

SUPPORTING STATEMENT
Rule 0-4

A. JUSTIFICATION

1. Necessity for the Collection Information

Multiple sections of the Investment Advisers Act of 1940 (“Act” or “Advisers Act”)¹ give the Securities and Exchange Commission (“Commission”) the authority to issue orders granting exemptions from the Act’s provisions. The section that grants broadest authority is section 206A, which provides the Commission with authority to conditionally or unconditionally exempt persons, securities or transactions from any provision of the Advisers Act, or the rules or regulations 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.² Congress enacted section 206A to give the Commission the flexibility to address unforeseen or changed circumstances in the investment adviser industry. Rule 0-4 under the Advisers Act,³ entitled “General Requirements of Papers and Applications,” prescribes general instructions for filing an application seeking exemptive relief with the Commission.

Rule 0-4 currently requires that every application for an order for which a form is not specifically prescribed and which is executed by a corporation, partnership or other company and filed with the Commission contain a statement of the applicable provisions of the articles of incorporation, bylaws or similar documents, relating to the right of the person signing and filing such application to take such action on behalf of the applicant, and a statement that all such requirements have been complied with and that the person signing and filing the application is

¹ 15 U.S.C. 80b-1 et seq.

² ? 15 U.S.C. 80b-6(a).

³ 17 CFR 275.0-4.

fully authorized to do so. If such authorization is dependent on resolutions of stockholders, directors, or other bodies, such resolutions must be attached as an exhibit to or quoted in the application. Any amendment to the application must contain a similar statement as to the applicability of the original statement of authorization. When any application or amendment is signed by an agent or attorney, rule 0-4 requires that the power of attorney evidencing his authority to sign shall state the basis for the agent's authority and shall be filed with the Commission. Every application subject to rule 0-4 must be verified by the person executing the application by providing a notarized signature in substantially the form specified in the rule. Each application subject to rule 0-4 must state the reasons why the applicant is deemed to be entitled to the action requested with a reference to the provisions of the Act and rules thereunder, the name and address of each applicant, and the name and address of any person to whom any questions regarding the application should be directed. Rule 0-4 requires that a proposed notice of the proceeding initiated by the filing of the application accompany each application as an exhibit and, if necessary, be modified to reflect any amendment to the application.

Rule 0-4 contains a currently approved "collection of information," for purposes of the Paperwork Reduction Act, under Office of Management and Budget ("OMB") control number 3235-0633. An agency may not sponsor, or conduct, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. In light of the Commission's recent adoption of rule 206(4)-5,⁴ which contains a provision for seeking an exemptive order from the Commission, we are revising the collection of information requirement for rule 0-4.

2. Purpose of the Information Collection

⁴ The adopting release is attached as Appendix A. All terms used, but not defined in this Supporting Statement, are defined in Appendix A.

Respondents to the collection are applying for orders of the Commission exempting them from one or more provisions of the Advisers Act. The requirements of rule 0-4 are designed to provide Commission staff with the necessary information to assess whether granting the orders of exemption are necessary and appropriate, in the public interest and consistent with the protection of investors and the intended purposes of the Act.

3. Role of Improved Information Technology

Currently, applications subject to rule 0-4 are not permitted to be filed electronically, but the Commission may consider them for electronic filing in the future.

4. Efforts to Identify Duplication

The Commission periodically evaluates collection of information requirements for duplication, and reevaluates them whenever it proposes a rule or form, or a change in either. The reporting requirements of rule 0-4 are not duplicated elsewhere.

5. Effect on Small Entities

The requirements of rule 0-4 apply equally to all applicants seeking orders of the Commission exempting them from one or more provisions under the Act, regardless of size. The burden on smaller entities may be greater; however, allowing small entities to seek exemption from Advisers Act provisions contributes to lessening the burden on these entities overall. As required by the Regulatory Flexibility Act,⁵ the Commission reviews all rules periodically to identify ways to minimize reporting and recordkeeping requirements that may affect small businesses.

6. Consequences of Less Frequent Collection

The requirements of rule 0-4 apply only to applications for orders from the Commission for which a form is not specifically prescribed. Because the Commission has no control over the

⁵ 5 U.S.C. 601.

number of applications submitted, it cannot generally require less frequent collection unless it does not require the collection with respect to every application. Eliminating rule 0-4 requirements for certain or all applications would make it difficult for the Commission to process and review requests for exemptive relief. The Commission will, however, when it deems it necessary and appropriate, codify prior exemptive relief granted to applicants into rules, thus eliminating the need for respondents to file exemptive applications in those instances and relieving them of the requirements of rule 0-4.

7. Inconsistencies with Guidelines in 5 CFR 1320.5(d)(2)

Rule 0-4 requires applications to be filed in quintuplicate.⁶ Multiple copies are needed because they must be distributed to several different offices within the Commission.

8. Consultation Outside the Agency

The Commission requested public comment on the exemptive order provisions under rule 206(4)-5 before it submitted this request for extension to OMB. The Commission received limited comment on this aspect of the rule, and none pertained to the burdens associated with submitting an application for exemptive relief to the Commission for its consideration, except as indicated in Item 13 below.

The Commission and the staff of the Division of Investment Management also participate in an ongoing dialogue with representatives of the investment adviser industry through public conferences, meetings and informal exchanges. These various forums provide the Commission and the staff with a means of ascertaining and acting upon paperwork burdens confronting the industry.

9. Payment or Gift to Respondents

Not applicable.

⁶ 17 CFR 275.0-4(b).

10. Assurance of Confidentiality

Not applicable.

11. Sensitive Questions

Not applicable.

12. Estimate of Hour Burden

The current approved collection of information contains an estimated total annual hour burden of one hour for administrative purposes because most of the work of preparing an application is performed by outside counsel and, therefore, imposes minimal, if any, hourly burden on respondents. Because we expect that all, or substantially all, of the work of preparing an application for an exemptive order under rule 206(4)-5 will also be performed by outside counsel, we continue to believe that the current estimate of one hour, in the unlikely event the adviser does perform an administrative role, is sufficient. As a result, we are not increasing our estimated hourly burden in connection with the adoption of rule 206(4)-5. The estimate of annual burden hours is made solely for the purposes of the Paperwork Reduction Act, and is not derived from a comprehensive or even representative survey or study of the costs of Commission rules and forms.

13. Estimate of Total Annual Cost Burden

Applicants for orders under the Advisers Act can include registered investment advisers, affiliated persons of registered investment advisers, and entities seeking to avoid investment adviser status, among others. Commission staff estimates that it receives approximately 9 applications per year submitted under rule 0-4 of the Act. Although each application typically is submitted on behalf of multiple applicants, the applicants in the vast majority of cases are related entities and are treated as a single respondent for purposes of this analysis.

Most of the work of preparing an application is performed by outside counsel. The cost outside counsel charges applicants depends on the complexity of the issues covered by the application and the time required. Based on conversations with applicants and attorneys, the cost ranges from approximately \$7,000 for preparing a well-precedented, routine application to approximately \$80,000 to prepare a complex or novel application. We estimate that the Commission receives 2 of the most time-consuming applications annually, 4 applications of medium difficulty, and 3 of the least difficult applications subject to rule 0-4. This distribution gives a total estimated annual cost burden to applicants of filing all applications of \$355,000 [(2x\$80,000) + (4x\$43,500) + (3x\$7,000)].

In the Proposing Release, we estimated that approximately five advisers annually would apply to the Commission for an exemption from rule 206(4)-5.⁷ We also estimated that an advisory firm that applies for an exemption would hire outside counsel to prepare their exemptive requests, and that counsel would spend 16 hours preparing and submitting an application for review at a rate of \$400 per hour, for a per application cost of \$6,400 and a total estimated cost for five applications annually of \$32,000.

The Commission requested public comment on these estimates in the Proposing Release, and we received comments indicating that our estimate of five exemptive application submissions per year is too low.⁸ We did not receive comments on our cost estimates. Given that the advisory industry is much larger than the municipal securities industry (which has been subject to a rule similar to rule 206(4)-5 for approximately 15 years, and which rule contains a similar exemptive order provision), and in light of the number of comment letters we received that expressed concern about inadvertent violations of the rule that would not qualify for the

⁷ See Proposing Release, at Section III.B.

⁸ See Appendix A, *citing* Davis Polk Letter and ICI Letter.

exception for returned contributions, our staff estimates that approximately seven advisers annually would apply to the Commission for an exemption from the rule. Although we may initially receive more than seven applications a year for an exemption, over time, we expect the number of applications we receive will significantly decline to an average of approximately seven annually. We continue to believe that a firm that applies for an exemption will hire outside counsel to prepare an exemptive request, but based on commenters' concerns have raised the number of hours counsel will spend preparing and submitting an application from 16 hours to 32 hours, at a rate of \$400 per hour.⁹ As a result, each application will cost approximately \$12,800, and the total estimated cost for seven applications annually will be \$89,600. The total estimated annual cost burden to applicants of filing all applications has therefore increased to \$444,600.¹⁰

The estimate of annual cost burden is made solely for the purposes of the Paperwork Reduction Act, and is not derived from a comprehensive or even representative survey or study of the costs of Commission rules and forms.

14. Estimate of Cost to the Federal Government

Not applicable.

15. Explanation of Changes in Burden

There is no change in hour burden. Rule 0-4 imposes no hourly burden, however we are continuing to request 1 hour for administrative purposes. The estimated annual cost burden for this collection of information has increased from \$355,000 to \$444,600 because the Commission adopted new rule 206(4)-5, under which we expect to receive an average of seven additional applications for an exemptive order each year.

⁹ The hourly cost estimate of \$400 is based on our consultation with advisers and law firms who regularly assist them in compliance matters.

¹⁰ $\$355,000 + \$89,600 = \$444,600.$

16. Information Collection Planned for Statistical Purposes

Not applicable.

17. Approval to not Display Expiration Date

Not applicable.

18. Exceptions to Certification Statement

Not applicable.

B. COLLECTIONS OF INFORMATION EMPLOYING STATISTICAL METHODS

Not applicable.