

September 22, 2004

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<sup>1</sup> appreciates the opportunity to comment on the Securities and Exchange Commission's reproposal of Rule 202(a)(11)-1 under the Investment Advisers Act of 1940.<sup>2</sup> The proposed rule would exclude a broker-dealer providing investment advice from regulation under the Advisers Act so long as specified conditions are met.<sup>3</sup>

Rule 202(a)(11)-1 was first proposed for comment in 1999.<sup>4</sup> At the time, the Institute filed a letter expressing our support for the proposal.<sup>5</sup> At the same time, our letter recommended that the Commission study some of the broader issues that were raised by the proposal, including whether the exercise of discretionary authority should trigger regulation under the Advisers Act and the meaning of the terms "solely incidental" and "special compensation" as used in Section 202(a)(11)(C) of the Advisers Act.

In response to the Commission's current request for comment on Rule 202(a)(11)-1, the Institute reiterates both our support for the proposed rule and our recommendation that the Commission study the broader issues raised by the proposal. In the five years since this proposal

---

<sup>1</sup> 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.

<sup>2</sup> See *Certain Broker-Dealers Deemed Not to Be Investment Advisers*, SEC Release Nos. 34-50213 and IA-2278 (Aug. 18, 2004).

<sup>3</sup> These conditions are: that the advice is provided on a non-discretionary basis, the advice is solely incidental to the broker-dealer's brokerage services, and the broker-dealer discloses to its customers that its accounts are brokerage accounts.

<sup>4</sup> See *Certain Broker-Dealers Deemed Not to Be Investment Advisers*, SEC Release Nos. 34-42099 and IA-1845 (Nov. 4, 1999).

<sup>5</sup> 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.

was first published for comment, broker-dealers have been able to utilize fee-based accounts without having to register under the Advisers Act.<sup>6</sup> During this time, the NASD has monitored and issued regulatory guidance on the use of these accounts by broker-dealers.<sup>7</sup> We strongly urge the Commission to encourage the NASD to remain diligent in overseeing the use of these accounts by broker-dealers.

The Institute appreciates the opportunity to again submit comments in support of the Commission's proposed rule. If you have any questions concerning these comments or would like additional information, please contact the undersigned by phone at 202-326-5825.

Sincerely,

Tamara K. Salmon  
Senior Associate Counsel

---

<sup>6</sup> In the 1999 Proposing Release, the Commission's Division of Investment Management indicated that it would not recommend that the Commission take any action against a broker-dealer acting in reliance on the proposed rule during its pendency. As such, since its proposal, broker-dealers have been able to rely on the rule as if it had been adopted.

<sup>7</sup> For example, in November 2003, the NASD issued a Notice to Members that reminded broker-dealers of their suitability obligations in connection with the use of fee-based accounts. See *NASD Notice to Members 03-68* (November 2003). Also, last month, the NASD published "Fee-Based Account Questions & Answers" ("Q&As") that discussed the NASD's oversight of these accounts and clarify broker-dealers' responsibilities in connection with their use. The Q&As are on the NASD's website at: [http://www.nasdr.com/ntm0368\\_faqs.asp](http://www.nasdr.com/ntm0368_faqs.asp) (Aug. 23, 2004).