

COVID-19 NEWS OF INTEREST

SEC Staff Provides No-Action Relief to Temporarily Extend Benefits of Rule 17a-9 Under the 1940 Act to Additional Affiliates and Funds

April 2, 2020

AUTHORS

Elliot J. Gluck | Neesa P. Sood

On March 19, 2020 and March 26, 2020, the staff of the Securities and Exchange Commission (the “SEC”) issued two letters to the Investment Company Institute (the “ICI”) providing no-action relief with respect to certain purchases of securities from registered open-end investment companies (“Funds”) by affiliated persons of such Funds (or affiliated persons of such persons) (“Affiliates”) that would not otherwise be permitted by Section 17(a) of the Investment Company Act of 1940 (the “1940 Act”) or Rule 17a-9 thereunder.¹ The ICI requested the relief because of the significant securities market disruptions caused by the COVID-19 outbreak.

Background

Rule 17a-9 provides an exemption from the prohibitions of Section 17(a) of the 1940 Act to permit an Affiliate of a Fund that holds itself out as a money market fund (a “Money Market Fund”) to purchase distressed and non-distressed securities from the Money Market Fund. The relief provided by Rule 17a-9 is not available with respect to Funds that are not Money Market Funds. In addition, as a result of certain conditions of Rule 17a-9, Affiliates of Money Market Funds that are subject to Sections 23A and 23B of the Federal Reserve Act (the “FRA”) may not rely on Rule 17a-9 to purchase

¹ Investment Company Institute, SEC No-Action Letter (Mar. 19, 2020), available [here](#), and Investment Company Institute, SEC No-Action Letter (Mar. 26, 2020), available [here](#).

SEC Staff Provides No-Action Relief to Temporarily Extend Benefits of Rule 17a-9 Under the 1940 Act to Additional Affiliates and Funds

securities from Money Market Funds because of conflicting regulations to which they are subject (e.g., Sections 23A and 23B of the FRA and Regulation W).²

The COVID-19 outbreak has caused short-term dislocation in the market for money market securities and various types of debt securities. In light of the dislocation, Affiliates of Funds may wish to purchase securities from the Funds in an effort to enhance Fund liquidity (and stability in the case of Money Market Funds), but may not be able to do so in reliance on Rule 17a-9.

Extension of Rule 17a-9 Relief for Purchases of Securities from Money Market Funds by Certain Affiliates

In its March 19, 2020 letter (“March 19 Letter”), the SEC staff stated that it would not recommend enforcement action to the SEC against any Money Market Fund, or any Affiliate of the Money Market Fund that is subject to Sections 23A and 23B of the FRA, under Section 17(a) of the 1940 Act or Rule 17a-9 thereunder, if the Affiliate purchases securities from the Money Market Fund under the circumstances and subject to the conditions set out below:

1. The purchase price of the purchased security would be its fair market value as determined by a reliable third-party pricing service.
2. The purchase satisfies the conditions of Rule 17a-9 under the 1940 Act except to the extent that the terms of such purchase would otherwise conflict with (i) applicable banking regulations or (ii) the exemption issued by the Board of Governors of the Federal Reserve System on March 17, 2020, defining “covered transaction” for purposes of Section 23A of the FRA to not include the purchase of assets from an affiliated Money Market Fund.
3. The Money Market Fund timely files Form N-CR reporting such transaction under Part C of such Form, and reports in Part H of such Form that the purchase was conducted in reliance on the March 19 Letter.
4. The relief provided by the March 19 Letter shall be in effect on a temporary basis, and will cease to be in effect upon notice from the SEC staff.

Extension of Rule 17a-9 Relief for Purchases of Debt Securities from Mutual Funds by Affiliates

In its March 26, 2020 letter (“March 26 Letter”), the SEC staff stated that it would not recommend enforcement action to the SEC against any Fund that is not an exchange-traded fund and that does not hold itself out as a Money Market Fund (each, a “Mutual Fund”), or any Affiliate of the Mutual Fund that is not a registered investment company, under Section

² Sections 23A and 23B of the FRA impose certain restrictions on a bank’s loans to, purchase of assets from, and certain other transactions with, affiliates. Regulation W promulgated by the Board of Governors of the Federal Reserve System implements Sections 23A and 23B of the FRA.

SEC Staff Provides No-Action Relief to Temporarily Extend Benefits of Rule 17a-9 Under the 1940 Act to Additional Affiliates and Funds

17(a) of the 1940 Act, if the Affiliate purchases debt securities from the Mutual Fund under the circumstances and subject to the conditions set out below (which conditions are in general accordance with those set out in Rule 17a-9(b)):

1. The purchase price for the debt security is paid in cash.
2. The price of the purchased debt security is its fair market value under Section 2(a)(41) of the 1940 Act, provided that this price is not materially different from the fair market value of the debt security indicated by a reliable third-party pricing service.
3. In the event that the Affiliate thereafter sells the purchased debt security for a higher price than the purchase price paid to the Mutual Fund, the Affiliate shall promptly pay to the Mutual Fund the amount by which the subsequent sale price exceeds the purchase price paid to the Mutual Fund. If the Affiliate is subject to Sections 23A and 23B of the FRA, 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.
4. Within one business day of the purchase of the debt security, the Mutual Fund must publicly post on its website and inform the SEC staff via email to IM-EmergencyRelief@sec.gov stating the name of the Mutual Fund, the name of the Affiliate, the debt security(s) purchased (including a legal identifier if available), the amount purchased, and the total price paid.
5. The relief provided by the March 26 Letter shall be in effect on a temporary basis, and will cease to be in effect upon notice from the SEC staff.

In addition to the issuance of the March 19 Letter and March 26 Letter, other measures have been taken by regulators to assist Funds in meeting demands for redemptions and to stabilize the financial markets generally, including the establishment of a money market mutual fund facility by the Federal Reserve System³ and the ability for Funds (that are not Money Market Funds) to obtain short-term lending.⁴

³ See COVID-19 News of Interest – Federal Reserve and U.S. Treasury Seek to Bolster Money Market Funds (Mar. 23, 2020), available [here](#).

⁴ See COVID-19 News of Interest – SEC Provides Relief for Registered Funds to Obtain Short-Term Funding (Mar. 26, 2020), available [here](#).

SEC Staff Provides No-Action Relief to Temporarily Extend Benefits of Rule 17a-9 Under the 1940 Act to Additional Affiliates and Funds

Willkie has multidisciplinary teams working with clients to address coronavirus-related matters, including, for example, contractual analysis, litigation, restructuring, financing, employee benefits, SEC and other corporate-related matters. Please click [here](#) to access our publications addressing issues raised by the coronavirus. For advice regarding the coronavirus, please do not hesitate to reach out to your primary Willkie contacts.

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

Elliot J. Gluck
212 728 8138
egluck@willkie.com

Neesa P. Sood
202 303 1232
nsood@willkie.com

Copyright © 2020 Willkie Farr & Gallagher LLP.

This alert is provided by Willkie Farr & Gallagher LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This alert may be considered advertising under applicable state laws.

Willkie Farr & Gallagher LLP is an international law firm with offices in New York, Washington, Houston, Palo Alto, San Francisco, Chicago, Paris, London, Frankfurt, Brussels, Milan and Rome. The firm is headquartered at 787 Seventh Avenue, New York, NY 10019-6099. Our telephone number is (212) 728-8000 and our fax number is (212) 728-8111. Our website is located at www.willkie.com.