

## **THE OFFERING DOCUMENTS<sup>1</sup>**

### **I. REGISTRATION AND THE REGISTRATION STATEMENT – 1933 ACT AND 1940 ACT REQUIREMENTS**

#### **A. Initiating a Registration**

##### **1. Notification of registration**

Section 8(a) of the 1940 Act provides that an investment company may initiate a registration under the Act by filing a notification of registration with the SEC. The prescribed form is designated Form N-8A (“Notification of Registration”). A company becomes “registered” when the form is received by the SEC. Because the Internal Revenue Code provides pass-through tax treatment to entities that, among other requirements, are registered as investment companies every day of the tax year, the N-8A is normally filed the same day the entity is organized as a corporation or trust.

##### **2. 1940 Act registration statement**

Section 8(b) of the 1940 Act and Rule 8b-5 thereunder provide that, within 3 months after filing the notification of registration on Form N-8A, the registrant must file a registration statement describing its objectives, investment policies, investment restrictions, method of operations and management. It also must include certain important corporate documents. Open-end management companies use Form N-1A, closed-end management companies use Form N-2.

##### **3. Combined registration statement**

Section 8(c) authorizes the Commission to permit the use of an issuer’s 1933 Act registration statement or response filed by it under the Securities Exchange Act of 1934 to supply the portions of the information required under Section 8(b). Forms N-1A and N-2 are utilized for registration of mutual funds and closed-end investment companies under both the 1933 and 1940 Acts.

#### **B. Registration on Form N-1A**

Form N-1A is the registration statement for open-end investment companies. In

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<sup>1</sup> The information below is intended to be a summary and is not intended to be exhaustive. Do not rely on this information without consulting with counsel.

1998, the SEC adopted sweeping amendments to Form N-1A. The amendments, part of broader disclosure reform initiatives that were undertaken by the SEC, were designed to make the prospectus a more effective tool for investors by focusing its contents on information essential to making investment decisions, instead of technical and legal matters. In 2009, the SEC adopted additional amendments to Form N-1A, which involved reorganizing the content in Form N-1A to permit registrants to use a “summary prospectus” as a delivery option. All new registration statements or post-effective amendments filed on or after January 1, 2010 have had to comply with these amendments to Form N-1A. Form N-1A consists of three parts:

## **1. Part A - Prospectus**

Part A of Form N-1A contains information which must be included in the prospectus pursuant to Section 10(a)(1) of the 1933 Act. The prospectus must provide essential information about the registrant in a way that will assist a shareholder or prospective shareholder in making an informed decision about whether to purchase the securities being offered. The information contained in the prospectus must be presented in a clear, concise and understandable manner. In particular, information must be provided in “plain English” as provided in Rule 421(d) under the 1933 Act. With the 2009 amendments, Items 2 to 8 are required to be in numerical order at the front of a prospectus, can only be preceded by the front cover page (Item 1) or a table of contents and cannot include disclosure other than that permitted by Items 2 to 8. The required information includes:

- a. Item 1 – Front and Back Cover Pages. Four items are required on the front cover page: the fund’s name, the fund’s ticker symbol, the date of the prospectus, and a disclaimer about the SEC’s approval of the securities being offered. Exchange-traded funds (“ETFs”) must also disclose the principal market on which they are traded. The back cover page should include disclosure concerning the availability of the statement of additional information, and the annual and semi-annual reports.
- b. Items 2, 3 and 4 – Risk/Return Summary. The risk/return summary includes a description of the fund’s investment objectives or goals, a fee table showing shareholder fees and annual fund operating expenses, a summary of the fund’s principal investment strategies and principal risks, and a bar chart and table showing the fund’s year-to-year volatility, including after-tax returns,

calculated using the highest federal income tax rate. (The after-tax return requirement does not apply to money market funds or to prospectuses used only for investors in tax-deferred vehicles.)

- c. Item 5 – Management. Funds must disclose the name of each investment adviser and the name, title and length of service of the portfolio managers.
- d. Item 6 – Purchase and Sale of Fund Shares. Funds must disclose any investment minimums and summarize the procedures for redeeming shares. ETFs have additional disclosure requirements.
- e. Item 7 – Tax Information. Funds must state whether they intend to make distributions that are taxed as ordinary income or capital gains or whether they intend to make tax-exempt distributions.
- f. Item 8 – Financial Intermediary Compensation. Funds are required to include disclosure about payments the fund and its related companies might make to financial intermediaries for the sale of fund shares.
- g. Item 9 - Investment Objectives, Principal Investment Strategies, Related Risks and Disclosure of Portfolio Holdings. The fund's objective must be stated, including whether the objective can be changed without shareholder approval. Principal investment strategies and the principal risks of investment must be disclosed. A fund must also state that a description of the fund's policies and procedures with respect to the disclosure of its portfolio securities is available in its SAI and on its website, if applicable.
- h. Item 10 - Management, Organization and Capital Structure. Funds must disclose information about advisory services provided to, and advisory fees paid by, the fund, the identity of the portfolio managers, material legal proceedings against the fund, its adviser or its principal underwriter. With respect to disclosure of advisory services, the fund must also state that a discussion regarding the board of directors' basis for approving any investment advisory contract is available in the fund's shareholder report. With respect to disclosure about the portfolio managers, the fund must disclose each member of a portfolio management team who is jointly and primarily responsible for the day-to-day management of the fund's portfolio (or, if more than five persons are jointly and primarily

responsible, state only the five persons with the most significant responsibility). The fund must also disclose that additional information concerning the portfolio manager or management team is available in the SAI.

- i. Item 11 - Shareholder Information. A fund must disclose the procedures for pricing shares, including, if applicable, its policy of using fair value pricing, the procedures for purchasing and redeeming shares, its policy with respect to dividends and distributions, and the tax consequences of buying, holding, exchanging and selling shares. A fair value pricing summary must also be provided. The fund must also disclose any risks to shareholders of frequent purchases and redemptions of fund shares, and whether a fund has adopted such policies and procedures with respect to such frequent purchases and redemptions.
- j. Item 12 - Distribution Arrangements. A fund must include a brief description of arrangements that result in sales load breakpoints, including a summary of shareholder eligibility requirements and the methods used to value accounts in order to determine whether a shareholder has met sales load breakpoints. Disclosure about 12b-1 fees, master-feeder fund arrangements and multiple class plans also must be provided.
- k. Item 13 - Financial Highlights. An audited table of financial highlights covering a five-year period must be disclosed.
- l. As noted above, Items 2 to 8 must be presented in order, and information about obtaining additional information must be on the back cover. Otherwise, Form N-1A does not impose any order on the items in the prospectus.

## **2. Part B - Statement of Additional Information**

Part B of Form N-1A, the Statement of Additional Information (“SAI”), is intended to provide additional information about the registrant that is not required to be included in the prospectus but which the SEC has concluded may be of interest to some shareholders. The 1998 amendments moved several items from Part A to the SAI. The SAI must be provided upon request to recipients of the prospectus. To obtain a measure of protection against liability for omissions from the prospectus, most funds incorporate the SAI by reference into the prospectus. This was effective to protect a

fund in at least one litigated case. See White v. Melton, 757 F. Supp. 267 (S.D.N.Y. 1991). Information that must appear in the SAI includes:

- a. Item 14 - Cover Page and Table of Contents. Must include the fund's name, the fund's ticker symbol, the date of the SAI and a statement that the SAI is not a prospectus with disclosure regarding how the prospectus may be obtained. ETFs must also disclose the principal market on which they are traded.
- b. Item 15 - General Information and History. Must provide the date and form of organization of the fund, including the jurisdiction in which it is organized and a general history of its operations.
- c. Item 16 - Investment Strategies and Risks. Should not include a repetition of the information presented in the prospectus; requires disclosure of fundamental policies (*i.e.*, those investment policies that may be changed only by a majority vote of the outstanding shares). A fund must disclose its policies and procedures with respect to the disclosure of its portfolio securities and any ongoing arrangements to make available information about its portfolio securities.
- d. Item 17 - Management of the Fund. Includes the identification and description of occupations of all directors and officers of the fund and information about fund governance; requires the disclosure of all directors who are "interested persons," officers' and directors' associations with fund affiliates, the investment adviser, and principal underwriters; must include information concerning the compensation of directors, officers and members of the advisory board (if any). The SAI must also show associations of certain members of the directors' families with fund affiliates (beyond those associations that might make the director an "interested person" of the fund). In addition, the SAI must disclose the directors' ownership of shares of the funds that they govern, and of shares of funds in the entire fund complex. A fund is required to disclose whether it and its investment adviser and principal underwriter have adopted codes of ethics under Rule 17j-1 under the 1940 Act, and for a fund that invests in voting securities, to describe its proxy voting policies and procedures and how shareholders can obtain information on how the fund voted its proxies.

- e. Item 18 - Control Persons and Principal Holders of Securities. Requires disclosure of any controlling person (ownership of 25% of the fund's voting securities or actual control) and a description of the control relationship; also requires the disclosure of the name and address of any person or beneficiary who holds of record more than 5% of the fund's equity securities.
- f. Item 19 - Investment Advisory and Other Services. Includes a description of the advisory agreement, underwriting agreement, management related service contract, and plan of distribution, and disclosure of compensation to underwriters, dealers and sales personnel.
- g. Item 20 - Portfolio Managers. A fund must provide information regarding other accounts managed by any of its portfolio managers, including a description of material conflicts of interest that may arise in connection with simultaneously managing the fund and the other accounts. A fund must disclose the structure of, and the method used to determine, the compensation of each portfolio manager. A fund must also disclose each portfolio manager's ownership of securities in the fund.
- h. Item 21 - Brokerage Allocation. Must describe the fund's policy in effecting securities transactions and selecting brokers and the aggregate commissions incurred during the three most recent fiscal years; must disclose brokerage commissions paid to affiliates and the percentage of the commissions paid by the fund which this amount represents.
- i. Item 22 - Capital Stock and Other Securities. Includes a full description of authorized securities of the fund and the particular attributes of the fund's capital stock.
- j. Item 23 - Purchase, Redemption and Pricing of Shares. Includes an explanation of the offering of fund shares, description of how the fund's portfolio securities are valued, and the fund's redemption procedures. The fund must also disclose any arrangements with any person to permit frequent purchases and redemptions of fund shares, including the identity of such person and any compensation or consideration received by the fund for such arrangements.

- k. Item 24 - Taxation. Requires an explanation of any tax information relevant to investors, including whether the fund qualifies for pass-through tax treatment under Subchapter M of the Internal Revenue Code.
- l. Item 25 - Underwriters. Includes a description of the principal underwriter's commissions in the aggregate for the last three fiscal years and more detailed information about amounts received by each principal underwriter who is an affiliate of the fund.
- m. Item 26 - Calculation of Performance Data. This item provides an explanation and formulae for the calculation of performance data included in the Prospectus.
- n. Item 27 - Financial Statements (typically incorporated by reference from the annual report sent to shareholders). In addition to providing financial statements and schedules in accordance with Regulation S-X, a fund is required, among other things, to include management's discussion of fund performance in annual reports and to discuss, in reasonable detail, the material factors and the conclusions that formed the basis for the board of directors' approval of any investment advisory contract. The fund's discussion must include factors relating to both the board's selection of the investment adviser, and its approval of the advisory fee and any other amounts to be paid under the advisory contract. The factors mirror the *Gartenberg* factors.

### 3. Part C - Other Information

Part C of Form N-1A contains information that is not required to be in the prospectus or SAI but must nevertheless appear in the registration statement. Part C must include the following:

- a. Item 28 - Exhibits (including Articles of Incorporation, By-laws, advisory, custodian, transfer agency and other contracts entered into by the fund).
- b. Item 29 - A list of persons controlled by or under common control with registrant.
- c. Item 30 - Indemnification. Requires disclosure of the general effect of any contract, arrangement or statute under which any director, officer, underwriter, or affiliated person of the registrant

is insured or indemnified in any manner against any liability that may be incurred in such capacity, other than insurance provided by the above persons for their own protection).

- d. Item 31 - Business and Other Connections of Investment Adviser.
- e. Item 32 - Principal Underwriters (identity and certain other information).
- f. Item 33 - Location of Accounts and Records.
- g. Item 34 - Management Services.
- h. Item 35 - Undertakings (of the fund).
- i. Signatures. Persons required to sign the registration statement include the registrant, its principal executive officer(s), its principal financial officer, and the majority of its board of directors or trustees. Because all filings are now electronic, funds must maintain signed original at its offices.

## **C. SEC Review of the Initial Registration Statement**

### **1. Transmitting the registration statement**

When filing a registration statement or amendment with the SEC, a fund should include a letter of transmittal describing: (a) any material changes from the most recent filing of the same kind by that complex; (b) any problem areas that warrant particular attention; (c) any new investment techniques, products, or methods of distribution; and (d) any prior filings intended as precedent for the current filing. (See Investment Company Act Release No. 13768 (February 15, 1984)).

### **2. Review of the registration statement by the Office of Disclosure Policy and Review**

Any registered fund registration statement filed with the SEC is assigned to the Office of Disclosure Policy and Review, which is within the Division of Investment Management. Funds and fund complexes are assigned to a particular branch, and all disclosure matters relating to that fund complex are customarily reviewed by that particular branch, although the SEC may rotate the reviewers every several years. In addition to the reviewing branches, the Office of Disclosure Policy and Review has a



Senior Accountant who generally is called upon by the branches to review complex financial matters.

### **3. Type of review to expect**

- a. Full Review. Full review of the entire registration statement will typically occur, but a registrant may request selective review of certain portions of its registration statement.
- b. Selective Review. A registrant may request selective review of a registration statement if the registration statement is substantially similar to disclosure contained in previous filings by a fund in the same complex that was reviewed by the staff relatively recently (See 1933 Act Release No. 6510 (Feb. 15, 1984)).
  - (1) Conditions for selective review of a new fund registration include that the disclosure for the new fund may not be substantially different from that in the previous filed registration statement or other documents cited as similar.
  - (2) Where a registrant has requested selective review, the SEC staff typically will review the remainder of the registration statement only to confirm that a full review is not necessary.

### **4. Exchange of comments**

Initial written comments from the SEC staff based upon its review of the filing typically are provided to the registrant within 30 days of filing. Responses to the staff comments may be handled in various ways.

- a. Telephone follow-up with the staff to clarify any comments given is usually productive. Written responses are typically required.
- b. SEC staff have varying preferences regarding when a registrant must respond to comments.
- b. Pre-effective amendments to the registration statement should be filed after all outstanding comments have been resolved.

### **5. When registration becomes effective**

The initial registration statement usually becomes effective by SEC order,

granted only when all SEC staff comments have been resolved. For subsequent amendments, Rule 485 provides the dates on which such amendments may become effective. As soon as the registration statement is effective, sale of fund shares may commence.

## **6. Tandy Representations**

From the mid 1970s until October 2016, and in connection with responding to SEC staff comments, the staff formerly requested that the fund provide a written statement, the so called “Tandy Representations,” acknowledging that:

- a. The fund is responsible for the adequacy and accuracy of the disclosure in the filings;
- b. Staff comments or changes to disclosure in response to staff comments in the filings reviewed by the staff do not foreclose the Commission from taking any action with respect to the filing; and
- c. The fund may not assert staff comments as a defense in any proceeding initiated by the Commission or any person under the federal securities laws of the United States.

In addition, Tandy Representation requests were accompanied by a statement that the Division of Enforcement has access to all information provided to the staff of the Division of Investment Management in fund filings and in response to staff comments on filings. Effective October 5, 2016, Tandy Representations will no longer be requested by the staff.

## **D. Number of Shares Registered - Rule 24f-2**

Open-end investment companies are deemed to have registered an indefinite number of shares under Section 24(f)(2).

1. The investment company must file a Rule 24f-2 Notice within 90 days of the end of its fiscal year, accompanied by payment of registration fees on shares sold, less shares redeemed, during the period. Shares distributed in payment of dividends and distribution must be counted as sold for this purpose.
2. If the company does not pay the fee within that period, it will owe interest thereon, and may be subject to other penalties.

## II. POST-EFFECTIVE AMENDMENTS

### A. General

1. Modifications to a registration statement may be made after its original effective date by filing “post-effective amendments” with the SEC. Rule 485 under the 1933 Act was adopted to provide an easy, controllable mechanism to make amendments. The Rule distinguishes between “routine” and “non-routine” changes; the distinction affects the length of time necessary for the modification to become effective.
2. Post-effective amendments are generally needed in order to update financial information which has become stale. Section 10(a)(3) of the 1933 Act prohibits any registrant from using a prospectus with audited financial statements that are more than 16 months old. Amendments also are needed when a prospectus no longer accurately reflects fund operations or practices.

### B. Non-Routine Amendments - Rule 485(a)

1. A non-routine amendment consists most often of material changes in a prospectus or statement of additional information. Material changes include, but are not limited to -
  - a. Changes in a registrant’s investment objectives or policies;
  - b. Termination of an investment advisory contract; or
  - c. Resignation of the registrant’s independent public accountants or one of its directors.
2. Except as otherwise provided, a post-effective amendment becomes effective 60 to 80 days after filing, as designated by the registrant, unless the SEC, in the public interest and with due regard for investor protection, declares the amendment effective on an earlier date.
3. Post-effective amendments filed to establish a new series of an existing investment company registrant are also filed under Rule 485(a). Such amendments become effective 75 to 95 days after filing, as designated by the registrant.

### C. Routine Amendments - Rule 485(b)

A routine post-effective amendment becomes effective on the date when it is filed or on a later date designated by the registrant on the facing sheet of the amendment. The date may be no later than 30 days after the date on which the amendment is filed. Prerequisites for filing pursuant to this subpart of the Rule are:

1. The amendment is filed for one of the following purposes and no other:
  - a. to update financial statements;
  - b. to designate a new effective date for a previously filed Rule 485(a) amendment;
  - c. to disclose or update information required by Item 5 of Form N-1A;
  - d. to make any non-material changes that the registrant deems appropriate (e.g., correcting inconsistencies, typographical or other technical errors or changes deemed immaterial by registrant); or
  - e. any other purpose which the SEC shall approve.
2. The registrant must represent that no material event requiring disclosure in the prospectus has occurred since the latest of these dates:
  - a. the effective date of the registrant's registration statement;
  - b. the effective date of its most recent post-effective amendment to its registration statement that included a prospectus; or
  - c. the filing date of a post-effective amendment which has not yet become effective.
3. If counsel prepares or reviews the post-effective amendment, it must furnish a written representation that the amendment does not contain disclosures that would render it ineligible under subsection (b).
4. The post-effective amendment must recite that it will become effective pursuant to subsection (b) of the Rule.
5. The signature page of the amendment must certify that the amendment meets all of the requirements for effectiveness pursuant to subsection (b) of the Rule.

6. Penalties for misusing Rule 485(b) include the suspension of the ability to file pursuant to that subsection.

**D. “Sticker” Amendments - Rule 497**

Certain changes in the prospectus can be made by supplementing the existing prospectus pursuant to Rule 497(c). These “sticker” amendments have the effect of providing information on a current basis.

**III. 1933 ACT CIVIL LIABILITY**

**A. False or Misleading Registration Statements**

The 1933 Act provides a specific civil remedy for purchasers who acquire securities covered by false or misleading registration statements. A registration statement is misleading if at the time it becomes effective it contains “an untrue statement of material fact or omit(s) to state a material fact required to be stated therein, or necessary to make the statements therein not misleading.” (Section 11(a).)

1. Persons who may be liable:
  - a. Every person who signed the registration statement;
  - b. Every director of the issuer;
  - c. Every person about to become a director, who with his or her consent is named in the registration statement;
  - d. Every accountant, engineer, appraiser, attorney, or other person who gives an expert opinion with respect to a part of a registration statement;
  - e. Every underwriter of the security; and
  - f. Any controlling person of the foregoing.
  - g. Certain defenses may be available.

**B. False or Misleading Prospectuses or Oral Communications**

Section 12 of the 1933 Act permits purchasers to sue any seller or offeror of a security who used a prospectus or oral communication that was false or materially misleading. Certain defenses may be available.

**C. Statute of Limitations**

Section 13 of the 1933 Act provides a statute of limitations for actions under Section 11 or 12 of the Act; *i.e.*, one year from the date the purchaser discovers the violation, but in no event more than three years after the purchase.

**IV. STATE SECURITIES LAWS**

In connection with the enactment of the National Securities Markets Improvements Act of 1996, the substantive regulation of SEC registered mutual funds by state securities laws was eliminated. However, many states require certain notice filings and filing fees. Depending on the state, these may include copies of all registration statements and post-effective amendments and/or certain other forms (such as Form NF or Form U-2).