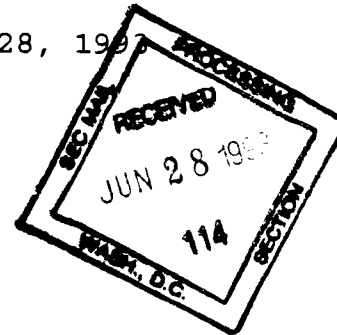


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June 28, 1993



Jonathan G. Katz, Secretary  
U.S. Securities and Exchange Commission  
450 Fifth Street, N.W.  
Room 6184, Stop 6-9  
Washington, D.C. 20549

RE: Expedited Procedure for Exemptive Orders  
and Expanded Delegated Authority (File  
No. S7-13-93)

Dear Mr. Katz:

The Investment Company Institute<sup>1</sup> appreciates the opportunity to express its views on proposed rule amendments that would establish an expedited review procedure for routine applications for a Commission order under the Investment Company Act of 1940 ("Act"). The proposals would amend rule 0-5 under the Act, which sets forth procedures for the processing of applications, and rule 30-5, promulgated pursuant to Section 4A of the Securities Exchange Act of 1934, which delegates certain Commission functions to the Director of the Division of Investment Management. The rule proposals result from staff recommendations set forth in the May, 1992 report Protecting Investors: A Half Century of Investment Company Regulation, which noted that many responses to the Commission's request for comments on reform of the Act were critical of the lengthy process for obtaining exemptive relief.<sup>2</sup>

The Institute commends the Commission and its staff for seeking to streamline the Commission's consideration of requests for exemptive relief. The Commission's exemptive authority is critical to the development of innovative financial products and to the evolution of the financial services industry. Time delays in the Commission's exemptive process impede not only innovation,

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<sup>1</sup> The Investment Company Institute is the national association of the American investment company industry. Its membership includes 4,116 open-end investment companies ("mutual funds"), 336 closed-end investment companies and 13 sponsors of unit investment trusts. Its mutual fund members have assets of about \$1.665 trillion, accounting for approximately 95 percent of total industry assets, and have about 38 million individual shareholders.

<sup>2</sup> See Protecting Investors Report at 504.

but even well-established investment company practices that have been the subject of numerous orders granting exemptive relief.

### Summary of the Institute's Position

The Institute supports the proposed changes to rule 30-5, which would permit the Director of the Division of Investment Management to grant exemptive relief with respect to all provisions of the Act and the Investment Advisers Act if the matter does not appear to warrant Commission consideration. We believe this expanded delegated authority will speed the granting of appropriate exemptive relief.

With respect to the proposed amendments to rule 0-5, while we appreciate and support the Commission's efforts, we believe that the proposal does not go far enough because it addresses only routine applications. We urge the Commission to consider changes that would result in more timely processing of all requests for relief. We respectfully request that the Commission reconsider proposing a procedure for the automatic issuance of an order after a stated period of time.<sup>3</sup>

If, however, the Commission determines that it is appropriate to revise its procedures in the limited fashion proposed, we believe that it is critical that an expedited review procedure for routine applications not become a substitute for exemptive rulemaking. We also have a number of specific comments on the ways in which the proposal may inhibit unnecessarily the manner in which routine applications are processed. These matters are discussed in greater detail below.

### The Commission Should Act to Ensure the Timely Processing of All Exemptive Applications

As proposed, the expedited review procedure would be available only for an application seeking "relief that is consistent in all material respects" with the relief granted in the most recent precedential order. The release appears to contemplate that the expedited review procedure would be used only for requests that are essentially identical, except for identifying information, to previously granted applications.<sup>4</sup>

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<sup>3</sup> See Institute Comment Letter on SEC Release No. 17534 (June 15, 1990) (announcing Special Study of the Act), and Letter from Craig S. Tyle to Marianne Smythe, September 3, 1992, regarding the Protecting Investors Report recommendations on expediting applications for a Commission order.

<sup>4</sup> See SEC Release No. IC-19362 (March 26, 1993) at 8. The proposed amendments seek to enable an applicant to receive an exemptive order within 90  
(continued...)

The Institute respectfully submits that the proposed revisions, by focusing only on those applications that are so routine that they are virtually identical to previous applications and orders, will not improve significantly the time periods for obtaining exemptive relief. Current Division of Investment Management guidelines already provide that routine applications ordinarily should be noticed within 60 days.<sup>5</sup> Thus, in order to have any meaningful effect on the exemptive application process, changes must address the timely processing of all applications rather than those that already qualify for public notice within 60 days. (To the extent there exist constraints that preclude complete adherence to current Division guidelines it appears that the same constraints could preclude adherence to the proposed expedited procedure.)

Therefore, the Institute continues to believe that the most effective approach would be for the Commission to propose a system under which 1) an application for exemptive relief under Section 6(c) on file for more than 90 days would be deemed granted if the Commission did not act on the application during that period, and 2) an application for relief identical to, and subject to the same conditions as, a previous order would be deemed granted 30 days after filing if the staff did not object within that period.<sup>6</sup>

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<sup>4</sup> (...continued)

days of filing an application if the application is based on clear precedent. As long as certain requirements are met, the proposal envisions that a notice of application would be issued by the Commission within 60 days of filing. Absent a hearing request, an order would be issued within 30 days from publication of the notice in the *Federal Register*.

Use of the expedited procedure is subject to a number of other conditions, e.g., inclusion of each condition and material representation set forth in the most recent precedent, a copy of the application marked to show changes from recent precedent, and a statement signed by counsel representing that the application meets certain requirements of the rule.

<sup>5</sup> See SEC Release No. IC-14492 (April 30, 1985).

<sup>6</sup> As we have stated previously, we believe that the Commission should lengthen the time periods if it believes the Commission and its staff need more time to operate within an automatic effectiveness framework, rather than reject the approach entirely. See Letter from Craig S. Tyle to Marianne Smythe, supra n. 3 at 3.

We appreciate the concern that the Commission fulfill its obligation under Section 6(c) to grant only those exemptions that are in the public interest and  
(continued...)

If the Commission is unwilling to propose that applications be eligible for automatic effectiveness, we believe that the Commission should consider proposing that notices of all applications be submitted automatically to the *Federal Register* for publication within our suggested time periods, unless the Commission or staff objects.<sup>7</sup> This would provide some mechanism to deal with all applications in a timely manner, while retaining a public notice and comment period.

The Expedited Review Procedure Should Not Become a Substitute for Exemptive Rulemaking

As the Proposing Release observes, applications for exemptive orders have addressed a wide variety of issues in a number of contexts.<sup>8</sup> Commission experience with a series of exemptive applications, all of which seek essentially the same relief, at times results in the promulgation of an exemptive rule that obviates the necessity for obtaining individual exemptive relief.<sup>9</sup>

We do not believe it is the Commission's intent that the proposed expedited review procedure should serve as a substitute for appropriate exemptive rulemaking. However, we are concerned that adoption of the expedited review procedure could be interpreted by some as lessening the need for the Commission to

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<sup>6</sup> (...continued)

consistent with investor protection. We believe that our approach is not inconsistent with this obligation. In the case of novel applications, the procedure allows ample time for the Commission or staff to prevent an application from being granted automatically if any public policy questions are raised. In the case of applications for which identical relief has been granted previously, the public interest issues already have been subject to Commission and staff scrutiny. A shorter time period during which the staff could "pull" the application therefore appears appropriate.

<sup>7</sup> Rule 0-2(g) under the Act and rule 0-4(g) under the Advisers Act require that an application be accompanied by a proposed notice. Division guidelines set forth standards for such proposed notices. See SEC Release No. 14492 supra n. 5.

<sup>8</sup> Proposing Release at 3.

<sup>9</sup> See, e.g., rule 2a-7, which grants exemptive relief from Section 2(a)(41) and rules 2a-4 and 22c-1 for money market funds.

move quickly to develop exemptive rules in certain areas. This, we believe, would be ill-advised.<sup>10</sup>

Promulgation of a rule provides the industry with greater certainty as to Commission requirements, and eliminates the time and expense involved in filing an exemptive application. We strongly urge the Commission to continue its efforts towards the adoption of appropriate exemptive rules and the development of rule proposals in areas where the necessity and appropriateness of exemptive relief is well-settled, such as in the case of multiple class funds. We hope that the adoption of any expedited procedures for existing exemptive applications would not in any way delay or impede such efforts.

Provisions of Proposed Rule 0-5 That Unnecessarily Impede Routine Applications Should be Eliminated

If the Commission determines to proceed with the proposed amendments to rule 0-5, certain aspects of the proposal, which may make receipt of a routine exemptive order more difficult or time-consuming than necessary, should be modified or eliminated. As noted above, current Division guidelines provide that routine applications requiring no amendments should be published for notice within 60 days.<sup>11</sup> We respectfully submit that the proposed expedited procedure, by making public notice of a routine application within 60 days contingent on compliance with fairly stringent conditions, runs the risk of making receipt of a routine order more difficult. We urge the Commission to subject use of the expedited procedure to as few conditions as possible.

- A. The Proposal Should Be Revised to Require That An Application's Conditions and Representations Be Consistent In All Material Respects with Precedent.

Proposed subparagraph (b)(1)(iii) would require that an application seeking expedited review contain each condition and

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<sup>10</sup> Such an approach would, of course, raise serious Administrative Procedure Act concerns. The APA requires advance public notice and comment on all proposed rulemaking, an essential procedure that cannot be duplicated through the exemptive process. During the exemptive process, an applicant may agree to conditions solely to get a new product to market. Similarly, an applicant may agree to conditions irrelevant to it but that might be unduly burdensome to another applicant. If conditions in one exemptive application are inflexibly applied to subsequent applications through the proposed expedited review procedure, and the expedited procedure becomes a substitute for exemptive rulemaking, then the administrative rulemaking process will have been circumvented.

<sup>11</sup> See n. 5, supra.

each material representation included in the final version of the most recent precedential application. This approach treats all conditions as per se material, and requires their inclusion in any application seeking expedited review. We question whether in all cases, each condition is material. At times, an applicant may agree readily to a condition preliminarily suggested by the staff merely because compliance with the condition is not burdensome. Such conditions at times then become "codified" in subsequent applications, even though their materiality has not been analyzed searchingly.

Therefore, we believe that it would be more appropriate for the rule to require that an application for expedited review contain conditions and representations that are consistent in all material respects with the conditions and representations set forth in the precedential application. This would enable an applicant to obtain expedited review without requiring the inflexible application of each condition of a prior order, while ensuring that the conditions and representations, taken as a whole, are consistent with precedent.<sup>12</sup>

B. Expedited Applications Should Be Able to Seek Only a Portion of the Relief Granted in a Prior Order.

The Commission specifically requests comment on whether only applications that obtained relief identical to the application seeking expedited review should be recognized as precedent, or whether applications should serve as precedent even though the application for expedited review seeks only a portion of the relief granted in the previous application.<sup>13</sup> We strongly urge the Commission to allow applications to receive expedited review so long as the relief requested is precedented, whether or not only a portion of the relief in the prior orders is requested. We can think of no public policy reason that suggests it is appropriate to expedite an application that seeks all the relief granted in a prior order, but not an application that seeks only a portion of the relief granted in a prior order. For the same reasons, we believe that it would be appropriate to allow expedited review of an application that seeks relief that "mixes and matches" relief granted in prior orders so long as the relief requested is precedented.

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<sup>12</sup> The Institute's suggested change would make subparagraph (b) (1) (iii) consistent with the introductory language in subparagraph (b) (1), which provides that an application for expedited review shall seek relief that is "consistent in all material respects with relief granted" by precedential orders.

<sup>13</sup> See Proposing Release at 13.

C. Applications Seeking Relief from Sections 2(a)(9),  
3(b)(2) and 9(c) Should Not Be Precluded Per Se from  
Seeking Expedited Review

Proposed rule 0-5(b) provides that applications filed for exemptions from Sections 2(a)(9), 3(b)(2) or 9(c) would be ineligible for expedited review due to the fact-intensive nature of the inquiry.<sup>14</sup> While we agree that in most instances, the desirability of granting exemptive relief under these sections will depend on the facts presented rather than precedent, we submit that this may not always be the case.<sup>15</sup> We suggest that the better approach might be to allow applications under all sections of the Act to seek expedited review. Under proposed rule 0-5(b)(4), the Commission could discontinue expedited review of any application if necessary.

D. Time Limits in the Expedited Procedure Should Be  
Modified to Reduce Unnecessary Delays

Time periods in the expedited review procedure should be as favorable to applicants as possible, consistent with Commission resource constraints. Generally, the Institute concludes that the time limits in proposed rule 0-5(b) are reasonable. However, we have the following suggestions as to ways in which the time periods may be to the detriment of applicants, without any corresponding benefit to the public or the Commission.

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<sup>14</sup> See Proposing Release at 9. Under Section 2(a)(9), the Commission may find that a person does not control a company; Section 3(b)(2) permits the Commission to find that an issuer is primarily engaged in a non-investment company business; Section 9(c) allows the Commission to permit an otherwise disqualified person to serve in various fund-related capacities.

<sup>15</sup> Even applications under Section 9(c), while never routine, can be strikingly similar at times. See, e.g., Smith Barney, Harris, Upham & Co., Inc. IC Rel. No. 17404 and 17404A (April 2 and April 11, 1990) (notice and temporary order), IC Rel. No. 17501 (May 21, 1990) (permanent order); PaineWebber, Inc., IC Rel. No. 17588 (July 16, 1990) (notice and temporary order), IC Rel. No. 17789 (October 10, 1990) (permanent order); Dean Witter Reynolds IC Rel. No. 17887 (November 29, 1990) (notice and temporary order), IC Rel. No. 18023 (February 28, 1991) (temporary order), IC Rel. No. 18097 (April 15, 1991) (temporary order) IC Rel. No. 18119 (April 29, 1991) (order). These applications, which are substantially similar in terms of the facts presented and their conditions and representations, are illustrative of a number of exemptive applications received by the Commission in the early 1990s requesting orders pursuant to Section 9(c). Each involved a statutory disqualification arising under Section 9(a)(3) solely because the applicant employs a person disqualified under Section 9(a)(1) or 9(a)(2). In each case, the disqualified individual did not serve in any investment company-related capacity, nor did the violations giving rise to the Section 9(a) disqualification stem from any investment company-related activity.

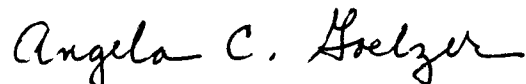
Proposed rule 0-5(b)(1) provides that an application for expedited review must rely on precedent issued no more than two years preceding the filing of the application.<sup>16</sup> While we recognize that the Commission may not wish to expedite an application that relies on potentially outdated precedent and that the staff is more likely to be familiar with very recent precedent, we submit that two years is an unnecessarily narrow window. We suggest that a somewhat longer period, perhaps five years, would strike a balance between the Commission's legitimate concerns and the reasonable expectations of applicants.

Further, we question a provision of proposed rule 0-5(b)(3) relating to the tolling of the 60 day review period preceding publication of the notice. Specifically, we note that the issuance of a comment letter would automatically toll the 60 day period, and that the 60 day period would resume 15 days after receipt of a response. While we recognize that some additional time is appropriate for the staff to review the comment letter response, we believe that the 60 day review period should resume sooner, because the staff would be familiar with the issues presented. We suggest that the 60 day period resume 7 days after an amended application is received.

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We appreciate the opportunity to comment on these proposed amendments. We would be pleased to furnish any additional information requested.

Very truly yours,



Angela C. Goelzer  
Associate Counsel

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<sup>16</sup> See Proposing Release at 13, 22.