INVESTMENT COMPANY INSTITUTE

The Asset Management Industry SERVING INDIVIDUAL INVESTORS

MEMO# 12023

June 19, 2000

HOUSE AND SENATE VOTE TO FACILITATE ELECTRONIC TRANSACTIONS; WHITE HOUSE APPROVAL EXPECTED

[12023] June 19, 2000 TO: BOARD OF GOVERNORS No. 34-00 FEDERAL LEGISLATION MEMBERS No. 7-00 PRIMARY CONTACTS - MEMBER COMPLEX No. 40-00 PUBLIC INFORMATION COMMITTEE No. 22-00 RE: HOUSE AND SENATE VOTE TO FACILITATE ELECTRONIC TRANSACTIONS; WHITE HOUSE APPROVAL EXPECTED The U.S. House of Representatives and Senate voted overwhelmingly last week to remove a major barrier to electronic commerce by approving legislation that gives electronic signatures, contracts and other records the same legal status as their written counterparts. Enactment of the bill is expected shortly, as President Clinton recently confirmed that he would sign the conference report of S. 761, the “Electronic Signatures in Global and National Commerce Act” (E-SIGN), into law. Specifically, E-SIGN grants legal effect, validity and enforceability to electronic signatures, contracts and records used in interstate and international commercial transactions. This means, for example, that contracts could be completed online without having to obtain written signatures, and legal notices and information could be sent to consumers via e-mail. Exceptions exist for certain documents, such as wills, official court papers, and cancellation notices for utility and health care services. (Federal regulators, however, are granted the authority to eliminate some of these exceptions if they are no longer deemed necessary.) E-SIGN also provides for the uniform acceptance of electronic signatures regardless of technology. The bill does not define what constitutes an appropriate electronic signature, and instead lets the parties to a transaction decide. Importantly, E-SIGN requires a consumer’s affirmative consent to conduct business online before electronic records can be used as a substitute for required written notices or disclosures. Prior to consenting, a consumer must be provided with a “clear and conspicuous” disclosure that includes a statement of any right the consumer may have to still receive information in paper form and a description of the hardware and software necessary to access the electronic information. In addition, the bill states that a consumer’s consent must “reasonably demonstrate” that he or she can access the information in its electronic form. In a House floor statement, House Commerce Committee Chairman Tom Bliley (R-VA) and Rep. Edward Markey (D-MA) clarified what is considered a reasonable demonstration. For example, the requirement would be satisfied if the provider of an electronic record sent a consumer an e-mail with attachments (in the same formats used to provide the records), asked the consumer to open the attachments, and requested the consumer to indicate in an e-mail response that he could access information in the

attachments. The E-SIGN consent requirements, however, do not apply to electronic records provided to a consumer who, prior to October 1, 2000, consented to receive them in accordance with existing rules, such as the SEC's interpretive guidelines. The bill also gives regulators the authority to exempt certain types of records from these consumer consent provisions if the provisions prove to be a substantial burden on electronic commerce and are not needed to protect consumers. In particular, the bill directs the SEC to adopt an exemption 2allowing registered investment companies to provide prospectuses online, without having to comply with the E-SIGN consent provisions, when the prospectuses are being provided along with fund advertising or supplemental sales literature. The bill clarifies that, absent special circumstances involving law enforcement or national security, contracts and records can be retained in electronic form without a paper backup, even if a law or regulation requires that they be retained in writing. However, procedures for filing records with a regulatory agency or self-regulatory organization are not affected by the bill. Furthermore, state legislatures are permitted to modify the E-SIGN bill by enacting the official version of the Uniform Electronic Transactions Act (UETA) or by enacting other laws that are consistent with E-SIGN. E-SIGN commissions two studies to be completed by Commerce Department by June 2001. One will evaluate the benefits and burdens of the consumer consent provisions, and the second will compare the effectiveness of delivering electronic records to the effectiveness of delivering written records via traditional mail services. E-SIGN will take effect on October 1. However, the provisions relating to electronic record retention will not be effective until March 1, 2001 and could be delayed by regulatory agency action until June 1, 2001. This is to allow federal regulators adequate time to adopt any special rules regarding electronic record retention. Matthew P. Fink President

---