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The SEC Exemptive Process 2.0

By Robert A. Robertson and Joseph P. Kelly, II

Since the enactment of the Investment Company Act of 1940 (Investment Company Act) and the Investment Advisers Act of 1940 (Advisers Act), the authority of the Securities and Exchange Commission (SEC or Commission) to grant relief from certain statutory provisions has played an important role in the regulation of the investment management industry. The Commission may issue an order granting an exemption from particular legal prohibitions, approve specified types of transactions, or make certain legal declarations. Because many of the applications for these orders involve requests for exemptive relief, the orders are commonly referred to as "exemptive orders."

This article updates an earlier *Investment Lawyer* article on exemptive applications published in the mid-1990s. Since that time, the exemptive process has evolved to be more efficient. Most notably, the SEC recently adopted expedited review procedures to more quickly process "routine applications."[1] Therefore, the time is right to update the prior article.[2]

The Statutory Framework

The Investment Company Act authorizes the SEC to issue orders granting relief from specific statutory provisions in at least 33 separate instances.[3] However, the SEC's broadest exemptive powers with respect to investment company regulation are set forth in Section 6(c) of the Investment Company Act. Section 6(c) provides that the Commission:

> by order upon application, may conditionally or unconditionally exempt any person, security, or transaction... from any provision… of [the Investment Company Act]… if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of [the Act].

According to one of the statute's principal authors, David Schenker, the provision recognizes "the technical nature of this business and... the difficulty of making provisions for regulating an industry which has so many variants and so many different types of activities...."[4] The Advisers Act, which governs investment advisers, contains a provision that is virtually identical to Section 6(c).[5]

Even though Section 6(c)'s language is broad, the SEC uses its power "with circumspection."[6] In the Commission's view, "the propriety of granting an exemption largely depends upon the purposes of the section from which an exemption is requested, the evils against which it is directed, and the end which it seeks to accomplish."[7]

The legal consequences of an exemptive order are generally to shield an applicant from liability that

may otherwise result from engaging in the activity described in the application. Section 38(c) of the Investment Company Act specifically provides that, "[n]o provision of this [Act] imposing any liability shall apply to any act done or omitted in good faith in conformity with any... order of the Commission...." The Advisers Act has an identical provision.[8]

However, the US District Court stated in *Entel v. Allen* that Section 38(c) is inapplicable in situations where an exemptive order is obtained through fraudulent statements or omissions in an application.[9] In addition, an applicant would be liable for making an untrue statement of a material fact or omitting to state a fact that makes the statements made in the application materially misleading.[10]

Pre-Filing Considerations

Is SEC Action Necessary?

Only proposed activities that arguably are prohibited by the Investment Company Act or the Advisers Act are appropriate for an exemptive application. The SEC's Division of Investment Management (Division) occasionally receives applications that request relief from a specific section or rule for a transaction that, in the Division's opinion, does not implicate that provision. In these situations, the Division may ask the applicant to remove that particular request for relief or amend the application to further explain why relief is necessary.

Of course, it is not always clear if a specific statutory provision or rule is implicated. In researching these issues, counsel should consider the specific legal provision, any relevant legislative history, case law, Division no-action and interpretive letters, SEC releases, and, most importantly, prior exemptive orders. Summaries of applications are published in the *Federal Register*, and are available on the SEC Website and through other online services. In addition, counsel may obtain comment letters that the Division sends to applicants, and responses to those comments, through Freedom of Information Act (FOIA) requests.[11] These comment letters and responses often provide valuable insight concerning the Division's rationale for supporting or not supporting an applicant's proposal.

If there is no clear exemptive precedent for the proposed activity and it is a close call as to whether the activity is prohibited by a specific provision of the Investment Company Act or the Advisers Act, counsel should consider whether requesting a no-action position from the Division is more appropriate.[12] The no-action route may be more appropriate for several reasons: counsel may believe that the proposed activity is not prohibited by a specific legal provision but desires assurance from the Division, or there may not be a clear line of no-action precedent for the transaction.[13]

Counsel also should consider the different legal consequences of an exemptive order versus a no-action letter. Unlike an exemptive order, the Division's no-action assurances do not preclude private parties from bringing a successful legal action.[14] However, it seems "highly unlikely" that a court would disregard the views of the Division.[15] In practice, matters that should be addressed in an exemptive application and those that are more appropriately handled through the no-action process sometimes overlap, and are debated both in the halls of the SEC and among members of the private bar.

Meeting with Staff

The Staff of the Division is generally available to respond to telephone inquiries about the exemptive process. A staff attorney with the Division is assigned to respond to inquiries from the public each business day. The appropriate telephone number is (202) 942-0564.

There are occasions, however, when counsel believes it would be useful to meet with the Staff prior to filing an application to discuss whether the Division would be inclined to support a particular proposal or how an application should be structured. The Division's policy is to schedule a pre-filing meeting only when "a proposal involves issues

that must be resolved before an application can be formally filed with the Commission."[16] If counsel believes that a meeting would be appropriate, counsel should telephone the Chief Counsel's Office at (202) 551-6825. If Chief Counsel's Office agrees that a pre-filing meeting would be useful, the Staff often will ask counsel to submit a short letter before the meeting, summarizing the facts of the proposal, the legal issues involved, and counsel's legal analysis and conclusions.

Preparing the Application

Many of the procedures for preparing and filing applications are set forth in Rule 0-2 under the Investment Company Act and Rule 0-4 under the Advisers Act; others are published in SEC releases, and some have developed as a matter of practice.

Applications, with the exception of applications to deregister an investment company,[17] generally are presented in the following format:

I. The "Facing Page"
II. Text of the Application
   A. Name of Applicants and Relevant Statutory Provisions
   B. Description of Applicants and Proposed Transaction
   C. Request for Relief and Legal Analysis
   D. Discussion of Precedent
   E. Conditions
   F. Persons to Contact and Signature Pages
III. Exhibits
IV. Supporting Documents
V. Authorization
VI. Verification

Facing Page

The "facing page," or cover page, should state in the heading that the application is before the SEC. It also should state the legal names of the applicants and their addresses, and the sections or rules from which relief is sought. In addition, the names and addresses of persons who should be contacted with any questions or communications may be included.[18]

Each page of the application should be numbered sequentially from the facing page through the last page of the document, including any attachments, and the total number of pages should be set forth on the facing page.[19] A notation for an application file number should be included, but the actual number should be left blank—the SEC will assign the application a file number when the application is filed. There are additional requirements for an "expedited review."[20]

Body of Application

Following the facing page, the text of the application should have an introductory paragraph that states the names of the applicants and the requested statutory relief. The Division generally requests that the parties who are requesting relief, and parties who will be bound by conditions to an order, be named as applicants. For applicants requesting an "expedited review," additional information must be included on the facing page.

The application next should provide a brief description of the applicants, for instance, their form of organization and general operations. The proposed transaction then should be described in some detail. The factual presentation should be as concise as possible, while ensuring that the Commission has sufficient information to make the required statutory findings.

An essential element of the application is the request for relief and the legal analysis. The request for relief should clearly and accurately state what relief is being requested and make clear that the relief is requested "to the extent necessary" to engage in the proposed transaction described in the application. The legal analysis should set forth the pertinent provisions of the statute or rules and state why relief is necessary.[21] The application also should analyze the facts of the proposed transaction in light of the

requisite statutory findings and state why the applicant believes that the transaction meets the standards for relief.[22]

In preparing an application, counsel should "recognize the difference between their proposal and prior applications requesting similar relief and, to the extent possible, bring their proposal within applicable precedent."[23] Precedent should be cited and discussed where appropriate. If an applicant's proposal is "substantially identical" to recently granted application, the application may be eligible for "expedited review."[24]

SEC orders often are conditioned on an applicant agreeing to take or not take certain actions. These conditions are included in a separate section of the application, and generally will be preceded by language to the effect that: "Applicants agree that any order granted pursuant to this application will be subject to the following conditions." The conditions are critical in determining whether an applicant's proposal meets the statutory standards for relief.

The main body of the application should conclude by stating the name, address, and telephone number of each person to whom the SEC should direct any questions or communications regarding the application (or refer to this information if it appears on the facing page).[25] Each of the applicants must sign the application.[26]

Authorization

When an applicant is a corporation, partnership, or other company, the applicant must include an "authorization," which is a concise statement of the applicable provisions of the articles of incorporation, bylaws, or similar documents, relating to the right of the person signing and filing the application to take such action on behalf of the applicant.[27] The authorization must also include a statement that these requirements have been complied with and that the person signing and filing the application is fully authorized to do so.

If the authorization is dependent on resolutions of shareholders or directors, the resolutions must be attached as an exhibit. If an amendment to the application is subsequently filed, the amendment must include a similar statement or a statement indicating that the authorization in the original application still remains in effect.[28]

Verification

The final part of the application is the "verification," which requires the person signing the application to verify every statement of fact formally filed in support of an application. If the applicant is a corporation, the form of the verification is provided in Rule 0-2(d) under the Investment Company Act and Rule 0-4(d) under the Advisers Act.

Confidential Treatment

Applicants occasionally want to keep information submitted in support of an application confidential. Section 45(a) of the Investment Company Act and Section 210(a) of the Advisers Act provide that information contained in any application will be made available to the public, *unless* the Commission issues an order that "finds that public disclosure is neither necessary nor appropriate in the public interest or for the protection of investors." If an applicant wants confidential treatment for any information submitted, the following steps should be taken.

Confidential treatment requests and the information with respect to which confidential treatment is requested must be submitted in paper format to the Division.[29] The application should request confidential treatment under the appropriate statutory provision for the relevant information, *generally* describe the information, and explain the basis of the request. The Division Staff then will review the information along with the application and will determine whether the statutory standard for making the information non-public has been met.

For information that is not part of the formal application, such as supplemental letters, counsel

may request that the SEC keep the information confidential under an exception to the FOIA, which requires federal agencies generally to make documents in their control available to the public.[30] The procedures for requesting confidential treatment for documents and for requesting documents under FOIA are contained in 17 C.F.R. § 200.83. Under these regulations, counsel may request that the Commission afford confidential treatment "for reasons of personal privacy or business confidentiality, or for any other reason permitted by Federal law...."[31]

FOIA procedures apply only where "no other statute or Commission rule provides procedures for requesting confidential treatment respecting particular categories of information...."[32] Thus, the FOIA procedures apply only in cases that are outside the scope of Section 45(a) of the Investment Company Act or Section 210(a) of the Advisers Act.[33]

Filing the Application

Whether relief is being sought under the Investment Company Act or Advisers Act determines how an exemptive application is filed.[34]

Investment Company Act

Applications under the Investment Company Act are filed electronically via the EDGAR system.[35] There is no filing fee. Each signatory to an electronic filing is required to manually sign a signature page or other document authenticating, acknowledging or otherwise adopting his or her signature that appears in typed form in the electronic filing.[36] This document must be: executed before or at the time the electronic filing is made; retained by the applicant for a period of five years; and made available to the SEC upon request.[37] A transmittal letter should accompany the application and briefly state the reasons why the applicant believes it is entitled to the action requested, the name and address of each applicant, and the name and address of any person to whom any questions regarding the application should be directed.[38]

The EDGAR Filer Manual provides for three EDGAR electronic submission types for applications: (1) 40-APP, (2) 40-OIP, and (3) 40-6B. Most applicants will submit their applications under EDGAR submission type 40-APP. Applicants submitting certain insurance product applications, such as mixed and shared funding, bonus recapture, fund substitution,[39] and exchange offers, will use EDGAR submission type 40-OIP. Employees' securities company applications (also processed by the Division of Investment Management) will use EDGAR submission type 40-6B. These three submission types are designed to facilitate and expedite Staff review of the submissions.

If applicants have any questions as to the appropriate EDGAR submission type, they should contact the Chief Counsel's Office at IMOCC@sec.gov or (202) 551-6825 to verify in advance the correct submission type so that the application can be routed correctly.

Advisers Act

Applications under the Advisers Act are filed on paper. There is no filing fee. Five copies of an application should be filed with the SEC.[40] The applicant must manually sign one copy.[41] The other copies may have facsimile or typed signatures.[42] A transmittal letter should accompany the application and should reference the provisions of the Advisers Act and the associated rules under which application is made. The transmittal letter also should briefly indicate whether the application closely follows precedent, and, if not, the major substantive areas from which it deviates.[43]

Applications under the Advisers Act are filed with the SEC's Office of the Secretary at the following address: US Securities and Exchange Commission, Office of the Secretary, 100 F Street, NE, Washington, DC 20549.

Whether the applicant mails or hand delivers the application, the applicant should also email a date-stamped copy of the application to the Office of the Secretary at *Secretarys-Office@sec.gov*.[44]

Standard Staff Review

Review and Staff Comments

The Division's process for reviewing exemptive applications begins with the Chief Counsel's Office. The exemptive applications program is headed by an associate director, then a couple of assistant chief counsels who report to the associate director, and a number of Staff attorneys. Generally, a Staff attorney, working with an assistant chief counsel and the associate director, will determine whether the Division has any questions or comments concerning the application. For applications that raise important policy issues, a deputy director or the Division director would be consulted.

Staff comments usually are sent to the applicant in a letter; however, in certain circumstances, comments are given over the telephone. Comments take several forms. The Division may request that certain facts be clarified in the application or that the legal analysis better support the request for relief.

An applicant will be asked in a comment letter to respond to the comments by filing an amended and restated application. When an applicant amends an application, the procedures are the same as the initial filing—except that counsel should send the reviewing Staff attorney the amended and restated application marked to show changes.

Standard Review Time Frame

For a "standard review" application (that is, an application not eligible for and proceeding under expedited review), the Division should take "action" within 90 days of the initial filing and each of the first three amendments to that application.[45] For any subsequent amendment, the Division should take action within 60 days. The Division may grant 60-day extensions and the applicant should be notified of any such extension.[46] An "action" on the application or an amendment consists of:

- Issuing a notice of the application;
- Providing the applicant with requests for clarification or modification of the application; or
- Informing applicant that the application will be forwarded to the Commission.[47]

Expedited Staff Review

The SEC has an expedited review process for "routine applications" under the Investment Company Act.[48] The agency's goal was to balance an applicant's desire for a prompt decision on their application with the SEC's need for adequate time to consider requests for relief. The SEC also sought to make the application process less expensive for applicants, which would benefit fund shareholders.[49]

Eligibility for Expedited Review

An applicant may request expedited review for a "routine application." That is an application "substantially identical" to two other applications for which an order granting the requested relief has been *issued within three years* of the date of the application's initial filing.[50]

Substantially Identical Standard

"Substantially identical" applications are those requesting relief from the same sections of the Investment Company Act and the rules thereunder, containing identical terms and conditions,[51] and differing only with respect to factual differences.[52] The SEC specifically did not allow for "mix and match" precedent applications, that is, applications that combine portions or sections of different prior applications.[53]

Applications that Might not Qualify for Expedited Review

The SEC did not explicitly exclude any particular types of applications from expedited review. The proposing release and the adopting release, nevertheless, stated that it would be "highly unlikely" that the following types of applications would qualify:

- Section 2(a)(9)—Declarations regarding "control;"
- Section 3(b)(2)—Inadvertent investment companies;
- Section 6(b)—Employee securities companies;
- Section 8(f)—Deregistration;
- Section 9(c)—Ineligible and disqualified firms; and
- Section 26(c)—Fund substitutions.[54]

In the SEC's view, these types of applications, among others, are generally too fact-specific for applicants to be able to meet the substantially identical standard.[55]

Expedited Review Additional Requirements

In addition to meeting the "substantially identical" standards, applications for expedited review must include:[56]

- A notation on the cover page prominently stating "EXPEDITED REVIEW REQUESTED UNDER 17 C.F.R. 270.0-5(d)."[57]
- Exhibits with marked copies of the application showing changes from the final versions of the two precedent applications.[58]
- A cover letter, signed, on behalf of the applicant, by the person executing the application:
  - Identifying the two substantially identical applications that serve as precedent, explaining why the applicant chose those particular precedents, and, if more recent applications of the same type have been approved, why the precedents chosen are appropriate; and
  - Certifying that the applicant believes the application meets the Rule requirements[59] and that the precedent marked copies are complete and accurate.[60]

Expedited Review Time Frame

The SEC will issue a notice for an application submitted for expedited review no later than 45 days from the date of filing, unless it notifies the applicant that the application is not eligible for expedited review.[61]

While the SEC anticipates that a notice typically will be issued within the 45-day timeline, there may be situations where further Staff review is necessary. This may include, for example, cases where the SEC is considering a change in policy that would make the requested relief, or its terms and conditions, no longer appropriate, or there may be cases where the Staff is investigating potential violations of Federal securities laws that may be relevant to the requested relief.[62] If the Staff notifies the applicant that an application is not eligible, they will give the applicant the option to either withdraw the application or amend it to make changes so that the application could proceed outside of the expedited review process.

The 45-day review time frame will pause, for among other reasons, an applicant filing an unsolicited amendment or the Staff requesting an amendment.[63] If an applicant does not file an amendment responsive to a Staff request within 30 days of receiving such request, the application will be deemed withdrawn.[64]

Notice of Application and Order

Once the Division believes that an application meets the statutory requirements for the relief sought, it generally will publish a notice of application in the *Federal Register* and on the SEC Website.[65] A notice of application is designed to inform the public of the nature of an application and provide interested parties with an opportunity to request a hearing on the propriety of granting the requested relief.[66]

In addition to summarizing an application, the notice will indicate the earliest date that the SEC will issue an order granting the application.[67] The notice also will state that any interested person may request, within a designated time frame referred to as the "notice period," that the Commission hold a hearing on the application.

The SEC will order a hearing on the matter, if it "appears that a hearing is necessary or appropriate in the public interest or for the protection of investors...."[68]

The notice period is the period between publication in the *Federal Register* and the date fixed in the notice as the last date to request a hearing. By law, the notice period—with few exceptions—is required to be "not less than fifteen days."[69] As a matter of practice, the SEC sets the end of the notice period at 25 days after it authorizes the notice to be published. This allows sufficient time for publication in the *Federal Register.*

If the Commission does not order a hearing, it will issue an order granting the application usually the next business day following the end of the notice period. The order is published on EDGAR and the SEC Website (not the *Federal Register*).[70] That usually concludes the exemptive application process.[71]

Hearings on Applications

A Commission hearing on an exemptive application may happen in one of two ways:

1. The Division may conclude that the relevant statutory findings for granting relief, for example, that the proposal is "consistent with the protection of investors," cannot be made. In this case, the Division will send the applicant a letter stating that the Division will not support the application, and, if the applicant wants to continue to pursue the request, the Division will set the application down for a Commission hearing.[72] At the hearing, the Division would oppose the granting of the application; or
2. An interested person may request a hearing on an application where the Division supports an application, after a notice is published in the ordinary course.[73]

If the Commission determines that a hearing is warranted in either case, the process may vary.[74] "On particularly complex issues, the Commission may assign the matter to an administrative law judge to conduct a full evidentiary hearing and prepare a written opinion. This is an exceedingly rare event."[75] "More frequently the Commission will order a written hearing that consists of a public order identifying the issues to be addressed and invites interested persons to submit written statements. The Commission then issues its order based upon this written record.[76]

The Division's Delegated Authority

One of the least understood areas of the exemptive process is the delegated authority of the Division. Congress provided the Commission with the authority to grant relief from provisions of the Investment Company Act and the Advisers Act. The Division (although part of the SEC), is not the "Commission," which is comprised of the persons who the President appoints to run the SEC. Nevertheless, the Commission may delegate certain functions.[77] The functions that the Division may perform pursuant to its delegated authority are set forth in 17 C.F.R. § 200.30-5.[78]

With respect to exemptive applications under the Investment Company Act and the Advisers Act, the Division may, with certain exceptions,[79] issue notices of applications:

> where, upon examination, the matter does not appear to the Director [of the Division] to present significant issues that have not been previously settled by the Commission or to raise questions of fact or policy indicating that the public interest or the interest of investors warrants that the Commission consider the matter.[80]

The Division also may issue orders granting applications where a notice has been issued and no request for a hearing has been received from an interested person.[81] The Division does not have the authority to deny an application.

If the Division director believes that the Commission should consider an application, the review period may be extended for some time. The Division must prepare documentation—referred to as an "action memorandum"—to submit the application to the Commission for its consideration, and the Commission must consider the proposal. The Commission may or may not grant the application.

Post-Order Considerations

After the SEC issues an exemptive order, there may be changes in an applicant's circumstances that call into question the validity of the order. For example, an applicant may be planning a reorganization or may want to engage in the approved transaction in a manner that is different from how it is described in the application.

An analysis of the appropriate course of action depends on whether the modification affects a representation that an applicant made in an application or affects a condition to the order. The Division generally applies a materiality standard to representations, but strictly construes conditions.[82] If an order would no longer be valid given the circumstances presented, an applicant should file a new application requesting an order to amend the prior order. The outcome of these issues depends on the facts and circumstances. If counsel is unclear as to whether an order would continue to be valid, he or she may submit a no-action request. In addition, an informal discussion with the Division Staff may be prudent. A review of related no-action requests should assist counsel when confronted with these issues.

Corporate Reorganizations

The *Neuberger Berman* no-action letter, among others, demonstrates the Division's position that a reorganization of an existing business where there is no change in control is not a material modification and does not require an amended order.[83] In *Neuberger Berman*, Neuberger Berman Management LLC (NBM), its affiliated companies, and their mutual funds and exchange-traded funds (ETFs) had obtained various exemptive orders from 2009 to 2013.[84] In 2016, NBM transferred to Neuberger Berman Investment Advisers LLC (NBIA) the advisory services under its investment management agreements with the funds. NBM was merged into Neuberger Berman LLC (NB LLC), and thereafter ceased to exist. NBM was, and NB LLC and NBIA were, and NBIA continued to be, indirect, wholly-owned subsidiaries of Neuberger Berman Group LLC (NB Group).[85]

The Division allowed NBIA "to step into the shoes" of NBM for purposes of the existing orders given that, prior to the NBM merger, NBM and NBIA were both wholly-owned subsidiaries of and controlled by NB Group. "[I]n the event of an internal corporate reorganization where there is no change of control of the ultimate corporate parent involved, the ability to rely on the existing orders should not depend on the continued existence of a single named entity (NBM)."[86] The Division, therefore, concluded that it would not recommend that the Commission take enforcement action, under the 1940 Act provisions covered by the existing orders, against NBIA for relying on the existing orders. Lastly, the Division also stated, in *Neuberger Berman*, that it, "would not object if third parties rely on [the Neuberger Berman] no-action letter to the extent that they find themselves in substantially similar facts and circumstances under their existing exemptive orders under the 1940 Act."[87]

Mergers with Unaffiliated Third Parties

The merger of an applicant with an unaffiliated party may or may not require an amended order, depending on the facts and circumstances. Consider the *MTB Group of Funds* no-action letter. Where M&T Bank Corporation (M&TCorp.) acquired Allfirst Financial, Inc. along with the Allfirst wholly-owned subsidiary Allfirst Bank, which was the parent of Allied Investment Advisors, Inc. (AIA).[88] AIA was the investment adviser to mutual funds. At the time of the acquisition, Allfirst Bank was merged into a wholly-owned banking subsidiary of

M&TCorp., and the banking subsidiary became the parent of AIA. After the acquisition, AIA changed its name to MTB Investment Advisors, Inc. (MTBIA) and requested that the Division allow it and the funds to rely on exemptive orders previously issued to AIA. The Division concluded that it would not recommend enforcement action noting that orders extended to entities that were part of the M&TCorp. control group, which would include MTBIA and the funds, and the "orders grant[ed] relief that is routinely granted.[89]

However, the Division in other third-party merger situations did *not* provide no-action assurance. For example, in *Nike Securities*, Clayton Brown & Associates, Inc. sold its unit investment trust business to Nike.[90] After the sale, Nike submitted a letter to the Division seeking the Division's views on Nike relying on Clayton Brown exemptive orders. Because the situation did not involve a "continuity of parties," the Division advised "Nike to submit applications seeking amendments to the Clayton Brown orders."[91]

In situations such as a sale of assets or a merger where the successor cannot rely on the predecessor's exemptive order, the Division may provide temporary no-action assurance to the successor entity while the successor seeks to obtain a new order seeking identical relief. For instance, *Innovator Capital*, Innovator Management LLC (Innovator) and its ETFs obtained three exemptive orders.[92] Later, Innovator entered into an agreement with Innovator Capital Management, LLC (Innovator Capital) pursuant to which Innovator transferred the assets of its investment advisory business to Innovator Capital.[93] After the closing, Innovator Capital began serving as investment adviser to the ETFs. Since the transaction was not publicized, Innovator Capital was not in a position to file for the exemptive orders that would effectively provide the same relief previously granted in the existing orders prior to closing.

The Division permitted Innovator Capital to rely on the existing orders pending receipt of the requested orders provided that the firm complied with the terms and conditions of the existing orders. The Division indicated that it would not recommend enforcement action if Innovator Capital relied on the existing orders until the earlier of the issuance of the requested orders, or 150 days from the date of the closing. The Division also stated that it, "would not object if third parties rely on [the *Innovator Capital*] no-action letter to the extent that they find themselves in substantially similar facts and circumstances."[94] However, the Division noted that the third party would need to promptly file an application for the relevant exemptive relief and confirm with the Staff that it would support granting such exemptive relief prior to doing so.[95]

Not Relying on Exemptive Relief

The *Maxim Series Fund* no-action letter illustrates that the Division is willing to not require compliance with an exemptive order's terms and conditions if the applicant decides not to rely on the order.[96] In this case, certain portfolios were available as investment options under variable annuity contracts and variable life insurance policies offered by participating insurance companies. The portfolios, their adviser and participating insurance companies were granted mixed and shared fund exemptive relief where portfolio shares were sold to variable annuity and variable life insurance separate accounts of participating insurance companies and qualified pension and retirement plans.[97]

However, a change in the federal tax law created the opportunity for the *Maxim* portfolios to increase their asset base through the sale of portfolio shares to college savings plans. The portfolios intended to sell their shares to college savings plans without relying on the mixed and shared funding order or any new exemptive order. The Division stated that it would not recommend enforcement action for violations of the terms and conditions of mixed and shared funding orders and instead comply with Sections 9(a),

13(a), 15(a), and 15(b) of the Investment Company Act.

Compliance with Exemptive Orders

An applicant's compliance representations and conditions in exemptive orders and no-action letters are often reviewed by the SEC's Office of Compliance Inspections and Examinations (OCIE) as part of its inspections and examinations program. Applicants that receive and rely on exemptive orders are at risk of violating the federal securities laws if they do not comply with the representations and conditions of such orders. As a result, applicants should adopt and implement policies and procedures, in accordance with Rule 38a-1 or Rule 206(4)-7, that are reasonably designed to ensure ongoing compliance with each representation and condition of an order.[98]

Conclusion

The SEC's authority to grant relief from provisions of the Investment Company Act and the Advisers Act continues to play a significant role in allowing the regulation of the investment management industry to evolve with changing financial markets. In the 1970s, the SEC issued the first orders permitting money market funds to use alternative valuation methods, and in the 1980s and 1990s, exemptive orders allowed funds to sell multiple classes of shares with different sales charges.[99] Beginning in the 1990s, the SEC issued orders permitting the operation of ETFs.[100] The SEC practice of using the exemptive process to respond to industry initiatives undoubtedly will continue.

Mr. Robertson is a partner at Dechert LLP, and a former counsel to an SEC Commissioner. **Mr. Kelly** is the general counsel and chief compliance officer at Dunham & Associates Investment Counsel, Inc. The authors thank Linda Muzere and Marylyn Harrell, associates at Dechert LLP, for their assistance with this article.

NOTES

1 *Amendments to Procedures with Respect to Applications under the Investment Company Act*, Rel. Nos. 33658 (Oct. 18, 2019) (proposing release) [hereinafter Release 33658] and IC-33921 (July 6, 2020) (adopting release) [hereinafter Release IC-33921].

2 Robert A. Robertson, "The SEC Exemptive Process," *The Investment Lawyer* (May 1996).

3 *See* Center for Capital Markets Competitiveness, Examining the Efficiency and Effectiveness of the SEC 5 (Feb. 2009) [hereinafter Center for Capital Markets] (the study was conducted by Jonathan G. Katz, former Secretary of the SEC); Division of Investment Management, SEC, Protecting Investors: A Half Century of Investment Company Regulation 503, n. 2 (1992) [hereinafter *1992 Division Report*].

4 Investment Trusts and Investment Companies, Hearings on S. 3580 Before A Subcommittee of the Committee on Banking and Currency, U.S. Senate, 76th Cong., 3rd Sess. 1940 p. 197.

5 Section 206A of the Advisers Act.

6 Harbine Financial Service, 46 S.E.C. 1328, 1330 (Aug. 14, 1978); International Funeral Services of California, Inc., 46 S.E.C. 214, 218 (Jan. 5, 1976).

7 Harbine Financial Service, 46 S.E.C. 1328, 1330 (Aug. 14, 1978); Transit Investment Corporation, 28 S.E.C. 10, 15-16 (May 5, 1948).

8 Section 211(d) of the Advisers Act.

9 Entel v. Allen, 270 F. Supp. 60 (S.D.N.Y. 1967).

10 Section 34(b) of the Investment Company Act and Section 207 of the Advisers Act. *See* Saylor v. Lindsley, 456 F.2d 896, 903-04 (2d Cir. 1972).

11 Release IC-33658, *supra* n.1.

12 The procedures for submitting a request for no-action assurances or interpretive advice are set forth in *Adoption of Section 200.81 Concerning Public Availability of Requests for No-Action and Interpretive Letters and the Responses Thereto by the Commission's Staff*, Investment Company Act Release No. 6220 and Advisers Act Release No. 274 (Oct. 29, 1970); and *Procedure Applicable to Requests for No-Action or Interpretive Letters*, Investment Company Act Release No. 6330 and Advisers Act Release No. 281 (Jan. 25,

1971). *See* Thomas P. Lemke, "The SEC No-Action Letter Process," *Bus. Law.*, 1019-1044 (Aug. 1987) [hereinafter SEC No-Action Letter Process].

13 Counsel should be mindful that third parties may rely on Division no-action letters. Consequently, if there is a clear line of no-action precedent, it is not necessary for counsel to request additional assurance from the Division. *See* SEC No-Action Letter Process, *supra* n.12, at 1043-1044.

14 In addition, the SEC has specifically commented that it "should be recognized that no-action and interpretive responses by the [S]taff are subject to reconsideration and should not be regarded as precedents binding the Commission." *Public Availability of Requests for No-Action and Interpretive Letters and Responses Thereto by the Commission's Staff*, Securities Act Rel. No. 5098 (Oct. 29, 1970), 35 Fed. Reg. 17779 (Nov. 19, 1970). *See also* American Bar Association, Committee on Federal Regulation of Securities, "Integration of Securities Offerings: Report of the Task Force on Integration," 41 *Bus. LAW*. 595, 597 (1986), at 613 n. 75.

15 SEC No-Action Letter Process, *supra* n.12, at 1043.

16 *Commission Policy and Guidelines for Filing Applications for Exemption*, Investment Company Act Release No. 14492 and Investment Advisers Act Release No. 969 (Apr. 30, 1985). [hereinafter Release No. 14492].

17 Applications to deregister investment companies generally are filed on Form N-8F. Rule 8f-1 of the Investment Company Act.

18 Rule 0-2(f) under the Investment Company Act and Rule 0-4(f) under the Advisers Act.

19 Rule 0-2(h) under the Investment Company Act and Rule 0-4(i) under the Advisers Act.

20 *See* Expedited Staff Review *infra*.

21 Rule 0-2(e) under the Investment Company Act and Rule 0-4(e) under the Advisers Act.

22 Rule 0-2(e) under the Investment Company Act and Rule 0-4(e) under the Advisers Act; Release No. 14492, *supra* n.16.

23 Release No. 14492, *supra* n.16.

24 *See* Expedited Staff Review *infra*.

25 Rule 0-2(f) under the Investment Company Act and Rule 0-4(f) under the Advisers Act.

26 Rule 0-2(b) under the Investment Company Act and Rule 0-4(b) under the Advisers Act.

27 Rule 0-2(c) under the Investment Company Act and Rule 0-4(c) under the Advisers Act.

28 *Id*.

29 *See* Rule 101(c)(1)(i) of Regulation S-T.

30 Section 552 of FOIA.

31 Rule 83(b) of the SEC's Rules on Information and Requests.

32 Rule 83(c) of the SEC's Rules on Information and Requests.

33 *Confidential Treatment Procedures under the Freedom of Information Act,* Investment Company Act Release No. 11354 and Advisers Act Release No. 729 (Sept. 12, 1980).

34 An application for an order under both the Investment Company Act and the Investment Advisers Act should be submitted separately under each Act.

35 17 C.F.R. §§ 232.101 and 232.201. *Mandatory Electronic Submission of Applications for Orders Under the Investment Company Act and Filings Made Pursuant to Regulation E*, Investment Company Act Release No. 28476 (Oct. 29, 2008).

36 *See* Rule 302(b) of Regulation S-T.

37 *Id*.

38 Rule 0-2(e) and (f) under the Investment Company Act.

39 Applications relating to the substitution of securities held by a variable insurance separate account filed under Section 26(c) of the Investment Company Act.

40 Rule 0-4(b) under the Advisers Act.

41 *Id*.

42 *Id*.

43 Release No. 14492, *supra* n.16.

44 *See* IM Information Update, Division of Investment Management Staff Statement on Hearing Requests on Applications Filed Under The Investment Company Act of 1940 and Investment Advisers Act of 1940, IM-INFO-2020-03 (Apr. 2020).

[45] 17 C.F.R. § 202.13(a). The 90- or 60-day period will stop running upon any irregular closure of the SEC's Washington, DC office to the public for normal business, and will resume upon the reopening of the Washington office to the public for normal business. *Id*.

[46] *Id*.

[47] 17 C.F.R. § 202.13(b). These time frames, however, "are not intended to create enforceable rights by any interested parties and shall not be deemed to do so." 17 C.F.R. § 202.13(c). "Rather, this rule provides informal non-binding guidelines and procedures." *Id*.

[48] Rule 0-5 under the Investment Company Act; Release IC-33921, *supra* n.1. Expedited review procedures do not apply to applications under the Advisers Act. The SEC receives only a few applications under that Act each year, and the applications are filed on paper rather than electronically via the EDGAR system. These applications are generally fact intensive, so they are less likely to qualify for an expedited review process like the one we are adopting here. Release IC-33921, *supra* n.1.

[49] Release IC-33921, *supra* n.1.

[50] Rule 0-5(d)(1); Release IC-33921, *supra* n.1. If an application has more than two qualifying precedents, the application should include exhibits with marked copies showing changes from only two qualifying precedent applications and an accompanying cover letter explaining why those two precedents were chosen. Release IC-33921, *supra* n.1, n. 57.

[51] The SEC believes that even small changes to the terms and conditions, compared to a precedent application, may either raise a novel issue or require a significant amount of time for the Staff to consider whether a novel issue is raised. Release IC-33921, *supra* n.1.

[52] Factual differences not material to the relief requested might include the applicants' identities, the state of a fund's legal organization, and the constitution of the fund's board of directors. Rule 0-5(d)(2); Release IC-33921, *supra* n.1.

[53] Release IC-33921, *supra* n.1.

[54] *See id*.

[55] *Id*. at n.67-68, 75.

[56] Rule 0-5(e).

[57] Rule 0-5(e)(1).

[58] Rule 0-5(e)(2).

[59] Rule 0-5(d).

[60] Rule 0-5(e)(3).

[61] Rule 0-5(f)(1).

[62] Release IC-33921, *supra* n.1.

[63] Rule 0-5(f)(2)(i).

[64] Rule 0-5(f)(2)(ii).

[65] Rule 0-5(a) under the Investment Company Act and Rule 0-5(a) under the Advisers Act.

[66] Rule 0-5(a) under the Investment Company Act and Rule 0-5(a) under the Advisers Act. *See also Rule Amendments Requiring Investment Companies to Submit Proposed Notices of Pending Applications for Exemptions*, Investment Company Act Release No. 7926 (Aug. 7, 1973).

[67] Rule 0-5(a) under the Investment Company Act and Rule 0-5(a) under the Advisers Act.

[68] Rule 0-5(c) under the Investment Company Act and Rule 0-5(c) under the Advisers Act.

[69] Section 1508 under the Federal Register Act.

[70] Commission orders are subject to judicial review. Section 43(a) under the Investment Company Act and Section 213 under the Advisers Act.

[71] Under certain statutory provisions of the Investment Company Act, an exemption automatically becomes effective without any Commission action. *See*, *e.g.*, Rule 6b-1 under the Investment Company Act.

[72] The procedures for Commission hearings are set forth in the Commission's Rules of Practice. 17 C.F.R. § 201.300 to 400.

[73] Release IC-33921, *supra* n.1; IM Information Update, Division Of Investment Management Staff Statement on Hearing Requests on Applications Filed Under The Investment Company Act of 1940 and Investment Advisers Act of 1940, IM-INFO-2020-03 (Apr. 2020).

[74] Center for Capital Markets, *supra* n.3, at 30-31.

[75] *Id*.; *Application of TIAA-CREF*, Investment Company Act Release No. IC-16235, proceeding instituted

Jan. 12, 1988. Settled proceeding concluded Jan.11, 1990, Investment Company Act Release No. IC-17303.

[76] Center for Capital Markets, *supra* n.3, at 30-31.

[77] Sections 4A and 4B under the Exchange Act.

[78] 17 C.F.R. § 200.30-5.

[79] The Division of Investment Management's delegated authority for certain matters under Section 9 of the Investment Company Act is separately set forth under Rule 30-5 of the Commission's Rules of Organization and Program Management.

[80] 17 C.F.R. § 200.30-5(a)(3). *See* Release IC-33921, *supra* n.1, n.20.

[81] 17 C.F.R. § 200.30-5(a)(2). *See* Release IC-33921, *supra* n.1, n.20. Any person aggrieved by an action taken pursuant to the Division's delegated authority may seek Commission review of the matter. 17 C.F.R. § 201.430.

[82] Stagecoach Funds, SEC No-Action Letter (Nov. 28, 1994).

[83] Neuberger Berman Investment Advisers LLC, SEC No-Action Letter (Sept. 28, 2016).

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *Id.*, fn. 7.

[88] MTB Group of Funds, SEC No-Action Letter (Oct. 21, 2003).

[89] *Id. See also* Goldman Sachs Group of Funds, SEC No-Action Letter (Nov. 22, 1991); Federated Investors, Inc., SEC No-Action Letter (Sept. 22, 1989).

[90] Nike Securities L.P., SEC No-Action Letter (Nov. 22, 1991).

[91] *Id.*

[92] Innovator Capital Management, LLC, et al., SEC No-Action Letter (Oct. 6, 2017) [hereinafter Innovator Capital No-Action Letter].

[93] Despite the similarities in the company names, Innovator and Innovator Capital were not affiliates.

[94] Innovator Capital No-Action Letter, *supra* n.92, n. 4.

[95] *Id. See also* Fixed Income Securities, L.P., SEC No-Action Letter (Apr. 29, 2004); The Chase Manhattan Bank, N.A., SEC No-Action Letter (Jul. 25, 1995); Shearson Lehman Brothers Inc. and Smith Barney, Harris Upham & Co., SEC No-Action Letter (Jun. 8, 1993).

[96] Maxim Series Fund, Inc., SEC No-Action Letter (Jul. 31, 2009).

[97] A life insurance company that relies on mixed and shared funding exemptive orders obtains exemptions in advance of the time that the exemptions are needed. The exemptions apply immediately for use in a future contingency that may never eventuate.

[98] SEC Guidance Update, Compliance with Exemptive Orders, No. 2013-02 (May 2013).

[99] *See 1992 Division Report*, *supra* n.3, at 506-507.

[100] Release 33658, *supra* n.1.