



DIVISION OF
INVESTMENT MANAGEMENT

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

August 21, 2007

Ms. Mary Podesta
Acting General Counsel
Investment Company Institute
1401 H Street, NW
Washington, DC 20005

Re: Funds Use of Rule 22c-2 Information for Marketing Purposes

Dear Ms. Podesta:

The enclosed newspaper article drew our attention by suggesting that funds may use for marketing purposes the shareholder identity and trading information they receive from intermediaries under rule 22c-2.¹ Please share with your membership a reminder that funds' use or disclosure of rule 22c-2 information for marketing purposes is prohibited under the Gramm-Leach-Bliley Act's privacy rules, unless the intermediaries' consumers have been given notice and the opportunity to opt out of this information sharing.

As you know, rule 22c-2 requires funds to enter into written agreements with their financial intermediaries, including those holding shares through omnibus accounts, under which the intermediaries must agree to provide funds with certain shareholder identity and transaction information upon request.² Under the rule, funds must be able to request and promptly receive shareholder identity and transaction information pursuant to these agreements by October 16, 2007.

As was noted in the release adopting rule 22c-2, funds' use of this shareholder identity and transaction information for marketing purposes is governed by the Gramm-

¹ Daisy Maxey, *Funds' Outsourcing May Be Boon to Investors*, Wall St. J. (May 29, 2007) at C2 ("rule [22c-2] may provide mutual-fund companies with 'a treasure trove of data they can mine to market directly to customers'"). See also Lee Barney, *Rule 22c-2 Offers Funds Great Marketing Prospects*, Money Management Executive (Jun. 4, 2007) ("While the mutual fund industry has wrangled over, and largely resisted, the logistics and the estimated \$617 million cost of complying with Rule 22c-2 for the past three years, funds should actually view the perceived regulatory onus in a new light: As a tremendous marketing opportunity.")

² 17 CFR 270.22c-2(a)(2)(i).

Leach-Bliley Act's privacy rules.³ In general, the privacy rules require that financial institutions, including investment companies, provide consumers with notice and an opportunity to opt out before institutions are permitted to share consumers' nonpublic personal information with nonaffiliated third parties.⁴ In response to commenters' concerns that these restrictions would prohibit or interfere with rule 22c-2's shareholder information agreements, the Commission noted its view that rule 22c-2 information disclosures are permitted under certain of the privacy rules' exceptions.⁵ In particular, the Commission noted that these disclosures are within the scope of the privacy rules' exceptions for (1) processing and servicing transactions at the consumers' request and (2) complying with applicable legal requirements.⁶

This finding has two practical consequences. First, it means that most intermediaries will not have to change their privacy or opt out notices in order to comply with rule 22c-2. This is because the privacy rules permit information sharing under the exceptions if financial institutions include in their privacy notices a statement that they make disclosures to "other nonaffiliated third parties as permitted by law."⁷ As a matter of routine practice, most financial institutions currently include this statement in their privacy notices.

Second, it means that funds receiving rule 22c-2 information under the exceptions are permitted to use or redisclose this information only for purposes of the exception, which does not include marketing purposes, unless permitted under the intermediary's privacy policy.⁸ This is because the privacy rules limit the redisclosure and reuse of

³ See Mutual Fund Redemption Fees, Investment Company Act Release No. 27504 (Sept. 27, 2006) [71 FR 58257 (Oct. 3, 2006)] at n.44. See also Mutual Fund Redemption Fees, Investment Company Act Release No. 26375A (Mar. 5, 2004) [69 FR 11762 (Mar. 11, 2004)] at n.47; Mutual Fund Redemption Fees, Investment Company Act Release No. 26782 (Mar. 11, 2005) [70 FR 13328 (Mar. 18, 2005)] at n.47; Mutual Fund Redemption Fees, Investment Company Act Release No. 27255 (Feb. 28, 2006) [71 FR 11351 (Mar. 7, 2006)] at nn.16, 19.

⁴ See 15 U.S.C. 6802. The Commission's limitation on the disclosure of nonpublic personal information to nonaffiliated third parties can be found in section 10(a)(1) of Regulation S-P (17 CFR 248.10(a)(1)). Regulation S-P applies to brokers, dealers, investment companies and investment advisers registered with the Commission. Privacy rules that are consistent and comparable apply to other financial institutions who may act as intermediaries. For example, limitations on national banks' disclosure of nonpublic personal information to nonaffiliated third parties can be found in the Comptroller of the Currency's privacy rule. See 12 CFR 40.10(a)(1).

⁵ See *supra* note 3.

⁶ See, e.g., 17 CFR 248.14(a), (b)(2) and 17 CFR 248.15(a)(7)(i).

⁷ See 17 CFR 248.6(b).

⁸ See Privacy of Consumer Financial Information (Regulation S-P), Securities Exchange Act Release No. 42974, Investment Company Act Release No. 24543, Investment Advisers Act Release No. 1883 (Jun. 22, 2000) [65 FR 40334 (Jun. 29, 2000)] at text accompanying n.150.

information received under an exception to the purposes for which the information was received.⁹ Thus, unless the intermediaries' privacy policies disclose this information sharing and the consumer has not opted out, investment companies are prohibited from using rule 22c-2 information for marketing purposes under the privacy rules' general restrictions on sharing nonpublic personal information with nonaffiliated third parties.¹⁰

Thank you in advance for your attention to this matter. If your members have questions concerning the disclosure or use of rule 22c-2 information for marketing purposes, those questions should be addressed to the Office of Regulatory Policy.

Sincerely,



Robert Plaze
Associate Director

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⁹ See, e.g., 17 CFR 248.11(a) and (c). The privacy rules also contain an example prohibiting the use of information received under the relevant exceptions for marketing purposes. See 17 CFR 248.11(a)(2).

¹⁰ See, e.g., 17 CFR 248.10(a)(1).