

SUPPORTING STATEMENT
For the Paperwork Reduction Act Information Collection Submission for
Rule 139b

A. JUSTIFICATION

1. Necessity for the Information Collection

As directed by the Fair Access to Investment Research Act of 2017¹ (the “FAIR Act”), the Commission adopted new rule 139b under the Securities Act of 1933² to extend the safe harbor under rule 139 to a “covered investment fund research report.”³ Specifically, new rule 139b provides a safe harbor to a broker-dealer who publishes or distributes in the regular course of its business research reports concerning one or more “covered investment fund(s)” while participating in the distribution of a covered investment fund’s securities. A broker-dealer may issue an issuer-specific research report or an industry research report so long as the respective conditions for each report are met; however, should a broker-dealer offer performance information in either report, it must comply with the disclosure requirements for standardized performance in rule 139b(a)(3). As a result, rule 139b contains a “collection of information” requirement within the meaning of the Paperwork Reduction Act of 1995 (“PRA”).⁴

On June 8, 2018 the Commission issued a release proposing new rule 139b.⁵ In the Proposing Release, the Commission solicited comment on whether rule 139b should include a

¹ Pub. L. 115-66, 131 Stat. 1196 (2017).

² 15 U.S.C. 77a *et seq.*

³ *See* Covered Investment Fund Research Reports, Securities Act Release No. 10580 (Nov. 30, 2018) [83 FR 64180 (Dec. 13, 2018)] (“Adopting Release”).

⁴ 44 U.S.C. 3501–3521.

⁵ *See* Covered Investment Fund Research Reports, Securities Act Release No. 10498 (May 23, 2018) [83 FR 26788 (June 8, 2018)] (“Proposing Release”).

standardized performance disclosure requirement.⁶ In response to comments received, the Commission decided to adopt such a requirement.⁷ The Commission found that standardized performance presentation is an appropriate requirement because investors tend to consider fund performance a significant factor in evaluating or comparing investment companies, and aid in addressing potential investor confusion if a communication were not easily recognizable as research as opposed to an advertising prospectus or supplemental sales literature. The standardized performance requirement of rule 139b compels broker-dealers issuing research reports that include performance information about open-end funds to do so in accordance with the requirements set forth in paragraphs (d), (e), and (g) of rule 482.⁸ Rule 139b⁹ also requires that research reports that include performance information about closed-end funds present it in accordance with the instructions to item 4.1(g) of Form N-2¹⁰ under the Investment Company Act of 1940 (“Investment Company Act”).¹¹ Performance measures calculated by broker-dealers are not required to be kept confidential and there is no mandatory retention period.

2. Purpose and Use of the Information Collection

As noted above, investors tend to consider fund performance a significant factor in evaluating or comparing investment companies. Standardized performance also aids in

⁶ See Proposing Release, *supra* note 5, at 26803–04.

⁷ See Adopting Release, *supra* note 3, at Section II.C.

⁸ See 17 CFR 230.139b(a)(3) and 17 CFR 230.482.

⁹ See 17 CFR 230.139b(a)(3).

¹⁰ 17 CFR §239.14 and 17 CFR 274.11a-1.

¹¹ 15 U.S.C. 80a-1 *et seq.*

addressing potential investor confusion if a communication were not easily recognizable as research as opposed to an advertising prospectus or supplemental sales literature.

Rule 139b compels broker-dealers issuing research reports that include performance information about open-end funds to do so in accordance with the requirements set forth in paragraphs (d), (e), and (g) of rule 482. Rule 139b also requires that research reports that include performance information about closed-end funds present it in accordance with the instructions to item 4.1(g) of Form N-2 under the Investment Company Act. Thus, the standardized performance requirement of rule 139b is a “collection of information” requirement within the meaning of the PRA, and the Commission is submitting the collection of information to the Office of Management and Budget (“OMB”) for review in accordance with 44 U.S. C. 3507(d) and 5CFR 1320.11. The rule requires that a broker or dealer that publishes or distributes a research report under rule 139b and offers performance information in that report, must also provide alongside that standardized performance information as required by rule 139b(a)(3).

As noted above, rule 139b contains a “collection of information” requirements within the meaning of the PRA. The title for the collection of information is:

- “Rule 139b Disclosure of Standardized Performance.”

3. Consideration Given to Information Technology

The collection of information requirements under the adopted rule will not be provided to the Commission, either electronically or otherwise.

4. Duplication

Rule 139b duplicates many of the provisions of rule 139 with modifications to accommodate covered investment funds. As directed by the FAIR Act, the Commission adopted rule 139b in order to extend the rule 139 safe harbor for broker-dealers publishing or distributing research reports when participating in the offering of an issuer's securities to covered investment funds. The duplication of rule 139 is, therefore, consistent with Congressional directive.

Furthermore, rule 139b incorporates performance standards from other rules. As discussed above, rule 139b requires that research reports about open-end funds that include performance information must present it in accordance with paragraphs (d), (e), and (g) of rule 482. Rule 139b also requires that research reports about closed-end funds that include performance information must present it in accordance with instructions to item 4.1(g) of Form N-2. These overlapping performance standards are intended to promote the Commission's goal of minimizing investor confusion related to whether a publication is a research report or an investment company advertisement or selling material.

The Commission believes that there are no other federal rules duplicating, overlapping, or conflicting with rule 139b.

5. Effect on Small Entities

The Commission reviews all rules periodically, as required by the Regulatory Flexibility Act, to identify methods to minimize recordkeeping or reporting requirements affecting small businesses. The current performance standards for research reports do not distinguish between small broker-dealers and other broker-dealers. To the extent smaller broker-dealers publish or distribute research reports, their burden to prepare research reports may be greater than for larger

broker-dealers due to economies of scale. This burden will include the cost of reviewing a research report to confirm that it meets the requirements of rule 139b.

The Commission considered special requirements for small entities. The Commission believes, however, that imposing different requirements on smaller broker-dealers will not be consistent with investor protection and the purposes of the rule's conditions. The use of different standards for small entities may create a risk that investors may receive false or misleading information.

6. Consequences of Not Conducting Collection

Rule 139b requires that research reports about open-end funds that include performance information must present it in accordance with paragraphs (d), (e), and (g) of rule 482. Rule 139b also requires that research reports about closed-end funds that include performance information must present it in accordance with instructions to item 4.1(g) of Form N-2. Standardized performance helps reduce potential investor confusion between research reports and investment company advertisements or selling materials.

7. Inconsistencies With Guidelines in 5 CFR 1320.5(d)(2)

Not applicable.

8. Consultation Outside the Agency

The Commission issued an Adopting Release soliciting comment on the “collection of information” requirements and associated burdens.¹² The collections of information were not

¹² See Adopting Release, *supra* note 3, at 64218. The Commission received no comments in response to this request in the Adopting Release.

contemplated at the time the Proposing Release was published, but were included in the final rules in response to comments received from the public on the Proposing Release.

Comments on the Commission's releases are generally received from registrants, investors, and other market participants. In addition, the Commission and staff participate in an ongoing dialogue with representatives of various market participants through public conferences, meetings and informal exchanges. The Commission considered all comments received on the Proposing Release prior to publishing the final rule. Comments received on the Proposing Release are available at <https://www.sec.gov/comments/s7-11-18/s71118.htm>. A copy of the Adopting Release is attached.

9. Payment or Gift

Not applicable.

10. Confidentiality

Not applicable.

11. Sensitive Questions

No PII collected/not applicable.

12. Burden of Information Collection

The following estimates of average burden hours and costs are made solely for purposes of the PRA and are not derived from a quantitative, comprehensive, or even representative survey or study of the burdens associated with Commission rules and forms. Rule 139b(a)(3) requires that covered investment fund research reports about open-end funds that include performance

information must present it in accordance with paragraphs (d), (e), and (g) of rule 482. Rule 139b(a)(3) also requires that covered investment fund research reports about closed-end funds that include performance information must present it in accordance with instructions to item 4.1(g) of Form N-2. The standardized performance requirement is mandatory only if a broker-dealer provides performance information in their covered investment fund research report. Performance information provided in a covered investment fund research report will not be kept confidential.

For purposes of the PRA, we estimate that 10% of the rule 482 and rule 34b-1 communications currently filed by broker-dealers with FINRA (approximately 65,000) could be considered as rule 139b covered investment fund research reports.¹³ We estimate that broker-dealers will publish annually 6,500 (10% of 65,000) covered investment fund research reports. Moreover, we assume for purposes of the PRA that all estimated rule 139b research reports will include fund performance information. We further estimate that 1,417 broker-dealers would likely be respondents to the collection of information with a frequency of 4.6 responses per year.¹⁴ We further estimate that 50% of these broker-dealers will have experience in complying with standardized performance requirements under rule 482. For the 50% of this subset of broker-dealers that do not have experience with complying with rule 482, we estimate that there will be a one-time implementation cost for each broker-dealer of 5 internal burden hours. Additionally, we estimate that each research report will require 3 hours of ongoing internal burden hours by a broker-dealers' personnel to comply with the rule 139b collection of information requirements, which for each broker-dealer is estimated to be 13.8 internal burden

¹³ See Adopting Release, *supra* note 3, at 64217.

¹⁴ See Adopting Release, *supra* note 3, at 64218. 6,500 covered investment fund research reports / 1,417 broker-dealers = 4.6 annual responses per broker-dealer.

hours.¹⁵ Accordingly, we estimate that the standardized performance presentation requirements will result in an average annual hour burden of about 16.3 hours per broker-dealer¹⁶ in the first year of compliance and about 13.8 hours per broker-dealer for each of the next two years. Amortized over three years, the average annual hour burden will be about 14.63 hours per broker-dealer.¹⁷

In sum, we estimate that rule 139b's requirements will impose a total annual internal hour burden of 20,731 hours on broker-dealers.¹⁸ We do not think there is an external cost burden associated with this collection of information.

Based on a Commission estimate of 20,731 hours and an estimated wage rate of approximately \$214.75 per hour,¹⁹ the total cost of the hour burden for complying with the standardized performance requirements of rule 139b is \$4,451,982.25.²⁰

Table 1: Summary of Annual Responses, Burden Hours, and Burden Hour Costs Estimates for the Disclosure Requirement under Rule 139b.

Annual number of responses

Previously approved 0

¹⁵ 4.6 annual responses per broker-dealer x 3 internal burden hours = 13.8 annual internal burden hours per broker-dealer.

¹⁶ (50% of * 13.8 hours ongoing compliance) + (50% * (13.8 hours ongoing compliance + 5 hours of initial compliance hours)).

¹⁷ ((16.3 internal burden hours in year 1) + (13.8 internal burden hours in year 2) + (13.8 internal burden hours in year 3)) / 3.

¹⁸ 14.63 annualized burden hours * 1,417 broker-dealers.

¹⁹ This estimate is based on the hourly wage rates published in SIFMA's *Management & Professional Earnings in the Securities Industry 2013* for a junior business analyst and compliance attorney, modified by Commission staff to account for an 1800-hour work-year and inflation, and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead. The estimated wage rate of \$214.75 is a weighted average based on the estimate that a junior business analyst would handle 75% of the hours spent at an hourly rate of \$169 and a compliance attorney would handle the remaining 25% of the hours spent at an hourly rate of \$352. $(\$169 \times 0.75) + (\$352 \times 0.25) = \$214.75$.

²⁰ $\$214.75 \times 20,731 = \$4,451,982.25$.

Requested	6,500
Change	6,500

Annual time burden (hrs.)

Previously approved	0
Requested	20,731
Change	20,731

Annual cost burden (\$)

Previously approved	\$0
Requested	\$0
Change	\$0

13. Cost to Respondents

Compliance with the conditions of rule 139b will not require any investment in capital equipment or outside services. As noted above, we do not believe there to be an external cost burden.

14. Cost to the Federal Government

There is no cost associated with the adoption of rule 139b.

15. Changes in Burden

The total annual hour burden is 20,731 hours. Because rule 139b is a new rule, there is no prior existing annual burden. The increase in burden hours, therefore, is equivalent to the total annual burden hours of 20,731. We do believe there to be an external cost burden associated with the new rule.

16. Information Collection Planned for Statistical Purposes

Not applicable.

17. Approval to Omit OMB Expiration Date

Not applicable.

18. Exceptions to Certification Statement for Paperwork Reduction Act Submission

Not applicable.

B. COLLECTIONS OF INFORMATION EMPLOYING STATISTICAL METHODS

Not applicable.