

MEMO# 11898

May 22, 2000

PROPOSED CROSS-TRADES DISCLOSURE FORM FOR ERISA PLANS AND CONFERENCE CALL SCHEDULED FOR JUNE 13 AT 2PM EST

1 See Institute memorandum to Investment Advisers No. 6-00 and Pension Committee No. 14-00, dated February 16, 2000. [11898] May 22, 2000 TO: INVESTMENT ADVISERS COMMITTEE No. 16-00 PENSION COMMITTEE No. 36-00 AD HOC COMMITTEE ON CROSS-TRADES RE: PROPOSED CROSS-TRADES DISCLOSURE FORM FOR ERISA PLANS AND CONFERENCE CALL SCHEDULED FOR JUNE 13 AT 2PM EST

As you are aware, the Department of Labor held hearings on active cross-trades issues in February. A number of associations representing financial institutions testified at the hearings, including the Institute, the Securities Industry Association ("SIA"), the Investment Counsel Association of America ("ICAA") and the Association of Investment Management and Research ("AIMR").¹ All of these organizations supported allowing ERISA-covered pension plans to participate in cross-trades programs and encouraged the Department to develop a disclosure regime to enable plan fiduciaries to monitor cross-trades activities. At these hearings, the Department asked a number of similar questions to the ICI, SIA, ICAA and AIMR. These questions related to what information financial institutions would disclose to plan fiduciaries concerning cross-trades activities and the duties of plan fiduciaries versus those of board of directors of investment companies. In response to the concerns raised by Department representatives at the hearings, the ICI, in conjunction with the SIA, ICAA and AIMR, discussed submitting a joint letter to the Department responding to these questions. Attached is a draft letter to the Department drafted jointly by the ICI, SIA, ICAA and AIMR addressing (1) the respective duties of plan fiduciaries and investment company board of directors, and (2) a proposed disclosure regime to enable plan fiduciaries to review cross-trades activities. The discussion involving the respective duties of plan fiduciaries and investment company board of directors describes the legal standards applicable to directors and ERISA plan fiduciaries and proposes a sophistication test of \$25 million for plan fiduciaries who wish to enter into a cross-trades program on behalf of their plans. This discussion notes that both plan fiduciaries and investment company directors are held to similar standards of care and loyalty with respect to actions taken on behalf of the plan and its participants or the investment company and its shareholders. The disclosure proposal includes a list of quarterly disclosure to plan fiduciaries, a list of disclosures to be provided upon request by the plan fiduciary and certain record-keeping requirements. The submission includes a "mock-up" of the proposed quarterly disclosure form, which includes information concerning the trade date, the name of the issuer/security, the type of

transaction (sale or purchase), the principal amount, the number of shares, the price, the basis for the price, the closing or opening price of the security on the date of the cross-trade and/or the price of the security at the end of the quarterly reporting period and a statement certifying that the cross-trades are in compliance with the firm's procedures. The proposed disclosures provided upon request include the generic type of the counter-party certifying that it was not a proprietary account, the percentage of trades that were cross-trades, the justification of the cross-trade, the counter-party's generic justification for the cross-trade and any other information available on the cross-trade. The proposal also includes a record-keeping requirement for written records concerning the cross-trade for six years from the end of the fiscal year in which the cross-trade occurred. Please review the draft joint submission to the Department and provide your comments to me by phone at (202) 218-3563, fax at (202) 326-5841 or email at ricard@ici.org by COB Monday June 12, 2000. Specifically, we ask that you provide us comments regarding the appropriateness of the proposed sophistication test of \$25 million, the quarterly disclosure requirements, in particular, the requirement to provide the closing or opening price of the cross-trade on the date of the trade or the requirement to provide quarterly-end prices of the securities involved in the trade and the information to be provided upon request by plan fiduciaries. In addition, we have scheduled a conference call to discuss the letter to the Department on Tuesday, June 13, 2000 at 2:00 p.m. EST. If you are interested in participating on the call, please fax the attached form to Melanie Washington at (202) 326-5841 by COB Friday June 9, 2000. If you have any questions concerning the proposal or the conference call, please call me at (202) 218-3563 or Russ Galer at (202) 326-5835. Kathryn A. Ricard Associate Counsel Attachment

ATTENDANCE FORM FOR INSTITUTE'S CONFERENCE CALL ON THE PROPOSED CROSS-TRADES DISCLOSURE FORM FOR ERISA PLANS Yes, I will participate on the Conference Call regarding the Proposed Cross-Trades Disclosure Form for ERISA Plans on Tuesday, June 13, 2000 at 2:00 p.m. EST. To participate in the call, dial 1-800-949- 5539 and ask for the Cross-Trades call, confirmation #4247872. Please fax your RSVP to Melanie Washington at 202-326-5841 no later than Friday, June 9, 2000. Committee Member Company Phone

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