The Asset Management Industry
SERVING INDIVIDUAL INVESTORS
INVESTMENT COMPANY INSTITUTE

MEMO# 29339

September 14, 2015

ICI Submits Comment Letter on SEC's Clawback Proposal

[29339]

September 14, 2015

TO: CLOSED-END INVESTMENT COMPANY MEMBERS No. 28-15
CHIEF COMPLIANCE OFFICER COMMITTEE No. 18-15
ETF (EXCHANGE-TRADED FUNDS) COMMITTEE No. 23-15
ETF ADVISORY COMMITTEE No. 22-15
SEC RULES MEMBERS No. 53-15
SMALL FUNDS MEMBERS No. 40-15
UNIT INVESTMENT TRUST MEMBERS No. 5-15 RE: ICI SUBMITS COMMENT LETTER ON SEC'S CLAWBACK PROPOSAL

Today ICI submitted a comment letter in response to the SEC's proposed new rule and form amendments to implement the provisions of Section 954 of the Dodd-Frank Act. [1] This statutory provision, which adds new Section 10D to the Securities Exchange Act of 1934, requires the SEC to adopt rules directing the national securities exchanges and national securities associations to prohibit the listing of any security of an issuer that is not in compliance with Section 10D's requirements for:

- disclosure of the issuer's policy on incentive-based compensation, and
- recovery of incentive-based compensation that is received in excess of what would have been received under an accounting restatement.

The Proposal would apply only to those registered funds that:

- list their securities on an exchange (i.e., exchange-traded funds and closed-end funds);
- have internal management (i.e., have paid employees of their own, as opposed to relying on an investment adviser's employees, whom the adviser pays); and
- pay their executive officers incentive-based compensation. [2]

Because of the paucity of internally managed funds, the SEC estimated that the Proposal would apply to approximately seven registered investment companies. [3]

Summary of the ICI Comment Letter

In our comment letter attached below, we support the SEC's determination to exclude most

registered investment companies from the Proposal. We recommend, however, that the SEC exclude all registered investment companies. In support of this recommendation, we make the following points:

- The concerns behind this Dodd-Frank Act provision do not apply to listed funds;
- The SEC excluded all registered investment companies from certain prior compensation-related rulemakings;
- Listed funds' financial statements and accounting practices are less complex than those of operating companies; and
- Costs of implementation and compliance will outweigh any benefits.

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Attachment

endnotes

[1] Listing Standards for Recovery of Erroneously Awarded Compensation, SEC Release No. 33-9861 (the "Proposal"), available at www.sec.gov/rules/proposed/2015/33-9861.pdf. See Institute Memorandum No. 29181, dated July 16, 2015, for a summary of the Proposal.

[2] The proposed rule expressly exempts unit investment trust securities and "[a]ny security issued by a management company, as defined in 15 U.S.C. 80a-4(3), that is registered under section 8 of the Investment Company Act of 1940…, if such management company has not awarded incentive-based compensation to any executive officer of the company in any of the last three fiscal years, or in the case of a company that has been listed for less than three fiscal years, since the listing of the company."

[3] Proposal at 108. In arriving at this estimate, we believe the SEC neglected to consider how fund complexes compensate their chief compliance officers ("CCOs"), and how this could affect the Proposal's reach. We state in the letter that if the SEC did not intend to include listed fund CCOs within this definition of "executive officer," it should amend the definition accordingly or provide guidance to that effect.