

**MEMO# 15451**

December 13, 2002

# **DRAFT INSTITUTE LETTER ON SEC PROPOSAL TO IMPLEMENT STANDARDS OF PROFESSIONAL CONDUCT FOR ATTORNEYS**

[15451] December 13, 2002 TO: SEC RULES COMMITTEE No. 104-02 CLOSED-END INVESTMENT COMPANY COMMITTEE No. 53-02 COMPLIANCE ADVISORY COMMITTEE No. 112-02 INVESTMENT ADVISERS COMMITTEE No. 30-02 UNIT INVESTMENT TRUST COMMITTEE No. 31-02 RE: DRAFT INSTITUTE LETTER ON SEC PROPOSAL TO IMPLEMENT STANDARDS OF PROFESSIONAL CONDUCT FOR ATTORNEYS As we previously informed you,<sup>1</sup> the Securities and Exchange Commission has issued a release requesting comments on a proposed rule implementing the requirements in Section 307 of the Sarbanes-Oxley Act and prescribing minimum standards of professional conduct for attorneys appearing and practicing before the Commission in the representation of issuers. The Institute has prepared a draft comment letter (attached) on the proposal, the most significant aspects of which are summarized below. Comments on the proposed rule must be received by the SEC no later than December 18, 2002. We have scheduled a conference call for Monday, December 16, at 4 pm Eastern to discuss the Institute's draft comment letter. The dial-in number for the call will be 888-324- 6856 and the pass code for the call will be Sarbanes-Oxley/Ari Burstein. If you are planning to participate on the call, please notify Monica Carter-Johnson by phone at 202-326-5823 or by e-mail at [mcarter@ici.org](mailto:mcarter@ici.org). I. Proposed Rule's Impact on Investment Companies In general, the draft letter states that the Institute has serious concerns with the potential impact of certain provisions of the proposed rule on investment company governance and attorney-client relationships in the investment company industry. The draft letter notes that the proposal goes beyond what is required by the Act and that there are substantial doubts as to whether the Act requires that the Commission define its scope so that attorneys representing an investment adviser to an investment company would be treated as jointly representing the investment company. 1 Memorandum to SEC Rules Committee No. 98-02, Investment Advisers Committee No. 29-02, Compliance Advisory Committee No. 108-02, Closed-End Investment Company Committee No. 49-02 and Unit Investment Trust Committee No. 27-02, dated November 27, 2002. 2 The letter therefore recommends that the proposed rule be amended so that attorneys would be deemed to act "in the representation of" an investment company only insofar as they are employed or retained by the investment company. The letter also recommends that the Commission clarify in the release adopting the final rule that, absent these circumstances, an attorney to an investment adviser does not jointly represent the adviser and an investment company that the adviser serves. The draft letter also states that the investment company industry employs a large number of persons who, though

admitted to practice law, are not members of the firm's legal department and do not provide legal services to an investment company (e.g., investment company directors or employees involved in fund administration, accounting or operations). The letter recommends that the Commission amend the proposed rule so that it does not impose reporting requirements on persons who are not performing legal services for an investment company or an investment adviser.

II. "Reporting Out" Requirements The proposed rule would require attorneys appearing and practicing before the Commission in the representation of an issuer to give notice to the Commission of an issuer's inappropriate response to reported evidence of a material violation that is ongoing or has yet to occur. The draft letter states that the proposal's "reporting out" provisions will go much further than existing laws and that the proposed rule's definition of "material violation," in the context of the investment company industry, will encompass a host of substantive regulatory violations that are not the result of bad faith acts (e.g., violations of the affiliated transactions prohibitions or daily pricing provisions of the 1940 Act). The letter therefore recommends that the Commission amend the proposed rule so that these provisions do not apply to attorneys representing investment companies.

III. Additional Comments The draft letter also contains several miscellaneous comments. For example, the proposed rule would extend to non-U.S. attorneys acting in the representation of a U.S. investment company. The draft letter recommends that the Commission take greater time to allow consideration of these issues. The Proposing Release also requests comment on whether a prohibition on private rights of actions against an attorney based on his or her compliance with the rule should be included in the rule. The draft letter recommends that the Commission expressly provide in the proposed rule that there is no private right of action challenging an attorney's decision to take, or not to take, action under the proposed rule.

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