

**MEMO# 30557**

February 1, 2017

## **Update on Recent SEC Staff Letter Interpreting Section 22(d)**

[30557] February 1, 2017 TO: ICI Members

Investment Company Directors

ICI Global Members

Investment Advisers Committee

Pension Committee

SEC Rules Committee

Small Funds Committee SUBJECTS: Disclosure

Distribution

Fees and Expenses

Fund Governance

Intermediary Oversight

Investment Advisers RE: Update on Recent SEC Staff Letter Interpreting Section 22(d)

The SEC Division of Investment Management recently issued an interpretive letter under section 22(d) of the Investment Company Act with respect to the distribution of fund shares.[\[1\]](#) In the letter, the staff expresses its view that, under the circumstances described in the letter, section 22(d)'s restrictions do not apply to a broker, when the broker acts as agent on behalf of its customers and charges its customers commissions for effecting transactions in a class of fund shares without any front-end load, deferred sales charge, or other asset-based fee for sales or distribution (defined in the letter as "Clean Shares"). The staff also states its belief that section 22(d) does not prohibit a principal underwriter of Clean Shares from entering into a selling agreement with a broker under the circumstances described in the letter.

Since the letter was issued, we have received numerous questions from members regarding whether a broker could, consistent with the staff's analysis in the letter, receive a non-distribution related sub-transfer agent, administrative, sub-accounting or other shareholder servicing fee from fund assets ("sub-accounting fee").[\[2\]](#) This memorandum explains our understanding of this issue.[\[3\]](#)

The staff's reasoning in the letter implicitly allows a broker to receive non-distribution related sub-accounting fees.[\[4\]](#) The staff describes Clean Shares as not having "any front-end load, deferred sales charge, or other asset-based fee for sales or distribution."[\[5\]](#) It emphasizes, in concluding that section 22(d)'s restrictions do not apply to a broker when it acts as its customers' agent and charges its customers commissions for effecting transactions in Clean Shares, that those Clean Shares will not include any form of

distribution-related payment to the broker. The staff's reasoning therefore would be consistent with a broker receiving *non-distribution* related sub-accounting fees.<sup>[6]</sup>

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#### endnotes

<sup>[1]</sup> SEC Interpretive Letter (pub. avail. Jan. 11, 2107), *available at* <https://www.sec.gov/divisions/investment/noaction/2017/capital-group-011117-22d.htm> ("SEC Interpretive Letter"). For a summary of the letter, please see ICI Memorandum No. 30518 (January 12, 2017), *available at* [https://www.ici.org/my\\_ici/memorandum/memo30518](https://www.ici.org/my_ici/memorandum/memo30518).

<sup>[2]</sup> We also have received questions from members regarding whether a broker could, consistent with section 22(d), receive revenue sharing payments from the fund's adviser. The SEC Interpretive Letter, by its terms, does not address the analysis of revenue sharing payments under section 22(d). SEC Interpretive Letter, *supra* note 1, at n.3. We are continuing to analyze this issue and discuss it with outside counsel.

<sup>[3]</sup> Nothing in this memorandum constitutes, or should be considered, a substitute for legal advice. Each fund, fund board, and investment adviser should seek the advice of counsel for issues related to its individual circumstances.

<sup>[4]</sup> The SEC staff has explained that, whether a sub-accounting fee is, in fact, a payment for distribution-related activities, and must be paid pursuant to rule 12b-1 under the 1940 Act, depends on the facts and circumstances. See *Mutual Fund Distribution and Sub-accounting Fees*, IM Guidance Update No. 2016-01 (January 2016), *available at* <https://www.sec.gov/investment/im-guidance-2016-01.pdf>.

<sup>[5]</sup> (emphasis added).

<sup>[6]</sup> This should include a "service fee" paid by a fund pursuant to a rule 12b-1 plan for personal service and/or the maintenance of shareholder accounts, pursuant to FINRA rule 2341, provided the fee is not used to finance distribution activities. Cf. IM Guidance Update No. 2016-01, *supra* note 4.