CLIENT ALERTS & INSIGHTS

Benesch COVID-19 Resource Center: SEC Relief for Investment Companies and BDCs

APRIL 17, 2020

The Securities and Exchange Commission (the "SEC") has made a concerted effort to provide guidance and targeted assistance and relief in response to the effects of the COVID-19 outbreak. As part of these efforts, the SEC has provided certain relief for registered investment companies and business development companies ("BDCs").

Board Meetings

The SEC recognizes that travel to and participation in in-person board of director meetings for registered management investment companies and BDCs presents a challenge given the COVID-19 pandemic. Accordingly, the SEC issued an order providing conditional relief from the requirements under the Investment Company Act of 1940, as amended (the "Company Act"), requiring in-person voting by boards of directors of registered management investment companies and BDCs.

This relief is in effect from March 13 through August 15, 2020 and has certain conditions. In particular, the SEC's order requires that:

- Reliance on this relief is necessary or appropriate because of the 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 a vote cast at the next in-person meeting.

Filing, Transmittal and Delivery Obligations

Forms N-CEN and N-PORT Filing Relief

The SEC also recognizes potential challenges in the timely filing of Forms N-CEN and N-PORT. Accordingly, the SEC ordered that, during the period between March 13 and June 30, 2020, registered funds required to file Form N-CEN or Form N-PORT pursuant to the Company Act are temporarily exempted from such filing deadline requirements where the following conditions have been met:

- The registered fund is unable to meet the filing deadline due to circumstances related to current or potential effects of COVID-19;

- Registered funds relying on the SEC's relief promptly notify the SEC staff via email at IM-EmergencyRelief@sec.gov (which email should state that the fund is relying on this relief);
- Any registered fund relying on this relief includes a statement on the applicable registered fund's public website briefly stating as much;
- The registered fund required to file such Form N-CEN or Form N-PORT files such repots 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 on a delayed basis in reliance on this relief must include a statement this relief was relied upon and the reasons why it was unable to file such report on a timely basis.

Form N-23C-2

The SEC provided similar relief for closed-end funds and BDCs with respect to the filing of a Form N-23C-2 related to the intent to call or redeem securities. Such companies are temporarily permitted to file such forms fewer than 30 days prior to the company's call or redemption of securities, provided that such company meets the following conditions:

- Promptly notifies the SEC staff via email at IM-EmergencyRelief@sec.gov stating that it is relying on this relief;
- Ensures that the filing of the notice on an abbreviated timeframe is permitted under relevant state law and the company's governing documents; and
- Files a notice that contains all the information required by the Company Act 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.

Annual and Semi-Annual Reports

The SEC similarly provided relief in connection with the transmittal of annual and semi-annual reports to investors. For the period between March 13 and June 30, 2020, registered investment management companies and registered unit investment trusts are temporarily exempt from the Company Act requirements to transmit annual and semi-annual reports to investors, where the following conditions are met:

- The registered fund is unable to prepare or transmit the report due to circumstances related to current or potential effects of COVID-19;
- Registered funds relying on the SEC's relief promptly notify the SEC staff via email at IM-EmergencyRelief@sec.gov (which email should state that the fund is relying on this relief);

- Any registered fund relying on this relief includes a statement on the applicable registered fund's public website briefly stating as much; 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.

Prospectus Delivery

In connection with the relief described above, the SEC also provided it would not seek enforcement action if a registered fund does not deliver to investors the current prospectus of the registered fund where the prospectus is not able to be timely delivered because of circumstances related to COVID-19, provided that the sale of shares to the investor was not an initial purchase by such investor of shares of the registered fund and:

- The registered fund:
  - Notifies SEC staff via email at IMEmergencyRelief@sec.gov stating that it is relying on this SEC position;
  - Publishes on its public website that it intends to rely on this SEC position; and
  - Publishes its current prospectus on its public website; and
- Delivery was originally required on or after March 13 but on or prior to June 30, 2020, and the prospectus is delivered to investors as soon as practicable, but not later than 45 days after the date originally required.

Funding Relief

The SEC is providing temporary flexibility to obtain short-term funding to (1) registered open-end management investment companies other than money market funds ("open-end funds") and (2) insurance company separate accounts registered as unit investment trusts ("separate accounts"). Subject to certain conditions, it provides the following temporary exemptive relief from the Company Act:

- Relief permitting registered open-end funds and insurance company separate accounts to borrow money from certain affiliates.
- Relief that permits additional flexibility under existing interfund lending arrangements and extends the ability to use interfund lending arrangements to funds that do not currently have exemptive relief.
- Relief that permits registered open-end funds to enter into lending arrangements or borrowings that deviate from fundamental policies, subject to prior board approval.

Other Relief for BDCs

Further, the SEC is also providing temporary flexibility for BDCs to issue and sell senior securities and participate in certain joint enterprises or other joint arrangements that would otherwise be prohibited by the Company Act. Subject to certain conditions, it provides the following temporary relief:

- Exemptive relief from certain asset coverage requirements under the Company Act, and the requirement under the Company Act to determine asset coverage on the basis of values calculated as of a time within 48 hours next preceding the time of such determination, with regard to the issuance and sale of senior securities by BDCs.
- Expanded relief from Sections 17(d) and 57(a)(4) of the Company Act and Rule 17d-1 thereunder for BDCs that have existing co-investment exemptive relief.

If you have any questions regarding the above, please contact a member of Benesch's Corporate & Securities Practice Group.

***

Please note that this information is current as of the date of this Client Alert, based on the available data. However, because COVID-19's status and updates related to the same are ongoing, we recommend real-time review of guidance distributed by the CDC and local officials.

