

MEMO# 11930

June 6, 2000

DRAFT ICI COMMENT LETTER ON SEC ELECTRONIC MEDIA RELEASE

* See Memorandum to Advertising Compliance Advisory Committee, No. 15-00 and SEC Rules Committee No. 68-00, date May 3, 2000 (transmitting SEC Release Nos. 33-7856, 34-42728, IC-24426 (April 28, 2000) ("Release"). [11930] June 6, 2000 TO: ADVERTISING COMPLIANCE ADVISORY COMMITTEE No. 19-00 SEC RULES COMMITTEE No. 83-00 RE: DRAFT ICI COMMENT LETTER ON SEC ELECTRONIC MEDIA RELEASE

Attached for your review is a draft of the Institute's 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.* The draft letter is briefly summarized below. Please note that in several places within the letter we have asked members for specific examples we could include in the letter to help illustrate our positions. We would appreciate your suggestions in this regard. Comments on the Release must be filed with the Commission by June 19th. Please provide your comments on the draft letter by Monday, June 12th to Frances Stadler (by phone at 202/326- 5822; fax at 202/326-5827; or e-mail at frances@ici.org) or Dore Zornada (by phone at 202/326-5819; fax at 202/326-5839; or e-mail at dvanslyke@ici.org). The draft 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 sales literature does not make the sales literature become part of the prospectus; (2) that the inclusion of an inactive third-party URL address in a fund prospectus does not make the third-party web site part of the prospectus; and (3) when material on a fund web site outside of a prospectus would be considered impermissible free writing. The letter also: (1) recommends that the requirements for obtaining informed consent to electronic delivery of disclosure documents be streamlined; (2) encourages the Commission to take a forward-looking approach to reliance on implied consent; (3) requests

clarification concerning the use of an electronic notice of the availability of a Rule 10b-10 confirmation; (4) recommends that the existing paper back-up delivery requirement be eliminated for electronic-only offerings; (5) 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; (5) 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 (6) requests clarification that neither a fund nor its principal underwriter would have liability under the federal securities laws for information posted on a fund's online bulletin board in certain circumstances. Doretha VanSlyke Zornada Assistant Counsel Attachment

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