MEMO# 9226

September 8, 1997

REVISED NASD NON-CASH COMPENSATION PROPOSAL

1 SEC Release No. 34-38993 (August 29, 1997), 62 Fed. Reg. 47080 (September 5, 1997). 2 See Memorandum to Closed-End Fund Committee No. 18-96, SEC Rules Committee No. 72-96 and Unit Investment Trust Committee No. 27-96, dated July 10, 1996. 3 A reference in the July 1996 proposal to "persons associated with a member and, if appropriate, their guests" was dropped from this subsection of the rule. It still appears, however, in the text of the release describing the rule provision. [9226] September 8, 1997 TO: CLOSED-END INVESTMENT COMPANY COMMITTEE No. 32-97 SEC RULES COMMITTEE No. 87-97 UNIT INVESTMENT TRUST COMMITTEE No. 55-97 RE: REVISED NASD NON-CASH COMPENSATION PROPOSAL ____ The Securities and Exchange Commission has published for comment a revised version of the NASDs proposed amendments to its rules governing non-cash compensation. A copy of the SEC release is attached.1 The new version is very similar to the NASD proposal the SEC issued for comment in July 1996.2 The principal differences between the two proposals are highlighted in the summary description of the revised proposal below. Comments on the attached proposed amendments must be filed by September 26th. If there are issues you would like the Institute to consider addressing in its comment letter, please contact me at (202) 326-5822 or by e-mail to frances@ici.org by September 15th. Like the July 1996 proposal, the attached proposal would prohibit most non-cash compensation, subject to specified exceptions. The proposal has been revised, however, to prohibit an NASD member or person associated with a member not only from accepting any non-cash compensation (subject to the specified exceptions), but also from making payments or offers of payments of such compensation. The types of non-cash compensation proposed to be permitted would remain the same and include: (1) gifts of up to $100 that are not preconditioned on achievement of a sales target; (2) an occasional meal, ticket to a sporting event or the theater, or comparable entertainment which is neither so frequent nor so extensive as to raise any question of propriety and is not preconditioned on achievement of a sales target;3 (3) payment or reimbursement in connection with training or educational meetings, subject to several conditions; (4) in-house incentive programs, subject to various conditions, including that the 4 The continued reference to the "cash sales incentive provisions" appears to be an error, as those provisions were deleted from the proposal. 2 program must give equal credit for each sale of an investment company security. In addition, as under the July 1996 proposal, there is a general exception for arrangements that are permitted by an SEC rule, regulation, interpretive release, or interpretive or no-action letter and that meet certain other conditions. In response to comments received on the July 1996 proposal, the NASD has deleted provisions that would have prohibited the receipt by associated persons of cash compensation preconditioned on the achievement of a sales target unless the program satisfied conditions similar to those that apply to in-house non-

cash incentive programs. (The stated purpose of this provision was to prevent circumvention of the non-cash incentive prohibition.) Like the July 1996 proposal, the attached proposal would not change the existing prospectus disclosure requirements with respect to cash compensation, and non-cash compensation would not be subject to prospectus disclosure requirements. The SEC release discusses in detail the NASDs intention to solicit comments separately on regulation of cash compensation arrangements. It states that "[t]he NASD will reconsider the appropriateness of prospectus disclosure in light of the Commissions recent initiatives for simplified prospectus disclosure as well as the responses to NASDs publication of a Request for Comment on cash compensation issues." (Footnote omitted.) The attached proposal includes the same recordkeeping requirements for cash and non- cash compensation that were included in the July 1996 proposal. The SEC release provides additional guidance, however, on the records required with respect to non-cash compensation. It states that the proposed requirement to disclose the "nature" of non-cash compensation means that records should include, among other things, disclosure of whether the compensation is paid in connection with a sales incentive program or a training and education meeting. The records should "retain all information necessary to determine that the rule is being complied with." In the case of compensation paid in connection with a training or education meeting, this would include, for example, the date and location of the meeting, the fact that attendance at the meeting is not conditioned on the achievement of a sales target, the fact that payment is not applied to the expenses of guests of associated persons of the member, "and any other information required to enable NASD Regulation to determine compliance with the rule." If the SEC approves the proposed amendments, they will be effective on the date announced in an NASD Notice to Members, which will be no more than 60 days after SEC approval. As in the case of the 1996 proposal, the release states that, "[w]ith respect to the non- cash and cash sales incentive provisions,4 no new sales incentive programs may be commenced" after the effective date. (As we indicated last year, presumably new programs that satisfy the rules conditions could be commenced after the effective date.) Ongoing programs on the effective date could continue for no more than six months after the effective date (i.e., sales could continue to be applied to those programs). In addition, "non-cash and 3cash sales incentives" earned by associated persons could be received for up to twelve months following the expiration of the six-month implementation period. Frances M. Stadler Associate Counsel Attachment (in .pdf format)
