

Compliance with Exemptive Orders

In June 2011, the Securities and Exchange Commission's Office of Inspector General transmitted its final report detailing, among other things, the results of its review of the Commission's oversight of compliance with the representations and conditions of exemptive orders (OIG Report).¹ The OIG Report detailed certain examples of firms that failed to comply with the representations and conditions of exemptive orders and made recommendations that are intended to enhance the Commission's oversight of compliance with representations and conditions in exemptive orders.² In connection with these findings and recommendations, we are issuing the following guidance.³

Rule 206(4)-7 under the Investment Advisers Act of 1940 (Advisers Act), in relevant part, requires investment advisers to adopt and implement written policies and procedures reasonably designed to prevent violation of the Advisers Act and the rules thereunder and to annually review the adequacy of those policies and procedures and the effectiveness of their implementation. Rule 38a-1 under the Investment Company Act of 1940 (1940 Act), in relevant part, requires funds to adopt and implement written policies and procedures reasonably designed to prevent the fund from violating the federal securities laws, to obtain board approval of such policies and procedures, and to annually review the adequacy of the policies and procedures of the fund. Rule 206(4)-7 and rule 38a-1 do not enumerate specific required elements of the policies and procedures, but allow compliance programs to be tailored to the nature and scope of the entity's own business.⁴

Entities that receive and rely upon exemptive orders are at risk of violating the federal securities laws if they fail to comply with the representations and conditions of such orders. Thus, the consequences of non-compliance may be severe. One way for such entities to address such risk is to adopt and implement policies and procedures, in accordance with rule 206(4)-7 or rule 38a-1, that are reasonably designed to ensure ongoing compliance with each representation and condition of the order. For example, a fund may have received an order that includes conditions relating to board review. The fund could consider adopting a specific policy or procedure to address the required board review. Alternatively, the fund could consider whether an existing policy or procedure relating to board review of other matters would incorporate the specific board review required by



the particular condition. As with all policies and procedures under the compliance rules, the adequacy and effectiveness of implementation of any such policy should be reviewed at least annually, in an effort to ensure ongoing compliance with such conditions.

Endnotes

- 1 SEC Office of Inspector General, *Oversight of and Compliance With Conditions and Representations Related to Exemptive Orders and No-Action Letters*, Report No. 482 (June 29, 2011) available at: <http://www.sec-oig.gov/Reports/AuditsInspections/2011/482.pdf>.
- 2 OIG Report pp. 24-29.
- 3 In addition, the National Exam Program announced that an investment adviser-investment company examination focus area for 2013 is compliance with exemptive orders. See National Exam Program: Examination Priorities for 2013 (February 21, 2013) available at: <http://www.sec.gov/about/offices/ocie/national-examination-program-priorities-2013.pdf>
- 4 *Compliance Programs of Investment Companies and Investment Advisers*, SEC Release Nos. IA-2204, IC-26299 (Dec. 17, 2003) available at: <http://www.sec.gov/rules/final/ia-2204.htm>.

This IM Guidance Update summarizes the Commission staff's views regarding various requirements of the Investment Company Act of 1940 and/or the Investment Advisers Act of 1940. Future changes in laws or regulations may supersede some of the discussion or issues raised herein. This IM Guidance Update is not a rule, regulation or statement of the Commission, and the Commission has neither approved nor disapproved of this IM Guidance Update.

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