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PH COVID-19 Client Alert Series: Regulatory and Practical Issues Facing Registered Investment Companies and Investment Advisers

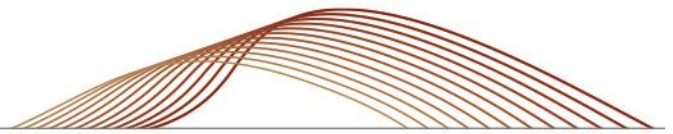
By [The Investment Management Practice](#)

As the number of coronavirus or COVID-19 cases increases in the United States, investment advisers and the registered investment companies they advise are facing a variety of challenges—including issues with meeting regulatory filing requirements and reporting deadlines, holding in-person board meetings, and business continuity preparedness. In addition, investment advisers are also evaluating whether updates are necessary to public disclosure documents in light of the rapid increase in COVID-19 cases and the potential effect it may have on global economies and markets.

In responses to industry concerns around COVID-19, the Securities and Exchange Commission (the “SEC” or the “Commission”) and its staff have recently issued various guidance in an effort to assist market participants in responding to the challenges posed by COVID-19.

SEC’s Division of Investment Management Issues Statement on Fund Board Meetings

On March 4, 2020, the staff of SEC’s Division of Investment Management issued the Statement on Fund Board Meetings and Unforeseen or Emergency Circumstances Related to Coronavirus Disease 2019¹ (the “Statement”). In the Statement, the staff noted that fund boards may have upcoming meetings that were anticipating in-person attendance and that boards may be concerned about potential travel restrictions or the ability of directors to travel. As a result of these concerns and further effects of COVID-19, the staff extended the no-action position expressed in the Independent Directors Council letter² with respect to unforeseen or emergency circumstances to cover all approvals and renewals (including material changes) of contracts, plans, or arrangements under section 15(c) of the Investment Company Act of 1940, as amended (“1940 Act”) or rules 12b-1 or 15a-4(b)(2) under the 1940 Act, as well as the selection of a fund’s independent public accountant pursuant to Section 32(a) of the 1940 Act, where such accountant is not the same accountant as selected in the immediately preceding fiscal year. The staff noted that this position would apply to board meetings held between March 4, 2020 and June 15, 2020. Furthermore, the Statement noted that the staff may extend the time period for the no-action position as circumstances warrant, with any additional conditions deemed appropriate.



SEC Issues Order under Section 36 of the Securities Exchange Act of 1934 Granting Exemptions from Specified Provisions of the Exchange Act and Certain Rules Thereunder

On March 4, 2020, the SEC issued an exemptive order³ (the “Order”), which provides certain regulatory relief to reporting companies under the Securities Exchange Act of 1934, as amended (the “1934 Act”). Pursuant to the Order, between March 1, 2020 and April 30, 2020, the filing deadlines under 1934 Act will be extended to 45 days after the original due date. To take advantage of the extended deadline, a reporting company must provide the following disclosures:

- A statement that it is relying on the Order;
- A brief description of the reasons why it could not file such report, schedule, or form on a timely basis;
- The estimated date by which the report, schedule or form is expected to be filed;
- If appropriate, a risk factor explaining, if material, the impact of COVID-19 on the company’s business; and/or
- An exhibit signed by any person, other than the company, stating the specific reasons why such person is unable to furnish any required opinion, report, or certification, if that inability to furnish such required opinion, report, or certification is the reason why the subject report cannot be timely filed.

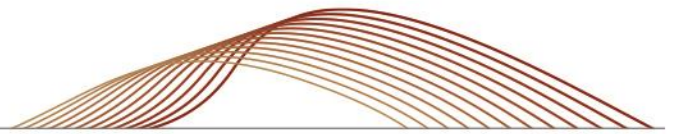
Likewise, the Order exempts reporting companies from delivery requirements under Sections 14(a) and (c) of the 1934 Act and Regulations 14A and 14C and Rule 14f-1 thereunder to furnish materials to security holders when mail delivery is not possible due to COVID-19 and the company has made a good faith effort to furnish such soliciting materials to the security holder.

SEC Issues Exemptive Relief under Investment Advisers Act and the 1940 Act

On March 13, 2020, the Commission issued two separate orders in an effort to help funds and investments advisers deal with the consequences of COVID-19.

First, the Commission published an order under the Investment Advisers Act of 1940,⁴ as amended (the “Advisers Act”) (the “Advisers Act Order”) providing a temporary exemption from certain requirements of the Advisers Act. The relief under the Advisers Act Order is limited to filing or delivery obligations, as applicable, for which the original due date is on or after March 13, 2020, but on or prior to April 30. In order to be exempt from the filing or delivery obligations, as applicable, the following conditions must be satisfied:

- The registered investment adviser or exempt reporting adviser is unable to meet a filing deadline or delivery requirement due to circumstances related to current or potential effects of COVID-19;
- The investment adviser relying on the Advisers Act 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), promptly provides the Commission via email at IARDLive@sec.gov and discloses 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 this Order;
 - a brief description of the reasons why it could not file or deliver its Form on a timely basis; and
 - the estimated date by which it expects to file or deliver the Form.
- Any investment adviser relying on the Advisers Act Order with respect to filing Form PF required by Rule 204(b)-1 must promptly notify the Commission via email at FormPF@sec.gov stating:
 - that it is relying on this Order;
 - a brief description of the reasons why it could not file or deliver its Form on a timely basis; and
 - the estimated date by which it expects to file or deliver the Form.
 - The investment adviser files the Form ADV or Form PF, as applicable, and delivers 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 not later than 45 days after the original due date for filing or delivery, as applicable.

Also on March 13, 2020, the SEC published an order under the 1940 Act⁵ (“1940 Act Order”) which provides relief from certain requirements under the 1940 Act.⁶ In order to take advantage of the relief provided under the 1940 Act Order the following conditions must be satisfied:

- Reliance on this 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; and
- The board of directors, including a majority of the directors who are not interested persons of the registered management investment company or business development company (“BDC”), ratifies the action taken pursuant to this exemption by vote cast at the next in-person meeting.

The 1940 Act Order also provides temporary relief from certain filing requirements⁷ so long as the following conditions are satisfied:

- The registered fund is unable to meet a filing deadline due to circumstances related to current or potential effects of COVID-19;
- Any registered fund relying on this Order promptly notifies the Commission staff via email at IM-EmergencyRelief@sec.gov stating:
 - that it is relying on this 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 registered fund relying on the 1940 Act Order includes a statement on the applicable registered fund’s public website briefly stating that it is relying on the 1940 Act Order and the reasons why it could not file its reports on a timely basis;
- The registered 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
- Any Form N-CEN or Form N-PORT filed pursuant to the 1940 Act Order must include a statement of the filer that it relied on the 1940 Act Order and the reasons why it was unable to file such report on a timely basis.

In addition, the 1940 Act Order provides that, during the applicable time period,⁸ a registered management investment company is temporarily exempt from the requirements of Section 30(e) of the 1940 Act and Rule 30e-1 thereunder to transmit annual and semi-annual reports to investors where the conditions below are satisfied and a registered unit investment trust is temporarily exempt from the requirements of Section 30(e) of the 1940 Act and Rule 30e-2 thereunder to transmit annual and semi-annual reports to unitholders where the following conditions are satisfied:

- The registered fund is unable to prepare or transmit the report due to circumstances related to current or potential effects of COVID-19;
- Any registered fund relying on the 1940 Act Order promptly notifies the staff via email at IM-EmergencyRelief@sec.gov stating:
 - that it is relying on the 1940 Act 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 registered fund relying on the 1940 Order includes a statement on the applicable registered fund’s public website briefly stating that it is relying on the 1940 Act Order and the reasons why it could not prepare and transmit its reports on a timely basis; and
- The registered fund transmits the reports to shareholders 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 shareholders.

The 1940 Act Order also provides that, during applicable time period,⁹ closed-end funds and BDCs are temporarily exempt from the requirement to file notices of their intention to call or redeem securities at least 30 days in advance under Section 23(c) and 63, as applicable of the 1940 Act and Rule 23c-2 (“Notice”) thereunder if such company files a Form N-23C-2 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 when the following conditions are satisfied:



- The fund relying on the 1940 Act Order:
 - Promptly notifies Commission staff via email at IM-EmergencyRelief@sec.gov stating:
 - that it is relying on the 1940 Act Order; and
 - a brief description of the reasons why it needs to file a Notice fewer than 30 days in advance of the date set by the company for calling or redeeming the securities of which it is the issuer;
 - Ensures that the filing of the Notice on an abbreviated time frame is permitted under relevant state law and the company's governing documents;
 - Files a Notice 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 shareholders whose securities are being called or redeemed.

Finally, the Commission states that it would not provide a basis for a Commission enforcement action if a registered investment company does not deliver the current prospectus to investors where it is unable to be timely delivered because of circumstances related to COVID-19 and delivery was due during the applicable time period, provided that the sale of shares to the investor was not an initial purchase by the investor of shares of the registered investment company and the registered investment company:

- Notifies Division of Investment Management staff via email at IM-EmergencyRelief@sec.gov stating: (1) that it is relying on this Commission position; (2) a brief description of the reasons why it or any other person required could not deliver the prospectus to investors on a timely basis; and (3) the estimated date by which it expects the prospectus to be delivered;
- Publishes on its public website that it intends to rely on the Commission position and briefly states the reason why it could not deliver the prospectus on a timely basis;
- Publishes its current prospectus on its public website; and
- Delivery was originally required on or after the date of the 1940 Act Order but on or prior to April 30, 2020 and the prospectus is delivered to investors as soon as practicable, but not later than 45 days after the date originally required.

Risk Disclosure

Investment advisers and the funds they advise should also evaluate whether revisions or updates should be made to disclosure documents in light of COVID-19. Based on our experience, because the outbreak of COVID-19 coincided with the release of fourth quarter and annual earnings information for many companies, some registrants did choose to include risk factor disclosures related to the virus. Risks discussed included disruption to business operations due to a variety of factors, travel restrictions, and uncertainty related to the impact of COVID-19 on the market. Currently, no SEC



guidance has been issued regarding requirements for specific risk disclosure related to COVID-19; however, registrants should be working to identify any funds that have exposure to sectors and geographic locations that will be impacted by the virus and consider whether additional disclosure is warranted. This is particularly important in light of SEC staff guidance from 2016,¹⁰ which states that funds have a responsibility to review their risk disclosure on an ongoing basis and update accordingly based on current conditions. Given that the effects of COVID-19 on any fund's portfolio are as yet unknown, it would be prudent for funds and their investment advisers to evaluate these changing market conditions as they apply to a particular investment strategy.

Continuing Operations

Investment advisers and funds are also facing unprecedented business continuity concerns in light of the increased COVID-19 cases. Thus far, the responses from companies have been varied based on geographical location and instances of employees having contracted COVID-19. For example, certain investment advisers have begun relocating some portfolio managers from their headquarters to remote offices as a precaution and in accordance with the established business continuity plans. Other firms have taken measures in order to combat the spread of COVID-19, largely, companies are encouraging employees to work from home and conducting increased and more thorough cleaning and disinfecting of offices. Many companies have also enacted travel restrictions related to all non-essential travel and mandatory 14 day self-quarantine periods in place for those employees that have recently travelled to any country labelled as Level 2 or 3 by the U.S. Center for Disease Control and Prevention. Large business and social gatherings and in-person meetings are also being cancelled or postponed in an effort to curb the spread of the virus. The SEC has also asked employees at its Washington, D.C. office to telecommute as a precaution and has moved to virtual meetings while attempting to remain fully operational.

The potential impact of COVID-19 continues to rapidly evolve and companies should be vigilant in monitoring the situation and maintain close communications with their board of directors, auditors, legal counsel, and all services providers as the situation progresses.

To discuss any of the items covered under this Alert and what it may mean for your business, please contact a member of the Paul Hastings [Investment Management Practice](#). We will provide further updates as the issues unfold.





If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

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- ¹ *IM Staff Statement, Fund Board Meetings and Unforeseen or Emergency Circumstances Related to Coronavirus Disease 2019 (COVID-19)*, <https://www.sec.gov/investment/staff-statement-im-covid-19> (March 4, 2020).
 - ² See Letter from the staff of the Division of Investment Management to Independent Directors Council, <https://www.sec.gov/divisions/investment/noaction/2019/independent-directors-council-022819> (February 28, 2019).
 - ³ *Order Under Section 36 of the Securities and Exchange Act of 1934 Granting Exemptions from Specified Provisions of the Exchange Act and Certain Rules Thereunder*, <https://www.sec.gov/rules/other/2020/34-88318.pdf> (March 4, 2020).
 - ⁴ *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*, <https://www.sec.gov/rules/other/2020/ia-5463.pdf> (March 13, 2020).
 - ⁵ *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*, <https://www.sec.gov/rules/other/2020/ic-33817.pdf> (March 13, 2020).
 - ⁶ Registered management investment company or a BDC and any investment adviser of or principal underwriter for such registered management investment company or BDC is exempt from the requirements imposed under sections 15(c) and 32(a) of the 1940 Act and Rules 12b-1(b)(2) and 15a-4(b)(2)(ii) under the 1940 Act.
 - ⁷ A registered fund that is required to file Form N-CEN pursuant to Rule 30a-1 under the 1940 Act, or Form N-PORT pursuant to Rule 30b1-9 under the 1940 Act on or after the date of the 1940 Act Order but on or prior to April 30, 2020.
 - ⁸ A registered management investment company that is required to file annual and semi-annual reports to unitholders and shareholders pursuant to Section 30(e) of the 1940 Act and Rule 30e-1 on or after the date of the 1940 Act Order but on or prior to April 30, 2020.
 - ⁹ A closed-end fund or BDC that is required to file notices under Sections 23(c) and 63 of the 1940 Act, and Rule 23c-2 if such company files a Form N-23C-2, on or after the date of the 1940 Act Order to June 15, 2020.
 - ¹⁰ See *Fund Disclosure Reflecting Risks Related to Current Market Conditions*, <https://www.sec.gov/investment/im-guidance-2016-02.pdf> (March 2016).

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