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1940 Act Issues to Consider During the Pandemic - Part 4

Stradley's Coronavirus Task Force will be updating this high-level overview of coronavirus disease 2019 (COVID-19) related issues for registered investment companies and fund managers as developments warrant.

NEW ISSUES:

- **SEC Lending and Borrowing Relief:** *The SEC has issued an order providing additional flexibility for open-end funds (other than money market funds) and insurance company separate accounts registered as unit investment trusts to obtain short-term funding.¹ The relief is available until a notice terminating it is issued, which will be at least two weeks from the date of the notice and no earlier than June 30, 2020. Prior to relying on any of the relief, the fund would have to notify SEC staff. In addition, interfund lending requires notification on a fund's public website.*
 - *Fund affiliates may lend money to the fund on a collateralized basis, provided the board makes determinations that the borrowing is in the best interest of the fund and its shareholders and that it will be for the purposes of satisfying shareholder redemptions.*
 - *For fund families with an SEC order permitting an interfund lending and borrowing facility, a lending fund may lend up to 25% of its current net assets and the term may be for any period that does not extend beyond the expiration of the relief, notwithstanding the terms of the order, provided, among other conditions, that the board reasonably determines that the maximum term for interfund loans is appropriate. (Recent orders typically limit lending funds to 15% of current net assets and the term to seven days.)*
 - *For fund families without an interfund lending order, funds may lend and borrow in accordance with the terms of any such order issued within the past twelve months, with the same modifications.²*
 - *Funds are not required to seek shareholder approval if lending under the relief would violate a fundamental policy, provided that the board reasonably determines that the lending or borrowing is in the best interests of the fund and its shareholders. (New 3/27/2020)*
- **OCIE Statement:** *The SEC's Office of Compliance Inspections and Examinations has issued a statement that it has moved to conducting examinations off-site through correspondence, unless it is absolutely necessary to be on-site, and that it will work with registrants to ensure that its work can be conducted in a manner consistent*

with maintaining normal operations and with necessary or appropriate health and safety measures.³ OCIE also stated that reliance on regulatory relief will not be a risk factor utilized in determining whether OCIE commences an examination, and it encourages registrants to utilize available regulatory relief as needed. (New 3/27/2020)

- **Signatures on EDGAR Filings:** The SEC staff has issued a statement on the manual signature and record requirements for documents filed electronically with the SEC.⁴ The staff will not recommend enforcement action if a signatory retains a document adopting the signature and provides the document to the filer for retention, with the time and date executed, and the filer establishes and maintains policies and procedures governing this process. (New 3/27/2020)
- **FINRA Guidance:** FINRA has issued guidance that provides temporary relief and guidance with respect to a number of requirements, including filings that would otherwise be required for temporary relocations and the timing of FOCUS reports and certain other filings.⁵ The guidance will be available until FINRA publishes a Regulatory Notice announcing a termination date. (New 3/27/2020)
- **Blue Sky Guidance:** A number of state and provincial securities regulators have published guidance that provides relief or other COVID-19-related updates.⁶ The North American Securities Administrators Association has established a resource page to collect these updates. (New 3/27/2020)

UPDATED ISSUES:

Market closures and market restrictions: A list of securities market closures and market restrictions is available [here](#). (Updated 3/27/2020)

Money Market Mutual Funds:

- **Form N-CR:** Several money market funds have filed on Form N-CR to report financial support, and one money market fund has filed on Form N-CR to report a downward deviation of its shadow price by more than ¼ of 1 percent.

An amended report is required to be filed within four business days of the provision of financial support or downward deviation that describes the reason for the support and terms of the support or the reason for the deviation, as applicable. (Updated 3/23/2020)

- **Purchases by Affiliated Banks:** The Federal Reserve Board has issued a template exemptive letter allowing banks to purchase assets from affiliated money market funds, subject to certain conditions, including that the assets must be investment grade and purchased at fair market value.⁷ In addition, the SEC staff has granted no-action relief to permit certain bank affiliates of money market funds to purchase securities from the funds in accordance with the Federal Reserve Board guidance, but otherwise pursuant to rule 17a-9, subject to certain conditions.⁸ The SEC no-action letter does not affect the ability of other money market fund affiliates to purchase assets from the fund in accordance with rule 17a-9. (Updated 3/23/2020)
- **Liquidity Facility:** The Federal Reserve Board has announced a Money Market Mutual Fund Liquidity Facility (MMLF) that is intended to assist money market funds in meeting demands for redemptions.⁹ Under the MMLF, the Federal Reserve Bank of Boston will lend to depository institutions and bank holding companies, taking as collateral assets purchased by the borrower from prime money market funds (i) concurrently with the borrowing or (ii) on or after March 18, but before the opening of the facility. The facility is similar to the Asset-Backed Commercial Paper Money Market Mutual Fund Liquidity Facility that operated from late 2008 to early 2010 but will purchase a broader range of assets. The Federal Reserve Board expanded the facility to cover certain assets purchased from tax-exempt municipal money market funds.¹⁰ The Federal Reserve Board has announced that the facility opened March 23, and full documentation and additional guidance are available.¹¹ (Updated 3/23/2020)
- **Guaranty:** The proposed *Coronavirus Aid, Relief, and Economic Security Act (CARES Act)*, as approved by the Senate on March 25, would suspend the existing prohibition on the use of the Exchange Stabilization Fund for the



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establishment of any guaranty programs for the money market fund industry.¹² Any such guarantee shall be limited to a guarantee of the total value of a shareholder's account in a participating fund as of the close of business on the day before the announcement of the guarantee and terminate not later than December 31, 2020. This provision, if passed, would still require action by the Department of the Treasury to establish a Money Market Funds Guaranty Program. (Updated 3/27/2020)

- **Exchange-traded funds:** For an ETF that invests in foreign markets that close, the ETF may wish to consider whether to invest in alternative instruments, such as ADRs, in order to achieve the desired exposure to the foreign securities. In circumstances where there is no ability to make additional investments in appropriate alternative instruments, an ETF may wish to stop accepting creation unit purchases. The Commission previously has noted that ETFs generally may suspend the issuance of creation units only for a limited time and only due to extraordinary circumstances, such as when the markets on which the ETF's portfolio holdings are traded are closed for a limited period of time.¹³ ETF issuers should be aware that any decision to suspend creations could have an impact on the arbitrage efficiency of the ETF and could lead to greater deviations between the market price of the ETF shares and the NAV of the shares. Like other open-end funds, ETFs cannot suspend redemptions unless the New York Stock Exchange is closed or there is appropriate guidance from the SEC. ETFs are permitted to charge transaction fees of up to 2% on redemptions. Such fees are designed to offset the costs of redemptions to the ETF. Some fixed-income ETFs that deliver cash redemptions instead of in-kind redemptions reportedly have increased their transaction fees on redemptions in light of increased transaction costs in the bond market. (Updated 3/23/2020)
- *On March 23, 2020, the Federal Reserve Bank of New York established the Secondary Market Corporate Credit Facility (SMCCF), which will purchase in the secondary market corporate bonds issued by investment grade U.S. companies and U.S.-listed ETFs whose investment objective is to provide broad exposure to the market for U.S. investment grade corporate bonds.¹⁴ The SMCCF would not be permitted to purchase more than 20% of the assets of any ETF as of March 22, 2020. The SMCCF will cease making such purchases no later than September 30, 2020, unless extended. (Updated 3/27/2020)*
- **SEC Filings:** The SEC updated its previous orders under both the 1940 Act and the Advisers Act to extend the time periods of the relief.¹⁵ Entities must notify the SEC staff and/or investors, as applicable, of the intent to rely on the relief, but generally no longer need to describe why they are relying on the order or estimate a date by which the required action will occur. The 1940 Act Orders provide relief from

the timeliness requirements of Form N-CEN, Form N-PORT, and Form N-23C-2 when a fund is unable to meet a deadline due to circumstances related to current or potential effects of COVID-19. The relief for Forms N-CEN and N-PORT applies to filing obligations for which the original due date is on or after March 13 but on or prior to June 30, 2020, while the relief for Form N-23C-2 extends to August 15, 2020. The Advisers Act Orders provide timeliness relief for Form ADV and Form PF filings and for Form ADV Part 2 client delivery obligations for 45 days from the original due date, when the original due date is on or after March 13 but on or prior to June 30, 2020. The SEC previously posted staff guidance that Form ADV does not have to be updated to reflect temporary teleworking locations.¹⁶ The SEC has also provided relief from timeliness requirements for certain filings under the Securities Exchange Act of 1934.¹⁷ Note that filings not covered by the orders continue to be required on a timely basis, including filings on Form N-LIQUID, Form N-CR, and Form N-MFP, although it is possible that the SEC will consider issues with these forms on an individualized basis. The SEC provided information on contacting the staff with issues, including issues with these filings, in press releases announcing the actions.¹⁸ (Updated 3/27/2020)

- **In-person board meetings:** The 1940 Act Orders allow fund boards to meet telephonically or by video conference to consider and vote on matters that would otherwise require an in-person vote. The relief applies whenever reliance upon it is necessary or appropriate due to circumstances related to current or potential effects of COVID-19 and is available until August 15, 2020. The SEC's Division of Investment Management previously provided no-action relief for the period from March 4 to June 15.¹⁹ (Updated 3/27/2020)
- **Delivery of prospectuses and shareholder reports:** The 1940 Act Orders also provide relief from the obligations to timely transmit annual and semiannual reports to shareholders and to file them with the SEC. The relief applies when the original due date is on or after March 13 but on or prior to June 30, 2020, and the fund is unable to prepare or transmit the report due to circumstances related to current or potential effects of COVID-19. In addition, the SEC announced that it would not provide a basis for an SEC enforcement action if a fund does not timely deliver a current prospectus because of circumstances related to COVID-19 when delivery was originally required during this period. The position is not available to an initial purchase by the investor of the fund's shares. (Updated 3/27/2020)
- **Annual meetings:** The SEC staff has provided guidance to both operating companies and funds that is intended to provide regulatory flexibility to companies seeking to change the date and location of the meetings and use new technologies, such as "virtual" shareholder meetings that avoid the need for in-person shareholder attendance,

while at the same time ensuring that shareholders and other market participants are informed of any changes.²⁰ The guidance notes that the ability to conduct a “virtual” meeting is governed by state law, where permitted, and the issuer’s governing documents. *Note that companies seeking to conduct a virtual meeting may, under state law, need to have an appropriate process for shareholders to vote at the meeting.* (Updated 3/27/2020)

- **State and Local Closures:** Several states, counties and cities (e.g., California, Pennsylvania, New York and Illinois) have announced business closures in connection with “shelter-in-place” public health efforts to slow the spread of COVID-19. Some of the orders may contain broad exceptions for the financial services industry, while others may not. Beyond the direct impact on firms in those localities, review the location of service providers and the terms of these orders carefully to determine whether necessary support functions will remain available. FINRA has posted a resource page with links to state “shelter-in-place” and “stay-at-home” orders.²¹ (Updated 3/27/2020)

ISSUES:

- **Transfer Agents:** The SEC provided a broad exemption for the period from March 16 to May 30 from requirements applicable to transfer agents except for the safeguarding requirement.²² Transfer agents relying on the relief must provide notice to the SEC by May 30. The SEC encourages transfer agents and the issuers for whom they act to inform affected security holders. (New 3/23/2020)
- **Tax implications for funds with institutional shareholders:** For institutional funds with few shareholders, beware that the fund could fall into personal holding company status if at any time during the last half of the taxable year more than 50 percent in value of the fund’s shares are owned, directly or indirectly, by or for not more than 5 “individuals.” For purposes of this rule, employee pension trusts, private foundations, trusts forming part of a plan providing for the payment of supplemental unemployment compensation benefits, and a trust, a portion of which is permanently set aside or to be used exclusively for charitable purposes, are considered individuals. (New 3/23/2020)
- **CPO NFA Filings:** The CFTC staff has provided no-action relief to commodity pool operators that extends certain filing deadlines.²³ With respect to Form CPO-PQR filings under CFTC Regulation 4.27, Small and Mid-Sized CPOs have until May 15, 2020 to submit their annual filings for 2019, while Large CPOs have until July 15, 2020 to submit their filings for Q1 2020. For pool annual reports under CFTC Regulations 4.7(b)(3) or 4.22(c) that are due on or before April 30, 2020, the deadline for filing and distributing the

report, which must include certified financial statements, has been extended until 45 days after the due date specified in the regulations. For monthly or quarterly reports to pool participants under CFTC Regulation 4.7(b)(2) or 4.22(b) for all reporting periods ending on or before April 30, 2020, the deadline for distribution to participants has been extended to 45 days after the end of the reporting period (instead of 30 days as stated in the regulations). The National Futures Association has issued similar relief for CPO Members and has provided commodity trading advisor Members with similar relief for NFA Form PR filings.²⁴ (Updated 3/23/2020)

- **Liquidity risk management:** Current developments raise a number of issues for the management of funds’ liquidity risk:
 - **Assessment, management, and periodic review of liquidity risk:** Funds should review fund liquidity risk in light of current and reasonably expected market events and redemption patterns and may need to consider appropriate mitigating steps for strengthening the fund’s ability to meet redemptions, including readying borrowing and other liquidity facilities.
 - **Classification of portfolio investments:** Rule 22e-4 requires funds to review their portfolio investments’ liquidity classifications more frequently than monthly if changes in relevant market, trading, and investment-specific considerations are reasonably expected to materially affect classifications. Such reviews should focus especially on holdings that could be considered illiquid investments as a result of these developments or that could fall out of highly liquid investment status. An important consideration will be a review of the reasonably anticipated trading sizes in light of redemption expectations. Funds should be alert to the possibility that vendor classifications may be based on historical rather than current data.
 - **Highly liquid investment minimum:** For funds that currently hold primarily highly liquid assets, and therefore are not required to have an HLIM, the program administrator may need to examine whether the fund can still qualify for that status. For HLIM funds, the HLIM may need to be reviewed under the required factors in light of current market and redemption developments and, if a shortfall is reasonably anticipated, a shortfall response plan should be developed, which must include a plan for reporting shortfalls to the fund’s board.
 - **Illiquid investments:** During this period of extreme market volatility, the fund should monitor closely whether there is a need to reclassify holdings as illiquid investments. Funds should be prepared to file Form N-LIQUID if the fund’s illiquid assets exceed 15% of

its net assets. The program administrator should have guidance designed to prevent purchases that would violate the prohibition on acquiring illiquid investments when over the 15% limit. We do not yet know if the SEC will provide guidance relieving funds from filing Form N-LIQUID in the event of foreign or other market closings that are beyond the scope of existing guidance on extended foreign holidays.

- **Redemptions in kind:** Funds may wish to consider whether redemptions in kind would be an appropriate tool for large redemption requests, including whether operational logistics are in place to accommodate any such redemption requests. (Updated 3/19/2020)
- **Form CRS:** We understand that the SEC staff is considering whether brokers and advisers should be given relief from the Form CRS deadline. Unless such relief is given, compliance with the Form CRS requirement will be required as of June 30, 2020. (New 3/19/2020)
- **SEC Comment Periods:** The SEC has issued a statement noting that the Commission and staff have historically considered comments submitted after a comment period closes but before adoption of a final rule or order.²⁵ For certain pending rule proposals, including proposals concerning auditor independence, the accredited investor definition, and fund investments in derivatives, the SEC stated that it will not take final action before April 24 in order to allow commenters additional time if needed. (New 3/19/2020)
- **MiFID II Reporting:** Under the MiFID II delegated regulation, investment firms providing the service of portfolio management and subject to MiFID II must inform the client where the overall value of the portfolio, as evaluated at the beginning of each reporting period, depreciates by 10% and thereafter at multiples of 10%, no later than the end of the business day in which the threshold is exceeded or, in a case where the threshold is exceeded on a non-business day, the close of the next business day.²⁶ (New 3/19/2020)
- **Fund Boards:** Fund directors should stay up to speed on current market events so they can properly apply their business judgment as necessary from a governance standpoint. In many cases, fund boards are receiving periodic status reports or attending status updates from fund advisers. Examples of areas for directors to consider include, for funds, fund flows, liquidity levels, valuation, and performance; and for fund advisers, status of operations under business continuity plans, market assessments, and the assessment of critical fund service providers. Board reporting from fund advisers is particularly important during times of market stress. To strike an appropriate balance

between staying apprised and being efficient and respectful of fund advisory personnel time, boards may seek to channel questions or communications through independent counsel or the board chair/lead independent director. (New 3/19/2020)

- **Business continuity plans:** Business continuity at the current time is key. In most cases, those plans already are in effect. Consideration should be given to contingency planning in the event that fund managers, transfer agents, pricing services, or other service providers are unable to provide services because of employee absences. Funds and fund managers should make and communicate revisions to their plans as they adjust to the developing environment.
- **Valuation:** Funds should examine whether they are able to obtain valid prices for their investments, especially in markets that may be closed or have limited availability. Experience from the 2008 financial crisis shows that vendor reassurances as to the quality of their pricing information may provide false comfort, so vendor prices should be checked for reliability. At this time, we do not expect the SEC to provide relief from the daily pricing requirement.
- **Redemptions:** Under Section 22(e) of the 1940 Act, open-end funds generally may not suspend the right of redemption unless the New York Stock Exchange is closed, or the SEC provides guidance that daily redemptions are not required because trading is restricted or an emergency exists. At this point, funds should assume that they must continue to provide daily redemptions. Funds should review any borrowing arrangements that may need to be utilized. We are closely monitoring for any relevant guidance from the SEC or its staff on this topic.
- **Cybersecurity:** Firms are at increased risk of cyberattacks, particularly with the use of remote offices and telework. Anxious employees may be more vulnerable to email phishing attacks. Employees should be reminded of the continued need for vigilance.
- **Prospectus disclosures:** Funds should review their prospectus disclosures, and particularly their risk disclosures. It may be appropriate to add a pandemic risk factor if this risk is not already addressed. However, funds have different risk profiles, and there is no one-size-fits-all solution for the necessary disclosures.

¹ Release No. IC-33821 (Mar. 23, 2020), <https://www.sec.gov/rules/other/2020/ic-33821.pdf>.

² Recent interfund lending orders are available at <https://www.sec.gov/rules/icreleases.shtml#interfundlending>.

³ OCIE Statement on Operations and Exams – Health, Safety, Investor Protection and Continued Operations are our Priorities (Mar. 20, 2020),

<https://www.sec.gov/ocie/announcement/ocie-statement-operations-health-safety-investor-protection-and-continued>.

⁴ Staff Statement Regarding Rule 302(b) of Regulation S-T in Light of COVID-19 Concerns (Mar. 24, 2020), <https://www.sec.gov/corpfin/announcement/staff-statement-regarding-rule-302b-regulation-s-t-light-covid-19-concerns>.

⁵ Frequently Asked Questions Related to Regulatory Relief Due to the Coronavirus Pandemic (Mar. 24, 2020), <https://www.finra.org/rules-guidance/guidance/faqs/coronavirus>. FINRA guidance, updates, and other information on COVID-19 are available at <https://www.finra.org/rules-guidance/key-topics/covid-19>. Other self-regulatory organizations are also providing relief and guidance. See, e.g., Cboe Regulatory Circular 20-021 (Mar. 25, 2020), <http://cdn.cboe.com/resources/regulation/circulars/regulatory/RC20-021-Filing-Extensions-for-Annual-Reports-and-FOCUS-Reports.pdf>; Cboe Regulatory Circular 20-022 (Mar. 25, 2020), <http://cdn.cboe.com/resources/regulation/circulars/regulatory/RC20-022-Extension-of-Time-for-Certain-Filings-Currently-Due-April-1-2020.pdf>.

⁶ Novel Coronavirus COVID-19 Updates, <https://www.nasaa.org/industry-resources/covid-19-updates/>.

⁷ Money Market Mutual Funds Template Letter (Mar. 17, 2020), <https://www.federalreserve.gov/supervisionreg/legalinterpretations/fedreserseactint20200317.pdf>.

⁸ Investment Company Institute, SEC No-Action Letter (Mar. 19, 2020), <https://www.sec.gov/investment/investment-company-institute-031920-17a>.

⁹ Press Release, Federal Reserve Board broadens program of support for the flow of credit to households and businesses by establishing a Money Market Mutual Fund Liquidity Facility (MMLF) (Mar. 18, 2020), <https://www.federalreserve.gov/newsevents/pressreleases/monetary20200318a.htm>.

¹⁰ Press Release, Federal Reserve Board expands its program of support for flow of credit to the economy by taking steps to enhance liquidity and functioning of crucial state and municipal money markets (Mar. 20, 2020) <https://www.federalreserve.gov/newsevents/pressreleases/monetary20200320b.htm>.

¹¹ Policy Tools: Money Market Mutual Fund Liquidity Facility, <https://www.federalreserve.gov/monetarypolicy/mmlf.htm>.

¹² H.R. 748, § 4015, 116th Cong. (2020), <https://www.appropriations.senate.gov/imo/media/doc/FINAL%20FINAL%20CARES%20ACT.pdf>.

¹³ Release Nos. 33-10695, IC-33646 (Sept. 25, 2019), 84 Fed. Reg. 57162, 57178 (Oct. 24, 2019), <https://www.federalregister.gov/d/2019-21250>.

¹⁴ Policy Tools: Secondary Market Corporate Credit Facility, <https://www.federalreserve.gov/monetarypolicy/smccf.htm>.

¹⁵ For the 1940 Act Orders, see Release No. IC-33824 (Mar. 25, 2020), <https://www.sec.gov/rules/other/2020/ic-33824.pdf>; Release No. IC-33817 (Mar. 13, 2020), <https://www.sec.gov/rules/other/2020/ic-33817.pdf>. For the Advisers Act Orders, see IA-5469 (Mar. 25, 2020), <https://www.sec.gov/rules/other/2020/ia-5469.pdf>; Release No. IA-5463 (Mar. 13, 2020), <https://www.sec.gov/rules/other/2020/ia-5463.pdf>. The various forms of relief provided by the SEC are subject to conditions that are set out in the respective orders, such as subsequent ratification of votes, notice to the SEC of filing delays, and website disclosure of issues with the delivery of shareholder reports, prospectuses, and Form ADV client brochures.

¹⁶ Using IARD, Form ADV: Item 1.F, <https://www.sec.gov/divisions/investment/iard/iardfaq.shtml#item1f>.

¹⁷ Release No. 34-88465 (Mar. 25, 2020), <https://www.sec.gov/rules/exorders/2020/34-88465.pdf>; Release No. 34-88318 (Mar. 4, 2020), <https://www.sec.gov/rules/other/2020/34-88318.pdf>.

¹⁸ Press Release 2020-73, SEC Extends Conditional Exemptions from Reporting and Proxy Delivery Requirements for Public Companies, Funds, and Investment Advisers Affected by Coronavirus Disease 2019 (COVID-19) (Mar. 25, 2020), <https://www.sec.gov/news/press-release/2020-73>; Press Release 2020-63, SEC Takes Targeted Action to Assist Funds and Advisers, Permits Virtual Board Meetings and Provides Conditional Relief from Certain Filing Procedures (Mar. 13, 2020), <https://www.sec.gov/news/press-release/2020-63>.

¹⁹ SEC 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), <https://www.sec.gov/investment/staff-statement-im-covid-19>.

²⁰ Staff Guidance for Conducting Annual Meetings in Light of COVID-19 Concerns (Mar. 13, 2020), <https://www.sec.gov/ocr/staff-guidance-conducting-annual-meetings-light-covid-19-concerns>.

²¹ State “Shelter-in-Place” and “Stay-at-Home” Orders, <https://www.finra.org/rules-guidance/key-topics/covid-19/shelter-in-place>.

²² Release No. 34-8844 (Mar. 20, 2020), <https://www.sec.gov/rules/exorders/2020/34-88448.pdf>.

²³ Press Release No. 8136-20, CFTC Issues Third Wave of Relief to Market Participants in Response to COVID-19 (Mar. 20, 2020), <https://www.cftc.gov/PressRoom/PressReleases/8136-20>.

²⁴ Notice to Members I-20-15 (Mar. 23, 2020), <https://www.nfa.futures.org/news/newsNotice.asp?ArticleID=5218>.

²⁵ Comment Periods for Certain Pending Actions, <https://www.sec.gov/rules/proposed.shtml>.

²⁶ European Commission Delegated Regulation art. 62, <https://ec.europa.eu/transparency/regdoc/rep/3/2016/EN/3-2016-2398-EN-F1-1.PDF>.