INVESTMENT COMPANY INSTITUTE

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SEC DIVISION PERMITS DEDUCTION OF MODEL FEE IN PERFORMANCE DATA ADVERTISEMENTS

December 11, 1989 TO: INVESTMENT ADVISER ASSOCIATE MEMBERS NO. 59-89 INVESTMENT ADVISER MEMBERS NO. 59-89 RE: SEC DIVISION PERMITS DEDUCTION OF MODEL FEE IN PERFORMANCE DATA ADVERTISEMENTS ____ On November 27, 1989, the SEC's Division of Investment Management, in response to the Securities Industry Association's request for no-action assurance concerning investment adviser advertising, stated that the Division would not recommend enforcement action under Rule 206(4)-1(a)(5) of the Advisers Act if investment advisers advertise historical net performance results by deducting a "model fee" rather than the actual fee charged during the time period portrayed. The Division's response permits the use of a model fee, subject to certain conditions and only until May 27, 1990. A copy of the SIA's no- action request and the Division's response are attached. As we previously informed you, the Division of Investment Management in 1986 issued a no-action response to the Clover Capital letter in which the Division stated that investment advisory performance data must be provided net of investment advisory fees. (See Memorandum to Investment Adviser Members No. 33-86 and Investment Adviser Associate Members No. 36-86, dated November 24, 1986). In 1988, the Institute was successful in obtaining an exemption from the Clover Capital no-action response provided that gross performance data is presented on a one-on-one basis, through a confidential and private communication, and that certain disclosures are made, including a discussion of the effect over a period of years that compounding could have on investment advisory fees. (See Memorandum to Investment Adviser Members No. 42-88 and Investment Adviser Associate Members No. 43-88, dated October 3, 1988). The Division's recent no-action response does not affect the Division's 1988 response. The SIA's November 7, 1989 letter recommended that a model fee be used in place of an actual fee in calculating net performance results because many advisers found it difficult or impossible to reconstruct past performance data in a way that reflected the fees actually charged to specific accounts. The SIA proposed including a legend indicating that "the performance figures do not reflect the deduction of investment advisory fees actually charged the account. However, the performance figures do reflect the deduction of model advisory fees." In the Division's response letter to the SIA, the Division permitted the use of a model fee until May 27, 1990, provided the following two principles are met. First, if the adviser offered more than one fee schedule for a given size account during the periods portrayed, the appropriate fee for each period is the fee for the given account size derived from the schedule most often selected by clients. Second, if the adviser includes performance from different size accounts, the appropriate fee for each period is the highest fee charged during that period to any account included in the performance portrayal. Through the no-action position, the Division has granted advisers a six-month grace period, until May 27, 1990, to advertise historical net performance data by deducting a "model fee" as described above, instead of the actual advisory fee. Beginning not later than May 27, 1990, however, any advertisement that includes data concerning performance after that date must reflect deduction of an adviser's actual fees. Thus, if the period advertised includes performance data before and after May 27, 1990, the adviser should include appropriate disclosure explaining that the results reflect both the deduction of a "model fee" and the deduction of the adviser's actual fee. Robert L. Bunnen, Jr. Assistant General Counsel Attachment

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