

MEMO# 33916

November 23, 2021

ICI Submits Comment Letter on SEC's Clawback Proposal

[33916]

November 23, 2021

TO: ICI Members

Investment Company Directors SUBJECTS: Audit and Attest

Audit Committees

Closed-End Funds

Compensation/Remuneration

Compliance

Disclosure

Exchange-Traded Funds (ETFs)

Fund Accounting & Financial Reporting

Fund Governance

Unit Investment Trusts (UITs) RE: ICI Submits Comment Letter on SEC's Clawback Proposal

In October, the SEC re-opened the comment period[\[1\]](#) for its 2015 clawback proposal,[\[2\]](#) which it never adopted. Yesterday, ICI submitted the attached comment letter, once again reiterating that all registered investment companies ("funds") should be excluded from any final rule.

Background

In 2015, the SEC proposed a new rule and form amendments to implement Section 954 of the Dodd-Frank Act, which added Section 10D to the Exchange Act. Section 10D 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 does not develop and implement a policy providing for:

- disclosure of the issuer's policy on incentive-based compensation that is based on financial information reported under the securities laws; and
- recovery of incentive-based compensation that the issuer's executive officers receive during the preceding 3-year period in excess of what they would have received under an accounting restatement.

Proposed Rule 10D-1 under the Exchange Act would exempt the securities of most—but not all—funds.[\[3\]](#) The proposed rule would require:

- each national securities exchange and national securities association that lists securities to file with the SEC, for approval, proposed rules that comply with any final SEC rule; and
- a listed issuer to adopt a written policy providing for the recovery of erroneously awarded incentive-based compensation to executive officers.

The proposal also would subject applicable funds to new disclosure requirements.

Summary of ICI's Comment Letter

Our comment letter focuses on the proposal's treatment of funds and reiterates the comments we made in our 2015 comment letter.^[4] Once again, we recommend that the SEC exclude all funds from these new requirements. Otherwise, internally managed exchange-listed funds and certain other listed funds that directly provide incentive-based compensation to their chief compliance officers (CCOs) could be subject to the rule.^[5]

In support of this recommendation, we make the following points:

- The concerns behind this Dodd-Frank Act provision do not apply to listed funds (i.e., ETFs and many closed-end funds);
- The SEC excluded all funds 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 for any potentially affected funds will outweigh any benefits.

Matthew Thornton
Associate General Counsel

endnotes

^[1] Reopening of Comment Period for Listing Standards for Recovery of Erroneously Awarded Compensation, SEC Release No. 33-10998 (Oct. 14, 2021), *available at* www.sec.gov/rules/proposed/2021/33-10998.pdf. See also Institute Memorandum [No. 33831](#), dated October 18, 2021, for a more complete summary of this release.

^[2] Listing Standards for Recovery of Erroneously Awarded Compensation, SEC Release No. 33-9861 (the "proposal") (July 1, 2015), *available at* www.sec.gov/rules/proposed/2015/33-9861.pdf. See Institute Memorandum [No. 29181](#), dated July 16, 2015, for a more complete summary of the proposal.

^[3] The proposed rule and form amendments would apply only to those funds that: (i) list their securities on an exchange (i.e., ETFs and many closed-end funds); (ii) 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 (iii) pay their executive officers incentive-based compensation.

^[4] *Available at* www.sec.gov/comments/s7-12-15/s71215-25.pdf.

^[5] We recommend that if the SEC does not provide a complete exclusion for funds, then

the SEC should clarify that listed fund CCOs are not included within the rule's definition of "executive officer."

Copyright © by the Investment Company Institute. All rights reserved. Information may be abridged and therefore incomplete. Communications from the Institute do not constitute, and should not be considered a substitute for, legal advice.