

**MEMO# 18440**

January 21, 2005

## **DRAFT INSTITUTE LETTER ON SECURITIES ACT REFORM PROPOSALS**

[18440] January 21, 2005 TO: CLOSED-END INVESTMENT COMPANY COMMITTEE No. 3-05 EQUITY MARKETS ADVISORY COMMITTEE No. 7-05 FIXED-INCOME ADVISORY COMMITTEE No. 3-05 SEC RULES COMMITTEE No. 6-05 RE: DRAFT INSTITUTE LETTER ON SECURITIES ACT REFORM PROPOSALS As we previously informed you,<sup>1</sup> the Securities and Exchange Commission has proposed modifications to the securities registration and offering processes under the Securities Act of 1933.<sup>2</sup> The proposals address communications related to registered securities offerings, registration and other procedures in the offering and capital formation processes, and delivery of information to investors. The Institute has prepared a draft comment letter on the proposal. The most significant aspects of the draft letter are summarized below and a copy of the draft letter is attached. Comments on the proposals are due to the Commission no later than January 31, 2005. If you have any comments on the draft letter, please contact the undersigned by phone at 202- 371-5410 or by e-mail at [jheinrichs@ici.org](mailto:jheinrichs@ici.org) no later than January 28th. As a preliminary matter, the draft letter notes that the proposals provide an excellent framework for considering modifications to the offering process of investment companies. As an example, the draft letter states that it would be appropriate for the Commission to consider adopting an "access equals delivery" model, similar to that set forth in the proposals, for the offer and sale of investment company securities. Because investment companies are subject to a separate framework governing the registration of their securities and their communications with investors, however, the draft letter recommends the Commission undertake a separate rulemaking initiative for investment companies. The draft letter also urges the Commission not to apply certain aspects of the current proposals to investment companies on a piecemeal basis, but instead consider all related issues in the context of a comprehensive proposal focused on investment companies. 1 Memorandum to Closed-End Investment Company Members No. 73-04, Equity Markets Advisory Committee No. 45-04, Fixed-Income Advisory Committee No. 13-04 and SEC Rules Members No. 163-04, dated November 15, 2005 [18189]. 2 SEC Release Nos. 33-8501, 34-50624, and IC-26649 (Nov. 3, 2004), 69 Fed. Reg. 67392 (Nov. 17, 2004). 2 Communications During the Offering Process The draft letter supports the proposals to create safe harbors for ongoing communications during an offering and communications prior to filing a registration statement. The draft letter notes, however, that certain conditions imposed on the safe harbors may limit their usefulness to issuers. Accordingly, the draft letter recommends that the Commission reconsider and clarify these conditions to ensure the safe harbors' usefulness to issuers. The draft letter also supports the proposals to permit, under specified conditions, issuers and other offering participants to use a new type of written communication called a "free writing prospectus" after the filing of the registration statement. The draft letter states, however, that the Institute is concerned with the potential cross-liability of offering participants for the free

writing prospectuses of other participants. In order to address these uncertainties regarding liability, the draft letter recommends that the Commission clarify the circumstances under which participants in an offering could be liable for the free writing prospectuses of other participants. Liability Provisions The proposals would clarify that sellers' liability for purposes of Sections 12(a)(2) and 17(a)(2) of the Securities Act will be imposed based on the information that purchasers actually possess at the time of sale. Unlike other provisions of the proposals, this proposal would not exclude the offer or sale of investment company securities. Although the draft letter supports the Commission's goal of ensuring that investors receive materially complete and accurate information before they decide to purchase a security, the draft letter notes that it would be more appropriate to consider any proposals affecting the offer and sale of investment company securities in the context of a separate reconsideration of this framework. In an effort to address uncertainty as to issuer liability under Section 12(a)(2), the proposals also would clarify that an issuer in a primary offering of securities, regardless of the form of the underwriting arrangement, be considered to offer or sell the securities to the purchaser, and therefore be a seller for purposes of Section 12(a)(2) as to any communications made by or on behalf of the issuer. The proposals would apply to communications made by or on behalf of investment companies in any profile pursuant to Securities Act Rule 498 and in any advertisements pursuant to Securities Act Rule 482. The draft letter states that it would be more appropriate to consider issuer liability under Section 12(a)(2) as it applies to investment companies in a separate framework tailored specifically to investment companies. Prospectus Delivery Reforms The proposals would modify the way in which the final prospectus delivery obligations under the Securities Act are satisfied by creating an "access equals delivery" model for final prospectuses. Under this model, issuers and intermediaries could satisfy their delivery requirements if a final prospectus is filed with the Commission within the required filing deadline. 3 The draft letter strongly supports this proposal. The draft letter notes that an "access equals delivery" model would facilitate a regime that allows for tailored disclosures to investors depending on their level of investment experience and interest by, for example, providing certain information to investors at the point of sale, while making other more detailed information available on a public website.

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