

SEC Takes Targeted Action to Assist Funds and Advisers in Light of Coronavirus Pandemic: Provides Temporary, Conditional Exemptions from Certain 1940 Act and Advisers Act Requirements

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Table of Contents

| | |
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| 1940 Act Relief | 3 |
| SEC Statement Regarding Prospectus Delivery and Related Enforcement Actions..... | 6 |
| Advisers Act Relief | 7 |
| Potential for Additional or Extended Relief..... | 10 |

SEC Takes Targeted Action to Assist Funds and Advisers in Light of Coronavirus Pandemic: Provides Temporary, Conditional Exemptions from Certain 1940 Act and Advisers Act Requirements

On March 13, 2020, the Securities and Exchange Commission issued two orders¹ providing relief to registered funds and investment advisers whose operations may be affected by the coronavirus outbreak. In each order, the SEC acknowledged that coronavirus-related disruptions may pose challenges to satisfying certain requirements under the Investment Company Act of 1940 and rules thereunder, as well as the Investment Advisers Act of 1940 and rules thereunder. In light of these challenges, the SEC provided certain temporary, conditional relief, including:

- For registered investment companies, unit investment trusts and business development companies, as applicable, relief from certain requirements relating to:
 - In-person board votes;
 - Form N-CEN and Form N-PORT filings;
 - Shareholder report transmittal; and
 - 30-day advance notice filings of intention to call or redeem securities.
- For registered investment advisers (RIAs) and exempt reporting advisers (ERAs), as applicable, relief from certain requirements relating to:
 - Form ADV amendments and filings;
 - Form ADV, Part 2 delivery; and
 - Form PF filings.

Further, the SEC included in the 1940 Act Order a statement regarding SEC enforcement action related to certain prospectus delivery obligations. The exemptive relief and SEC statement are summarized in the following tables.

¹ Order Under Section 6(c) and Section 38(a) of the Investment Company Act of 1940 Granting Exemptions from Specified Provisions of the Investment Company Act and Certain Rules Thereunder; Commission Statement Regarding Prospectus Delivery, SEC Rel. No. IC-33817 (Mar. 13, 2020) (1940 Act Order); Order Under Section 206A of the Investment Advisers Act of 1940 Granting Exemptions from Specified Provisions of the Investment Advisers Act and Certain Rules Thereunder, SEC Rel. No. IA-5463 (Mar. 13, 2020) (Advisers Act Order).

1940 Act Relief

| Exemption | Conditions | Time Period |
|--|---|-------------------------------------|
| <p>In-Person Board Vote Requirements (applicable to registered investment companies, BDCs, and their investment advisers and principal underwriters)</p> <ul style="list-style-type: none"> • Investment Advisory and Principal Underwriter Contracts² • Selection of Independent Public Accountant³ • 12b-1 Plans and Related Agreements⁴ • Certain Interim Advisory Agreements Relating to Assignments⁵ | <ul style="list-style-type: none"> • Reliance on the 1940 Act 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 may participate by any means of communication that allows all directors participating to hear each other simultaneously during the meeting. • The board, including a majority of the Independent Directors, ratifies the action taken pursuant to the exemption by vote cast at the next in-person meeting. | <p>March 13 – June 15, 2020</p> |

² See 1940 Act Section 15(c) (requiring the terms of any investment advisory or principal underwriting contract, and any renewal thereof, to be approved by a vote of a majority of the registered investment company's directors, who are not parties to such contract or interested persons of any such party, "cast in person" at a meeting called for the purpose of voting on such approval).

³ See 1940 Act Sections 32(a)(1) (requiring selection of a registered investment company's independent public account by the vote, "cast in person," of a majority of the members of the registered investment company's board of directors who are not interested persons of such registered investment company (Independent Directors)) and 32(a)(2) (permitting filling vacancies due to the death or resignation of the independent public accountant by the vote of a majority of the Independent Directors "cast in person" at a meeting called for the purpose of voting on such action).

⁴ See 1940 Act Rule 12b-1(b)(2) (requiring that written plans adopted by a registered investment company pursuant to Rule 12b-1, and any related agreements, be approved by a vote of the board of directors of such company, and the directors that are Independent Directors and have no direct or indirect financial interest in the operation of the plan or related agreements, "cast in person" at a meeting called for the purpose of voting on such plan or agreements).

⁵ See 1940 Act Rule 15a-4(b)(2)(ii) (permitting – where the previous advisory contract was terminated by assignment and, in connection with the assignment, the adviser or a controlling person directly or indirectly receives money or other benefit – a person to act as investment adviser to a fund under an interim advisory contract if, among other things, the board of directors, including a majority of the Independent Directors, has voted "in person" to approve the interim advisory contract before the previous advisory contract is terminated).

| Exemption | Conditions | Time Period |
|---|--|--|
| <p>Form N-CEN⁶ and Form N-PORT⁷ Filing Requirements (applicable to registered investment companies and unit investment trusts)</p> | <ul style="list-style-type: none"> • 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 (IM-EmergencyRelief@sec.gov): <ul style="list-style-type: none"> ○ Stating that it is relying on the 1940 Act Order; ○ Providing a brief explanation of why it could not file its report on a timely basis; and ○ Indicating the estimated date by which it expects to file the report. • The fund includes on its public website: <ul style="list-style-type: none"> ○ A statement that it is relying on the 1940 Act Order; and ○ A brief explanation of why it could not file its reports on a timely basis. • The fund files the Form N-CEN or Form N-PORT as soon as practicable, but not later than 45 days after original due date. • Any Form N-CEN or Form N-PORT filed pursuant to the 1940 Act Order must include a statement of the filer that the fund relied on the 1940 Act Order and the reasons why it was unable to file such report on a timely basis. | <p>March 13 – April 30, 2020⁸</p> |

⁶ See 1940 Act Rule 30a-1 (requiring management investment companies to file annual reports on Form N-CEN not more than 75 calendar days after the close of each fiscal year, and requiring unit investment trusts to file annual reports on Form N-CEN not more than 75 calendar days after the close of each calendar year).

⁷ See 1940 Act Rule 30b1-9 (requiring registered investment companies and exchange-traded funds organized as unit investment trusts, other than money market funds and small business investment companies, to file monthly reports of portfolio holdings on Form N-PORT, and providing that reports on Form N-PORT for each month in each fiscal quarter of a registered investment company must be filed no later than 60 days after the end of such fiscal quarter).

⁸ This relief is applicable to filing or transmittal obligations, as applicable, for which the original due date was on or after March 13, 2020 but on or prior to April 30, 2020.

| Exemption | Conditions | Time Period |
|---|---|--|
| <p>Transmittal of Annual and Semiannual Shareholder Reports to Investors⁹</p> <p>(applicable to registered investment companies and unit investment trusts)</p> | <ul style="list-style-type: none"> • The fund is unable to prepare or transmit the report due to circumstances related to current or potential effects of COVID-19. • The fund promptly notifies the SEC Staff via email (IM-EmergencyRelief@sec.gov): <ul style="list-style-type: none"> ○ Stating that it is relying on the 1940 Act Order; ○ Providing a brief explanation of why it could not transmit its report on a timely basis; and ○ Indicating the estimated date by which it expects to transmit the report. • The fund includes on its public website: <ul style="list-style-type: none"> ○ A statement that it is relying on the 1940 Act Order; and ○ A brief explanation of why it could not prepare and transmit its reports on a timely basis. • The fund transmits the reports to shareholders as soon as practicable, but not later than 45 days after original due date, and files the report within 10 days of transmission to shareholders. | <p>March 13 – April 30, 2020⁸</p> |
| <p>Notice of Intention to Call or Redeem Securities – 30-Day Advance Filing Requirement¹⁰</p> <p>(applicable to registered closed-end funds and BDCs)</p> | <ul style="list-style-type: none"> • The company promptly notifies the SEC Staff via email (IM-EmergencyRelief@sec.gov): <ul style="list-style-type: none"> ○ Stating that it is relying on the 1940 Act Order; and ○ Providing a brief explanation of why it needs to file the notice fewer than 30 days in advance. | <p>March 13 – June 15, 2020</p> |

⁹ See 1940 Act Section 30(e) (requiring registered investment companies to transmit annual and semi-annual reports to shareholders); 1940 Act Rule 30e-1(c) (requiring registered investment companies' annual and semi-annual reports to be transmitted within 60 days of the close of the period covered by the report, among other requirements); 1940 Act Rule 30e-2(a) (requiring, for registered unit investment trusts substantially all the assets of which consist of securities issued by a management company, that annual and semi-annual reports must be transmitted to shareholders of record within the periods allowed under Rule 30e-1).

¹⁰ See 1940 Act Section 23(c) and Rule 23c-2(b) thereunder (requiring that a registered closed-end fund file with the SEC notice of its intention to call or redeem any securities of which it is the issuer at least 30 days prior to the date set for the call or redemption); 1940 Act Section 63 (applying 1940 Act Section 23 to a BDC to the same extent as if it were a registered closed-end fund, with certain exceptions). The 1940 Act Order permits filing such notice fewer than 30 days prior to (including the same business day as) the call or redemption of securities of which it is the issuer where the noted conditions are satisfied.

| Exemption | Conditions | Time Period |
|-----------|---|-------------|
| | <ul style="list-style-type: none"> • The company ensures that filing the notice on an abbreviated time frame is permitted under relevant state law and company governing documents. • The company files a notice containing all information required by Rule 23c-2 prior to: <ul style="list-style-type: none"> ○ Any call or redemption of existing securities; ○ Commencement of any offering of replacement securities; and ○ Providing notification to existing shareholders whose securities are being called or redeemed. | |

Prior to the SEC's publication of the 1940 Act Order, the Staff of the SEC's Division of Investment Management had issued a statement on March 4, 2020 extending a prior no-action position regarding meetings held by a registered fund's board of directors during unforeseen or emergency circumstances. The expanded relief allowed a board to vote telephonically or through other means, rather than in person, regarding approval of material changes to certain current and new agreements and arrangements.¹¹ The 1940 Act Order's relief relating to in-person board vote requirements, detailed in the preceding table, addresses the same substantive considerations as, and offers more regulatory certainty than, a Staff position.¹²

SEC Statement Regarding Prospectus Delivery and Related Enforcement Actions

In addition to the exemptive relief detailed above, recognizing that "there may be difficulties in the timely delivery of registered fund prospectuses," the SEC issued a statement in the 1940 Act Order that it "would not provide a basis for [an SEC] enforcement action if a registered fund does not deliver to investors the current prospectus of the registered fund where the prospectus is not able to be timely delivered because of circumstances related to COVID-19 and delivery was due" on or after March 13, 2020 but on or prior to April 30, 2020. Importantly, this relief does not apply where delivery was due in connection an initial share purchase by the investor. In addition, the SEC conditioned this position on the following:

- The fund notifies the Division of Investment Management Staff via email (IM-EmergencyRelief@sec.gov):

¹¹ See Division of Investment Management Staff Statement on Fund Board Meetings and Unforeseen or Emergency Circumstances Related to Coronavirus Disease 2019 (COVID-19) (March 4, 2020).

¹² See e.g., Commission Notice: Order Under Sections 6(c), 17(d) and 38(a) of the Investment Company Act of 1940 Granting Exemptions from Certain Provisions of the Act and Certain Rules Thereunder, SEC Rel. No. IC-25156 (Sept. 14, 2001).

- Stating that it is relying on this SEC position;
- Providing a brief explanation of why the prospectus could not be delivered to investors on a timely basis; and
- Indicating the estimated date by which it expects the prospectus to be delivered.
- The fund includes on its public website a statement that it intends to rely on the SEC position and briefly explains why it could not deliver the prospectus on a timely basis.
- The fund publishes its current prospectus on its public website.
- The fund delivers the prospectus to investors as soon as practicable, but not later than 45 days after the date originally required.

Advisers Act Relief

| RIA/ERA | Exemption | Conditions | Time Period |
|---------|---------------------|---|---|
| RIAs | Form ADV amendments | <ul style="list-style-type: none"> ● The RIA is unable to meet a filing deadline due to circumstances related to current or potential effects of COVID-19. ● The RIA promptly notifies the SEC via email (IARDLive@sec.gov) and provides disclosure on its public website:¹³ <ul style="list-style-type: none"> ○ Stating that the RIA is relying on the Advisers Act Order; ○ Providing a brief explanation of why it could not file its Form ADV on a timely basis; and | March 13 – April 30, 2020 ¹⁴ |

¹³ If the investment adviser does not have a public website, it must promptly provide equivalent notice to its clients and/or private fund investors.

¹⁴ This relief is applicable to filing obligations for which the original due date was on or after March 13, 2020 but on or prior to April 30, 2020.

| RIA/ERA | Exemption | Conditions | Time Period |
|---------|--|--|---|
| | | <ul style="list-style-type: none"> ○ Indicating the estimated date by which it expects to file its Form ADV. ● The RIA files Form ADV as soon as practicable, but not later than 45 days after original due date. | |
| | <p>Form ADV delivery requirements:</p> <ul style="list-style-type: none"> ● Current brochure or summary of material changes to brochure if there are material changes since last annual updating amendment¹⁵ ● Amended brochure or brochure supplement (or statement describing the material facts) relating to disciplinary information¹⁶ | <ul style="list-style-type: none"> ● The RIA is unable to meet a delivery requirement due to circumstances related to current or potential effects of COVID-19. ● The RIA promptly notifies the SEC via email (IARDLive@sec.gov) and provides disclosure on its public website:¹³ <ul style="list-style-type: none"> ○ Stating that the RIA is relying on the Advisers Act Order; ○ Providing a brief explanation of why it could not deliver its brochure, summary of material changes, or brochure supplement (as applicable) on a timely basis; and ○ Indicating the estimated date by which it expects to deliver its brochure, | <p>March 13 – April 30, 2020¹⁷</p> |

¹⁵ See Advisers Act Rule 204-3(b)(2) (in instances of material changes to the brochure since the last annual updating amendment, requiring delivery, within 120 days of an adviser’s fiscal year-end and without charge, of (i) the current brochure, or (ii) the summary of material changes under Form ADV, Part 2A, Item 2).

¹⁶ See Advisers Act Rule 204-3(b)(4) (requiring prompt delivery of an amended brochure or brochure supplement, or a statement describing the material facts relating to the change in disciplinary information, after adviser amends its brochure or brochure supplement, if the amendment adds disclosure of a disciplinary event, or materially revises information about a previously-disclosed disciplinary event, in response to Form ADV Part 2A Item 9 or Part 2B Item 3).

¹⁷ This relief is applicable to delivery obligations for which the original due date was on or after March 13, 2020 but on or prior to April 30, 2020.

| RIA/ERA | Exemption | Conditions | Time Period |
|---------|------------------|--|---|
| | | <p>summary of material changes, or brochure supplement (as applicable).</p> <ul style="list-style-type: none"> • The RIA delivers its brochure, summary of material changes, or brochure supplement (as applicable) as soon as practicable, but not later than 45 days after original due date. | |
| | Form PF filing | <ul style="list-style-type: none"> • The RIA is unable to meet a filing deadline due to circumstances related to current or potential effects of COVID-19. • The RIA promptly notifies the SEC via email (FormPF@sec.gov): <ul style="list-style-type: none"> ○ Stating that the RIA is relying on the Advisers Act Order; ○ Providing a brief explanation of why it could not file its Form PF on a timely basis; and ○ Indicating the estimated date by which it expects to file its Form PF. • The RIA files Form PF as soon as practicable, but not later than 45 days after original due date. | March 13 – April 30, 2020 ¹⁴ |
| ERAs | Form ADV filings | <ul style="list-style-type: none"> • The ERA is unable to meet a filing deadline due to circumstances related to current or potential effects of COVID-19. • The ERA promptly notifies the SEC via email (IARDLive@sec.gov) and provides disclosure on its public website:¹³ | March 13 – April 30, 2020 ¹⁴ |

| RIA/ERA | Exemption | Conditions | Time Period |
|---------|-----------|---|-------------|
| | | <ul style="list-style-type: none"> ○ Stating that the ERA is relying on the Advisers Act Order; ○ Providing a brief explanation of why it could not file its Form ADV on a timely basis; and ○ Indicating the estimated date by which it expects to file its Form ADV. • The ERA files Form ADV as soon as practicable, but not later than 45 days after original due date. | |

Potential for Additional or Extended Relief

The SEC noted in both orders that it would consider additional relief and may extend the period for relief (potentially with additional conditions) as necessary or appropriate.

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