

Legal Update

COVID-19: US SEC Provides Temporary, Conditional Relief to Funds and Advisers (Updated)

In response to the evolving situation surrounding the coronavirus 2019 (“COVID-19”) and the uncertainty as to the duration of the nationwide disruptions to businesses and everyday activities caused by COVID-19, the US Securities and Exchange Commission (“SEC”) on March 25, 2020 extended two orders originally published on March 13, 2020 providing temporary, conditional exemptions from certain filing and delivery requirements under the Investment Advisers Act of 1940 (the “Advisers Act”) and from in-person meeting and certain filing requirements under the Investment Company Act of 1940 (the “1940 Act”).

The new Advisers Act and 1940 Act orders issued on March 25 supersede and extend the filing periods covered by the original March 13 orders (each an “Original Order”) until either June 30 or August 15. While the two March 25 orders generally kept in place the conditions required under the Original Orders, these new orders no longer require advisers or funds relying on such relevant order to briefly describe in its email correspondence to the SEC’s staff or on its website (as applicable) the reasons why it is relying on the order or (if applicable) to provide an estimated date by which it expects the required action will occur.

Advisers Act Relief

The [Advisers Act order](#) conditionally exempts an SEC registered investment adviser from the requirements under:

- Advisers Act Rule 204-1 to file an amendment to Form ADV;
- Rule 204-3(b)(2) and (b)(4) related to the delivery of Form ADV Part 2 (or a summary of material changes) to existing clients; and
- Advisers Act Section 204(b) of and Rule 204(b)-1 thereunder to file Form PF (if applicable).

The order also conditionally exempts “exempt reporting advisers” from the requirements under Advisers Act Rule 204-4 to file reports on Form ADV.

To rely on these exemptions, the following **three** conditions must be satisfied:

- **COVID-19 Impact:** The registered investment adviser or exempt reporting adviser must be unable to meet a filing deadline or delivery requirement due to circumstances related to current or potential effects of COVID-19;
- **Notice to the SEC:** An investment adviser relying on the order with respect to the filing of Form ADV or delivery of its

brochure, summary of material changes, or brochure supplement required by Rule 204-3(b)(2) or (b)(4), must promptly provide to the SEC via email at IARDLive@sec.gov and disclose on its public website (or if it does not have a public website, it must promptly notify its clients and/or private fund investors of) that it is relying on the order.

An investment adviser relying on the order with respect to filing Form PF required by Rule 204(b)-1 must promptly notify the SEC via email at FormPF@sec.gov stating that it is relying on the order.

- **File/Deliver the Form ASAP (But Within 45 Days):** The investment adviser must file the Form ADV or Form PF, as applicable, and deliver the brochure (or summary of material changes) and brochure supplement required by Rule 204-3(b)(2) and (b)(4) under the Advisers Act, as soon as practicable, but no later than 45 days after the original due date for filing or delivery, as applicable.

This relief is limited to filing or delivery obligations for which the original due date is on or after the date of the Original Order (March 13, 2020) but on or prior to **June 30, 2020**.

1940 Act Relief

The [1940 Act order](#) provides exemptive relief in four areas, and also provides “no-action” relief in connection with prospectus delivery requirements, as summarized below.

In Person Meeting Relief – The order exempts a registered management investment company or a business development company (“BDC”), and any investment adviser or principal underwriter for such company, from the requirements imposed under 1940 Act Sections 15(c) and 32(a) and 1940 Act Rules 12b-1(b)(2) and 15a-4(b)(2)(ii) that votes

of the board of directors of such a company be cast in person.

To rely on this relief, the company must meet the following **three** conditions:

- **COVID-19 Impact** – Reliance on the order must be “necessary or appropriate” due to circumstances related to current or potential effects of COVID-19.
- **Group Audio** – The votes required to be cast at an in-person meeting instead must be 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.
- **Ratification at the Next In Person Meeting** – The board of directors, including a majority of the directors who are not “interested persons” (as defined in the 1940 Act) of the company, must ratify the action taken pursuant to the exemption by vote cast at the next in-person meeting.

This relief is limited to the period from and including the date of the Original Order (March 13, 2020) to **August 15, 2020**.

[This relief crystallizes the prior statements](#) from the SEC staff regarding in person meetings under the 1940 Act. [See our March 4, 2020 Legal Update “COVID-19: US SEC Staff Offers Relief for RIAs and Funds” for further detail.](#)

Form N-CEN and Form N-PORT Relief –

The 1940 Act order temporarily exempts registered funds that are required to file Form N-CEN pursuant to 1940 Act Rule 30a-1, or Form N-PORT pursuant to 1940 Act Rule 30b1-9, from those form filing requirements.

To rely on this relief, the registered fund must meet the following **five** conditions:

- **COVID-19 Impact** – The registered fund must be unable to meet a filing deadline due to circumstances related to current or potential effects of COVID-19.
- **Notice to SEC Staff** – The registered fund must promptly notify the SEC staff via email at IM-EmergencyRelief@sec.gov stating that it is relying on the order.
- **Public Statement** – The registered fund must include a statement on its public website briefly stating that it is relying on the order.
- **File ASAP (But Within 45 Days)** – The registered fund must file the report as soon as practicable, but no later than 45 days after its original due date.
- **Statement in the Filing Itself** – Any Form N-CEN or Form N-PORT filed pursuant to the order must include a statement of the filer that it relied on the order and of the reasons why it was unable to file such report on a timely basis.

This relief is limited to filing obligations for which the original due date is on or after the date of the Original Order but on or prior to **June 30, 2020**.

Shareholder Report Transmittal Relief –

The 1940 Act order temporarily exempts registered management investment companies from the requirements of 1940 Act Section 30(e) and Rule 30e-1 thereunder to transmit annual and semi-annual reports to investors. It also temporarily exempts registered unit investment trusts from the requirements of 1940 Act Section 30(e) and Rule 30e-2 thereunder to transmit annual and semi-annual reports to unitholders.

To rely on the relief, the issuer must satisfy the following **four** conditions:

- **COVID-19 Impact** – The registered fund must be unable to prepare or transmit the

report due to circumstances related to current or potential effects of COVID-19.

- **Notice to SEC Staff** – The registered fund must promptly notify the SEC staff via email at IM-EmergencyRelief@sec.gov stating that it is relying on the order.
- **Public Statement** – The registered fund must include a statement on its public website briefly stating that it is relying on the order.
- **Transmit ASAP (But Within 45 and 10 Days)** – The registered fund must transmit the reports to shareholders as soon as practicable, but no later than 45 days after the original due date, and file the report within 10 days of its transmission to shareholders.

This relief is limited to transmittal obligations for which the original due date is on or after the date of the Original Order but on or prior to **June 30, 2020**.

Closed-End Fund and BDC Filing Relief –

The 1940 Act order provides a temporary exemption for closed-end funds and BDCs from the requirement to file with the SEC notices of their intention to call or redeem securities at least 30 days in advance under 1940 Act Sections 23(c) and 63, as applicable, and Rule 23c-2 thereunder, if the company files a Form N-23C-2 (“Notice”) with the SEC fewer than 30 days prior to, including the same business day as, the company’s call or redemption of securities of which it is the issuer.

To rely on the order, the company must satisfy the following **three** conditions:

- **Notice to SEC Staff** – The company must promptly notify SEC staff via email at IM-EmergencyRelief@sec.gov stating that it is relying on the order.
- **Compliance with State Law and Governing Documents** – The company must ensure that the filing of the Notice on

an abbreviated time frame is permitted under relevant state law and the company's governing documents.

- **Filing of a Notice** – The company must file a Notice that contains all the information required by Rule 23c-2 before:
 - any call or redemption of existing securities;
 - the commencement of any offering of replacement securities; and
 - providing notification to the existing shareholders whose securities are being called or redeemed.

This relief is limited to the period from and including the date of the Original Order to **August 15, 2020**.

Prospectus Delivery “No-Action” Relief –

The SEC stated that it would not recommend an SEC enforcement action if a registered 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.” The delivery must have been originally required on or after the date of the Original Order (March 13, 2020) but on or prior to **June 30, 2020**.

This relief does not apply to deliveries required in connection with the initial sale of shares to an investor.

To rely on this “no-action” relief, the registered fund must comply with the following four conditions:

- **Notice to SEC Staff** – The registered fund must notify Division of Investment Management staff via email at IM-EmergencyRelief@sec.gov stating that it is relying on this SEC position.
- **Public Statement** – The registered fund must publish on its public website that it intends to rely on the SEC position.
- **Prospectus on Website** – The registered fund must publish its current prospectus on its public website.

- **Delivery to Investors ASAP (But Within 45 Days)** – The registered fund must deliver the prospectus to investors as soon as practicable, but no later than 45 days after the date originally required.

Questions for the SEC Staff?

The [press release](#) accompanying the orders encouraged firms to contact the SEC staff with questions and concerns, and provided the following contact information for the SEC's Division of Investment Management:

- For general questions or concerns related to impacts of coronavirus on the operations or compliance of funds and advisers, including questions about Form N-MFP and Form N-CR, please email IM-EmergencyRelief@sec.gov.
- For questions regarding Form N-LIQUID, please email IM-N-LIQUID@sec.gov and simultaneously contact: Tim Husson, Associate Director, at (202) 551-6803 and Jon Hertzke, Assistant Director, at (202) 551-6247.
- For questions regarding Form ADV, email IARDLive@sec.gov.
- For questions regarding Form PF, email FormPF@sec.gov.

In addition, advisers might find the SEC's COVID-19 Response [webpage](#) to be a helpful resource. This webpage provides updated information on the SEC's own operations, as well as its response to COVID-19 and related market and industry impact, with links to SEC and staff statements, speeches and guidance regarding COVID-19. Notably, the webpage also makes clear that the SEC's enforcement and examination staff remain fully operational.

Conclusion

The SEC says that it will continue to monitor the COVID-19 situation, which may prompt the SEC to extend again all or some of the

relief with possibly more or revised conditions imposed thereon. The SEC indicated that it may issue other relief if necessary or appropriate.

While these orders can provide welcome relief to funds and advisers, it is important to note that the relief has been provided on a conditional basis, and funds and advisers might find that certain conditions are not as easy to meet as hoped. It is also unclear how certain conditions will be interpreted. For example, the release does not indicate what “promptly” means in this context, nor does it provide guidance as to the circumstances under which an adviser or fund would be “unable” to meet a certain requirement for purposes of the relief. In the past, unanswered regulatory questions such as these, unfortunately, have often been interpreted and evaluated by the SEC and its staff with the benefit of hindsight, leaving advisers and funds with uncertainty as to whether and how to proceed. This crisis will certainly pass, leaving an inquisitive SEC examination and enforcement staff.

That said, oral statements that Chair Clayton made on a March 16, 2020 morning news show provide some reassurance regarding how the SEC and its staff might evaluate market participant actions in response to the COVID-19 situation. When discussing business continuity plans, he emphasized that “health and safety is paramount.” Chair Clayton recognized that with any transition (presumably referring to telework, operations and other transitions being undertaken in connection with the COVID-19 situation), there will be “bumps in the road.” He also acknowledged that although we can look to the past disruptions for guidance as to how to proceed with this one, this one “is not the same.” In addition, the SEC’s Office of Compliance Inspections and Examinations (“OCIE”) issued a [statement](#) on March 23, 2020 noting that it “believes it is important to

communicate to registrants that reliance on regulatory relief will not be a risk factor utilized in determining whether OCIE commences an examination” and that it “encourage[s] registrants to utilize available regulatory relief as needed.”

If you have any questions about these SEC orders, or about the SEC’s and its staffs’ responses to COVID-19 more generally, please contact Stephanie M. Monaco, Leslie S. Cruz or any member of our Investment Management Practice. We are here to help with any questions of interpretation or assistance with compliance with the relief provided by the orders, including contacting the SEC staff if needed. In addition, we will continue to keep funds and advisers updated on any future significant SEC or staff announcements.

The SEC orders are part of an evolving COVID-19 response that is moving across regulatory agencies. Please visit our [website](#) to learn more.

For more information about the topics raised in this Legal Update, please contact any of the following lawyers.

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