

MEMO# 2552

February 22, 1991

INSTITUTE SUBMITS AMICUS BRIEF IN FUND PROXY CASE [AMICUS]

February 22, 1991 TO: BOARD OF GOVERNORS NO. 14-91 SEC RULES COMMITTEE NO.
12-91 RE: INSTITUTE SUBMITS AMICUS BRIEF IN FUND PROXY CASE

The Institute has submitted an amicus curiae brief to the Supreme Court in the case *Kamen v. Kemper Financial Services, Inc.* The *Kamen* case involved a money market fund shareholder's claims for excessive fees under Section 36(b) and that the fund's proxy statement was misleading. The U.S. Court of Appeals for the Seventh Circuit had affirmed the dismissal of the proxy claim on the grounds that the plaintiff was required, but failed, to make a demand on the fund's board of directors. (See Memorandum to SEC Rules Members, No. 60-90, dated August 16, 1990.) The court's decision abolished the "futility" exception to the demand requirement in the Seventh Circuit. (The futility exception excuses demand in a derivative suit where it can be shown that a demand on the board would be futile because the board, for reasons of bias or otherwise, would be unwilling to proceed with the suit directly.) The Supreme Court granted certiorari on this claim. The Institute's brief, a copy of which is attached, argues that the plaintiff failed to establish that demand in this case would have been futile. In addition, the Institute argues that the futility exception is generally inappropriate in cases involving investment companies given the statutory role of independent directors. The Institute's brief also responds to an argument raised by the Securities and Exchange Commission in its amicus brief. The Commission argued that proxy claims were necessarily direct claims, as opposed to derivative claims (which require demand). The Institute notes that since the alleged proxy misstatements relate only to the advisory fees charged, the claim is barred since Section 36(b) provides an exclusive remedy. If, however, the plaintiff was seeking a separate remedy, the Institute argues that the claim would be derivative in nature. Craig S. Tyle Associate General Counsel Attachment