

Comment Letter on SEC E-SIGN Interim Final Rule, September 2000

September 1, 2000

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

**Re: Exemption From Section 101(c)(1) of the Electronic Signatures In Global and National Commerce Act for Registered Investment Companies
(File No. S7-14-00)**

Dear Mr. Katz:

The Investment Company Institute¹ appreciates the opportunity to comment on interim final rule 160 under the Securities Act of 1933, which would exempt from the consumer consent requirements of the Electronic Signatures in Global and National Commerce Act ("E-SIGN") prospectuses of registered investment companies ("mutual funds") that are used for the sole purpose of permitting supplemental sales literature to be provided to prospective investors.² Rule 160, which was mandated by E-SIGN,³ would permit a mutual fund to provide supplemental sales literature on its web site or by other electronic means without first obtaining an investor's consent to receive in electronic form the statutory prospectus that is required to precede or accompany the supplemental sales literature.⁴

The Institute generally supports Rule 160. We are concerned, however, that the rule is unnecessarily restrictive in its current form. In particular, as adopted, Rule 160 would exempt a mutual fund prospectus from the consumer consent requirements of Section 101(c) of E-SIGN if it is sent or given "for the sole purpose" of permitting a communication not to be deemed a prospectus under Section 2(a)(10)(a) of the Securities Act. The Release notes that the exemption would not be available when a fund's prospectus is provided to an investor for a purpose other than, or in addition to, this purpose. For the reasons discussed below, we do not believe that the exemption should be limited in this manner.

First, the "sole purpose" limitation is not required by E-SIGN. As indicated above, Section 104(d)(2) requires the Commission to exempt from the consumer consent provisions "any records that are required to be provided in order to allow advertising, sales literature, or other information concerning a security issued by [a registered investment company], or concerning the issuer thereof, to be excluded from the definition of a prospectus under Section 2(a)(10)(A) [sic] of the Securities Act." This provision does not require the Commission, in granting the exemption, to limit the purposes for which such records may be used.

Second, the "sole purpose" limitation is inconsistent with the securities laws and the Commission's interpretive positions regarding electronic delivery of disclosure documents. For example, if a fund delivers its prospectus to an investor with supplemental sales literature in a manner that satisfies the prospectus delivery requirements of Section 2(a)(10)(a) of the Securities Act,⁵ the securities laws (i.e., Section 5(b)(2) of the Securities Act) do not impose an additional prospectus delivery requirement if the investor subsequently purchases fund shares. Indeed, the Commission previously has specifically indicated that a fund may rely on effective electronic delivery of its prospectus with electronic supplemental sales literature to satisfy other prospectus delivery purposes.⁶ In the absence of a separate prospectus delivery requirement in connection with an investor's subsequent purchase of fund shares,⁷ there should be no need to obtain consent to electronic delivery of a second prospectus.

Third, the "sole purpose" limitation does not appear to serve an important policy objective. In this regard, we note that the Release does not provide a policy rationale explaining why the "sole purpose" limitation is necessary, such as identifying investor protection concerns that this condition is intended to address. Eliminating the "sole purpose" requirement would not thwart any Commission policy objective because, consistent with existing law, an investor who has already received a prospectus should not have to receive another one (and consent to receiving it electronically, if applicable) if he or she subsequently purchases fund shares.

We therefore recommend that the Commission revise Rule 160 to eliminate the "sole purpose" limitation by deleting the term "sole" from the text of the rule. As a practical matter, this change will ensure that funds maintain a degree of flexibility in dealing with their customers that is available under existing laws and Commission interpretations. For example, if a fund is reasonably assured that an investor has already received a fund prospectus, the fund should not be required to deliver another prospectus (and to obtain consent to electronic delivery in the case of an electronic prospectus) in connection with a fund purchase. This result should not vary depending on whether the investor received a paper copy of the prospectus in the mail or received the prospectus electronically in connection with viewing supplemental sales literature on the fund's web site. Of course, if the investor has not yet received a prospectus, delivery of a prospectus would be required in connection with the purchase, and the fund would need to comply with any applicable consumer consent provisions if the prospectus will be delivered electronically.

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The Institute appreciates the opportunity to present its views on Rule 160. If you have any questions or would like additional information, please contact the undersigned at (202) 326-5822 or Barry E. Simmons at (202) 326-5923.

Sincerely,

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ENDNOTES

¹ The Investment Company Institute is the national association of the American investment company industry. Its membership includes 8,239 open-end investment companies ("mutual funds"), 489 closed-end investment companies and 8 sponsors of unit investment trusts. Its mutual fund members have assets of about \$7.047 trillion, accounting for approximately 95% of total industry assets, and over 78.7 million individual shareholders.

² SEC Release Nos. 33-7877; IC-24582 (July 27, 2000), 65 Fed. Reg. 47281 (August 2, 2000) (the "Release").

³ Section 101(c) of E-SIGN requires consumers to affirmatively consent before electronic records can be used to provide them with information that is required by law to be provided or made available to them in writing. Section 104(d)(2) of the legislation directs the Commission to exempt from the consumer consent requirements "any records that are required to be provided in order to allow advertising, sales literature, or other information concerning a security issued by [a registered investment company], or concerning the issuer thereof, to be excluded from the definition of a prospectus under Section 2(a)(10)(A) [sic] of the Securities Act."

⁴ As indicated in the Release, this is currently permitted pursuant to Commission interpretations of existing laws, and Rule 160 clarifies that a fund may continue this practice after October 1, 2000, the effective date of E-SIGN.

⁵ See, e.g., SEC Release Nos. 33-7233, 34-36345, IC-21399 (Oct. 6, 1995), 60 Fed. Reg. 53458 (Oct. 13, 1995) ("1995 Release") (describing several acceptable means of establishing delivery of electronic disclosure documents). See also SEC Release Nos. 33-7288, 34-37182, IC-21945 (May 9, 1996), 61 Fed. Reg. 24644 (May 15, 1996).

⁶ See 1995 Release, Example 35, 60 Fed. Reg. at 53465. This example provides generally that electronic delivery of a fund's prospectus may be inferred when an investor accesses supplemental sales literature on the fund's web site that contains hyperlinks to the fund's electronic prospectus and includes a caption referring the investor to the prospectus. The example states that such electronic delivery of the prospectus "would be sufficient for other purposes if the fund could reasonably establish that the investor has actually accessed the sales literature or the prospectus." (Emphasis added.) See also id., Example 36, which provides in relevant part that: "A fund may rely upon a user's having accessed, printed or downloaded a prospectus for the fund in order to deliver supplemental sales literature or an order form or to establish delivery of the prospectus in connection with a sale of fund shares." (Emphasis added.)

⁷ In describing the "sole purpose" requirement, the Release states that "if an investor views a fund's prospectus and supplemental sales literature on its web site and subsequently purchases fund shares, Rule 160 will not apply to the delivery of the prospectus that is required in connection with the purchase." Release at 6 (emphasis added). The Commission should clarify that, consistent with its

earlier guidance discussed above, delivery of a second prospectus is not required if a fund can reasonably establish that the investor has already received a prospectus.

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