

Morgan Lewis

REGISTERED FUNDS TRENDS AND DEVELOPMENTS

Quarter in Review Series: Fifth Edition

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Overview



- What to Expect from the SEC During the Biden Administration
- New Marketing Rule for Advisers: Does it Impact 1940 Act Managers?
- Prohibited Transactions with Chinese Military Companies: The Need for Ongoing Compliance
- In-Person Board Meetings: Will We Be Remote Forever?
- GameStop, Reddit, AMC, Silver, Robinhood: New Risks to Funds?

What to Expect from the SEC During the Biden Administration

New Leadership

- Nominee for SEC Chairman: Gary Gensler
 - Former Chairman of the CFTC and former Goldman Sachs partner
 - Professor at MIT Sloan School of Management focusing on blockchain and financial technology, digital currencies, data analytics, and public policy

Examinations and Enforcement

- Sustainable, socially responsible, impact, and ESG funds
- Non-transparent actively managed ETFs, leveraged and inverse ETFs, and mutual fund to ETF conversions
- Reg BI, share class selection, revenue-sharing payments, and payments for order flow
- Data analytics
- Business continuity and cybersecurity

Opportunities for Rulemaking/Clarity

- Climate and ESG, digital currencies, disclosure reforms, and money market funds

New Marketing Rule for Advisers: Does it Impact 1940 Act Managers?



On December 22nd, 2020, SEC adopted its new Marketing Rule for investment advisers.



Effective Date: May 4, 2021



Compliance Date: November 4, 2022



New Marketing Rule will encompass both the current Advertising Rule (Rule 206(4)-1) and Cash Solicitation Rule (Rule 206(4)-3)



The SEC has stated the Marketing Rule does not apply to advertisements of registered funds, however, certain materials used in tandem with fund offering documents, like model performance, could be impacted.



Marketing Rule expands the term "advertisement" to include compensated endorsements and client testimonials



All investment advisers should reassess policies and procedures, marketing materials, and solicitation arrangements to comply with the new rule



Marketing Rule also imposes recordkeeping requirements for advisers' marketing materials, pursuant to Rule 204-2

Prohibited Transactions with Chinese Military Companies: The Need for Ongoing Compliance

On Nov. 12, 2020, President Trump signed Executive Order 13959 (“E.O. 13959”) prohibiting U.S. persons from purchasing or investing in publicly-traded securities of companies identified by the U.S. Government as “Communist Chinese military companies” (“CCMCs”) or in instruments that are derivative of, or are designed to provide investment exposure to, those companies, **beginning 9:30 AM EST on Jan. 11, 2021.**

E.O. 13959 requires the divestiture of any position, properly established before January 11, by November 11, 2021.

E.O. 13959 prohibits (i) such transactions in securities of any future-designated CCMCs **60 days** after the designation; and (ii) any transaction that evades or avoids, has the purpose of evading or avoiding, causes a violation of, or attempts to violate EO 13959.

Wind-Down Period: E.O. 13959 exempts purchases for value or sales (i) made on or before 11:59 PM EST on Nov. 11, 2021, solely to divest from securities held by a US person in a CCMC as of 9:30 a.m. EST on Jan. 11, 2021; or (ii) 365 days from the date of a future CCMC determination, solely to divest from securities held by a US person as of the date 60 days from the future CCMC determination.

Authority to implement E.O. 13959 is delegated to Treasury (OFAC). OFAC has issued FAQs to highlight key issues and topics relating to sanctions implementation.

Unclear what the Biden Administration will do with E.O. 13959.

Funds should review their assets to determine whether and how E.O. 13959 could affect their operations, and review existing compliance policies to ensure appropriate monitoring of current or future investments in CCMCs.

In-Person Board Meetings: Will We Be Remote Forever?

The 1940 Act and rules thereunder require that certain vote of the board of trustees of a registered investment company be cast in person.

Last year's outbreak of COVID-19 has presented significant challenges for boards of trustees of registered investment companies to travel in order to meeting the in-person voting requirements set forth in the 1940 Act.

In light of the impacts of COVID-19, the SEC issued orders dated March 13, 2020, March 25, 2020 and June 19, 2020 that conditionally exempt registered investment companies and their investment advisers and principal underwriters from the in-person voting requirements.

The exemption is temporarily available from March 13, 2020 to (and including) the date to be specified in a public notice from the SEC staff stating that the relief provided in the orders will terminate, which date will be at least two weeks from the date of the notice.

What is the industry saying?

What can we expect next from the SEC?

GameStop, Reddit, AMC, Silver, Robinhood: New Risks to Funds?



- Retail investors organizing through Reddit (Wallstreetbets) discovered short positions in stocks like AMC Entertainment and GameStop and developed plan to enact a “short squeeze” on the positions by coordinating a stock purchase plan to pump up the value of the stocks through low-cost trading platforms like Robinhood, causing hedge funds to incur huge losses on their short positions.
- At various points during the peak trading activity, Robinhood and other brokerage firms stopped the trading of AMC, GameStop and other heavily shorted and heavily traded stocks.
- Robinhood announced that the unprecedented move was done as a result of the “extraordinary circumstances in the market” and cited SEC net capital obligations.
- SEC investigations, congressional hearings
- Calls for SEC to ban payment for order flow - accepting payments for routing customers’ orders to certain traders and exchanges.
- Potential changes to rules on shorting.
- Are there new risks to funds?

Timothy W. Levin



Timothy W. Levin, leader of the firm's investment management practice, counsels investment advisers and other financial services firms on the design, development, and management of pooled investment vehicles and investment advisory programs. He also advises fund managers in connection with organization, registration, and ongoing regulatory compliance. Additionally, he represents managers and sponsors of unregistered pooled investment vehicles.

Timothy's clients include many types of registered investment companies, such as mutual funds and registered funds of hedge funds, and funds focused on alternative investment strategies, including business development companies (BDCs). His unregistered pooled investment vehicle clients include private funds, bank collective investment trusts (CITs), and companies seeking exemption from investment company status.

Since 2008, *Chambers USA: America's Leading Lawyers for Business* has recognized Timothy for his work.

He speaks frequently at conferences and moderates panels. He also co-chairs the annual Hedge Fund Conference. Timothy is the editor of *Morgan Lewis Hedge Fund Deskbook: Legal and Practical Guide for a New Era* and the *Mutual Fund Regulation and Compliance Handbook*.

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Brian T. London represents mutual funds, exchange-traded funds (ETFs), closed-end funds, private funds, and their investment advisers in US and international legal, regulatory, and transactional matters. His experience extends to work in several areas, including the development and launch of new funds, fund reorganizations, corporate governance matters, and ongoing compliance issues. Additionally, Brian counsels investment adviser clients on the applicability and interpretation of securities laws, including with respect to business combinations, registration and disclosure, and pay-to-play issues.

Jonathan J. Nowakowski



Jonathan J. Nowakowski advises investment companies, investment advisers, and private funds on a variety of regulatory compliance, corporate, and transactional matters. Jon counsels clients in all aspects of their organization, registration, operation, and liquidation.

Before joining Morgan Lewis, Jon served in various compliance, risk management, and legal roles at an international bank and broker-dealer, a large national law firm, and a global investment bank. He also previously held a FINRA Series 7 license.

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Ellen G. Weinstein



Ellen Weinstein focuses her practice on a wide range of securities regulatory issues facing investment advisers, including private investment funds and large financial institutions. She provides counsel to these companies on regulatory compliance, SEC examinations, preparation of policies and procedures, and structure and operations.

While in law school, Ellen served as a legal intern at the US Securities and Exchange Commission and the Consumer Financial Protection Bureau. Prior to joining Morgan Lewis, Ellen worked at a leading cryptocurrency exchange, focusing on emerging regulatory and compliance issues in the fintech space.

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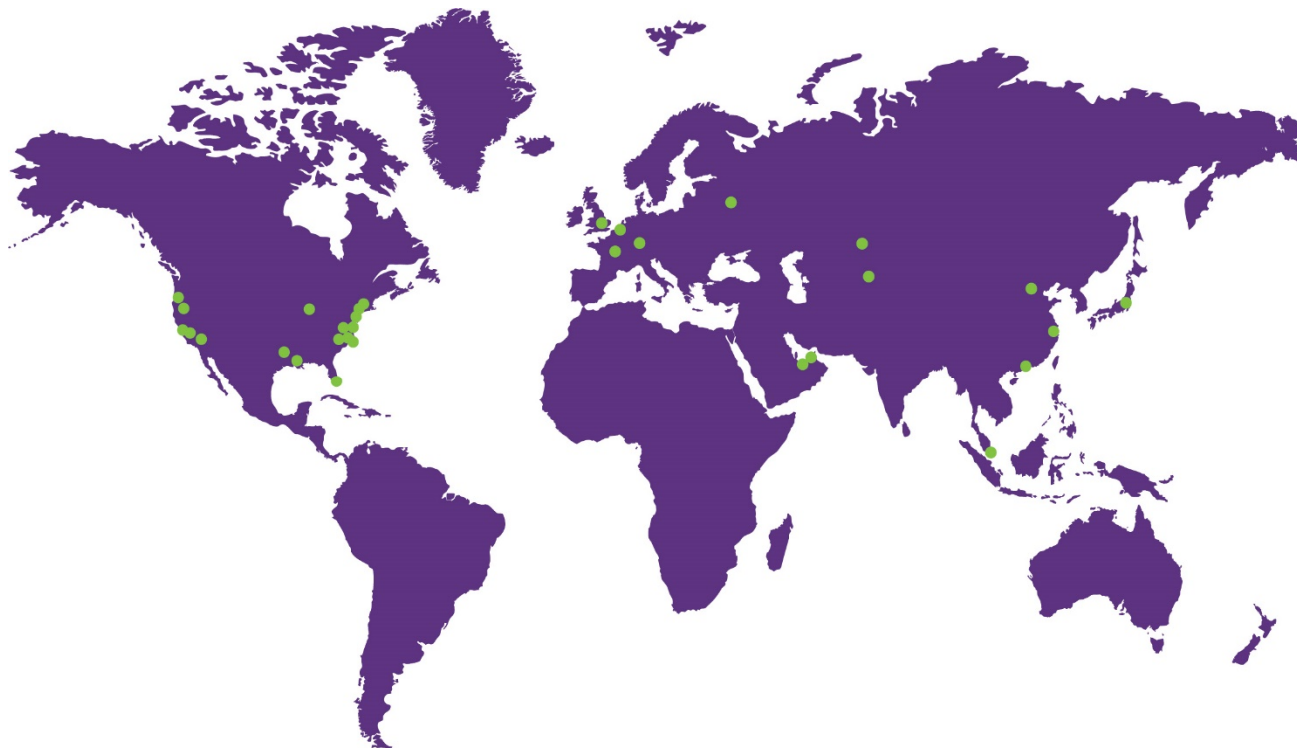
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