Special Issue on COVID-19 Related Developments

# Investment Services Regulatory Update

## March 2020

Monthly Version

VedderPrice

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# COVID-19 RELATED DEVELOPMENTS

## SPECIAL REGULATORY UPDATE

## SEC Updates Investment Company Act Exemptive Order in Response to COVID-19

On March 25, 2020, the Securities and Exchange Commission ("SEC") issued an exemptive order (the "Order") superceding its March 13, 2020 exemptive order, which provided relief from certain provisions of the Investment Company Act of 1940, as amended (the "1940 Act"), to registered funds in light of the current outbreak of coronavirus disease 2019 (COVID-19). In each case, the relief is available if reliance on the Order is necessary or appropriate in light of the current or potential effects of COVID-19.

In extending the previous 1940 Act exemptive relief by two months and eliminating prior conditions requiring disclosure as to why the exemptive relief was being relied upon, the SEC recognized the evolving challenges market participants are facing in meeting the requirements of the federal securities laws.

### Relief from In-Person Meeting Requirements

The Order provides relief from the in-person meeting requirements under Sections 15(c) and 32(a) of the 1940 Act and Rules 12b-1(b)(2) and 15a-4(b)(2)(ii). These provisions relate to the approval or renewal of advisory and underwriting agreements, the approval or renewal of distribution plans, agreements or arrangements, and the appointment of auditors. The relief is available if (1) the votes cast for such matters are cast at a meeting in which directors may participate by any means that allows all directors to hear each other simultaneously during the meeting; and (2) the board, including a majority of independent directors, ratifies such actions at the next in-person meeting.

This relief is available for votes held from March 13, 2020 through August 15, 2020.

### Relief from Filing Obligations

The Order provides relief from the filing obligations of Form N-PORT and Form N-CEN, if the fund is unable to meet the filing deadline due to circumstances related to the effects of COVID-19. To rely on the Order, a registered fund must do the following:

- Promptly notify the SEC staff via e-mail at IM-EmergencyRelief@sec.gov that it is relying on the Order.
- Include a statement on its website that it is relying on the Order.
- File the reports within 45 days of the original due date.
- Include a statement in any Form N-CEN or Form N-PORT filed pursuant to the Order that such filing was made in reliance on the Order and the reasons why the fund was unable to make timely filings.

This relief applies to filings with original due dates from March 13, 2020 through June 30, 2020.

### Relief from Shareholder Report Delivery Obligations

Registered funds are temporarily exempt from the requirement to transmit annual and semi-annual reports to investors.To rely on the Order, a registered fund must do the following:

- Promptly notify the SEC staff via e-mail at IM-EmergencyRelief@sec.gov that it is relying on the Order.
- Provide website notification that the fund is relying on the Order.
- Transmit the reports to shareholders as soon as practicable but not later than 45 days after the original due date, and file the report within 10 days of transmission to shareholders.

This relief applies for reports with originally scheduled due dates from March 13, 2020 through June 30, 2020.

### Relief from Advance Notice Requirements of Rule 23c-2

For registered closed-end funds and business development companies, the Order provides temporary relief from the requirement to file notices of their intent to call or redeem securities at least 30 days in advance under Sections 23(c) and 63 of the 1940 Act and Rule 23c-2 thereunder. To rely on the Order, the fund must do the following:

- Promptly notify the SEC staff via e-mail at IM-EmergencyRelief@sec.gov of its intent to rely on the Order.
- Determine that the abbreviated notice is permitted under state law and the fund's governing documents.
- File a Form N-23C Notice containing all required information prior to (including the same business day as) (1) the call or redemption of securities, (2) the commencement of offering of replacement securities and (3) providing notification to existing shareholders.

This relief applies through August 15, 2020.

### Position Regarding Prospectus Delivery Requirements

In the same release adopting the updated Order, the SEC reiterated its position that it would not take enforcement action if a registered fund does not deliver to investors a current prospectus on the required date, provided the sale was not an initial purchase of fund shares, if the fund:

- Promptly notifies the SEC staff via e-mail at IM-EmergencyRelief@sec.gov stating that it is relying on the position.
- Provides website notification that it is relying on the position.
- Publishes its prospectus online.
- Delivers the prospectus as soon as practicable but not later than 45 days after the date originally required.

This relief applies to delivery required from March 13, 2020 through June 30, 2020.

## COVID-19 Update—SEC Staff Expands Exchange Act, Form ADV and Form PF Filing Relief

On March 25, 2020, the staff of the Securities and Exchange Commission issued two exemptive orders expanding previously issued temporary relief from Exchange Act filings on Schedules 13G and 13F, as well as expanding previously issued temporary relief and relaxing conditions for Form ADV and Form PF filing and delivery obligations (each, a "New Order" and together, the "New Orders"). The New Orders supersede the original orders issued on March 4, 2020 with respect to the Exchange Act relief (previous Vedder Price Alert available here) and March 13, 2020 with respect to the Form ADV and Form PF relief (previous Vedder Price Alert available here).

### Schedules 13G and 13F Relief

The New Order, like the original order, extends the due date of filings on Schedules 13G and 13F for up to a maximum of 45 days from the original due date, but now covers those filings that would otherwise be due on or before July 1, 2020 (the original order applied only to those filings due through April 30, 2020). As a reminder, the New Order does not apply to filings on Schedule 13D.

### Form ADV and Form PF Relief

The New Order, like the original order, extends the due date of filings and deliveries, as applicable, of Form ADV or Form PF for up to a maximum of 45 days from the original due date, but now applies to filings or deliveries that are due on or before June 30, 2020 (the original order applied only to those filings and deliveries due on or before April 30, 2020).

**Note that Form ADVs normally due by March 31 will continue to have a due date of May 15, 2020, the same as under the original order, subject to the conditions below.**

*To rely on the Form ADV or Form PF relief, an adviser must:*

- *promptly* notify the SEC staff via email at IARDLive@sec.gov (for Form ADV) or FormPF@sec.gov (for Form PF) and, with respect to Form ADV only,

disclose on the adviser's public website (if the adviser does not have a public website, it must promptly notify its clients and/or private fund investors) that the adviser is relying on the New Order; and

- file and deliver, as applicable, its Form ADV or Form PF as soon as practicable, but in no event later than 45 days of the original due date for filing or delivery.

Note that the New Order removes the condition to include in the email correspondence to the staff and website disclosure, as applicable, why it is unable to meet the filing or delivery deadline and provide an estimated date of filing or delivery.

## SEC Issues Temporary Borrowing Relief for Mutual Funds and Insurance Company Separate Accounts

On March 23, 2020, the Securities and Exchange Commission ("SEC") issued an exemptive order (the "Order") providing relief from certain provisions of the Investment Company Act of 1940 (the "1940 Act") and various rules thereunder to registered open-end management investment companies (other than money market funds) ("funds") and insurance company separate accounts organized as unit investment trusts ("separate accounts") in order to permit short-term borrowing from affiliates. The Order is the latest in a series of SEC orders addressing the current outbreak of coronavirus disease 2019 (COVID-19) by providing a range of exemptive relief under the 1940 Act.

Notably, this is the first time the SEC's recent exemptive relief has been expressly extended to insurance company separate accounts. While separate accounts invest solely in underlying variable insurance trusts and look to those funds for liquidity by redeeming fund shares, as a practical matter, the recent volatility in the markets might impact underlying fund redemptions by separate accounts.[1]

The relief is designed to provide funds and separate accounts with additional tools to address liquidity issues that may arise as investors request withdrawals and transfers. In issuing the Order, the SEC was able to draw on a playbook from the September 11, 2001 attacks where the SEC granted exemptive relief to funds and separate accounts in the wake of those attacks.

The Order is effective from March 23, 2020 through at least June 30, 2020. The Order may be withdrawn no earlier than June 30, 2020, by the staff by publishing a public notice at least two weeks before withdrawal.

### 1. Fund and Separate Account Borrowing from Affiliates

The Order provides relief from the following provisions of the 1940 Act to permit funds and separate accounts to borrow from affiliates, subject to the conditions described below.

- **Section 12(d)(3).** Section 12(d)(3) of the 1940 Act generally prohibits funds and separate accounts (among others) from acquiring any security (including a loan or note) issued by a broker, dealer, underwriter or investment adviser. The Order exempts funds and separate accounts from Section 12(d)(3) to the extent a fund affiliate or separate account affiliate is a broker, dealer, underwriter or investment adviser.
- **Section 17(a).** Section 17(a) of the 1940 Act generally prohibits first or second tier fund affiliates of funds or separate accounts from extending loans to the fund or separate account. The Order exempts first and second tier affiliates of funds and separate accounts from Section 17(a) to permit affiliates to make collateralized loans.
- **Section 18(f)(1).** Section 18(f)(1) of the 1940 Act permits funds to borrow from banks as long as 300% asset coverage is maintained. The Order exempts funds from Section 18(f)(1) to permit a fund to borrow money from a first or second tier affiliate that is not a bank and is not itself a registered investment company.

The practical effect of these exemptions is that funds and separate accounts will be permitted to borrow via collateralized loans from affiliates for the purpose of

satisfying redemptions. Fund boards of directors, including a majority of the independent directors, and insurance companies in the case of separate accounts, must reasonably determine that such borrowing is in the best interest of the fund or separate account and its shareholders or unit holders, and that the borrowing will be for the purpose of satisfying redemptions.

### 2. Interfund Lending Arrangements for Fund Complexes *with* Existing Interfund Lending Orders

Many fund complexes, including some proprietary insurance funds, have received an exemptive order from the SEC from various provisions of the 1940 Act to permit interfund lending arrangements (an "Existing IFL Order"). Most Existing IFL Orders provide that a fund's aggregate outstanding interfund loans will not exceed 15% (or a lower limitation) of its current net assets. The Order increases the limit to 25%.

The Order also permits funds to borrow or make loans through interfund lending facilities for any *term*, notwithstanding any conditions otherwise limiting the term of such loans in an Existing IFL Order, provided that: (i) the term of any interfund loan made in reliance on the Order does not extend beyond the expiration of the temporary relief, (ii) the board of directors, including a majority of the independent directors, reasonably determines that the maximum term for interfund loans to be made in reliance on the Order is appropriate, and (iii) the loans will remain callable and subject to early repayment on the terms described in the Existing IFL Order.

Funds must otherwise comply with their Existing IFL Orders, and prior to relying on the relief for the first time, a fund must disclose on its website that it is relying on an exemptive order that modifies the terms of its Existing IFL Order.

### 3. Interfund Lending Arrangements for Fund Complexes without Existing Interfund Lending Orders

For fund complexes that are not currently able to rely upon an Existing IFL Order, the Order permits funds in a complex to use interfund lending arrangements during the effective period of the Order. In order to rely upon the relief, the fund must satisfy the terms and conditions for relief in an interfund lending exemptive order issued by the SEC within the 12 months preceding the date of the Order. Funds may also rely on any additional relief granted to complexes with an Existing IFL Order (e.g., asset coverage, loan term conditions). Money market funds, however, may not participate as borrowers in the interfund facility.[2]

Prior to relying on the relief for the first time, a fund must disclose on its website that it is relying on the relief to utilize an interfund lending and borrowing facility. The fund is not required to amend its registration statement prior to relying upon the relief, but must disclose reliance on the relief in any prospectus supplement it files for other reasons, or a new or amended registration statement or shareholder report. Disclosure applies to filings made while the fund is relying on the relief and should include the material facts about a fund's participation or intended participation in the facility.

### 4. Relief for Funds to Deviate from Fundamental Policies with Respect to Lending or Borrowing

Notwithstanding the relief provided by the Order, many funds have fundamental investment policies that would prohibit borrowing and lending as contemplated by the Order. To address this, the Order exempts funds from Sections 13(a)(2) and 13(a)(3) of the 1940 Act so that they may borrow and lend in accordance with the Order notwithstanding a fundamental policy that otherwise could only be changed through a shareholder vote, *without prior shareholder approval.* The board of directors, including a majority of independent directors, must reasonably determine that such lending or borrowing is in the best interests of the fund and its shareholders. The fund must also promptly notify its shareholders of the deviation by filing a prospectus supplement and including a statement on the fund's website.

In order to rely upon *ANY* relief available in the Order, the fund or separate account must notify the SEC staff via email prior to its reliance. A copy of the Order is available here.

[1] Release No. 25156 (Sept. 14, 2001).

[2] On March 19, 2020, the SEC staff issued a temporary no-action letter to the Investment Company Institute permitting money market funds regulated under Rule 2a-7 to sell securities under certain circumstances to their first and second tier affiliates that are subject to Sections 23A and 23B of the Federal Reserve Act. A copy of the no-action letter is available here.

## Strategies for Funds Facing Liquidity Issues as a Result of the COVID-19 Pandemic

Due to economic conditions that have resulted from the COVID-19 pandemic, many regulated investment companies ("RICs") may have liquidity issues with respect to their investment portfolios. One alternative for RICs that are facing such liquidity issues is to consider delaying distributions so that, rather than paying distributions on a monthly or quarterly basis, the RIC makes its distributions on an annual basis. The tax laws allow a RIC to pay a dividend in January of the next year and have it treated as if it were made on December 31st of the current year. For RICs that use the calendar year as their taxable year, such dividends can satisfy the prior year's distribution requirement and avoid income and excise taxes. Deferring any remaining 2020 dividends until January 2021 may be a useful cash management strategy for these calendar year RICs. Other RICs may be able to use this strategy to at least avoid the annual excise tax, which is calculated on a calendar year basis for all RICs.

RICs may also consider making a distribution that provides for a cash or stock election, which the IRS indicated in Revenue Procedure 2017-45 will be treated as a dividend for income and excise tax purposes. To qualify for this treatment, generally the RIC must pay at least 20% of the distribution in cash. If the shareholders' cash elections exceed 20% of the total distribution, the RIC can allocate the cash proportionally among the shareholders electing cash as more fully described below.

**Revenue Procedure 2017-45 applies in the following situation:**

1. A "publicly offered" RIC makes a distribution to its shareholders with respect to its stock. For this purpose, "publicly offered" means a RIC the shares of which are continuously offered pursuant to a public offering (within the meaning of section 4 of the Securities Act of 1933, as amended), regularly traded on an established securities market, or held by or for no fewer than 500 persons at all times during the taxable year;

2. Pursuant to the declaration of the distribution, each shareholder has a cash-or-stock election with respect to part or all of the distribution. The existence of a cash-or-stock election does not affect the federal income tax treatment of the portion, if any, of the declared dividend that is not subject to the election;

3. The Cash Limitation Percentage (i.e., the ratio of (a) the maximum amount of cash to be distributed to all shareholders as limited by the declaration of the dividend to (b) the amount that would be distributed if all shareholders were entitled to, and actually received, 100% cash in the distribution) is not less than 20%;

4. Every shareholder that is not an Excess Cash Claimant (i.e., a shareholder who has elected to receive more of their distribution in cash than the Cash Limitation Percentage) will receive cash equal to the shareholder's elected cash amount;

5. If the aggregate of all the shareholders' elected cash amounts does not exceed the maximum amount of cash to be distributed to the shareholders pursuant to the declaration, then every Excess Cash Claimant receives cash equal to that shareholder's elected cash amount;

6. If the aggregate of all shareholders' elected cash amounts exceeds the maximum amount of cash to be distributed to the shareholders pursuant to the declaration, then each Excess Cash Claimant receives an amount of cash that is as close in amount as practicable to the sum of—

- (a) the product of the Cash Limitation Percentage and the entire distribution to which that shareholder is entitled; and
- (b) a proportionate share of the remaining cash available for distribution after taking into account the above cash distributions based on the Excess Cash Claimants' remaining cash claims; and

7. The calculation of the number of shares to be received by a shareholder is determined based upon a formula that—

- (a) utilizes the market price of the shares;
- (b) is designed so that the value of the number of shares to be received in lieu of cash with respect to a share corresponds as closely as practicable to the amount of cash to be received under the declaration with respect to that share; and
- (c) uses data from a period of no more than two weeks ending as close as practicable to the payment date.

In a situation where all shareholders submit cash elections (which may be likely in today's environment), the above formula will result in all shareholders receiving 20% cash and 80% stock, which means that by using this cash or stock election strategy a RIC will make a pro rata cash distribution to its shareholders equal to 20% of the total distribution combined with, in effect, a pro rata stock split.

## SEC Staff Issues Statement on Regulation S-T Manual Signature Requirements

On March 24, 2020, the staff of the SEC's Division of Corporation Finance, Division of Investment Management and Division of Trading and Markets issued a statement concerning the authentication document retention requirements under Regulation S-T for electronic filings made with the SEC, in light of health, transportation and other logistical issues raised by coronavirus disease 2019 (COVID-19).

Rule 302(b) of Regulation S-T requires that each signatory to a document filed electronically with the SEC under the federal securities laws "manually sign a signature page or other document authenticating, acknowledging or otherwise adopting his or her signature that appears in typed form within the electronic filing" before or at the time the filing is made. Further, electronic filers must retain the paper originals of the signatures for a period of five years and furnish copies to the SEC or its staff upon request.

Because of potential difficulties in obtaining manually signed signature pages for electronic filings in light of circumstances arising from the COVID-19 pandemic, the SEC staff stated that it would not recommend that the SEC take enforcement action with respect to the requirements of Rule 302(b) if (1) the signatory retains the manually signed signature page or other authentication document and provides the document as promptly as reasonably practicable to the electronic filer in the ordinary course (e.g., if a signatory is working remotely, he or she may retain the paper original until the signatory can return to his or her place of work and deliver such document to the electronic filer); (2) the signature page indicates the date and time it was signed; and (3) the filer establishes and maintains policies and procedures for this process. The staff also stated that a signatory may provide to the filer an electronic record (such as a photograph or pdf) of the document when it is signed.

The SEC staff's statement is available here

## COVID-19 Update – SEC Staff Issues Guidance for Conducting Annual Meetings

On March 13, 2020, the staff of the SEC's Division of Investment Management and Division of Corporation Finance issued guidance in response to various inquiries from issuers and shareholders regarding compliance with the federal proxy rules for upcoming annual meetings in light of health, transportation and other logistical issued raised by the spread of COVID-19. The staff's guidance addressed the following:

### Changing the Date, Time or Location of an Annual Meeting.

An issuer that has already mailed and filed definitive proxy materials can notify shareholders of a change in the date, time or location of its annual meeting without mailing additional soliciting materials or amending its proxy materials if it:

- issues a press release announcing the 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 the change.

Issuers are expected to take the foregoing actions 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.

Issuers that have not yet mailed or filed their definitive proxy materials should consider whether to include disclosures regarding the possibility that the date, time or location of an annual meeting will change due to COVID-19.

**Conducting "Virtual" Shareholder Meetings.**

An issuer's ability to conduct a "virtual" meeting or a "hybrid" meeting (i.e., an in-person meeting that also permits shareholder participation through electronic means) is subject to applicable provisions of state law and the issuer's governing documents. Issuers that plan to hold virtual or hybrid meetings must notify shareholders, intermediaries and other market participants of those plans in a timely manner, along with clear directions about the logistical details of the virtual or hybrid meeting, including how shareholders can remotely access, participate in and vote at the meeting. For issuers that have not yet filed and delivered their definitive proxy materials, the disclosures should be in the definitive proxy statement and other soliciting materials. Issuers that have already filed and mailed their definitive proxy materials would not need to mail additional soliciting materials (including new proxy cards) solely for the purpose of switching to a virtual or hybrid meeting if they follow the steps described above for announcing a change in the meeting's date, time or location.

**Presentation of Shareholder Proposals.**

To the extent permitted by state law, issuers are encouraged to provide shareholder proponents or their representatives with the ability to present their proposals through alternative means, such as by phone, during the 2020 proxy season. If a shareholder proponent or representative is not able to attend the annual meeting and present the proposal due to COVID-19, the staff would consider this to be "good cause" as the basis for issuers to exclude a proposal submitted by the shareholder proponent for any meetings held in the following two calendar years.

The staff's guidance is available here.

## Board Oversight in the Age of COVID-19

As veterans of the asset management industry — having experienced the 2008 financial crisis and the market disruption following 9/11 — coronavirus is similar to a movie we have seen before, but with an ending that is far from clear. Despite this uncertainty, the role of fund Independent Board Members remains essentially the same: to gather information, ask appropriate questions, oversee fund service providers, and exercise your reasonable business judgment to take appropriate action when needed to protect the interests of the funds you oversee and their shareholders.

We at Vedder Price have been working with the many boards we represent to implement a range of approaches to managing Independent Board Members' oversight responsibilities as the current crisis unfolds. We want to share some of these approaches with you, and to that end, we will have a weekly update with insights on board practices. We also will highlight emerging issues that may become matters for board attention during this challenging period. As an additional resource, we include a link to our Coronavirus Task Force website where we have collected Client Alerts prepared by Vedder Price subject matter experts that address issues stemming from the current pandemic, including matters facing other asset management industry participants.

## What Are Boards Doing Now?

### Communication – Keeping Abreast of Developments

Boards are sensitive to the fact that management is focused on reacting to an environment that is impacting its workforce and challenging its fundamental business operations, including those related to mutual funds, closed-end funds and ETFs. A board can be supportive while still taking steps to monitor the situation and provide appropriate oversight. What are we seeing boards do

- Convene an informational call with management, including portfolio management personnel, to hear about company operations and any experienced or anticipated challenges
- Determine whether and with what frequency informal board calls or status reports may be appropriate or necessary based on current market conditions and the specific types of funds overseen
- Establish weekly "check-ins" by the board chair and committee chairs with their fund management contacts
- Plan periodic communications with the fund chief compliance officer, to monitor for any stress with respect to compliance policies and procedures
- Work with fund management to establish triggers for a call to discuss valuation or liquidity issues
- Confer on the need to revise prospectus risk disclosure to more clearly state the risks related to a pandemic situation or the uncertainty that a prolonged period of market volatility may present
- Lean on the board's independent legal counsel as a resource to help the board navigate through this challenging time or to streamline communications with management

### Board Meetings

Most boards have suspended in-person meetings in reliance on the recent order from the Securities and Exchange Commission. So what are we seeing boards do now with respect to scheduled meetings?

- Determine if interim board meetings are necessary or whether periodic informal briefings will suffice under the circumstances to bridge the gap until the next formal meeting
- Defer regular meeting agenda items to increase the efficiency of telephonic/video board meetings, while implementing controls to track deferred items that will require ratification at the board's next in-person board meeting
- Consider how best to deliver board materials to Independent Board Members on boards without access to electronic portals

## What's Next – Emerging Issues

This crisis is still evolving and its impacts are uncertain. Below we highlight issues beyond those currently in the forefront (e.g., asset flows, redemption levels, sources of liquidity to fund redemptions, adviser business continuity planning and financial strength, etc.) that may evolve into matters for board consideration in the coming weeks, including those related to the following topics:

- **Emerging Markets.** As other countries consider responses to the virus, the potential for securities market closures or limits on trading, including prohibiting short-selling, may impact the trading and pricing of non-U.S.-issued depository receipts.
- **Liquidity Risk Management Programs.** Liquidity thresholds, security classifications and the evaluation of reasonably anticipated trading sizes may be challenged under stressed market conditions. The overly conservative liquidity thresholds and tolerances initially included in some fund procedures are under further consideration as funds edge closer to liquidity limits. Note that the Liquidity Rule requires notifications to the board when certain thresholds are breached.
- **Fair Value Pricing.** Trading in fixed income markets is under stress, and pricing vendors may not be keeping pace, which may result in revised approaches to value or fair value securities.

- **Money Market Fund Issues.** The Federal Reserve Board has established a Money Market Mutual Fund Liquidity Facility that would be available to funds facing unanticipated redemptions, and the Treasury Department is considering additional support for money market funds. The move to zero interest rates is having collateral consequences for money market funds, and institutional money funds appear to be the first ones impacted.
- **Exchange-Traded Funds.** In light of extreme market volatility, monitor the continuing commitment of market makers; also, consider that to the extent bid-ask spreads widen, tracking error could exceed a fund's established guidelines, adversely impacting the effectiveness of the arbitrage mechanism.
- **Closed-End Funds.** For closed-end funds that use leverage, rapid declines in asset values could cause leverage levels to exceed applicable asset coverage requirements.

## Board Oversight in the Age of COVID-19: Part Two

*Part Two of a weekly series detailing approaches that Independent Board Members are utilizing to address coronavirus-related matters and highlighting emerging issues. Please visit our Coronavirus Task Force page for more information.*

### What are Boards Doing Now?

**Board Communications.** Boards are arranging for periodic updates from fund management to track matters impacting funds overseen. We see diversity in how boards are approaching these updates. But whether the updates are by teleconference or written communication, the key is that boards find an effective way to keep informed and provide oversight of the challenges facing their particular funds.

- **Timing:** Some boards are scheduling periodic updates every one to two weeks for the next few months; others are receiving a weekly email; still others are setting the expectation with fund management that updates should occur periodically (we typically see every 10 days or so), but should occur sooner as events warrant.
- **Format:** Many boards are receiving these updates through a teleconference, particularly if there are concerns about valuation or liquidity for particular funds overseen. Some boards have found a written communication process to be effective, with the option to have a teleconference should the need arise.
- **Content:** For these updates, some boards establish a regular agenda to be addressed, including updates from portfolio management, fund operations (liquidity, valuation, etc.), distribution, oversight of third-party service providers, compliance and adviser-related matters. Others are looking to fund management to highlight those matters that are most urgent. For those boards holding teleconferences, we generally are not seeing written materials being provided, to allow fund management to focus on matters at hand and provide the most up-to-date information. Whether boards hold teleconferences or get written updates, it is important to provide an avenue for the questions of board members to be addressed.
- **Participants:** For teleconference updates, some boards are limiting the fund management participants to a few key persons (the CIO, Fund Treasurer, CCO and Chief Legal Officer); others also include more of those who regularly present at meetings, to allow deeper dives into operational matters. Fixed Income, Energy and Healthcare PMs and/or analysts are also popular invitees.
- **Minutes/Board Fees:** To date, practice has varied as to whether these periodic update sessions are treated as formal board meetings, whether minutes are kept, and whether board fees are paid for participation (for those boards that pay per meeting fees outside of a retainer).

**Future Board Meetings.** Now that the February/March meeting cycle has passed for many boards, attention is turning to May/June meetings, noting that the SEC has

extended the relief to allow telephonic instead of in-person meetings to August 15, 2020.

**Audit/Valuation Committee Communications.** Chairs or full committees are checking in with fund accounting and the auditors for updates on valuation and any challenges that may have surfaced. The committee chairs are evaluating the appropriate frequency of further communications.

### What's Next – Emerging Issues

Below are some emerging issues for board consideration of their potential impact to funds overseen.

**Bond ETFs.** What will the impact be of the Federal Reserve's plan to support bond ETFs? The details of this plan are still being written so we will continue to monitor for impacts. Liquidity in the more challenging parts of the fixed-income markets has improved, but widened ETF spreads persist.

**Compliance with Names Rule.** Some fund CCOs have reported violations of the 80% requirement of the Names Rule as a result of market volatility and outflows. Prospectus disclosure is being reviewed for flexibility under unanticipated circumstances.

**Closed-End Funds.** Based on recent SEC guidance on the conduct of annual shareholder meetings under the federal proxy rules, boards of closed-end funds may be asked to approve changes to the date, time or location of meetings or consider the possibility of virtual shareholder meetings, which may be limited by state law or the issuer's governing documents and may require amendments to governing documents. Please click here for more information.

**ETF Rebalancing.** Index providers are in some cases delaying rebalancing dates, in which case funds have added disclosures notifying shareholders of this decision. Further, to the extent an index no longer meets the IRS diversification requirements, funds that track the index may experience a wider tracking error as they adjust holdings to ensure they remain diversified.

**Daily Pricing.** The time needed to produce and distribute daily fund net asset values is extending, but intermediaries and other recipients have been understanding thus far.

**Fair Value Pricing.** For funds using fair value pricing models to re-price foreign holdings after major moves in the U.S. markets, these models do not re-price non-U.S. futures on foreign indexes, which some funds may be using to hedge exposures.

**Pricing Vendors.** Given the volatility in the trading markets, some fund complexes have increased their monitoring of evaluated prices provided by pricing vendors.

**Key Employee Illness.** What is the impact of a key employee becoming ill with the virus? All fund managers should evaluate their teams for redundancy and consider the possibility that more than one employee may be ill at the same time.

**Liquidity Issues – Loans from Affiliates.** The SEC has issued temporary relief to permit open-end funds (other than money market funds) and insurance company separate accounts to seek collateralized loans from affiliates in order to meet redemptions. Before such borrowing, boards would be required to reasonably determine that such borrowing is in the best interest of shareholders and that the purpose is for satisfying redemptions. The SEC Order provides additional relief relaxing or permitting interfund lending by fund complexes that currently rely on an interfund lending order and those that do not. In each case, the complex must meet specified conditions and boards must make certain findings. The intent to rely on the SEC Order to change the terms of an existing order or to engage in interfund lending anew must be disclosed on the fund's website and prospectus disclosure may need to be updated. Finally, the SEC Order provides that funds may borrow or lend notwithstanding fundamental policies that could only be changed by shareholder vote, without seeking prior shareholder approval. Before relying on the SEC Order for any purpose, a fund or separate account must provide email notice to the SEC. Please click here for more information.

**Liquidity Issues – Delaying Distributions.** One option for funds facing liquidity concerns is to consider delaying distributions so that, rather than paying distributions on a monthly or quarterly basis, the fund makes its distributions on an annual basis. A fund may also consider making a

distribution that provides for a cash or stock election, which will be treated as a dividend for income and excise tax purposes. Consideration of prior board resolutions declaring dividends and applicable state law is needed to assess whether this flexibility is available. Please click here for more information.

## NFA Issues COVID-19 Alert on Business Continuity Plans, Relief for Branch Office Requirements and Reminder on Upcoming Deadline for CTA-PR Filing Relief

On March 4, 2020, the National Futures Association (the "NFA") issued a notice to its members addressing concerns surrounding the coronavirus (COVID-19). With the coronavirus's potential to interfere with members' regulatory requirements and disturb their day-to-day operations, the NFA provided assurance that it, and the CFTC, will remain practical and flexible in working with members as issues arise.

- The NFA encouraged members to ensure that any business continuity plans ("BCP") are up-to-date and adequately equipped to handle a pandemic. NFA Compliance Rule 2-38 and NFA Interpretive Notice 0952 requires all members to maintain a BCP. The NFA requires members to submit the name and contact information for their designated disaster recovery contacts, whom the NFA can contact in the event of an emergency.
- The NFA requested members to contact the staff with any questions, concerns or needs regarding regulatory relief.
- Document your activities under your BCP related to COVID-19. We anticipate the staff will want to review your actions during your next exam.

### Annual Pool Financial Statements and Other Regulatory Filings such as CTA-PR/CPO-PQR

Commodity Pool Operators ("CPOs") should discuss with their auditors whether each of their commodity pools will be able to meet the deadline for fiscal year-end December 2019 pools. For most CPOs, the deadline for distributing and filing pool financials is 90 days after the pool's fiscal year-end. The NFA maintains a process to request an extension. Please contact us if you need assistance with an extension.

Following conversations with the staff, we don't expect to see detailed relief on CTA-PR or CPO-PQR filing deadlines. To the extent you need additional time to meet regulatory filings, the NFA requests that you contact them. We are happy to assist you with that process.

### Relief for Branch Office Requirements

In light of COVID-19's spread, the NFA issued a separate notice to members on March 13, 2020 regarding Compliance Rule 2-7 for branch offices. Under Form 7-R, a member is required to list the location of their branch office, along with the name of a qualified branch office manager. Each branch manager is required to maintain a Series 30.

- Due to COVID-19, the NFA has received a number of inquiries asking whether a BCP that allows a member's associated person ("AP") to work from a remote location violates the NFA's branch office requirements.
- In response, the NFA affirmed that it will not pursue disciplinary action against a member who allows an AP to work from a remote location that lacks a branch manager and is not listed on Form 7-R.
- The NFA conditioned the relief on (1) the member meeting recordkeeping requirements and (2) implementing adequate safeguards to supervise the AP's activities. The NFA emphasized the temporary nature of this arrangement, and expects APs to be back working at the branch listed on Form 7-R upon the return to standard business operations.

### Reminder on Upcoming Deadline for CTA-PR Filing Relief for Certain CTAs

To the extent a Commodity Trading Advisor ("CTA") directs trading solely for pools for which the firm operates as a registered or exempt CPO, the CFTC has provided relief under Rule 4.27 to eliminate the requirement for the CTA to file CTA-PR. The NFA has a procedure by which the CTA can claim the exemption from CTA-PR. No later than March 31, 2020 the eligible firms should log in to their annual questionnaire and check "no" to the question "Does the firm currently direct any trading of commodity interest accounts?" and then click "Submit Filing." Responding "No" will discontinue all future notifications to complete a CTA-PR.

The March 4, 2020 notice is available here.

The March 13, 2020 notice is available here.

## Investment Services Group Members

### Chicago


Cathy G. O'Kelly, *Co-Chair*..... +1 (312) 609 7657
Juan M. Arciniegas..... +1 (312) 609 7655
James A. Arpaia..... +1 (312) 609 7618
Deborah B. Eades..... +1 (312) 609 7661
Renee M. Hardt..... +1 (312) 609 7616
Joseph M. Mannon..... +1 (312) 609 7883
John S. Marten, *Editor*..... +1 (312) 609 7753
Maureen A. Miller..... +1 (312) 609 7699
Jacob C. Tiedt, *Editor*..... +1 (312) 609 7697
Junaid A. Zubairi..... +1 (312) 609 7720
Heidemarie Gregoriev..... +1 (312) 609 7817
Nathaniel Segal, *Editor*..... +1 (312) 609 7747
Adam S. Goldman..... +1 (312) 609 7731
Cody L. Lipke..... +1 (312) 609 7669
Kelly Pendergast Carr..... +1 (312) 609 7719
Mark Quade..... +1 (312) 609 7515
David W. Soden..... +1 (312) 609 7793
Cody J. Vitello..... +1 (312) 609 7816
Jeff VonDruska..... +1 (312) 609 7563
Jake W. Wiesen..... +1 (312) 609 7838
Tyrique J. Wilson..... +1 (312) 609 7689


### San Francisco


Rob Crea..... +1 (424) 204 9504


### Washington, DC


Bruce A. Rosenblum, *Co-Chair*..... +1 (202) 312 3379
Marguerite C. Bateman..... +1 (202) 312 3033
W. Thomas Conner..... +1 (202) 312-3331
Amy Ward Pershkow..... +1 (202) 312 3360
Kimberly Karcewski Vargo..... +1 (202) 312 3385
John M. Sanders..... +1 (202) 312 3332


VedderPrice

### Investment Services Group

With significant experience in all matters related to design, organization and distribution of investment products, Vedder Price can assist with all aspects of investment company and investment adviser securities regulations, compliance issues, derivatives and financial product transactions, and ERISA and tax inquiries. Our highly experienced team has extensive knowledge in structural, operational and regulatory areas, coupled with a dedication to quality, responsive and efficient service.