The Investment Lawyer
Covering Legal and Regulatory Issues of Asset Management
VOL. 31, NO. 1 • JANUARY 2024

Mixed Signals: SEC De-Emphasizes Disclosure of Section 15(c) Process While Deeming Process an Exam Priority and Considering New Fund Fee Disclosure Rule

By Gary O. Cohen

The Securities and Exchange Commission (SEC), over the last several years, has arguably[1] de-emphasized its requirement for disclosure[2] (disclosure) of the process by which mutual fund (fund) boards of directors (board) evaluate and approve investment advisory contracts (advisory contracts) under Section 15(c) (Section 15(c) process) of the Investment Company Act of 1940 (1940 Act) (disclosure).

The SEC:

- originally located[3] the disclosure in the Statement of Additional Information (SAI), which was commonly incorporated into the prospectus;
- moved[4] the disclosure from the SAI to the shareholder report;[5] and
- more recently, moved[6] the disclosure from the shareholder report to Form N-CSR Certified Shareholder Report of Registered Management Investment Companies (Form N-CSR).

This article examines the SEC's location and relocations of the disclosure and offers observations on the SEC's shifting rationales.

This examination is relevant today for two reasons. First, the SEC continues to stress the importance of the Section 15(c) process. Last year, the SEC launched a probe[7] of certain funds with low investment performance and/or high fees, particularly poor returns over long periods. The SEC's Division of Examinations has designated[8] the Section 15(c) process as an examination priority. The current Director of the SEC's Division of Investment Management (IM Division) has publicly spoken[9] about the SEC's bringing enforcement litigation under Section 36(b)[10] of the 1940 Act.

Second, the SEC has announced[11] that, by April 2024, it expects to propose new rules regulating fund fees and disclosure of those fees. The explanation is that "[t]he [IM] Division is considering recommending that the Commission propose changes to regulatory requirements relating to registered investment companies' fees and fee disclosure."[12] An SEC rule regarding disclosure of fund fees likely would involve advisory contract fees and possibly the basis on which fund boards approved the fees.

The SEC's announcement of new regulation of fund fees and fee disclosure raises questions about the current marketing of fund shares, particularly who reads fund fee disclosure. Should fund disclosure be directed to individual investors, *intermediaries* such as investment advisers to individual investors, or employer sponsors of employee retirement plans, or some or all? Should investor testing be done with individual investors, intermediaries, or both? Should the SEC study the current marketing of fund shares, including use of fund disclosure, before the SEC proposes new regulation of fund fees and fund fee disclosure? Is there any lesson for the SEC to learn from the history recited below?

SEC Location of Disclosure

SAI Disclosure

The SEC began requiring[13] the disclosure in 2001, locating it in the SAI. The requirement was general: "[d]iscuss in reasonable detail the material factors and the conclusions with respect thereto that formed the basis for the board of directors' approving the existing investment advisory contract."[14] The SEC called for discussion of only one particular factor, which was "any benefits derived or to be derived by the investment adviser from the relationship with the Fund such as soft dollar arrangements by which brokers provide research to the Fund or its investment adviser in return for allocating Fund brokerage."[15]

Curiously, the SEC stopped short of requiring disclosure of additional factors that federal courts had found to be "reasonably necessary"[16] for fund directors to request and evaluate under Section 15(c)[17] of the 1940 Act. The SEC did not explain why it did not require disclosure of the court-approved factors.[18] Nevertheless, funds disclosed[19] director consideration of these so-called Gartenberg factors in their Section 15(c) processes.

The SEC defended the SAI as the appropriate location for the disclosure. The SEC disagreed with "a number of commenters who argued that information about the board's basis for approving an existing advisory contract is not relevant to an investment decision."[20] As support, the SEC noted "that the United States General Accounting Office (GAO), in a recent report to Congress on mutual fund fees, stressed the importance of heightening 'investors' awareness and understanding of the fees they pay."[21]

Funds commonly incorporated the SAI into the prospectus. So, the disclosure was generally subject to liability under Sections 11 and 12 of the Securities Act of 1933 (1933 Act).

Shareholder Report Disclosure

In 2004, the SEC moved[22] the disclosure from the SAI to the shareholder report. The SEC apparently reversed its 2001 determination that the SAI was the most appropriate location for the disclosure. The SEC declared, without reference to its 2001 determination, that "shareholder reports are the location where investors are more likely to read and benefit from this disclosure"[23] and where the disclosure will be "more timely."[24]

In addition, the SEC said that location of the disclosure in the shareholder report might improve the substance of the disclosure. The SEC's explanation was that "[t]he visibility of this disclosure, alongside other current information about a fund, such as investment performance and current period dollars and cents expense disclosure, may encourage funds to provide a *meaningful* explanation of the board's basis for approving an investment advisory contract."[25]

Still further, the SEC said that location of the disclosure in the shareholder report might improve the quality of the Section 15(c) process itself. The SEC explained that the need for funds to provide meaningful disclosure "may encourage fund boards to consider investment advisory contracts more carefully."[26]

In terms of substance, the SEC reversed its course taken in 2001 and began to require[27] disclosure of fund directors' consideration of the court-approved Gartenberg factors. The SEC required disclosure of adviser services, investment performance, costs, profits, benefits, and economies of scale. The SEC also required disclosure of fund directors' use of comparisons of fund advisory contracts with advisory contracts of others.

Another aspect of de-emphasis was that the disclosure in the shareholder report, as contrasted with the SAI incorporated into the prospectus, was not subject to liability under the 1933 Act.

Form N-CSR Disclosure

In 2022, the SEC moved[28] the disclosure from the shareholder report to the Form N-CSR. In 2004, the SEC had said that location of the disclosure in the shareholder report would make it "more likely" that "investors" would "read and benefit from this disclosure" and make the disclosure "more timely."[29] Contrary to this thinking, the SEC, in 2022, said that location of the disclosure in the shareholder report "does not pertain directly to a retail shareholder's understanding of the operations and performance of the fund."[30] The SEC did not explain the basis for this determination. The SEC also said that the disclosure "does not lend itself to the type of focused disclosure that the proposed annual report was designed to include."[31]

In moving the disclosure from the SAI to the shareholder report in 2004, the SEC had said that the new location "may encourage funds to provide a meaningful explanation of the board's basis for approving an investment advisory contract."[32] The SEC also said that location in the shareholder report "may encourage fund boards to consider investment advisory contracts more carefully and investors to consider more carefully the costs and value of the services rendered by the fund's investment adviser."[33]

The SEC, in reversing itself in 2022, did not disclose whether or not these possible benefits to investors had actually eventuated. There was no indication whether or not funds had provided more meaningful disclosure or whether fund boards had more carefully evaluated advisory contracts. Ironically, the SEC, in requiring disclosure of the basis of board continuation of an advisory contract, did not disclose the complete basis for its determination to move the disclosure from the shareholder report to Form-CSR.

The SEC explained the relocation of the disclosure to Form N-CSR in only broad terms as follows:

> Because of the nature and quantity of information in this disclosure, we believe that it is better suited to appear in a different location that would continue to permit access to fund shareholders and other market participants who find this information to be particularly useful and meaningful. Providing this information on Form N-CSR will continue to allow these persons effectively to consider the costs and value of the services that the fund's investment adviser renders.[34]

In relocating the disclosure from the shareholder report to Form N-CSR, the SEC made[35] no change in the required substance of the disclosure.

Of course, the disclosure in the Form N-CSR, as contrasted with the SAI incorporated into the prospectus, is not subject to liability under the 1933 Act.

Observations of SEC's Shifting Rationales

The SEC articulated a rationale for each of the three locations of the disclosure discussed above. The following offers observations of the SEC's shifting rationales.

Aid to Investment Decision

Throughout the location and relocation of the disclosure, the SEC has been consistent in indicating that the disclosure is an aid to an investor's investment decision regarding fund shares.

The SEC based its original location of the disclosure in the SAI on the belief that the disclosure was relevant to investor decision-making. The SEC reached this belief even though "[a] number of commenters argued that information about the board's basis for approving an existing advisory contract is not relevant to an investment decision."[36]

Even after moving the disclosure from the SAI to the shareholder report, the SEC continued to believe that the disclosure was relevant to an investment decision. The SEC stated that "it is important for investors to have access to information about advisory contract approvals *before investing in a fund*."[37] "For that reason," the SEC continued, "we are requiring that a fund prospectus state that a discussion regarding the board of directors' basis for approving any investment advisory contract is available in the fund's annual or semi-annual report to shareholders, as applicable."[38]

In moving the disclosure from the shareholder report to Form N-CSR, the SEC stated that "[r]equiring funds to provide shareholders with information regarding the board's review of investment advisory contracts . . . assists investors in making informed investment decisions."[39] Such assistance is provided, however, only if investors[40] access a fund's Form N-CSR disclosure on the fund's website or Form N-CSR on the SEC's database.

Despite these pronouncements, the SEC moved the disclosure further and further away from a fund's primary disclosure documents, requiring investors to hunt down the disclosure on a fund's website.

Regulation by Disclosure

The SEC has used its disclosure requirement not only for informing investors, but for the *regulatory* purpose of improving the Section 15(c) process that boards follow.

As stated above, the SEC, in moving the disclosure from the SAI to the shareholder report, acknowledged that its Section 15(c) disclosure requirements could change fund behavior. The SEC said that relocation of the disclosure could cause funds to improve its disclosure, as well as its Section 15(c) process per se, as follows:

> The visibility of this disclosure, alongside other current information about a fund, such as investment performance and current period dollars and cents expense disclosure, may encourage funds to *provide a meaningful explanation* of the board's basis for approving an investment advisory contract. This, in turn, may encourage fund boards to *consider investment advisory contracts more carefully*. . . .[41]

In moving the disclosure from the shareholder report to Form N-CSR, the SEC stated that "[r]equiring funds to provide shareholders with information regarding the board's review of investment advisory contracts . . . encourages fund boards to engage in vigorous and independent oversight of advisory contracts."[42]

Despite these regulatory objectives, the SEC moved the disclosure further and further away from a fund's primary disclosure documents, making it arguably less likely that boards would be pressured to improve their Section 15(c) processes.

What Went Askew?

The SEC has not publicly identified the fundamental reason for its apparent de-emphasis of the disclosure resulting from relocations of the disclosure. However, the fundamental reason may be that the SEC did not base its determinations regarding relocations on investor testing.

From the outset, the SEC seems to have made *presumptions* about investor needs and what disclosure would satisfy those needs. In originally requiring the disclosure in the SAI, the SEC asserted, without citing any empirical basis, that "[m]utual fund fees and expenses, including advisory fees, are extremely important to shareholders" and the disclosure would "help them evaluate the board's basis for approving the renewal of an existing investment advisory contract."[43] In moving the disclosure from the SAI to the shareholder report, the SEC declared, without citing any empirical basis, that "shareholder reports are the location where investors are more likely to read and benefit from this disclosure"[44] and that such disclosure would be "more timely"[45] there for investors.

The SEC's Investor Advocate has reported to Congress that it "has long championed the [SEC's] use of investor testing to inform rulemaking initiatives, particularly those initiatives involving changes to disclosures provided to retail investors."[46] The Investor Advocate has further reported that it "continue[s] to conduct research of [its] own, employing surveys, focus groups, and other methods to gain insight into investor behavior and provide data regarding disclosure-related policy choices."[47] The Investor Advocate report to Congress in 2022 states that its "work provides concrete steps to help improve the usability of mandated disclosures"[48] through "methods to more accurately collect data from investors."[49]

Voices outside the SEC have also urged the SEC to employ investor testing. According to the Investor Advocate,[50] the Consumer Federation of America, the CFA Institute, and the Investment Company Institute have called for the SEC to engage in investor testing of disclosure to retail customers.

In moving the disclosure from the shareholder report to Form N-CSR, the SEC based *certain* of its determinations, in part, on information received from investors and others outside the agency. The information came

> through investor testing conducted prior to the proposal, surveys, and other information-gathering[,] . . . feedback from investors responding to the Fund Investor Experience RFC [request for public comment], as well as investors participating in certain past quantitative and qualitative investor testing initiatives on the Commission's behalf . . . .[51]

However, the SEC's references to investor testing are in the context of investor preference for "concise layered disclosure"[52] and not for the document where such disclosure would be located. The SEC did not state that the information it obtained through investor testing was part of the basis for moving the disclosure from the shareholder report to Form N-CSR.

Conclusion

The SEC has continued to jawbone about the importance of the Section 15(c) process. Last year, the SEC launched a probe of certain funds with low investment performance and/or high fees. Also last year, the SEC's Division of Examinations designated the Section 15(c) process as an examination priority. At the same time, the SEC has arguably de-emphasized the disclosure of the Section 15(c) process to investors by moving the disclosure further and further away from a fund's primary disclosure documents. The SEC, over a 22-year period, relocated the disclosure from the relatively prominent SAI to the shareholder report, and finally to the obscure Form N-CSR, a form filed with the SEC but not delivered to investors. The disclosure located in the SAI and incorporated into the prospectus, was subject to liability under the 1933 Act, but not disclosure in the shareholder report or Form N-CSR. The fundamental reason for these SEC relocations of the disclosure may be that the SEC relied on the *presumption* of investor needs and preferences instead of empirical evidence based on investor testing. The SEC's Investor Advocate, as well as outside entities, have urged the SEC to base its disclosure requirements on investor testing.

Mr. Cohen is of counsel at Carlton Fields, P.A., in Washington, DC. He spent five years on the Staff of the SEC's IM Division, ultimately serving as assistant chief counsel, and has dealt with the Division as a private practitioner for more than 50 years. He has served on The Investment Lawyer's Editorial Board since the outset of the publication in 1993 and has written more than 50 articles. He thanks Barry Barbash, former Director of the IM Division from 1993 to1998 and retired partner of Willkie, Farr, for reading and commenting on the article. He thanks his colleagues Ann B. Furman and Thomas C. Lauerman and his firm's librarian, Nicole Warren, for reviewing and contributing to this article. The views expressed are those of Mr. Cohen and do not necessarily reflect the views of his firm, its lawyers, its clients, or Mr. Barbash.

NOTES

1 At least some of the SEC's commissioners can be expected to disagree with the thesis of this article, possibly explaining that the Commission's location and relocations of the disclosure has simply reflected an ongoing effort to locate the disclosure where it would be most meaningful to fund shareholders. Accordingly, this article, when referring to the author's thesis, uses terms like "apparently" and "arguably" out of respect for that presumed view.

2 This article addresses *ongoing* SEC disclosure requirements for the Section 15(c) process and *not* SEC disclosure requirements of that process for proxy statements in connection with shareholder approval of advisory contracts. The SEC disclosure requirement for proxy statements is in Schedule 14A, Rule 14a-101, Item 22, Information Required in Investment Company Proxy Statements, Sub-item (c)(11), Approval of Investment Advisory Contract, under the Securities Exchange Act of 1934. The SEC has required proxy statement disclosure since 1944. *See Amendments to Proxy Rules for Registered Investment Companies,* Investment Company Act Release. No. 20614 (Oct. 13, 1994) (adopting amendments to Schedule 14A, at Item 22(c)(11)), 59 FR 52689, 52699 (Oct. 19, 1994), available at *https://www.sec.gov/files/rules/final/33-8433.pdf.* Furthermore, this article addresses the SEC disclosure requirement for the Section 15(c) process for open-end investment companies registering on Form N-1A, rather than (i) exchange-traded funds (ETFs), (ii) closed-end investment companies registering on Form N-2, and (iii) life insurance company management separate accounts registering on Form N-3. This article speaks as of October 19, 2023.

3 *Role of Independent Directors of Investment Companies*, Securities Act Release No. 7932, Exchange Act Release No. 43786, Investment Company Act Release No. 24816, at 3744 (Jan. 2, 2001) (adopting requirement for disclosure in SAI of basis for board's approval of advisory contract), 66 Fed. Reg. 3734, 3744 (Jan. 16, 2001) [hereinafter SEC Release Requiring Disclosure in SAI], available at *https://www.govinfo.gov/content/pkg/FR-2001-01-16/pdf/01-536.pdf.*

4 *Disclosure Regarding Approval of Investment Advisory Contracts by Directors of Investment Companies*, Securities Act Release No. 8433, Exchange Act Release No. 49909, Investment Company Act Release No. 26486 (June 23, 2004), 69 FR 39797 (June 30, 2004) [hereinafter SEC Release Moving Disclosure to Shareholder Report], available at *https://www.sec.gov/rules/2004/06/disclosure-regarding-approval-investment-advisory-contracts-directors-investment.*

5 Annual and semi-annual shareholder reports are required by Section 30(e) of the 1940 Act, and the disclosure requirements for the shareholder reports are set out in Item 27A of Form N-1A Registration Statement under the 1940 Act.

6 *Tailored Shareholder Reports for Mutual Funds and Exchange-Traded Funds; Fee Information in Investment Company Advertisements*, Securities Act Release No. 11125, Exchange Act Release No. 96158, Investment Company Act No. 34731 (Oct. 25, 2022), 87 FR 72758, 72795 (Nov. 25,2022) [hereinafter SEC Release Moving Disclosure to Form N-CSR], available at *https://www.federalregister.gov/documents/2022/11/25/2022-23756/tailored-shareholder-reports-for-mutual-funds-and-exchange-traded-funds-fee-information-in.*

7 For a description and discussion of the SEC Staff's probe, *see* Gary O. Cohen, "SEC Probes Fund Section 15(c) Process," *The Investment Lawyer,* Vol. 30, No. 3, at 30 (Mar. 2023) [hereinafter SEC Probes Fund Section 15(c) Process]. The SEC Staff sent letters to selected mutual funds requesting: meeting materials for fund board of directors' meetings; board meeting

minutes; documents and communications regarding board approval of advisory contracts; policies and procedures required by Rule 38a-1 under the 1940 Act, including Section 15 policies and procedures; and director evaluations under Rule 0-1(a)(7)(v) under the 1940 Act.

8 SEC, Division of Examinations, 2023 Examination Priorities 16 (Feb.7, 2023) [hereinafter SEC 2023 Examination Priorities], available at *https://www.sec.gov/files/2023-exam-priorities.pdf*. However, the SEC Staff did *not* announce the Section 15(c) process as an examination priority for the previous year, 2022. *See* SEC, Division of Examinations, 2022 Examination Priorities 11-16 (Mar. 2022), available at *https://www.sec.gov/files/2022-exa,-priorities.pdf*. As if to remedy an oversight, the SEC Staff stated, in 2023 with emphasis added, that "the Division will *continue* to evaluate boards' processes for assessing and approving advisory and other fund fees, particularly for funds with weaker performance relative to their peers." SEC 2023 Examination Priorities, *supra* n.8, at 16 (emphasis added).

9 The Director, for example, has said:

> Fund advisers do owe the funds they manage a fiduciary duty, which includes a duty of care and a duty of loyalty. The Commission can always enforce a breach of fiduciary duty by a fund adviser. In addition, the Investment Company Amendments Act of 1970 also added Section 36(b), which as you know specifies that a registered fund's adviser has a fiduciary duty with respect to the receipt of compensation for services or material payments from the fund or its shareholders. To enforce this duty, fund shareholders or the Commission may bring an action under this subsection. No plaintiff has yet won a 36(b) case, but if no adviser can ever lose one—and none has, so far—one wonders whether the duty enacted in the statute is truly being honored.

William Birdthistle, Director, SEC IM Division, Remarks at the ICI Investment Management Conference (Mar. 28, 2022) (footnote omitted), available at *https://www.sec.gov/news/speech/birdthistle-remarks-ici-investment-management-conference-032822#_ednref12.*

10 Section 36(b) of the 1940 Act provides:

> For the purposes of this subsection, the investment adviser of a registered investment company shall be deemed to have a fiduciary duty with respect to the receipt of compensation for services, or of payments of a material nature, paid by such registered investment company, or by the security holders thereof, to such investment adviser or any affiliated person of such investment adviser. An action may be brought under this subsection by the Commission, or by a security holder of such registered investment company on behalf of such company, against such investment adviser, or any affiliated person of such investment adviser, or any other person enumerated in subsection (a) of this section who has a fiduciary duty concerning such compensation or payments, for breach of fiduciary duty in respect of such compensation or payments paid by such registered investment company or by the security holders thereof to such investment adviser or person. . . .

11 Executive Office of the President, Office of Management and Budget, Office of Information and Regulatory Affairs, Agency Rule List -- Spring 2023, SEC, [hereinafter SEC Rule List] available at *https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST&currentPub=true&agencyCode=&showStage=active&agencyCd=3235&csrf_token=C2E1884B21E7C71BE3AE63FB4ACBFA65D2AB2104E6785966CDA166941CC85516D63E61ABCE3EC1EB459D377798AE0EFC9568.* *See* Gary Gensler, Chair, SEC, Statement on the Spring 2023 Regulatory Agenda June 13, 2023, available at *https://www.sec.gov/news/statement/gensler-statement-unified-agenda-061323.*

12 SEC Rule List, *supra* n.11.

13 SEC Release Requiring Disclosure in SAI, *supra* n.3, at 3744.

14 *Id.* at 3762.

15 *Id.*

16 Gartenberg v. Merrill Lynch Asset Mgmt., 694 F.2d 923 (2d. Cir. 1982) [hereinafter *Gartenberg II*], available at *https://www.casemine.com/judgement/us/5914c325add7b049347c43c6,* (aff'g Gartenberg v. Merrill Lynch Asset Mgmt., 528 F. Supp. 1038 (S.D.N.Y. 1981) (identifying the essential facts needed to negotiate a reasonable fee) [hereinafter *Gartenberg I*], available at *https://law.justia.com/cases/federal/district-courts/FSupp/528/1038/1765368/*). The US Supreme Court has held that the appropriate standard for determining whether a fund's adviser violated its fiduciary duty under Section 36(b) of the 1940 Act is the standard set forth in *Gartenberg I and II, id.*) in Jones v. Harris Assoc., 559 U.S. 335, 344 (2010). The court-approved factors are: (i) the adviser's cost in providing the services; (ii) the nature and quality of the adviser's services; (iii) the extent to which the adviser realizes economies of scale as the fund's assets increase; (iv) the adviser's profitability from the advisory contract; (v) fee rates for comparable funds; and (iv) the adviser's so-called "fall-out" benefits. The one factor that the SEC required be discussed probably qualifies as a "fall-out" benefit. The SEC began to require disclosure of these so-called "Gartenberg factors" in 2004. *See infra* n.27 and accompanying text.

17 Section 15(c), as relevant here, provides that "[i]t shall be the duty of the directors of a registered investment company to request and evaluate . . . such information as may reasonably be necessary to evaluate the terms of any contract whereby a person undertakes regularly to serve or act as investment adviser of such company."

18 In the related area of distribution plans, the SEC also stopped short of setting out a list of specific factors in Rule 12b-1 under the 1940 Act for consideration by fund directors. However, Rule 12b-1(d) sets out a note stating: "For a discussion of factors which may be relevant to a decision to use company assets for distribution, see Investment Company Act Releases Nos. 10862, September 7, 1979, and 11414, October 28, 1980."

19 The fund industry had a keen interest in how the SEC's required disclosure would develop in form and substance. *The Investment Lawyer* ran three articles by the author before and after compliance with the SEC's required disclosure became effective: Gary O. Cohen, "Disclosing Directors' Basis for Approving Underlying Fund Advisory Contract," Vol. 8, No. 11, at 1 (Nov. 2001); "Disclosure of Directors' Basis for Approving Investment Advisory Contracts," Vol. 9, No. 9. at 1 (Sept. 2002) ("disclosure varies wide in form and substance"); "New Disclosure Requirements for Directors' Basis for Approving Investment Advisory Contracts," Vol. 11, No. 10, at 1 (Oct. 2004) ("disclosure . . . continues to vary"). *See also* Gary O. Cohen, "Legal Standard for Fund Board's Approval of Advisory Contracts," *The Investment Lawyer*, Vol. 13, No. 1, at 1 (Jan. 2006) ("fund disclosure varies"), and Gary O. Cohen, "Fund Director Approval of Advisory Contracts: Shareholder Report Disclosure," *The Investment Lawyer*, Vol. 14, No. 1, at 3 (Jan. 2007).

20 SEC Release Requiring Disclosure in SAI, *supra* n.3, at 3744.

21 *Id.*

22 SEC Release Moving Disclosure to Shareholder Report, *supra* n.4, at 39800.

23 *Id.* at 39879.

24 *Id.* at 39800, 39804, and 39806.

25 *Id.* at 39800 (emphasis added; footnote omitted).

26 *Id.*

27 *Id.* at 39807. The SEC required disclosure as follows:

> Factors relating to both the board's selection of the investment adviser and approval of the advisory fee and any other amounts to be paid by the Registrant under the contract. This would include, but not be limited to, a discussion of the nature, extent, and quality of the services to be provided by the investment adviser; the investment

performance of the Registrant and the investment adviser; the costs of the services to be provided and profits to be realized by the investment adviser and its affiliates from the relationship with the Registrant; the extent to which economies of scale would be realized as the Registrant grows; and whether fee levels reflect these economies of scale for the benefit of the Registrant's investors. Also indicate in the discussion whether the board relied upon comparisons of the services to be rendered and the amounts to be paid under the contract with those under other investment advisory contracts, such as contracts of the same and other investment advisers with other registered investment companies or other types of clients (*e.g.*, pension funds and other institutional investors). If the board relied upon such comparisons, describe the comparisons that were relied on and how they assisted the board in concluding that the contract should be approved.

28 SEC Release Moving Disclosure to Form N-CSR, *supra* n.6, at 72795.

29 SEC Release Moving Disclosure to Shareholder Report, *supra* n.4, at 39000, 39804, and 39806.

30 SEC Release Moving Disclosure to Form N-CSR, *supra* n.6, at 72795.

31 *Id*.

32 *Id.*

33 SEC Release Moving Disclosure to Shareholder Report, *supra* n.4, at 39800.

34 SEC Release Moving Disclosure to Form N-CSR, *supra* n.6, at 72795-72796 (footnote omitted). New Rule 30e-1(b)(2)(i) under the 1940 Act requires that a fund "must make the disclosures required by Items 7 through 11 of Form N-CSR . . . publicly accessible, free of charge, at the [fund's] website address." Item 11 requires a "Statement Regarding Basis for Approval of Investment Advisory Contract." So, the disclosure will be available to investors on a fund's website.

35 *See id*. at 72858 (item 11 of SEC Form N-CSR under the 1940 Act).

36 SEC Release Requiring Disclosure in SAI, *supra* n.3, at 3744. The SEC required that the prospectus set out a reference to the SAI for "additional information about Fund directors," but not specifically about director consideration of the Section 15(c) process. *Id*. at 3762-3763.

37 SEC Release Moving Disclosure to Shareholder Report, *supra* n.4, at 39800 (emphasis added).

38 *Id*. (footnote omitted).

39 SEC Release Moving Disclosure to Form N-CSR, *supra* n.6, at 72764.

40 Regarding terminology, the SEC, as quoted in this article, uses the terms "shareholders" and "investors" virtually interchangeably. This article uses the term "investors," because it can be read to include offerees of fund shares in addition to shareholders.

41 SEC Release Moving Disclosure to Shareholder Report, *supra* n.4, at 39800 (emphasis added; footnote omitted).

42 SEC Release Moving Disclosure to Form N-CSR, *supra* n.6, at 72795.

43 SEC Release Requiring Disclosure in SAI, *supra* n.3, at 3744.

44 SEC Release Moving Disclosure to Shareholder Report, *supra* n.4, at 39879.

45 *Id*. at 39800, 39804, and 39806.

46 SEC, Office of the Investor Advocate, Report on Activities: Fiscal Year 2021 at 12 (2021) (Rick A. Fleming was Investor Advocate) [hereinafter SEC Investor Advocate 2021 Report to Congress], available at *https://www.sec.gov/files/fy21_oiad_sar_activities_report_final_508.pdf*.

47 *Id.*

48 SEC, Office of the Investor Advocate, Report on Activities: Fiscal Year 2022 at 26 (2022) (Marc Oorloff Shamar was Investor Advocate), available at *https://www.sec.gov/files/fy22-oiad-sar-activities-report.pdf*.

49 *Id*. at 43.

50 SEC Investor Advocate 2021 Report to Congress, *supra* n.46, at 12.

51 SEC Release Moving Disclosure to Form N-CSR, *supra* n.6, at 72761. The SEC Release Requiring

Disclosure in the SAI, *supra* n.3, and the SEC Release Moving Disclosure to Shareholder Report, *supra* n.4, had no reference to "investor testing," but the SEC's Release Moving Disclosure to Form N-CSR, *supra* n.6, had several references to investor testing.

52 SEC Release Moving Disclosure to Form N-CSR, *supra* n.6, at 72761.