

MEMO# 35217

March 27, 2023

ICI Files Comment Letter to SEC on Re-Proposal Regarding ABS Conflicts of Interest

[35217]

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TO: ICI Members
Fixed-Income Advisory Committee
Money Market Funds Advisory Committee
SEC Rules Committee SUBJECTS: Derivatives
Fixed Income Securities
Investment Advisers
Money Market Funds
Trading and Markets RE: ICI Files Comment Letter to SEC on Re-Proposal Regarding ABS Conflicts of Interest

On March 27, ICI filed a comment letter on the SEC's re-proposal of a rule that was initially proposed in September 2011 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").[\[1\]](#) Our letter is attached and is summarized below.

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, although we recommend providing further certainty that acts routinely taken by actual or potential long-only investors in ABS would not cause them to be deemed "sponsors" for purposes of the rule;
- Acknowledging that there is a common market understanding that fund[\[2\]](#) securities are not considered ABS for purposes of the Securities Exchange Act of 1934; and
- Including in the rule text a definition of "conflicted transaction" that we believe would: (i) clarify that the rule would not apply to investments in ABS by funds or advisers;[\[3\]](#) 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:

- Clarify that funds' and advisers' hedging activities through ABS indices would not be considered a "conflicted transaction" for purposes of the Re-Proposed Rule;
- Implement in any final rule an information barriers exception;
- Adopt the conditions that the Proposing Release suggests for an information barriers exception, subject to our recommended modifications; and
- Provide either a specific exception from any information barriers requirement under the Re-Proposed Rule for funds and advisers; or an exception from any such requirement for affiliates and subsidiaries that are subject to existing rules and regulations that provide for conflict management or for restricting information flow. The letter notes that funds and advisers are already subject to extensive laws and regulations addressing conflicts of interest, including information barrier requirements.

Lastly, the letter recommends that the Commission provide an implementation period of at least 12 months from publication of any final rule in the Federal Register, to provide those entities that would be deemed securitization participants with adequate time to implement the changes that the Commission proposes.

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] We use the term "adviser" to refer to an investment adviser registered under the Investment Advisers Act of 1940.