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July 12, 2007

Ms. Barbara Z. Swcney  
NASD  
Office of the Corporate Secretary  
1735 K Street NW  
Washington, DC 20006-1506

Re: Proposed Guidance on Supervision of  
Electronic Communications;  
NASD Notice to Members 07-30

Dear Ms. Sweeney:

The Investment Company Institute<sup>1</sup> is writing to support the adoption of the NASD's and NYSE's proposed joint guidance regarding members' review and supervision of electronic communications.<sup>2</sup> The guidance will provide much needed clarity regarding the application of the NASD's and NYSE's rules to the wide and evolving range of electronic communication devices that can be utilized by members. In addition, the guidance should help resolve some uncertainty in the industry resulting from a recent enforcement proceeding involving a broker-dealer's failure to reasonably supervise salespersons' electronic communications.<sup>3</sup> We are particularly pleased that the guidance has been drafted to be technology neutral, which will benefit members as they consider which new technologies to deploy and how to accommodate them into their supervisory policies and procedures. The Institute recommends that the final version of the guidance further clarify the issues set forth below.

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<sup>1</sup> The Investment Company Institute is the trade association of the U.S. mutual fund industry. More information about the Institute can be found at the end of this letter.

<sup>2</sup> See *Supervision of Electronic Communications*, NASD Notice to Members 07-30 (July 2007).

<sup>3</sup> See *In re Bear, Stearns & Co., Inc.*, SEC Release No. 34-54806 (Nov. 21, 2006).

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## GUIDANCE INTENDED TO CLARIFY EXISTING REQUIREMENTS

The Institute recommends that the NASD and NYSE clarify that the guidance is not intended to expand members' existing obligations to supervise communications – regardless of medium. Instead, the guidance is intended to assist members in supervising, consistent with existing regulatory requirements, the variety of electronic communication devices used by members and their associated persons. A statement along these lines will ensure that the guidance is not misinterpreted to impose upon members obligations beyond those currently imposed through NASD Rule 3010 and other supervisory rules, some of which are expressly mentioned in the guidance.

## “FLAGGING” COMMUNICATIONS

According to the proposed guidance, when employing risk-based procedures to review electronic communications, a member should consider, in part, how to effectively “flag” certain types of communications.<sup>4</sup> This provision appears intended to alert members to the fact that certain electronic communications – either due to the nature of the sender's job responsibilities (*e.g.*, research analysts) or the substance of the communication (*e.g.*, order error) – may require additional scrutiny by the member. As such, in designing their supervisory procedures, members may want to ensure that they “flag” those communications for a particular method of review (*e.g.*, lexicon or sampling) as required or appropriate.

We are concerned that this provision may be interpreted to require members to review *all* communications and “flag” for additional review those that – on a risk-based basis – may evidence or contain customer complaints, regulatory concerns, etc. This would place an impossible burden on most members due to their volume of communications. We therefore recommend that the NASD and NYSE further clarify that members are expected to take a risk-based approach to defining the universe of communications to review and that “flagging” may then be used to further narrow that universe.

## SUPERVISING ONE'S OWN COMMUNICATIONS

According to the proposed guidance, an individual may not conduct supervisory reviews of his or her own electronic communications unless the member's size and/or structure is such that the member has no other reasonable alternative for reviewing those communications. While this type of limitation is clearly necessary and appropriate, we recommend that the guidance also recognize that there may be other limited instances in which it is appropriate for an individual to conduct a supervisory review of its his or her own electronic communications. For example, it would seem unnecessary in the public interest to require additional supervisory review of client communications drafted by an attorney, principal acting in a compliance capacity, or a senior officer of the member.

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<sup>4</sup> Notice at p.4.

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Accordingly, we recommend that the guidance clarify that a member's supervisory procedures governing review of electronic communications may exempt certain communications from supervisory review where, based upon the nature of the communication or the status of the person drafting it, additional review is unnecessary in the public interest. This clarification will assist members in determining which communications may be subject to additional supervisory review.

#### DOCUMENTING THE REVIEW OF CORRESPONDENCE

Section II.F. of the proposed guidance, relating to documenting the review of correspondence, provides in part that evidence of a review should include, at a minimum, "the communication that was reviewed." We recommend that the NASD and NYSE provide greater specificity about the evidence required and, in particular, whether something less than maintaining a copy of the entire communication would be sufficient. For example, would a log that includes the *number* of communications reviewed (*e.g.*, 30 e-mails reviewed) suffice? If not, would maintaining a record of the "header" information from the communication suffice? If the header information suffices, what header information must be included (*e.g.*, "to," "from," "subject," "time," etc.)? Knowing what documentation the NASD's and NYSE's examiners are expecting to see when they conduct examinations will better enable members to ensure that their documentation meets these expectations. We also recommend that, when addressing this issue, the guidance clarify that members may both conduct reviews electronically and electronically maintain documentation of such reviews.

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The Institute appreciates the opportunity to provide these comments on the proposed guidance. If you have any questions regarding our views, please contact the undersigned by phone (202-326-5825) or email ([tamara@ici.org](mailto:tamara@ici.org)).

Sincerely,



Tamara K. Salmon

Senior Associate Counsel

#### ABOUT THE INVESTMENT COMPANY INSTITUTE

The Investment Company Institute's membership includes 8,766 open-end investment companies (mutual funds), 670 closed-end investment companies, 440 exchange-traded funds, and 4 sponsors of unit investment trusts. Mutual fund members of the ICI have total assets of approximately \$11.242 trillion (representing 98 percent of all assets of US mutual funds); these funds serve approximately 93.9 million shareholders in more than 53.8 million households.