The Asset Management Industry
SERVING INDIVIDUAL INVESTORS
INVESTMENT COMPANY INSTITUTE

COMMENT LETTER

June 29, 1999

Comment Letter on SEC Securities Offerings Proposal, June 1999

June 29, 1999

Mr. Jonathan G. Katz
Secretary
Securities and Exchange Commission
450 Fifth Street, N.W.
Stop 6-9
Washington, DC 20549

Re: The Regulation of Securities Offerings (File No. S7-30-98)

Dear Mr. Katz:

The Investment Company Institute[1] appreciates the opportunity to comment on the Securities and Exchange Commission's ("Commission") proposals (the "Proposals") to modernize and clarify the regulatory structure for offerings under the Securities Act of 1933 (the "Securities Act"). [2] Investment companies are both significant issuers of securities and, on behalf of millions of mostly retail investors, significant investors in securities. Because investment companies as issuers are explicitly excluded from the reach of most of the Proposals, our comments primarily reflect the views of our members as investors.

I. Summary

The Proposals follow several years of studying ways to improve the offering process by the Commission and the staff of the Division of Corporation Finance. The Institute has been an active participant in the Commission's endeavor,[3] and we commend the Commission and its staff for their diligent efforts to streamline and reform the securities offering process and maintain investor protection.

The Institute strongly supports the Commission's goals underlying the Proposals—to provide more information to investors before they commit to purchase securities and to encourage issuers to register their securities rather than issue them in the private placement market. We believe that, in general, the Proposals could help to achieve those goals. Several of the Proposals, however, could introduce new inefficiencies in the offering process that could defeat the Commission's objectives. To avoid those results, we recommend that the Commission revise certain of the Proposals.

The more significant of our recommendations are highlighted below:

- We support the Commission's desire to make available increased information about the terms of a securities offering prior to an investor's commitment to purchase. A pre-sale document should only be required, however, where such information is not readily available in a timely manner, such as for high-yield securities, asset-backed securities, and "novel" securities offerings. In other instances (e.g., traditional equities or investment-grade fixed-income securities), requiring pre-sale delivery of a term sheet or preliminary prospectus could add delays and costs to the offering process that would outweigh the benefits of increased information.
- We support the Commission's desire to encourage open communications. In particular, we support the bright-line safe harbor for communications by an issuer that take place before the issuer files a registration statement as it should afford issuers and their representatives with more certainty, and should encourage open communications with the public. We are concerned, however, that subjecting communications during the offering period to "cross-liability" under Section 12(a)(2) of the Securities Act could render the safe harbor for those communications ineffective. We believe that the Commission's goals could be achieved if it limited Section 12(a)(2) liability for "free writing" to the party making the communication.
- We believe that in order for the proposed registration system, where an issuer would file a new registration statement for each offering on Form B, to be an effective substitute to the current shelf registration system, it is critical that Form B be made widely available to issuers. We believe that disqualifying an issuer from using Form B for not addressing comments on filings under the Securities Exchange Act of 1934 (the "Exchange Act"), or as a result of certain insiders or underwriters violating provisions of the federal securities laws, will unnecessarily render the form unavailable to many issuers.
- We recommend that the Commission not limit the ability to register resales of securities on Form B to issuers that are otherwise eligible to use that form. If the Commission nevertheless adopts this limit, it should, at the very least, permit its use in the case of resales by persons that are not affiliated with the issuer.
- We support the initiatives designed to increase the number of registered, as opposed to private or offshore, offerings. We have concerns, however, about the Proposals relating to registered Form B offerings made to qualified institutional buyers ("QIBs"), particularly the Commission's blanket exclusion of investment advisers from purchasing securities in registered offerings made only to QIBs, and about the Commission's statements regarding the use of these offerings as conduits to the public market. Additional guidance from the Commission in this area would be helpful. We also believe that the Commission should not increase the threshold for determining whether an institution meets the QIB definition.
- We believe that if the Commission modifies the eligibility requirements for use of Form B as recommended below, it may not be necessary to retain the Exxon Capital line of interpretive letters. However, if the eligibility to use Form B is limited in the manner proposed, we recommend that the Commission reconsider its decision in the Proposals to rescind the Exxon Capital interpretations.
- We support the Commission's allowing issuers to change the nature of an offering from public to private and private to public. This safe harbor would afford issuers with greater certainty, which should result in more offerings and increased investment opportunities for funds and their shareholders. We are concerned, however, that interpreting the safe harbors to apply to pooled investment vehicles resembling investment companies registered with the Commission under the Investment

Company Act of 1940 (the "Investment Company Act") would be inconsistent with the legislative purpose underlying the private investment company provisions of that Act.
- We support the Commission's initiatives relating to reporting under the Exchange Act, particularly the provisions that would shorten the reporting time frame and provide risk disclosure in Exchange Act reports. We believe, however, that requiring additional signatories for certain reports will increase the compliance burden without discernable investor protection benefits.
- We believe the fundamental changes suggested in the Proposals are unnecessary for the offer and sale of investment company securities. If the Commission nevertheless believes that similar changes should be considered for investment companies, there would need to be careful consideration of how such a system should be structured in light of the differences between investment companies and operating companies.

Our specific comments on the Proposals follow below.

II. Discussion

A. Delivery of a Pre-Sale Document

The Proposals would significantly alter the way that securities are offered and sold. Larger, seasoned issuers that qualify for new Form B under the Securities Act ("Form B Issuers") would provide investors with a pre-sale document, such as a term sheet, which outlines the key features of the securities, or a preliminary prospectus. Smaller, less seasoned issuers would register securities on new Form A ("Form A Issuers") and would provide potential investors with a preliminary prospectus three to seven days prior to pricing or the commitment to purchase the securities. Issuers would have to notify investors of any material changes to the transaction at least twenty-four hours before pricing or the commitment to purchase the securities, and would be exempt from delivering a final prospectus to investors so long as the final statutory prospectus is available free of charge upon request.

The Institute supports the goal of increasing the availability of information about the terms of a securities offering prior to commitment. We do not believe that it is necessary, however, to require issuers to deliver a pre-sale document in all types of offerings. In most types of offerings (e.g., offerings of shares of traditional equities or investment-grade fixed-income securities), our members have reported that they generally have access to sufficient information to make an informed purchase decision prior to the time of commitment. Requiring pre-sale delivery in these instances may therefore be unnecessary and could cause issuers to elect instead to raise capital through private or offshore markets. This result may have implications for investment companies as it could make it more difficult for them to comply with fundamental investment policies that limit the amount of restricted securities they may hold in their portfolios or to comply with the position of the Commission's staff that no more than 15% of an open-end investment company's assets should be invested in illiquid securities.[4]

The Institute therefore recommends that the scope of the proposed pre-sale delivery requirement be narrowed to apply to only those offerings where information is not readily available to investors in a timely manner or in a form that can be easily used. Examples of where our members report such a deficiency exists include offerings of high-yield securities, asset-backed securities, and "novel" securities.[5]

It is our understanding that many high-yield securities offerings and asset-backed securities offerings are being brought to market under compressed time periods. In these deals, an underwriter will offer investors the opportunity to participate in the deal but will allow investors a very limited amount of time, often only a few hours, to decide whether to purchase the securities. Our members report that these deals (often referred to as "drive by" deals in the high-yield market) are all done orally and without much, if any, information provided about the terms of the deal. In the case of smaller, unseasoned issuers, our members report that some information is provided on the terms of the deal. However, in these cases, the quality of the disclosure is often poor and the terms of the deal may change from the time of the offer to the time that the deal actually takes place.

The Proposals specifically requested comment on the treatment of asset-backed securities in relation to the Proposals. The Institute and its members have been concerned about the nature and quality of disclosure relating to asset-backed securities offerings for some time. In our 1995 letter to former Commissioner Wallman regarding the Advisory Committee on Capital Formation and Regulatory Processes, we stated that our members found disclosure about certain asset-backed financings to be lacking.6 In addition, in a 1996 letter to the Division of Corporation Finance,7 we noted that our members are significant purchasers of asset-backed securities and that funds' efforts to analyze these offerings are made more difficult when the timeliness and quality of written information are insufficient.

In order to provide for more complete disclosure on a more consistent basis, the Institute recommends that the Commission require pre-sale disclosure documents for high-yield, asset-backed, and novel securities offerings. These documents should be required to be delivered in a timely manner (e.g., at least 48 hours in advance of the commitment) and to contain a series of specified items, representing the basic information that prospective purchasers find to be essential in making an investment decision.

At a minimum, we believe such disclosure documents should provide a plain English summary of the key terms of the offering. In the case of asset-backed securities offerings, we recommend that disclosure documents contain: (1) general information regarding the asset-backed securities offering, including information on the participants in the transaction, the assets being securitized, credit enhancements, ratings, prefunding arrangements and tax characteristics of the securities; (2) information concerning each class of security being offered and the various financial characteristics of each class; (3) information on the pool of collateral underlying the offering; and (4) information concerning the financial performance of the servicer.

In the case of high-yield securities offerings, we recommend that disclosure documents contain: (1) information concerning the key aspects of the securities (e.g., title, amount, interest rate, maturity, call provisions, and offering price); (2) summary financial information regarding the issuer; (3) a summary of the material indenture provisions governing the bonds, including secured collateral and subordination provisions, negative pledge clauses, restrictions on dividends, borrowings, extraordinary transactions, and default provisions; and (4) the material risk factors unique to the issuer or the bonds.

This information represents information that our members believe would facilitate the making of an informed investment decision before a commitment to purchase is made. The Institute offers its assistance to the Commission in formulating more specific information that would be beneficial to investors in high-yield, asset-backed, and novel securities offerings.

B. Communications During the Offering Process

Safe Harbor for Communications Before the Offering Period

Proposed Rule 167 would provide a bright-line safe harbor for any communications made by, or on behalf of, any issuer that take place during a specified period before the issuer files a registration statement. The Institute strongly supports this portion of the Proposals. We agree with the Commission that the certainty afforded by the proposed safe harbor will encourage open communications by issuers and their representatives with members of the public. We particularly support the extension of this safe harbor to any communications that occur outside of the offering period. We believe that antifraud liability under the Exchange Act will sufficiently deter those that may consider making false or misleading statements during this period to defraud potential investors. We also believe that the large amount of public information readily available about Form B Issuers, and the 30-day "quiet period" during which communications are restricted for Form A Issuers, provides sufficient investor protection.[8]

Safe Harbor for Communications During the Offering Period

Under the Proposals, Form B Issuers would not be subject to restrictions on communications during the pre-filing and waiting periods, on the theory that little risk exists that communications by or on behalf of these issuers during the registration process will condition the market for their securities. Together, proposed Rules 165 and 425 would require the filing with the Commission of all free writings used during the offering period,[9] and would subject the materials to liability under Section 12(a)(2) of the Securities Act.

The Institute agrees with the premise that the free flow of information would provide benefits to investors and issuers, and that the prohibitions on communications under existing laws are not necessary for investor protection. The Institute, however, believes that the proposed safe harbor should be revised in one important respect. We recommend that the Commission narrow the scope of Section 12(a)(2) liability for free writings used during the offering period. Under the Proposals, issuers and the entire underwriting syndicate offering the issuer’s securities could be subjected to liability for the statements of any participant in the offering. This potential "cross-liability," in turn, could subject issuers and syndicate members to greater uncertainties, and most likely lead to higher costs (and lower investor returns). We therefore recommend that the Commission limit liability for free writing to the party that makes the communication.[10]

We also are concerned by the proposed treatment of roadshow slides and other electronic media, which previously have been deemed oral communications, as subject to the free writings filing requirement. Letters issued by the Division of Corporation Finance lay the groundwork for allowing the roadshow process to take full advantage of the electronic communications technology that is rapidly changing the capital markets.[11] Rather than making these materials freely available to the public, as the Commission intends, we believe that the Proposals would simply discourage their use.

C. Eligibility for Form B

Under the Proposals, the current shelf registration system would effectively be replaced with a system where an issuer would file a new registration statement for each offering on Form B. The Institute believes that in order for this new registration system to be an effective substitute to the current shelf registration system, it is critical that Form B be made widely available to issuers. An issuer, however, would not be eligible to use Form B under the Proposals if, among other things: (i) it has outstanding comments on Exchange Act reports that the issuer would be incorporating by reference into its Form B, no matter how recently the comments have been made, or the level of materiality of the comments; or (ii) underwriters or insiders of the issuer have been found to have violated the federal securities laws, or to have engaged in securities fraud, business-related fraud, or perjury, within five years before the date of filing a Form B. The Institute is concerned that limiting the eligibility to use Form B in the manner proposed could undermine the overall utility of the proposed approach, which we generally support.[12]

Conditioning use of Form B on compliance with any staff comments is overly broad. If, for example, the staff sent a comment letter to an issuer on an Exchange Act report that the issuer would be incorporating by reference into its Form B, reflecting only minor comments, that issuer would be precluded from proceeding with the offering, at least on an expedited basis on Form B. The Institute therefore recommends that the Commission not adopt this disqualification. We further believe that this disqualification is unnecessary given the protections already afforded by the federal securities laws against issuers making materially misleading disclosures.

In addition, the Institute is concerned that the disqualification of underwriters or insiders for securities law violations could restrict the number of available underwriters generally or reduce the number of underwriters with expertise in particular markets. This could reduce offerings in a particular market, thereby increasing the costs of such offerings. The Institute therefore recommends that the Commission not adopt this disqualification provision. At a minimum, the Institute recommends that the Commission limit the reach of the disqualification to the most serious violations of the securities laws and not technical noncompliance with the laws.

D. Short Form Registration of Resales

Under the current registration system, resale offers may be registered on Form S-3, regardless of whether the issuer would be eligible to use that form for the initial offering of the securities. In the Proposing Release, the Commission stated that an issuer would be precluded from registering a resale offering on Form B, unless the issuer meets all of the eligibility criteria for using that form. As a result, the number of issuers that may use Form B to register resale offers of their securities may be decreased, with selling security holders forced to use Form A for these offerings to the secondary market. Investment companies, which frequently purchase large blocks of privately placed securities with resale registration rights, may in turn find their ability to resell these securities encumbered, to the detriment of their shareholders. We therefore recommend that the Commission permit all issuers to utilize Form B for registering resales of securities.

If the Commission is unwilling to allow Form B to be used generally for resale offers, it should, at the very least, permit its use in the case of resales by persons that are not affiliated with the issuer. If an entity is not affiliated with the issuer, the likelihood of an issuer using the entity as a conduit to the public market is greatly diminished. This approach would allow investors, such as investment companies, that purchase large blocks of privately placed securities and resell them later for business reasons, to continue to manage their portfolios in a flexible manner.

E. Proposals Relating to Private Placements

Qualified Institutional Buyers

To encourage more registered offerings, the Commission has proposed to allow issuers to register securities that are offered and sold only to QIBs on Form B.[13] Unlike securities now sold in Rule 144A offerings, securities sold in these registered offerings would be freely resalable because they would not be "restricted securities" as defined in Rule 144(a)(3). To address perceived concerns that investors and issuers could arrange to use Form B when the offering is not in fact intended to be a QIB-only offering, but instead a distribution to the public using a QIB as a conduit, the Proposals would exclude all dealers and investment advisers from purchasing securities through those offerings, even if they otherwise met the QIB definition. In response to the same concern, the Commission stated that if an offering did not come to rest with QIBs, and the QIBs are conduits for sales to the public, the offering retroactively would be ineligible for registration on Form B. The Commission also asked for comment whether the threshold for determining whether an institution meets the QIB definition should be increased. The Institute has several concerns with these aspects of the Proposals.

First, we strongly oppose the blanket exclusion of investment advisers from these types of offerings. The proposal to exclude all investment advisers from purchasing securities in registered QIB-only offerings unfairly constrains the affairs of the many advisers that are not in the business of reoffering securities to their clients.[14] We believe a more appropriate course for the Commission to take, which appears to be consistent with the purposes underlying the QIB provision, would be to eliminate this broad prohibition on advisers, and issue guidance that only advisers purchasing for their own accounts, or for the accounts of other QIBs (e.g., investment companies), would be permitted to purchase securities in these QIB offerings. If the Commission does not eliminate this broad prohibition, at the very least it should clarify that the prohibition would not apply to advisers purchasing securities on behalf of their investment company clients. Clearly, these transactions do not raise the types of concerns that the Commission sought to address.

Second, we believe it is very important that the Commission clarify its general statements that Form B could be inappropriately used by certain issuers and QIBs as a conduit offering to the public market. The guidance in the Proposing Release does not provide sufficient comfort for investment companies and other institutional investors that may wish to purchase large blocks of these registered QIB-only securities, but then resell them for legitimate business reasons. Therefore, we request clarification that the Commission does not intend to reinstitute the "presumptive underwriter" doctrine that was effectively rescinded in an interpretive letter issued by the Division of Corporation Finance. [15] Investment companies’ and other buyers’ fears of being deemed underwriters when engaging in normal business practices will discourage widespread use of the Form B registered QIB offering. The stated benefits of resalability of the securities sold through QIB-only offerings will not be realized if purchasers are unable to resell the securities freely without concern of being deemed underwriters.[16]

Finally, we would oppose raising the threshold for determining whether an institution meets the QIB definition. Such a change could exclude from QIB status smaller and medium-sized investment companies that previously had been able to purchase securities in Rule 144A offerings, thus denying them and their shareholders the ability to take advantage of potentially attractive investment opportunities. Absent indications that smaller institutional investors have been unable to protect their shareholders’ interests, which has not been the experience of our members and for which no evidence is offered in the Proposing Release, the Commission should not raise the existing QIB threshold of $100 million.

Exxon Capital Exchanges

The Division of Corporation Finance has issued a series of interpretive letters taking the position that an issuer of securities sold in a private offering can register an offering of substantially identical securities in exchange for the privately placed securities ("Exxon Capital exchanges).17 For the past decade, issuers have followed this procedure, in part, because it allows them to avoid the delay often associated with registration, while giving investors freely tradable securities. Investment companies and other investors have benefited from these exchanges; they may purchase privately offered securities that after an exchange offer will have the liquidity investment companies need to maintain portfolios consistent with Division of Investment Management positions. The Proposals would rescind the Exxon Capital interpretive positions.

The Institute believes that if the Commission modifies the eligibility requirements for use of Form B as recommended above (see Sections II.C., II.D., and II.E.), it may not be necessary to retain Exxon Capital. We are concerned, however, that if these modifications are not made, issuers that are not eligible to use Form B may be unwilling to register various offerings or it may be more difficult for them to register resales of securities purchased by investment companies in private placements. This, in turn, could adversely affect the liquidity of securities frequently issued in the Rule 144A market to the detriment of investment companies and their shareholders. Therefore, if the eligibility to use Form B is still limited as proposed, we would recommend that the Commission reconsider its decision in the Proposals to rescind Exxon Capital.

Safe Harbor For Abandoned Public Offerings

Under existing Commission interpretations, an issuer generally cannot change the nature of an offering it has commenced from public to private or private to public. The Proposals would afford issuers this type of flexibility under certain conditions. The Institute supports this provision of the Proposals because it is likely to encourage a greater number of securities offerings, at potentially lower costs to issuers, thereby providing investment companies with more investment opportunities. The Institute is concerned, however, that interpreting the safe harbors to apply to pooled investment vehicles resembling investment companies registered with the Commission under the Investment Company Act would be inconsistent with the legislative purpose underlying the private investment company provisions of that Act.

The private investment company provisions of the Investment Company Act—Section 3(c)(1) and Section 3(c)(7)—are specialized and limited exclusions from the Act’s definition of "investment company" for pooled vehicles whose interests are held by not more than 100 persons, or by an unlimited number of qualified purchasers,18 and which are not making and do not propose to make a public offering of their securities. The requirements of Sections 3(c)(1) and 3(c)(7) reflect Congress’ clear desire that sponsors of these funds intend not to make a public offering at any time. Accordingly, the Commission should make clear in any adopting release that the proposed safe harbor would not apply to private investment companies relying on Section 3(c)(1) or Section 3(c)(7) of the Investment Company Act.

F. Proposed Changes to Exchange Act Reports

The Proposals would shorten the time frame in which certain Exchange Act reports must be filed with the Commission and would expand the information that must be filed on Form 8-K, including disclosure of the most significant risks associated with an investment in a company’s securities. The Institute supports timely and complete disclosure of important information about an issuer. Generally, the Institute believes that an accelerated filing schedule would provide more information to the public at an earlier date and may help to address some of the Commission’s concerns regarding selective disclosure.

The Proposals also would require any person signing a registration statement or Exchange Act report to certify that he or she read the filing and does not know of any material misstatement, or omissions of information, that make statements in the filing misleading. In addition, the Proposals would increase the number of persons required to sign certain reports filed under the Exchange Act to include the principal executive officers of the filer and at least a majority of the filer’s board. The Institute is not opposed to the affirmative representation to be made in the proposed certification, however, we believe it would not provide additional investor protection in light of the liability that is already imposed on persons signing Exchange Act reports under the antifraud provisions of that Act.[19] In addition, we do not believe that increasing the number of signatories is likely to improve disclosure to investors; the antifraud liability currently imposed on signatories acts as sufficient discipline against misleading disclosure.

G. Request for Comments About Investment Company Issuers

The Commission asked for comment regarding how, if at all, the Proposals should be modified to reflect the unique circumstances of investment companies. In our view, the fundamental changes suggested in the Proposals are unnecessary for the offer and sale of investment company securities. We strongly believe that the registration system that the Commission has thoughtfully crafted for investment companies has worked well for issuers and investors for close to sixty years.

Offerings of investment company securities do not present the same concerns that the Proposals are designed to address, e.g., concerns about insufficient information being made available to investors, about issuers choosing not to register their securities, and about the scope of the liability provisions of the Securities Act. For example, open-end investment companies typically offer securities on a continuous basis. In engaging in continuous offerings under the Securities Act, these investment companies must maintain current registration statements. All sales of open-end investment company securities therefore are already subject to Section 11 and Section 12(a)(2) liability.

If the Commission nevertheless believes that similar changes should be considered for investment companies, there would need to be careful consideration of how such a system should be structured in light of the differences between investment companies and operating companies. Certainly the Commission would first have to issue a concept release soliciting public comments on how such a new investment company registration system should be structured before developing specific proposals.[20]

* * *

The Institute appreciates the opportunity to comment on these very important proposals. Any questions regarding our comments may be directed to the undersigned at (202) 326-5815.

Very truly yours,

Craig S. Tyle

cc: The Honorable Arthur Levitt, Chairman
Norman S. Johnson, Commissioner
Isaac C. Hunt, Commissioner
Paul R. Carey, Commissioner
Laura S. Unger, Commissioner

Brian J. Lane, Director
Anita T. Klein, Senior Special Counsel
Division of Corporation Finance

Paul F. Roye, Director
Division of Investment Management

Harvey J. Goldschmid, General Counsel
Office of General Counsel

Securities and Exchange Commission

ENDNOTES

1 The Investment Company Institute is the national association of the American investment company industry. Its membership includes 7,576 open-end investment companies ("mutual funds"), 479 closed-end investment companies, and 8 sponsors of unit investment trusts. Its mutual fund members have assets of about $5.860 trillion, accounting for approximately 95% of total industry assets, and over 73 million individual shareholders.

2 SEC Release Nos. 33-7606A; 34-40632A; IC-23519A; International Series Release No. 1167A (November 18, 1998), 63 Fed. Reg. 67174 (December 4, 1998) ("Proposing Release").

3 See, e.g., Letter from Craig S. Tyle, General Counsel, Investment Company Institute, to Jonathan G. Katz, Secretary, Commission (October 31, 1996) and Letter from Craig S. Tyle, General Counsel, Investment Company Institute, to Securities and Exchange Commission Commissioner Steven M.H. Wallman (September 21, 1995).

4 The Commission's Division of Investment Management takes the view that no more than 15% of a mutual fund's net assets may be illiquid (10% for money market funds). See Investment Company Act Release No. 18612 (March 12, 1992) (revising former Guide 4 to Form N-1A, the registration form for mutual funds). "Illiquid" assets generally are those that cannot be disposed of by an investment company in the ordinary course of its business within seven days at approximately the value at which the fund has valued the investment.

5 For these purposes, "novel" securities could be defined as securities that have new structures or unique terms that have not been offered previously or were first offered in the market place within the previous twelve months.

6 See Letter from Craig S. Tyle to Commissioner Steven M.H. Wallman, supra note 3.

7 Letter from Alexander C. Gavis, Assistant Counsel, Investment Company Institute, to Michael H. Mitchell, Special Counsel, Division of Corporation Finance, Commission, dated October 29, 1996.

8 We suggest that the Commission clarify the use of hyperlinks on a Form A issuer's web

site during the 30-day quiet period. The Proposing Release notes that information on an issuer’s web site that is not covered by a communication safe harbor must be removed during the quiet period, and that third parties acting on behalf of the issuer similarly must remove certain information about the issuer. The release, however, does not address an issuer’s responsibilities with respect to hyperlinks. We request that the Commission clarify that an issuer will not be required to discontinue hyperlinks to a third-party’s web site if the issuer provides an "on-going hyperlink" to that web site, or if the hyperlink is to a site that is intended for use by the general public for reference and educational purposes, and the information on the third-party site does not refer to the issuer. This position would be consistent with that taken by NASD Regulation relating to the responsibility of a member for the content of third-party information that is contained on a hyperlinked web site. See Letter from Thomas M. Selman, Director, Advertising/ Investment Companies Regulation, NASD Regulation, Inc., to Craig S. Tyle, General Counsel, Investment Company Institute (November 11, 1997). We believe that this guidance would provide a balance between the Commission’s appropriate desire to ensure that Form A Issuers observe the quiet period, and the need for issuers and their representatives to have certainty that they have complied with the safe harbor

9 We note that the "offering period" for Form B Issuers begins 15 days before the "first offer." The term "first offer" is not defined in the Proposals. We recommend that the Commission either clarify the meaning of this term, or provide a bright-line definition of the commencement of the offering period, comparable to that proposed for Form A Issuers.

10 Subjecting the issuer and underwriters to liability for free writing materials prepared by others is problematic because unlike Section 10(a) prospectuses, which are part of the registration statement and prepared with the involvement of the underwriters and their counsel, free writing materials created by one member of an underwriting syndicate do not lend themselves to this type of review and thus are largely outside the control of other underwriters and/or their counsel.

11 See Private Financial Network (pub. avail. March 12, 1997); Net Roadshow, Inc. (pub. avail. September 8, 1997); Bloomberg LP (pub. avail. December 1, 1997); and Thomson Financial Services, Inc. (pub. avail. September 4, 1998).

12 Under the Proposals, Form B issuers also would be required to file with the Commission information about delayed shelf offerings as part of the effective registration statement by the time of the sale. The Institute supports this proposal. Currently, that information can be filed up to two business days after the earlier of pricing of the securities or first use of the prospectus supplement.

13 These offerings could be made where the issuer has been a reporting company for at least one year, has filed at least one annual report under Section 13(a) of the Exchange Act, and is current and timely in fulfilling its reporting requirements.

14 Advisers typically purchase securities directly for their clients. The Investment Company Act and the Investment Advisers Act of 1940 limit the ability of advisers to sell securities to investment companies and non-investment company clients, respectively, out of inventory and thus to act as a conduit to the public in these QIB-only offerings. See Section 17(a) of the Investment Company Act and Section 206(3) of the Advisers Act.

15 American Council of Life Insurance (pub. avail. May 10, 1983).

16 Another element of the Proposals that may well preclude the QIB provisions from having their intended effect is the Commission’s decision not to allow issuers to rely on the presumption in Rule 401(g) under the Securities Act that an offering was filed on the proper form. This change creates the possibility that securities were inadvertently offered and sold in violation of Section 5 and exposes issuers, investment companies and others not only to liability under Sections 12(a)(1) and 12(a)(2), but also to liability under the antifraud provisions of the Exchange Act. To guard against the possibility that an offering could retroactively be deemed illegal in its entirety, with full rescission rights for all purchasers, issuers may impose inefficient procedures on resale to prevent this result. To limit the resale of these registered securities, for example, issuers may adopt contractual measures such as initial representations and warranties, transfer restrictions and mandatory legal opinions on transfer. To avoid this result, the Commission should clarify the limited instances, if at all, when it would deem an offering retroactively illegal.

17 See, e.g., Exxon Capital Holdings Corporation (pub. avail. May 13, 1988); Morgan Stanley and Co., Inc. (pub. avail. June 5, 1991); and Shearman & Sterling (pub. avail. July 2, 1993).

18 The term "qualified purchaser" is defined in Section 2(a)(51) of the Investment Company Act to include (i) individuals and certain family companies that have not less than $5 million in "investments," (ii) certain trusts if both the trustee or other person with investment discretion and all settlors or other contributors are qualified purchasers, and (iii) other persons that own and invest on a discretionary basis not less than $25 million in "investments." Rule 2a51-1 under the Act defines the term "investments" for purposes of determining whether a person is a "qualified purchaser."

19 See Section 18(a) of the Exchange Act.

20 The Proposals also would revise Securities Act Rule 134 to narrow its application to investment companies. As noted in the Proposing Release, the proposed amendments would not make substantive changes to the content of Rule 134 but would make it more understandable and would reflect changes made by the National Securities Market Improvement Act of 1996 by specifically deleting legend text referring to state registration of securities. The Institute supports these amendments. The Institute also supports requiring a legend substantially similar to that required to appear in Rule 482 advertisements in Rule 134 advertisements that are used with a profile.