

MEMO# 15023

August 12, 2002

ICI DRAFT COMMENT LETTER ON APPLICATION OF PROPOSED CEO CERTIFICATION REQUIREMENT TO INVESTMENT COMPANIES

URGENT/ACTION REQUESTED [15023] August 12, 2002 TO: ACCOUNTING/TREASURERS COMMITTEE No. 40-02 CLOSED-END INVESTMENT COMPANY COMMITTEE No. 32-02 COMPLIANCE ADVISORY COMMITTEE No. 59-02 SEC RULES COMMITTEE No. 64-02 UNIT INVESTMENT TRUST COMMITTEE No. 21-02 RE: ICI DRAFT COMMENT LETTER ON APPLICATION OF CEO CERTIFICATION REQUIREMENT TO INVESTMENT COMPANIES As you are aware, the SEC recently issued a release in which it solicited comment on the manner of application of the Section 302 certification requirement in the Sarbanes-Oxley Act of 2002 to investment companies.¹ Attached is a draft of the Institute's comment letter, which reflects the consensus of members reached on the conference call held on August 7 to discuss this issue. Set forth below is a summary of our draft letter. We have flagged in bold specific issues on which we would like member input. The SEC's comment period expires on August 19, 2002. Therefore, we would like your comments on the draft letter by close of business tomorrow (Tuesday, August 13). You can provide your comments to the undersigned by phone at 202/326-5824, by fax at 202/326- 5827 or by email at amy@ici.org, or to Barry Simmons by phone at 202/326-5923, by fax at 202/326-5827 or by email at bsimmons@ici.org.

Application of Section 302 to Investment Companies The Institute's letter does not address the issue of whether investment companies are covered by Section 302, in part because some members and their outside counsel may wish to argue otherwise. Do members agree with the approach taken in the letter, or should we endorse requiring funds to be covered? On a related issue, after further consideration, we decided to argue that UITs should be exempted for the following reasons. First, there is no policy basis for subjecting UITs to a certification requirement. UITs are fixed investment pools. Investors receive a prospectus containing financial information about the trust, but there is little additional material. ¹ See Memorandum to Accounting/Treasurers Members No. 24-02, Closed-End Investment Company Members No. 31-02, Compliance Advisory Committee No. 57-02, SEC Rules Members No. 60-02 and Unit Investment Trust Members No. 17-02, dated August 2, 2002 [14992]. ² information in subsequent financial disclosures. Second, UITs are not required to send periodic reports to unitholders. Thus, there would no financial statements contained in periodic filings of UITs that could be certified. Third, it is not clear who could certify UIT information, as they do not have officers. A UIT sponsor will typically have no role in preparing information that is periodically disseminated to unitholders by the trustee, and it is unclear whether the SEC would have the authority to require officers of the trustee to be responsible for the certifications required. Scope of

Certification The draft letter recommends that any certification requirement for officers of investment companies should apply to such companies' financial statements, and not to information contained in Form N-SAR. The letter recommends that the requirement apply to the financial statements in the annual and semi-annual reports sent to shareholders and filed with the SEC. In particular, the letter recommends that the certification cover the financial statements required under Regulation S-X, along with the condensed financial information for the same period. (See footnote 5 of the letter, in which we flag several questions for members relating to the definition of financial statements for purposes of our recommendation.) The letter further recommends that investment company officers not be required to certify the MDFP. **Certifying Officers** On the August 7th call, we decided not to address the issue of who should sign the certification. In view of the fact that the SEC specifically sought comment on this issue, we decided to address it in the letter. The letter states that, for management investment companies, the appropriate persons to provide the certification are the individuals who serve as the fund's principal executive officer and principal financial officer (or their equivalent). The letter notes that, in most cases, this would be the fund's president or chairman, and the fund's treasurer, respectively. This approach is more appropriate than designating officers of any particular third party. In addition, the letter states that the wide variety of relationships between funds and their affiliates and other service providers would seem to preclude the possibility of crafting a standard that could specify which third party personnel should be responsible for certification. Finally, this approach would give funds the flexibility to designate the appropriate persons for this purpose. We are interested in members' views on this section of the letter. **Internal Controls** With respect to the statements required in the certification regarding the issuer's internal controls, the letter seeks clarification from the Commission that internal controls in this context are limited to those procedures designed to collect, process and make known to certifying officers the material information that forms the basis of the information that is being certified under Sections 302(a)(2) and (3).² The letter further recommends that the Commission clarify 2 Section 302(a)(2) requires certification that, based on the officer's knowledge, the report does not contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which such statements were made, not misleading. Section 302(a)(3) requires certification that, based on the officer's knowledge, the financial statements, and other financial information in the report, fairly 3 that, in the case of a fund complex, the same internal control system can apply to more than one fund in the complex. **Transition Period** The letter recommends a transition period for investment companies of 120 days following adoption. Amy B.R. Lancellotta Senior Counsel Attachment (in .pdf format) present in all material respects the financial condition and results of operations of the issuer as of, and for, the periods presented in the report.