

ALERTS

Regulated Funds: SEC Provides Conditional Relief in Response to COVID-19

March 18, 2020

On March 13, 2020, the U.S. Securities and Exchange Commission issued an order providing an exemption for registered investment companies and business development companies (“Regulated Funds”) from certain requirements under the Investment Company Act of 1940, as amended (“1940 Act”), in light of operational challenges arising in connection with the current coronavirus outbreak (“Order”).^[1] Among other things, the Order provides relief from the requirement to hold in-person meetings of Regulated Fund boards of directors for certain 1940 Act approvals, as well as extends the transmittal and filing deadlines for certain registered fund reports.

In-Person Voting Requirements

Pursuant to the Order, for the period from the date of the Order through June 15, 2020 (subject to extension by the SEC), Regulated Funds are exempted from the in-person voting requirements of the 1940 Act with respect to the approval of a fund’s advisory agreement, interim advisory agreement and 12b-1 distribution plan and the selection of a fund’s independent public accountant. In lieu of voting at an in-person meeting, the votes to approve these matters must instead be cast at a meeting utilizing any means of communication that allows the participating directors to hear each other simultaneously during the meeting. This exemptive relief is conditioned on being “necessary or appropriate due to circumstances related to current or potential effects of COVID-19.” In

addition, if a Regulated Fund relies on this relief, the fund's board, including a majority of the independent directors, must ratify the action taken pursuant to this exemption at the board's next in-person meeting. The Order formalizes guidance on this matter that was recently issued by the Staff of the Division of Investment Management of the SEC ("Staff Statement").^[2] Because the Order provides exemptive relief (in contrast with the prior Staff Statement), it obviates possible concerns relating to the validity of approvals made during the COVID-19 situation other than at in-person meetings. For more information about the Staff Statement, please refer to the *SRZ Alert* available [here](#).

Forms N-CEN and N-PORT Filing Requirements

The Order states that "disruptions to transportation, and limited access to facilities, personnel, and third party service providers as a result of COVID-19 could hamper the efforts of registered funds with filing obligations to meet their filing deadlines," while also noting the importance of providing timely investment information to investors. For funds that are "unable to meet a filing deadline due to circumstances related to current or potential effects of COVID-19" with respect to filings with a due date on or after the date of the Order but on or prior to April 30, 2020, the Order provides a temporary exemption from the Form N-CEN and Form N-PORT filing requirements, subject to the following conditions.

- The fund must promptly notify the SEC staff by email as described further below;
- Disclosure must be included on the fund's public website, briefly stating that the fund is relying on the Order and describing the reasons it could not file its reports on a timely basis;
- The delayed Form N-CEN or Form N-PORT must be filed as soon as practicable, but not later than 45 days after the original due date; and
- The delayed Form N-CEN or Form N-PORT must include a statement that the fund relied on the Order and provide the reasons why it was unable to file the report on a timely basis.

Transmission of Annual and Semi-Annual Reports

Citing the same concerns relating to the filing of Forms N-CEN and N-PORT, the Order also provides temporary relief from the requirement to transmit annual and semi-annual reports to investors with respect to reports with a due date on or after the date of the Order but on or prior to April 30, 2020, for funds unable to prepare or transmit the report because of COVID-19 issues. Funds delaying the transmission of investor reports in reliance on the Order must meet the following conditions.

- The fund must promptly notify the SEC staff by email as described further below;
- The fund must include a statement on the fund's public website briefly stating that it is relying on the Order and the reasons why it could not prepare and transmit the report on a timely basis; and
- The fund must transmit the delayed report to investors as soon as practicable, but no later than 45 days after the original due date, and file the report with the SEC within 10 days of its transmission to investors.

Timing of Filing Form N-23C-2

From the date of the Order through June 15, 2020, Regulated Funds are exempted from the requirement to file with the SEC notices of their intention to call or redeem securities at least 30 days in advance 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, subject to meeting the following conditions.

- The Regulated Fund must promptly notify the SEC staff via email at IM-EmergencyRelief@sec.gov stating that the fund is relying on the Order and including 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 Regulated Fund for calling or redeeming the securities of which it is the issuer;
- The Regulated Fund ensures that the filing of the Form N-23C-2 on an abbreviated time frame is permitted under relevant state law and the Regulated Fund's governing documents; and
- The Regulated Fund 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 shareholders whose securities are being called or redeemed.

Delivery of Fund Prospectuses

The Order states that a delay in the delivery of the current prospectus of a fund to an existing shareholder of the fund, where the prospectus cannot be timely delivered because of circumstances relating to COVID-19, would not be a basis for an enforcement action by the SEC, if the following conditions are met.

- The fund notifies the SEC staff by email as described further below;
- The fund publishes on its public website that it intends to rely on the SEC position contained in the Order and briefly states the reasons why it could not deliver the prospectus on a timely basis;
- The fund publishes on its public website its current prospectus; and
- Delivery of the prospectus was originally required to be made on or after the date of the 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.

Notification to SEC Staff Regarding Reliance on Order

A fund relying on the Order with respect to the delayed filing or transmission of its reports or relying on the SEC position contained in the Order with respect to delayed prospectus delivery must promptly notify the SEC staff via email at IM-EmergencyRelief@sec.gov stating:

- That it is relying on the Order or SEC position, as applicable;
- A brief description of the reasons why it could not file or transmit its report on a timely basis, or why it or any other person required could not deliver the prospectus on a timely basis, as applicable; and
- The estimated date by which it expects to file or transmit the report, or expects the prospectus to be delivered, as applicable.

Issues to Consider in Relying on the Order

Funds should consider the potential benefits and drawbacks of relying on the Order with respect to delayed filings of a fund's Forms N-CEN and N-PORT or its shareholder reports, or delayed prospectus delivery, given the requirements to publicly disclose the reasons for the need to rely on the relief. Funds should consider whether a filing or transmission delay could reflect negatively on the perceived effectiveness of the fund's business continuity procedures and planning. In addition, as noted in the Order, funds must continue to evaluate their obligations to make materially accurate and complete disclosures in their filings, in accordance with the federal securities laws.

Authored by Karen Spiegel.

If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

[1] 1940 Act Release No. 33817 (Mar. 13, 2020), available [here](#).

[2] Division of Investment Management Staff Statement on Fund Board Meetings and Unforeseen or Emergency Circumstances Related to Coronavirus Disease 2019 (COVID-19) (Mar. 4, 2020), available [at here](#).

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