

MEMO# 23053

November 5, 2008

SEC Adopts Rules Mandating Edgar Filing of Exemptive Applications

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TO: CLOSED-END INVESTMENT COMPANY MEMBERS No. 58-08
ETF ADVISORY COMMITTEE No. 34-08
INVESTMENT ADVISER MEMBERS No. 18-08
SEC RULES MEMBERS No. 134-08
SMALL FUNDS MEMBERS No. 69-08
UNIT INVESTMENT TRUST MEMBERS No. 12-08 RE: SEC ADOPTS RULES MANDATING
EDGAR FILING OF EXEMPTIVE APPLICATIONS

The Securities and Exchange Commission has adopted several rule amendments relating to its Electronic Data Gathering, Analysis and Retrieval ("EDGAR") system, including a requirement that exemptive applications under the Investment Company Act of 1940 must be submitted electronically through EDGAR. [\[1\]](#) Regulation E filings by small business development companies and business development companies must be similarly submitted. The amendments, which are briefly summarized below, will become effective on January 1, 2009.

Mandatory Electronic Submission of Exemptive Applications

All applications for exemptive orders under the Investment Company Act filed on or after January 1 will have to be submitted electronically through the EDGAR system. Applicants will be subject to the provisions of Regulation S-T (General Rules and Regulations for Electronic Filings) and the EDGAR Filer Manual. In accordance with Regulation S-T, any

amendments to an application (including amendments to applications initially filed in paper format), related correspondence, and supplemental information will have to be filed through EDGAR. [\[2\]](#) Requests for confidential treatment, however, will continue to be made in paper format.

As discussed in the Release, there will be three submission types for applications: 40-APP, for applications typically processed by the Division of Investment Management's Office of Investment Company Regulation; 40-OIP, for applications typically processed by the Division's Office of Insurance Products; and 40-6B, for employees' securities company applications. The Release explains that the different submission types are designed to facilitate and expedite staff review, by automatically routing applications to the appropriate office. [\[3\]](#)

Ability to Pursue Exemptive Relief on a Confidential Basis

In its comment letter on the Commission's proposal, the Institute emphasized the need for applicants to be able to pursue requests for exemptive relief on a confidential basis, when appropriate. The Institute's letter stated that the proposal did not appear to preclude the submission of draft applications, but asked that the Commission provide clarification on this point. [\[4\]](#)

The Release reaffirms the policy, first stated in a 1985 release, that the Commission staff will review draft applications only "in the most extraordinary situations." The Release explains:

Consistent with this policy, the staff will continue to accept draft applications only in situations where the applicant clearly demonstrates the extraordinary circumstances that necessitate the submission of a draft application. We believe that this approach continues to strike an appropriate balance between encouraging innovation in the fund industry, making effective use of staff resources, and serving the interests of the public. . . . The new filing requirement will only change the format (from paper to electronic) of documents that were and will be publicly available. [\[5\]](#)

Hardship Exemptions from EDGAR Filing Requirements

Regulation S-T contains certain exemptions from EDGAR filing requirements, including: (1) a temporary hardship exemption in Rule 201, which is available in cases of unanticipated technical difficulties that prevent the timely preparation and submission of an electronic copy; and (2) a continuing hardship exemption in Rule 202, which is available

upon application to the Commission in cases where all or part of a filing cannot be made without undue burden or expense. Under the amendments as proposed, the temporary hardship exemption (which is self-executing) would not be available for EDGAR submissions of exemptive applications, based upon the Commission's view that "there is generally no submission exigency or submission deadline associated with these submissions." [6]

The Commission adopted this amendment without change. In response to concerns raised by the Institute, however, the Release clarifies that the Commission staff will continue its current practice of working with applicants who are experiencing unexpected technical or other difficulties to establish appropriate timeframes for the submission of amended applications. [7]

Other Amendments Relating to the Filing of Exemptive Applications

The Commission adopted, without change, its proposed amendments to Rule 0-2 under the Investment Company Act, which governs the form of applications under that Act. The amendments will eliminate: (1) the requirement that all verifications of applications and statements of fact be notarized; and (2) the requirement to include a draft notice as an exhibit to an application.

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endnotes

[1] See Mandatory Electronic Submission of Applications for Orders Under the Investment Company Act and Filings Made Pursuant to Regulation E, SEC Rel. Nos. 33-8981, 34-58874, and IC-28476 (Oct. 29, 2008) (the "Release"). Page numbers in this memorandum refer to the Release as posted on the Commission's website, which is available at <http://www.sec.gov/rules/final/2008/33-8981.pdf>.

[2] Related correspondence and supplemental information are not automatically disseminated publicly through the EDGAR system but are immediately available to the Commission staff. Release at n.31.

[3] Applicants may contact the IM EDGAR Inquiry Line (202/551-6989) for assistance in determining the appropriate submission type.

[\[4\]](#) For a summary of the Institute's comment letter, see Institute Memorandum 22069, dated Dec. 20, 2007.

[\[5\]](#) Release at 8-9.

[\[6\]](#) Release at 17.

[\[7\]](#) The Institute's letter noted that there typically is a deadline associated with the filing of an amended application, and thus an applicant having filing difficulties may need a short grace period in which to submit an electronic version of its amended application. The letter expressed the Institute's understanding, based on informal discussions with the Commission staff, that applicants who need additional time to file amendments often ask the staff for limited extensions, and that those requests are frequently granted.

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