COVID-19: UPDATED REGULATORY RELIEF FOR REGISTERED FUNDS AND INVESTMENT ADVISERS

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U.S. Investment Management Alert

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The pandemic coronavirus ("COVID-19") continues its unprecedented disruption of the economy and markets. In particular, the disruption to day-to-day operations and travel difficulties resulting from the spread of COVID-19 have caused concern among open- and closed-end registered investment companies ("funds") and investment advisers that they will be unable to meet certain technical requirements set forth under the Investment Company Act of 1940, as amended (the "1940 Act") and the Investment Advisers Act of 1940, as amended (the "Advisers Act").

On March 13, 2020, as part of the U.S. Securities and Exchange Commission's ("SEC") ongoing response to the COVID-19 disruption, the SEC issued two exemptive orders granting a number of exceptions to funds and investment advisers whose operations may be impacted by COVID-19. These exemptive orders extend existing no-action relief, formalize prior SEC guidance and provide clear regulatory authority for funds, investment advisers, and their boards to rely upon, which is a welcome and needed development for the asset management industry.

The first order addresses certain fund disclosure, filing, and meeting requirements under the 1940 Act (the "1940 Act Order"), [1] while the second order addresses investment advisers' and exempt reporting advisers' ("ERA") information filing requirements under the Advisers Act (the "Advisers Act Order," [2] and together with the 1940 Act Order, the "Orders"). The Orders provide express regulatory relief for various types of funds and investment advisers, including but not limited to the following:

- Relaxing in-person board meeting requirements under the 1940 Act;
- Relaxing funds' annual and semi-annual report transmittal obligations;
- Extending the filing deadlines for Form N-CEN, Form N-PORT, and Form N-23C-2; and
- Extending the filing deadlines for investment advisers and ERAs with respect to Form ADV and Form PF.

The 1940 Act Order also contains an SEC statement providing relief to funds with respect to the prospectus delivery obligations. [3]

On March 25, 2020, the SEC issued two new orders, one under the 1940 Act ("New 1940 Act Order"), and a second under the Advisers Act ("New Advisers Act Order", and together with the New 1940 Act Order, the "New Orders"). [4] The New Orders supersede the Orders by extending the original relief periods and simplifying the original Orders' notice provisions by generally removing the requirement that funds and investment advisers describe in notices and public website disclosures (i) the reasons why the fund or investment adviser is relying on

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the Orders, and (ii) the estimated date the delayed delivery or filing obligations will be completed, as discussed in more detail below.

REGISTERED INVESTMENT COMPANY RELIEF

In-Person Board Meeting Requirements

The 1940 Act requires that the board of directors ("Board") of funds [5] to cast their votes in-person to approve certain key arrangements and contracts. Specifically, Sections 15(c) (approval of advisory contracts) and 32(a) (selection of accountant) under the 1940 Act, as well as Rules 12b-1(b)(2) and 15a-4(b)(2)(ii) promulgated thereunder, require Boards to approve the applicable arrangements by casting "in-person" votes. The SEC previously issued a no-action letter to the Independent Directors Council (the "IDC Letter") that provided Boards greater flexibility in complying with the 1940 Act's in-person voting requirements for the approvals and renewals of investment advisory contracts, distribution contracts, and Rule 12b-1 plans, as well as the approvals of fund's independent public accountants. [6] However, the relief granted by the SEC in the IDC Letter is available only under certain circumstances, and is subject to certain limitations, such as the Board's renewal of ***existing*** contracts, plans, or arrangements as opposed to approval of ***new*** contracts, plans, or arrangements. On March 4, 2020, the SEC released a statement regarding the impact of COVID-19 on funds and investment advisers (the "Statement"). [7] Although the Statement purported to extend the IDC Letter's relief to cover ***all*** approvals and renewals of applicable contracts, plans, or arrangements, without the restrictions imposed by the IDC Letter, Boards and investment advisers remained unsure whether the SEC had authority to expand the IDC Letter's relief through the issuance of a guidance statement rather than issuance of an order.

The New 1940 Act Order explicitly enumerates the broad exemption described in the Statement from the in-person Board meeting requirements set forth in the 1940 Act first and provides authority for expanding the relief provided in the IDC Letter. Specifically, a fund, and any investment adviser of or principal underwriter for such fund, is exempt from the requirement that fund's Board casts its votes in-person **if the following conditions are met**:

1. Reliance on the New 1940 Act Order is necessary or appropriate due to circumstances related to current or potential effects of COVID-19;
2. The votes required to be cast at an in-person meeting are instead cast at a meeting in which directors may participate by any means of communication that allows all directors participating to hear each other simultaneously during the meeting; and
3. The Board, including a majority of the directors who are not interested persons of the fund, ratifies the action taken pursuant to this exemption by a vote cast at the next in-person meeting.

This relief is available from March 13, 2020 to August 15, 2020. [8]

Annual and Semi-Annual Report Transmittal Requirements

Section 30(e) of the 1940 Act and Rule 30e-1 promulgated thereunder require funds to deliver annual and semi-annual reports containing certain enumerated information and financial statements to investors.

The New 1940 Act Order temporarily exempts a fund [9] from the requirements to transmit annual and semi-annual reports to investors if the following conditions are satisfied:

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4. The fund is unable to prepare or transmit the report due to circumstances related to current or potential effects of COVID-19;
5. The fund promptly notifies the staff via email at IMEmergencyRelief@sec.gov that it intends to rely on the New 1940 Act Order;
6. The fund includes a statement on its public website briefly stating that it is relying on the New 1940 Act Order; and
7. The fund transmits the reports to shareholders as soon as practicable and files the report within 10 days of its transmission to shareholders. Any reports transmitted late in reliance on the relief set forth in the New 1940 Act Order must be transmitted no later than 45 days after the original transmission due date.

This relief is available for annual or semi-annual reports with an original due date during the period from March 13, 2020 to June 30, 2020. [10]

Prospectus Delivery Requirements

In the New 1940 Act Order, the SEC ***states its position, but does not provide formal exemptive relief***, that it would not provide a basis for a SEC enforcement action if a fund does not deliver to investors its current prospectus where the prospectus is not able to be timely delivered because of circumstances related to COVID-19 and delivery was due during the limited time period specified below, **provided that the sale of shares to the investor was not an initial purchase by the investor of shares of the fund** and:

8. The fund:
    a. Notifies Division of Investment Management staff via email at IMEmergencyRelief@sec.gov that it intends to rely on the SEC position;
    b. Publishes on its public website that it intends to rely on the SEC position;
    c. Publishes its current prospectus on its public website; and
9. Delivery was originally required during the period from March 13, 2020 to June 30, 2020, and the prospectus is delivered to investors as soon as practicable but not later than 45 days after the date originally required.

This relief is available from March 13, 2020 to August 15, 2020. [11]

Fund Filing Requirements

Rule 30a-1 under the 1940 Act requires funds to file annual reports with the SEC not later than 75 days after the close of the fiscal year for which the report is being prepared. Form N-CEN is the reporting form used to file the annual reports filed pursuant to Rule 30a-1. In addition, funds use Form N-PORT to file monthly portfolio holdings reports pursuant to Rule 30b1-9 under the 1940 Act.

Under the New 1940 Act Order, ***a fund that is required to file Form N-CEN or Form N-PORT is temporarily exempt from such filing requirements where the following conditions are met***:

10. The fund is unable to meet a filing deadline due to circumstances related to current or potential effects of COVID-19;

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11. Any fund relying on the New 1940 Act Order promptly notifies the SEC staff via email IM-EmergencyRelief@sec.gov it is relying on the New 1940 Act Order;
12. Any registered investment company relying on the New 1940 Act Order includes a statement on its public website briefly stating that it is relying on the New 1940 Act Order;
13. The fund required to file such Form N-CEN or Form N-PORT files such report as soon as practicable, but not later than 45 days after the original due date; and
14. Any Form N-CEN or Form N-PORT filed pursuant to the New 1940 Act Order must include a statement of the filer that it relied on the New 1940 Act Order and the reasons why it was unable to file such report on a timely basis.

This relief is available for Form N-CEN or Form N-PORT filings with an original due date during the period from March 13, 2020 to June 30, 2020. [12]

Form N-23C-2 Filing Requirements

Pursuant to Sections 23(c) (registered closed-end funds) and 63 (business development companies ("BDCs")) of the 1940 Act, as well as Rule 23c-2 thereunder, closed-end funds and BDCs intending to call or redeem securities must file a Form N-23C-2 ("Notice") with the SEC at least 30 days in advance of such call or redemption.

As long as the below conditions are met, closed-end funds and BDCs (together, the "Company") relying on the New 1940 Act Order are temporarily exempt from the 30 days advance notice requirement. Accordingly, a Company may file a Notice with the SEC fewer than 30 days prior to, including the same business day as, the Company's call or redemption of securities, if the Company:

15. Promptly notifies SEC staff via email at IM-EmergencyRelief@sec.gov that it is relying on the New 1940 Act Order;
16. Ensures that the filing of the Notice on an abbreviated time frame is permitted under relevant state law and the Company's governing documents; and
17. Files a Notice that contains all the information required by Rule 23c-2 prior to:
    d. any call or redemption of existing securities;
    e. the commencement of any offering of replacement securities; and
    f. providing notification to the existing shareholders whose securities are being called or redeemed.

This relief is available from March 13, 2020 to August 15, 2020. [13]

INVESTMENT ADVISER RELIEF

Form ADV and Form PF Filing Requirements

Sections 203 and 204 of the Advisers Act, and Rule 204 thereunder, authorize the SEC to collect from investment advisers the information required by Form ADV. Filing Form ADV is mandatory for investment advisers who are required to register with the SEC and for ERAs. An updated Form ADV must be filed on an annual basis. In addition, Rule 204(b)-1 promulgated under the Advisers Act requires registered investment advisers to private

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funds with private fund assets under management of at least $150 million to file a report on Form PF. An updated Form PF must be filed on an annual basis. [14]

For Form ADV and Form PF filings with original due dates occurring during the period specified below, the New Advisors Act Order exempts (1) registered investment advisers from requirements to file Form ADV amendments; deliver Form ADV Part 2 amended brochures, brochures supplements, or summary of material changes to **existing** clients; and file Form PF; and (2) ERAs from the requirement for file reports on Form ADV, in each case if the following conditions are satisfied:

18. The registered investment adviser or ERA is unable to meet a filing deadline or delivery requirement due to circumstances related to current or potential effects of COVID-19;
19. With respect to filing Form ADV, the investment adviser promptly notifies the SEC via email at IARDLive@sec.gov and includes a disclosure statement on its public website (or if it does not have a public website, promptly notifies its clients and/or private fund investors) that it is relying on the New Advisers Act Order;
20. With respect to filing Form PF, the investment adviser must promptly notify the SEC via email at FormPF@sec.gov that it is relying on the New Advisers Act Order; and
21. The investment adviser files the Form ADV or Form PF, as applicable, and delivers the brochure (or summary of material changes) and brochure supplement as soon as practicable but not later than 45 days after the original due date for filing or delivery, as applicable.

This relief is available for filings and deliveries of Form ADVs, Form PFs, and amendments to Form ADV or Form PF with an original due date from March 13, 2020 to June 30, 2020. [15] The time period for any or all of the relief may, if necessary, be extended with any additional conditions that are deemed appropriate, and the SEC may issue other relief as necessary or appropriate.

The condition requiring investment advisers send an email to the SEC and post information to the investment adviser's website may discourage investment advisers from relying on this relief. In the New Advisers Act Order, the SEC states it will continue to monitor the situation, and that the time period for any or all of the relief may, if necessary, be extended with any additional conditions that are deemed appropriate.

The New Orders do not provide relief for filings other than those discussed above, such as Form N-LIQUID, Form N-CR, and Form N-MFP.

QUESTIONS OR COMMENTS

We are advising funds and their managers on an array of legal and operational questions in light of COVID-19. Please reach out with any questions you may have as you prepare your business for the potential impacts of COVID-19.

NOTES

[1] SEC, Rel. No. 33817 (Mar. 13, 2020), https://www.sec.gov/rules/other/2020/ic-33817.pdf.

[2] SEC, Rel. No. 5463 (Mar. 13, 2020), https://www.sec.gov/rules/other/2020/ia-5463.pdf.

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[3] 1940 Act Order, Section VI.

[4] SEC, Rel. No. 33824 (Mar. 25, 2020), https://www.sec.gov/rules/other/2020/ic-33824.pdf; SEC, Rel. No. 5469 (Mar. 25, 2020), https://www.sec.gov/rules/other/2020/ia-5469.pdf.

[5] The exemptive relief also is generally applicable to the boards of directors of business development companies.

[6] *Independent Directors Council*, SEC No-Action Letter (pub. avail. Oct. 12, 2018), https://www.sec.gov/divisions/investment/noaction/2018/independent-directors-council-101218.htm.

[7] SEC, Division of Investment Management Staff Statement, *Fund Board Meetings and Unforeseen or Emergency Circumstances Related to Coronavirus Disease 2019 (COVID-19)* (Mar. 4, 2019), https://www.sec.gov/investment/staff-statement-im-covid-19; *see* Lori L. Schneider, Marguerite W. Laurent & Elizabeth M. Johnson, C*OVID-19: Evaluating the Need for In-Person[Fund Board Meetings and Other Considerations for U.S. Asset Managers*, K&L GATES (Mar. 6, 2020), http://www.klgates.com/preparing-your-us-asset-management-firm-for-the-pandemic-coronavirus-covid-19-03-06-2020/.

[8] The New 1940 Act Order extended the relief availability period from June 15, 2020 as provided under the 1940 Act Order to August 15, 2020.

[9] The exemptive relief is also generally applicable to transmittal of annual and semi-annual reports by unit investment trusts to their unitholders.

[10] The New 1940 Act Order extended the relief availability period from April 30, 2020 as provided under the 1940 Act Order to June 30, 2020.

[11] The New 1940 Act Order extended the relief availability period from June 15, 2020 as provided under the 1940 Act Order to August 15, 2020.

[12] The New 1940 Act Order extended the relief availability period from April 30, 2020 as provided under the 1940 Act Order to June 30, 2020.

[13] The New 1940 Act Order extended the relief availability period from June 15, 2020 as provided under the 1940 Act Order to August 15, 2020.

[14] Investment advisers that constitute "Large Liquidity Fund Advisers" as defined in Form PF must file Form PF with the SEC on a quarterly basis.

[15] The New Advisers Act Order extended the relief availability period from April 30, 2020 as provided under the Advisers Act Order to June 30, 2020.

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