February 7, 2005

Mr. Jonathan G. Katz  
Secretary  
U.S. Securities and Exchange Commission  
450 Fifth Street, NW  
Washington, DC  20549-0609  

Re: Certain Broker-Dealers Deemed Not to Be Investment Advisers; File No. S7-25-99

Dear Mr. Katz:

The Investment Company Institute\(^1\) supports the Securities and Exchange Commission’s proposed rule to exclude broker-dealers in certain circumstances from the Investment Advisers Act of 1940.\(^2\) We also support the Commission’s proposed publication of an interpretive statement to provide further guidance relating to this exclusion.

The Commission first proposed a rule to define when broker-dealers are excluded from regulation under the Advisers Act in 1999.\(^3\) At the time, the Institute supported the proposal but recommended that the Commission study some of the broader issues it raised.\(^4\) These issues included whether a broker-dealer’s exercise of investment discretion should trigger regulation under the Advisers Act and what advisory services of the broker-dealer are “solely incidental” to its brokerage services for purposes of relying on the exclusion. We are pleased that the Commission has undertaken a deliberative study of these issues. We believe the Commission’s resulting proposal is well-reasoned and provides greater clarity regarding when clients of a broker-dealer are entitled to the protections of the Advisers Act. The

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\(^1\) The Investment Company Institute is the national association of the American investment company industry. More information about the Institute is included at the end of this letter.


\(^3\) See SEC Release Nos. 34-42099 and IA-1845, Certain Broker-Dealers Deemed Not to Be Investment Advisers (Nov. 4, 1999).

\(^4\) See Letter from Tamara K. Reed, Associate Counsel, Investment Company Institute, to Mr. Jonathan G. Katz, Secretary, Securities and Exchange Commission, dated January 14, 2000. When the Commission reproposed the rule in August 2004, the Institute filed a comment letter reiterating our support for the rule as well as our recommendation that the Commission study the broader issues it raised. See Letter from Tamara K. Salmon, Senior Associate Counsel, Investment Company Institute, to Mr. Jonathan G. Katz, Secretary, Securities and Exchange Commission, dated September 22, 2004, commenting on SEC Release Nos. 34-50213 and IA-2278, Certain Broker-Dealers Deemed Not to Be Investment Advisers (Aug. 18, 2004).
proposal will also ensure that investors who pay special compensation to a broker-dealer are alerted to the
distinctions between the broker-dealer’s advisory services and its brokerage services.

We agree with the Commission’s approach to treat all accounts over which a broker-dealer
exercises investment discretion as advisory accounts regardless of the broker-dealer’s form of
compensation. We believe this bright-line test is an appropriate means by which to distinguish brokerage
accounts from advisory accounts. A broker-dealer’s ability to effect a trade without first consulting the
client constitutes the rendering of investment advice for which the client should be entitled to the
protections of the Advisers Act.

With respect to the proposed disclosure that would be required of a broker-dealer relying on the
exclusion, the Institute strongly supports both the placement and content of such disclosure. We believe it
will have the intended effect of alerting a broker-dealer’s clients to the fact that the regulatory protections
accorded to a brokerage account are distinct from those accorded to an advisory account. Moreover, it
will ensure that clients who are interested in learning more information about this distinction will have the
name of a contact at the firm to consult for such information. As such, this disclosure should help
investors make informed decisions regarding whether to retain a broker-dealer or an investment adviser to
assist them in fulfilling their investment goals.

We support the Commission’s proposal to publish an interpretive statement relating to what types
of advisory services of a broker-dealer are “solely incidental” to its brokerage services for purposes of the
exclusion in the Adviser’s Act. We agree with the Commission’s approach to provide this guidance by
identifying those practices that are not “solely incidental.” We additionally agree with the Commission
that financial planning and certain wrap fee program services should not be deemed solely incidental
practices for purposes of the exclusion.

The Institute appreciates the opportunity to support the Commission’s proposed rule and
interpretive statement. If you have any questions about these comments or would like additional
information, please contact the undersigned by phone at 202-326-5825.

Sincerely,

Tamara K. Salmon
Senior Associate Counsel