

COMMENT LETTER

December 14, 2007

Institute Comment Letter On SEC Proposal To Mandate EDGAR Filing of Exemptive Applications (pdf)

December 14, 2007 Ms. Nancy M. Morris Secretary U.S. Securities and Exchange Commission 100 F Street, N.E. Washington, D.C. 20549-9303 Re: Rulemaking for EDGAR System – Mandatory Electronic Submission of Applications for Orders Under the Investment Company Act and Filings Made Pursuant to Regulation E; File No. S7-25-07 Dear Ms. Morris: The Investment Company Institute¹ appreciates this opportunity to express support for the Commission’s proposal to require that all applications for exemptive orders under the Investment Company Act of 1940 be submitted through the Commission’s Electronic Data Gathering, Analysis and Retrieval (“EDGAR”) system.² Like the Commission, the Institute believes that the proposal will help to facilitate both the efficient submission of applications and the retrieval of those applications by interested parties. We also applaud this effort by the Commission to improve its ability to track and process exemptive applications, which are of vital importance to the fund industry and, ultimately, to fund investors. Following are the Institute’s specific comments on the proposal, which are intended to assist the Commission in making the exemptive applications process as effective and efficient as possible. 1 The Investment Company Institute is the national association of U.S. investment companies, including mutual funds, closed-end funds, exchange-traded funds (ETFs), and unit investment trusts (UITs). ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. Members of ICI manage total assets of \$12.98 trillion and serve almost 90 million shareholders. 2 SEC Rel. Nos. 33-8859, 34-56732, and IC-28042 (Nov. 1, 2007), 72 Fed. Reg. 63513 (Nov. 9, 2007) (“Proposing Release”). Page number citations in this letter reference the Proposing Release as posted on the Commission’s website, which is available at <http://www.sec.gov/rules/proposed/2007/33-8859.pdf>. The Institute likewise supports the proposal’s requirement that small business investment companies and business development companies submit their Regulation E filings via EDGAR. Ms. Nancy M. Morris December 14, 2007 Page 2 of 5 2 Ability to Pursue Exemptive Relief on a Confidential Basis As a general matter, applications for exemptive relief under the Investment Company Act are filed with the Commission before the Commission staff begins to review the applicant’s request for relief. In limited instances, however, the Commission staff may agree to begin its review based upon a draft application that the applicant submits directly to the staff, often in conjunction with a request for confidential treatment under the Freedom of Information Act.³ This approach is often reserved for cases where the information contained in the draft application, if revealed publicly at the early

stages of the staff's review, would be detrimental to the applicant. The Institute strongly believes that the Commission staff's willingness to consider exemptive applications in draft form and to grant requests for confidential treatment, when appropriate, is critical to encouraging innovation in the fund industry. The development of new investment products and more efficient and effective business practices can be a costly and time-consuming endeavor for fund sponsors and other applicants. In return for their investment of intellectual and financial capital, applicants should be rewarded for their innovation and creativity by being the "first to market" with their new product or practice. On its face, the proposal would not appear to preclude the Commission staff from allowing an applicant, when appropriate, to submit its request for exemptive relief in draft form. To provide greater certainty for fund sponsors and other potential applicants, however, the Institute recommends that the Commission provide clarification on this point in its adopting release.

Applications under Both the Investment Company Act and the Investment Advisers Act of 1940 The Proposing Release notes that applicants occasionally may wish to submit an application for an exemption under both the Investment Company Act and the Investment Advisers Act, but states that the Commission is not proposing to require EDGAR filing of applications requesting relief from the Investment Advisers Act. As a result, any applicant requesting relief from both Acts would be required to make separate submissions to the Commission – electronically via EDGAR under the Investment Company Act, and in paper form under the Investment Advisers Act. The Proposing Release fails to explain the Commission's rationale for this approach, which would appear to place an unnecessary burden on applicants and, moreover, to be inconsistent with the Commission's stated goal

3 See Commission Policy and Guidelines for Filing of Applications for Exemption, SEC Rel. Nos. IC-14492 and IA-869 (Apr. 30, 1985) ("1985 Release"). Ms. Nancy M. Morris December 14, 2007 Page 3 of 5 3 of facilitating the efficient submission of applications.⁴ The Institute accordingly recommends that the Commission consider alternative approaches, such as allowing a single EDGAR filing for an application requesting relief under both Acts and requiring the Commission staff to provide a cross reference to the EDGAR filing in the Investment Adviser Act files of the Commission's Public Reference Room. At the very least, the Commission should explain in its adopting release the rationale for its decision to require applicants to make duplicate filings in two different formats.

EDGAR Submission of Amended Applications As discussed in the Proposing Release, a current EDGAR filer (with certain exceptions) may obtain a temporary hardship exemption pursuant to Rule 201 under Regulation S-T if the filer experiences unanticipated technical difficulties that prevent the timely preparation and submission of an electronic filing. The rule allows submission of the filing in paper format, as long as the filer submits an electronic copy to the Commission within six business days. Reliance on this provision requires no prior approval from the Commission or its staff. Under the proposal, the temporary hardship exemption in Rule 201 would be unavailable for EDGAR submissions of exemptive applications under the Investment Company Act. According to the Proposing Release, the rationale for this decision is that "there is generally no submission exigency or submission deadline associated with these submissions."⁵ The Institute agrees with this assessment as it relates to the initial filing of an exemptive application. There typically is, however, a deadline associated with the filing of an amended application. SEC staff comment letters to applicants typically state: "If an amendment is not received within 60 days of this letter, the application will be placed on inactive status. The application may be reactivated at any time by the submission of an amendment responding to our comments." According to the 1985 Release, action on a reactivated application will not date back to the filing of the original application. This language in staff comment letters suggests, then, that an applicant's failure to meet the 60-day deadline would push its application to the back of the line. It is our understanding, based upon informal discussions with the SEC staff, that the

application process is more dynamic, and may involve a greater degree of flexibility, than is suggested by the language from staff comment letters as cited above. We are told that applicants who need additional time to file amendments often ask the staff for limited extensions, and that those requests are frequently granted, consistent with the policies and guidelines outlined in the 1985 Release. In the 4 We note that a number of small registered investment advisers do not make EDGAR filings in the normal course of business and thus imposing on them an EDGAR filing requirement could result in logistical difficulties and added expense. Applications filed under both statutes, however, would not present this set of circumstances, as the registered investment company applicant is already required to file numerous documents on EDGAR. 5 Proposing Release at 14. Ms. Nancy M. Morris December 14, 2007 Page 4 of 5 4 Institute's view, this cooperative approach is to be highly commended, and should be explicitly recognized in the Commission's adopting release. With specific regard to the filing of amended applications on EDGAR, we further recommend that the adopting release acknowledge that the SEC staff would be able, in its discretion, to provide an applicant experiencing unanticipated technical difficulties with a short grace period in which to submit an amendment electronically.6 Modifications to Rule 0-2 The Institute supports the Commission's proposal to modernize Rule 0-2 under the Investment Company Act by eliminating: (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. As suggested in the Proposing Release, neither of these requirements is necessary to assist the Commission or its staff in assessing the legitimacy of an application or in processing the application. In this same spirit, the Institute recommends that the Commission further modernize Rule 0-2 by eliminating from paragraph (c)(1) 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). In our view, this requirement is unnecessary because the person signing the application is required to attest to such resolutions in the verification required by paragraph (d) of the rule. We further note that board resolutions do not have to be submitted with other types of filings with the Commission, such as fund registration statements and proxy statements, nor are we aware of any history of abuse that would suggest this requirement must be maintained. * * * As was intended by Congress, the exemptive application process gives the Commission the flexibility to modify Investment Company Act requirements as necessary to allow for innovation and reflect modern day business realities while continuing to afford strong protections for investors. We 6 The Proposing Release appears to foreclose this possibility, by mentioning only that applicants could request a continuing hardship exemption under Rule 202 of Regulation S-T or a filing date adjustment under Rule 13(b) of Regulation S-T. Proposing Release at 14-15. Neither of these avenues, however, may be appropriate for all filers that experience unanticipated technical difficulties. A continuing hardship exemption under Rule 202 is available only if the applicant cannot submit all or part of an application without undue burden or expense. In the case of a filing date adjustment under Rule 13(b), the technical difficulties must be beyond the filer's control. Ms. Nancy M. Morris December 14, 2007 Page 5 of 5 5 believe that this proposal, coupled with the minor modifications as suggested above, would improve the efficiency and effectiveness of the application process.7 The Institute appreciates this opportunity to comment on the Commission's proposal. If you have any questions about our comments or would like additional information, please contact me at 202/326-5815, Robert C. Grohowski at 202/371-5430 or Rachel H. Graham at 202/326-5819. Sincerely, /s/ Karrie McMillan Karrie McMillan General Counsel cc: Andrew J. Donohue, Director Ruth Armfield Sanders, Senior Special Counsel (EDGAR), Office of Legal and Disclosure Nadya Roytblat, Assistant Director, Office of Investment Company

Regulation Keith Carpenter, Senior Special Counsel, Office of Insurance Products Division of Investment Management 7 We do not agree, however, with the suggestion in the Proposing Release that making exemptive applications available to the public via EDGAR would “improve investors’ ability to make informed investment decisions.” Proposing Release at 25. The notion that average investors would choose to access and review exemptive applications is inconsistent with investors’ expressed preference for concise and understandable information about the mutual funds in which they may invest. See Investment Company Institute, *Understanding Investor Preferences for Mutual Fund Information* (Aug. 2006), which is available at http://www.ici.org/stats/res/rpt_06_inv_prefs_full.pdf. This report, which was based on in-person interviews with more than 700 investors, also found that a majority of the investors consider fund prospectuses and annual reports to be too long and difficult to understand. Given that finding, it is unlikely that these investors would view exemptive applications – which are technical legal documents containing little information relevant to a decision whether to invest in a particular fund or fund family – any differently.

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