

MEMO# 12966

December 22, 2000

REVISED DRAFT OF ICI COMMENT LETTER ON RELATED PERFORMANCE INFORMATION; COMMENT DEADLINE EXTENDED

[12966] December 22, 2000 TO: ADVERTISING COMPLIANCE ADVISORY COMMITTEE No. 33-00 SEC RULES COMMITTEE No. 135-00 RE: REVISED DRAFT OF ICI COMMENT LETTER ON RELATED PERFORMANCE INFORMATION; COMMENT DEADLINE EXTENDED The Securities and Exchange Commission has extended the deadline for filing comments on NASD Regulation, Inc.'s proposed new Interpretive Material 2210-5 and conforming amendments to existing Rule 2210 and IM-2210-2 to permit certain types of related performance information in mutual fund sales material.¹ The SEC expects the notice announcing this extension to appear in the Federal Register during the week of December 25th. The new filing deadline for comments will be 21 calendar days from the date the notice of extension is published in the Federal Register. In light of this extension, we have attached for your review a revised draft of the Institute's comment letter on NASDR's related performance proposal. Please provide your comments on the draft letter to the undersigned no later than close of business Friday, January 5, 2001 (phone: 202/326-5819; fax: 202/326-5839; e-mail: dvanslyke@ici.org). The draft letter is substantially similar to the draft circulated on December 11, 2000,² but there is one change we would like to highlight. To avoid unduly restricting funds from advertising related performance information, the letter continues to recommend deleting the proposed prohibition on material differences between the portfolios to which the related performance relates and the advertised fund (General Standard (d)(1)). However, the letter no longer recommends requiring disclosure of any such material differences, based on our judgment that it is unclear, at best, how funds would be able to comply with such an ambiguous disclosure requirement. In addition, during the comment process an issue arose regarding the use of clone performance. Proposed IM-2210-5(a) would require a clone and the original fund to have the 1 See Memorandum to Advertising Compliance Advisory Committee No. 31-00 and SEC Rules Committee No. 127-00, dated November 16, 2000 (transmitting the SEC's request for comment). 2 See Memorandum to Advertising Compliance Advisory Committee No. 32-00 and SEC Rules Committee No. 131-00, dated December 11, 2000 (transmitting ICI comment letter). 2same investment adviser and subadviser in order to advertise clone performance. Some members believe that the rule should permit a clone and an original fund to have different investment advisers, as long as the portfolio management-related functions are completely delegated to the subadviser. Other members, however, believe that a difference in investment advisers should not be permitted because to do so could raise issues the

letter advocates against in the discussion of Bramwell-type3 performance. For example, it may be difficult to ensure that all functions related to performance were performed by the subadviser, and a difference in advisers would permit two different funds to advertise the same performance record. The revised draft letter does not address this issue; however, we would appreciate receiving members' comments on it. Doretha VanSlyke Zornada Assistant Counsel Attachment Attachment (in .pdf format) 3 See Bramwell Growth Fund (pub. avail. August 7, 1996) (permitting the presentation of the performance of a mutual fund that was previously managed by of the offered fund's portfolio manager).

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