

MEMO# 12035

June 20, 2000

ICI COMMENT LETTER ON SEC ELECTRONIC MEDIA RELEASE

[12035] June 20, 2000 TO: ADVERTISING COMPLIANCE ADVISORY COMMITTEE No. 21-00 SEC RULES COMMITTEE No. 91-00 RE: ICI COMMENT LETTER ON SEC ELECTRONIC MEDIA RELEASE The Institute recently filed the attached comment letter on the Securities and Exchange Commission's interpretive release providing additional guidance on the application of the federal securities laws to the use of electronic media by securities issuers, including investment companies.¹ The comment letter, which is substantially similar to the draft letter previously circulated to you, is briefly summarized below. 2 The comment letter supports the Commission's goals underlying the Release, but states that in the case of mutual funds, the new "guidance" it provides falls far short of these goals. The letter indicates that the Release increases the uncertainty about and barriers to the use of electronic media by mutual funds, in part by focusing on typical corporate issuers without giving adequate attention to unique considerations for mutual funds. In particular, the letter expresses disappointment with the guidance in the Release concerning responsibility for third-party information to which a mutual fund establishes a hyperlink, and recommends that the Commission revisit this issue and work with the NASD and the industry to establish objective criteria that mutual funds may rely on in this area. The letter also criticizes the Release's discussion of the so-called "envelope theory" (which deals with when electronically delivered documents are considered to be delivered together for purposes of the federal securities laws), because it creates problems and ambiguities for mutual funds. The letter therefore seeks clarification of several issues, including: (1) that a hyperlink from a fund prospectus to third-party information or to sales literature does not automatically make the third-party information or sales literature become part of the prospectus; and (2) when material on a fund web site outside of a prospectus would be considered "impermissible" free writing. The letter also: (1) notes that Congress has passed legislation that will apply detailed consent requirements to most electronic disclosure documents, and that the Institute is studying the legislation's impact on the Commission's guidance in this area and may have further comments at a later date; (2) recommends that the existing paper back-up delivery requirement be eliminated for electronic-only offerings; (3) recommends that historical material that is archived and labeled as such on a fund web site should not be deemed republished each day or when accessed by an investor; (4) requests clarification that live online auditoriums are oral communications that do not need to be filed pursuant to Section 24(b) of the Investment Company Act; and (5) requests clarification that neither a fund nor its principal underwriter would have liability under the federal securities laws for third-party information posted on a fund's online bulletin board in certain circumstances. 1 See Memorandum to Advertising Compliance Advisory Committee No. 15-00 and SEC Rules Committee No. 68-00, dated May 3, 2000 (transmitting SEC

Release Nos. 33-7856, 34-42728, IC-24426 (April 28, 2000) ("Release"). 2 See Memorandum to Advertising Compliance Advisory Committee No. 19-00 and SEC Rules Committee No. 83-00, dated June 6, 2000. 2Doretha VanSlyke Zornada Assistant Counsel Attachment Attachment (in .pdf format)

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