

SEC Staff Speaks to COVID-19 and Fund Prospectus Disclosure

On April 14, 2020, the staff of the SEC's Division of Investment Management (the "Division") published a [Statement on the Importance of Delivering Timely and Material Information to Investment Company Investors](#) (the "Statement"). The Statement gives notice that the Division has a keen eye on prospectus risk disclosure as it continues to monitor the ongoing impacts of the COVID-19 pandemic on investment companies. "In light of the current uncertainties and market disruptions," the Division explains, "investors need high-quality financial information more than ever." The Statement comes amid other guidance and temporary regulatory relief from the SEC, including public statements by [Chairman Jay Clayton](#) and [Chief Accountant Sagar Teotia](#) emphasizing the need to assist "Main Street investors" in navigating turbulent markets. Uniquely, the Statement focuses explicitly on how fund complexes might modify existing disclosures.

COVID-19 Risks and other Disclosure

With its Statement, the Division *encourages* funds to consider whether risk and other disclosures "should be revised based on how COVID-19-related events may affect the [fund] and its investments." This language raises questions about the regulatory gravitas of the Statement; language *directing* or *requiring* such consideration would be clearer. But, in addition to its encouragement, the Division also reminds funds of their obligation under the Securities Act of 1933 ("Securities Act") to update their prospectuses as necessary to deliver "timely and material" information to existing shareholders and new investors in light of the pandemic. The Statement notes that over 100 million U.S. individuals (or 45% of U.S. households) had invested over \$21 trillion in mutual funds and ETFs as of December 2018. It also highlights the importance of funds and variable insurance products engaged in continuous securities offerings to provide current risk and other disclosure to shareholders in compliance with the Securities Act. These days, what is more current than COVID-19?

Website Disclosure Is Enough

The Division seems to be guiding the fund industry to inform shareholders of COVID-19-related market risks of which they might not otherwise be aware. The Statement notes that these are "unprecedented times" and recognizes that funds may face "particularized obstacles" due to COVID-19. Indeed, the SEC allowed in its March 25, 2020, [Statement Regarding Prospectus Delivery](#) that, through June 30, 2020, it will not seek enforcement against a fund that is not able to timely deliver updated prospectuses to shareholders due to COVID-19 related complications as long as the current prospectus is filed with the SEC and made available on the fund's website. Still, in its Statement, the Division underscores the "bedrock principle of making timely and relevant information available to investors."

Review of Updates by Division Not Required

The Statement is particularly important for the many funds with December 31 fiscal year ends that must update their registration statements effective May 1, 2020. Nearly one-third of all funds, and nearly all variable insurance products, have December 31 fiscal year ends. The SEC has not extended the required effective date for these post-effective amendments, so these updates should appropriately reflect COVID-19 risk and related

information. Funds typically file under [Rule 485\(a\)](#) under the Securities Act to make material amendments to their registration statements, and file under Rule 485(b) to make routine updates and other immaterial changes. Post-effective amendments under Rule 485(b) become effective immediately; whereas the effectiveness of amendments under Rule 485(a) is delayed for 60 days to allow the Division an opportunity to review and comment on the changes. At this point, funds that must amend their registration statements by May 1 do not have the 60 days required for a Rule 485(a) filing. The Division may thus be making an implicit exception to Rule 485(a) by characterizing COVID-19 related disclosures as material and simultaneously indicating that funds updating their registration statements for May 1 should include such disclosures in their Rule 485(b) filings.

Conclusion

Funds should consult with counsel to ensure that their disclosures appropriately reflect the already experienced and potential effects of COVID-19. This is an urgent exercise not only for funds in the process of updating their disclosures for May 1, and other funds may also find it advisable to supplement their prospectus before a post-effective amendment is required.

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