(e) of the Advisers Act. *See* 17 C.F.R. § 230.602(c)(3). Rule 602(e) provides, however, that the disqualification shall not apply if the Commission determines, upon a showing of good cause, that it is not necessary under the circumstances that the exemption from registration pursuant to Regulation E be denied. *See* 17 C.F.R. § 230.602(e).

Good Cause

In light of the participation of the SCSD Investment Advisers in the SCSD Initiative and their agreement to consent to its terms, assuming the SCSD Investment Advisers comply with the terms of the SCSD Orders, and in light of the benefits of the SCSD Initiative discussed herein, the Commission has determined that good cause exists for not denying the various exemptions from registration discussed herein, and for the SCSD Issuers to receive waivers from being ineligible issuers that results from the entry of an SCSD Order.

IV.

Based on the foregoing, the Commission has determined that pursuant to Rules 262(b)(2), 506(d)(2)(ii), and 602(e) of the Securities Act, paragraph (2) of the definition of ineligible issuer in Rule 405 of the Securities Act, and Rule 503(b)(2) of Regulation Crowdfunding, the requisite showings of good cause have been made.

Accordingly, IT IS ORDERED, pursuant to Rules 262(b)(2), 506(d)(2)(ii), and 602(e) of the Securities Act, paragraph (2) of the definition of ineligible issuer in Rule 405 of the Securities Act, and Rule 503(b)(2) of Regulation Crowdfunding, that waivers from the application of the disqualification provisions of Rules 262(a)(4)(ii), 506(d)(1)(iv)(B), and 602(c)(3) of the Securities Act and Rule 503(a)(4)(ii) of Regulation Crowdfunding, and waivers from being ineligible issuers under Rule 405 of the Securities Act, resulting from the entry of an SCSD Order against a certain SCSD Investment Adviser are hereby granted to the SCSD Investment Advisers and the SCSD Issuers as reflected in the attached appendices. Nothing in this Order shall effect any pre-existing disqualification or ineligibility under the above provisions and nothing in this Order shall be interpreted to waive or limit any conditions or undertakings which are in place as a result of any prior waiver granted to any SCSD Investment Adviser or the SCSD Issuers. Failure to comply with terms of an SCSD Order would require us to revisit our determination that good cause has been shown and could constitute grounds to revoke or further condition the waiver. The Commission reserves the right, in its sole discretion, to revoke or further condition the waiver under those circumstances.

Because of the unique nature of the SCSD Initiative, this Order and the circumstances under which it was issued shall not be relied upon by any entity that may seek a waiver in the future from the disqualifications discussed herein.

By the Commission.

Vanessa A. Countryman
Secretary

Appendices: SCSD Investment Advisers
SCSD Issuers

Appendix A
(Waivers from disqualification under Regulations A, D, E, and Crowdfunding)

The SCSD Investment Advisers

Merrill Lynch, Pierce, Fenner & Smith, Incorporated
Eagle Strategies LLC

Appendix B
(Waivers from being ineligible issuers under Rule 405)

The SCSD Issuers

Bank of America Corporation
BofA Finance LLC