November 26, 2019

VIA ELECTRONIC SUBMISSION

Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street NE
Washington, D.C. 20549-1090.

Re: Amendments to Procedures With Respect to Applications Under the Investment Company Act of 1940 (SEC Release No. IC-33658; File No. S7-19-19 (Oct. 18, 2019))

Dear Ms. Countryman:

The American Investment Council (the "AIC") appreciates the opportunity to submit this letter to the Securities and Exchange Commission (the "SEC") on the proposal (the "Proposal") to amend rule 0-5 under the Investment Company Act of 1940 (the "Investment Company Act") "to establish an expedited review procedure for applications that are substantially identical to recent precedent as well as a new rule to establish an internal time frame for review of applications outside of such expedited procedure."[1]

The AIC is an advocacy, communications, and research organization established to advance access to capital, job creation, retirement security, innovation, and economic growth by promoting responsible long-term investment. In this effort, the AIC develops, analyzes, and distributes information about the private equity and private credit industry and its contributions to the U.S. and global economy. Established in 2007, and formerly known as the Private Equity Growth Capital Council, the AIC is based in Washington, D.C. The AIC's members are the world's leading private equity and private credit firms, united by their commitment to growing and strengthening the businesses in which they invest.[2]

[1] Amendments to Procedures With Respect to Applications Under the Investment Company Act of 1940 (SEC Release No. IC-33658; File No. S7-19-19 (Oct. 18, 2019))(the "Proposing Release").

[2] For further information about the AIC and its members, please visit our website at http://www.investmentcouncil.org.

The AIC's members have a significant interest in the review of exemptive applications under the Investment Company Act because certain members act as investment advisers or sub-advisers to investment companies registered under the Investment Company Act ("RICs") and companies that have elected to be regulated as a business development company under the Investment Company Act ("BDCs"; together with RICs, "regulated funds"). As such, AIC members or their affiliates have submitted applications seeking an order under sections 17(d) and 57(i) of the Investment Company Act and rule 17d-1 thereunder to permit certain RICs and BDCs to co-invest with each other and with certain affiliated investment funds and accounts ("Co-Investment Applications"). The AIC expects that more members will submit Co-Investment Applications in the future.

The AIC supports the goals of the Proposal "to improve the efficiency and speed of the application process" under the Investment Company Act. As discussed below, however, the AIC believes that Co-Investment Applications should be permitted to use the expedited review process and that additional flexibility should be added to the "substantially identical" standard underlying eligibility for the expedited review process. The AIC also believes that the SEC should use this rulemaking to develop a more flexible process for the submission of exemptive applications in draft form.

Co-Investment Applications

The AIC disagrees with the statement in footnote 32 of the Proposing Release that Co-Investment Applications would "usually not meet the standard for expedited review" because Co-Investment Applications "typically include different terms and conditions than those of precedent applications."

Based on the data in the Proposing Release, Co-Investment Applications were the second largest category of exemptive applications under the Investment Company Act for the period 2016- 2018.[3] Permitting Co-Investment Applications would significantly support the Proposal's goals of increasing efficiency and reducing the burden on the SEC staff. Furthermore, the volume of this type of application increases the likelihood of there being precedents that will meet the proposed standard for expedited review.

Based on our review of recent Co-Investment Applications, we believe that a significant number of the Co-Investment Applications could meet the "substantially identical" standard in the Proposal, including with respect to the terms and conditions.[4] While there may be variations among applications, the variations

[3] *See* Proposing Release at p. 26.

[4] *See, e.g.*, New Mountain Finance Corporation, et al., Investment Company Act Release No. 33624 (September 12, 2019)(notice); John Hancock GA Mortgage Trust, et al., Investment Company Act Release No. 33493 (May 28, 2019)(notice); BlackRock Capital Investment Corporation (May 21, 2019)(notice); Nuveen Churchill BDC LLC, et al., Investment Company Act Release No. 33475 (May 15, 2019)(notice); Pharos Capital BDC, Inc., et al.,

themselves are well established and an application based on such a variation would likely meet the "substantially identical" standard.

These applications contain substantially identical (if not identical) terms and conditions covering (i) the identification, allocation, board approval and execution of co-investment transactions, (ii) restrictions on investing in related parties, (iii) the notification, allocation, board approval (if required) and execution of dispositions of such investments, (iv) the notification, allocation, board approval (if required) and execution of follow-on investments, (v) quarterly reporting to the fund boards, (vi) annual reviews by the regulated fund's chief compliance officer and the independent directors of the fund board, (vii) record-keeping requirements, (viii) expense and transaction fee allocation, (ix) additional independence requirements for the independent directors of the regulated fund boards and (x) voting delegation requirements where the adviser, certain of its affiliated persons, and its affiliated funds own a controlling interest in the regulated fund.

We believe the substantial identity of these terms and conditions along with the volume of Co-Investment Applications confirms that Co-Investment Applications should be eligible for expedited review.

"Substantially Identical" Standard

Additionally, we believe that there should be more flexibility in the proposed standard for expedited review. First, the two-year precedent look back is too limited. A longer period would still satisfy the SEC's goals of ensuring that the precedents are "relatively recent." A five-year look back for precedents would assure sufficient certainty that the precedents remained relevant. Alternatively, there could be a requirement that at least one of the precedents be more recent, for example, one in the last three years and two in the last five years. This would permit greater flexibility in the event that the recent volume of applications seeking an exemption from a particular provision of the Investment Company Act has been low, but the terms and conditions of the precedential exemptive applications have been relatively settled.

We further note that the SEC staff will have the authority under the expedited review process to notify the applicant that the application is not eligible for the expedited review process because "further consideration is necessary for appropriate consideration of the application."[5] This explicitly includes situations "where the [SEC] is considering a change in policy that would make the requested relief, or its

Investment Company Act Release No. 33372 (Feb. 8, 2019)(notice); Stellus Capital Investment Corporation, et al., Investment Company Act Release No. 33289 (November 6, 2018)(notice).

[5] Proposing Release at p. 17.

terms and conditions, no longer appropriate."[6] Therefore, the SEC staff will be able to remove applications from the expedited review process where they have determined that a potential change in policy has made the precedents relied upon by the applicant "stale."

We also believe that the definition of "substantially identical" applications is too rigid. Under the Proposal, an application would be substantially identical to precedent only if it contained "identical terms and conditions, and differing only with respect to factual differences that are not material to the relief requested. An alternative that would meet the SEC's objectives would be for the terms and conditions to be *substantially* identical and differ only with respect to factual differences that are not material to the relief requested. This would essentially apply the same standard to the terms and conditions as is applicable to the exemptive application as a whole.

We understand that, in certain circumstances, minor changes to the terms and conditions may have a material effect on the relief requested. We are concerned, however, that minor changes to terms and conditions will unnecessarily cause the exemptive application to not meet the "substantially identical" standard, even if the minor changes are not material to the relief requested. For example, where there is a low volume of exemptive applications, there might be minor changes that are identical to terms and conditions contained in prudential applications that were granted outside of the two-year lookback period. As noted above, the SEC staff will have the ability to review the application during the expedited review period and will be able to determine whether they agree that the minor changes to the terms and conditions are not material to the relief requested (or whether additional consideration is needed to make such a determination).

Draft Submissions of Novel Applications

For novel exemptive applications, particularly those tied to new and innovative products, the ability to submit a draft application to the SEC staff depends entirely on whether the SEC staff will view the application as relating to an "extraordinary situation."[7] To our knowledge, the SEC staff had not provided a clear explanation of how it evaluates whether an application meets this high standard. We request that the SEC more clearly define this standard, and establish a formal process for applicants to seek review of draft applications.

New and innovative regulated fund products, including those sponsored and developed by the AIC's members, are more likely to require novel forms of

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6 Proposing Release at p. 17.

7 *See* Commission Policy and Guidelines for Filing of Applications for Exemption, Investment Company Act (SEC Release No. 14492 (Apr. 30, 1985)).

exemptive relief in order to operate. An exemptive application for a new fund or other new innovation may contain information that a sponsor ordinarily would view as confidential, proprietary or trade secret, as it may describe, or allow competitors to infer, details about innovative ideas that are the result of significant investment, in both time and money, by fund sponsors. In order to foster innovation in the regulated fund space, it is important for such competitively sensitive information to be disclosed only once a sponsor has determined that a regulated fund product is viable, and commences the public registration process or otherwise makes a public announcement.

Under the Proposal, novel exemptive applications would be subject to the "standard review" process, which allows the SEC staff to provide comments on both initial applications and amendments within 90 days, and have the ability to grant 90-day extensions when necessary.[8] For novel exemptive applications, the SEC staff frequently issues more than one round of comments, resulting in a lengthy process that can take many months (or sometimes years). The lengthy process for novel applications does not align with the registration statement process for new regulated funds, as the SEC staff issues comments on initial registration statements within 30 days of receipt of the filing.[9] Additionally, BDCs that qualify as emerging growth companies can submit for draft registration statements for SEC staff review[10] and private BDCs are able to register their securities on Form 10, which becomes automatically effective 60 days after filing.

This timing mismatch puts sponsors of new and innovative regulated funds in an untenable position that discourages innovation and capital formation. A sponsor may not make the investment to develop a new regulated fund due to the significant uncertainty around the ability to submit a draft exemptive application and the attendant risk that it would be required to publicly disclose what are, in effect, confidential trade secrets, well in advance of a potential offering for a new regulated fund.

In order to promote the development of new and innovative regulated funds, we request that the SEC more clearly define what constitutes an "extraordinary situation," and that the SEC provide a formal process for applicants seeking review of novel draft exemptive applications prior to public filing.

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8 *See* Proposing Release at p. 21.

9 *See* Review of Investment Company Filings, Audit No. 273 (June 26, 1998), https://www.sec.gov/oig/reportspubs/aboutoigaudit273finhtm.html.

10 *See* Draft Registration Statement Processing Procedures Expanded (June 29, 2017)(announcement), https://www.sec.gov/corpfin/announcement/draft-registration-statement-processing-procedures-expanded.

We believe that the SEC could look to Exemption Four of the Freedom of Information Act ("FOIA") as one indicator that an application presents an "extraordinary situation" appropriate for draft review. Exemption Four of FOIA allows documents filed with the SEC that contain "trade secrets and commercial or financial information obtained from a person and privileged or confidential" to be exempt from requests by the public.[11] Specifically, the standard could require that the novel exemptive application must contain a "trade secret" meaning it is "a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort" and there is a "direct relationship" between the trade secret and the productive process.[12] We believe that in most circumstances, a fund sponsor would be able to explain to the SEC staff why an innovative new product meets this standard.

In order for the SEC staff to be able to evaluate whether a potential application meets the standard described above, we propose that the SEC establish a formal process for review of draft applications. The contours of such a process could be similar to the standard application review process, and might include the following:

(1) the applicant(s) would be required to submit a request to the SEC staff via an online form, fax or mail that includes: (i) the draft exemptive application; and (ii) a representation letter;

(2) the representation letter would include an explanation from the applicant(s) of why the application is novel compared to other precedent and describe the information that qualifies the application for the "extraordinary" standard discussed above (*e.g.*, for an application containing a trade secret or other confidential information, why the information is valuable and how premature public disclosure of the information could harm the applicant(s);

(3) the SEC staff would have 20 business days from the date that the SEC staff receives the request to respond to the applicant(s) and grant or deny review of the application in draft form;

(4) the SEC staff would have 90 days to provide comments on both draft applications and amendments and the ability to grant 90 day extensions when necessary;

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[11] *See* Freedom of Information Act, 5 U.S.C. § 552(b)(4) (2018).

[12] *See* Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1288 (D.C. Cir. 1983); *See* Department of Justice, Freedom of Information Act Guide (May 2004) https://www.justice.gov/oip/foia-guide-2004-edition-exemption-4#N_3_.

(5) the applicant(s) would be required to respond to comments from the SEC staff within 60 days or the application will be placed on inactive status; and

(6) the amended draft exemptive application would be filed publicly when the SEC publishes its notice of the application stating its intent to grant the requested relief.[13]

If the SEC adopts this formalized process and clarifies the "extraordinary" standard for draft review, it would support the SEC's mission to facilitate capital formation by removing a meaningful impediment to the development of new and innovative regulated funds.

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The AIC appreciates the opportunity to comment on the Proposal and would be pleased to answer any questions that you might have concerning our comments.

Respectfully submitted,

Jason Mulvihill
Chief Operating Officer & General Counsel
American Investment Council

[13] We believe that, due to the competitive and confidentiality concerns noted earlier, only the final draft of the application should be filed publicly, and if the SEC staff declines to grant a draft application, the draft application should not be made public.