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[redacted]

December 4, 2019

Ms. Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: Amendments to Procedures With Respect to Applications under the Investment Company Act of 1940 (File No. S7-19-19)

Dear Ms. Countryman:

Stradley Ronon Stevens & Young, LLP ("Stradley") appreciates the opportunity to comment on the proposal by the U.S. Securities and Exchange Commission ("Commission") to establish an expedited review procedure for applications under the Investment Company Act of 1940 ("Act") as well as a new rule to establish an internal timeframe for review of applications outside of such expedited procedure.[1]

Stradley maintains one of the largest investment management practices in the United States, representing investment advisers, public and private funds, fund boards and trustees, service providers, insurance companies, and other industry participants in matters ranging from the routine to the most sophisticated. In the course of these representations, Stradley has assisted with the creation of innovative investment products and services through the exemptive applications process under the Act. In the last five years alone, Stradley has filed approximately 50 different exemptive applications on behalf of clients.

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1 *See* Amendments to Procedures With Respect to Applications under the Investment Company Act of 1940, Investment Company Act Release No. 33658 (Oct. 18, 2019) ("Proposing Release").

We agree with the Commission that the applications process under the Act has been a valuable tool to facilitate new developments in the investment management industry, and we commend the Commission for seeking to improve the efficiency of this process. We are broadly supportive of the Commission's proposal, although we have some suggestions for refinements. However, we do not support the Commission's announced plan to publicly disseminate comments by the Commission staff on applications and the related response letters submitted by applicants or their counsel.

I. Comments on the Expedited Review Process

A. Applications that are suitable for expedited review should be required to be substantially identical to one other application that previously received an order within the last five years.

As proposed, the expedited review process would be available only if an application that is suitable for expedited review is substantially identical to two other applications for which an order granting the requested relief has been issued within two years of the date of the application's initial filing.

We believe that these parameters are unnecessarily restrictive and that an applicant should be permitted to submit a suitable application for expedited review if the application contains terms and conditions that are substantially identical to another application that has been approved by the Commission within the last five years. For example, if the Commission approves a new type of application, a subsequent application with substantially identical terms and conditions should be eligible for expedited treatment even if only one approved application exists. As another example, for an application type that is only submitted infrequently, a new application of that type should be eligible for expedited treatment when it contains terms and conditions that are substantially identical to an approved application from within the last five years that remains acceptable to the Commission.

In this regard, we note that the proposed rule would permit the Commission staff to notify an applicant that an application is not eligible for expedited review because additional time is necessary for appropriate consideration of the application. The Proposing Release notes that such a situation might occur if the Commission is considering a change in policy that would make the requested relief, or its terms and conditions, no longer appropriate. Accordingly, if the Commission staff believes that an application submitted for expedited review does not have sufficient recent precedent such that the staff can be confident that the same terms and conditions would be appropriate, the proposed rule provides an option for the staff to inform the applicants that the application would be considered through the standard review process.

B. Applicants should be required to submit only one marked copy of the application showing changes from a precedent application.

The proposed rule would require applicants to submit exhibits with marked copies of the application showing changes from the final versions of two precedent applications.

As noted above, we do not believe that two precedent applications should be a requirement in the first instance. However, even if two precedent applications must be identified, we do not believe that marked copies against both applications should be required. For many years now, the Commission staff routinely has requested that applicants informally submit a version of the application marked against a single precedent application. This process has worked well to expedite the review of applications, and it has been unnecessary to provide applications marked against multiple pieces of precedent.

For an application that is substantially identical to an application that has previously received expedited review, presenting a version of the newly filed application marked against more than one prior application would seem particularly unnecessary. Even if the precedent application did not receive expedited review, submitting versions of a new application marked against two pieces of substantially identical precedent would seem redundant and of limited value.

Based on the existing applications review process, we therefore believe that it is unlikely that the Commission staff would benefit from reviewing two substantially identical marked applications. In addition, requiring two such exhibits would significantly increase the size of a filing, essentially requiring the filing of three applications in one submission. The increased size of the filing would generate additional costs due to the corresponding increase in preparation and review time for the two exhibits.

C. An additional cover letter identifying precedent and providing additional certifications is unnecessary.

The proposed rule would require the person executing the application to submit an accompanying cover letter identifying the precedent for the application, certifying that the applicant believes that the application meets the requirements for expedited treatment, and certifying that the marked copies required by the rule are complete and accurate.

We believe that the same objectives could be achieved without the need for a cover letter and new types of certifications. First, the marked copy of the application that is submitted as an exhibit will necessarily indicate the precedent upon which the application is based. In addition, applications already typically cite precedent applications, and the Commission simply could require the application itself to identify the relevant precedent application utilized as the basis for expedited review. Second, with respect to a certification that the applicants believe that the application meets the requirements for expedited treatment, this belief is effectively indicated by the notation on the cover page of the application that expedited review is requested. Applicants would not submit applications marked for expedited review unless they believed that the applications met the standards of the rule. Finally, the rule does not need to require a new type of certification with respect to the completeness and accuracy of marked exhibits. Rule 0-2(d) under the Act currently requires an authorized person for each applicant to sign the application and state that the person "is familiar with such instrument, and the contents thereof, and that the facts therein set forth are true to the best of his or her knowledge, information, and belief." The new rule could require applications seeking expedited treatment to expand this existing

verification to indicate that any marked copies submitted in order to qualify for expedited treatment are complete and accurate to the best of the signer's knowledge, information, and belief. This suggested approach would be much simpler mechanically and would impose the same standard that applies to the facts of the application itself.

II. Comments on Standard Review Process

A. Commission action under the standard review process should occur no later than 120 days from the filing of the application or amendment.

The Commission also proposes a new rule to provide a timeframe for the review of applications that are not eligible for the expedited review process. Under the proposed rule, the Commission staff should take action on an application within 90 days, although the Commission staff may grant itself a 90 day extension.

As noted in the Proposing Release, the Commission staff has successfully provided comments on all exemptive applications within 120 days for many years. We suggest that if the Commission adopts a rule providing for action within 90 days, the possible extension of time for action should be 30 days. As a result, the maximum internal deadline would remain the current 120 days rather than an expanded 180 day period.

B. The Commission should consider a final deadline for the Commission and its staff to take action on an application under the standard review process.

While the Commission proposes a deadline for final action on applications submitted for expedited treatment, the Commission does not propose a similar deadline for final action on applications submitted for standard review.

We believe that the Commission should consider a deadline for final action on standard review applications. Historically, the review of some applications has continued for years. Because the Commission staff does not have any ultimate deadline for concluding its review of an application or for making recommendations to the Commission regarding whether to support or oppose an application, an application can continue to receive comments at periodic intervals for an indefinite period of time. We suggest that the Commission impose an ultimate deadline on the amount of time that the Commission staff may take to review an application.

Subjecting the standard review process to an ultimate deadline for action on an application would be consistent with the process that governs Commission action with respect to applications for rule changes by self-regulatory organizations under Section 19(b) of the Securities Exchange Act of 1934, as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. Such a process would help to ensure that applicants not only receive comments on a timely basis, but that the comments help to advance an application toward final action by the Commission.

III. The Commission should not disseminate comments on applications or responses to comments.

In addition to proposing new rules, the Proposing Release indicates that the Commission intends to begin publicly disseminating comments on applications, and responses to those comments, no later than 120 days after the Commission has issued an order granting or denying the requested relief or after an application has been withdrawn.[2] The Commission indicates that this process would be designed to improve the transparency of the applications process.

We do not support the proposed process for the release of comments and responses. As an initial matter, we do not believe that publication of correspondence will enhance transparency of the applications process. More significantly, we are concerned that the proposed dissemination policy would have a chilling effect on innovation and would create administrative burdens as a result of the interplay between the new policy and the Freedom of Information Act ("FOIA").

Although dissemination of correspondence might increase publicly available information, such information would not necessarily increase transparency of Commission policymaking through the exemptive applications process. Particularly with respect to novel applications, issues that may seem significant initially are addressed in the course of the review of the application and may ultimately be deemed irrelevant to the final application. On many occasions, such issues may be addressed through meetings or calls between the Commission staff and applicants and/or their counsel. In this context, we are concerned that comment letters and response letters generated in the course of the negotiation of the terms and conditions of an application may not provide useful information to the public. The comments may appear to present positions of the Commission staff that have not been endorsed or vetted by the Commission or even by senior members of the Commission staff. Written correspondence from various stages in the review of an application also may present an incomplete picture of the review process and the resolution of issues.

When the review of an application is complete and the final version of the application is filed publicly, the Commission issues a public notice of its intention to grant or deny the requested relief. At that point, the application itself contains all of the information and analysis that the Commission and the Commission staff consider relevant. Public dissemination of the written correspondence between the Commission staff and the applicants relating to non-final versions of the application would be unnecessary and potentially confusing to the public.

In addition, we are concerned that the proposed publication of comments and responses may have a chilling effect on innovation through the applications process. Some applications present novel ideas for services and products. In these instances, comments from the Commission staff can be extensive and can raise a wide range of potential issues in order to ensure that the Commission staff understands the proposal and the relevant legal analysis. In the

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[2] Under the proposed rules, an application submitted for expedited review would be deemed withdrawn if the applicants do not respond to comments within 30 days. An application subject to standard review would be deemed withdrawn if the applicants do not respond to comments within 120 days.

course of this process, it is important for applicants to be able to communicate with the Commission staff without concern that their supplemental descriptions of business plans or legal analysis will be subsequently available to the public, including competitors. In addition, the proposed dissemination policy would result in the publication of written correspondence if the applicants do not respond to comments within 120 days. In some cases, the continued development of a new service or product may cause applicants to take more than 120 days to respond to comments. Again, applicants should not have to worry that their ongoing efforts to innovate may be disclosed to the public through the publication of correspondence with the Commission staff.

Finally, we are concerned about the interplay between the proposed dissemination process and confidential treatment requests pursuant to FOIA. In the Proposing Release, the Commission indicates that it would not disclose "materials (or portions thereof) covered by confidential treatment requests." We understand this position to mean that the Commission and its staff would not publicly disseminate materials for which confidential treatment has been requested under FOIA, regardless of whether a determination has been made to grant confidential treatment in response to a FOIA request.

As a result of this policy, we anticipate that applicants increasingly would request confidential treatment for response letters in order to avoid disclosure of sensitive information. However, it is unclear how the Commission would treat outgoing comment letters from the Commission staff that relate to confidentially submitted material. If such comment letters are disclosed, they indirectly may reveal information from the applicants' confidential material. Moreover, even if the Commission staff redacts comments that refer to confidentially submitted material, the redacted letters still would reveal the existence of the confidential material, which then could prompt requests for disclosure of the material pursuant to FOIA. Such FOIA requests would trigger the process by which the Commission staff must determine whether to afford confidential treatment to materials by seeking substantiation of the confidential treatment request from the applicants. The process of substantiating confidential treatment would be costly for applicants, while evaluating the substantiation would be time consuming for Commission staff. As a result, we believe that the public dissemination of comment letters and response letters would create administrative burdens for applicants and Commission staff that could offset the gains in efficiency resulting from the streamlining of the applications review process.

Stradley appreciates the opportunity to comment on the Commission's proposal to improve the review of applications under the Act. If you have any questions regarding our comments, please contact me at [redacted].

Sincerely,

Michael W. Mundt
Partner
Stradley Ronon Stevens &Young, LLP

cc: The Honorable Jay Clayton, Chairman
The Honorable Robert J. Jackson Jr., Commissioner
The Honorable Allison Herren Lee, Commissioner
The Honorable Hester M. Peirce, Commissioner
The Honorable Elad L. Roisman, Commissioner

Dalia Blass, Director, Division of Investment Management