

MEMO# 13286

March 19, 2001

ICI COMMENT LETTER TO FTC CONCERNING ESIGN ISSUES

[13286] March 19, 2001 TO: ELECTRONIC COMMERCE ADVISORY COMMITTEE No. 6-01 PENSION COMMITTEE No. 16-01 PENSION OPERATIONS ADVISORY COMMITTEE No. 23-01 SEC RULES COMMITTEE No. 28-01 TAX COMMITTEE No. 12-01 TECHNOLOGY ADVISORY COMMITTEE No. 3-01 RE: ICI COMMENT LETTER TO FTC CONCERNING ESIGN ISSUES As we previously informed you, the Federal Trade Commission and the Department of Commerce recently issued a notice seeking public comment on the benefits and burdens of the consumer consent requirement set forth in 101(c)(1)(C)(ii) of the Electronic Signatures in Global and National Commerce Act ("ESIGN").¹ That provision states that if information is required to be provided or made available to a consumer in writing, the information may be provided electronically only if the consumer "consents electronically, or confirms his or her consent electronically, in a manner that reasonably demonstrates that the consumer can access information in the electronic form that will be used to provide the information that is the subject of the consent." The Institute has filed a comment letter in response to the notice. A copy of the letter is attached and it is summarized below. The letter states that mutual funds are leaders in using electronic means to increase efficiency and enhance the types and quality of services they provide to investors. It notes that the Institute has actively supported legislative and regulatory initiatives, such as ESIGN, that are designed to facilitate electronic commerce. After acknowledging that consumers and businesses alike already are realizing some of the benefits of ESIGN, the letter indicates that ESIGN also has raised several questions and issues. Some of these questions and issues relate to ESIGN's impact on existing regulatory guidance concerning electronic delivery of disclosure documents. The letter asserts that this has resulted in uncertainty that could have the effect of frustrating ESIGN's goal of facilitating the use of electronic records. Regarding 101(c)(1)(C)(ii) of ESIGN, the letter points out that there are some questions concerning the circumstances in which it applies. In addition, the letter comments on the burdens of the requirement that consumers consent or confirm their consent electronically, and 1 See Memorandum to Electronic Commerce Advisory Committee No. 1-01, SEC Rules Committee No. 16-01 and Technology Advisory Committee No. 2-01, dated February 14, 2001; Memorandum to Tax Committee No. 8-01, Pension Committee No. 14-01 and Pension Operations Subcommittee No. 19-01, dated February 23, 2001. 2 contrasts that requirement to the more flexible approach taken by the Securities and Exchange Commission in its guidance on the use of electronic media. The letter also discusses the "reasonable demonstration" requirement, describing some of the compliance methodologies Institute members are employing. The letter cautions against narrow interpretations of the reasonable demonstration requirement that would make compliance highly impractical or impossible. It also suggests that periodic reevaluation of the consent requirement will be advisable to assure that it is serving its intended purpose without unduly constraining the

use of new technologies. The letter touches briefly on other consent-related issues, including suggesting that a reasonable interpretation of 101(c)(1)(D)(ii) of ESIGN would permit a mutual fund investor to consent at the outset to electronic delivery of all information relating to his or her investment in the fund. The letter concludes by suggesting that federal agencies such as the SEC and the IRS should issue guidance that accommodates reasonable and workable approaches to conducting business with mutual fund investors electronically. It notes that review of these issues by regulators will also help identify areas where legislative changes might be warranted. Frances M. Stadler Deputy Senior Counsel Attachment Attachment (in .pdf format)

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