



[Investment Company Act Release No. 34147; 812-15096-01]

KKR Registered Advisor LLC and KKR Real Estate Select Trust Inc.

December 22, 2020.

AGENCY: Securities and Exchange Commission (“Commission”).

ACTION: Notice.

Notice of an application for an order under section 6(c) of the Investment Company Act of 1940 (“Act”) for an exemption from section 23(a)(1) of the Act.

Summary of Application: Applicants request an order to permit certain registered closed-end management investment companies (“closed-end funds”) and business development companies (“BDCs”),¹ and together with the closed-end funds, “Funds”) to pay Advisory Fees (defined below) in shares of their common stock (“Shares”).

Applicants: KKR Registered Advisor LLC (the “Existing Adviser”) and KKR Real Estate Select Trust Inc. (the “KREST Fund” and together with the Existing Adviser, the “Applicants”).

Filing Dates: The application was filed on February 19, 2020, and amended on May 28, 2020, September 14, 2020, November 5, 2020, and December 18, 2020.

Hearing or Notification of Hearing: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by e-mailing the Commission’s Secretary at Secretaries-Office@sec.gov and serving Applicants with a copy of the request by e-mail. Hearing requests should be received by the Commission by 5:30 p.m. on January 18, 2021, and should be accompanied by proof of service on the Applicants, in the form of an affidavit or, for lawyers, a certificate of service. Pursuant to rule 0-5 under the Act, hearing requests should state the nature of the writer’s interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to

¹ The term “BDC” means business development company as defined under Section 2(a)(48) of the Act.

be notified of a hearing may request notification by e-mailing the Commission's Secretary at Secretarys-Office@sec.gov.

ADDRESSES: Secretary, U.S. Securities and Exchange Commission: Secretarys-Office@sec.gov. Applicants: Lori Hoffman, Esq., General.Counsel@kkr.com.

FOR FURTHER INFORMATION CONTACT: Hae-Sung Lee, Senior Counsel, at (202) 551-7345, or Trace W. Rakestraw, Branch Chief, at (202) 551-6825 (Division of Investment Management, Chief Counsel's Office).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's website by searching for the file number or an Applicant using the "Company" name box, at

<http://www.sec.gov/search/search.htm> or by calling (202) 551-8090.

Applicants' Representations:

1. Applicants seek an order of the Commission under section 6(c) of the Act, granting an exemption from section 23(a)(1) of the Act to the extent necessary to allow a Fund² to pay its Adviser³ all or part of the Advisory Fees⁴ earned by the Adviser in Shares in lieu of paying an equivalent amount in cash.

2. The Existing Adviser, a Delaware limited liability company registered as an investment adviser under the Advisers Act, currently serves as the investment adviser to the

² The term "Fund" means (i) the KREST Fund and (ii) any existing or future closed-end management investment company (A) that is registered under the Act or has elected to be regulated as a BDC, (B) whose investment adviser is an Adviser (as defined below) and (C) that intends to rely the requested order. Each person that currently intends to rely on the requested order is named as an Applicant. Any person that relies on the requested order in the future would do so only in accordance with the terms and conditions contained in the Application.

³ The term "Adviser" means (i) the Existing Adviser, (ii) any investment adviser that controls, is controlled by or is under common control with the Existing Adviser and is registered as an investment adviser under the Investment Advisers Act of 1940, as amended (the "Advisers Act") or (iii) any successor in interest to any entity described under (i) and (ii) of this definition. For purposes of the requested order, the term "successor" is limited to an entity that results from a reorganization into another jurisdiction or a change in the type of business organization.

⁴ The term "Advisory Fees" means the compensation a Fund agrees to pay its Adviser pursuant to an investment advisory agreement with its Adviser subject to section 15 of the Act (each, an "Advisory

KREST Fund pursuant to its Advisory Agreement. The Existing Adviser, or another Adviser registered under the Advisers Act, would serve as investment adviser to each Fund.

3. The KREST Fund, a Maryland corporation that would register under the Act as a closed-end management investment company, would continuously offer its Shares and expects to offer periodic liquidity with respect to its Shares through tender offers conducted in compliance with rule 13e-4 under the Securities Exchange Act of 1934 (as amended, the “Exchange Act”).⁵ The KREST Fund would be non-listed, and the Shares would not trade on an exchange.⁶ The KREST Fund expects to invest primarily in illiquid assets.

4. As required by section 15 of the Act, the Adviser would manage the Fund pursuant to an Advisory Agreement that precisely describes the nature and method of calculation of the Advisory Fees. The Advisory Agreement would specify that the Adviser may elect to receive payment of the Advisory Fees it has earned, in whole or in part, in an amount of Shares equal in value to the dollar figure of the Advisory Fees owed. Each fund would disclose this mechanism in its registration statements and proxy statements.

5. Applicants represent that each fund’s advisory agreement would specify the fee calculation period for Advisory Fees (e.g., annually, quarterly, monthly, etc.) (such period, the “Fee Calculation Period”). At the beginning of each Fee Calculation Period, each Fund’s Adviser would elect to receive its Advisory Fees for such period in cash, Shares or some combination of both.⁷ In making such an election, the Adviser must consider the best interests of the Fund and its shareholders.

Agreement”). Such compensation may include base management fees, income-based incentive fees, and/or capital gains-based incentive fees, as applicable and permissible under the Advisers Act. With respect to the requested relief, the Applicants do not differentiate among these types of Advisory Fees because, in each case, an Adviser would receive shares in lieu of a dollar amount of Advisory Fees.

⁵ Other Funds that rely on the requested order in the future may offer periodic liquidity in compliance with rule 23c-3 under the Act (“Interval Funds”).

⁶ If the KREST Fund, or any other Fund, lists its Shares, it would no longer rely on the requested order.

⁷ If an Adviser elects to receive its Advisory Fees in a combination of cash and shares of common stock, it would also choose at the beginning of the Fee Calculation Period what portion of Advisory Fees it would receive in Shares.

6. The number of Shares the Adviser would receive would be calculated by dividing the earned Advisory Fees elected by the Adviser for payment in Shares by the greater of (i) the current net asset value (“NAV”) per share of the class of Shares the Adviser would receive, as determined by or under the supervision of the Fund’s board of directors in accordance with the Act and (ii) the current offering price of the class of Shares the Adviser would receive. For example, if an Adviser earned Advisory Fees amounting to \$200,000 for a given Fee Calculation Period and the Fund’s NAV per share and offering price per share was \$25 at the time of issuance to the Adviser, the Fund would issue 8,000 Shares to the Adviser if the Adviser had elected to receive its entire Advisory Fee in Shares for that Fee Calculation Period.

7. A Fund would only rely on the requested relief to issue Shares of a class that is otherwise available for purchase, and reasonably expected to be purchased, by other similarly eligible investors. Furthermore, the Adviser would receive Shares at the same price as such other investors acquiring the same class of Shares. Such class of Shares would not exist solely for investment by the Adviser and/or its affiliates. The Fund’s Advisory Agreement would detail the specific class of Shares that the Fund may issue to the Adviser as compensation in lieu of a cash payment.

8. For any Fee Calculation Period during which the Adviser has elected to receive all or a portion of its Advisory Fees in Shares, the Fund would post a notice to that effect on the Fund’s website. The Fund would also maintain and make publicly available on its website a historical record of how the Adviser was compensated for each Fee Calculation Period during the Fund’s last three fiscal years. The Fund would include, in response to any item on the applicable form for registration of securities requiring a description of the Adviser’s compensation (currently Item 9 of Form N-2), a cross-reference noting the availability of such historical information on the Fund’s website.

9. Any Shares received by the Adviser in lieu of cash would be subject to the same fees and expenses applicable to the Fund’s other shareholders in the relevant class, would not

receive preferential voting, dividend or liquidity rights with respect to its Shares, and would otherwise have the same rights and obligations as Shares of the same class issued to other investors in the Fund, except that an Adviser would “mirror vote” any Shares received in lieu of a cash payment for Advisory Fees.

10. Each Adviser would have the same opportunity and rights to liquidate Shares of a fund it received in lieu of cash payment of Advisory Fees as other shareholders of that fund. As required by section 30(h) of the Act, each Adviser and its affiliated persons would make public filings with the Commission disclosing any transactions in a Fund’s Shares as required by Section 16 of the Exchange Act.

11. An Adviser that elects to receive payment in Shares, however, would commit to not selling those Shares for at least 12 months from the date of issuance, except in exceptional circumstances such as if it no longer serves as the investment adviser of the Fund. In such a case, the Adviser would keep a record of the reason for selling the Shares within 12 months and the records would be maintained and preserved in accordance with rule 204-2(e)(1) under the Advisers Act. Applicants state that this commitment would provide further assurances that an Adviser bears the long-term benefits and risks of an investment in a Fund’s Shares and decreases the likelihood of any potential over-reaching by the Adviser. Each fund would publicly disclose the Adviser’s commitment in the Fund’s registration statement.

12. Consistent with fiduciary obligations under the Act, on an annual basis, the Independent Directors (defined below) of each Fund will review such Fund’s Advisory Agreement in accordance with section 15(c) and subject to section 36 of the Act, including those provisions allowing for payment of Advisory Fees in Shares. To the extent an Adviser receives any fallout benefits from receiving compensation in Shares rather than in cash, the Adviser would disclose such benefits to the Independent Directors.

13. The Adviser would have the ability to assign its right to receive payment of any Advisory Fees to an entity it controls, is controlled by or with which it is under common control

(a “control affiliate”); provided that such an assignment may not disadvantage the fund. Any Shares issued to a control affiliate of an Adviser would be subject to the same conditions of the requested relief as if the Shares were issued to and held by the Adviser directly and an Adviser’s obligations to a Fund under the Advisory Agreement would remain unchanged. To the extent an Adviser receives any fallout benefits from an assignment to a control affiliate, the Adviser would disclose such benefits to the Independent Directors⁸ of the applicable Fund in connection with their annual review of such Fund’s Advisory Agreement in accordance with section 15(c) of the Act.

Applicants’ Legal Analysis:

14. Section 23(a)(1) of the Act prohibits a registered closed-end investment company from issuing any of its securities in exchange for services. Section 63 of the Act makes the prohibition in section 23(a)(1) applicable to BDCs.

15. Section 6(c) of the Act provides that an exemptive order may be granted if and to the extent that such an exemption is “necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions” of the Act.

16. Applicants assert that the concerns underlying section 23(a)(1) of the Act do not exist under the requested relief. These concerns include: (i) preferential treatment of investment company insiders and the use of options and other rights by insiders to obtain control of the investment company; (ii) complication of the investment company’s structure that made it difficult to determine the value of the company’s shares; and (iii) dilution of stockholders’ equity in the investment company.⁹

⁸ The term “Independent Directors” means members of the Fund’s board of directors who are not “interested persons” of the Fund within the meaning of section 2(a)(19) of the Act.

⁹ See H.R. Rep. No. 76-2639, at 8 (1940) and S. Rep. No. 76-1775, at 7 (1940).

17. In particular, section 23(a)(1) of the Act was enacted in response to a then-common practice of funds paying insiders a definite number of shares of the fund at a future date for their services (rather than assigning a fixed dollar value to the services).¹⁰ If the value of the fund's shares appreciated by the time the shares were payable by the fund, the compensation paid to the insiders exceeded the original cash value of the services provided. As a result, the fund treated insiders on a basis more favorable than other shareholders by allowing them to acquire fund shares at less than the net asset value of the shares. The insiders received a "windfall" that diluted the value of the shares held by other shareholders. Applicants maintain that the proposed arrangement addresses this concern because the value of the Shares an investment adviser would receive would be equal to a fixed-dollar amount as calculated under the fund's investment advisory agreement.

18. Applicants assert that the requested relief does not raise otherwise concerns about preferential treatment of Applicant's insiders because an Adviser would receive a class of Shares that is available for purchase by similarly qualified investors and that would be issued at the same price per share available to other investors in the Fund at the time of issuance to the Adviser. No Adviser would receive any preferential voting, dividend or liquidity rights with respect to Shares. The Shares would be subject to the same fees and expenses applicable to other shareholders in the relevant class. Furthermore, the Adviser and any control affiliate would mirror vote any Shares received in lieu of cash for Advisory Fees. Thus, Applicants state that the requested relief would not become a means for insiders to obtain control of any Fund.

19. The Funds would not modify their capital structure as a result of the requested relief. The Fund's registration statements and proxy statements would include "plain English" disclosure on the existence of the relief, a statement that the Adviser may be compensated in

¹⁰ *Investment Trusts and Investment Companies: Hearings on H.R. 10065 Before the House Subcomm, on Interstate and Foreign Commerce, 76th Cong., 3d Sess. 109 (1940) (statement of David Schenker, Chief Counsel, Investment Trust Study, SEC).*

Shares in lieu of cash and any potential risks associated with relying on the relief. Such risk disclosure may explain that third party shareholders would not have priority over the Adviser or its affiliates with respect to receiving liquidity during any periodic tender or repurchase offers and that may have the effect of diluting third party shareholders with respect to any such offers.

20. Applicants believe the proposed arrangement does not raise dilution concerns associated with other forms of equity-based compensation, such as stock options. The Fund would issue Shares to the Adviser at the greater of their current NAV per share and their current offering price, and the Fund would increase its assets in direct proportion to the Shares issued to the Adviser, forestalling any dilutive effect.

21. Applicants believe the requested relief is appropriate and in the interest of the Funds' shareholders because when an Adviser elects to receive its Advisory Fees in Shares, it would increase fund assets available for investment purposes and create better alignment of interests between the Fund and the Adviser. Absent the requested relief, a fund would be required to hold a greater amount of investable assets in cash for payment of Advisory Fees or could be forced to liquidate assets at unfavorable times or prices to pay Advisory Fees in cash, which could be problematic for a fund that invests primarily in illiquid assets. For any Fee Calculation Period where the Adviser elects payment in Shares, the advance notice provided by the Adviser's election would allow the Fund to deploy the cash that would otherwise need to be held for payment of Advisory Fees, reducing cash "drag" and opportunity costs for the Fund.

22. Applicants assert that the requested relief further aligns the interests of an Adviser with those of Fund shareholders because the Adviser has more so-called "skin in the game." As opposed to payment in cash, an Adviser would invest in the Fund alongside, and at the same price as, other investors. This would further align the interests of Fund shareholders and the Fund's Adviser because the Adviser's realizable compensation for any past payment is tied to maintaining or increasing the NAV per share price until the Adviser liquidates such Shares.

23. Applicants state that the Commission has previously provided exemptive relief to allow internally managed closed-end funds and BDCs to issue restricted stock, and in some cases, stock options, as part of a compensation package for employees, officers, and directors. Applicants believe the rationale for such relief is similar to the requested relief because both would provide for investment strategy alignment while allowing the funds to maximize cash available to investments.

Applicants' Conditions:

Applicants agree that any order granting the requested relief would be subject to the following conditions:

1. Each Fund will adopt an Advisory Agreement that specifies that its Adviser may opt to receive Shares in lieu of cash payment of Advisory Fees. Such Advisory Agreement will contain:

a. A precise formula for determining the number of Shares to be issued as compensation to the Adviser for each applicable Fee Calculation Period, including the date upon which the calculation shall be performed, stating that the number of Shares that an Adviser will receive will be equal to the quotient of (x) the sum of Advisory Fees elected by the Adviser for payment in Shares and (y) the greater of (i) the current NAV per share of the class of Shares the Adviser will receive, as determined by or under the supervision of the Fund's board of directors in accordance with section 23(b) of the Act and (ii) the current offering price of the class of Shares the Adviser will receive.

b. A provision ensuring that such Adviser must elect in advance of each Fee Calculation Period whether the Advisory Fees for that Fee Calculation Period will be payable in cash, Shares of the Fund, or some combination of cash and Shares of the Fund, and if a combination of cash and Shares, what the breakdown will be.

2. Any Shares received by an Adviser in lieu of cash payment of Advisory Fees will have the same rights and obligations as Shares of the same class issued to other investors in the

Fund, except that an Adviser will mirror vote any Shares received in lieu of cash payment of Advisory Fees in the same proportion as the vote of all other shareholders that are not (i) an Adviser or its control affiliates, and (ii) to the Adviser's knowledge, affiliates of the Adviser (excluding control affiliates), for so long as the Adviser serves as the investment adviser to the Fund. The Adviser will not receive preferential voting, dividend or liquidity rights with respect to its Shares and will be subject to the same fees and expenses applicable to the Fund's other shareholders in the relevant class.

3. Each Fund will disclose in its registration statements and proxy statements (i) that its Adviser may be compensated in Shares in lieu of cash payments in reliance on the relief, (ii) that its Adviser will commit not to sell any Shares received in lieu of a cash payment of Advisory Fees for at least 12 months from the date of issuance, except in exceptional circumstances (in such a case, the Adviser will keep a record of the reason for selling the Shares within 12 months and the records will be maintained and preserved in accordance with rule 204-2(e)(1) under the Advisers Act), and (iii) any potential risks related to relying on the relief. For any Fee Calculation Period during which the Adviser has elected to receive all or a portion of its Advisory Fees in Shares, the Fund will post a notice to that effect on the Fund's website. The Fund will maintain and make publicly available on the Fund's website a historical record of how the Adviser was compensated for each Fee Calculation Period during the Fund's last three fiscal years. The Fund will include, in response to any item on the applicable form for registration of securities requiring a description of the Adviser's compensation (currently Item 9 of Form N-2), a cross-reference noting the availability of such historical information on the Fund's website.

4. The requested relief will expire on the effective date of any Commission rule under the Act that provides relief addressing the ability of closed-end investment companies to pay their investment advisers their advisory fees in shares in lieu of paying an equivalent amount in cash.

By the Commission.

Eduardo A. Aleman,
Deputy Secretary.

[FR Doc. 2020-28749 Filed: 12/28/2020 8:45 am; Publication Date: 12/29/2020]