

Expedited Review of Applications & Automatic Withdrawal

On July 6, 2020, the Commission approved rule amendments to establish an expedited review procedure for exemptive and other applications under the Investment Company Act of 1940 (“Act”) that are substantially identical to recent precedent, as well as a new informal internal procedure for applications that would not qualify for the new expedited process.¹ Additionally, the amendments provide for automatic withdrawal of pending applications when applicants do not respond to Staff comments within a certain time. These actions were intended to make the application process more efficient and effective, as well as to provide additional certainty and transparency regarding the process.

The expedited review process and automatic withdrawals became effective on June 14, 2021. The Division of Investment Management (“Division” or “Staff”) would like to share its experience with these new procedures and provide applicants with tips to assist them in filing applications.

Expedited Review

Generally, a notice for an expedited application will be issued no later than 45 days from the filing date unless the application is removed from the expedited process or the review period is paused, both in circumstances specified by the rule.² Additionally, an application under expedited review will be deemed withdrawn if the applicant does not file an amendment responsive to Staff comments within 30 days.³

Rule 0-5(d)(1) under the Act provides that an application under expedited review must be “substantially identical” to two other applications for which an order granting the requested relief has been issued within the prior three years. Rule 0-5(d)(2) defines “substantially identical” applications as applications requesting relief from the same sections of the Act and rules, containing identical terms and conditions, and differing only with respect to factual differences that are not material to the relief requested. Examples of such factual differences

¹ See Amendments to Procedures With Respect to Applications under the Investment Company Act of 1940, Investment Company Act Release No. 33921 (Jul. 6, 2020) (“Adopting Release”) available at <https://www.sec.gov/rules/final/2020/ic-33921.pdf>. The new informal internal procedure largely reflects prior staff practices.

² Rule 0-5(f).

³ Rule 0-5(f)(2)(ii) (“If the applicant does not file an amendment responsive to any request for modification within 30 days of receiving such request, including a marked copy showing any changes made and a certification signed by the person executing the application that such marked copy is complete and accurate, the application will be deemed withdrawn.”).

from precedent include the applicants’ identities, the state of legal organization of a fund, and the constitution of the fund’s board of directors.⁴

As of May 1, 2023, 81 applications have been filed requesting expedited review. The following chart shows the types of applications that the Staff approved under delegated authority through the expedited process as of that same date.

Application Type	Notices Issued Under Expedited Review
Multi-Class	17
Non-In-Person Board Meetings	10
Distributions	3
Exchange Traded Funds – Active	5
Multi-Manager – Voting & Disclosure	7
Interval Funds	1
Total	43

A number of applications did not qualify for expedited review. In particular, we have received eight co-investment applications seeking expedited review, none of which met the expedited review rule’s “substantially identical” standard.⁵ While co-investment applications that meet the substantially identical standard are eligible for expedited review,⁶ the Commission has noted that such applications typically include different terms and conditions than those of precedent applications, and would usually not meet the standard.⁷ Our initial experience with the expedited process has confirmed the Commission’s assessment of co-investment applications. Accordingly, we strongly recommend that applicants for co-investment relief consider carefully, before seeking expedited review, whether they meet the substantially identical standard. Careful consideration will avoid the delay and use of resources associated with applicants having to file an amendment to the application to switch to standard review. (If an application does not qualify for expedited review, the Staff will not provide substantive comments until it fully considers the application under the standard review process.)

⁴ Adopting Release at pg. 14, footnote 40.

⁵ Co-investment applications generally seek relief to permit business development companies and closed-end management investment companies to co-invest in portfolio companies with each other and with other affiliated funds.

⁶ Adopting Release at pg. 24, footnote 77.

⁷ 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”) available at <https://www.sec.gov/rules/proposed/2019/ic-33658.pdf>, at pg. 14, footnote 32.

Tips for Filing Applications under Expedited Review

In most cases the Staff will not need to issue comments on an expedited application.⁸ This is because such applications must closely track precedent, so that the Staff should not need to provide comments to the applicants addressing whether changes from precedent alter the scope or nature of the requested relief.⁹ The Division generally believes comments on such applications will decrease over time as applicants become more familiar with the applicable requirements.

Based on our experience to date, we would like to draw applicants' attention in particular to the following tips:¹⁰

- When preparing an expedited application, note the Commission's statement that "[t]he reference to 'identical' terms and conditions requires that not only the substance of the terms and conditions be the same, but also that their wording be the same."¹¹ Accordingly, the wording of applications requesting expedited review should track their chosen precedents (except, as described above, for factual differences that are not material to the requested relief).
- Applicants must file the marked copies of the expedited application required by rule 0-5(e)(2) in a manner so that they are visible to the public on EDGAR.
- As required by rule 0-5(e)(1), include a notation on the cover page of the application that states prominently, "EXPEDITED REVIEW REQUESTED UNDER 17 CFR 270.0-5(d)." Accordingly, this notation must be on the application itself, as opposed to the attached cover letter that is not visible to the public.
- As required by rule 0-5(e)(3), the cover letter must be signed, on behalf of the applicants, by the person executing the application. If two or more people sign the application, they must all sign the cover letter.
- As required by rule 0-5(e)(3)(i), explain in the cover letter why the applicants chose their particular precedents.
 - If more recent applications of the same type have been approved, applicants should explain why their precedents, rather than the more recent applications,

⁸ Adopting Release at pg. 16 ("In most cases under this standard, the Staff should be able to issue a notice within 45 days without issuing any comments to the applicant first.").

⁹ Proposing Release at pg. 11 ("With respect to routine applications, because the Staff has already performed the overall legal and policy analysis underlying the requested relief, the Staff generally should be able to review these applications much more quickly.").

¹⁰ For all applicable requirements, see the Adopting Release.

¹¹ Adopting Release at pg. 18.

were chosen. The Staff believes this should be done with enough specificity to enable the Staff to understand what unique terms or conditions their chosen precedents have.

- If the precedent applications were the most recent applications of the same type having received an order at the time the application was filed, the Staff believes that applicants may provide that as the explanation.
- As required by rule 0-5(e)(3)(ii), certify in the cover letter that the applicants believe the application meets the requirements of paragraph (d) of rule 0-5 and that the marked copies required by rule 0-5(e)(2) are complete and accurate.
- If applicants would like to receive communications regarding the application via e-mail, they should include an e-mail address in the contact information listed in the application or the cover letter.
- The Staff believes that an applicant should list the precedents relied on to qualify for expedited review in the precedent section of the application.

Automatic Withdrawal

The Commission also adopted rule 0-5(g) under the Act to deem applications, other than expedited applications, withdrawn if the applicant does not respond in writing to Staff written or oral comments within 120 days. Under rule 0-5(f)(ii), expedited applications will be deemed withdrawn if an applicant does not file an amendment responsive to Staff comments within 30 days.¹²

The Division reminds applicants that such withdrawals occur by operation of law and do not require any action by the Staff to be effectuated. The Staff intends to reflect the withdrawal by uploading a form APP-WDG generally within 30 days after the end of the 30-day period for expedited applications and the 120-day period for other applications.¹³

This Information Update represents the views of the staff of the Division of Investment Management. It is not a rule, regulation, or statement of the U.S. Securities and Exchange Commission. The Commission has neither approved nor disapproved its content. This Information Update, like all staff statements, has no legal force or effect: it does not alter or amend applicable law, and it creates no new or additional obligations for any person.

¹² The staff has previously provided comments in both oral and written form.

¹³ Adopting Release at pg. 36, footnote 119.