

MEMO# 17944

September 2, 2004

INSTITUTE DRAFT COMMENT LETTER ON THE SEC'S PROPOSAL TO EXCLUDE CERTAIN BROKER-DEALERS FROM THE ADVISERS ACT

[17944] September 2, 2004 TO: INVESTMENT ADVISERS COMMITTEE No. 13-04 SEC RULES COMMITTEE No. 74-04 RE: INSTITUTE DRAFT COMMENT LETTER ON THE SEC'S PROPOSAL TO EXCLUDE CERTAIN BROKER-DEALERS FROM THE ADVISERS ACT As we previously informed you, the SEC recently repropose comment Rule 202(a)(11)-1 under the Investment Advisers Act of 1940, which was originally proposed in 1998.¹ This rule would exclude a broker-dealer providing investment advice from regulation under the Advisers Act so long as: (i) the advice is provided on a non-discretionary basis; (ii) the advice is solely incidental to its brokerage services; and (iii) the broker-dealer discloses to its customers that its accounts are brokerage accounts. The Institute has prepared the attached draft comment letter, which is briefly summarized below. Comments on the reproposal must be filed no later than September 22nd. Please provide any comments on the draft letter no later than Wednesday, September 15th to the undersigned by phone (202-326-5825) or e-mail (tamara@ici.org). The Institute's draft letter discusses the comment letter that the Institute filed on the 1998 proposal and reiterates our support for the proposed rule. It also reiterates the recommendation from our previous comment letter that the Commission study some of the broader issues that are raised by the proposal, including (1) whether the exercise of discretionary authority should trigger regulation under the Advisers Act and (2) the meaning of the terms "solely incidental" and "special compensation," as used in Section 202(a)(11)(C) of the Advisers Act. The draft letter notes that during the pendency of this proposal, broker-dealers have been able to rely on the relief that would be provided by the proposed rule² and, to our knowledge, during this time, there have been no reported abuses resulting from broker-dealers relying on the proposal, nor has there been any demonstration of harm to investors based upon such reliance. ¹ See Institute Memorandum to Investment Advisers Members No. 16-04 and SEC Rules Members No. 117-04 [17913], dated August 19, 2004. ² This is because, in addition to proposing the rule for comment, the 1999 proposing release noted that the Commission's Division of Investment Management would not recommend that the Commission take any action against a broker-dealer acting in reliance on the proposed rule during its pendency. ² As such, the Institute remains of the view that the approach taken in the Commission's proposal is a sound one. Tamara K. Salmon Senior Associate Counsel Attachment (in .pdf format)

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