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April 2, 2019

David Fredrickson
Chief Counsel and Associate Director, Division of Corporation Finance
United States Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

Re: The Money Management Institute – “Constructive Delivery” of Mutual Fund Prospectuses to Discretionary Investment Advisers

Dear Mr. Fredrickson:

On behalf of the Money Management Institute (“MMI”), we request that the staff of the Division of Corporation Finance of the Securities and Exchange Commission (“SEC”) confirm that a broker-dealer may satisfy its obligations under Section 5(b)(2) of the Securities Act of 1933 (the “Securities Act”) to deliver a prospectus to a client of an investment adviser purchasing shares of investment companies registered under the Investment Company Act of 1940 (“mutual funds”) by delivering the mutual fund prospectus to the investment adviser so long as the broker-dealer knows that the investment adviser is authorized to manage the client’s account on a discretionary basis and to accept delivery of mutual fund prospectuses on behalf of the client.

By way of background, MMI is the national organization for the advisory solutions industry and represents a broad spectrum of investment advisers that manage accounts on a discretionary basis. MMI is requesting this interpretive guidance because its members routinely receive feedback from advisory clients with discretionary accounts who are annoyed and overwhelmed by the large volume of mutual fund prospectuses they receive and do not wish to receive these prospectuses. Many of these clients are nevertheless forced to receive such prospectuses because, in some cases, the broker-dealers purchasing such mutual fund shares are concerned that delivery of the prospectuses directly to these clients might be required by Section 5(b)(2) of the Securities Act. Below we outline requested guidance that would confirm that a broker-dealer may rely on “constructive delivery” of mutual fund prospectuses to a client’s discretionary investment adviser consistent with the adviser’s fiduciary duty and common law agency principles.

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MMI seeks confirmation that a broker-dealer purchasing mutual fund shares on behalf of clients whose accounts are managed by a discretionary investment adviser may satisfy any mutual fund prospectus¹ delivery obligation² under Section 5(b)(2) of the Securities Act by delivering the prospectuses for such mutual funds to the clients' investment adviser in lieu of delivering them to the clients, in accordance with well-established common-law agency principles (which we refer to as "constructive delivery" principles) to the effect that delivery of a communication to an authorized agent (*i.e.*, a discretionary investment adviser) is deemed to constitute delivery to the agent's principal (*i.e.*, the adviser's client). A broker-dealer would be permitted to rely on constructive delivery of mutual fund prospectuses if the broker-dealer knows that the client has authorized the investment adviser to manage the client's account on a discretionary basis and to receive prospectuses on behalf of the client, as the client's agent. The broker-dealer could establish knowledge of the investment adviser's authority through: (i) knowledge that the investment advisory relationship between the client and the investment adviser includes authorization to receive prospectuses; (ii) obtaining representations from the investment adviser that it has the authority to manage the client's account on a discretionary basis and receive prospectuses on behalf of the client³; or (iii) confirming with the client that the client's investment adviser has the authority to manage the client's account on a discretionary basis and to receive prospectuses on behalf of the client. To ensure a client's ability to receive mutual fund prospectuses directly if the client so chooses, under the requested guidance, the broker-dealer would deliver a mutual fund prospectus directly to a client upon the client's request whether on paper or via an electronic communication containing a hyperlink to such prospectus, if the client has affirmatively consented to electronic delivery of such documents.

The requested guidance is supported by well-established common law agency principles. Under common-law agency principles, delivery of information to a properly authorized agent⁴ is deemed to constitute delivery to the principal if the communication falls within

¹ The requested guidance would apply to the delivery of both statutory and summary prospectuses, to the extent that delivery of a summary prospectus is sufficient to satisfy the broker-dealer's prospectus delivery obligations under applicable law.

² We note that the guidance being requested in this letter would be non-exclusive, and that a broker-dealer may not be required to deliver a prospectus under an existing interpretation or exception, such as Section 4(a)(4) of the Securities Act.

³ *See, e.g.*, New York Stock Exchange Educational Circular No. 273 (Aug. 13, 1969) (explaining that a firm carrying the account of the client of an investment adviser may verify that the investment adviser has the power to act for the client by obtaining an attestation from the investment adviser that the client has signed a power of attorney appointing the investment adviser to act for his or her account).

⁴ An agent is a person authorized by another to act on his behalf under his control. *See Proctor & Gamble v. Haugen*, 222 F.3d 1262, 56 U.S.P.Q. 2D (BNA) 1098, 104 A.L.R. 5th 737 (10th Cir. 2000). "An agency relationship has three essential characteristics: (1) the power of the agent to alter the legal relationship between the principal and third parties and the principal and himself; (2) the existence of a fiduciary relationship toward the principal with respect to matters within the scope of the agency; and (3) the right of

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the agent's scope of authority vis-à-vis the principal⁵ and the agent has actual or apparent authority to receive the notification on behalf of the principal.⁶ The general rule is that the relationship between an agent and his or her principal is contractual and the extent of the rights and duties of each must be found in the express or implied terms of the agency contract.⁷ Agency law principles also provide that an agent's knowledge of facts or information generally is imputed to the principal if the facts or information are material to the agent's duties to the principal.⁸ The arrangements between each client and its investment adviser would establish an agency/principal relationship⁹ involving, of course, the provision of fiduciary services.

* * * * *

In light of the forgoing, we request that you confirm that a broker-dealer may satisfy its obligations under Section 5(b)(2) of the Securities Act of 1933 to deliver a mutual fund prospectus to a client of an investment adviser purchasing shares of a mutual fund by delivering the prospectus to the investment adviser so long as the broker-dealer knows that the investment adviser is authorized to manage the client's account on a discretionary basis and is authorized to accept delivery of prospectuses on behalf of the client. This guidance, if confirmed, would not diminish clients' right to receive any such prospectuses delivered to the investment adviser on request, if desired.

the principal to control the agent's conduct with respect to matters within the scope of the agency." *Sabel v. Mead Johnson & Co.*, 737 F. Supp. 135, 138 (D. Mass. 1990) (citing Restatement (Second) of Agency §§ 12-14 (1958)).

⁵ See *Jamrog v. H.L. Handy Co.*, 284 Mass. 195 (1933) (quoting Mechem on Agency (2d Ed.) § 1803) ("It is the general rule, settled by an unbroken current of authority, that notice to, or knowledge of, an agent while acting within the scope of his authority and in reference to a matter over which his authority extends, is notice to, or knowledge of, the principal." . . . Generally notice to an agent, while acting for his principal, of facts affecting the character of the transaction is constructive notice to the principal.").

⁶ See Restatement (Third) Agency § 5.02 (stating that "[a] notification given to an agent is effective as notice to the principal if the agent has actual or apparent authority to receive the notification, unless the person who gives the notification knows or has reason to know that the agent is acting adversely to the principal").

⁷ "The relationship of agency rests on a contract, express or implied, between the parties." See *Esmond Mills v. Comm'r of Internal Revenue*, 132 F.2d 753, 755 (1st Cir. 1943); *Baumgartner v. Burt*, 148 Colo. 64, 365 P.2d 681, 90 A.L.R. 1286 (1961).

⁸ See Restatement (Third) Agency § 5.03; *Apollo Fuel Oil v. U.S.*, 195 F.3d 74 (2d Cir. 1999) (stating that, in general, "when an agent is employed to perform certain duties for his principal and acquires knowledge material to those duties, the agent's knowledge is imputed to the principal").

⁹ See *Leib v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 461 F. Supp. 951, 953-54 (E.D. Mich. 1978) (stating that the relationship between an investment adviser and its client is one of principal and agent); *Robinson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 337 F. Supp. 107, 111 (N.D. Ala. 1971).

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We welcome the opportunity to discuss this request with you. If you have any questions, please feel free to call me at 202.739.5453 or David Sirignano at 202.739.5420. On behalf of MMI, we appreciate the staff's consideration of this request.

Yours truly,

A handwritten signature in blue ink, appearing to read "Steven W. Stone". The signature is fluid and cursive, with a large initial "S" and "W".

Steven W. Stone

cc: SEC Division of Investment Management
SEC Division of Trading and Markets