

MEMO# 25420

August 17, 2011

ICI Submission to SEC Staff Requesting an Extension of the Compliance Date for Pay-to-Play Recordkeeping Requirements

[25420]

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TO: BROKER/DEALER ADVISORY COMMITTEE No. 49-11
BANK, TRUST AND RECORDKEEPER ADVISORY COMMITTEE No. 47-11 RE: ICI SUBMISSION TO SEC STAFF REQUESTING AN EXTENSION OF THE COMPLIANCE DATE FOR PAY-TO-PLAY RECORDKEEPING REQUIREMENTS

As you may know, since last October, the ICI has been working with the staff of the SEC's Division of Investment Management to address our members' concerns with the insurmountable challenges presented to advisers to mutual funds from the recordkeeping requirements associated with the SEC's new pay-to-play rule. In particular, the rule requires such advisers to maintain a list of government entities that have invested in a mutual fund through a participated-directed retirement plan or an education savings program (i.e., a 403(b), 457, or 529 plan). For omnibus accounts held on a mutual fund's books and records, the identity of shareholders that hold fund shares through such account is likely not information the fund or its adviser owns, controls, or possesses. Moreover, the omnibus accountholders that possess this information are under no regulatory duty to provide it to funds. In fact, in some instances, state laws may prohibit the entity from providing it (e.g., California Financial Institutions Code Section 1582, which applies to trust companies). As a result, fund advisers have been quite concerned since the rule was adopted in July 2010 about their ability to comply with this requirement. This concern has been the basis for the ICI's work with the SEC staff since last October.

After several meetings and calls to discuss these issues and our members' concerns, on August 12, 2011, the ICI submitted a formal request to the SEC staff requesting an extension of the compliance date for advisers to mutual funds with respect to the list of government entities holding fund shares through an omnibus account. Our submission is attached and described in more detail below. Please note that the extension requested by

the ICI would not relieve fund advisers from requesting shareholder information from their omnibus accountholders by the current compliance date (September 13, 2011). [1] Nor would it apply to the other recordkeeping requirements associated with the pay-to-play rule. [2] Instead, it would only protect fund advisers from regulatory liability if, in response to a request for information, they are unable to obtain on a timely basis from one or more of their omnibus accountholders the information they need to be fully compliant with the requirements of Rule 204-2(a)(18)(i)(B). [3]

The Institute's submission to the SEC staff discusses in detail: the impediments to our members' ability to obtain the required information; our members' efforts to date to attempt to obtain the information from intermediaries; the search protocols recommended by the ICI's Transfer Agency Advisory Committee Task Force (the "Task Force") to obtain this information; the Task Force's recommended template to provide to intermediaries; the Institute's outreach activities including our monthly calls with members to address members' implementation concerns; and the results of two recent informal surveys conducted by the ICI (at the request of the SEC staff) regarding members' implementation efforts and responses received to date. Based upon this discussion, the memo requests an extension of the compliance date.

Importantly, the extension we request is not to a specific date. This is because a mere extension of the current compliance date would not provide our members any greater ability to obtain this information from their intermediaries than they have today. Instead, our request is conditioned on events occurring that would provide mutual fund advisers some legal leverage to obtain the information from their omnibus accountholders. In particular, the Institute's submission requests that fund advisers not be required as of September 13, 2011 to maintain on their list of government entities the identity of any government entity that holds fund shares indirectly through an omnibus account held by a FINRA member, a bank or bank trust department, a retirement plan recordkeeping, or an insurance company until the earlier of the date the information is provided to the fund's transfer agent in a reasonably useful format [4] by the omnibus accountholder, or sixty days after the following, as applicable:

1. The compliance date for a FINRA rule that requires its members to maintain a list of their government entity clients and provide funds a list of the fund's shareholders on the list; [5]
2. The compliance date for a regulatory requirement compelling banks and bank trust departments to provide a fund a list of their government entity clients that own the fund's shares; or
3. The compliance date for any regulatory requirement compelling a retirement plan administrator or an insurance company to provide funds a list of their government entity plan holders that own fund shares.

Our submission notes that our request for an extension of the compliance date is limited to those situations in which the fund has requested this information [6] from its omnibus accountholders and an accountholder has not provided it. As noted above, this extension is intended to protect those funds' advisers that have requested the necessary information from their omnibus accountholders and been unable to obtain it. It also notes that, to avoid placing advisers under legal obligations that they cannot comply with, it may be necessary for the Commission to revise certain of the rule's existing reporting requirements.

Once the SEC staff acts on our formal request, we will let you know. In the meantime, we continue to encourage members to request the required information from your omnibus

acountholders and, for regulatory purposes, to document both your efforts and the responses you receive from your omnibus acountholders.

If you have any questions concerning issues relating to the pay-to-play rule or the Institute's efforts, please contact either Heather Traeger (202-326-5920) or Tami Salmon (202-326-5825) of the ICI Law Department.

Heather L. Traeger
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Senior Associate Counsel
[Attachment](#)

endnotes

[1] This information will enable fund advisers, when inspected by OCIE, to document the steps they have taken to obtain their information and the response – or lack of response – they received.

[2] E.g., the requirements for advisers to maintain a list of their covered associates and such persons' political contributions.

[3] Our submission also recommends that any extension of the compliance date also recognize delays by a fund's subadviser that result from the subadviser's inability to obtain the required information from the fund's primary adviser due to adviser's inability to obtain it from its intermediaries.

[4] Such format would be one that only provides information about the government entity clients of the omnibus acountholder and not all of its clients. As also discussed in our submission, the Institute presumes that, in identifying its government entity accounts, these omnibus holders need only search those accounts into which they have full transparency. So, for example, if the omnibus account holder has omnibus accounts on its books and records (i.e., a situation involving tiers of intermediaries as discussed in our submission), it would only be required to identify which of its omnibus acountholders are government entities. It would not be required to reach out to its omnibus acountholders for additional information regarding that omnibus acountholder's clients.

[5] If, after FINRA adopts a rule, a broker-dealer provides a mutual fund transfer agent a complete download of all of its clients holding the fund's shares, and not just those that are government entities, mutual fund transfer agents would likely need significantly more time than the sixty day period to determine which of the broker-dealer's clients are government entities. The requirements of Regulation S-P would likely preclude such a complete download, however, unless the broker-dealer providing the complete download has authority from each retail shareholder to share account information with the fund's transfer agent since this is not information that would appear to be covered by the exceptions in Regulation S-P that permit the sharing of a retail customer's non-public personal information with a non-affiliated entity.

[6] Consistent with the rule's requirement, fund advisers would be expected to request from their omnibus acountholders a list of government entities maintaining an account within the omnibus account by the rule's compliance date of September 13, 2011.

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