

**MEMO# 22030**

December 10, 2007

# **Draft Institute Comment Letter On SEC Proposal To Mandate EDGAR Filings of Exemptive Applications; Comments Requested By Noon On Thursday, December 13**

[22030]

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TO: CLOSED-END INVESTMENT COMPANY COMMITTEE No. 39-07  
INVESTMENT ADVISERS COMMITTEE No. 20-07  
SEC RULES COMMITTEE No. 93-07  
SMALL FUNDS COMMITTEE No. 40-07 RE: DRAFT INSTITUTE COMMENT LETTER ON SEC PROPOSAL TO MANDATE EDGAR FILINGS OF EXEMPTIVE APPLICATIONS; COMMENTS REQUESTED BY NOON ON THURSDAY, DECEMBER 13

As you know, the Securities and Exchange Commission recently published for comment several rule amendments to its Electronic Data Gathering, Analysis and Retrieval ("EDGAR") system, including a requirement that all applications for orders under the Investment Company Act of 1940 must be submitted electronically through EDGAR.\* The Institute's draft comment letter on the proposal is attached and briefly summarized below. Specific questions about possible additional areas for comment are included at the end of this memorandum.

The deadline for filing comment letters with the SEC is this Friday, December 14. If you have comments on the Institute's draft letter, please provide them directly to Rachel Graham by phone (202/326-5819) or email (rgraham@ici.org) by 12:00 pm Eastern time on Thursday, December 13.

The draft letter expresses general support for the proposal, stating that the EDGAR filing requirement should facilitate both the submission of applications and retrieval of those applications by interested parties. It also applauds this effort by the SEC to improve its tracking and processing of exemptive applications. The letter then outlines several specific comments on the proposal.

**Ability to Pursue Exemptive Relief on a Confidential Basis.** The draft letter discusses the need for applicants to be able to pursue requests for exemptive relief on a confidential basis, when appropriate. It explains that, in limited instances, the SEC staff may agree to review an application submitted in draft form, but this approach is often reserved for cases where the information in the draft application, if revealed publicly at the early stages of the staff's review, would be detrimental to the applicant.

The draft letter expresses the Institute's strong belief that the staff's willingness to consider applications in draft form and to grant requests for confidential treatment, when appropriate, is critical to encouraging innovation by the fund industry. It states that the proposal would not appear to preclude the submission of draft applications, but asks that the SEC provide clarification on this point in its adopting release.

**Other Comments.** The draft letter discusses several practical concerns about how the proposal would affect the filing of initial and amended applications, as well as the proposed amendments to Rule 0-2 under the Investment Company Act, which governs the form of applications.

- The draft letter recommends that EDGAR filers of exemptive applications be permitted to rely on Rule 201 of Regulation S-T, which affords a temporary hardship exemption to filers who experience unanticipated technical difficulties. The letter points out that there typically is a deadline associated with the filing of an amended application, and that an applicant's failure to meet this deadline may result in its application being placed on inactive status. It also explains why applicants experiencing such difficulties should be able to rely on the self-executing exemption in Rule 201 and not have to request that the SEC or its staff grant a filing date adjustment under Rule 13(b) of Regulation S-T.
- Under the proposal, applications that request relief from both the Investment Company Act and the Investment Advisers Act of 1940 would have to be filed in separate formats – electronically via EDGAR under the Investment Company Act and in paper form under the Investment Advisers Act. The draft letter states that this approach would appear to place an unnecessary burden on applicants and recommends that the SEC consider alternative approaches, such as allowing a single EDGAR filing with the appropriate cross reference in the SEC's Public Reference Room.
- The draft letter questions why, in the context of an application with multiple co-

applicants, the proposal would require that each applicant be an EDGAR filer. The letter recommends that the SEC consider requiring only the primary applicant to be an EDGAR filer, noting that a similar approach is taken with respect to group members on a Schedule 13G filing made via EDGAR.

- The draft letter expresses support for the proposed amendments to Rule 0-2 under the Investment Company Act, which would eliminate: (1) the requirement that all verifications of applications and statements of fact be notarized; and (2) the requirement that a draft notice be included as an exhibit to an application. It recommends that the SEC further modernize the rule by eliminating the requirement that a copy of any board resolution authorizing the actions of the person signing and filing the application be included as an exhibit to the application (or, alternatively, that the pertinent provisions of such resolution be quoted in the application).

Possible Additional Areas for Comment. We would welcome any feedback you wish to provide on the issues outlined below:

- The proposal does not contain a “grandfather” provision. Accordingly, any amendment to a pending exemptive application that is filed after the effective date of the proposal would have to be filed via EDGAR. It is our understanding from the SEC staff that this approach was taken to ensure uniformity and ease of administration. Are there reasons to request that the SEC include a grandfather provision?
- The SEC requests comment on what the transition period should be for funds and other applicants to prepare for mandatory EDGAR filing of exemptive applications. Should the Institute recommend a particular transition period and, if so, what should the length of that period be (e.g., 30 days, 60 days)? Is a longer transition period necessary if no grandfather provision is allowed?

Rachel H. Graham  
Associate Counsel

[Attachment](#)

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