

MEMO# 32589

July 8, 2020

SEC Adopts Expedited Procedure for Exemptive Order Applications

[32589]

July 8, 2020 TO: ICI Members
Closed-End Investment Company Committee
ETF (Exchange-Traded Funds) Committee
SEC Rules Committee
Small Funds Committee SUBJECTS: Compliance
Disclosure
Exchange-Traded Funds (ETFs)
Operations RE: SEC Adopts Expedited Procedure for Exemptive Order Applications

On July 6, the Securities and Exchange Commission adopted new procedures for Division of Investment Management staff to use in reviewing applications for exemptive relief under the Investment Company Act of 1940.[\[1\]](#) The Commission adopted the procedures largely as proposed but did not adopt its additional proposal to publicly disseminate staff comments on applications, pending further consideration. This memorandum provides brief background information and summarizes the Commission's rulemaking.

Background

In October 2019, the Commission proposed procedures for expedited review of exemptive relief applications that are substantially identical to relief that it had recently granted. For all other applications, the Commission proposed staff "should take action" within 90 days of an initial application or amendment under standard review procedures. The Commission also proposed to make public staff comments on applications and responses through EDGAR 120 days after final disposition of the application.

ICI filed a comment letter supporting the Commission's proposal as a whole and providing recommendations to further enhance the proposal's utility for registered funds.[\[2\]](#) Particularly, ICI recommended that the Commission expand eligibility for expedited review and narrow the timeframe for staff to review application amendments; better define the timeframes for standard review of exemptive order applications; and eliminate its proposal to publish staff comments on and applicant responses to exemptive applications on EDGAR.

Final Adopted Procedures

The final rulemaking largely adopted the Commission's proposals, with targeted revisions, including some in response to ICI's comments.

Expedited Review Process

Largely consistent with its proposal, the Commission adopted an expedited staff review of routine applications that are "substantially identical" to two other applications for which the Commission has granted exemptive relief.^[3] In general, applications that meet the expedited review requirements would receive a notice of application no later than 45 days from the filing of the application.

"Substantially identical" applications are those that both request the same relief and contain identical terms and conditions as two prior precedents, with only differences of non-material facts.^[4] Identical terms and conditions must have not only identical substance, but also identical wording. The Commission declined to allow applicants to "mix and match" and use portions or sections of different prior applications as precedent.^[5]

In response to comments, including ICI's, the Commission expanded the timeframe that an applicant may look back to identify identical precedent from the proposed two years to three years. The Commission, however, imposed a requirement that applicants explain their choice of precedent in a cover letter. Particularly, if more recent precedents are available, the applicant must explain why it did not use the more recent precedents.

The Commission also adopted requirements that an expedited review applicant must note on its application cover page that it is requesting expedited review, include the two substantially identical applications that serve as precedent as exhibits, and submit marked copies of its application against the two prior precedents. The applicant must certify that it believes the application meets the requirements of expedited review and that the marked copies comparing the application to prior precedent are complete and accurate.

If the application meets the expedited review requirements, the Commission will issue a notice of application no later than 45 days from the filing of the application.^[6] Under some circumstances, however, the 45-day period will pause and restart upon the applicant filing an amendment to the application, to allow time for staff review. For amendments that the staff does not solicit, the time frame for staff review is 30 days, after which any remaining time on the 45-day review period resumes. Amendments solicited by the staff will also pause the 45-day period. For such solicited amendments, the 45-day period will resume 14 days after the filing of an amended application that is responsive to staff request.

Standard Review Timeframe

The Commission adopted a standard review process for staff to act upon applications that do not meet the criteria for expedited review.^[7] Largely as proposed, the standard review process provides that staff "should" take action on a non-expedited application within 90 days of an initial filing or any amendments. In addition, the staff may grant itself 60-day extensions, with notice to applicants.

Staff action within the timeframe would include issuing a notice of application, providing comments on an application, or informing an applicant that the staff is forwarding an application to the Commission for its review. The staff also typically would notify an applicant if it recommends that the Commission deny an application to give an applicant

opportunity to withdraw its application.

In response to comments, including ICI's, about the timeframe for staff review of amendments to applications, the Commission slightly shortened the timeframe for review of any amendments subsequent to an application's third amendment to 60, rather than 90, days.

Withdrawn applications

The Commission adopted rule amendments to deem an application withdrawn if the applicant does not respond in writing to staff comments within 120 days.^[8] In response to an ICI request, the Commission clarified that such withdrawals are by operation of law and applicants will not need to take any affirmative action to cause the withdrawal.

Publication of Comments and Responses on EDGAR

In its proposal, the Commission would have required publishing staff comments on applications and applicant responses on EDGAR 120 days after the "final disposition" of an application.^[9] Commenters, including ICI, recommended against such publication as it would thwart open dialogue between applicants and increase the administrative burden on applicants and staff, among other concerns. The Commission stated that while it plans to continue to consider publicly disseminating staff comments and applicant responses, it recognized that commenters raised issues that merit further consideration. Accordingly, the Commission will not require comments and responses will to be disseminated at this time.

Effective Date

The adopted procedures will be effective 270 days after publication in the *Federal Register*.

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endnotes

^[1] *Amendments to Procedures With Respect to Applications Under the Investment Company Act of 1940*, Investment Company Act Release No. 33921 (Jul. 6, 2020), available at <https://www.sec.gov/rules/final/2020/ic-33921.pdf>.

^[2] See ICI Memorandum No. 32064 (Nov. 26, 2019), available at https://www.ici.org/my_ici/memorandum/memo32064.

^[3] See Investment Company Act rules 0-5(d)-0-5(f), *as amended*.

^[4] In response to an ICI request for clarification, the Commission stated that "terms" means representations in an application that are material to the requested relief. Terms are separate and apart from any express conditions included in the application.

^[5] The Commission did not exclude any particular types of Investment Company Act applications from expedited review but stated, based on staff experience, that certain lines of applications generally are too fact specific. The Commission particularly noted

applications filed under sections 2(a)(9), 3(b)(2), 6(b), 9(c), and 26(c) of the Investment Company Act and applications concerning co-investments.

[6] The procedures would also allow staff to notify the applicant that the application does not meet the expedited review requirements or that more time is necessary for further consideration of the application.

[7] See SEC Informal and Other Procedures rule 202.13 *as adopted*. This rule will provide non-binding guideline for Commission staff and is not intended to create enforceable rights.

[8] See Investment Company Act rule 0-5(g), *as amended*.

[9] The Commission currently makes public staff comments and responses through FOIA requests, other than materials for which an applicant has made a confidential treatment request.