

**MEMO# 15890**

April 11, 2003

# **INSTITUTE LETTER ON SEC PROPOSAL TO ADOPT MINIMUM STANDARDS OF PROFESSIONAL CONDUCT FOR ATTORNEYS**

[15890] April 11, 2003 TO: SEC RULES MEMBERS No. 46-03 CLOSED-END INVESTMENT COMPANY MEMBERS No. 33-03 COMPLIANCE ADVISORY COMMITTEE No. 28-03 INVESTMENT ADVISER MEMBERS No. 13-03 UNIT INVESTMENT TRUST MEMBERS No. 13-03 RE: INSTITUTE LETTER ON SEC PROPOSAL TO ADOPT MINIMUM STANDARDS OF PROFESSIONAL CONDUCT FOR ATTORNEYS The Institute has filed a comment letter with the Securities and Exchange Commission on its most recent proposal to adopt minimum standards of professional conduct for attorneys appearing and practicing before the Commission in the representation of issuers. In particular, the proposal solicits additional comments on, and proposes an alternative to, previously proposed requirements relating to an attorney's obligation to notify the Commission when that attorney, after reporting evidence of a material violation "up the ladder" within an issuer, reasonably believes the issuer has made no response or has not made an appropriate response ("noisy withdrawal"). The most significant aspects of the comment letter are summarized below. In general, the letter states that while the Institute continues to have concerns with the "noisy withdrawal" provisions, if the Commission determines to move forward with the proposal, it should adopt the proposed alternative, which would require the issuer, rather than the attorney, to report to the Commission an attorney's notice, subject to several recommendations regarding the alternative. I. "Noisy Withdrawal" Provisions Under the "noisy withdrawal" provisions, if an outside attorney retained by the issuer makes a "noisy withdrawal," that attorney is required to withdraw from representing the issuer; an in-house attorney under the same circumstances is not required to resign. The Commission specifically resolicited comment on whether an attorney who is employed by an investment adviser and who is representing the investment company before the Commission should be treated as an outside attorney retained by the investment company or an in-house attorney. As a preliminary matter, the letter reiterates the Institute's position that attorneys representing an investment adviser to an investment company do not jointly represent the investment company. However, because the Commission in adopting the "up the ladder" 2 provisions of the proposal did not agree with this position, for purposes of this provision, the letter states that an attorney employed by an investment adviser should be considered an in-house attorney of the investment company. The letter states that it would be extremely disruptive and unnecessarily harsh to force such an attorney to resign from his or her position because of the rule. II. Alternative Proposal to "Noisy Withdrawal" Provisions The letter states that the alternative proposal is preferable to the "noisy withdrawal" provisions

because, at least on its face, it avoids direct conflict with an attorney's duties of confidentiality and privilege. The letter recommends several changes to the alternative proposal to facilitate compliance with the rule.

**A. Determination by Committee of Independent Directors** The Commission requested comment on whether an issuer should not be required under the rule to disclose an attorney's written notice where a committee of independent directors of the issuer's board determines, based on the advice of counsel that was not involved in the matters underlying the reported material violation, (i) that the attorney providing the written notice acted unreasonably in providing the notice, or (ii) that the issuer has, subsequent to the written notice, implemented an appropriate response. The letter strongly supports allowing such a determination by a committee of independent directors. Nevertheless, the letter recommends that several changes and clarifications be made to this provision. First, the letter recommends that the Commission revise the standard under which the committee would have to make its determination in order to eliminate ambiguity surrounding the determination by the committee and appropriately put the decisionmaking power in the hands of the independent directors. The letter also recommends that the Commission clarify that directors who are not "interested persons" as defined in Section 2(a)(19) of the Investment Company Act would be considered "independent" for purposes of the rule and that once directors qualify as "independent" for purposes of the Act, those directors will remain "independent" for purposes of the rule.

**B. Form 8-K Filing Requirement** The proposal would require an issuer that has received notice from an attorney to notify the Commission on Form 8-K within two business days of receiving the notice. The Commission solicited comment on whether Form 8-K is the appropriate form to use for this type of disclosure or whether the Commission should adopt a new form specifically for registered investment companies. The letter urges the Commission not to adopt the proposed Form 8-K filing requirement for investment companies and instead recommends that it create a new form specifically for investment companies. The letter states that a new form would be more appropriate and less confusing for investment companies in meeting their disclosure obligations under the rule. In addition, the letter states that two business days after receiving notice from an attorney is not an appropriate amount of time in which to require investment companies or other issuers to make the necessary filing under the rule. The letter therefore recommends that an issuer be required to notify the Commission "promptly" after receipt of an attorney's written notice.

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