

MEMO# 35147

March 8, 2023

ICI Draft Comment Letter on SEC Re-Proposal on ABS Conflicts of Interest: Your Comments Requested by Friday, March 17

[35147]

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TO: Fixed-Income Advisory Committee
Money Market Funds Advisory Committee

SEC Rules Committee RE: ICI Draft Comment Letter on SEC Re-Proposal on ABS Conflicts of Interest: Your Comments Requested by Friday, March 17

As previously reported, on January 25, the Securities and Exchange Commission (the SEC or "Commission") re-proposed a rule that was initially proposed in September 2011 (the "2011 Proposal") to implement the prohibition under Section 621 of the Dodd-Frank Act on material conflicts of interest in connection with certain securitizations (the "Re-Proposed Rule").^[1]

ICI has prepared the attached draft comment letter, summarized below for your review and feedback. Comments are due to the SEC by March 27. Accordingly please provide your written comments to Nico Valderrama at nvalderrama@ici.org and to Sarah Bessin at sarah.bessin@ici.org no later than Friday, March 17.

ICI's letter generally supports the Re-Proposed Rule, as we believe it would serve to protect funds, as investors in asset-backed securities (ABS), against certain conflicts of interest which may be raised by the activities of securitization participants. The letter therefore supports the Commission:

- Defining in the rule text key terms regarding the persons subject to the rule;
- Acknowledging that there is a common market understanding of whether fund^[2] securities are considered ABS for purposes of the Securities Exchange Act of 1934;^[3] and
- Including in the rule text a definition of "conflicted transaction" that we believe would:
 - (i) clarify that the rule would not apply to actions taken by a fund or adviser in connection with investing in ABS, through its adviser acting in a fiduciary capacity; and
 - (ii) provide certainty for market participants that the rule would not unduly

restrict liquidity arrangements that are typical for asset-backed commercial paper (ABCP) facilities.

The letter explains, however, that we continue to have concerns about the potential for any final rule to impose an unwarranted compliance burden on affiliates or subsidiaries of securitization participants that have no role in structuring or distributing ABS. The letter therefore recommends that the Commission:

- Implement in any final rule an information barriers exception for affiliates or subsidiaries of securitization participants;
- Adopt the conditions that the Proposing Release suggests for an information barriers exception, subject to our recommended modifications; and
- Exempt funds and advisers from such conditions, as these entities have no role in the structuring or distribution of ABS and are already subject to information barriers that would address the types of conflicts of interest the Re-Proposed Rule intends to address.

Sarah A. Bessin
Deputy General Counsel - Markets, SMAs & CITs

Nicolas Valderrama
Counsel

Notes

[1] Prohibition Against Conflicts of Interest in Certain Securitizations, Securities Act Release No. 33-11151 (January 25, 2023), 88 FR 9678 (Feb. 14, 2023) ("Proposing Release"), available at <https://www.govinfo.gov/content/pkg/FR-2023-02-14/pdf/2023-02003.pdf>. For a summary of the Proposing Release please see ICI Memorandum No. 34859 (Feb. 6, 2023), available at <https://www.ici.org/memo34859>.

[2] We use the term "fund" to refer to an investment company registered under the Investment Company Act of 1940.

[3] Subject to member confirmation, we will note that it is common market understanding that funds do not issue ABS and their securities are not classified as ABS under the Exchange Act.