

## MITIGATION OF INVESTMENT ADVISER BUSINESS INTERRUPTION AND REGULATORY NON-COMPLIANCE RISKS RELATED TO COVID-19

We urge our clients to consult Pillsbury's comprehensive COVID-19 Resource Center for information regarding [Responding to a Global Crisis](#), [Business Interruption](#), [Cybersecurity](#), [Employer Concerns](#) and other general matters related to the COVID-19 pandemic. We also recommend the following specific measures to mitigate risks of business interruption and regulatory noncompliance resulting from the COVID-19 pandemic.

### Registered Investment Advisers

***Business Continuity Plans (BCPs) and Vendor Management.*** As part of its fiduciary duty to clients, a registered investment adviser is required to adopt and implement BCPs to reduce risks that could result in business interruption. Accordingly, in anticipation of the potential spread of COVID-19, many investment advisers have activated portions of their business continuity and crisis management plans, including, for example, through teleworking. As part of implementing BCPs, investment advisers should review third-party vendor contracts and outsourcing relationships in order to be prepared for disruptions that may affect them through back doors. Cloud-based services and other technology also should be reviewed and tested in light of increased demand for access arising out of teleworking. Communications with brokers and custodians should be reviewed to minimize the risk of communication and reporting failures that could harm clients.

***Filing Extensions for Investment Adviser Regulatory Reporting.*** The SEC issued emergency orders on March 13, 2020, providing temporary relief to [investment advisers](#) and [investment companies](#) from certain filing, disclosure delivery and governance requirements (e.g., Form ADV, 13G, CPO-PQR). Each form of relief was conditioned on actual coronavirus-related hardships and requires notice to the SEC's Division of Investment Management of reliance on such relief and the reasons for reliance. The SEC issued modified conditional orders on March 25, 2020 that provide [investment advisers](#) and certain [investment funds](#) additional time with respect to meeting certain filing and delivery requirements and holding in-person board meetings, if they are unable to meet the deadlines due to circumstances related to current or potential effects of COVID-19. The new orders supersede the SEC's original emergency orders issued on March 13, 2020, and extend the time period covered by the temporary exemptive relief until June 30, 2020.

An adviser's applicable filing and delivery obligations under the relief must be **satisfied no later than 45 days after the original due date** for filing or delivery (as was provided in the original exemptive order); however, the new order generally makes the temporary exemptive relief available for filing and delivery obligations that would have been due between March 13, 2020 and June 30, 2020 (unless further extended).

Among other conditions, entities must notify the Division staff and/or investors, as applicable, of the intent to rely on the relief,<sup>1</sup> but generally no longer need to describe (as required by the

---

<sup>1</sup> Notify the SEC at [IARDLive@sec.gov](mailto:IARDLive@sec.gov).

original order) why they are relying on the order or estimate a date by which the required action will occur. Further modifications in the near future are possible.

The following information is relevant only to those advisers that are experiencing coronavirus-related hardships, and, therefore, eligible to seek relief. Registered investment advisers are reminded that, notwithstanding that they are entitled to relief from the SEC, they remain obligated to evaluate and act in accordance with their fiduciary and other obligations to clients to deliver timely information and otherwise act in the clients' best interest.

- **Form ADV.** Registered investment advisers have a 45-day extension to file annual updating amendments to Form ADV and make the related delivery of Form ADV Part 2 (or a summary of material changes) to existing clients. Exempt reporting advisers likewise may rely on a similar extension to file reports on Form ADV.

Additionally, the SEC staff stated in the [Form ADV FAQ](#), that it would not recommend any enforcement actions against advisers that do not include, as an "office, other than your principal **office** and place of business, at which you conduct investment advisory business," remote teleworking locations employed on a temporary basis during the COVID-19 outbreak. This relief is only available where employees are "temporarily" teleworking pursuant to the investment adviser's BCP.

The SEC also updated [Question II.1 of the Custody Rule FAQ](#) and provided relief in connection with inadvertent custody of client funds or securities an adviser may receive at its office location in circumstances where the adviser is unable to access mail and deliveries at its office. Such client funds and securities will be deemed received on the date the adviser is actually able to access mail or deliveries at its office location. The "three business day" clock for return of funds to avoid "custody" begins to run when the investment adviser's personnel have access to office mail and deliveries. This relief is only available when the investment adviser's access to mail or deliveries at its office location is limited because it has implemented its business continuity plan in response to circumstances related to COVID-19.

- **Form PF.** Registered investment advisers have a 45-day extension to file Form PF.

**Custody Rule.** Investment advisers should discuss with their auditors the feasibility of complying with the Custody Rule's requirement of 120-day delivery of financial statements and with the National Futures Association (NFA) rules requiring audited pool financial statements to be delivered within 90 days following year-end. Please see the section above summarizing the revised SEC FAQ response relating to inadvertent custody.

### **NFA Member Firms**

**Filing Extensions.** [Conditional extensions](#) will be granted to NFA member firms affected by COVID-19 as summarized below:

- NFA members operating pools that have NFA reporting obligations (such as Rule 4.7 pools);

- “Where compliance is anticipated to be particularly challenging or impossible because of displacement of registrant personnel from their normal business sites ... in response to the COVID-19 pandemic.”

This relief does not extend to commodity pools not subject to any NFA reporting requirements (such as CFTC Rule 4.13(a)(3) “de minimis” pools and excluded pools under CFTC Rule 4.5) or to CPOs that are not NFA members.

- **Form CPO-PQR** Small and Mid-Size filers must file by May 15, 2020. Large filers (which were required to deliver their annual Form CPO-PQR within 60 days following the end of the preceding calendar year) may file their Q1 Form CPO-PQR by July 15, 2020.
- **Pool Annual Reports** under CFTC Rule 4.7(b)(3) and 4.22(c). Annual reports originally due on or before April 30, 2020 may be delivered to the NFA and pool participants no later than 45 days after the original due date. CPOs will also be permitted to seek additional time to file (up to 180 days from fiscal year end) under the “hardship” provisions of Rule 4.22(f).
- **Pool Periodic Account Statements** under CFTC Regulation 4.7(b)(2) or 4.22(b). Monthly or quarterly account statements for reporting periods ending on or before April 30, 2020 may be delivered to pool participants **within 45 days after the end of the reporting period.**

**Risk Factors and Disclosures.** Investment advisers should consider, in light of their strategy, sector focus, borrowing needs and availability, and other business practices, whether specific COVID-19-related risk disclosures are warranted. For example:

- Liquidity impact and related withdrawal/redemption limits; potential activation of gates and/or suspension provisions
- Termination or reduction of credit line by lender
- Counterparty management (e.g., credit risk; non-US counterparties)
- Travel restrictions and related effect on due diligence, research and investor visits
- Key personnel and employee risks (e.g., capacity and availability; satisfaction of devotion of time requirements)
- Ability to meet reporting requirements (e.g., regulatory filings; financial statements; tax information)
- Other operational or business continuity challenges for the adviser, service providers or counterparties (increased security challenges; challenges with teleworking)
- Material adverse event risks related to deal closure delays or broken deals
- Capital commitment and other material defaults
- Valuation issues related to scarcity of opportunities, trading restrictions, status of level 2, 3 and 4 assets, volatility and portfolio company insolvency

- Potential breaches of investment limitations and/or failure to adhere to disclosed strategy descriptions (in advisory contracts and investment fund documents) caused by market disruption, sudden market moves or internal limitations (e.g, personnel, systems)
- Performance reporting and updates, volatility
- Conflicts of interest (especially side by side management of proprietary assets and client accounts in light of potential increase in scarcity of opportunities and/or thinly traded positions)

Periodic investor/client letters, the Form ADV Part 2A annual update, and amendments to offering documents could serve as a mechanism for material disclosures.

### **Registered Funds - Investment Company Act Relief**

**Board Meetings.** Until August 15, registered investment company board approvals requiring in-person meetings may be granted in a meeting via “any means of communication that allows all directors participating to hear each other simultaneously during the meeting.” This relief applies to board meetings to be before August 15, 2020 (not conditioned on specific COVID-19 hardships) in connection with renewals and amendments of contracts, plans or arrangements under Section 15(c) or Rules 12b-1 or 15a-4(b)(2), as well as the selection of an independent public accountant.

**Prospectus Delivery.** There is a 45-day extension of the prospectus delivery requirement for share purchases of registered funds occurring through June 30, 2020 (other than an initial purchase by the investor) if the fund’s website has a link to the current prospectus and the fund states its reliance on the SEC relief. For the relief to apply, a registered fund would have to be unable to make a timely delivery of the prospectus because of circumstances related to coronavirus, subject to the conditions described in the orders, and notify<sup>2</sup> the SEC of its reliance on the SEC relief. The new SEC order no longer requires a statement of the reasons (on the website or in the notice to the SEC) why delivery cannot be made, or an estimated time when the prospectus can be delivered.

**Filing Extensions.** There also is a 45-day extension for the following filings for which the original due date is between March 13, 2020 and June 30, 2020):

- Form N-CEN and Form N-PORT to be filed by registered management investment companies and unit investment trusts affected by COVID-19; and
- Annual and semi-annual reports to be transmitted by registered management investment companies and unit investment trusts affected by COVID-19.

Relief also was granted to registered closed-end investment companies and business development companies with respect to the requirement to file Form N-23C-2 at least 30 days prior to calling or redeeming securities. The new order extends to the period from (and including) March 13, 2020 (and including) August 15, 2020. (The original order extended to June 15, 2020.)

---

<sup>2</sup> Notify the SEC at [EmergencyRelief@sec.gov](mailto:EmergencyRelief@sec.gov).

Pillsbury's Investment Funds and Investment Management team is available to assist with compliance and risk management related to COVID-19. Please contact your client relationship attorney for additional information regarding your obligations.