

**MEMO# 8656**

February 21, 1997

## **SEC PROPOSAL RELATING TO DETERMINATION OF WHETHER AN OFFERING DOCUMENT IS SUBJECT TO STATE REGULATION**

\* SEC Release No. 33-7388 (February 11, 1997); 62 Fed. Reg. 7186 (February 18, 1997) ("Proposing Release"). February 21, 1997 TO: SEC RULES COMMITTEE No. 20-97 UNIT INVESTMENT TRUST COMMITTEE No. 10-97 RE: SEC PROPOSAL RELATING TO DETERMINATION OF WHETHER AN OFFERING DOCUMENT IS SUBJECT TO STATE REGULATION

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As required by the National Securities Markets Improvement Act of 1996 ("NSMIA"), the Securities and Exchange Commission has issued a proposed definition of the phrase "prepared by or on behalf of the issuer" in Section 18 of the Securities Act of 1933. A copy of the proposal is attached\* and it is summarized below. Comments on the proposal are due on March 20, 1997. Please call Craig Tyle at (202) 326-5815 or Tami Cain Reed at (202) 326-5825 by Tuesday, March 4th if there are issues you would like the Institute to consider addressing in its comment letter. Section 18 reallocates regulatory responsibility for securities offerings between federal and state regulators based on the nature of the security or offering. It preempts state laws with respect to registration or qualification of "covered securities," as that term is defined in Section 18(b). ("Covered securities" include securities issued by a registered investment company.) In addition, Section 18 prohibits states from directly or indirectly prohibiting, limiting or imposing any conditions on the use of any offering document for a covered security that is "prepared by or on behalf of the issuer." Section 18(d)(2) requires the SEC to adopt a definition of "prepared by or on behalf of the issuer" as used in Section 18 not later than six months after the October 11, 1996 enactment of the NSMIA. Under the proposed definition, an offering document would be deemed to be "prepared by or on behalf of the issuer" for purposes of Section 18 if (1) its production is authorized by the issuer and (2) it is prepared by any of certain specified persons, including a director, officer, general partner, employee, affiliate, underwriter, account or agent of the issuer, or any agent or representative of the foregoing persons. The Proposing Release indicates that in the case of a registered investment company, an agent of the issuer generally would include the investment adviser or "any other agent that performs administrative functions on behalf of the company." 2Comments are requested on whether the definition should be expanded or narrowed by adding persons to or eliminating persons from the list; whether it would be sufficient simply to state that the person must be an agent or representative of the issuer; whether the definition should extend to offering documents approved by the issuer but prepared by a person that does not have a

managerial, employment or other agency relationship with the issuer; and whether there are any parties (e.g., underwriters) as to which the issuers authorization should be implied. Frances M. Stadler Associate Counsel Attachment (in .pdf format)

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