# Chapter 13

# Procedures for Exemptive Orders

## I. Introduction and Summary of Recommendations

The Commission is accorded significant discretion to administer the provisions of the Investment Company Act.[1] In at least thirty-three separate instances, the Act authorizes the Commission to issue orders for different types of relief from specific statutory requirements? The quintessential discretionary provision is section 6(c),[3] which authorizes the Commission to:

> conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provisions of [the Act] or of any rule or regulation thereunder, if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of [the Act]?

Congress, in its foresight, added this section to provide the Commission with administrative flexibility?

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[1]Investment Company Act of 1940, 15 U.S.C. § 80a.

[2]Investment Company Act §§ 2(a)(9), 3(b)(2), 8(f), 9(c), 10(e)(3), 10(f), 11(a), 12(g), 15(f)(3), 16(a), 17(b), 17(e)(2), 18(i), 18(j), 19(b), 22(b)(1), 22(e)(3), 23(b), 23(c)(1), 23(c)(3), 26(b), 27(b), 28(b), 28(d), 31(d), 34(a), 38(a), 56(b), 57(c), 57(j)(2)(E)(ii), 57(k), 57(n)(1)(A)(ii), 61(a)(3)(B)(i), 15 U.S.C. §§ 80a-2(a)(9), -3(b)(2), -8(f), -9(c), -10(e)(3), -10(f), -11(a), -12(g), -15(f)(3), -16(a), -17(b), -17(e)(2), -18(i), -18(j), -19(b), -22(b)(1), -22(e)(3), -23(b), -23(c)(1), -23(c)(3), -26(b), -27(b), -28(b), -28(d), -30(d), -33(a), -37(a), -55(b), -56(c), -56(j)(2)(E)(ii), -56(k), -56(n)(1)(A)(ii), -60(a)(3)(B)(i). In addition, the Commission also issues exemptive orders under rule 17d-1 to permit the consummation of joint transactions involving affiliates otherwise prohibited by section 17(d) and rule 17d-1 thereunder. 17 C.F.R. § 270.17d-1. See Chapter 12.

[3]15 U.S.C. § 80a-6(c).

[4]In addition, section 6(b) authorizes the Commission to exempt employees' securities companies from one or more of the Act's provisions, section 6(d) authorizes the Commission to exempt certain small, closed-end, intrastate investment companies from any or all of the Act's provisions, and section 6(e) authorizes the Commission, in exempting any investment company from the registration provisions of section 7 (15 U.S.C. § 80a-7), to impose conditions of compliance with any of the Act's provisions.

[5]In his remarks to Congress recommending the bill that later became the Investment Company Act, David Schenker, Chief Counsel of the Commission's Investment Trust Study and a principal (continued...)

Despite the flexibility of section 6(c), however, responses to the Commission's release soliciting comments on the reform of investment companies (the "Study Release"),[6] criticized section 6(c) and particularly the Commission's and the Division's administration of the provision.[7] While many commenters declared that the flexibility provided by section 6(c) is indispensable to the success of the Act,[8] many of the same commenters also complained that the process of obtaining an exemptive order simply takes too long? Commenters also criticized

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author of the Act, stated that "the difficulty of making provision for regulating an industry which has so many variants and so many different types of activities . . . is precisely [the reason that section 6(c)] is inserted." *Investment Trusts and Investment Companies: Hearings on S. 3580 Before a Subcomm. of the Senate Comm. on Banking and Currency*, 76th Cong., 3d Sess. 197 (1940) [hereinafter 1940 *Senate* Hearings].

[6]Request for Comments on Reform of the Regulation of Investment Companies, Investment Company Act Release No. 17534 (June 15, 1990), 55 FR 25322.

[7]*See, e.g.,* Letter from the Subcommittee on Investment Companies and Investment Advisers of the Committee on Federal Regulation of Securities, Section of Business Law, American Bar Association ("ABA Subcommittee"), to Jonathan G. Katz, Secretary, SEC 5-9 (Oct. 18, 1990), File No. S7-11-90 [hereinafter ABA Study comment]; Letter from Davis Polk & Wardwell to Jonathan G. Katz, Secretary, SEC 40-44 (Oct. 10, 1990), File No. S7-11-90 [hereinafter Davis Polk Study Comment]; Letter from Dechert Price & Rhoads to Jonathan G. Katz, Secretary, SEC 5, 11-17 (Oct. 10, 1990), File No. S7-11-90 [hereinafter Dechert Price Study Comment]; Letter from Federated Investors to Jonathan G. Katz, Secretary, SEC 26 (Oct. 10, 1990), File No. S7-11-90 [hereinafter Federated Study Comment]; Letter from Fidelity Management & Research Co., Inc. to Jonathan G. Katz, Secretary, SEC 9-10 (Oct. 11, 1990), File No. S7-11-90 [hereinafter Fidelity Study Comment]; Letter from IDS Financial Corporation to Jonathan G. Katz, Secretary, SEC 25-27 (Oct. 2, 1990), File No. S7-11-90 [hereinafter IDS Study Comment]; Letter from the Investment Company Institute ("ICI") to Jonathan G. Katz, Secretary, SEC 44-46 (Oct. 5, 1990), File No. S7-11-90 [hereinafter ICI Study Comment]; Letter from Merrill Lynch & Co., Inc. to Jonathan G. Katz, Secretary, SEC 1-4, Ex. I (Oct. 18, 1990), File No. S7-11-90 [hereinafter Merrill Lynch Study Comment]; Letter from PaineWebber Development Corporation to Jonathan G. Katz, Secretary, SEC 4 (Oct. 10, 1990), File No. S7-11-90 [hereinafter PaineWebber Study comment]; Letter from Prudential Mutual Fund Management, Inc. to Jonathan G. Katz, Secretary, SEC 8-9 (Oct. 9, 1990), File No. S7-11-90 [hereinafter Prudential Study Comment].

'According to Alfred Jaretzki, Jr., one of the principal authors of the Act, "Without these exemptive powers and without a wise exercise of discretion thereunder, the Act would be unworkable, unduly restrictive and would cause unnecessary hardships." Alfred Jaretzki, Jr., *The Investment Company Act of 1940*, 26 WASH. U. L.Q. 303, 344 (1941). Several responses to the Study Release shared Mr. Jaretzki's view. *See, e.g.,* ABA Study Comment, *supra* note 7, at 6; Davis Polk Study Comment, *supra* note 7, at 40-41 n. 57; ICI Study Comment, *supra* note 7, at 44-45; PaineWebber Study Comment, *supra* note 7, at 3 n.*.

[9]*See, e.g.,* ABA Study Comment, *supra* note 7, at 7 (recounting the experience of one of its members, stating that "whereas [the member] once advised clients to expect that an order could be issued in four to six months he now advises one to *two* years."). Critics have focused on
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the Division for a perceived reluctance to exercise its delegated authority[11] in granting exemptive orders,[11] and a perceived narrow interpretation of section 6(c).[12]

Because of the importance of the application procedure to the administration of the Act, the Division examined a number of options for reform, either through changes to the substantive standards in the statute or through procedural changes. We considered a number of alternatives, including the suggestions made by commenters. We conclude that while existing standards and procedures are fundamentally sound, they may be improved.

Our first recommendation for procedural reform is of our own creation, although it draws on certain of the recommendations made by commenters. The procedure we propose would permit expedited treatment of applications for which there is precedent. Applicants employing this procedure generally would receive relief no later than 120 days after filing an application. (Currently, on average, applicants receive orders approximately 190 days after filing.) Our second recommendation is an amendment to the Division's delegated authority that we believe would expedite review of applications. We discuss these recommendations, as well as the approaches we considered and rejected, below.

[9](...continued)
perceived unnecessary delays in the review of relatively routine applications (see, *e.g.,* IDS Study Comment, ***supra*** note **7,** at **26)** as well as those presenting novel and complex issues (see, ***e.g.,*** **ABA** Study Comment, *supra* note **7,** at **7-9;** Davis Polk Study Comment, *supra* note **7,** at **41-42;** Fidelity Study Comment, ***supra*** note **7,** at 9; **IDS** Study Comment, ***supra*** note **7,** at 26), and have argued that these delays make it difficult to obtain exemptive orders within the time frame required to accommodate a specific transaction, which may prevent worthwhile financial products from entering the marketplace, to the detriment of investors.

[10]*See infra* notes **36** & **46** and accompanying text.

[11]See, *e.g.,* **ABA** Study Comment, ***supra*** note **7,** at **7-9;** Merrill Lynch Study Comment, ***supra*** note **7,** at **2-3.**

[12]*See, e.g.,* Davis **Polk** Study Comment, *supra* note **7,** at **41-42;** Dechert Price Study Comment, ***supra*** note **7,** at 11-16; IDS Study Comment, *supra* note **7,** at **26;** Merrill Lynch Study Comment, *supra* note **7,** at **2;** PaineWebber Study Comment, ***supra*** note **7,** at 3-4.

## II. Background

### A. The Historical Use of Section 6(c)

Early opinions of the Commission emphasized that use of its exemptive authority was to be somewhat limited.[13] As the financial markets have evolved, however, the need for exemptive relief has grown, not only to respond to new innovations but also to keep pace with the general evolution of the investment company industry.[14] The orders issued by the Commission have addressed matters ranging from relatively minor investment company operational matters to complex trading vehicles that do not necessarily fit within the regulatory confines of the Act.

Perhaps the most powerful example of the flexibility and scope of the Commission's authority under section 6(c) is the introduction and growth of money market funds. Under section 2(a)(41), registered investment companies must value their securities based on market values, if available., or, if not, values determined in good faith by the board of directors. In a series of exemptive orders beginning in the 1970's, the Commission permitted money market funds to use two alternative valuation methods, amortized cost or penny rounding.[15] Those orders were later codified in rule 2a-7.[16] The orders and the rule were critical to the evolution and success of money market funds, which, as of year-end 1991, represented approximately $450 billion in assets and about 33% of all mutual fund assets.[17]

[13] In a 1941 opinion, the Commission stated that "[tlhe very breadth of a power to exempt any person, security, or transaction from any provision of the Act places upon us a grave responsibility that such power be exercised with the greatest circumspection." In re American Participations, Inc., 10 S.E.C. 430,437 n.8 (1941). See also In re Atlantic Coast Line Company, 11 S.E.C. 661,667 (1942) (construing section 6(c) as authorizing relief only in those "special situations that might have been overlooked or that could not be foreseen at the time the legislation was drafted").

[14] The extent to which the Commission and the financial services industry now depend on the exemptive process is demonstrated by the number of applications reviewed by the Division. In recent years, the number received has fluctuated somewhat, but is always substantial, ranging from 415 in fiscal year 1989 to 347 in fiscal year 1990 to 310 in fiscal year 1991.

[15] *See generally* Valuation of Debt Instruments and Computation of Current Price Per Share By Certain Open-End Investment Companies (Money Market Funds), Investment Company Act Release Nos. 12206 (Feb. 1, 1982), 47 FR 5428 (request for comments on proposed rule 2a-7) and 13380 (July 11, 1983), 48 FR 32555 (notice of final rule 2a-7).

[16] 17 C.F.R. § 270.2a-7.

[17] *See* ICI News Release, ICI 92-03 (Jan. 29,1992).

In the last several years alone, the Commission's exemptive orders have covered a wide variety of Investment Company Act issues. For example, many relate to new sales and distribution practices in the mutual fund industry, such as offers of exchange among investment portfolios in the same family of funds:' imposition of contingent deferred sales loads,[19] and more complicated matters such as funds offering multiple classes of shares with different sales charges and expenses.[20]

Recent Commission orders also have involved somewhat narrow but complicated factual circumstances. For example, in 1989, as part of its settlement with Drexel Burnham Lambert Inc. ("Drexel"), the Commission issued an order under section 9(c) of the Act temporarily allowing Drexel to remain as an adviser and principal underwriter to a number of registered investment companies, notwithstanding the automatic disqualification in section 9(a). The order contained a number of conditions, including a requirement that Drexel hire an independent examiner to conduct an extensive review of its investment company operations.[21]

Another exemptive order involving a complex factual situation is the 1990 Commission order permitting a unit investment trust to issue redeemable equity interests that are divided into two unredeemable components.[22] The order exempted the trust, its sponsor, and dealers from section 22(d) of the Act, thereby permitting the trust's securities to be traded freely on secondary markets.[23]

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[18] *See, e.g.,* PNCG Money Market Fund, Inc., Investment Company Act Release Nos. **16971** (May **19,** 1989), **54** FR **23000** (Notice of Application) and **17007** (June **14,** 1989), **43** SEC Docket **2059** (Order). Orders **of** this **type** now have been codified in rule **11a-3. 17** C.F.R. § **270.11a-3.**

[19] *See, e.g.,* Freedom Investment Trust, Investment Company Act Release Nos. **16487** (July **20,** 1988), **56** FR **56260** (Notice of Application) and **16526** (Aug. 16, 1988), **41** SEC Docket **904** (Order).

[20] *See, e.g.,* Goldman Sachs--Institutional Liquid Assets, Investment Company Act Release Nos. **17420** (Apr. **11,** 1990), **55** FR **14541** (Notice of Application) and **17479** (May 8, 1990), **46** SEC Docket **350** (Order).

[21] Drexel Burnham Lambert Inc., Investment Company Act Release No. **17133** (Sept. 11, 1989), **44** SEC Docket **1104.**

[22] The SuperTrust Trust for Capital Market Fund, Inc. Shares, Investment Company Act Release Nos. **17613** (July **25,19901, 55** FR **31281** (Notice **of** Application) and **17809** (Oct. 19, 1990), **47** SEC **Docket 1098** (Order).

[23] *Id.* In addition, as discussed in Chapter 1, the Commission has issued a number of orders in recent years exempting certain types of structured financings from the provisions of the Act.

### B. Current Procedures for Obtaining Exemptive Relief under Section 6(c)

Applicants seeking exemptive relief under section 6(c) must file an application with the Commission setting forth a basis for the relief requested (including a detailed justification for removal of any statutory protections), and identifying any benefits expected for investors and any conditions imposed to protect investors.[24] Applications are reviewed in the order received, unless the applicant makes a compelling demonstration that the application could not have been filed in time to allow it to be addressed and acted upon in due course.[25] The total time period for consideration of an exemptive application by the staff and (in some instances) the Commission, responses by the applicant, and the notice period typically ranges from six to eight months, depending on the novelty and complexity of the requested relief and the staff's workload. During the review process, the staff may send comment letters to the applicant requesting clarifications or modifications to the application to assure that the requested relief is consistent with statutory standards.[26] Once review of an application is completed, a notice outlining the requested relief is published in the *Federal Register* to give interested persons an opportunity to request that the matter be set down for a hearing.[27] After a notice period of approximately twenty-five

[24]Commission guidelines require prospective applicants to review all relevant provisions of the Act and rules thereunder, and all pertinent Commission releases, before filing an application. Applicants are also required, to the extent possible, to bring their proposal within applicable precedent, and to cite and discuss such precedent in the application. Commission Policy and Guidelines for Filing of Applications for Exemption, Investment Company Act Release No. 14992 (Apr. 30, 1985), 50 FR 19339 (setting forth procedures and guidelines for applicants to follow in connection with filing exemptive applications, and representing the Commission's efforts to streamline the exemptive applications process in response to increases in the early 1980's in both the number and complexity of exemptive applications filed under section 6(c)).

[25]*Id.* § 6/50 FR at 19340.

[26]Division guidelines require the staff to give initial comments on an exemptive application within 45 days of receipt of the application (id. at n.1, 50 FR at 19339 n.1) and the applicant to file any amendments to its application within 60 days of receipt of staff comments (id. § 8/50 FR at 19340). At the staff's discretion, an applicant who does not file an amendment within 60 days may be placed on inactive status. Id. An applicant may reactivate an inactive application at any time by filing an appropriate request with the Division or by filing the required amendment. Id. Action on reactivated applications commences from the date of the Division's receipt of such an such request or amendment, and does not date back to the filing of the original application. Id.

[27]Under section 40(a) of the Act, orders of the Commission may be issued only after appropriate notice and opportunity for hearing. 15U.S.C. § 80a-39(a). Division guidelines require that notices of routine applications which require no amendment be published within 60 days of receipt of the application. Inv. Co. Act Rel. 14492, supra note 24, at n.1, 50 FR at 19339 n.1.

days,[28] and unless a hearing is requested by an interested party or is ordered by the Commission on its own motion, an order is issued granting the requested relief?' If the staff determines that it cannot support an application because the relief requested is not justified, it may recommend that the application be withdrawn?' If the Division is unwilling to support an application, and it is not withdrawn, the Division submits the application to the Commission with a recommendation that it be set down for a hearing?' The Division does not have delegated authority to order hearings or deny applications.[32]

## III. Recommendations to Expedite Review of Exemptive Applications

Because of the importance of the exemptive process and the significant Commission resources involved, the Division has re-examined both the statutory basis for exemptive orders and the Commission's own procedures to determine if either could be improved.[33] Among other things, the Division hoped to identify a means to shorten the time period for the issuance of orders or withdrawal of applications, because of our concern that, at times, the process is unnecessarily lengthy. At the same time, we sought to avoid imposing on the Commission unnecessarily short time frames for resolving all requests for exemptive relief, given the complexity and significance of many applications.[34]

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[28]The Act does not specify the duration of the notice period. However, under the Federal Register Act, the notice period generally must last for at least 15 days after publication. 44 U.S.C. § 1508. Because of this 15 day requirement and because of the fact that notices generally are not published in the *Federal* Register for at least six days after the notice is issued, the Commission typically provides that the opportunity to request a hearing extends for between 25 and 28 days from the date of issuance.

[29]Internal Division guidelines also require that orders granted under delegated authority be issued within two business days after the expiration of the notice period. Inv. Co. Act. Rel. 14492, **supra** note 24, at n.1, 50 FR at 19339 n.1.

[30]*Id.* § 3, 50 FR at 19340.

[31]*Id.* at n.3, 50 FR at 19340 n.3.

[32]This authority is not granted to the Division Director under the rules governing delegated authority. 17 C.F.R. § 200.30-5(a)(1), (2).

[33]*See supra* notes 6 & 7 and accompanying text.

[34]A number of the other recommendations in the Division's study should reduce the need to rely on the Commission's exemptive authority. *See, e.g.,* Chapter 1 (exemptive rule for structured financings); Chapter 12 (amendments to rules 10f-3 and 17d-1 to reduce the scope of the prohibitions imposed by these rules) (17 C.F.R. §§ 270.10f-3, .17d-1); and Chapter 2 (new exception (continued...)

A. Expedited Procedures **for** Applications Based on Precedent

Our primary recommendation incorporates certain of the commenters' suggestions. It would establish a procedure that would decrease the amount of time required for consideration of applications that are controlled by precedent, while also incorporating appropriate safeguards.[35] Essentially, it would provide for expedited review of applications that are based on recent precedent, if the applicant complied with certain procedural requirements. The procedure we propose would be available only with respect to applications seeking relief from those provisions of the Act for which the Division has been granted delegated authority to issue notices and orders,[36] and only for those applicants who specifically request it. In addition, because our proposal would continue to require publication of a notice of application and would afford opportunity for a hearing, it would comply with section 40(a) of the Act. Consequently, the proposal could be implemented by a change in the Commission's procedures and would not require a statutory amendment.

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€or issuers whose securities are owned exclusively by qualified purchasers). We nevertheless believe that some changes to the applications procedures also are warranted.

[35]In response to the Study Release *(supra* note 6), several commenters recommended procedures providing for expedited treatment of applications for which there is precedent. Some commenters recommended that all applications seeking relief similar to that which the Commission has granted previously, and containing the same conditions as the precedential application, be deemed granted after 30 days if the Commission does not take affirmative action to prevent the exemption. See Fidelity Study Comment, *supra* note **7,** at 9; ICI Study Comment, *supra* note 7, at 45-46; Prudential Study Comment, *supra* note 7, at 9. These proposals could **only** be implemented through legislation. One commenter recommended, for applications "where there is precedent for the issues involved, and where applicants represent that there are no material differences of fact [from the precedential application], that exemptions be automatically granted after 60 days unless the staff indicates that it has concerns." IDS Study Comment, *supra* note 7, at 26. Another commenter suggested a slightly different approach, recommending that the Commission adopt a procedure for expedited treatment of exemptive requests where the application is accompanied by a certificate of independent fund counsel to the effect that the application is clearly supported by precedent and does not raise any material issues not addressed in a previous Commission order, including orders granted by delegated authority. Dechert Price Study Comment, supra note 7, at 16-17.

[36]17 C.F.R. § 200.30-5(a)(1), (2). For a discussion of the Division Director's delegated authority, see *infra* note **46.** As discussed below in Section III.B., we recommend that the Division's delegated authority be expanded to include all exemptive provisions of the Act. If this proposal were implemented, there would be no limitation concerning the provisions of the Act to which the expedited procedures described above would apply.

Our proposal is comprised of the following elements:

**a. Counsel Certification:** Investment company counsel would be required to certify that the application is consistent with the two most recent applications relied on as precedent, the most recent of which was issued within the last two years, and that such application contains all of the same conditions and material representations as the most recent precedential application. In addition, the applicant would be required to provide, as exhibits to its application, a copy of the application marked to show changes from the most recent precedential application and a draft notice marked to show changes from the Commission notice issued in connection with that application.[37] Counsel also would certify the accuracy of these exhibits.[38]

**b. Notice Within Ninety Days of Filing:** A notice of application would issue no later than ninety days of the filing of the application, unless the Division informed the applicant prior to that time that the application would not be handled under expedited procedures, but instead would be considered under regular review procedures. The Division would have complete discretionary authority to make this determination, which would not be subject to review.[39] The notice, which would be published in the Federal Register, would inform the public that, unless an interested party requests a hearing within the notice period (twenty-five to twenty-eight days), or the Commission orders a hearing on its own motion, an order will be issued.

**c. Order Within 120 Days of Filing:** An application satisfying the criteria of paragraph (a) above that is handled in accordance with the time periods set forth in paragraph (b) would be granted no later than 120 days after filing (or thirty days after issuance of the notice), unless a request for a hearing were filed in response to the notice of application published in the Federal Register, or the Commission ordered a hearing on its own motion.

While an expedited procedure runs the risk of overwhelming the Division's resources, we believe that there are sufficient safeguards built into the proposal to diminish that risk significantly.

[37] A number of law firms already provide copies of applications and draft notices marked to show changes from prior precedent.

[38] Compare the proposed procedures with the approach suggested by Dechert Price & Rhoads, discussed *supra* note 35.

[39] The circumstances under which an application would be reviewed under regular procedures are discussed *infra* note 41 and accompanying text.

First, we envision that the proposed procedure would be used only for applications that are clearly governed by precedent. While Division staff assigned to applications for which expedited treatment is requested would still have to find that the particular application did or did not conform with precedent, the required certifications by fund counsel and marked copy of the application and notice would provide some assurance that such is indeed the case.

Moreover, the Division would have a full ninety days to review the application and decide whether it is and should be controlled by the precedent cited.[40] If the Division believed that the application did not conform to, or was not controlled by, the precedent cited, or determined that the precedent relied on should not have precedential value or should be modified in future orders, it would inform the applicant that the application would be decided under regular application procedures.[41]

In addition, the requirement that the precedential order have been issued within the last two years would ensure that no "stale" precedent was relied on and that the Division would have some familiarity with the relief sought. More significantly, the Division's position on issues often evolves based on new information about the operation of particular types of exemptions. Because of the limited staff available to review applications, however, the Division rarely recommends that the Commission institute proceedings to revoke orders. Without the requirement that the precedent relied on be recent, and the staff's discretion to remove an application from expedited consideration, the expedited procedure could result in the granting of exemptive applications that merit fresh consideration.[42]

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[40]The proposed procedures also may have to take into account the impact of staff comment letters on the time limits prescribed in our recommendation. While we envision that comment letters will be infrequent, the Division may on occasion have questions or comments in connection with applications that appropriately qualify for expedited treatment under our proposal. One option would be to provide that comment letters toll the 90 day period. Additionally, or alternatively, the procedure could require an applicant to respond within a reasonable amount of time (*e.g.*, 30 days) or the 90 day period would begin anew.

[41]While, as noted in the text above, the Division's determination would not be reviewable, it is contemplated that these would be the only circumstances under which a ***particular*** application otherwise eligible for expedited treatment would be reviewed under regular procedures. The Division, however, would have the authority to suspend the availability of the expedited procedure in response to resource needs, although we expect this would happen rarely, if at all.

%ne alternative to the "recent precedent" approach would be for the Division to publish a list of applications that could not be relied on for expedited treatment. Given present staffing constraints, however, such an approach is unrealistic.

Finally, while we recognize that there is potential for abuse in the expedited procedure we propose, we believe we have diminished that potential through the required certifications of counsel and the requirement that the applicant provide as exhibits copies of the application and draft notice reflecting any changes from the precedent relied on. In connection with the required certifications, section 34(b) of the Act, which prohibits the making of misleading statements in filings under the Act, including applications, will apply. In addition, if counsel were to certify in a misleading manner, it might be grounds for a Commission disciplinary proceeding under rule 2(e) of the Commission's Rules of Practice.[43] In formulating the expedited treatment procedures, we also intend to consider whether additional, less drastic disciplinary procedures might be appropriate.[44]

We believe that our proposal would achieve the desired goal of enabling applicants seeking non-controversial relief based on established precedent to receive an exemption on a predictable and expedited basis.[45] Our proposal also provides the Division with the flexibility to require that an application be reviewed under regular procedures to avoid the possibility that an order would be issued based on mistaken precedent as well as to allow the Division's analysis with respect to the conditions and representations necessary for a particular type of exemptive relief to evolve. For these reasons, we recommend its implementation. Because staff resources are limited, however, the Commission should recognize, that the need to meet the time periods imposed by the recommended procedure could divert resources from novel and complex applications.

[43] 17 C.F.R. § 201.2(e).

[44] By way of analogy, under rule 487, which provides for expedited effectiveness of registration statements for certain series of unit investment trusts, the Commission may suspend indefinitely a registrant's eligibility for expedited treatment. 17 C.F.R. § 230.487. The Commission has delegated that authority to the Division Director. 17 C.F.R. § 200.30-5(b-3).

[45] We contemplated other approaches that utilized prior exemptive applications as precedent. For example, we considered implementing a procedure whereby applicants seeking expedited review of precedented applications would receive a "temporary" or time limited order within 60 days of filing (unless the staff determined that application would not be handled under expedited procedures) and a permanent order within 180 days of filing. During the temporary relief period, the staff could require amendments incorporating additional and/or modified conditions and representations. We envisioned that this approach would permit applicants to obtain relief quickly (even more quickly than under our recommended approach), but would also afford the staff the opportunity to "fine tune" applications before a permanent order was entered. We decided against recommending this approach, however, because of a concern that applicants would not find temporary relief helpful in most cases. An applicant proceeding with a proposed transaction, for example, would remain vulnerable to possible modification of its operations to satisfy conditions arising under the permanent order. In addition, we sought a relatively simple procedure.

### B. Amendments to the Division's Delegated Authority

We believe that delay on some applications may be caused by an unnecessarily narrow delegation of authority from the Commission to the Division Director.[46] Currently, the delegation of authority requires the Division Director to present to the Commission all applications involving any matter that has not been previously settled by the Commission, even if the matter does not raise investor protection or public interest concerns.[47] Because we believe that this standard is unnecessarily restrictive, we recommend that Commission rules governing the delegation of authority be amended to incorporate a concept of materiality in connection with the determination of whether a particular matter appears to present issues not previously settled by the Commission.[48]

Moreover, there are several exemptive provisions of the Act for which the Division Director has not been granted delegated authority to issue notices or orders.[49] Because we can discern no principled basis for distinguishing these

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[46]The Division Director has delegated authority to issue notices where, "upon examination, the matter does not appear to [herl to present issues not previously settled by the Commission or to raise questions of fact or policy indicating that the public interest or the interest of investors requires that a hearing be held." 17 C.F.R. § 200.30-5(a)(1). The Division Director is similarly permitted to "authorize the issuance of orders where a notice . . . has been issued and no [timely] request for a hearing has been filed by an interested person . . . *and* the matter involved presents no issue that [s]he believes has not previously been settled by the Commission and it does not appear to [her] to be necessary in the public interest or the interest of investors that a hearing be held." 17 C.F.R. § 200.30-5(a)(2) (emphasis added).

[47]*Id.*

[48]In response to the Study Release *(supra* note 6), the **ABA** Subcommittee and Merrill Lynch & Co., Inc. both maintained that the Division has been unduly narrow in exercising its existing delegated authority, although neither cited a specific example. **ABA** Study Comment, ***supra*** note **7,** at 7-9; Merrill Lynch Study Comment, *supra* note 7, at 1-11 to 1-14. For applications not decided under delegated authority, the **ABA** Subcommittee also charged that the Commission review procedure, including specifically the preparation and use of internal memoranda regarding particular applications and the Division's recommendation with respect thereto, is unduly time consuming and formalistic. **ABA** Study Comment, *supra* note **7,** at 9. We simply disagree. We believe that the Division has exercised its authority appropriately and that the Commission review procedure works well.

[49]This category includes section 2(a)(9) (Commission may determine that applicant has rebutted presumption of control); section 15(f)(3) (Commission shall consider asset size in determining whether to exempt transaction from the certain provisions of section 15(f)(1)); section 18(i) (Commission may permit issuance of stock by registered investment company that is not voting stock with rights set forth in that section); section 19(b) (Commission may permit distribution of long-term capital gains more often than once every twelve months); section 22(b)(1) (Commission may "make due allowance" and grant "appropriate qualified exemptions" from (continued...)

exemptive provisions from others for which delegated authority has been granted, we recommend that they be added to list of provisions included in the delegation. Under our proposal, the delegation would be amended to read as set forth in Appendix 13-A at the end of this chapter.

## IV. Other Options Considered

### A. Automatic Effectiveness for All Applications Absent Commission Action

We considered a more radical change to the Commission's exemptive procedures: amending the Act to provide that all exemptive applications become automatically effective within a fixed period of time unless the Commission takes action to stop effectiveness?' As noted by commenters supporting an automatic effectiveness rule?' such a change would make the Investment Company Act's exemptive procedures resemble provisions of the Securities Act governing the effectiveness of registration statements,[52] and provisions under the Exchange Act

[49](...continued)
provisions of section 22 when it appears that small companies are subject to relatively higher operating costs); section 27(b) (Commission may relax sales load requirements on registered investment companies that issue periodic payment plan certificates); section 28(b) (Commission may authorize as "qualified investments" for face amount certificate companies investments other than those defined in section 28(b)); section 28(d) (for face amount certificate companies, Commission may permit deferment of payment to a certificate holder other than deferment of the type and for the period specified in the subsection); section 34(a) (Commission may permit destruction or alteration of documents otherwise required to be preserved); section 38(a) (Commission may make, issue, amend, or rescind orders necessary or appropriate to the exercise of its powers, including rules and regulations defining accounting, technical, and trade terms, and prescribing the form in which information required for registration statements, applications, and reports to the Commission shall be set forth); section 56(b) (Commission may exempt business development companies ("BDCs") from requirements relating to director qualifications); and section 57(j)(2)(E)(ii) (Commission may approve loans by BDCs to certain directors or partners otherwise prohibited by sections 57(a) and (d)).

[50]Federated Investors, the ICI, and Prudential Mutual Fund Management all recommended that applications under section 6(c) be automatically granted 90 days after filing unless the Division or Commission takes some action to stop effectiveness. Federated Study Comment, *supra* note 7, at 1-2; ICI Study Comment, *supra* note 7, at 45-46; Prudential Study Comment, *supra* note 7, at 9.

[51]*See* IDS Study Comment, *supra* note 7, at 26 (regarding the procedures attending the review of proxy statements and post-effective amendments under the federal securities laws); ICI Study Comment, *supra* note 7, at 46 n.38 (regarding the processing of applications under section 4(c)(8) of the Bank Holding Company Act of 1956).

[52]These provisions are discussed *infra* note 55.

regarding the use of proxy materials.[53] We believe that such an approach would be seriously flawed, for several reasons.

We believe that a procedure that sets an inflexible time period for responding to all types of exemptive applications without regard to their novelty or complexity, or to the volume of applications and the Commission's staffing levels, would be unrealistic. These factors are largely outside the Commission's control. Moreover, trends in federal spending indicate that it is very uncertain whether the Commission would be able to devote sufficient resources so that *all* applications would be reviewed adequately within ninety days.

Moreover, if this approach were implemented,[54] it is likely that the practice would evolve into a procedure much like the one that now exists regarding the effectiveness of registration statements under the Securities Act. Although the Securities Act provides that registration statements become effective in twenty days unless the Commission issues a stop order,[55] in practice a large percentage contain the "delaying amendment" language prescribed in rule 473.[56]

[53]Rule 14a-6, 17 C.F.R. § 240.14a-6. The procedures for review of proxy materials generally permit an issuer whose preliminary proxy statement has been on file for 10 days to mail such materials to shareholders without first receiving notice or comments from the Division. If the Division has or will have comments on a preliminary proxy statement, it must advise the issuer promptly, and in no event later than the tenth day. Proxy statements become "automatically effective" when the solicitation concerns only those matters specified in rule 14a-6(a) under the Securities Exchange Act of 1934. Id.

[54]Unlike our recommended procedure, this approach would require a statutory amendment.

[55]Section 8(a) of the Securities Act provides that registration statements become effective in 20 days unless the Commission issues an order under either section 8(b) or 8(d). Securities Act of 1933, 15 U.S.C. § 77h(a), (b), (d). Procedures governing the review of post-effective amendments to registration statements filed by investment companies are set forth in rule 485 of Regulation C. 17 C.F.R. § 230.485. Under rule 485(a), post-effective amendments usually become effective on the 60th day after filing, although the Commission (and the Division Director, by delegation) has the authority to declare an earlier effective date. Under paragraph (b) of rule 485, post-effective amendments filed for certain limited purposes (*e.g.*, to increase the number or amount of securities proposed to be offered under section 24(e)(1) of the Investment Company Act (15 U.S.C. § 80a-24(e)(1)) may become effective on the date on which the amendment is filed, if certain conditions are satisfied. The Commission (and the Division Director, by delegated authority) may suspend a post-effective amendment prior to its effective date if it appears that the amendment may be incomplete or inaccurate in any material respect. 17 C.F.R. § 230.485(c). Following such action, the registrant may petition the Commission for review of the suspension. *Id.* The Commission will order a hearing on the matter if such a request is included in the petition. Id.

[56]Rule 473 of Regulation C, 17 C.F.R. § 230.473.

and do not become effective until the staff has completed its review.[57] Absent the equivalent of a delaying amendment, we believe that the system proposed would not be workable. With the equivalent of a delaying amendment, we do not believe that the proposal would be effective in expediting the review of exemptive applications.

In evaluating the propriety of any automatic effectiveness procedure, it is also important to recognize that section 6(c) of the Investment Company Act requires the Commission to determine whether and the extent to which a requested exemption is necessary and appropriate in the "public interest" -- a term that is not defined under the Act -- and is consistent with the "protection of investors" -- also undefined -- and the "policies and provisions" of the Act. Each determination requires the Commission not only to apply two flexible standards, but also may require a determination of consistency with the purposes of any one or more of the Act's sixty-five sections, and with the policies underlying the statute.

In this regard, we note that there is a critical distinction between allowing Securities Act registration statements and their amendments to become effective by the simple passage of time, and deeming exemptive applications to be granted on the same basis. In the first situation, a statutory obligation is imposed on the issuer to provide appropriate disclosure of material information.[58] Such obligation continues even after the registration statement has become effective and any staff review has been completed.[59] In contrast, approval of an exemptive application, which consists of both fact and legal argument, requires the Commission to apply the relevant statutory standards and make the required determination. Once granted, the "exempted" transaction or product may proceed with no ensuing liability for the applicant.[60]

In sum, given the broad authority in section 6(c) to exempt any person from any provision of the Act, the flexible standards governing such determinations, and the consequences of the granting of exemptive relief, we

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[57] For a description of this practice and its evolution, see LOUIS LOSS, **FUNDAMENTALS** OF SECURITIES REGULATION 122-25 (1988 & Supp. 1991).

[58] Securities Act §§ 11(a), 12, 17(a), 15 U.S.C. §§ 77k(a), 77*l*, 77q(a).

[59] *See generally* LOUIS LOSS AND JOEL SELIGMAN, SECURITIES **REGULATION** 3519-3525 (3d ed. 1991) (discussion of the duty to update and the duty to correct statements made in Commission filings and otherwise in connection with the sale of securities).

[60] Under section 38(c), no liability under the Act attaches "to any act done or omitted in good faith in conformity with any rule, regulation, or order of the Commission, notwithstanding that such rule, regulation, or order may, after such act or omission, be amended or rescinded or be determined by judicial or other authority to be invalid for any reason." 15 U.S.C. § 80a-37(c).

believe it would be inappropriate for all types of applications presumptively to be granted unless the Commission takes affirmative action to stop the application.

### B. Dispensing with Prior Notice for Routine Applications

In the Study Release, the Commission specifically noted the 1984 recommendation of the Task Group on Regulation of Financial Services ("Task Group") that "the process of granting exemptions under the Investment Company Act should be streamlined to remove the requirement for public notice and comment in every case."[61] As indicated above, we support the essence of the Task Group's recommendation, which is to shorten the review process. We believe that this objective would be achieved by the expedited procedures we recommend. In addition, our proposal does not require a statutory amendment.

We note that notices of applications form a body of law and administrative practice that is very valuable to investment company sponsors and their counsel, as well as to the Division. If the Act were amended to remove the prior notice requirement, we believe that it still would be necessary to draft and issue orders that summarized the substance of an application, so that the public would know of Commission regulatory decisions.

Finally, removing the notice requirement would have its costs. From time to time, the Commission receives hearing requests, which may result in the applicant amending its application or in a hearing. If prior notices were not given, interested persons, uninformed of Commission action, would be forced to seek any redress in court; such an outcome likely would result in less efficient resolution of their concerns.

### C. Substantive Changes to Section 6(c)

Commenters also suggested substantive changes to the Commission's exemptive authority.[62] One recommended that section 6(c) be amended to include expressly the ability to balance perceived costs of regulation to investors against any benefits accruing from an exemption.[63] That commenter cited two

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[61] Study Release, *supra* note 6, at 8 n.8. This recommendation was endorsed in the Dechert Price Study Comment, *supra* note 7, at 16, and the IDS Study Comment, *supra* note 7, at 27.

[62] Dechert Price Study Comment, *supra* note 7, at 11-16; Federated Study Comment, *supra* note 7, at 1; Merrill Lynch Study Comment, *supra* note 7, at Ex. I.A.

[63] Dechert Price Study Comment, *supra* note 7, at 15-16. To achieve this result, the commenter recommended adding the following sentence at the end of section 6(c): "In interpreting its authority under this subsection with respect to any section or rule, the Commission may take into (continued..)

recent orders of the Commission as evidence that the Commission has already used section 6(c) in such a manner, but the commenter expressed concern that the legislative history of the provision and the Commission's own early interpretations cast some doubt on this approach.[64] The recommended amendment purportedly would protect against challenges to the Commission's authority.

We do not recommend this amendment to section 6(c) because we believe that it is unnecessary. As the commenter noted, the Commission has treated investment flexibility, diversification, and cost to investors as appropriate elements for consideration under section 6(c).[65] We believe that the broad statutory authority granted to the Commission by section 6(c) permits the Commission to consider these factors.

Another commenter argued that:

> During the last few years, . . . it has become evident that the Commission staff is developing a new and severely restrictive view of Section 6(c). Under that approach, the exemptive authority of the Section does not reach certain provisions of the 1940 Act so that applications for exemption from those provisions do not warrant substantive consideration.[66]

To remedy this perceived problem, the commenter suggested adding the following sentence at the end of the section 6(c): "No provision of this title shall be construed as limiting the Commission's authority to grant exemptions under this subsection."[67]

We agree that section 6(c) empowers the Commission to exempt persons from every section of the Act, limited only by the requirement that the exemption

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[63](...continued)
account the estimated costs to investors of regulation under such section or rule as compared with the benefits to investors reasonably contemplated from granting an exemption." Id. at 16.

[64]*Id.* at 12-14.

[65]*Id.* at 14-15.

[66]Merrill Lynch Study Comment, supra note 7, at I-1. Another commenter apparently shares this view, stating that it "particularly takes issue with the proposition that certain provisions of the 1940 Act are automatically precluded from the possibility of exemptive relief due to the manner in which the statutory language is constructed." ABA Study Comment, supra note 7, at 5.

[67]Merrill Lynch Study Comment, supra note 7, at 1-2.

be in the public interest and consistent with the protection of investors and the purposes of the Act. While we believe that any consideration of an application under section 6(c) necessarily must be informed by a careful examination of the purpose(s) of the particular provision from which the applicant seeks relief, we do not believe that there are sections of the Act from which the Commission may not grant exemptions. Accordingly, we do not believe the suggested amendment is necessary.[68]

Finally, two commenters, while not suggesting substantive statutory amendments to section 6(c), recommended that the Commission issue a release clarifying its interpretation of the section's statutory standards![69] We do not agree with this proposal for a number of reasons.

Determinations under section 6(c) are made on a fact-specific basis. In our view, any attempt to define section 6(c) standards outside a specific factual context would not be fruitful and might unnecessarily limit the Commission's flexibility in the future.

Moreover, to the extent that it is possible to make statements of general applicability concerning section 6(c)'s standards, we believe that the Commission has already done so. In the Study Release, for example, the Commission indicated:

> Congress bestowed upon the Commission a broad power to exempt persons, securities, and transactions from any provision or provisions of the Investment Company Act "if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of [the Act]." That exemptive power has been historically exercised by the Commission "with circumspection and with full regard to the public interest and the purposes of the Act . . . ." Over the decades, the Commission has granted exemptions in situations where the Investment Company Act by its terms clearly applied, and has rejected the argument that simply because a provision prohibited certain conduct any exemption from that provision was contrary to the intent of the Act. . . ." The Commission believes that the tripartite test set forth in section 6(c) provides the Commission with

[68] In the Study Release *(supra* note 6), the Commission rejected the idea that its power under section 6(c) was limited because a particular provision prohibited certain conduct. *See* text accompanying note 70 below.

[69] Davis Polk Study Comment, *supra* note 7, at 42-44; PaineWebber Study Comment, supra note 7, at 4.

standards that, applied with circumspection, allow it to exempt particular vehicles and particular interests from those provisions of the Investment Company Act that inhibit competitive development of new products and new markets offered and sold in or from the United States?'

Lastly, we believe that an interpretive release is unnecessary. In our view, the Commission's interpretation of its authority under section 6(c) is discernible from its prior exemptive orders.

### D. Increased Use of Rulemaking Authority

While we believe that the proposed procedural changes and the suggested amendment to the Division's delegated authority would expedite the review of exemptive applications, we also believe that the greatest improvement to exemptive procedures would be for the Division to develop, and the Commission to adopt, exemptive rules more quickly -- in short, for the development and adoption of rules based on well-established precedent to become a more routine part of the Division's and Commission's work. Consequently, we recommend an increased allocation of Division personnel to rulemaking activities?'

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[70] Study Release, *supu* note 6, § IV (footnotes omitted).

'' Somewhat analogously, some commenters suggested that the Commission make increased use of its authority under section 6(c) to exempt "classes of persons, securities, or transactions" and to grant '%road, class-based exemptions" in situations where it appears likely that a particular exemption would benefit persons in addition to the applicant. Davis Polk Study Comment, *supa* note 7, at 41-42; Letter from Davis Polk & Wardwell to Jonathan G. Katz, Secretary, SEC (June 14, 1990), File No. S7-11-90 (supplementing Oct. 10, 1990 Davis Polk Letter re class exemptions); PaineWebber Study Comment, supra note 7, at 3-4. The ICI recommended that, failing adoption by the Commission of its suggestions concerning substantive modifications to the Act, the Commission should "be provided the authority to grant class exemptions with respect to each of [its] specific proposals." ICI Study Comment, *supra* note 7, at 45 n.37. We believe that a class-exemption order is unwise as a matter of policy. Procedures required in connection with the issuance of orders are not well-suited to crafting industry-wide standards. Notices of applications are designed to present the terms of the exemption solely for a particular applicant. Only "interested persons" (as that term is defined in the Act) may present their views (17 C.F.R. § 270.0-5(a)) and only by requesting a hearing (*id.*). In our view, rulemaking procedures are much better suited to address matters of general applicability. Notices of proposed rulemaking are designed to inform a wide range of persons on the broad policy issues presented. Any person may comment simply by writing a letter. 5 U.S.C. § 553(c). Finally, unlike an exemptive order, an exemptive rule is codified in the Code of Federal Regulations and other compilations of agency rules (5 U.S.C. § 553(d)), giving affected persons much clearer notice of the agency's determinations. While we believe that the Commission could modify its procedures for exemptive orders so that the procedures would be better suited to eliciting helpful public comment, such changes would simply have the effect of turning case-by-case adjudications into rulemaking proceedings. We see no discernible benefit from such a result.

The Commission should be aware, however, that because rulemaking takes time, any such shift in personnel may not result in an immediate improvement in the number of pending applications or in a reduction in the average amount of time required for an application to be noticed and ordered. Over time, however, we believe that the increased focus on rulemaking would lead to a significant decrease in the number of applications filed, with a resulting improvement in both backlog and the time period required for applications review.

## V. Conclusion

In our view, major changes to either the Commission's substantive authority or its procedures are unnecessary. While we support a procedural modification, as well as some modifications to the Division Director's delegated authority, we believe that the most significant way to reduce the backlog of applications is to amend the Act to remove unnecessary provisions and to adopt exemptive rules more quickly.

## APPENDIX 13-A

### Red-Lined Version of Proposed Amendments to Rule 30-5 of the Rules Delegating Functions to Division Directors, Regional Administrators and the Secretary of the Commission

(new language is shaded; ~~deleted language is struck through~~)

Rule 30-5. Pursuant to the provisions of Public Law No. 87-592, 76 Stat. 394 [15 U.S.C. 78d-1, 78d-2], the Securities and Exchange Commission hereby delegates, until the Commission orders otherwise, the following functions to the Director of the Division of Investment Management, to be performed by him or under his direction by such person or persons as may be designated from time to time by the Chairman of the Commission:

(a) With respect to the Investment Company Act of 1940 [15 U.S.C. 80a-1, et seq.]:

(1) To issue notices, pursuant to Rule 0-5(a), with fespect to applications for orders under ~~the following sections of~~ the Act and the rules and regulations promulgated thereunder and, with respect to Section 8(f) of the Act, in cases where no application has been filed, where, upon examination, the matter does not appear to him to present material issues not previously settled by the Commission or to raise questions of fact or policy indicating that the public interest or the interest of investors warrants consideration of the matter by the Commission. ~~requires that a hearing be held:~~

~~(i) Section 3(b)(2), 15 U.S.C. 80a-3(b)(2);~~

~~(ii) Section 6(b), 15 U.S.C. 80a-6(b);~~

~~(iii) Section 6(c), 15 U.S.C. 80a-6(c);~~

~~(iv) Section 6(d), 15 U.S.C. 80a-6(d);~~

~~(v) Section 6(e), 15 U.S.C. 80a-6(e);~~

~~(vi) Section 7(d), 15 U.S.C. 80a-7(d);~~

~~(vii) Section 8(f), 15 U.S.C. 80a-8(f);~~

~~(viii) Section 10(e), 15 U.S.C. 80a-10(e);~~

(ix) Section 10(f), 15 U.S.C. 80a-10(f);

(x) Section 11(a), 15 U.S.C. 80a-11(a);

(xi) Section 12(g), 15 U.S.C. 80a-12(g);

(xii) Section 15(f)(3), 15 U.S.C. 80a-15(f)(3);

(xiii) Section 17(b), 15 U.S.C. 80a-17(b);

(xiv) Section 17(d), 15 U.S.C. 80a-17(d);

(xv) Section 17(e), 15 U.S.C. 80a-17(e);

(xvi) Section 17(f), 15 U.S.C. 80a-17(f);

(xvii) Section 17(j), 15 U.S.C. 80a-17(j);

(xviii) Section 18(j), 15 U.S.C. 80a-18(f);

(xix) Section 23(b), 15 U.S.C. 80a-23(b);

(xx) Section 23(c), 15 U.S.C. 80a-23(c);

(xxi) Section 26(b), 15 U.S.C. 80a-26(b);

(xxii) Section 28(c), 15 U.S.C. 80a-28(c);

(xxiii) Section 31(d), 15 U.S.C. 80a-30(d);

(xxiv) Section 32(c), 15 U.S.C. 80a-31(c);

(xxv) Section 45(a), 15 U.S.C. 80a-44(a);

(xxvi) Section 57(e), 15 U.S.C. 80a-56(e);

(xxvii) Section 57(j), 15 U.S.C. 80a-56(j);

(xxviii) Section 57(k), 15 U.S.C. 80a-56(k);

(xxix) Section 57(n), 15 U.S.C. 80a-56(n); and

(xxx) Section 61(a)(3), 15 U.S.C. 80a-60(a)(3).

(2) To authorize the issuance of orders where a notice, pursuant to Rule 0-5(a), has been issued and no request for a hearing has been received from any interested person within the period specified in the notice and it appears to him that the matter involved presents no material issue that he believes has not previously been settled by the Commission and it does not appear to him to be necessary in the public interest or the interest of investors that the Commission consider the matter ~~a hearing be held~~;

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