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COMMENT LETTER

October 6, 2011

ICI Letter on Retrospective Review Of SEC Regulations (pdf)

October 6, 2011 Elizabeth M. Murphy Secretary Securities and Exchange Commission 100 F Street, N.E. Washington D.C. 20549-1090 Re: Retrospective Review of Existing Regulations (File No. S7-36-11) Dear Ms. Murphy: The Investment Company Institute1 appreciates the opportunity to offer our preliminary views as the Securities and Exchange Commission ("Commission" or "SEC") considers the development of a plan for the retrospective review of its regulations, as recommended by Executive Order 13579.2 We begin by outlining why ICI believes the development—and successful execution—of such a plan is critically important for registered investment companies ("funds") and other market participants and investors, the U.S. capital markets, and the Commission itself. We then explain that the Commission's current processes for the review of existing rules are insufficiently comprehensive and robust to ensure that the agency's regulatory program can keep pace with market developments and changes in the regulatory landscape. Finally, we offer ICI's preliminary suggestions for how the Commission could develop an effective and workable plan. Importance of This Initiative Executive Order 13579 calls upon the Commission and other independent regulatory agencies to modernize and improve their regulations in order to meet better the goal of protecting "public health, welfare, safety and our environment, while promoting economic growth, innovation, 1 The Investment Company Institute is the national association of U.S. investment companies, including mutual funds, closed-end funds, exchange-traded funds ("ETFs"), and unit investment trusts ("UITs"). ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. Members of ICI manage total assets of $12.5 trillion and serve over 90 million shareholders. 2 Retrospective Review of Existing Regulations, 76 Fed. Reg. 56128 (Sept. 12, 2011) ("Release"); Executive Order 13579, Regulation and Independent Regulatory Agencies (July 11, 2011), available at http://www.gpo.gov/fdsys/pkg/FR-2011-07- 14/pdf/2011-17953.pdf. Elizabeth M. Murphy October 6, 2011 Page 2 of 8 competitiveness, and job creation."3 Its precursor, Executive Order 135634 (together with Executive Order 13579, the "Executive Orders"), imposed the same policy objective on the executive branch agencies. As part of this effort, according to Executive Order 13579, each independent agency should develop and release to the public a plan, consistent with law and reflecting its resources and regulatory priorities and processes, under which the agency will periodically review its existing significant regulations to determine whether any such regulations should be modified, streamlined, expanded or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives. ICI long has considered strong and effective regulation to be a cornerstone of the fund industry's success in serving investors. Funds are subject to comprehensive regulation under all four

major federal securities laws. As large investors in the U.S. capital markets, funds also are affected by the regulations that apply to those markets and their participants (e.g., securities exchanges, broker- dealers). Consequently, we wholeheartedly agree with the observation in the Release that "[b]ecause today's financial markets are dynamic and fast-moving, the regulations affecting those markets and participants in these markets must be reviewed over time and revised as necessary so that the regulations continue to fulfill the Commission's mission."5 In 2007, when the U.S. Department of the Treasury was considering how best to reform and modernize regulation of the financial markets, ICI's many recommendations included a call for the retrospective review of existing regulations similar to that envisioned by the Executive Orders. Specifically, ICI recommended that the SEC and self-regulatory organizations should establish a process for reexamining existing rules, or at least those rules that it or industry participants identify as imposing unjustifiable costs or competitive burdens. This process should be designed to determine whether the rules are working as intended, whether there are satisfactory alternatives of a less burdensome nature, and whether changes should be made. The results of such an analysis should be used to inform future rulemaking efforts.6 Certainly much has changed on the financial landscape since 2007, and with these changes has come increasing pressure on the Commission to do more and deliver results despite its limited 3 Section 1(b) of Executive Order 13579. 4 Executive Order 13563, Improving Regulation and Regulatory Review (Jan. 18, 2011), available at http://www.gpo.gov/fdsys/pkg/FR-2011-01-21/pdf/2011-1385.pdf. 5 Release, supra note 2, at 56129. 6 Investment Company Institute, Submission to the Department of the Treasury: Review of the Regulatory Structure Associated with Financial Institutions (Dec. 7, 2007), available at http://www.ici.org/pdf/22027.pdf. Elizabeth M. Murphy October 6, 2011 Page 3 of 8 resources. In our view, these developments only serve to underscore the need for the Commission to build and maintain a smarter, more effective regulatory program. There appears to be a growing consensus that such a program must include a mechanism for the periodic assessment of which Commission rules work well and which do not.7 Existing Processes are Insufficiently Robust In its Release, the Commission describes its current processes, both formal and informal, for assessing the continued effectiveness of its existing rules. The Release asks commenters "to consider what additional steps, if any, beyond the Commission's current review processes could be implemented effectively and efficiently in light of the Commission's overall resource constraints and responsibilities."8 As outlined below, we believe that the current processes, even if taken as a whole, are simply not robust enough to enable the Commission to conduct a thorough and informed assessment of its rules in order to identify, and prioritize, those that should be made more effective and less burdensome. The Commission's "regulatory review" webpage, for example, is a small step in the right direction.9 Launched early this year, it invites the public to offer its views on how the Commission's rules could be modified "to better promote economic growth, innovation, competitiveness and job creation" in the context of the agency's mission. As currently constructed, however, the webpage is unlikely to become an effective tool for the agency. The hyperlink to this webpage is no longer viewable from the SEC home page. Nor is the webpage comprehensive—instead, it invites public comment in just three broad areas (the offer and sale of securities, disclosure and reporting requirements, and rules to promote economic growth), leaving the public to discern for itself what rules might fall into each area. It is not surprising, then, that no comments have been posted on this webpage since shortly after its launch. We further note that the webpage offers no indication as to what the agency might do with the comments it receives, beyond making them publicly available. The Commission's efforts in accordance with the Regulatory Flexibility Act are similarly insufficient to advance the policy objectives outlined in the Executive Order. For example, the periodic review required by Section

610(a) of that Act relates only to a subset of the agency's rules—those that have or will have a significant economic impact on a substantial number of small entities.10 The list of 7 In addition to the Executive Orders, legislation requiring retrospective review of regulations has been introduced in both chambers of Congress. See, e.g., H.R. 2308, the SEC Regulatory Accountability Act (introduced June 23, 2011) and S. 1615, the Financial Regulatory Responsibility Act of 2011 (introduced Sept. 21, 2011). 8 Release, supra note 2, at 56130 (emphasis added). 9 SEC, Improving Regulations: Reviewing Regulatory Requirements to Ensure They Continue to Promote Economic Growth, Innovation, Competiveness and Job Creation, at http://www.sec.gov/spotlight/regulatoryreviewcomments.shtml. 10 5 U.S.C. 602(a). Elizabeth M. Murphy October 6, 2011 Page 4 of 8 rules that the Commission intends to review within the next 12 months is not posted anywhere on the SEC website. Instead, it is up to an interested party to find the SEC's reform agenda within the Unified Agenda of Federal Regulatory and Deregulatory Actions. The most recent Unified Agenda was published on July 7—a full four months after the SEC announced it would accept comments on its agenda items. It is little wonder that no comments on that agenda can be found on the SEC's website. The Release notes numerous other ways in which the Commission and its staff may become aware of rules that may merit retrospective review, including through a variety of communications, types of public engagements, and the Commission's compliance and enforcement programs. While these informal processes may be quite useful in their own right, they do not provide any central system for keeping track of reform recommendations, offer little transparency to the public, and lack accountability. Developing a Comprehensive, Workable Plan: Preliminary Suggestions The logical starting point for the Commission is the considerable effort already expended by other federal agencies in developing preliminary and final plans for periodic retrospection of their existing rules.11 Two plans that demonstrate a very strong commitment to the policy objectives of the Executive Orders are the final plan developed by the Environmental Protection Agency ("EPA")12 and the preliminary plan issued by the Federal Trade Commission ("FTC").13 Below, we identify several aspects of the EPA and FTC plans that, in our view, should be considered for inclusion in the plan to be developed by the Commission.14 Scope: Although the Executive Orders call only for periodic review of existing "significant" regulations,15 the EPA plan envisions asking the public for comment on the full range of the agency's 11 The preliminary and final plans for several executive branch agencies are accessible at http://www.whitehouse.gov/21stcenturygov/actions/21st-century-regulatory-system. 12 EPA, Improving Our Regulations: Final Plan for Periodic Retrospective Reviews of Existing Regulations (Aug. 2011), available at http://www.epa.gov/improvingregulations/documents/eparetroreviewplan-aug2011.pdf. 13 FTC, Regulatory Review Plan: Ensuring FTC Rules are Up-to-Date, Effective, and Not Overly Burdensome (Sept. 2011), available at http://www.ftc.gov/ftc/regreview/regreviewplan.pdf. 14 We note that neither plan should be considered a blueprint for the Commission's own plan. EPA is an agency several times the size of the Commission, whereas FTC, by its own count, administers just 66 regulations and guides. 15 For executive branch agencies, "significant" regulations are those that, among other things, have an annual effect on the economy of $100 million or more or adversely affect in a material way, among other things, the economy or a sector thereof, productivity, competition or jobs. The Office of Information and Regulatory Affairs within the Office of Management and Budget determines whether a regulation is significant and thus subject to interagency review. See, e.g., Executive Order 12866, Regulatory Planning and Review (Sept. 30, 1993), available at http://www.reginfo.gov/public/jsp/Utilities/EO_12866.pdf. Elizabeth M. Murphy October 6, 2011 Page 5 of 8 regulations. The FTC preliminary plan likewise would cover all of the

agency's existing regulations and industry guides. We would suggest taking a similar approach in the Commission's plan, so that the agency receives comprehensive input from the public as to which rules may need to be modernized. Other aspects of the plan, as described below, will allow the Commission to limit the number of rules that are actually selected for retrospective review in a given time period. Frequency of review: The EPA plan outlines a process for conducting reviews of existing regulations every 5 years. 16 We would recommend that the Commission's plan follow a similar approach, with regular reviews occurring not more frequently than every five years but at least every ten years.17 In determining the appropriate length of the review cycle, the Commission should seek to ensure that (1) there is sufficient time between the adoption of a new rule and any assessment by the Commission of how it is working, and (2) the periodic reviews are not so frequent that they divert resources away from critical functions such as the timely consideration of no-action requests and exemptive applications and more timely and robust examinations. Responsibility for the plan: The EPA plan identifies a single person—the agency's Regulatory Policy Officer—who will have responsibility for overseeing the implementation of the agency's plan and the execution of its retrospective reviews. In the case of FTC, this responsibility will be entrusted to senior officials in the agency's Bureau of Consumer Protection. The Commission's plan should similarly identify one individual or group—such as the agency's General Counsel, or a committee of senior agency officials—who will fulfill this responsibility. The Commission may also wish to designate a particular individual (or office) within each division to coordinate that division's efforts in connection with the plan. Input from agency staff: The EPA plan was crafted with the help of a cross-agency working group, which sought recommendations on which rules should be reviewed from EPA rulemaking, compliance and enforcement staff. The plan suggests that a similar process will be used at the start of each review period to help identify rules that should be subject to review. We believe the Commission's plan should follow this approach and commit to seeking input from staff across the agency as to which rules should be subject to retrospective review (and the degree of review that is warranted). Cost-benefit analysis: Following issuance of the Executive Orders, the Office of Management and Budget ("OMB") provided federal agencies with guidance as to the key principles embodied in 16 The FTC plan would continue the agency's current practice of reviewing each agency rule or guide 10 years after its implementation and every 10 years thereafter. The agency publishes a table listing each rule or guide and the calendar year in which it will be reviewed. See FTC, Regulatory Review: Modified Ten-Year Schedule, available at http://www.ftc.gov/ftc/regreview/rev-schedule.pdf. 17 Alternatively, the Commission might choose to conduct its periodic reviews on a rolling basis, with only a subset of its rules (for example, those administered by a particular SEC division, or those adopted pursuant to one or more particular statutes) considered for review at a given time. Elizabeth M. Murphy October 6, 2011 Page 6 of 8 those orders. With regard to the development of retrospective review plans, the OMB guidance suggested, among other things, that plans should incorporate an analysis of costs and benefits and of potential savings. Specifically, OMB advised that [a]gencies may well find it useful to engage in a retrospective analysis of the costs and benefits (both quantitative and qualitative) of regulations chosen for review. Such analyses can inform judgments about whether to modify, expand, streamline, or repeal such regulations, and can also provide valuable insight on the strengths and weaknesses of pre-regulatory assessments, which can be used to enhance the agency's analytic capability. In particular, it is important to obtain a clear and concrete sense, to the extent feasible, of the potential savings of reforms in terms of monetary amounts or burden hours. Agencies should attempt to identify and quantify those savings, and should prioritize those reforms with the potential to have a significant impact.18 ICI is a strong proponent of meaningful cost-benefit analysis to inform regulatory rulemaking efforts, and we welcome

OMB's suggestions in this regard. We believe that when new regulations are required, or existing regulations are amended, the Commission (like all regulators) should thoroughly examine possible options and choose the alternative that reflects the best trade-off between costs to, and benefits for, investors. Effective cost-benefit analysis does not mean compromising protections for investors or the capital markets. Rather, it challenges the regulator to consider alternative proposals and think creatively to achieve appropriate protections while minimizing regulatory burdens, or to demonstrate that a proposal's costs and burdens are justified in light of the nature and extent of the benefits that will be achieved. We note that EPA has identified the costs of its regulations as one of the first areas for review under its plan. In particular, EPA will evaluate "why and to what degree compliance cost estimates developed prior to the issuance of a regulation (ex-ante compliance costs) differ from actual compliance costs realized after a regulation takes effect (ex-post compliance costs)" and, in so doing, seek to improve the agency's ability to estimate ex-ante compliance costs in its rulemaking.19 Through an analysis of five rules, EPA expects to explore the reasons why ex-ante cost estimates may diverge from estimates of ex- post costs, and whether any systematic biases exist in the agency's ex-ante cost estimates. The Commission may wish to consider whether there are elements of EPA's effort that could be reflected in its own plan. 18 See, e.g., Memorandum for the Heads of Independent Regulatory Agencies from Cass R. Sunstein, Administrator, Office of Information and Regulatory Affairs, OMB, dated July 22, 2011, available at http://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-28.pdf. 19 See EPA, Retrospective Review: The costs of regulations, available at http://www.epa.gov/regdarrt/retrospective/costsofregulations.html. Elizabeth M. Murphy October 6, 2011 Page 7 of 8 Public participation: In light of its limited resources and current regulatory demands, the Commission should seek assistance from all interested parties in order to develop its plan and maximize the effectiveness of its retrospective reviews. We note that many executive branch agencies and FTC have issued preliminary plans that specify which rules will be reviewed during the initial review period, and have sought public comment on those preliminary plans. EPA's plan, for example, briefly describes each rule selected for review, explains why it was included in the plan, and identifies the next step for the agency in reviewing that rule. We strongly believe that the Commission should follow a similar approach. Industry representatives, other market participants, investor advocates, and academics will be able to offer insights into why a particular rule may not be working as intended or otherwise needs to be modified.20 Public commenters also may be able to provide supporting data and analyses that are not otherwise known, or readily available, to the Commission and its staff. To facilitate ongoing public participation in this process, EPA and FTC have both developed prominent webpages devoted to their regulatory review efforts.21 We would encourage the Commission to use these webpages as possible models for improving upon the agency's current regulatory review webpage, as described above. There are two additional elements that ICI believes should be addressed in the Commission's retrospective review plan: Degree of review: Neither the EPA's nor the FTC's plan seems to indicate that the degree of retrospective review would vary among the rules selected for review. As a practical matter, we believe that it will, because a regulatory agency is likely to commit greater time and resources to reviewing a rule that, for example, is critical to the success of the agency's regulatory program or whose adoption generated significant controversy. The Commission's plan should specifically acknowledge this variable and, to the extent possible, identify the factors that will cause the agency to subject a particular rule to a greater degree of review. Agency resources: The Commission's plan should be designed with agency resources in mind, and the impact of resource limits on the plan's scope should be clearly communicated to the public. It 20 The quality and thoughtfulness of the comments may be enhanced if the Commission encourages

comments in certain specific areas. A recent FTC release, for example, poses questions in several different areas, such as whether FTC collects information no longer necessary to achieve its regulatory objectives, and whether there are rules that have been or soon will be overtaken by technological developments (and how those rules could be modified to accommodate or utilize such technologies. See FTC, Notice Announcing Ten-Year Regulatory Review Schedule and Request for Public Comment on the Federal Trade Commission's Regulatory Review Program, 76 Fed. Reg. 41150 (July 13, 2011). 21 EPA, Retrospective Reviews, at http://www.epa.gov/improvingregulations/; FTC, FTC Regulatory Review, at http://www.ftc.gov/ftc/regreview/index.shtml. Elizabeth M. Murphy October 6, 2011 Page 8 of 8 is also important that the plan be constructed with some flexibility to take into account unexpected developments. * * * * * We applaud the Commission for beginning its work on this important initiative, and appreciate your consideration of these preliminary comments. If you have questions or would like additional information, please contact me at 202/326-5815, or Rachel H. Graham at 202/326-5819. Sincerely, /s/ Karrie McMillan General Counsel cc: The Honorable Mary L. Schapiro, Chairman, SEC The Honorable Elisse B. Walter, Commissioner, SEC The Honorable Luis A. Aguilar, Commissioner, SEC The Honorable Troy A. Paredes, Commissioner, SEC Eileen Rominger, Director Division of Investment Management

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