

**MEMO# 1363**

August 23, 1989

## **SEC REPROPOSES AMENDMENTS TO RULES UNDER SECTION 16**

- 1 - August 23, 1989 TO: SEC RULES COMMITTEE NO. 51-89 CLOSED-END FUND COMMITTEE NO. 35-89 UNIT INVESTMENT TRUST COMMITTEE NO. 53-89 INVESTMENT ADVISERS COMMITTEE NO. 35-89 RE: SEC REPROPOSES AMENDMENTS TO RULES UNDER SECTION 16 \_\_\_\_\_ The SEC has repropoed for comment amendments to the rules under Section 16 of the Securities Exchange Act of 1934, governing reporting and short-swing profit recovery of certain insider transactions. The Institute filed two comment letters on the original proposal. (See Memorandum to SEC Rules Members No. 18-89, Closed-End Fund Members No. 16-89, Investment Adviser Members No. 22-89 and Investment Adviser Associate Members No. 21-89, dated March 15, 1989 and Memorandum to Unit Investment Trust Members No. 24-89, dated April 20, 1989.) The revised proposal would allow investment advisers eligible to file ownership reports on Schedule 13G to exclude customer account holdings in the determination of ten percent ownership status, as suggested by the Institute in its comment letters. A brief summary of the repropoed rules pertaining to beneficial ownership status follows.

**Determination of Insider Status** In order to determine who is a ten percent holder, the rules under Section 13(d) of 1934 Act (voting or investment power) would govern. The reproposal clarifies that the "pecuniary interest test", i.e., attribution of ownership of a security in which a person has a direct or indirect pecuniary interest, is only to be applied once a person has already been determined to be an insider. (Proposed Rule 16a-1) In addition, any institution eligible to file ownership reports on Schedule 13G, such as a registered investment adviser, (a "13G Institution") would not be deemed to own beneficially - 2 - securities held in fiduciary accounts. Thus, a registered - 3 - investment adviser generally would not have to aggregate holdings in affiliated investment companies and private accounts for the purpose of determining whether it is a ten percent holder of a class of equity securities. (Pursuant to Rule 13d-1(b)(1)(i), only securities acquired in the ordinary course of business and not with the purpose nor with the effect of changing or influencing the control of the issuer can be reported on Schedule 13G.) The SEC is requesting comment on whether the proposed rules should be amended to require reporting by 13G Institutions if more than ten percent of a class of equity securities is held for the account of a single customer or "group" under Rule 13d-2. Comment is also requested on whether a 13G Institution should be precluded from having a single person or investment committee make the investment decisions for each fiduciary account in order to be exempt from the Section 16 reporting requirements.

**Pecuniary Interest Test** The proposed rules would provide that an insider beneficially owns those securities in which it has a direct or indirect pecuniary interest, i.e., the opportunity to profit, directly or indirectly, from a transaction in the securities. This test is only applied if the person has already been determined to be an insider. The rules would provide a safe harbor for certain

management fees. A management fee would not represent an indirect pecuniary interest in a class of securities if the fee is based on net capital gains or portfolio appreciation for a period of one year or more and the securities in question do not account for more than ten percent of the portfolio. (Proposed Rule 16a-1(a)(2)(ii)(C)) Comment is requested on whether ten percent is a proper threshold. Attribution of Insider Status to Trusts The original proposal would have attributed insider status to any trust for which a trustee was an insider. The Institute had requested clarification that an investment company organized as a trust would not be deemed an insider solely due to the fact that one or more trustees were insiders. The revised proposed rules would not attribute insider status to trusts with insider trustees provided the trustee is a 13G Institution that acts as a trustee in the ordinary course of business. (Proposed Rule 16a-8(b)) - 4 - \* \* \* Excerpts from the release are attached. Comments on the proposed rules are due November 1, 1989. Please let me know what comments you would like the Institute to make by September 28, 1989. Craig S. Tyle Assistant General Counsel Attachment

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