Division of Investment Management Issues
Guidance Regarding Mixed and Shared Funding Orders

Friday, November 7, 2014

In October 2014, the staff of the Division of Investment Management of the SEC published a Guidance Update addressing whether a fund that offers its shares under a variable life and/or variable annuity contract is required to obtain a “mixed and shared funding” order prior to making such offer or, if an order previously has been obtained, whether a fund needs to comply with the terms and conditions of the order if the exemptions from the 1940 Act granted thereunder are not being relied upon.

In the Guidance Update, the staff notes that neither “mixed funding”—the sale of shares of a fund to various types of offerees (e.g., variable insurance contracts and retirement plans)—nor “shared funding”—the sale of shares of a fund as an investment option in variable insurance contracts issued by multiple unaffiliated insurance companies—is prohibited by the 1940 Act, but that insurance companies and their affiliates that seek to rely on certain SEC rules providing exemptions from Sections 9(a), 13(a) and 15(a) and (b) of the 1940 Act must comply with restrictions on mixed and shared funding. The staff further notes that, although many funds have sought and received mixed and shared funding orders to allow insurance companies and their affiliates to rely on the exemptions from Sections 9(a), 13(a) and 15(a) and (b) without complying with the restrictions on mixed and shared funding, such exemptions are very infrequently relied upon.

In light of the infrequent reliance, the staff states that: (1) a fund is not required to obtain a mixed and shared funding order prior to offering its shares as an investment option in one or more variable insurance contracts, but an insurance company and its affiliates will not have the exemptions typically granted by the orders, and (2) compliance with the terms and conditions of a previously issued order is not required if no insurance company or its affiliates are relying on the exemptions granted thereunder. The staff also notes in the Guidance Update that participation agreements between insurance companies and funds may require compliance with the terms and conditions of a fund’s mixed and shared funding order and that insurance companies and funds may want to revise the terms of their participation agreements to eliminate such requirements if the insurance companies are not relying on the exemptions granted under the orders.


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