

**MEMO# 13428**

April 20, 2001

# **INSTITUTE COMMENT LETTER ON SEC ELECTRONIC RECORDKEEPING PROPOSAL FOR INVESTMENT COMPANIES AND INVESTMENT ADVISERS**

[13428] April 20, 2001 TO: INVESTMENT ADVISERS COMMITTEE No. 12-01 ELECTRONIC COMMERCE ADVISORY COMMITTEE No. 9-01 OPERATIONS COMMITTEE No. 15-01 TRANSFER AGENT ADVISORY COMMITTEE No. 29-01 UNIT INVESTMENT TRUST COMMITTEE No. 14-01 RE: INSTITUTE COMMENT LETTER ON SEC ELECTRONIC RECORDKEEPING PROPOSAL FOR INVESTMENT COMPANIES AND INVESTMENT ADVISERS The Institute has prepared the attached comment letter on the SEC's proposal to amend Rule 31a-2 under the Investment Company Act of 1940 and Rule 204-2 under the Investment Advisers Act of 1940, to expand the circumstances under which funds and advisers may use electronic storage media to maintain and preserve records. The Institute's letter is similar to the draft letter we sent to you previously,<sup>1</sup> but has been modified slightly to reflect members' comments. As summarized below, the letter generally supports the Commission's proposal, but makes several technical recommendations to make the rules more workable and to ensure consistency in the recordkeeping process. Clarification of Obligations to Provide Records At the outset, the Institute's letter opposes the Commission's proposal to define in the rule what it means to "provide promptly" the records requested by SEC examiners and others. (The rule amendments would specify that information would have to be provided within one business day of the request.) The letter explains that the time needed to provide requested information can vary based on numerous factors, including among others, the amount of advance notice provided, the amount of information requested, the location of the information at the time the request is made, the type of medium on which the information is stored at the time the request is made, and the capabilities and capacity of the entity's computer and printer systems. The letter adds that codifying a one business day time frame in the rule inevitably will result in rule violations despite good faith efforts to comply, and will create an additional layer of regulation not otherwise justified in the circumstances.

1 See Memorandum to Investment Advisers Committee No. 11-01, SEC Rules Committee No. 34-01, Electronic Commerce Advisory Committee No. 8-01, Operations Committee No. 14-01, Transfer Agent Advisory Committee No. 28-01, and Unit Investment Trust Committee No. 13-01, dated April 10, 2001. 2Status of Other Recordkeeping Requirements The Institute's letter points out that the Commission's proposal does not address recordkeeping requirements contained in other rules under the Investment Company Act, such as Rule 2a-7 (money market funds) and Rule 17j-1 (codes of ethics). The letter cautions that if the Commission intends its proposed performance standards under Rules 31a-2 and Rule 204-2 to be the "exclusive means by which funds and advisers could comply with E-SIGN's

standards of accuracy and accessibility,” then it is all the more imperative that it clarify the status of such other recordkeeping requirements. The letter also reminds the Commission of its previously proposed (but never adopted) amendments to Rule 17Ad-7 under the Securities Exchange Act of 1934, which would have allowed registered transfer agents to use micrographic or electronic storage media to produce and preserve required records. Since E-SIGN will permit transfer agents to use electronic storage media as of June 1, 2001, the letter encourages the Commission to clarify what standards will apply to such recordkeeping, adding that any such standards should be consistent with those for fund and adviser records. Other Comments The Institute’s letter makes several technical comments on various aspects of the Commission’s proposal, and comments on one aspect of the proposal that while not specifically related to electronic recordkeeping, is relevant to the Commission’s overall effort to update its recordkeeping requirements. The letter points out that while Rule 31a-3 under the Investment Company Act recognizes that investment company records may be prepared or maintained by third parties, in order to provide additional flexibility to investment advisers, the Commission should take this opportunity to amend the advisers recordkeeping rules to give specific recognition to similar types of arrangements in that context. Barry E. Simmons Associate Counsel Attachment Attachment (in .pdf format)

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