GODFREY & KAHN S.C.

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Investment Management Legal and Regulatory Update

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LATEST DEVELOPMENTS

SEC Extends Time Periods of Regulatory Relief for Funds and Advisers Impacted by Coronavirus

On March 25, 2020, the SEC issued two separate orders (Modified Orders) extending the time periods for temporary exemptive relief previously provided to investment companies and investment advisers whose operations may be impacted by the coronavirus (COVID-19). The Modified Orders supersede the SEC's original orders of March 13, 2020 (Original Orders), which were discussed in our March 2020 Update.

The Modified Orders generally provide the same regulatory relief, subject to the same conditions, as the Original Orders but extend the time periods for the relief as indicated below. In addition, while the Modified Orders still require entities to notify the SEC staff and/or investors, as applicable, of the intent to rely on the relief, they no longer require entities to include in their email correspondence to SEC staff a description of why they are relying on the order or provide an estimated date by which the required action will occur.

Relief for Registered Investment Companies

- *In-Person Board Meetings*. The SEC granted temporary exemptive relief to registered investment companies from requirements that certain agreements and plans, such as investment advisory agreements, distribution agreements and Rule 12b-1 plans, and the selection of an independent registered public accounting firm, be approved by the company's board of directors by an in-person vote due to current or potential effects of COVID-19. The following conditions apply:

    1. Reliance on the relief is necessary or appropriate due to circumstances related to current or potential effects of COVID-19;

    2. The votes otherwise 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

    3. The board of directors, including a majority of the independent directors, ratifies the action at the next in-person board meeting.

        - *Time Period for Relief*: through August 15, 2020.

- *SEC Filings and Shareholder Reports*. Registered investment companies were granted temporary exemptive relief from Form N-CEN and N-PORT filing deadlines, as well as annual and semi-annual shareholder report transmittal deadlines. The following conditions apply:

1. The fund is unable to meet a filing deadline or unable to prepare or transmit a report due to circumstances related to current or potential effects of COVID-19;
2. The fund promptly notifies the SEC staff via email at IM-EmergencyRelief@sec.gov that it is relying on the order;
3. The fund includes a statement on its public website briefly stating that it is relying on the order;
4. Form N-CEN or Form N-PORT is filed, or the shareholder report is transmitted, as soon as practicable, but not later than 45 days after the original due date, and, in the case of shareholder reports, is filed via Form N-CSR within 10 days of its transmission to shareholders; and
5. Form N-CEN or Form N-PORT filed pursuant to the order must include a statement regarding reliance on the order and the reasons why it was unable to file such report on a timely basis.
    - *Time Period for Relief*: the relief is limited to filing or transmittal obligations, as applicable, for which the original due date is on or after March 13, 2020, but on or prior to June 30, 2020.

- *Prospectus Delivery*. The SEC will not seek enforcement action if a fund does not deliver to investors a current prospectus where the prospectus is not able to be timely delivered because of circumstances related to COVID-19, subject to the following conditions:
    1. The sale of shares to the investor was not an initial purchase by the investor of shares of the fund;
    2. The fund notifies the SEC staff via email at IM-EmergencyRelief@sec.gov that it is relying on the order;
    3. The fund includes a statement on its public website regarding its intent to rely on the order;
    4. The fund publishes its current prospectus on its public website; and
    5. The prospectus is delivered to investors as soon as practicable, but not later than 45 days after the date originally required.
        - *Time Period for Relief*: the relief is available for delivery that was originally required on or after March 25, 2020, but on or prior to June 30, 2020.
        - Please note that this relief currently does not extend to post-effective amendment filings to a fund's registration statement.

Relief for Investment Advisers and Exempt Reporting Advisers

- *Form ADV Filings and Brochure Delivery*. Advisers affected by COVID-19 were granted temporary exemptive relief from Form ADV filing requirements, including the annual updating amendment to Form ADV, as well as the requirements to deliver amended brochures, brochure supplements or summary of material changes to clients if timely delivery is not possible due to COVID-19.
- *Form PF*. Private fund advisers impacted by COVID-19 were granted relief from Form PF filing requirements.

The relief is subject to the following conditions:

1. The adviser is unable to meet a filing deadline or delivery requirement due to circumstances related to current or potential effects of COVID-19;

2. Any adviser relying on the order with respect to filing Form ADV and brochure delivery promptly notifies the SEC staff via email at IARDLive@sec.gov and discloses on its public website that it is relying on the order (or, if it does not have a public website, promptly notifies its clients and/or private fund investors);

3. Any adviser relying on the order with respect to filing Form PF must promptly notify the SEC staff via email at FormPF@sec.gov that it is relying on the order; and

4. The adviser files the Form ADV or Form PF, as applicable, and delivers the brochure (or summary of material changes) and brochure supplements as soon as practicable, but not later than 45 days after the original due date for filing or delivery, as applicable.

    - *Time Period for Relief*: The relief specified in the order is limited to filing or delivery obligations, as applicable, for which the original due date is on or after March 13, 2020, but on or prior to June 30, 2020.

The investment adviser order reminds advisers to continue to consider their obligations under federal securities laws, including their fiduciary duty. For example, they may have an obligation to inform clients of material developments regarding their business during the current pandemic.

The Modified Orders note that the SEC will continue to monitor the current situation related to COVID-19 and will consider extending further the time period for this relief and/or issuing additional relief from other regulatory requirements as may become necessary or appropriate.

Sources: SEC Extends Conditional Exemptions From Reporting and Proxy Delivery Requirements for Public Companies, Funds, and Investment Advisers Affected By Coronavirus Disease 2019 (COVID-19), SEC Press Release 2020-73 (March 25, 2020), available here; Order Granting Exemptions from Specified Provisions of the Investment Company Act and Certain Rules Thereunder; Commission Statement Regarding Prospectus Delivery, Release IC-33824 (March 25, 2020), available here; Order Granting Exemptions from Specified Provisions of the Investment Advisers Act and Certain Rules Thereunder, Release IA-5469 (March 25, 2020), available here.

SEC Staff Grants Temporary Liquidity Relief to Mutual Funds

In a March 26, 2020 no-action letter addressed to the Investment Company Institute, the SEC staff stated it would not recommend enforcement action under Section 17(a) of the Investment Company Act against any registered open-end fund (excluding exchange-traded funds) that does not hold itself out as a money market fund, or any affiliated person (or any affiliated person of an affiliated person) of the fund that is not a registered investment company and that purchases a debt security from the fund, notwithstanding the fact that the purchaser is unable to rely on Rule 17a-9 under the Investment Company Act because the fund is not a money market fund. The SEC issued the no-action position in an effort to improve a fund's liquidity and ability to satisfy shareholder redemptions in light of the significant market disruptions related to COVID-19.

The SEC staff's no-action position is based on the following conditions:

1. The purchased security is a debt security (including, without limitation, commercial paper, corporate debt securities, certificates of deposit, asset-backed debt securities and municipal obligations);

2. The purchase price is paid in cash;

3. The purchase price is the security's fair market value, provided that the price is not materially different from the fair market value of the security indicated by a reliable third-party pricing service;

4. Within one business day of purchasing the security, the fund publicly posts on its website and sends the SEC staff via email at IM-EmergencyRelief@sec.gov certain prescribed information regarding the purchase; and

5. In the event that the purchaser subsequently sells the security for a higher price than the purchase price paid to

the fund, the purchaser promptly pays to the fund the amount by which the subsequent sale price exceeded the purchase price. However, if the purchaser is subject to Sections 23A and 23B of the Federal Reserve Act, this condition does not apply to the extent that it would otherwise conflict with (i) applicable banking regulations, or (ii) any applicable exemption from such regulations issued by the Board of Governors of the Federal Reserve System.

- *Time Period for Relief*: in effect on a temporary basis in response to the national emergency concerning the COVID-19 outbreak, and will cease to be in effect upon notice from the SEC staff.

Sources: Investment Company Institute, SEC No-Action Letter (March 26, 2020), available here; Request for No-Action Relief for Affiliated Purchases of Debt Securities from Registered Open-End Investment Companies, Investment Company Institute (March 26, 2020), available here.

OCIE Publishes Observations on Cybersecurity and Resiliency Practices

The SEC's Office of Compliance Inspections and Examinations (OCIE) recently published a report summarizing examination observations related to cybersecurity and operational resiliency practices within a number of key areas, as set forth below, taken by broker-dealers, investment advisers and other SEC registrants. While recognizing that there is no "one-size-fits-all" approach to cybersecurity practices, OCIE published the report to assist market participants with assessing and enhancing their own cybersecurity preparedness.

1. **Governance and Risk Management**. OCIE observed that effective programs incorporated the following governance and risk management components, among others:
   - Appropriate Board and senior level engagement to set the strategy of and oversee the organization's cybersecurity and resiliency programs;
   - A risk assessment process to identify, analyze and prioritize cybersecurity risks relevant to the organization; and
   - Effective implementation and enforcement of written policies and procedures to address those risks, including testing, monitoring and continuously evaluating and adapting to changes.
2. **Access Rights and Controls**. OCIE identified the following access rights and controls:
   - Understanding the location of data, including client information, throughout an organization;
   - Restricting access to systems and data to authorized users; and
   - Establishing appropriate controls to prevent and monitor for unauthorized access.
3. **Data Loss Prevention**. OCIE observed various data loss prevention tools and processes, including the following, among others:
   - Establishing a vulnerability management program;
   - Implementing perimeter security to control and monitor all network traffic; and
   - Implementing capabilities that are able to detect threats on endpoints.
4. **Mobile Security**. OCIE observed the following mobile security measures used to address the additional and unique vulnerabilities created by the use of mobile devices and applications:
   - Establishing, and training employees on, policies and procedures for the use of mobile devices;

- Using a mobile device management (MDM) application or similar technology; and
- Implementing security measures, such as the use of multi-factor authentication for all internal and external users, taking steps to prevent the transfer of information to personal devices, and ensuring the ability to remotely clear data from devices.

5. **Incident Response and Resiliency**. OCIE noted the importance of business continuity and resiliency considerations (i.e., if an incident were to occur, how quickly can the organization recover and again safely serve clients?), and observed the following elements within the incident response plans of many organizations:
   - Developing a risk-assessed incident response plan for various extreme but plausible scenarios;
   - Testing and assessment of the plan; and
   - Determining and complying with applicable federal and state reporting requirements for cyber incidents or events.

   OCIE observed the following strategies to address resiliency:
   - Identifying and prioritizing core business services, and mapping the systems and processes that support those business services (including those over which the organization may not have direct control);
   - Assessing risks in light of an organization's core business services and developing a strategy for operational resiliency; and
   - Considering additional safeguards, such as maintaining back-up data in a different network and offline or evaluating whether cybersecurity insurance is appropriate for the organization's business.
6. **Vendor Management.** OCIE observed the following vendor management practices:
   - Establishing a vendor management program that addresses, for example, due diligence for vendor selection and implementing security requirements and appropriate safeguards;
   - Monitoring and overseeing vendors and contract terms; and
   - Assessing how vendor relationships are considered as part of the organization's ongoing risk assessment process.
7. **Training and Awareness.** OCIE observed the following practices used by organizations in the area of cybersecurity training and awareness:
   - Building a culture of cybersecurity readiness and operational resiliency;
   - Training all employees on the organization's cybersecurity policies and procedures, assessing the effectiveness of such training (including employee attendance at such training), and continuously re-evaluating and updating training programs based on cyber-threat intelligence; and
   - Providing specific cybersecurity and resiliency training and examples, including phishing exercises to help employees identify phishing emails.

Sources: SEC Office of Compliance Inspections and Examinations Publishes Observations on Cybersecurity and Resiliency Practices, Press Release No. 2020-20 (January 27, 2020), available here; OCIE Cybersecurity and Resiliency Observations, available here.

SEC Requests Comment on Fund Names Rule

The SEC recently released a request for public comment on Rule 35d-1 under the Investment Company Act (Names Rule), which, together with Section 35(d) of the Investment Company Act and the antifraud provisions of the federal securities laws, restricts the use of fund names that may be likely to deceive or mislead investors regarding a fund's investments. The request seeks feedback on whether the current requirements are effective and whether there are viable alternatives that the SEC should consider. Prompting the request are several market and other factors that have developed since adoption of the Names Rule in 2001 that the SEC believes have led to challenges in applying the Names Rule in its current form. These developments include: the increasing use of derivatives and certain hybrid financial instruments; the growth in the number of index-based funds, with the SEC noting that the underlying indices are not investment companies and therefore not subject to the Names Rule; and asset managers' use of fund names as a way of differentiating new funds for a competitive advantage.

The SEC also discussed the growing number of funds using environmental, social, and governance (ESG) considerations or other criteria requiring some degree of qualitative assessment or judgment in their investment mandates, which parameters are often included in the fund name. Noting that the number of funds using "ESG," "Clean," "Environmental," "Impact," "Responsible," "Social," or "Sustainable" in their names had grown from 65 at the end of 2007 to 291 by the end of 2019, the SEC observed that some funds treat these and similar terms as an investment strategy (to which the Names Rule does not apply) and accordingly do not impose an 80% investment policy with respect to the use of the term, and other funds treat them as a type of investment (which is subject to the Names Rule) and impose an 80% investment policy.

The request for comment contains a list of specific questions for which the SEC seeks input, as well as a general solicitation for market participants to provide comments, views, issues or approaches to be considered, including statistical, empirical, and any other data that may support their views. Comments are due May 5, 2020.

Sources: SEC Requests Comment on Fund Names Rule; Seeks to Eliminate Misleading Fund Names, Press Release No. 2020-50 (March 2, 2020), available here; Request for Comments on Fund Names, Release No. IC-33809 (March 2, 2020), available here.

SEC Staff Issues Updated FAQs on Form CRS and Regulation Best Interest

As of June 30, 2020, all broker-dealers and SEC-registered advisers must deliver Form CRS to their retail investors, and all broker-dealers with retail customers must comply with Regulation Best Interest (Reg BI), as described in our July 2019 and January 2020 Updates. On February 11, 2020, the SEC staff supplemented a previously issued series of Frequently Asked Questions (FAQs) addressing industry questions on Form CRS and Reg BI.

Among other things, the updated FAQs address who is considered a "legal representative" under the definitions of "retail investor" and "retail customer" for purposes of compliance with Form CRS and Reg BI, respectively, specifying that such term covers only non-professional (i.e., non-regulated) legal representatives. The FAQs clarify that a "retail investor" or "retail customer" would *not* include a professional legal representative (i.e., a regulated financial services industry professional), such as registered investment advisers and broker-dealers; corporate fiduciaries, including banks, trust companies, and similar financial institutions; insurance companies; or the employees or other regulated representatives of these entities.

The updated FAQs also address Form CRS delivery obligations for dually registered firms, indicating that if a retail investor client of such a firm converts from an investment advisory to a brokerage account, the firm would have to deliver a new relationship summary, because "[o]pening a new account that is different from the retail investor's existing account triggers delivery of the relationship summary." The FAQs also address several affiliate relationships, generally allowing the use of a single Form CRS so long as firms can fit all the required disclosure in four pages.

Sources: Frequently Asked Questions on Form CRS (Feb. 11, 2020), available here; Form CRS, available here; Frequently Asked Questions on Regulation Best Interest (Feb. 11, 2020), available here.

LITIGATION/ENFORCEMENT ACTIONS

Adviser Charged by the SEC with Failing to Maintain Adequate Controls for Material Nonpublic Information

On February 4, 2020, the SEC announced settled charges against registered investment adviser Cannell Capital, LLC (CCL) for not having policies and procedures reasonably designed to prevent the misuse of material nonpublic information (MNPI), in violation of Section 204A of the Advisers Act.

According to the SEC's order, CCL focuses on trading securities of small market capitalization public companies for which there may have been minimal trading and little or no analyst coverage. In order to understand these securities, CCL frequently communicated with issuer insiders and others who had access to MNPI. The order states that from 2014 through 2019, CCL failed to follow its written policies and procedures by not maintaining a reasonably designed "restricted list" of securities that members, officers, and employees and their family members were prohibited from trading after the firm came into possession of potential MNPI. Instead, the order indicated that CCL used a patchwork system that relied on a combination of restrictions within an electronic order management system, documents saved to a shared drive, emails, and/or verbal conversations to communicate restrictions on trading to applicable persons.

The SEC also found that CCL's written policies and procedures were not reasonably designed to prevent the misuse of MNPI because they did not address business-specific risks or establish specific procedures for handling common sources of MNPI, such as CCL publishing articles about issuers. Furthermore, CCL's policies also failed to address the risks posed by CCL being owned, controlled, and managed by a single person. The SEC found that this lack of structure made it possible to impose and lift trading restrictions in a manner that was potentially beneficial to CCL and its sole owner.

Without admitting or denying the findings in the SEC's order, CCL consented to the entry of a cease-and-desist order, a censure, and a $150,000 civil penalty.

Source: In the Matter of Cannell Capital, LLC, Release No. 5441 (February 4, 2020), available here.

COMPLIANCE DATES FOR FINAL RULES

<table>
<tr><th>Final Rule</th><th>Compliance Date(s)</th></tr>
<tr><td>Investment Company Reporting Modernization: New Form N-PORT (As Amended)</td><td>Fund complexes with less than $1 billion in net assets:
first filing date is June 1, 2020, based on March 2020 data. The actual filing date depends on a fund's fiscal quarter end.
<table>
<tr><th>Fiscal Quarter End</th><th>Deadline for First Form N-PORT</th><th>Required Monthly Data</th></tr>
<tr><td>March 31, 2020</td><td>June 1, 2020</td><td>March 2020</td></tr>
<tr><td>April 30, 2020</td><td>June 29, 2020</td><td>March, April 2020</td></tr>
<tr><td>May 31, 2020</td><td>July 30, 2020</td><td>March, April, May 2020</td></tr>
</table>
Once funds are required to file reports on Form N-PORT, they must maintain in their records the information that is required to be included on Form N-PORT within 30 days of each month end and file reports on Form N-PORT for each fiscal quarter within 60 days of such quarter end.</td></tr>
<tr><td>Rescission of Form N-Q
(funds are required to continue filing Form N-Qs until they begin filing Form N-PORTs)</td><td>Fund complexes with less than $1 billion in net assets:
May 1, 2020 (a fund's last Form N-Q reporting period will be for the fiscal quarter ended December 31, 2019, January 31, 2020, or February 29, 2020, as applicable)</td></tr>
<tr><td>Form N-1A
(narrative disclosure regarding operation of a fund's liquidity risk management program in new subsection of the applicable shareholder report)</td><td>Fund complexes with less than $1 billion in net assets:
June 1, 2020</td></tr>
<tr><td>FAST Act Amendments Impacting Registration Statement and Form N-CSR Filings</td><td>All investment company registration statement and Form N-CSR filings made on or after April 1, 2020, must be made in HTML format and include a hyperlink to each exhibit identified in the filing's exhibit index, whether the exhibit is included in the filing or incorporated by reference.</td></tr>
<tr><td>Form CRS, Client Relationship Summary</td><td>Form CRS must be filed and delivered to new customers/clients who are retail investors by June 30, 2020. Initial delivery of Form CRS to all of an investment adviser's and broker-dealer's existing customers/clients who are retail investors due by July 30, 2020.</td></tr>
</table>