The Asset Management Industry
SERVING INDIVIDUAL INVESTORS
INVESTMENT COMPANY INSTITUTE

COMMENT LETTER

June 20, 2000

Comment Letter on SEC Electronic Media Release, June 2000

June 19, 2000

Mr. Jonathan G. Katz
Secretary
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549-0609

Re: File No. S7-11-00

Dear Mr. Katz:

The Investment Company Institute[1] is writing in response to the Commission's recent release on the use of electronic media by securities issuers and market intermediaries.[2] Our members are actively engaged in using electronic means to communicate and conduct business with investors. Consequently, we strongly support the Commission's goals of reducing uncertainty about the application of the federal securities laws to the use of electronic media, and removing barriers to the use of electronic media, while preserving important investor protections.[3]

In the case of mutual funds, however, the Commission's new "guidance" falls far short of these goals. In fact, it takes several steps backwards by increasing uncertainty about and barriers to the use of electronic media by mutual funds. In large part, this is the result of the Release's focus on typical corporate issuers and its lack of attention to unique considerations for mutual funds. While the Release nominally covers mutual funds, in several instances references to mutual funds appear to be thrown in as afterthoughts. Moreover, in contrast to the Commission's previous releases on the use of electronic media,[4] both of which provided helpful examples to illustrate the application of the Commission's interpretive positions to mutual funds, the Release does not include any mutual fund-specific examples. The problems the Release creates for mutual funds are exacerbated by the odd procedural approach the Commission chose, under which new interpretive positions became effective while the Commission simultaneously requested comments on them.

This letter discusses issues that the Release raises regarding mutual funds' use of hyperlinks to third-party information. It then comments on issues that arise in connection with the Commission's attempt to clarify the "envelope theory." Finally, the letter addresses

issues related to consent, electronic-only offerings, access to historical information, and Internet discussion forums.

I. Mutual Fund Use of Hyperlinks to Third-Party Information

The Release purports to provide guidance on issuer responsibility for hyperlinked information under the anti-fraud provisions of the federal securities laws. With respect to mutual funds, however, the Release creates confusion and uncertainty in this area. The unfortunate result is to put a chilling effect on the use of an effective and convenient means of allowing investors to gain easy access to information that may assist them in making an investment decision or simply be of interest to them. The problems created by the guidance are discussed below.

First, mutual fund web sites generally are treated as a form of advertising and, as such, must be filed with the NASD under the NASD Conduct Rules. For the last several years, mutual funds whose web sites include hyperlinks to third-party information have relied upon guidance issued by the NASD regarding their responsibility for that information.5 While this guidance relates specifically to the responsibility of NASD members for third-party material under NASD rules, it establishes conditions that address relevant investor protection concerns. Nevertheless, without even so much as a footnote acknowledging the NASD's existing guidance, or any opportunity to comment ahead of time on a proposed different approach, the Release institutes new and conflicting standards for analyzing responsibility for hyperlinked information.

Second, the Commission's framework for analyzing issuer responsibility for third-party information simply does not work for mutual funds. In particular, in discussing issuer responsibility for hyperlinked information, the Release distinguishes between hyperlinks embedded in "documents" required to be filed or delivered under the federal securities laws, and other hyperlinks. In the case of "documents" falling into the first category, the Release indicates that an issuer would always be responsible for third-party information to which it establishes a hyperlink.6 For other hyperlinks, the Release discusses certain factors that may be relevant to an analysis of whether the issuer has "adopted" the hyperlinked information for anti-fraud purposes.

This framework ignores the fact that mutual fund advertisements and sales literature are "document[s] required to be filed . . . under the federal securities laws."7 In fact, because mutual fund web sites themselves generally are considered a form of advertising, read literally, the Release effectively indicates that a mutual fund is always responsible for third-party information to which it establishes a hyperlink from its web site. Presumably, this result is not what the Commission intended.

Third, the Release separately discusses considerations that apply to web site communications (including hyperlinks to third-party information) when an issuer is "in registration." By treating this as a discrete issue, the Release again makes apparent its focus on typical corporate issuers, while further complicating the application of its guidance to mutual funds, which are continuously "in registration."8 The Commission should clarify that any special restrictions on issuers "in registration" would cease to apply to a mutual fund once it has an effective registration statement.

In short, the discussion of hyperlinks in the Release evidences little understanding of how

mutual funds use web sites or even of how they are regulated – a bizarre occurrence given the Commission's oversight and regulatory responsibilities for this seven trillion dollar industry.

Our specific comments on the Commission's approach to analyzing issuer responsibility for hyperlinked third-party information are set forth below.

A. Relevant Factors

As noted above, the Release discusses certain factors that may be relevant to an analysis of whether an issuer has "adopted" third-party information to which it has established a hyperlink. These factors are: (1) the context of the hyperlink; (2) the risk of confusion about the source of the hyperlinked information; and (3) the presentation of the hyperlinked information. In contrast to the NASD Hyperlink Letter, which sets forth objective criteria for determining responsibility for hyperlinked information,9 the Commission's guidance incorporates many subjective elements. While we understand that the Commission has an interest in maintaining flexibility, excessively vague standards are difficult to administer, provide no regulatory certainty, and could discourage mutual funds from using hyperlinks to third-party information, thereby depriving investors of a useful and desirable feature of electronic communications.

1. Context of the Hyperlink

In introducing the discussion of the three factors listed above, the Release states: "We do not mean to suggest that any single factor, standing alone, would or would not dictate the outcome of the analysis."10 Yet, just two paragraphs later, the Release seems to contradict this statement by indicating that when an issuer embeds a hyperlink to a web site within a document that is required to be filed or delivered under the federal securities laws, the issuer should always be deemed to be adopting the hyperlinked information. We recommend that the Commission, at the very least, clarify that its sweeping statements in the Release regarding an issuer's responsibility for third-party information to which it establishes a hyperlink from a document required to be filed under the federal securities laws were not intended to cover hyperlinks from mutual fund advertisements or sales literature.

We note that the remaining discussion of the significance of the context in which an issuer places a hyperlink is not particularly helpful. For example, why should the fact that hyperlinked information may support a particular assertion on an issuer's web site necessarily suggest that the hyperlinked information is attributable to the issuer?11 And what should an issuer make of the statement that "even when an issuer remains silent about the hyperlink, the context nevertheless may imply that the hyperlinked information is attributable to the issuer"?12

Further, the Release states that "when an issuer is in registration, if the issuer establishes a hyperlink . . . from its web site to information that meets the definition of an "offer to sell," "offer for sale" or "offer" under Section 2(a)(3) of the Securities Act, a strong inference arises that the issuer has adopted the information for purposes of Section 10(b) of the Exchange Act and Rule 10b-5."13 The Release does not provide a rationale for this "strong inference," nor does it indicate how the inference might be countered. As a result, given that mutual funds are always "in registration" and given the breadth of information that might possibly be deemed an "offer to sell," "offer for sale" or "offer," this statement merely creates additional regulatory uncertainty for mutual funds. This result is directly contrary to the stated goals of the Release.

2. Risk of Confusion

The Release states that in determining whether an issuer has adopted hyperlinked information, the Commission also would consider the presence or absence of precautions against investor confusion about the source of the information. As a general matter, this is a reasonable proposition. We note, however, that after describing certain practices that may lessen confusion and thus help establish that an issuer has not adopted hyperlinked information, the Release indicates that "the risk of investor confusion is higher when information on a third-party web site is framed or inlined."14

The Institute is concerned that this negative characterization of the use of various techniques for importing third-party information into a web site ("inverse hyperlinks") inappropriately fails to acknowledge that there are effective ways to lessen the risk of confusion when these techniques are used. Indeed, earlier this year, the Institute sent a letter to the NASD recommending that the NASD extend its position on "ongoing hyperlinks" to cover inverse hyperlinks if the third-party information is clearly identified as such and investors are put on notice that the member is not responsible for the content of the third-party information.15 As we indicated to the NASD, the important consideration for regulatory purposes should not be how the information is linked, but rather that appropriate safeguards are in place to ensure that the third-party information investors receive is unbiased and not misleading.

Likewise, the Commission should not cast an unwarranted pall over the use of innovative techniques for providing investors with convenient access to useful information, but rather should focus on how to promote responsible use of these techniques. Thus, for example, a mutual fund web site should be able to include framed third-party information such as industry or market data or financial news, subject to safeguards that address the potential risk of confusion (e.g., clear identification of the source of the third-party information), without the mutual fund becoming responsible for the third-party information.

3. Presentation of the Hyperlinked Information

The Release indicates that the presentation of hyperlinked information by an issuer is relevant in determining whether the issuer has adopted the information. To some extent, it appears, this factor seeks to address concerns that the NASD Hyperlink Letter addresses through conditions that limit an NASD member’s ability to exercise selectivity in making a third-party hyperlink available. Unfortunately, the Release goes on to provide several examples of what the Commission might consider regarding the presentation of hyperlinked information. These examples introduce a hopeless degree of subjectivity into the analysis and do not seem to address significant or relevant investor protection concerns.

For example, the Release states that "where a wealth of information as to a particular matter is available, and where the information accessed by the hyperlink is not representative of the available information, an issuer’s creation and maintenance of a hyperlink could be an endorsement of the selected information."16 The Release provides no guidance, however, on how one might determine whether certain information is "representative of the available information" on a particular topic. Would Morningstar data be considered "representative of the available information" about mutual funds?

The Release also cites the layout of the screen containing a hyperlink, and the prominence, size, location, color, or type font or size used for a particular hyperlink as compared to

others as potentially relevant considerations. The notion that the color of a hyperlink should influence whether the issuer is responsible for the hyperlinked information is especially unhelpful, or can we expect the Commission to provide guidance on which colors it prefers?

Finally, the Release states that "[w]here the method of presenting the hyperlink influences disproportionately an investor's decision to view third-party information, the hyperlinked information is more likely attributable to an issuer." [17] The Institute wonders how such a criterion might possibly be applied in practice.

B. Institute Recommendations

As the foregoing comments suggest, the Institute is very disappointed in the "guidance" set forth in the Release concerning responsibility for third-party information to which a mutual fund establishes a hyperlink. The Commission should revisit this issue, working with the NASD and the industry to develop useful and workable guidance for mutual funds. In particular, the Commission should establish objective criteria that mutual funds may rely on and provide real-world examples of the application of its positions in the mutual fund context, as opposed to making vague, open-ended theoretical statements that raise more questions than they answer.

II. Clarification of the Envelope Theory

The Release seeks to clarify certain aspects 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. In so doing, however, the Release creates problems and ambiguities for mutual funds.

First, the Release states that "if an issuer includes a hyperlink within a Section 10 prospectus, the hyperlinked information would become part of that prospectus. When embedded hyperlinks are used, the hyperlinked information must be filed as part of the prospectus in the effective registration statement and will be subject to liability under Section 11 of the Securities Act."[18] These statements may create an inconsistency between electronic and paper documents. For example, in the paper context, issuers generally have the ability to define the boundaries of their prospectuses; information does not become part of the prospectus unless the issuer writes it in as part of the prospectus text or affirmatively indicates that it is incorporated by reference. Consistent with this, providing access to information through a hyperlink from a prospectus, as compared to in an envelope with a prospectus, should not result in a different liability standard, so long as appropriate steps are taken to make sure that the viewer understands where the prospectus begins and ends. While placing hyperlinks to third-party information within Section 10 prospectuses does not appear to be a common practice in the fund industry at present, the Commission should seek to avoid potential inconsistencies in regulatory treatment.[19]

Similarly, the Release raises issues in the area of permissible uses of mutual fund sales literature. Under Section 2(a)(10)(a) of the Securities Act, certain sales literature ("supplemental sales literature") is not considered a prospectus, as long as the material is preceded or accompanied by a Section 10(a) prospectus. Thus, for example, a mutual fund may place supplemental sales literature in an envelope with a Section 10(a) prospectus and send it to investors. The sales literature does not become part of the prospectus by virtue of being delivered with it.

Mutual funds also are permitted to use prospectus "wrappers," i.e., sales literature that is wrapped around the prospectus. Funds use various means to make clear to investors that the sales literature is not part of the prospectus. These means may include, for example, placing a legend on each page of the sales literature stating that it is not part of the prospectus, or using different paper stock, type size, and/or color to distinguish the sales literature from the prospectus.

Consistent with these uses of sales literature in the paper world, in an electronic environment, funds should be able to create hyperlinks from their prospectuses to sales literature – and vice versa – without the sales literature being considered part of the prospectus and subject to prospectus liability. The guidance in the Release would not accommodate this practice.

The Commission therefore should clarify that where a fund prospectus includes a hyperlink to sales literature (which may be a two-way hyperlink), the sales literature does not become part of that prospectus, so long as the fund takes steps to clearly differentiate the sales literature from the prospectus. 20

The Release also raises concerns as to whether material on a fund web site that is outside of a Section 10 prospectus (where the web site includes a Section 10 prospectus) would be considered (1) part of the prospectus and/or (2) "impermissible" free writing. For example, the Release notes that securities lawyers have raised concerns about whether, if a Section 10 prospectus is posted on a web site, the operation of the envelope theory causes everything on the site to become part of that prospectus. 21 The Release also indicates that concerns have been raised that information on a web site that is outside of the four corners of the Section 10 prospectus, but in close proximity to it, would be considered free writing.22 In addressing these matters, the Release states that "with respect to the free writing concern, the focus on the location of the posted prospectus is misplaced. Regardless of whether or where the Section 10 prospectus is posted, the web site content must be reviewed in its entirety to determine whether it contains impermissible free writing. The Commission staff will continue to raise questions about information on an issuer's web site that is either inconsistent with the issuer's Section 10 prospectus or that would constitute an 'offer to sell,' 'offer for sale' or 'offer under Section 2(a)(3) of the Securities Act."23

The discussion of these issues in the Release does not specifically address in any straightforward manner the situation where an issuer's web site as a whole and at all times is considered a form of advertising, as is the case for mutual funds. The Release also ignores the fact that SEC rules specifically allow mutual funds to provide forms of sales materials other than a Section 10(a) prospectus. 24 Moreover, the securities laws do not prohibit funds from providing non-offering material along with prospectuses and sales literature, so the notion of "impermissible" free writing seems misplaced in the mutual fund context. We recommend that the Commission clarify the application (or non-application, as the case may be) of its guidance in this area to mutual funds.

III. Other Topics

A. Consent Requirements

The Institute notes that Congress has recently passed the "Electronic Signatures in Global and National Commerce Act," which President Clinton is expected to sign into law. This legislation contains detailed consent requirements that will apply to most electronic disclosure documents. We are studying the impact of the legislation on the Commission's

guidance in this area, and may have further comments at a later time.

B. Electronic-Only Offerings

The Release requests comment on whether the existing paper back-up delivery requirement should be eliminated for electronic-only offerings where investor participation is limited to those investors who consent to electronic delivery of all disclosure documents. We believe that it should be eliminated in these circumstances. For instance, a mutual fund offering effected entirely through electronic media, where investors consent to delivery of all disclosure documents electronically, would by definition involve only investors who have affirmatively chosen to conduct business with the fund in an electronic only environment. In this situation, no investor protection purpose would be served by mandating a paper back-up system, which would require funds to prepare paper disclosure documents that they otherwise would not have to produce.

C. Access to Historical Information

The Release requests comment on how to facilitate the availability of historical information on the Internet consistent with the federal securities laws. We believe that the best way for mutual funds to minimize investor confusion while providing investors with access to historical information is to archive historical information in a separate or distinct area on the fund's web site that is clearly marked as historical or archived material. Historical material segregated in such a fashion would clearly indicate to investors that it is not current material and therefore should not be deemed to be republished each day or each time that it is accessed by an investor.

D. Internet Discussion Forums

The Release invites comment on issues relating to Internet discussion forums. We have two requests for clarification in this regard. First, we request clarification that the Commission considers live online auditoriums or web casts to be oral communications that do not need to be filed pursuant to Section 24(b) of the Investment Company Act. As the Release recognizes, such online auditoriums are typically held in "real-time," led by a moderator and may feature a guest "expert" who provides spontaneous answers to participants' questions. The statements of the moderator and the expert at these online discussion forums are analogous to oral statements made by speakers at live seminars, which the Commission has determined do not trigger the filing requirements of Section 24(b).25 In these live moderated forums, the guest expert, like the seminar speaker, is not reading prepared sales material, but speaking generally in his or her area of expertise, and answering spontaneous audience questions. We therefore believe that online auditoriums should not trigger the filing requirements of Section 24(b).

Second, we request clarification that a fund would not have liability under the federal securities laws with respect to information posted on a bulletin board on the fund's web site in certain circumstances. Specifically, we believe that where a fund hosts a bulletin board, the fund should not be liable under Section 12 of the Securities Act of 1933 or Rule 10b-5 of the Securities Exchange Act of 1934 for communications posted on the bulletin board by third parties, under the following conditions: (1) the fund does not post its own messages on the bulletin board;26 (2) the fund does not control which messages are or are not posted on the bulletin board or edit the content of the bulletin board, except for legal compliance reasons (e.g., to comply with laws regarding copyright infringement, defamation, obscenity, etc.); and (3) the fund clearly informs participants that it does not control participation in the bulletin board, has no liability for the content or accuracy of the posted information, and does not edit the substantive content of the material. Under such circumstances, a

fund is merely providing a forum for the free exchange of ideas and information, and is not offering its securities for sale. Consequently, the fund should not be liable under the federal securities laws for the content of communications posted by third parties. 27

* * *

The Institute hopes that the Commission will carefully consider our comments and, more generally, reconsider various positions taken in the Release, at least as they apply to investment companies. If you have any questions, please contact the undersigned at (202) 326-5815, Frances Stadler at (202) 326-5822 or Doretha VanSlyke Zornada at (202) 326-5819.

Sincerely,

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ENDNOTES

1 The Investment Company Institute is the national association of the American investment company industry. Its membership includes 8,051 open-end investment companies ("mutual funds"), 497 closed-end investment companies and 8 sponsors of unit investment trusts. Its mutual fund members have assets of about $7.009 trillion, accounting for approximately 95% of total industry assets, and over 78.7 million individual shareholders.

2 SEC Release Nos. 33-7856, 34-42728, IC-24426 (April 28, 2000), 65 Fed. Reg. 25843 (May 4, 2000) ("Release").

3 See SEC to Consider Issuance of Interpretive Release on the Use of Electronic Media, Fact Sheet, April 25, 2000, at 1.

4 SEC Release Nos. 33-7233, 34-36345, IC-21399 (October 6, 1995), 60 Fed. Reg. 53458 (October 13, 1995) ("1995 Release"); SEC Release Nos. 33-7288, 34-37182, IC-21945 (May 9, 1996) 61 Fed. Reg. 24644 (May 15, 1996).

5 See Letter from Thomas M. Selman, Director, Advertising/Investment Companies Regulation, NASD Regulation, Inc. to Craig S. Tyle, General Counsel, Investment Company Institute, dated November 11, 1997 ("NASD Hyperlink Letter").

6 See 65 Fed. Reg. at 25847, n. 41 (indicating that "[w]hen an issuer includes a hyperlink within a document required to be filed or delivered under the federal securities laws, we believe it is appropriate for the issuer to assume responsibility for the hyperlinked information as if it were part of the document"). See also 65 Fed. Reg. at 25849 (stating that "[i]n the context of a document required to be filed or delivered under the federal securities laws, we believe that when an issuer embeds a hyperlink to a web site within the document, the issuer should always be deemed to be adopting the hyperlinked information") (footnote omitted).

7 See Section 24(b) of the Investment Company Act. Pursuant to Rule 24b-3, most funds satisfy this requirement by filing sales material with the NASD.

8 The Release does mention, at the end of a lengthy footnote, that unlike other issuers, mutual funds "continuously offer and sell their shares to the public and, therefore, are continuously subject to the limitations on issuer communications under the Securities Act." 65 Fed. Reg. at 25850, n. 68.

9 The NASD Hyperlink Letter states that the NASD would not hold an NASD member responsible under the NASD Conduct Rules for the content or filing of information on a third-party web site to which the member establishes an "ongoing hyperlink" if: (1) the hyperlink is continuously available to investors who visit the member’s site; (2) the member has no discretion to alter the information on the third-party site; (3) investors have access to the hyperlinked site whether or not it contains favorable material about the member; and (4) the linked site could be updated or changed by the third party and investors would nonetheless be able to use the hyperlink. In addition, a member may not establish a hyperlink to a site that the member knows or has reason to know contains false or misleading information about the member’s products or services. The NASD Hyperlink Letter also indicates that NASD members would not be held responsible for the content or filing of an independent third party site that does not refer to the member or any of its affiliates and that is meant to educate investors about principles of investing or economic, tax, or financial issues.

10 65 Fed. Reg. at 25849.

11 This part of the Release implies that if a mutual fund web site includes generic information on a topic such as indexing or retirement issues, and provides a hyperlink to a third party site with a fuller discussion of these issues (that may support an assertion on the fund’s web site), the content of the third party web site would be attributable to the fund. It is unclear how this result would promote any important policy objective. Moreover, it is inconsistent with the guidance provided in the NASD Hyperlink Letter.

12 65 Fed. Reg. at 25849. A footnote to this statement in the Release refers the reader to the discussion of presentation of the hyperlinked information which, as discussed below, has its own flaws.

13 Id. (footnote omitted).

14 Id. (footnotes omitted).

15 Letter from Doretha VanSlyke Zornada, Assistant Counsel, Investment Company Institute, to Thomas M. Selman, Vice President, Investment Companies/Corporate Financing, NASD Regulation, Inc., dated February 24, 2000. The NASD has not yet issued a

response.

16 65 Fed. Reg. at 25849.

17 Id.

18 65 Fed. Reg. at 25847 (footnotes omitted).

19 Even if the Commission does not revise its general position on issuer liability for hyperlinks from Section 10 prospectuses to third-party information, the Commission should clarify its guidance on the placement of inactive uniform resource locators (URLs) to third-party web sites in prospectuses and other documents. In this regard, the Release states that "as with an embedded hyperlink, an issuer that includes a URL to a web site in a Section 10 prospectus or other document required to be filed or delivered under the federal securities laws is responsible for information on the site that is accessible through the resulting hyperlink." An exception is provided where a document provides an inactive URL to the Commission's web site or the issuer's web site, but the Release is silent as to whether this exception would also apply to an inactive URL address to a third-party web site. We can think of no valid policy reason for singling out the Commission's web site and the issuer's web site for this purpose. Thus, the Commission should clarify that its position on inactive URLs would extend to URLs to third-party web sites as well. Accordingly, as long as a fund takes reasonable steps to ensure that a URL to a third-party web site is inactive (for example, by removing "a>href" tagging) and includes a statement to denote that the URL is an inactive textual reference only, the information on the third-party web site should not be considered part of the document including the URL.

20 The Release raises another issue related to electronic supplemental sales literature in the context of discussing the ability of issuers and intermediaries delivering documents electronically to use portable document format (PDF). In particular, the Release clarifies that PDF may be used "if it is not so burdensome as to effectively prevent access." 65 Fed. Reg. at 25846. The Release also reminds issuers and intermediaries that the Commission will not consider an electronically delivered document to have been preceded or accompanied by another electronic document unless investors are provided with "reasonably comparable access" to both documents. Id. These statements may create ambiguity as to whether a fund prospectus in PDF that appears in close proximity to, or through a hyperlink from, supplemental sales literature that is in hypertext markup language (HTML), would be considered to precede or accompany the supplemental sales literature, such that the supplemental sales literature will not be deemed a prospectus, pursuant to Section 2(a)(10)(a) of the Securities Act of 1933. The Commission should clarify that a mutual fund could provide the prospectus in a different electronic format from the supplemental sales literature and still meet the "reasonably comparable access" standard. Thus, if investors seeking to access the prospectus are informed of the requirements necessary to access PDF documents and provided with any necessary software and technical assistance at no cost, investors would have reasonably comparable access to the prospectus and the supplemental sales literature. In these circumstances, the prospectus would be considered to precede or accompany the supplemental sales literature and the supplemental sales literature would not be deemed a prospectus.

21 See 65 Fed. Reg. at 25847.

22 Id.

23 Id. at 25847-48.

24 See, e.g., Rules 134 and 482 under the Securities Act of 1933.

25 See Tax Exempt Bond Fund for Minnesotans, Inc., SEC No-Action Letter (pub. avail. Mar. 10, 1981) ("an oral statement made at a seminar would not invoke the restrictions of Section 24(b) unless it communicates the contents of sales literature which has been transmitted through jurisdictional means such as the mails or interstate telephone ").

26 This condition should not preclude the fund from providing a topic for discussion on the bulletin board, so long as the fund does not participate in the discussion.

27 The same analysis and conclusion should apply to a fund’s principal underwriter.
