

MEMO# 11616

February 8, 2000

BILL FACILITATING USE OF ELECTRONIC RECORDS AND SIGNATURES

1 See Institute Memorandum to Board of Governors No. 72-99, Federal Legislation Members No. 26-99, Primary Contacts- Member Complex No. 103-99 and Public Information Committee No. 47-99, dated November 19, 1999. [11616] February 8, 2000 TO: PENSION COMMITTEE No. 12-00 PENSION OPERATIONS ADVISORY COMMITTEE No. 10-00 TAX COMMITTEE No. 5-00 RE: BILL FACILITATING USE OF ELECTRONIC RECORDS AND SIGNATURES

Attached is a copy of H.R. 1714, the "Electronic Signatures in Global and National Commerce Act." H.R. 1714 provides for the acceptance of electronic signatures and records in interstate commerce by according them the same legal effect and validity as written signatures and records. The Pension Committee expressed an interest at the February 2, 2000 meeting in being kept apprised of the status of this and similar legislation, because of an interest in assuring that the legislation would enable the formation and maintenance of retirement savings vehicles, such as IRAs, in a web- based or other 'paperless' environment. Similarly, members of the Tax Committee have expressed an interest in the extent to which various tax reports and filings are included in the bill. If, after reviewing the legislation, you have any thoughts or concerns regarding the applicability of the legislation to IRAs and other pension plans, please contact the undersigned at (202) 326-5835 or rgaler@ici.org. With respect to other tax-related concerns, please contact Deanna Flores at (202) 371-5436 or dflores@ici.org.

Status of Legislation. On November 9, the House of Representatives passed H.R. 1714 by a 356-66 vote. The Senate passed S. 761, the "Millennium Digital Commerce Act," on November 19. The Senate bill also would provide for the legal effect and validity of electronic signatures in interstate commerce. However, as passed, the Senate bill addresses only the use of electronic signatures in connection with the formation of contracts or agreements, but does not address "records." A House and Senate conference committee is expected to meet to resolve the differences between the two bills.¹

General Rule For Validity of Contracts, Agreements and Records. Under Title I of the bill, "any contract, agreement, or record entered into or provided," would not be denied legal effect, validity or enforceability merely because the contract, agreement or record was an "electronic record," rather than a traditional "writing" or signed with an "electronic signature," rather than a pen and ink signature. Title I would apply to any contract, agreement or record affecting interstate or foreign commerce. See sections 101(a) and (b). Persons would retain the right to contest the validity of an electronic signature. See section 101(d).

²Specific terms, such as "electronic signature," "electronic record," and "record" are defined at section 105. The term "record" means "information that is subscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form." Consumer Consent ("Opt-in") to Provision of Electronic Records. If a statute or regulation requires that a record be provided or made available to a consumer in

writing, provision of an electronic record would satisfy the requirement if the consumer has affirmatively consented (opted in) to the provision or availability of the record as an electronic record. Prior to a consumer's consent, the provider of the electronic record would be required to provide the consumer with a statement of the hardware and software requirements for accessing and retaining the electronic records. The consumer's consent to the use of electronic records must include acknowledgement of an obligation to notify the provider of the electronic records of any change in electronic mailing address to which the records would be provided. Consumers would be permitted to revoke such consent. See section 101(b)(2). Retention of Contracts, Agreements and Records. If a statute or regulation requires that a contract, agreement or record be in writing or be retained (including retention in "original form"), that requirement would be satisfied by retaining an electronic record of the information. The electronic record must accurately reflect the information set forth in the document and remain accessible for the period required by the statute or regulation for reference, transmission and printing. Similarly, the bill would permit retention of a check electronically if all the information on the front and back of the check were retained accurately and remained accessible to the extent required under the relevant law. See section 101(c). Relation to State Laws. A State statute or regulation may modify, limit or supersede the provisions of Title I of the bill if the statute or regulation enacts or adopts the Uniform Electronic Transactions Act or specifies alternative procedures for the use or acceptance of electronic records and signatures to establish the legal effect, validity or enforceability of contracts, agreements and records. See section 102(a). Such laws, however, may not discriminate in favor or against a specific technology or entity engaged in the business of facilitating the use of electronic signature and records, or be based on procedures or requirements not sufficiently specific or not publicly available. See section 102(b). Inapplicability to Certain Contracts, Agreements or Records. Title I would not apply to any requirement by a Federal regulatory agency or self-regulatory organization that records be filed or maintained in a specified standard or format. See section 103(a)(4). Title I also generally would not apply to contracts, agreements or records entered into between a party and a State agency; official court documents; and notices regarding the termination of utilities, health insurance or life insurance benefits, or repossession, foreclosure, or eviction. See section 103. Additionally, Title I would not apply to contracts, agreements or records governed by laws relating to wills, codicils or testamentary trusts; adoption, divorce and matters of family law; and the Uniform Commercial Code (with the exception of sections 1-107 and 1-206 and Articles 2 and 2A); and other laws specified at section 103. Other Aspects of H.R. 1714, Including Application to Securities Laws. Title II of the bill would direct the Secretary of Commerce to conduct several studies on the status of relevant state laws, and another to identify domestic and foreign impediments to electronic commerce and promote the use and acceptance of electronic signatures on an international basis. Title III addresses the use of electronic signatures under the Federal securities laws by amending section 3 of the Securities Exchange Act of 1934. 3 Russell G. Galer Senior Counsel Attachment