

SEC Grants Relief to Funds and Advisers Related to COVID-19 Outbreak



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As a result of the current and potential effects of COVID-19, the SEC has relaxed certain requirements of the Investment Company Act of 1940 and the Investment Advisers Act of 1940 and rules under the Acts.

Specifically, on March 13, 2020, the Commission issued an order that temporarily eliminates in-person board meeting requirements, and permits a fund to delay certain filing obligations and prospectus delivery requirements under the Investment Company Act

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of 1940 (the ICA Order) (available at: <https://www.sec.gov/rules/other/2020/ic-33817.pdf>), and an order temporarily delaying deadlines for filing Forms ADV and Forms PF by investment advisers and exempt reporting advisers under the Investment Advisers Act of 1940 (the Advisers Act Order) (available at: <https://www.sec.gov/rules/other/2020/ia-5463.pdf>).

Pepper Hamilton attorneys are monitoring regulatory developments closely, and remain committed to assisting our clients through this time. Do not hesitate to contact any of the authors listed here.

Relief under the Investment Company Act

In-Person Board Meeting Requirements

Until June 15, 2020, a registered investment company or Business Development Company (BDC) and any investment adviser of or principal underwriter for such registered investment company or BDC is exempt from certain requirements that votes of boards of directors be cast in person.¹ Specifically, the relief relates to the following sections of and rules under the Investment Company Act:

- Section 15(c) - relating to approval of investment advisory and underwriting contracts
- Section 32(a) - relating to selection of auditors
- Rule 12b-1(b)(2) - relating to approval of distribution plans in which an investment company acts as a distributor of its own securities, and
- Rule 15a-4(b)(2)(ii) - related to approval of interim investment advisory contracts.

Reliance on the ICA Order with respect to in-person meeting requirements is subject to the following conditions:

- 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 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 BDC, ratifies the action taken pursuant to this exemption by vote cast at the next in-person meeting.

Additional 45 Days to File Form N-Port and Form N-CEN Filings

Until April 30, 2020, a registered fund that is required to file Form N-CEN pursuant to Rule 30a-1 under the Investment Company Act, or Form N-PORT pursuant to Rule 30b1-9 under the Investment Company Act, is temporarily exempt from such form-filing requirements.

Reliance on the ICA Order with respect to Form N-Port or Form N-CEN is subject to the following conditions:

1. The registered fund is unable to meet a filing deadline due to circumstances related to current or potential effects of COVID-19
2. Any registered fund relying on the ICA Order promptly notifies the Commission staff via email at IM-EmergencyRelief@sec.gov stating:
 - a. That it is relying on the ICA Order
 - b. A brief description of the reasons why it could not file its report on a timely basis, and
 - c. The estimated date by which it expects to file the report
3. Any registered fund relying on the ICA Order includes a statement on the applicable registered fund's public website briefly stating that it is relying on the ICA Order and the reasons why it could not file its reports on a timely basis
4. 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
5. Any Form N-CEN or Form N-PORT filed pursuant to the ICA Order must include a statement of the filer that it relied on the order and the reasons why it was unable to file such report on a timely basis.

Additional 45 days to Transmit Annual and Semi-Annual Reports by Investment Companies

Until April 30, 2020, a registered investment company is temporarily exempt from the requirements of Section 30(e) of the Investment Company Act and Rule 30e-1 thereunder to transmit annual and semi-annual reports to investors.

Reliance on the ICA Order with respect to transmittal of annual and semi-annual reports is subject to the following conditions:

1. The registered fund is unable to prepare or transmit the report due to circumstances related to current or potential effects of COVID-19
2. Any registered fund relying on ICA Order promptly notifies the staff via email at IM-EmergencyRelief@sec.gov stating:
 - a. That it is relying on this order
 - b. A brief description of the reasons why it could not transmit its report on a timely basis, and
 - c. The estimated date by which it expects to transmit the report
3. Any registered fund relying on ICA Order includes a statement on the applicable registered fund's public website briefly stating that it is relying on this order and the reasons why it could not prepare and transmit its reports on a timely basis, and
4. 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.

Reduced Notice Period for Share Repurchases

Until June 15, 2020, closed-end funds and BDCs are temporarily exempt from the requirement to file with the Commission notices of their intention to call or redeem securities at least 30 days in advance under Sections 23(c) and 63, as applicable, of the Investment Company Act and Rule 23c-2 thereunder, if such company files a Form N-23C-2 (Notice) with the Commission less than 30 days before, including the same business day as, the company's call or redemption of securities of which it is the issuer.

Reliance on the ICA Order with respect to Form N-23C-2 is subject to the following conditions:

1. The closed-end fund or BDC (Company) relying on the ICA Order:
 - a. Promptly notifies Commission staff via email at IM-EmergencyRelief@sec.gov stating that it is relying on the ICA Order, and
 - b. 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
2. Ensures that the filing of the Notice on an abbreviated time frame is permitted under relevant state law and the Company's governing documents
3. Files a Notice that contains all the information required by Rule 23c-2 before:
 - a. Any call or redemption of existing securities
 - b. The commencement of any offering of replacement securities, and
 - c. Providing notification to the existing shareholders whose securities are being called or redeemed.

Additional 45 Days to Deliver Prospectuses

The Commission stated that it would not provide a basis for a Commission enforcement action if a registered fund does not deliver to investors the current prospectus of the reg-

istered fund where the prospectus is not able to be timely delivered because of circumstances related to COVID-19 and delivery was due during the limited period specified below, provided that the sale of shares to the investor was not an initial purchase by the investor of shares of the registered fund.

Reliance on the ICA Order with respect to prospectus delivery requirements is subject to the following conditions:

1. The registered fund:

a. Notifies Division of Investment Management staff via email at IM-EmergencyRelief@sec.gov stating:

i. That it is relying on this Commission position

ii. 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

iii. The estimated date by which it expects the prospectus to be delivered

b. Publishes on its public website that it intends to rely on the Commission position and briefly states the reasons why it could not deliver the prospectus on a timely basis

c. Publishes its current prospectus on its public website, and

2. Delivery was originally required on or after March 13, 2020 but on or before 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.

Relief Under the Advisers Act

Suspension of Form ADV Amendment and Delivery Requirements

The Advisers Act Order provides a temporary exemption from certain requirements. Specifically, subject to certain conditions, for filings due from March 13, 2020 but before April 30, 2020:

- A registered investment adviser is exempt from the requirements:

- Under Rule 204-1 of the Advisers Act to file an amendment to Form ADV, and
- Under 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
- An exempt reporting adviser is exempt from the requirements under Rule 204-4 under the Advisers Act to file reports on Form ADV, and
- A registered investment adviser that is required by Section 204(b) of and Rule 204(b)-1 under the Advisers Act to file Form PF is exempt from those requirements.

Additional 45 Days to File Annual Form ADV

Registered investment advisers or exempt reporting advisers that rely on the Advisers Act Order must satisfy certain requirements:

- The adviser is unable to meet a filing deadline or delivery requirement due to circumstances related to current or potential effects of COVID-19
- The adviser, with respect to the filing of Form ADV or delivery of its brochure, summary of material changes, or brochure supplement, 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 the Advisers Act Order
 - A brief description of the reasons why it could not file or deliver its Form ADV on a timely basis, and
 - The estimated date by which it expects to file or deliver the Form
- The adviser, with respect to Form PF, must promptly notify the Commission via email at FormPF@sec.gov stating:
 - That it is relying on the Advisers Act Order

- A brief description of the reasons why it could not file its Form on a timely basis, and
- The estimated date by which it expects to file the Form
- The 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.

Should you have any questions related to the items discussed in this Client Alert or regarding your legal and compliance obligations during the COVID-19 outbreak, please do not hesitate to contact any of the authors listed here. Pepper Hamilton attorneys are ready to assist you through this rapidly developing situation.

Endnote

1 On March 14, 2020, the Staff of the Division of Investment Management extended until June 15, 2020 the relief granted to the Independent Directors Council in February 2019, which provided that it would not recommend enforcement if a board did not satisfy the in-person vote requirement due to emergency circumstances affecting some or all of the directors. <https://www.sec.gov/investment/staff-statement-im-covid-19>. See also Independent Directors Council, No Action Letter (Feb. 28, 2019) <https://www.sec.gov/divisions/investment/noaction/2019/independent-directors-council-022819>.