

COMMENT LETTER

August 23, 2002

Comment Letter on SEC Form 8-K Proposal, August 2002

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Mr. Jonathan G. Katz
Secretary
U.S. Securities and Exchange Commission
450 5th Street, N.W.
Washington, D.C. 20549

Re: Additional Form 8-K Disclosure Requirements and Acceleration of Filing Date (File No. S7-22-02)

Dear Mr. Katz:

The Investment Company Institute¹ appreciates the opportunity to comment on the Securities and Exchange Commission's most recent proposal to amend Form 8-K under the Securities Exchange Act of 1934.² The Commission's proposal would: (1) add eleven new events that will trigger a Form 8-K filing obligation; (2) relocate to the form two disclosure items that are currently required to be included in companies' annual and quarterly reports; (3) amend several of the form's existing disclosure items; (4) shorten the deadline for filing the form to two business days after the occurrence of a triggering event; (5) arrange the form's items into eight sections; (6) create a new safe harbor for certain violations of the form's filing requirements; and (7) grant an automatic two business day extension of the filing deadline to companies providing proper notice on Form 12b-25 of an inability to timely file a particular Form 8-K.

The Commission's proposal is one of several corporate governance initiatives designed to improve the timeliness and quality of information disseminated to the public.³ The Institute's members have a significant interest in all of these proposals. We estimate that investment companies held, as of year-end 2001, more than \$4 trillion in U.S. corporate equity and fixed-income securities, on behalf of millions of individual shareholders. As significant participants in the securities markets, our members are keenly interested in having timely access to relevant and accurate information on corporate events. Accordingly, we strongly support the proposal.

We note that the proposed amendments would expand Form 8-K to include eleven new events that, in the Commission's view, are of such significance that timely disclosure is necessary to enable the market to perform properly and efficiently. The selection of these

events is based on various factors that the Commission determined investors would consider important in making an investment or voting decision, including (1) the frequency of occurrence of the event, (2) the likely market reaction to the event, and (3) the potential impact of the event on a company's operations and financial statements.⁴ In addition to supporting the proposal to expand the list of triggering events for reporting on Form 8-K in this manner, the Institute urges the Commission to consider taking a similar approach in another context—specifically, by providing a similar list of items in Regulation FD under the Exchange Act that would trigger the public disclosure obligation thereunder.

Regulation FD addresses issues related to the selective disclosure of “material” nonpublic information by issuers to analysts and institutional investors by requiring that when an issuer discloses such information, it do so publicly.⁵ In a [comment letter](#) to the Commission when it proposed Regulation FD, the Institute objected to the use of an unqualified materiality standard in the context of informal communications between issuers and the marketplace because of concerns that its application could chill valuable marketplace contacts and increase volatility in the market.⁶ To avoid this result, we recommended limiting Regulation FD to those types of information that are especially likely to have a significant impact on the price of an issuer's securities. To that end, we suggested a list of such types of information for inclusion in Regulation FD.⁷

Our concerns about Regulation FD's reliance on a materiality standard were not unfounded. Indeed, in a [report](#) to the Commission on the impact of Regulation FD on the marketplace one year after its effective date, former Commissioner Laura Unger urged the Commission to provide more guidance on the application of the materiality standard under Regulation FD.⁸ Consistent with this recommendation, and in light of the proposed expansion of the list of items required to be reported on Form 8-K, we are taking this opportunity to urge the Commission to revisit Regulation FD and its use of the materiality standard. We recommend that the Commission use the list of events contained in its Form 8-K proposal as a template for the types of information that should warrant public dissemination under Regulation FD. Providing a specific list in Regulation FD would not only provide greater precision and clarity to the rule, but also would help facilitate the real-time dissemination of important information to the marketplace.

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The Institute appreciates the opportunity to express its views on the Commission's proposal. If you have any questions, or would like additional information, please contact the undersigned at (202) 326-5815.

Sincerely,

Craig S. Tyle
General Counsel

cc: Alan L. Beller, Director
Ray Be, Special Counsel
N. Sean Harrison, Special Counsel
Division of Corporation Finance

Paul F. Roye, Director
Division of Investment Management

ENDNOTES

[1](#) The Investment Company Institute is the national association of the American investment company industry. Its membership includes 8,990 open-end investment companies (“mutual funds”), 504 closed-end investment companies and six sponsors of unit investment trusts. Its mutual fund members have assets of about \$6.615 trillion, accounting for approximately 95 percent of total industry assets, and over 88.6 million individual shareholders.

[2](#) SEC Release Nos. 33-8106; 34-46084 (June 17, 2002); 67 Fed. Reg. 42914 (June 25, 2002) (the “Proposing Release”).

[3](#) See e.g., SEC Release Nos. 33-8089 and 34-45741 (April 12, 2002) (proposing to accelerate the filing of annual reports (Form 10-K) and quarterly reports (Form 10-Q) under the Exchange Act); SEC Release Nos. 33-8090 and 34-45742 (April 12, 2002) (proposing to expand the list of significant events requiring current disclosure on Form 8-K); and SEC Release Nos. 33-8098 and 34-45907 (May 10, 2002) (proposing to require MD&A disclosure about management’s application of critical accounting policies).

[4](#) See Proposing Release at n. 39.

[5](#) SEC Release Nos. 33-7881, 34-43154, IC-24599 (August 15, 2000); 65 Fed. Reg. 51716 (August 24, 2000).

[6](#) See [Letter](#) from Craig S. Tyle, General Counsel, ICI, to Jonathan G. Katz, Secretary, SEC, dated April 27, 2000. See also Letter from Craig S. Tyle, General Counsel, ICI, to David M. Becker, General Counsel, SEC, dated May 16, 2001 (reiterating our comments in response to the Commission’s roundtable on Regulation FD).

[7](#) The list was derived, in part, from Form 8-K filing requirements, earlier proposed amendments to that form, and guidance provided by various exchanges.

[8](#) See Special Study: Regulation Fair Disclosure Revisited, Commissioner Laura S. Unger (December 2001).