

CLIENT ALERT

# SEC Adopts Expedited Review Process for Exemptive Applications

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## AUTHORS

Elliot J. Gluck | David Howe

On July 6, 2020, the Securities and Exchange Commission (the “Commission”) adopted rule amendments and a new rule to establish an expedited review procedure for exemptive and other applications under the Investment Company Act of 1940 (the “Investment Company Act”) that are substantially identical to recent precedent and an internal timeframe for review of other applications.<sup>1</sup> The rule amendments also deem an application outside the scope of the expedited review procedure withdrawn when the applicant fails to respond to Commission staff (“Staff”) comments in writing within 120 days. The amendments will be effective 270 days after publication in the Federal Register.

## Expedited Review Procedure

The Commission adopted amendments to Rule 0-5 under the Investment Company Act (the rule that sets out the procedure for applications under the Investment Company Act) to provide for expedited review of applications that are “substantially identical” to two other applications for which an order granting the requested relief has been issued within the previous three years. The amendments define “substantially identical” applications as those requesting relief from the same sections of the Investment Company Act and rules thereunder, containing identical terms and conditions, and differing only with respect to factual differences that are not material to the relief requested. The Commission noted that applications that “mix and match” multiple precedents will not meet the “substantially identical” standard.

<sup>1</sup> See *Amendments to Procedures With Respect to Applications Under the Investment Company Act of 1940*, Rel. No. IC-33921 (July 6, 2020), available [here](#).

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While all types of applications are potentially eligible for expedited review, the Commission believes, based on the Staff's experience, that certain lines of applications are generally too fact specific to meet the "substantially identical" standard. These include applications filed under Sections 2(a)(9) (e.g., declaration regarding control), 3(b)(2) (e.g., inadvertent investment companies), 6(b) (employees' securities company), 8(f) (investment company deregistration), 9(c) (ineligible persons), and 26(c) (fund substitution). The Commission noted, however, that under certain circumstances, applications filed under such sections may be able to satisfy the "substantially identical" standard.

Under the expedited review procedure, applications must include (1) a notation on the cover page stating prominently "EXPEDITED REVIEW REQUESTED UNDER 17 CFR 270.0-5(d);" (2) exhibits with marked copies of the application showing changes from the final versions of the two precedent applications; and (3) an accompanying signed cover letter. The cover letter must (i) identify the two substantially identical precedent applications, explaining why the particular precedents were chosen and, if applicable, why more recent precedent applications were not selected, and (ii) certify that the applicant believes that the application meets the requirements for expedited review and that the marked copies are complete and accurate.

Under the rule amendments, an application submitted for expedited review will be issued no later than 45 days from the date of filing, unless the application is not eligible because it does not meet the required criteria for expedited review or additional time is necessary for appropriate consideration of the application. The Commission noted that additional time for consideration may be necessary when it is considering a change in policy that would make the requested relief no longer appropriate or where the Staff is investigating potential violations of federal securities laws that may be relevant to the request for relief. In instances where the Staff notifies an applicant that its application is not eligible for expedited review, it will give the applicant the option to either withdraw the application or amend it so that it can proceed outside of the expedited review process.<sup>2</sup>

If an applicant submits an unsolicited amendment to an application that is under expedited review, the 45-day review period will be paused for 30 days, though the Staff may act before the end of such pause if the amendment contains only minor changes. In addition, any Staff comments requesting a change to the application pauses the 45-day period, with such pause ending 14 days after the filing of an amended application that is responsive to the Staff comments. If the applicant does not file such an amended application within 30 days of receiving the Staff comments, the application will be deemed withdrawn. Lastly, the 45-day period pauses upon any irregular closure of the Commission's Washington, DC office to the public for normal business, and resumes upon the re-opening of the office to the public for normal business.

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<sup>2</sup> In connection with the amendments to Rule 0-5, the Commission also amended 17 CFR 200.30-5 to delegate to the Director of the Division of Investment Management of the Commission the authority to notify an applicant that its application is not eligible for expedited review.

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### Timeframe for “Standard Review”

The Commission also adopted a rule which establishes an internal timeframe for the Staff to review all applications filed under Rule 0-5 that are outside of the expedited review process. Newly adopted 17 CFR 202.13 provides that the Staff should take action on such applications within 90 days of the initial filing and each of the first three amendments, and within 60 days of any subsequent amendment. For purposes of the rule, action on an application consists of (1) issuing a notice of application; (2) providing the applicants with comments; or (3) informing the applicants that the application will be forwarded to the Commission, in which case it is no longer subject to the internal timeframe periods set out above. Under an amendment to Rule 0-5, if an applicant has not responded in writing to a request for clarification or modification of an application filed under standard review within 120 days after the request, the application will be deemed withdrawn.

The new rule establishing an internal timeframe for Staff review states that it is not intended to, and does not, create enforceable rights by any interested parties. Rather, the rule states that it provides informal non-binding guidelines and procedures that the Commission anticipates the Division of Investment Management will follow.

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

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**Elliot J. Gluck**  
212 728 8138  
egluck@willkie.com

**David Howe**  
212 728 8094  
dhowe@willkie.com

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