

MEMO# 28494

October 30, 2014

SEC Staff Issues Guidance on Mixed and Shared Funding Exemptive Orders

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TO: VARIABLE INSURANCE PRODUCTS ADVISORY COMMITTEE No. 8-14 RE: SEC STAFF
ISSUES GUIDANCE ON MIXED AND SHARED FUNDING EXEMPTIVE ORDERS

The Division of Investment Management (“IM”) of the Securities and Exchange Commission (“SEC”) recently issued an IM Guidance Update [\[1\]](#) that clarifies whether (i) a registered investment company (“registered fund”) that offers its shares as an investment option under a variable life and/or variable annuity contract is required to obtain a “mixed and shared funding” exemptive order from the SEC prior to making any such offer, and (ii) a registered fund that has previously obtained a mixed and shared funding exemptive order must, in all circumstances, comply with the terms and conditions of that order. ICI had requested that IM issue the Guidance Update, which is summarized briefly below.

Background

The Guidance Update explains that neither mixed nor shared funding is prohibited by the Investment Company Act of 1940 (“1940 Act”). [\[2\]](#) However, the SEC rules applicable to variable life insurance, which provide limited exemptions from Sections 9(a), 13(a), and 15(a) and (b) of the 1940 Act, generally condition those exemptions on compliance with restrictions on mixed and shared funding.

Registered funds offered as investment options under variable insurance contracts typically are organized to serve as funding vehicles for both variable annuity and variable life insurance contracts, as well as retirement plans and other offerees. In addition, registered fund sponsors often seek to offer fund shares as funding vehicles for the variable insurance contracts of multiple, unaffiliated insurance companies. The Guidance Update explains that, for many years, registered funds offered under variable life insurance contracts have applied for, and obtained, mixed and shared funding exemptive orders that provide insurance companies and their affiliates with the same exemptions from Sections 9(a), 13(a), and 15(a) and (b) of the 1940 Act that are provided by the variable life insurance rules, but without the restriction under those rules that prohibits mixed and shared funding.

Staff Guidance

The staff takes the view that a registered fund that offers its shares as an investment

option in one or more variable annuity and/or variable life insurance contracts of affiliated and/or unaffiliated life insurers is not required to obtain a mixed and shared funding exemptive order prior to making any such offer. The staff emphasizes that a registered fund is permitted to engage in both mixed funding and shared funding without obtaining a mixed and shared funding exemptive order. If a fund engages in those activities without an exemptive order, the insurer that issues the contracts under which the fund is an investment option (as well as the insurer's affiliates) will not have the benefit of the exemptions typically granted by those exemptive orders, although the staff points out that these exemptions may be of limited value given how infrequently they are relied upon.

The staff also takes the view that it is not necessary to comply with the terms and conditions of a previously issued mixed and shared funding exemptive order if the exemptions granted by the order are not being relied upon. [3] The staff further explains that it is unnecessary to comply with the conditions to the exemptions from Sections 9(a), 13(a), 15(a), and 15(b) that are provided by the variable life insurance rules themselves, including the restrictions on mixed and shared funding, if those exemptions are not being relied upon (i.e., if there is full compliance with Sections 9(a), 13(a), 15(a), and 15(b) or there is reliance on other exemptions under SEC rules or another exemptive order).

The staff concludes with several recommendations for life insurers that issue variable insurance contracts, registered funds that offer their shares as investment options under variable insurance contracts, and advisers to such registered funds:

- consider the staff's views in the Guidance Update in determining whether to apply for mixed and shared funding exemptive orders;
- consider whether any parties are relying on the exemptions granted in existing mixed and shared funding exemptive orders and, if not, whether continued compliance with the terms and conditions of those orders is necessary; and
- in cases where registered funds and insurers determine that there has been no reliance on the exemptions granted in mixed and shared funding exemptive orders and none is anticipated, consider whether the terms of participation agreements that require compliance with such orders should be revised to eliminate the requirement.

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endnotes

[1] The Guidance Update is available at:
<http://www.sec.gov/investment/im-guidance-2014-10.pdf> ("Guidance Update").

[2] "Mixed funding" refers to the sale of the shares of a registered fund to various types of offerees, such as when a fund is used as an investment option in both variable annuity contracts and variable life insurance contracts, or when a fund is used as an investment option in both variable life insurance contracts and retirement plans. "Shared funding" refers to the sale of the shares of a registered fund as an investment option in variable insurance contracts issued by multiple unaffiliated insurance companies.

[3] For example, if the insurers or their affiliates are complying with Sections 9(a), 13(a), 15(a), and 15(b) of the 1940 Act or are relying on other exemptions in the SEC's rules or under another exemptive order.

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