

**MEMO# 9283**

September 29, 1997

# **INSTITUTE LETTER IN RESPONSE TO NASDR REQUEST FOR COMMENT ON RELATED PERFORMANCE INFORMATION**

\* See Memorandum to SEC Rules Committee No. 78-97 and Advertising Subcommittee No. 28-97, dated August 7, 1997. [9283] September 29, 1997 TO: ADVERTISING SUBCOMMITTEE No. 33-97 SEC RULES COMMITTEE No. 94-97 RE: INSTITUTE LETTER IN RESPONSE TO NASDR REQUEST FOR COMMENT ON RELATED PERFORMANCE INFORMATION

The Institute recently filed with NASD Regulation, Inc. the attached comment letter in response to NASDRs request for comment on issues raised by allowing mutual fund advertising and sales literature to include the presentation of performance of other substantially similar mutual funds and unregistered funds and accounts managed by the same investment adviser or portfolio manager.\* The letter states that NASDR should permit mutual fund sponsors to include as part of an advertised funds performance record the performance of an unregistered predecessor entity (as permitted in the MassMutual no-action letter), but only if the predecessor entity was not created for the purpose of establishing a track record and was managed in all material respects equivalently to the manner in which the advertised fund is managed. In addition, any such performance should be accompanied by information reflecting the performance of the advertised fund after its conversion once the fund has been in existence for at least a year. The letter states that NASDR should not permit sales material to include performance of another mutual fund previously managed by the advertised funds portfolio manager while he or she was with another investment advisory firm (the Bramwell no-action letter fact pattern). The letter further states that NASDR should allow mutual fund sales material to include the performance of substantially similar private accounts and mutual funds managed by the same investment adviser (or under certain circumstances, an affiliate of the adviser), subject to a number of conditions. In addition to requiring the conditions that were contained in the Nicholas-Applegate II, ITT-Hartford, and GE Funds no-action letters, NASDR should: (1) require any such performance information to be presented less prominently than the advertised funds own performance; (2) prohibit references to related performance information in headlines; (3) prohibit rankings based on related performance information; (4) require disclosures of significant differences between the advertised fund and the private accounts and other mutual funds, including differences in advisory personnel; (5) generally require all private account performance to be computed on a composite basis, adjusted for the advertised funds current fees, and otherwise in accordance with the standards established by the Association for Investment Management and Research; (6) require any related performance information to be as current as the advertised funds performance; and (7) require all private accounts with investment objectives, policies and strategies that are substantially

similar to those of the advertised fund to be included in the composite (to avoid "cherry-picking"). Joseph P. Savage Assistant Counsel Attachment

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