

**MEMO# 1040**

March 15, 1989

## **INSTITUTE COMMENTS ON SEC PROPOSED AMENDMENTS TO SECTION 16 RULES**

March 15, 1989 TO: SEC RULES MEMBERS NO. 18-89 CLOSED-END FUND MEMBERS NO. 16-89 INVESTMENT ADVISER MEMBERS NO. 22-89 INVESTMENT ADVISER ASSOCIATE MEMBERS NO. 21-89 RE: INSTITUTE COMMENTS ON SEC PROPOSED AMENDMENTS TO SECTION 16 RULES \_\_\_\_\_ In December, the SEC proposed a number of substantive changes to the rules under section 16 of the Securities Exchange Act of 1934. (See Institute memorandum to Closed-End Fund Committee No. 35-88, dated December 15, 1988; and Institute memorandum to SEC Rules Committee No. 12-89, dated February 6, 1989.) Under that statutory provision, a beneficial owner of more than ten percent of any class of equity security registered under section 12 of the Exchange Act is treated as an insider subject to the reporting obligations of section 16(a) and the short swing profit recovery rules of section 16(b). The proposed rules include a new two part definition for determining beneficial ownership. Either or both of these proposed rules could be interpreted to attribute more than ten percent beneficial ownership to an investment adviser managing investment companies and other discretionary accounts. Under the first proposed rule, an investment adviser could be deemed to be a more than ten percent beneficial owner of a specific security pursuant to an attribution analysis under section 13(d) of the Exchange Act. The second test could attribute to an adviser ownership of any security in which he were deemed to have a direct or indirect pecuniary interest. In the attached comment letter, the Institute requests clarification of the proposed rules relating to the determination of ten percent beneficial ownership to exclude from attribution to an adviser those shares held by an investment company or account managed by the adviser in the ordinary course of his business, provided that the shares were not acquired for the purpose of influencing or exercising control. The letter notes that an analysis importing into section 16 the attribution rules of section 13(d) should not ignore the different policy goals of section 13(d) and section 16. If, however, the Commission concludes that the rules of section 13(d) should be applied to determine beneficial ownership under section 16, the distinction drawn in rule 13d-1 between those who invest for the purpose of control and those who do not should be maintained. The letter also requests confirmation of the Institute's view that an adviser managing investment companies and other accounts typically would not have a sufficient pecuniary interest in the securities held by those companies and accounts to be deemed their beneficial owner. Clarification of the treatment of investment companies organized as business trusts as beneficial owners is also requested in the Institute's letter. Such a company should not be deemed an insider under section 16 solely by virtue of the insider status of one or more trustees of the fund. We will keep you informed of developments. Catherine L. Heron

Copyright © by the Investment Company Institute. All rights reserved. Information may be abridged and therefore incomplete. Communications from the Institute do not constitute, and should not be considered a substitute for, legal advice.