

MEMORANDUM

To: File No. S7-18-09

From: Sarah A. Bessin
Assistant Director
Division of Investment Management

Date: March 11, 2010

Re: Follow-up information provided by the Investment Company Institute (“ICI”)

On March 2, 2010, I received the attached email from Tamara Salmon at the ICI providing, at the staff’s request, additional information on certain points raised in the ICI’s October 6, 2009 comment letter. The email addresses certain issues relating to 529, 403(b), and 457 plans, and refers to the ICI’s suggestion in their comment letter that subadvisers be excepted from the rule, although they did not indicate in their comment letter which subadvisers they thought should be excepted.

Attachment

From: Salmon, Tamara <tamara@ici.org>
To: Bessin, Sarah; Traeger, Heather <htraeger@ici.org>
Cc: Kahl, Daniel; Rovers, Melissa A.; Traeger, Heather <htraeger@ici.org>
Sent: Tue Mar 02 17:09:23 2010
Subject: RE: Pay-to-play

Sarah -- we haven't come up with a definition of "subadviser" yet but, here's some feedback on the other issue you raised. As you know, in the ICI's comment letter on the SEC's pending pay-to-play proposal we expressed concern with the ability of investment advisers to mutual funds being able to identify which accounts on their records are government-run funds and would, therefore, trigger the proposal's recordkeeping requirements. You inquired whether, if an account is identified on the adviser's records as a 457, 403(b), or 529 plan account, the investment adviser could reasonably assume that the account relates to a government-run fund.

Subsequent to our conversation, I contacted a few of the Institute's members to ask whether they could determine, based on an account being held as a 457, 403(b), or 529 plan account, that it was related to a government-run fund. According to what each of these members told me, it would only be reasonable to assume that 529 accounts are government-run funds. This is because all of their 529 plan accounts are created to accommodate state 529 plans. As such, advisers could presume that any of the accounts they hold on their books as 529 plan accounts are from government-run funds.

The same is not true of section 457 and 403(b) plans. While these accounts are generally associated with retirement plans for government employees, they are not used exclusively for this purpose. Certain non-profit or tax-exempt entities or ministers can establish these types of plans so the labeling of an account as a 457 or 403(b) account would not necessarily indicate a nexus between the account and a government run fund. Moreover, these members noted that it is not uncommon for contributions of 401(k), 457, and 403(b) plans to be comingled by a retirement plan administrator into an omnibus position that is forwarded to the fund. In such instances, because only the recordkeeper would know the name of the plan participants and the type of retirement plan into which the omnibus position will be allocated, it would likely be impossible to determine which of its accounts may be government run based solely upon their status as a retirement account.

Let me know if you have further questions on this issue or other issues, or if there are other questions you need me to check with our members about. Thanks again for reaching out to us!