

MEMO# 1824

April 5, 1990

INSTITUTE PETITION FILED IN INDEX PARTICIPATIONS CASE

April 5, 1990 TO: BOARD OF GOVERNORS NO. 23-90 RE: INSTITUTE PETITION FILED IN INDEX PARTICIPATIONS CASE _____ The Institute has filed a conditional petition for certiorari with the U.S. Supreme Court in the case concerning "index participations". A copy of the petition (without appendices) is attached. "Index participations" (or "IPs") were products developed by certain stock exchanges that provided investors with interests in a selected portfolio of stocks (such as the S&P 500) and enabled them to receive capital gains or losses and dividends based on the underlying portfolio. The Institute had challenged the SEC's order approving the IPs, arguing that they constituted investment company securities and that the SEC erred in not giving effect to the Investment Company Act in its consideration of the product. (See Memorandum to Board of Governors No. 35-89, dated June 2, 1989). The SEC's order was also challenged by two futures exchanges, which argued that IPs constituted futures, rather than securities, and thus could be traded only on a futures exchange. Last August, the U.S. Court of Appeals for the Seventh Circuit ruled in favor of the futures exchanges. The court did not reach the question of whether IPs were investment company securities. (See Memorandum to Board of Governors No. 51-89, dated August 22, 1989.) Three stock exchanges, along with the Options Clearing Corporation, have filed cert. petitions requesting that the Supreme Court review the Seventh Circuit's decision. The Institute's petition requests that, if the Supreme Court grants the petition filed by the stock exchanges and the OCC, the Court either (1) remand the case to the Seventh Circuit to consider the Investment Company Act issues if the Supreme Court reverses the lower court's decision or (2) consider the Investment Company Act issues itself along with the issues raised by the exchanges and the OCC. We will keep you informed of developments. Craig S. Tyle Associate General Counsel Attachment