

Memorandum

UPDATE: SEC Provides Temporary Relief to Regulated Funds and Investment Advisers Affected by the Coronavirus

April 14, 2020

On March 13, 2020, the U.S. Securities and Exchange Commission (“SEC”) announced regulatory relief for registered investment companies and business development companies (collectively referred to as “regulated funds”) and investment advisers whose operations may be affected by the coronavirus disease 2019 (“COVID-19”) by issuing two exemptive orders. The relief for regulated funds, which was modified and extended on March 25, 2020, covers board actions that ordinarily must be taken at in-person board meetings, and certain filing and delivery requirements for regulated funds and certain investment advisers. The SEC staff also issued guidance for conducting shareholder meetings in light of COVID-19 concerns.

It is expected that the impacts of COVID-19 may delay or prevent regulated funds and advisers from meeting certain regulatory obligations due to restrictions on large gatherings, travel and access to facilities, the potential limited availability of personnel and access to key services providers, and similar disruptions. SEC Chairman Jay Clayton explained that this relief is intended to provide additional time to allow affected funds and advisers to continue to meet their investors’ and clients’ expectations. Further, this relief is designed to enable regulated funds and advisers to continue to meet their regulatory obligations and continue their operations, while recognizing that there may be temporary disruptions beyond their control. The temporary relief for investment advisers extends until June 30, 2020. As discussed in more detail below, certain portions of the temporary relief for regulated funds are available until June 30, 2020, and the other portions of the relief extend until August 15, 2020.

Key Takeaways

Investment advisers and regulated funds should assess now if they anticipate a need to rely on this SEC relief so they can take the required steps to meet the conditions of the relief. In addition, to the extent investment advisers and regulated funds will need information from third parties (*e.g.*, fund administrators, portfolio companies, etc.) in order to meet the filing and delivery obligations discussed in the SEC relief, they should be in regular communication with those third parties and continually assess whether those third parties will be able to provide the information to advisers in a timely manner.

TAKEAWAYS FOR INVESTMENT ADVISERS

Specific takeaways for investment advisers include that:

- An investment adviser whose fiscal year ended on December 31, 2019 that is unable to file its annual amendment to Form ADV by March 30, 2020 due to the effects of COVID-19 is permitted to file the amendment as soon as practicable after March 30, 2020, but not later than May 14, 2020, subject to certain SEC notification and website disclosure requirements.
- To the extent an investment adviser must file an other-than-annual amendment to Form ADV by a date between March 13, 2020 and June 30, 2020, but is unable to meet that deadline due to the effects of COVID-19, the adviser is permitted to file the amendment as soon as practicable after the original due date, but no later than 45 days after that original due date.
- An investment adviser whose fiscal year ended on December 31, 2019 that is unable to file its annual Form PF by April 29, 2020 due to the effects of COVID-19 is permitted to file the annual Form PF as soon as practicable after April 29, 2020, but not later than June 13, 2020, subject to certain SEC notification requirements.

TAKEAWAYS FOR REGULATED FUNDS

Specific takeaways for regulated funds include that:

- Boards of regulated funds may enter into, renew or materially amend investment advisory contracts, underwriting and distribution agreements and Rule 12b-1 plans, and select a regulated fund's independent public accountant, at non-in-person meetings. The relief expires after August 15, 2020 (extended from the original expiration date of June 15, 2020).
- Business development companies and closed-end registered funds may file notices under Rule 23c-2 for the full or partial call or redemption of any security less than 30 days prior to the call or redemption date, provided that such notice complies with notice requirements under the governing documents for such security and applicable law. The relief expires after August 15, 2020 (extended from the original expiration date of June 15, 2020).
- Regulated funds can change the time, date or location of an annual shareholder meeting without amending their proxy materials, subject to compliance with applicable state law requirements and certain other conditions.
- Form N-CEN and Form N-PORT submissions, and annual and semi-annual shareholder reports, that registered investment companies are required to file or transmit between March 13, 2020 and June 30, 2020 (extended from the original eligibility period end date of April 30, 2020) may be filed or transmitted by a date that is no later than 45 days after the original due date for such filing or report.

Temporary Exemptive Relief Orders

Balancing the needs and safety of regulated entities impacted by COVID-19 against the importance of market participants receiving materially accurate and timely information, the SEC has issued the relief orders summarized below.

RELIEF RELATED TO THE INVESTMENT COMPANY ACT OF 1940

Pursuant to the Investment Company Act of 1940, as amended (the “Investment Company Act”), the SEC issued an [Order](#)¹ (“Investment Company Act Order”) on March 25, 2020 providing temporary relief regarding:

- In-person board meeting requirements for investment adviser and auditor approvals;
- Form N-CEN and Form N-PORT filing deadlines;
- Annual and semi-annual report transmittal deadlines;
- Prior notice timing requirements under Rule 23c-2 for calling or redeeming securities; and
- Enforcement of prospectus delivery requirements for existing investors purchasing additional shares.

In-Person Board Meetings

The Investment Company Act Order provides temporary relief to regulated funds, and any investment adviser or principal underwriter of such companies, from Investment Company Act sections and rules requiring certain agreements, plans, or arrangements to be approved by the company’s board at an in-person meeting due to circumstances related to COVID-19. Specifically, the relief can be relied upon for the following actions that fund boards must otherwise take at an in-person meeting:

- **Section 15(c).** Entering into, renewing or materially amending investment advisory contracts and principal underwriting agreements (including interim investment advisory contracts pursuant to Rule 15a-4(b)(2)(ii)).
- **Section 32(a).** Selection of the fund’s independent public accountant.
- **Rule 12b-1.** Approval or renewal of a fund’s Rule 12b-1 plan or any related agreements.

The Investment Company Act Order requires the votes to be cast at a meeting in which board members may participate by any means of communication that allows all board members participating to hear each other simultaneously during the meeting (*i.e.*, the relief cannot be relied upon for actions by written consent). A fund board must ratify the actions taken pursuant to the exemptive relief at its next in-person meeting. The Investment

¹ The SEC’s original [Order](#) providing temporary exemptive relief for regulated funds was issued on March 13, 2020; it was modified and extended by the Order issued on March 25, 2020.

Company Act Order limits relief concerning in-person board meetings to the period of March 13, 2020 to August 15, 2020 (extended from the original expiration date of June 15, 2020).

Filing Deadlines for Form N-CEN, Form N-PORT and Annual and Semi-Annual Reports

The Investment Company Act Order provides temporary relief to registered investment companies affected by COVID-19 from Form N-CEN and Form N-PORT filing deadlines. The Investment Company Act Order also provides temporary relief for annual and semi-annual reports required by Section 30(e) of the Investment Company Act and Rule 30e-1 thereunder. The period of relief is limited to filing obligations for which the original due date is March 13, 2020 through June 30, 2020 (extended from the original eligibility period end date of April 30, 2020). A regulated fund relying on the relief should file its report as soon as practicable, and must do so no later than 45 days after the original due date. With respect to Form N-CEN and Form N-PORT, the form eventually filed must include a statement of the filer that it relied on this order and the reason it was unable to file such report on a timely basis.

A regulated fund relying on this relief must promptly notify SEC staff by email (IM-EmergencyRelief@sec.gov) that it is relying on this order and include a statement on its website briefly stating that it is relying on this order. In the superseding exemptive order issued on March 25, 2020, the SEC removed the prior requirements that a regulated fund state why it cannot file its reports on a timely basis in the email to the SEC staff and on its website, and the fund no longer has to provide the SEC staff with an estimated date to make the filings.

Prior Notice Timing Requirements for Rule 23c-2 Filings

The Investment Company Act Order provides temporary relief to closed-end regulated funds affected by COVID-19 from the requirement to file Form N-23C-2 at least the required 30 days prior to calling or redeeming securities. Regulated funds relying on the Investment Company Act Order must also notify SEC staff of their intention to rely on it and provide the SEC with certain information. This exemptive relief applies to the timing of the filing of any notice under Rule 23c-2, which is more expansive than the recent Rule 23c-2 no-action relief provided by the SEC staff to Gladstone Investment Corporation on December 5, 2019. In order to rely on the exemptive relief, the fund must:

- Promptly notify the SEC staff via email (IM-EmergencyRelief@sec.gov) of its intent to rely on the Investment Company Act Order;
- Ensure that the filing of the notice on an abbreviated time frame is permitted under relevant state law and the fund's governing documents (*i.e.*, the timing of the notice must also comply with the notice periods in the contracts and organizational documents governing the security); and

- The notice must contain all of the information required by Rule 23c-2 and must be filed with the SEC 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.

In the superseding exemptive order issued on March 25, 2020, the SEC removed the prior requirement that a regulated fund state in the email to the SEC staff why it needs to file the notice fewer than 30 days from the call or redemption date. The Investment Company Act Order limits relief concerning the timing of Form N-23C-2 filings to the period of March 13, 2020 to August 15, 2020 (extended from the original expiration date of June 15, 2020).

DELAYED DELIVERY OF FUND PROSPECTUSES FOR SUBSEQUENT PURCHASES

The Investment Company Act Order also stated that the SEC will refrain from taking enforcement action if a regulated fund does not deliver its current prospectus to investors on time because of circumstances related to COVID-19, and delivery was originally due on March 13, 2020 through June 30, 2020 (extended from the original eligibility period end date of April 30, 2020), provided that the sale of shares to an investor was not an initial purchase of shares. Regulated funds seeking to rely on this Commission position must notify the SEC staff and post notices on their websites to comply with requirements similar to the notice requirements discussed above. In any event, regulated funds relying on this relief must deliver their prospectuses to investors as soon as practicable, and no later than 45 days after the date originally required.

STAFF GUIDANCE FOR CONDUCTING ANNUAL SHAREHOLDER MEETINGS

The SEC staff issued separate [guidance](#) for conducting annual shareholder meetings that is applicable to all issuers, and is of particular importance to closed-end regulated funds that are required to hold annual shareholder meetings. For funds that have already set the date, time or location of their shareholder meeting, the staff guidance permits a fund that has already mailed and filed its definitive proxy materials to notify shareholders of a change in the date, time or location of its shareholder meeting without mailing additional soliciting materials or amending its proxy materials if it:

- Issues a press release announcing such change;
- Files the announcement as definitive additional soliciting material on EDGAR; and
- Takes all reasonable steps necessary to inform other intermediaries in the proxy process (such as any proxy service provider) and other relevant market participants (such as the appropriate national securities exchanges) of such change.

These actions should be taken promptly after making a decision to change the date, time or location of the meeting and sufficiently in advance of the meeting so the market is alerted to the change in a timely manner. Any

changes must also comply with applicable state law requirements. The guidance also covers procedures for conducting “virtual” or “hybrid” shareholder meetings and provides guidance under Rule 14a-8(h) under the Securities Exchange Act of 1934 for shareholders to present proposals remotely.

RELIEF RELATED TO THE INVESTMENT ADVISERS ACT OF 1940

Pursuant to the Investment Advisers Act of 1940, as amended (“Advisers Act”), the SEC issued an [Order](#)² (“Advisers Act Order”) on March 25, 2020 providing temporary relief to:

- Registered investment advisers and exempt reporting advisers affected by COVID-19, from the requirement to file an amendment to Form ADV and the requirement to file reports on Form ADV Part 1A, respectively;
- Registered advisers, from requirements to deliver amended brochures, brochure supplements or summary of material changes to clients where the disclosures cannot be timely delivered because of circumstances related to COVID-19; and
- Private fund advisers affected by COVID-19, from Form PF filing requirements.

The relief in the Advisers Act Order is only available to advisers that are unable to meet a filing deadline or delivery requirement due to circumstances related to current or potential effects of COVID-19. In addition, the relief is limited to filing or delivery obligations, as applicable, for which the original due date is March 13, 2020 through June 30, 2020. In any event, the filing and delivery obligations should be met as soon as practicable, but no later than 45 days after the original due date.

An investment adviser relying on the Advisers Act Order with respect to the filing of Form ADV or the delivery of its brochure, brochure supplement or summary of material changes must promptly email the SEC (IARDLive@sec.gov) and disclose on the adviser’s public website (or, in the absence of a public website, promptly notify clients and/or private fund investors) that it is relying on this order. Investment advisers relying on the Advisers Act Order with respect to filing Form PF must provide a similar notification to the SEC (FormPF@sec.gov).

Conclusion

The SEC announced that it will continue to assess the impacts of COVID-19 on investors and market participants, and will consider additional relief from other regulatory requirements. The SEC encouraged affected firms and financial professionals to contact SEC staff with questions and concerns. The SEC also announced that it may extend the time period for relief, with any additional conditions it deems appropriate, or provide additional relief as circumstances warrant.

² The SEC’s original [Order](#) providing temporary exemptive relief was issued on March 13, 2020; it was modified and extended by the Order issued on March 25, 2020.

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