

November 26, 2019

Ms. Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: Amendments to Procedures with Respect to Applications Under the Investment Company Act of 1940 (File No. S7-19-19)

Dear Ms. Countryman:

The Investment Company Institute¹ strongly supports the Securities and Exchange Commission's proposal to ease burdens on funds seeking exemptive relief from certain aspects of the Investment Company Act of 1940 ("Investment Company Act").² We believe the proposal will promote modernization, foster certainty, and greatly improve what is often a costly and time-consuming, administrative process for the fund industry. We also provide recommendations to further enhance the proposal's utility.

¹ The Investment Company Institute (ICI) is the leading association representing regulated funds globally, including mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and similar funds offered to investors in jurisdictions worldwide. ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. ICI's members manage total assets of US\$23.7 trillion in the United States, serving more than 100 million US shareholders, and US\$7.1 trillion in assets in other jurisdictions. ICI carries out its international work through ICI Global, with offices in London, Hong Kong, and Washington, DC.

² See *Amendments to Procedures With Respect to Applications Under the Investment Company Act of 1940*, Investment Company Act Release No. 33658 (Oct. 18, 2019) ("Proposal" or "Proposing Release"), available at <https://www.sec.gov/rules/proposed/2019/ic-33658.pdf>.

I. Executive Summary

The Commission's authority to exempt funds from aspects of the Investment Company Act is critical to the development of innovative financial products and the evolution of the fund industry. As one of the original drafters of the Investment Company Act wrote in 1941,

“[w]ithout these exemptive powers and without a wise exercise of discretion thereunder, the Act would be unworkable, unduly restrictive, and would cause unnecessary hardships.”³

As the Commission acknowledges, however, delays in the exemptive process impede not only industry innovation but even well-established investment company practices that require individual firms to seek their own exemptive orders, despite the Commission already having considered and granted orders, with similar facts and conditions, to other firms.

We therefore applaud the Commission's proposal to make the process for obtaining exemptive relief more efficient and less costly. We provide a few recommendations to further the proposal's objectives, as summarized immediately below:

- We support streamlining the consideration of requests for exemptive relief through an expedited review process. We recommend that the Commission improve the process further by expanding eligibility for expedited review and narrowing the timeframe for staff to review application amendments.
- We generally support the Commission's proposal to provide a non-binding timeframe for review of exemptive order applications that do not meet the expedited review requirements. We believe, however, that the Commission should better define the timeframes generally, and particularly with respect to review of amended applications.
- We do not support publishing, through the EDGAR Public Dissemination Service, staff comments on and applicant responses to exemptive applications. We believe that this aspect of the proposal will impede industry innovation and unnecessarily increase burdens on staff and applicants.⁴

³ Jaretski, *The Investment Company Act of 1940*, 26 Wash. U. L.Q. 303, 304 (1941).

⁴ We recognize that currently certain information already may be made public pursuant to Freedom of Information Act (“FOIA”) requests. We further recognize that if the rule is adopted as proposed, applicants still would be able to submit requests for confidential treatment. The Commission also proposes to amend rule 0-5 to deem an application withdrawn if the applicant does not respond in writing to staff comments. While we do not have any recommendations regarding this aspect of the proposal, we request clarification of how the Commission would treat an application that the staff requests to be withdrawn and an applicant declines to withdraw under this amended rule.

II. Expedited Review

We applaud the Commission's proposal to establish an expedited review procedure for routine applications for exemptive relief.⁵ Establishing an expedited process is an idea that the Institute has long supported.⁶ We recommend, however, that the Commission refine its approach to make the expedited process more efficient and effective for applicants and staff.

A. Expand Eligibility for Expedited Review

We recommend that the Commission ease the expedited review process in order to make the process more workable for applicants. As discussed below, the Commission can meet its goal of allowing the procedure for only "routine" applications without a few of the proposed requirements. Further, the proposed list of requirements risks allowing very few applications to qualify for the expedited review process, diminishing its expected benefits for both staff and applicants.⁷

We recommend that the Commission expand eligibility for expedited review to applications with prior precedent within the past five, rather than two, years. A review of the lines of exemptive relief that the Commission publishes on its website shows that many lines of relief do not include two orders between the period of December 2017 through November 2019.⁸ While not entirely clear, this lack of precedent may be due to applicants infrequently requesting a certain type of relief, or because of the lengthy process. In any event, because many lines of exemptive relief may not have enough prior precedents within two years, very few types of applications will be eligible for expedited review. Five

⁵ We specifically support the Commission's proposal for a fund to identify two prior precedents upon which its own request for relief is based. We think two prior precedents demonstrate that a line of relief is established while minimizing burdens on applicants. We also support proposed procedures for additional information that the Commission would require applicants to provide in cover letters and exhibits to applications. We do not believe such additional information would be unduly burdensome.

⁶ See Letter from Angela C. Goelzer, Associate Counsel, ICI, to Jonathan G. Katz, Secretary, SEC, dated June 28, 1993, available at <https://www.ici.org/pdf/4942.pdf>.

⁷ We request that the Commission identify in detail any information in an application other than the requested relief and the registrant-provided conditions that must be substantially identical to prior precedent to meet the "substantially identical" requirement. We request that the Commission clarify the use of the word "terms" in the requirement that an application for exemptive relief must contain "identical terms and conditions" as prior precedent. Exemptive orders typically grant relief subject to a set of conditions that applicants provide in their applications. Applicants, however, typically do not include "terms" in their application.

⁸ See <https://www.sec.gov/rules/icreleases.shtml>. Notable exceptions with plentiful orders in the past two years are applications for relief for exchange-traded funds and for funds-of-funds. The Commission recently adopted an ETF rule and proposed a fund-of-funds rule. Because Commission rulemaking presumably eliminates the need for some or all exemptive relief for exchange traded funds or funds-of-funds (if the proposal is adopted), then it is not clear how many lines of exemptive application would be eligible for the expedited review process.

years of prior precedent would allow a greater number of applicants to seek expedited exemptive relief while also allowing for only relatively recent orders to form the basis for relief.

We also request that the Commission clarify that an application for expedited review may contain conditions that are substantially identical in all *applicable* respects with those set forth in prior precedent. Limiting the expedited process to applications “differing only with respect to factual differences that are not material to the relief requested” treats all other conditions as *per se* essential.⁹ We question whether this is appropriate in all cases. For example, some applications will include conditions relating to an applicant’s affiliates. That condition may be applicable for the initial, but not subsequent, applicants with different corporate structures. However, for purposes of the expedited review process, the first applicant’s conditions essentially would be codified.

The Commission instead could require each applicant to explain in its application why particular conditions in prior orders are irrelevant. This would place the burden on the applicant to explain its eligibility for expedited review, both calibrating and ensuring that the conditions, taken as a whole, are consistent with prior precedent.¹⁰

As an alternative, or addition, to the expedited review process, we recommend that the Commission issue standard, generic template conditions for routine or frequently requested applications for exemptive relief. Doing so would reduce significantly burdens for applicants and staff, who could consider modifications to otherwise substantially similar conditions on an expedited basis. Further, we recommend that the Commission periodically codify that exemptive relief in a rule. Exemptive rulemaking obviates the necessity for obtaining individual exemptive relief and the time and expense to registrants and staff to process requests for exemptive relief.

B. Revise the Timeframes for Staff Expedited Staff Review of Amendments

We recommend that the timeframe for the expedited review process be adjusted to achieve greater efficiency while acknowledging the limited staff resources expected to respond to such applications. As such, we support the Commission’s proposal to generally issue a notice for application no later than 45 days from the filing of an application for expedited review. The proposal also provides an exception

⁹ Proposal, *supra* note 2, at 13. The proposal gives examples of factual differences not material to the relief requested, including the applicant’s identity and state of incorporation.

¹⁰ Further, the proposal states that “applicants would not be allowed to ‘mix and match’ relief under the proposed rule...[i.e.,] combine portions or sections of different prior applications.” Proposal, *supra* note 2, at 13, n. 29. We recommend that the Commission allow applications to receive expedited review so long as the relief requested is precedented in one or more orders and the applicant “maps” the requested relief to match the prior precedent. This should provide flexibility and ease the review burden on the staff.

from the 45-day period so that the staff may determine that “the application is not eligible for expedited review or further consideration is necessary.”

We believe, however, the timeframes that the Commission proposes for staff to review unsolicited amendments to applications should be revised. Applicants sometimes amend applications to correct or update factual information that is immaterial to the legal analysis or request for relief.¹¹ We agree that the staff needs additional time to review an application after such an unsolicited amendment, but a 45-day restart would not be necessary in every case. We recommend that instead the Commission establish a 14-day pause for immaterial unsolicited amendments, and only allow restarting the timeframe for material unsolicited amendments. Such a pause would be consistent with the timeframe that the Commission proposes for reviewing solicited amendments.

III. Timeframe for Standard Review

The Commission proposes a timeframe for standard review of exemptive relief applications. The non-binding timeframe externalizes the staff’s own recent internal guidance to “take action” on applications within 90 days, subject to 90-day extensions. We strongly support the Commission providing transparency on the general timeframe for staff action. The proposal benefits applicants by providing certainty and setting expectations for resolving pending questions.

The Commission’s policy goals in proposing the timeframe are undermined, however, by not actually requiring that the staff take action on an application within 90 days.¹² Unlike the proposed rule for the expedited review process, which enumerates a list of staff or Commission actions that must take place within 45 days, the standard timeframe lacks this precision. We therefore recommend that any final rule require staff action or communication to the applicant to occur within 90 days.¹³

Similarly, the proposed rule allows the staff to grant itself 90-day extensions upon notice to the applicant. We question whether the intent and effectiveness of the proposed rule may be compromised if the staff has the flexibility to grant itself unlimited 90-day extensions. We therefore recommend that the Commission enumerate the circumstances upon which the staff can grant itself 90-day extensions, similar to the proposed expedited review process rule. Alternatively, or additionally, the Commission could provide the Division of Investment Management Director, in Rule 0-5, the ability to grant

¹¹ Examples of immaterial amendments include clean up edits, organizational edits, and changes or additions to facts that do not change the conditions of relief.

¹² Proposed rule 202.13(a) states only that the Division staff “should” take action.

¹³ We also recommend that any such required actions or communications include providing applicants with substantive status updates on their applications, such as whether the Division of Investment Management has shared an application with another Division.

extensions on matters not enumerated, but substantially similar to those described in the rule. The recommended approach would provide some, but not unlimited, flexibility.

We further recommend that the Commission require the Director of the Division of Investment Management to review and/or approve additional extensions beyond the first 90-day extension. The recommended approach would allow the Commission to establish guardrails which should facilitate greater certainty for staff and applicants alike.

Finally, the proposed rule does not address the timeframe for staff review of application amendments. Similar to our recommendations for the expedited review process, the staff should have a circumscribed period of time to review amendments, depending on the materiality of the amendments. We recommend:

- For staff-solicited amendments, staff should have 14 business days to review. This period should be sufficient because the staff recommended the amendment.
- For immaterial unsolicited amendments, staff should also have 14 business days to review.
- For material unsolicited amendments, staff should have 90 business days to review.

IV. Publishing Staff Comments and Applicant Responses on EDGAR

Staff comments and related applicant responses regarding an exemptive application are not publicly released today. Rather, an interested person must file a FOIA request with the Commission requesting that information. The Commission proposes to change this by publishing on EDGAR staff comments and applicant responses on exemptive applications 120 days after the application's "final disposition."¹⁴

A. EDGAR Publication Adds Burdens and Stifles Innovation

Exemptive applications by their nature promote complex, nascent, or experimental ideas. Such applications benefit from fulsome and unrestricted communications between funds and staff – for example, to resolve confusion, understand complicated products, or modify ideas to better align with regulation or interpretation. We are concerned that proactively releasing communications between staff and applicants on novel applications would discourage innovation in the fund industry and thwart open dialogue between funds and staff. We therefore recommend that the Commission eliminate or revise its approach in any final rule.¹⁵

¹⁴ Such information would be available unless those applications are subject to confidential treatment requests.

¹⁵ Further, we question the benefit to publishing staff comments and applicant responses on withdrawn applications. Because there are a myriad of business or other reasons for an applicant to withdraw an application, staff comments on many applications that do not proceed to a Commission or staff decision-making stage are unlikely to have any benefit as precedent to investors or market participants.

One example of the potential effect on innovation would be an applicant submitting an initial application for a novel concept but withdrawing the application to further develop the idea. In return for its investment of intellectual and financial capital, the applicant should be rewarded for innovation by being the first in the market with a new product or practice, supported by dialogue with staff. The release of staff comments on the initial application 120 days after withdrawal, however, would allow other firms a “free-riding” advantage to be able to exploit that information to the detriment of the initial applicant.¹⁶

Further, in order to protect their nascent or sensitive ideas, applicants will be more likely to submit confidential treatment requests for all materials they file in connection with any application. An increase in confidential treatment requests will increase burdens on applicants who must take steps to substantiate their requests, and on Commission staff, who will evaluate such requests.

The proposal also is likely to make the exemptive relief process longer and more cumbersome for both staff and applicants as applicants who previously interacted with staff through written communications may shift to request more telephone or in-person meetings with staff in order to limit the release of potentially sensitive dialogues on EDGAR.¹⁷ For funds who limit written communications to protect proprietary information, however, verbal communications may not be as efficient or effective at resolving complex issues as written communications would have been.

Overall, these increased burdens may undermine the time and cost that registrants and staff otherwise would save by using the expedited review process that the Commission proposes.¹⁸

Finally, releasing such information is unlikely to benefit investors. We do not agree with the Commission’s statement that there would be benefit to the public in releasing staff comments and applicant responses to exemptive applications on EDGAR. While the Commission may view the benefits of publishing staff comments on disclosure documents such as investment company registrations as indicative of the benefits of publishing staff comments on exemptive applications, these two models stand in contrast. On the one hand, certain registration statement amendments can

¹⁶ Commission regulations recognize the value of firms being able to protect the development of proprietary ideas. *See* Confidential Treatment Requests Under the Freedom of Information Act, 17 C.F.R. 200.83. Considerations in determining whether to grant a confidential treatment request include “the adverse consequences to a business enterprise, financial or otherwise, that would result from disclosure of confidential commercial or financial information, including any adverse effect on the business’ competitive position,” “the measures taken by the business to protect the confidentiality of commercial or financial information,” and “the ease or difficulty of a competitor’s obtaining or compiling the commercial or financial information.”

¹⁷ We request clarification whether publication on EDGAR is limited to written staff comments and responses, or whether the staff will also memorialize meetings and phone calls with applicants.

¹⁸ *See infra* section II.

become effective automatically whether or not the registrant responds to staff comments.¹⁹ For these registrations, there is benefit to publishing staff comments on EDGAR because there would be no other public record of the staff's views.

Conversely, there is no automatic effectiveness for exemptive order applications – applicants must respond to staff comments by amending their applications to succeed in receiving exemptive relief. Thus, the existing record of amended applications and orders granting or denying an application already serve as fulsome precedent for the issues that the Commission or staff considers in their review. Therefore, publishing staff comments and applicant responses would be superfluous.

Given the limited benefit and great potential costs, we recommend that the Commission not require in any final rule publication of staff comments and applicant responses to exemptive applications on EDGAR.

B. Address Proposed Changes in an Economic Analysis

The Commission does not discuss its proposal to proactively publish staff comments and responses on EDGAR in its economic analysis. Because doing so will burden applicants and affect the future behavior of regulated parties, such a procedural change is not ripe for being proposed for public comment until the Commission considers the costs and benefits in an economic analysis.

The Investment Company Act requires that if

“the Commission is engaged in rulemaking and is required to consider or determine whether an action is consistent with the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.”²⁰

In promulgating such a procedural change that is intended to have an effect on the behavior of regulated parties, agencies should consider any relevant rulemaking requirements.²¹ The Commission

¹⁹ See Securities Act Rule 485(a); see also SEC Division of Investment Management, *Review of Certain Filings Under Automatic Effectiveness Rules*, ADI 2019-07 (Apr. 2, 2019), available at <https://www.sec.gov/investment/accounting-and-disclosure-information/adi-2019-07-review-certain-filings-under-automatic>.

²⁰ Investment Company Act Section 2(c). See also SEC Division of Economic and Risk Analysis, *Current Guidance on Economic Analysis in SEC Rulemakings*, (Mar. 16, 2012), available at https://www.sec.gov/divisions/riskfin/rsfi_guidance_econ_analy_secrulemaking.pdf.

²¹ See, e.g., *Executive Order on Promoting the Rule of Law Through Improved Agency Guidance Documents*, (Oct. 9, 2019), available at <https://www.whitehouse.gov/presidential-actions/executive-order-promoting-rule-law-improved-agency-guidance-documents/> (excluding only internal guidance that is not intended to have a substantial future effect on the behavior of regulated parties from the definition of guidance); see also Office of Management and Budget, *Guidance on*

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proposing to release staff comments and applicant responses will affect behavior, including by increasing requests for confidential treatment and changing the ways in which applicants will engage staff.²² As such, we believe that the Commission should analyze the costs and benefits of this change and the effects it will have on efficiency, competition, and capital formation before implementing the change.

* * *

ICI and its members appreciate the opportunity to comment on the SEC's proposal. If you have any questions with respect to this comment letter, please contact me at (202) 326-5813 or Bridget Farrell at (202) 218-3573.

Sincerely,

/s/ Susan Olson

Susan Olson
General Counsel

cc: The Honorable Jay Clayton
The Honorable Robert J. Jackson
The Honorable Hester M. Peirce
The Honorable Elad L. Roisman
The Honorable Allison Herren Lee

Dalia O. Blass
Director, Division of Investment Management

Compliance with the Congressional Review Act, (Apr. 11, 2019), available at <https://www.whitehouse.gov/wp-content/uploads/2019/04/M-19-14.pdf> (stating that the Congressional Review Act “applies to all Federal agencies, including the historically independent agencies” and promoting “more consistent compliance ... across the Executive Branch.”).

²² See *infra* section IV.A.