

Alert

Regulated Funds: SEC Adopts Amendments to Exemptive Applications Procedures

July 14, 2020

On July 6, 2020, the SEC adopted amendments to Rule 0-5 under the Investment Company Act of 1940, as amended (“1940 Act”), establishing an expedited review process for exemptive applications submitted under the 1940 Act that are substantially similar to prior precedent.¹ The amendments to Rule 0-5 (“Amendments”) represent an effort by the SEC to balance the desire for prompt decisions by SEC staff (“Staff”) on applications with the timeframe needed by the Staff to review requests for exemptive relief appropriately. The Amendments should benefit registered investment companies, business development companies and their respective investment advisers and affiliated private fund platforms that have historically sought exemptive relief to solve certain structural challenges posed by the 1940 Act, or to permit them to operate in a more efficient and low-cost manner. Moreover, the Amendments should enable applicants seeking exemptive orders under the 1940 Act to obtain such relief in a more expeditious manner in many cases. We expect, however, that the Staff will likely rigorously enforce the “substantially similar to prior precedent” prong set forth in the Amendments, meaning that applicants needing only slight deviations from prior precedent could still fall outside the scope of the expedited review process.

The Amendments reflect a continuing effort by both the Staff and the SEC to streamline the process for more routine exemptive relief under the 1940 Act, including through the proposal and adoption of new exemptive rules to supplant previously required exemptive relief. For example, the SEC has proposed a set of rule changes permitting fund-of-funds arrangements without the need for obtaining separate exemptive relief.² The proposed Rule 12d1-4 would, if adopted, create a consistent framework for the formation and regulation of fund-of-funds under the 1940 Act by codifying the set of preexisting conditions previously established by the SEC through exemptive orders.³ Additionally, the SEC recently adopted Rule 6c-11, which permits Exchange Traded Funds (“ETFs”) to operate under the 1940 Act and “come directly to market” without first obtaining an exemptive order from the SEC.⁴ The SEC had issued roughly 300 exemptive orders allowing ETFs to operate under the 1940 Act prior to the adoption of Rule 6c-11.⁵

¹ Investment Company Act Release No. 33921, July 9, 2020, available [here](#).

² Investment Company Act Release No. 33329, Dec. 19, 2018, available [here](#).

³ The proposed rule, if enacted, will permit a registered investment company or business development company to acquire the securities of any other registered investment company or business development company in an amount that exceeds the limits in section 12(d)(1) of the 1940 Act.

⁴ Investment Company Act Release No. 33646, Sept. 26, 2019, available [here](#).

⁵ *Id.*

Qualification for Expedited Review

In order to qualify for the expedited review process, an application must meet two requirements established under the Amendments. First, an application must be “substantially identical” to two prior applications in which the SEC granted relief.⁶ Based on recent informal Staff guidance provided prior to adoption of the Amendments, we anticipate that this prong of the Amendments will be construed narrowly, at least at the outset. As a result, we expect that even minor modifications of definitions or conditions included in applications for exemptive relief may cause those applications to fall outside of the expedited review process. Second, both “substantially identical” applications must have been approved within the preceding two years of the current application.⁷ This second prong may in certain cases limit the availability of expedited review to more common applications, such as those for co-investment relief. If an application qualifies for the expedited review process, a decision on the application will be issued by the SEC within 45 days of the application being filed with the SEC.⁸ Applicants will be notified by the Staff should their application be ineligible for expedited review.⁹ Once the Staff has issued comments on an application under expedited review, applicants have 30 days to respond to Staff comments.¹⁰

Practical Implications of the Expedited Review Process

While the Amendments provide a significantly faster path forward for routine applications for exemptive relief that can meet both prongs of the test for expedited review, the nature of those prongs may pose challenges for certain applicants that may need slight deviations from prior precedent. As a result, prospective applicants may want to consider forgoing even minor changes to the wording of defined terms or conditions included in proposed applications from prior precedent if the timing of exemptive relief is critical to their operations. In addition, prospective applicants who may require even minor deviations from the wording of prior applications may wish to discuss such changes with the Staff in advance of filing to confirm whether their application would continue to qualify for expedited review.

If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

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⁶ The Amendments define “substantially identical” as applications “requesting relief from the same sections of the Act and 17 CFR part 270, containing identical terms and conditions, and differing only with respect to factual differences that are not material to the relief requested.” *Supra* note 1.

⁷ *Id.*

⁸ The SEC is also establishing a timeframe for applications ineligible for expedited review. All applications (the initial filing through the third amendment) will be considered within 90 days of filing. All subsequent amendments to an application will be considered within 60 days of filing. *Id.*

⁹ *Id.*

¹⁰ Under the standard review process, applicants have 120 days to respond to Staff comments. *Id.*

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