

MEMO# 32019

October 22, 2019

SEC Proposes New Procedures for Exemptive Order Applications; Call Scheduled for October 29 at 2:00 PM (ET)

[32019]

October 22, 2019

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 Proposes New Procedures for Exemptive Order Applications; Call
Scheduled for October 29 at 2:00 PM (ET)

On October 18, the SEC proposed new procedures for Division of Investment Management staff to use in their review of applications for exemptive relief.^[1] The proposed procedures would establish an expedited review for applications that seek relief that is substantially identical to relief that the Commission has recently granted. For all other applications, the Commission proposes staff should take action within 90 days of an initial application or amendment. Finally, the Commission proposes to make public staff comments on applications and responses through EDGAR 120 days after “final disposition.”

Comments on the proposal are due 30 days after publication in the Federal Register. The Investment Company Institute will be filing a comment letter on the proposal. We will have a call to discuss the proposal and potential comments on October 29 at 2 pm (ET). If you would like to participate in the call, please contact Brenda Turner at bturner@ici.org or 202-326-5820 to receive dial-in information. If you have any questions, please contact Bridget Farrell at bridget.farrell@ici.org.

Expedited Review Process

The Commission proposes an expedited staff review of routine applications that are “substantially identical” to two other applications for which the Commission has granted

exemptive relief within two years of the new application's initial filing.

For purposes of the expedited review, "substantially identical" means applications that both request the same relief and contain identical terms and conditions as two prior precedents, with only differences of non-material facts. Even small changes to terms and conditions would not allow an application to meet the substantially identical requirement.[\[2\]](#)

If the application meets the above requirements, a notice of application would be issued no later than 45 days from the filing of the application. The proposal, however, 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.

Among other requests for comment, the Commission asks:

- Does the proposed 45-day time period strike the right balance between facilitating a prompt review and allowing staff to appropriately review an application? Should the time period be shorter? Should the time period be longer?
- Is the substantially identical standard appropriate? Does it effectively limit the applications eligible for expedited review to routine applications that the staff can review in an expedited manner?

Standard Review Timeframe

For exemptive relief applications that do not meet the criteria for expedited review, the Commission proposes a timeframe for staff to act upon an application.[\[3\]](#) Under the proposed rule, staff "should" take action on a non-expedited application within 90 days of the initial filing or amendments, subject to 90-day extensions.

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.[\[4\]](#)

With respect to the proposed 90-day standard review timeframe, the Commission asks:

- Is the 90-day period for taking action on applications appropriate? Is this period too long? Too short?
- Is the Commission's specification of potential actions on an application appropriate? Does the proposal adequately cover actions on applications that may be taken?

Publication of Comments and Responses on EDGAR

The Commission proposes to make public staff comments on applications and responses on EDGAR 120 days after the "final disposition" of an application.[\[5\]](#)

In this context, "final disposition" would mean that:

- the Commission has issued an order granting or denying the requested relief or
- the applicant has withdrawn the application.

The staff would not make public any materials for which an applicant has made a confidential treatment request.

The Commission asks the following questions about its proposal to make public comments

and responses:

- Is the public dissemination of staff comments to applications, and responses thereto (subject to confidentiality requests) in the public interest? Would this dissemination potentially lead to competitive harm affecting applicants? Would it create undesirable incentives regarding the use of the process for making confidential treatment requests?
- What types of information that applicants currently disclose in comments, if any, would applicants potentially request be kept confidential? How common is such information included in written comments? Do applicants anticipate they would request confidential treatment frequently?

Bridget Farrell
Assistant General Counsel

endnotes

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

[2] The Commission also expects that some types of applications would be too fact-specific to meet the substantially identical requirement, including 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.

[3] Although this proposal would amend current administrative procedures rules, the Commission proposes this timeframe as a non-binding guideline for staff rather than a requirement.

[4] The Commission also proposes to deem any application as withdrawn if the applicant does not respond in writing to staff comments within 120 days.

[5] 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.