

MEMO# 3414

January 7, 1992

OUTSTANDING ISSUES UNDER NASD ASSET-BASED SALES CHARGE PROPOSAL AND RULE 12B-1

January 7, 1992 TO: SEC RULES COMMITTEE NO. 1-92 RE: OUTSTANDING ISSUES UNDER
NASD ASSET-BASED SALES CHARGE PROPOSAL AND RULE 12b-1

As you know, the Institute recently filed a supplemental submission with the Securities and Exchange Commission relating to the NASD's proposal to regulate asset-based sales charges under its Rules of Fair Practice ("NASD Proposal"). (See Memorandum to SEC Rules Committee No. 77-91, dated December 23, 1991.) In the event that the SEC approves most, if not all, of the NASD Proposal in the near future, there are several related outstanding issues that require attention. As further described below, these include both issues under the NASD Proposal and questions about the status of Rule 12b-1. The Institute plans to form an ad hoc task force to address these matters. In addition, they will be discussed at the January 14 meeting of the SEC Rules Committee. Issues Under the NASD Proposal In its May 10, 1991 comment letter to the SEC recommending approval of the NASD Proposal (see Memorandum to SEC Rules Members No. 30-91, dated May 14, 1991), the Institute supported the NASD's recommendation that the proposed rule change become effective one year after its approval by the SEC because, among other things, this transition period would provide an opportunity for the industry to work with the NASD to iron out any remaining technical issues. The Institute suggested that this might be accomplished through an NASD question-and-answer release. Issues Regarding Rule 12b-1 Another area for consideration is whether any changes to Rule 12b-1 are warranted in view of the SEC's expected approval of the NASD Proposal. In this regard, we note that the SEC proposed sweeping amendments to Rule 12b-1 in June 1988 that were never adopted or withdrawn. (The Commission has indicated that it is considering the comments received on the proposed amendments as part of the ongoing 1940 Act study.) As you may recall, the Institute supported certain aspects of the 1988 proposed amendments and strongly opposed others. Although several of the changes supported by the Institute are addressed in the NASD Proposal, the Institute also favored adoption of those amendments that would: make explicit that compensation paid under Rule 12b-1 plans must be "within the range of what would have been negotiated at arm's length" in light of all the surrounding circumstances; clarify that, for purposes of Rules 12b-1 and 17d-3, each separate series of a series fund should be treated as a separate fund; and provide exemptive relief enabling funds with 12b-1 plans to enter into joint arrangements for the distribution of their shares. At the meeting on January 14, the Committee will discuss whether to recommend these and/or other changes to Rule 12b-1. For your convenience, copies of Rule 12b-1 as currently in effect and as proposed to be amended are attached. Miscellaneous Another

question to be considered is whether funds will be required to amend their 12b-1 plans to comply with the NASD Proposal and, if so, whether a shareholder vote is necessary. Thus, an issue exists as to whether a request for industry-wide relief would be appropriate in this regard, and/or whether there are other areas where regulatory relief may be needed.

Formation of Ad Hoc Task Force We plan to discuss these and related issues at the January 14 SEC Rules Committee meeting. In addition, as noted above, the Institute plans to form an ad hoc task force to address outstanding issues. A sign-up sheet will be circulated at the meeting. If you would like to participate on the task force but will not be able to attend the January 14 Committee meeting, please call me at (202) 955-3514. Frances M. Stadler
Assistant General Counsel Attachment

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