The Asset Management Industry
SERVING INDIVIDUAL INVESTORS
INVESTMENT COMPANY INSTITUTE

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DEPARTMENT OF LABOR LETTER CONCERNING PROXY VOTING RESPONSIBILITIES UNDER ERISA

- 1 - January 25, 1990 TO: PENSION MEMBERS NO. 3-90 INVESTMENT ADVISER MEMBERS NO. 5-90 INVESTMENT ADVISER ASSOCIATE MEMBERS NO. 5-90 RE: DEPARTMENT OF LABOR LETTER CONCERNING PROXY VOTING RESPONSIBILITIES UNDER ERISA _____ As you know, the Department of Labor issued a letter in February 1988 describing the Department's views concerning the fiduciary obligations of investment managers under the Employee Retirement Income Security Act ("ERISA") with respect to the voting of proxies on plan-owned stock. (See Institute Memorandum to Pension Members No. 15-88, Investment Adviser Members No. 9-88, and Investment Adviser Associate Members No. 8-88, dated March 3, 1988). The Department stated that the voting of proxies appurtenant to the shares is a fiduciary act because such voting is part of managing plan assets. According to the 1988 letter, section 403(a) of ERISA requires that the trustee of an employee benefit plan must have exclusive authority and discretion to manage and control plan assets, unless the trustee is explicitly subject to the direction of a named fiduciary or the authority to manage the plan assets is delegated by the named fiduciary to an investment manager. If such an investment manager is appointed, the Department takes the position that the investment manager must decide how to vote any proxies with respect to plan-owned shares unless, in delegating management authority, the named fiduciary reserves to itself or to the trustee the right to vote proxies. The Department also stated that the named fiduciary must monitor the activities of the manager, including the voting of proxies. This monitoring requirement necessitates that the investment manager keep accurate records as to the voting of proxies. Attached is a copy of a letter from the Department providing further guidance on three specific issues concerning proxy voting raised in a letter from Institutional Shareholder Services, Inc., a copy of which is also attached. First, the - 2 - Department's letter addresses the effect of language in the investment management agreement upon the allocation of proxy voting responsibility. If the investment management agreement provides that the manager is not required to vote proxies but does not expressly preclude the manager from voting, the Department takes the position that a delegation to the manager of proxy voting responsibility will have occurred. On the other hand, if either the plan or the investment management contract (in the absence of a specific plan provision) expressly precludes the investment manager from voting proxies, then proxy voting will be the trustee's exclusive responsibility. Second, the letter states that the fiduciary who has the authority to vote proxies has an obligation under ERISA to take "reasonable steps under the particular circumstances" to ensure that proxies are received. Accordingly, the investment manager must determine whether it has developed

procedures for reconciling proxies which satisfy its fiduciary obligations. If the investment manager determined to make no effort to reconcile proxies, however, the manager would fail to satisfy its fiduciary obligations under ERISA. Finally, the letter discusses the monitoring responsibilities of the named fiduciary and the corresponding recordkeeping responsibilities of the investment manager. In order for the named fiduciary to carry out his fiduciary responsibilities, he must be able to review periodically not only the manager's voting procedures but also the actions taken in individual situations. The named fiduciary must carry out this responsibility without regard to his relationship to the plan sponsor. We will keep you informed of further developments. Kathy D. Ireland Associate General Counsel Attachments

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