



SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 34848; File No. 812-15437]

Confluent, Inc.

March 6, 2023.

AGENCY: Securities and Exchange Commission (“Commission”).

ACTION: Notice.

Notice of application for an order under Section 3(b)(2) of the Investment Company Act of 1940 (“Act”).

Applicant: Confluent, Inc.

Summary of Application: Applicant seeks an order under Section 3(b)(2) of the Act declaring it to be primarily engaged in a business other than that of investing, reinvesting, owning, holding or trading in securities. Applicant states that it is in the business of providing to its customers a data infrastructure platform focused on developing and supporting technology designed to enable real-time data, from multiple sources, to constantly stream across an organization.

Filing Dates: The application was filed on February 13, 2023 and amended on March 2, 2023.

Hearing or Notification of Hearing: An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing by e-mailing the Commission’s Secretary at Secretarys-Office@sec.gov and serving applicants with a copy of the request, by e-mail if an e-mail address is listed for the relevant Applicant below, or personally or by mail, if a physical address is listed for the relevant Applicant below. Hearing requests should be received by the Commission by 5:30 p.m. on March 31, 2023, and should be accompanied by proof of service on the applicants, in the form of an affidavit, or for lawyers, a certificate of service. Pursuant to rule 0-5 under the Act, hearing requests should state the nature of the writer’s interest, any facts bearing upon the desirability of a hearing on the matter, the reason for

the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by e-mailing the Commission's Secretary at Secretarys-Office@sec.gov.

ADDRESSES: The Commission: Secretarys-Office@sec.gov. Applicant: Steffan Tomlinson, Chief Financial Officer, and Melanie Vinson, Chief Legal Officer, Confluent Inc., at legal@confluent.io; Amy Caiazza, at acaiazza@wsgr.com.

FOR FURTHER INFORMATION CONTACT: Rochelle Kauffman Plesset, Senior Counsel or Terri Jordan, Branch Chief, at (202) 551-6825 (Division of Investment Management, Chief Counsel's Office).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. For Applicant's representations, legal analysis, and conditions, please refer to Applicant's first amended and restated application, dated March 2, 2023, which may be obtained via the Commission's website by searching for the file number at the top of this document, or for an Applicant using the Company name search field, on the SEC's EDGAR system. The SEC's EDGAR system may be searched at <https://www.sec.gov/edgar/searchedgar/legacy/companysearch.html>. You may also call the SEC's Public Reference Room at (202) 551-8090.

Applicant's Representations:

1. Applicant states that it is a Delaware corporation formed in 2014 that, directly and through its wholly-owned subsidiaries,¹ is engaged in the business of providing to its customers a data infrastructure platform focused on developing and supporting technology designed to enable real-time data, from multiple sources, to constantly stream across an organization. Applicant also states that it offers professional services and educational services in support of its products.

2. Applicant states that its business is highly capital intensive, requires R&D of new technologies, and does not involve the Applicant acquiring or retaining significant "hard"

¹ Applicant states that these subsidiaries conduct businesses that are integrally related to the Applicant's business, such as sales and marketing or research and development ("R&D") activities in their respective jurisdictions.

operating assets. Applicant states that it maintains significant cash reserves that it seeks to invest for purposes of conserving capital and providing liquidity until the funds are used in its data infrastructure business. As described more fully in the application, Applicant states that it requires significant liquid capital primarily to: (i) advance the commercialization of its products, (ii) make other capital expenditures in keeping with the growth of the Company's operating business, and (iii) fund R&D for new products and services.

3. Applicant states that it has financed operations primarily through offerings of equity and debt securities, but ultimately seeks to generate cash from its operations to support its business. Applicant states that it seeks to preserve capital and maintain liquidity, pending the use of such capital for its business operations, by investing in "Capital Preservation Instruments".² Applicant states that it may in the future make strategic investments in "other investments" consistent with Rule 3a-8. Applicant states that such securities will not be acquired for speculative purposes.

² As used in Applicant's application, Capital Preservation Instruments refer collectively to any cash items and securities that are held for the purpose of conserving the Applicant's capital and liquidity until they are used by the Applicant to support its business (as such business is described in Applicant's application). Such holdings are liquid (i.e., can be readily sold), earn competitive market returns and present a low level of credit risk, including short-term investment grade securities, Government securities (as defined in Section 2(a)(16) of the Act), securities of money market funds registered under the Act, and other cash items; but excluding investments in equity or speculative instruments.

Applicant's Legal Analysis:

1. Applicant seeks an order under Section 3(b)(2) of the Act declaring that it is primarily engaged in a business other than that of investing, reinvesting, owning, holding or trading in securities, and therefore is not an investment company as defined in the Act.

2. Section 3(a)(1)(A) of the Act defines the term “investment company” to include an issuer that is or holds itself out as being engaged primarily, or proposes to engage primarily, in the business of investing, reinvesting or trading in securities. Section 3(a)(1)(C) of the Act further defines an investment company as an issuer that is engaged or proposes to engage in the business of investing, reinvesting, owning, holding or trading in securities, and owns or proposes to acquire investment securities having a value in excess of 40% of the value of the issuer’s total assets (exclusive of Government securities and cash items) on an unconsolidated basis. Section 3(a)(2) of the Act defines “investment securities” to include all securities except Government securities, securities issued by employees’ securities companies, and securities issued by majority-owned subsidiaries of the owner which (a) are not investment companies, and (b) are not relying on the exclusions from the definition of investment company in Section 3(c)(1) or Section 3(c)(7) of the Act. Applicant states that it has never been, is not now, and does not propose to be, primarily engaged in the business of investing, reinvesting, owning, holding, or trading in securities. Applicant states, however, that during fiscal years 2019 and 2020 it held investment securities that exceeded 40% of its total assets on an unconsolidated basis (exclusive of government securities and cash items). Applicant states that during this time period it may have met the definition of “investment company” pursuant to Section 3(a)(1)(C) of the Act. Applicant states that it has more recently limited its holdings of investment securities to avoid meeting Section 3(a)(1)(C) but states that doing so on a continuous basis may hinder its business over the long term.

3. Rule 3a-8 under the Act provides an exclusion from the definition of investment company if, among other factors, a company’s R&D expenses are a substantial percentage of its

total expenses for the last four fiscal quarters combined. While Applicant believes that it complies with the conditions of Rule 3a-8, Applicant states that it is concerned that its R&D expenses, while substantial in absolute terms, may not always be considered substantial as a ratio of overall expenses. Although Applicant states that it anticipates R&D expenses to increase in absolute terms, such expenses are not anticipated to increase proportionately with Applicant's overall expenses, particularly given increases in expenses related to sales and marketing, the administration of a rapidly expanding employee base, and other administrative expenses. Applicant states that its R&D expenses as a percentage of total expenses was 22.26% for the twelve months ended December 31, 2021, and Applicant expects the percentage relative to total expenses to decrease over time.

4. Section 3(b)(2) of the Act provides that, notwithstanding Section 3(a)(1)(C) of the Act, the Commission may issue an order declaring an issuer to be primarily engaged in a business other than that of investing, reinvesting, owning, holding, or trading in securities directly, through majority-owned subsidiaries, or controlled companies conducting similar types of businesses. Applicant requests an order under Section 3(b)(2) of the Act declaring that it is primarily engaged in a business other than that of investing, reinvesting, owning, holding or trading in securities, and therefore is not an investment company as defined in the Act.

5. In determining whether an issuer is "primarily engaged" in a non-investment company business under Section 3(b)(2) of the Act, the Commission considers the following factors: (a) the company's historical development, (b) its public representations of policy, (c) the activities of its officers and directors, (d) the nature of its present assets, and (e) the sources of its present income.³

6. Applicant submits that it satisfies the criteria for issuance of an order under Section 3(b)(2) of the Act because Applicant is primarily engaged in the business of providing data

³ Tonopah Mining Company of Nevada, 26 SEC 426, 427 (1947).

infrastructure services, and is not in the business of investing, reinvesting, owning, holding or trading in securities.

a. Historical Development. Applicant states that, since its inception in 2014, Applicant has operated in the software and technology sector to develop comprehensive, scalable data infrastructure services for business use. Applicant states that in March 2021, the number of its customers surpassed 2,500.

b. Public Representations of Policy. Applicant states that it has consistently represented that it is engaged in the business of providing data infrastructure services. Applicant further states that it has never held and does not now hold itself out as an investment company within the meaning of the Act or as engaging in the business of investing, reinvesting, owning, holding or trading in securities. Applicant explains that in its annual reports, prospectuses, Commission filings, press releases, marketing materials, and on its investor website, Applicant's public representations consistently state its mission of pioneering a fundamentally new category of data infrastructure focused on data in motion. Applicant submits that its public representations make clear that shareholders invest in the Applicant's securities with the expectation of realizing gains from Applicant's development and sale of data infrastructure services, and not from returns on an investment portfolio. Applicant states that its only public representations regarding its investment securities are those required to be disclosed in public filings with the Commission.

c. Activities of Officers and Directors. Applicant represents that its officers and directors spend substantially all of their time managing the Applicant's data infrastructure services business. Applicant states that its cash management activities are managed internally by its Chief Financial Officer and externally by three investment managers, whose activities are supervised by the Chief Financial Officer. In addition, of the Applicant's approximately 2,601 employees (as of September 30, 2022), Applicant states that only two employees spend time on

matters relating to the management of its Capital Preservation Instruments. Applicant states that none of its officers, directors, or employees devote or proposes to devote more than 1% of his or her time, if even that, to management of Capital Preservation Instruments on behalf of the Applicant.

d. Nature of Assets. Applicant states that, as of September 30, 2022, Applicant's investment securities constituted approximately 32% its total assets (excluding Government securities and cash items) on an unconsolidated basis.⁴ Furthermore, Applicant states that 100% of its investment securities consist of Capital Preservation Instruments. Applicant uses its Capital Preservation Instruments to finance its continued operations. Applicant states that it needs the ability to invest more than 40% of the total value of its assets (exclusive of Government securities and cash items) on an unconsolidated basis in Capital Preservation Instruments to ensure that funds are managed and available to accommodate future growth of the business and general corporate purposes. In addition, Applicant states that it may in the future make strategic investments in "other investments" consistent with Rule 3a-8. Applicant states, however, that no more than 10% of its total assets (exclusive of Government securities and cash items, including securities of money market funds registered under the Act) will consist of investment securities other than Capital Preservation Instruments.⁵

e. Sources of Income and Revenue. Applicant represents that since its inception it has carried net operating losses. Applicant states that it does, however, derive income from its investment securities. Applicant states that a review of its current source of revenues provides a more accurate review of its operating company status, particularly given the upward trend in

⁴ Applicant states that none of its subsidiaries hold any investment securities.

⁵ Applicant states that it intends to calculate this percentage by consolidating its financial statement with the financial statements of its wholly-owned subsidiaries (but not with any majority-owned subsidiary that may be acquired in the future).

recognizing substantially increased revenues due to sales of new subscriptions. Applicant states that it derives substantially all of its revenue from subscriptions and, to a lesser extent, services. Applicant states that its revenues for the years ended December 31, 2020 and 2021 were \$233.6 million and \$387.5 million respectively, on an unconsolidated basis. By contrast, Applicant states that it earned \$0.8 million in net investment income in 2021 and \$2.8 million in 2020. Applicant states that all such income was derived from Capital Preservation Instruments. Applicant states that if net investment income were compared to its revenue, it would be equal to approximately 0.2% of revenue for the fiscal year ended December 31, 2021 and to approximately 1.2% of revenue for the fiscal year ended December 31, 2020.

For the fiscal nine months ended September 30, 2022, Applicant earned \$9.6 million of net investment income, representing approximately 2.3% of revenue for that time period. Applicant explains that the increase in net investment income is due to the deployment into Capital Preservation Instruments of the proceeds of its June 2021 initial public offering and December 2021 convertible debt issuance and the increase in interest rates in the fixed income markets.

7. Applicant asserts that its historical development, its public representations of policy, the activities of its officers and directors, the nature of its assets and its sources of income and revenue, as discussed in the application, demonstrate that it is engaged primarily in a business other than that of investing, reinvesting, owning, holding or trading securities. Applicant thus asserts that it satisfies the criteria for issuing an order under Section 3(b)(2) of the Act.

Applicant's Conditions:

Applicant agrees that any order granted pursuant to the application will be subject to the following conditions:

1. Applicant will continue to use its accumulated cash and securities to support its primary business (as such business is described in Applicant's application);

2. Applicant will refrain from investing or trading in securities for speculative purposes;
and

3. No more than 10% of Applicant's total assets will consist of investment securities other than Capital Preservation Instruments (as such capitalized term is described in Applicant's application). For purposes of this condition, total assets excludes cash items (including securities issued by money market funds registered under the Act) and Government securities (as defined in Section 2(a)(16) of the Act). This percentage is to be determined on an unconsolidated basis, except that Applicant should consolidate its financial statements with the financial statements of any wholly-owned subsidiaries.

For the Commission, by the Division of Investment Management, under delegated authority.

Sherry R. Haywood,
Assistant Secretary.

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