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SEC Provides Conditional Relief for Investment Advisers, Registered Funds and BDCs in Connection with Coronavirus Outbreak

March 17, 2020

On Friday, March 13, 2020, the U.S. Securities and Exchange Commission ("SEC") announced the issuance of a pair of exemptive orders providing conditional relief for investment advisers, registered investment companies and business development companies ("BDCs") (together with registered investment companies, "funds") whose operations may be affected by the COVID-19 virus. The relief covers certain filing and delivery requirements for investment advisers and in-person board meetings and certain filing and delivery requirements for funds.

Relief under the Investment Advisers Act

The order (the "IAA Order") under the Investment Advisers Act of 1940, as amended (the "Advisers Act"), provides a 45-day extension to advisers that are unable to meet a filing deadline or delivery requirements due to circumstances related to current or potential effects of COVID-19. The IAA Order affects:

- Amendments to Form ADV. Registered advisers and exempt reporting advisers (ERAs) with fiscal years ending December 31 have annual updating amendments due on March 30, 2020;
- Form PF Filings. Registered advisers to private funds with fiscal years ending December 31 that must file Form PF have filing deadlines of April 29, 2020; and
- Brochure Delivery. Registered advisers that must deliver to clients an updated brochure (Part 2A) or brochure supplement (Part 2B) have delivery obligations 120 days after the end of their fiscal year (*e.*, April 29, 2020 for advisers with fiscal years ending December 31).

The IAA Order provides that an adviser may file its Form ADV or Form PF and deliver its client brochure and brochure supplement not later than 45 days after the original due date for filing or delivery, as applicable, but in any event as soon as practicable. An investment adviser relying on the relief provided in the IAA Order must promptly (i) provide the SEC via email at IARDLive@sec.gov and (ii) disclose on its public website (or if it does not have a public website, promptly notifies its clients and/or private fund investors of) the following information:

- that it is relying on the IAA Order;
- a brief description of the reasons why it could not file or deliver its Form ADV/PF or brochure and brochure supplement on a timely basis; and
- the estimated date by which it expects to file the Form ADV/PF or deliver the brochure and brochure supplement.

The IAA Order does not provide relief from the anti-fraud provisions of the Advisers Act. An adviser planning to make changes in its business practices that must be disclosed to clients in its amended brochure will need to consider delaying those changes until it is able to deliver updated disclosure.

Relief under the Investment Company Act

The order (the "ICA Order") under the Investment Company Act of 1940, as amended (the "Investment Company Act"), provides relief for funds in respect of certain in-person meeting requirements and filing and delivery obligations under certain conditions:

In-person board meeting requirements

Until June 15, 2020, a fund and any investment adviser of or principal underwriter for such fund is exempt from the requirements imposed under Sections 15(c) and 32(a) of the Investment Company Act and Rules 12b-1(b)(2) and 15a-4(b)(2)(ii)[1] thereunder that require votes of the fund's board of directors be cast in person, provided that:

- reliance on the ICA Order is necessary or appropriate due to circumstances related to current or potential effects of COVID-19;
- the votes required to be cast at an in-person meeting are instead cast at a meeting in which directors participate by any means of communication that allows all directors participating to hear each other simultaneously during the meeting; and

- the board of directors, including a majority of the directors who are not "interested persons" (as defined in the Investment Company Act) of the fund, ratifies the action taken pursuant to the ICA Order by vote cast at the next in-person meeting.

In contrast to the no-action relief provided by the staff of the SEC's Division of Investment Management in February 2019 (and subsequently broadened in early March 2020)[2], the ICA Order provides exemptive relief, which means that, for example, an advisory contract entered into during a telephonic meeting conducted in accordance with the ICA Order will be a contract entered into pursuant to Section 15 of the Investment Company Act. As a result, the ICA Order addresses potential matters with respect to the statutory validity of contracts approved under these conditions.

Form N-CEN and Form N-PORT filing requirements

For the filing of any Form N-CEN *(Annual Report For Registered Investment Companies)* or Form N-PORT *(Monthly Portfolio Investments Report)* for which the original due date is on or after the date of the ICA Order, but on or prior to April 30, 2020, a fund is temporarily exempt from such filing requirements where the conditions below are satisfied:

- The fund is unable to meet a filing deadline due to circumstances related to current or potential effects of COVID-19;
- The fund promptly notifies the SEC staff via email at IM-EmergencyRelief@sec.gov stating:
    - that it is relying on the ICA Order;
    - a brief description of the reasons why it could not file its report on a timely basis; and
    - the estimated date by which it expects to file the report;
- Any fund relying on the ICA Order includes a statement on the fund's public website briefly stating (i) that it is relying on the ICA Order and (ii) the reasons why it could not file its report on a timely basis;
- The fund files its Form N-CEN or Form N-PORT, as applicable, as soon as practicable, but not later than 45 days after the original due date; and
- Any Form N-CEN or Form N-PORT filed pursuant to the ICA Order must include a statement of the fund that (i) it relied on the ICA Order and (ii) the reasons why it was unable to file such report on a timely basis.

Transmittal of annual and semi-annual reports to investors

For any required transmittal of a fund's annual and semi-annual reports to investors for which the original due date is on or after the date of the ICA Order, but on or prior to April 30, 2020, a fund is temporarily exempt from the requirements of Section 30(e) of the Investment Company Act and Rule 30e-2 thereunder to transmit annual and semi-annual reports to investors where the conditions below are satisfied:

- The fund is unable to prepare or transmit the report due to circumstances related to current or potential effects of COVID-19;
- Any fund relying on the ICA Order promptly notifies the SEC staff via email at IM-EmergencyRelief@sec.gov stating:
    - that it is relying on the ICA Order;
    - a brief description of the reasons why it could not transmit its report on a timely basis; and
    - the estimated date by which it expects to transmit the report;
- Any fund relying on the ICA Order includes a statement on the fund's public website briefly stating that (i) it is relying on the ICA Order and (ii) the reasons why it could not prepare and transmit its reports on a timely basis; and
- The fund transmits its reports to investors as soon as practicable, but not later than 45 days after the original due date and files the report within 10 days of its transmission to investors.

Timing of filing of Form N-23C-2

Until June 15, 2020, closed-end funds and BDCs are temporarily exempt from the requirement to file with the SEC notices of their intention to call or redeem their securities at least 30 days in advance under Section 23(c) and Section 63, as applicable, of the Investment Company Act and Rule 23c-2 thereunder if the fund files a Form N-23C-2 *(Notice of Intention to Redeem Securities)* with the SEC fewer than 30 days prior to, including the same business day as, the fund's call or redemption of securities of which it is the issuer where the conditions below are satisfied:

- The fund relying on the ICA Order promptly notifies the SEC staff via email at IM-EmergencyRelief@sec.gov stating:
    - that it is relying on the ICA Order; and

        - a brief description of the reasons why it needs to file a Form N-23C-2 fewer than 30 days in advance of the date set by the fund for calling or redeeming the securities of which it is the issuer;

- The fund relying on the ICA Order ensures that the filing of the Form N-23C-2 on an abbreviated time frame is permitted under relevant state law and the fund's governing documents;
- The fund relying on the ICA Order files a Form N-23C-2 that contains all the information required by Rule 23c-2 prior to:
    - any call or redemption of existing securities;
    - the commencement of any offering of replacement securities; and
    - providing notification to the existing holders whose securities are being called or redeemed.

SEC Statement Regarding Prospectus Delivery

The SEC stated that it would not provide a basis for an SEC enforcement action if a fund does not deliver to investors the fund's current prospectus where the prospectus is not able to be timely delivered because of circumstances related to COVID-19 and delivery was originally required on or after the date of the ICA Order but on or prior to April 30, 2020, provided that (i) the sale of fund shares to the investor was not an initial purchase by the investor of such shares and (ii) the fund:

- notifies the SEC staff via email at IM-EmergencyRelief@sec.gov stating:
    - that it is relying on the SEC position in the ICA Order;
    - a brief description of the reasons why it or any other person required could not deliver the fund's prospectus to investors on a timely basis; and
    - the estimated date by which it expects the prospectus to be delivered;
- publishes on its public website that it intends to rely on the SEC position in the ICA Order and briefly states the reasons why it could not deliver the prospectus on a timely basis;
- publishes its current prospectus on its public website; and
- delivers its prospectus to investors as soon as practicable, but not later than 45 days after the date originally required.

For funds with securities registered under the Securities Act of 1933, as amended (the "Securities Act"), the ICA Order does not explicitly address relief with respect to a fund's failure to deliver a prospectus that meets the requirements of Section 10 of the Securities Act.[3] Such failure would expose funds to liability under Section 5 of the Securities Act and would grant investors rescission rights under Section 12(a)(1) of the Securities Act. Without additional clarification from the SEC with respect to relief beyond the Investment Company Act, we recommend that funds (other than BDCs) speak with their counsel before relying on the ICA Order with respect to the prospectus delivery relief.

Conclusion

The SEC and its staff continue to assess impacts relating to the coronavirus on investors and market participants, and the SEC has stated that it will consider additional relief from other regulatory requirements. The SEC further stated that it may further extend the aforementioned time periods for relief, with any additional conditions it deems appropriate, or provide additional relief as circumstances warrant.

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[1] These statutory and rule provisions require, among other things, a fund board of directors to approve the fund's advisory contract (Section 15(c)), independent public accountant (Section 32(a)), Rule 12b-1 plan (Rule 12b-1(b)(2)), and certain interim advisory contracts (Rule 15a-4(b)(2)(ii)) in an "in person" meeting.

[2] Independent Directors Council, SEC No-Action Letter (Feb. 28, 2019) and Division of Investment Management Staff Statement on Fund Board Meetings and Unforeseen or Emergency Circumstances Related to Coronavirus Disease 2019 (COVID-19), SEC Staff Statement (Mar. 4, 2020). For additional information about this prior guidance, please refer to our prior client alerts regarding the February 2019 No-Action Relief and COVID-19 Staff Statement.

[3] We note that BDCs are permitted to use Rules 172 and 173 under the Securities Act, which generally allow for the satisfaction of final prospectus delivery obligations through filing such final prospectus with the SEC, thereby satisfying the prospectus delivery requirements of Section 10.

Related Professionals

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