The Asset Management Industry
SERVING INDIVIDUAL INVESTORS
INVESTMENT COMPANY INSTITUTE

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SEC ADOPTS REGULATION S, SOLICITS COMMENTS ON EXTENDING AVAILABILITY TO OPEN-END FUNDS AND UNIT INVESTMENT TRUSTS

May 4, 1990 TO: INVESTMENT ADVISER ASSOCIATE MEMBERS NO. 15-90 INVESTMENT ADVISER MEMBERS NO. 16-90 SEC RULES MEMBERS NO. 33-90 UNIT INVESTMENT TRUST COMMITTEE NO. 22-90 INTERNATIONAL FUNDS TASK FORCE NO. 6-90 CLOSED-END FUND MEMBERS NO. 17-90 RE: SEC ADOPTS REGULATION S, SOLICITS COMMENTS ON EXTENDING AVAILABILITY TO OPEN-END FUNDS AND UNIT INVESTMENT TRUSTS

The SEC has adopted Regulation S, which is intended to clarify the extraterritorial application of the registration provisions of the Securities Act of 1933. A copy of the adopting release is attached. Regulation S was originally proposed in June 1988 and was reproposed in July 1989. The Institute submitted comment letters supporting the adoption of Regulation S and recommending certain revisions, several of which were incorporated into the Regulation as adopted. Regulation S became effective on May 2, 1990. Generally, the registration provisions of the 1933 Act do not apply to offers and sales of securities that take place outside of the United States. Regulation S creates two non- exclusive safe harbors (an "issuer safe harbor" and a "resale safe harbor") from these registration provisions for certain offers or sales of securities, provided that various conditions are satisfied. Two conditions that must be met with respect to all offers and sales of securities under Regulation S are: (1) the offer or sale must be made in an "offshore transaction" and (2) there can be no "directed selling efforts" in the United States. As the Institute requested in its comment letter on reproposed Regulation S, the adopting release clarifies that the placement of a buy order by an authorized employee of a U.S. corporation or partnership while abroad would satisfy the requirement under the definition of "offshore transaction" that the buyer be outside of the United States. Similarly, if the buyer is an investment company, placement of a buy order outside the United States by an authorized employee of the investment company or its adviser would satisfy this requirement. The adopting release also reflects the Institute's recommendation that the Commission codify a staff no-action position that under certain circumstances, private foreign offerings in the U.S. will not be integrated with public offerings concurrently made abroad. Thus, the release specifies that offshore transactions made in compliance with Regulation S will not be integrated with contemporaneous registered domestic offerings or domestic offerings exempt from registration. As the Institute suggested in its comment letter, Regulation S also has been revised to clarify that the definition of "U.S. person" excludes, among other things, any discretionary, rather than custodial, account held by a fiduciary for a non-U.S. person. The adopting release states that Regulation S will be

available with respect to offers and sales of securities issued by registered closed-end investment companies but not securities of registered open-end investment companies or unit investment trusts. The release requests comments as to whether application of Regulation S should be extended to mutual funds and unit investment trusts and, if so, how such extension should be accomplished. In previous comment letters, the Institute recommended that Regulation S be available with respect to offers and sales of securities issued by all registered investment companies. The release at pages 85-87 requests comments on a number of specific questions relating to the possible extension of Regulation S to offers and sales of securities issued by registered mutual funds and unit investment trusts. These include (1) whether the concerns outlined in Securities Act Release No. 33-5068 (June 23, 1970) and the release proposing Regulation S (for example, the fear that foreign investors would seek redemptions requiring the sale of portfolio securities because of a later realization that they were inadequately informed about their investment) continue to be significant and how they can be addressed, (2) whether this concern about redemptions could be addressed adequately by relying on the antifraud provisions of the 1933 Act and disclosure requirements of the foreign country in which the securities are sold, (3) whether application of Regulation S would meet the legitimate expectations of investors and foreign regulators when U.S. mutual funds are offered and sold abroad, (4) whether the restrictions and procedures required by the third category of the issuer safe harbor of Regulation S are appropriate for investment company securities or whether additional, fewer or different restrictions and procedures are warranted (for example, should offering documents be required to include a description of the substantive requirements of the 1940 Act, a description of how redemption procedures differ from those of similar investment vehicles in the country where the offer is made, and risk factor disclosure?), (5) whether delivery of a disclosure document should be required even if not required in the jurisdiction where the offer and sale are made, and (6) whether there should be rules or guidelines relating to the use of advertising and sales literature in connection with offers and sales of mutual fund and unit investment trust securities under Regulation S. Comments on extending the application of Regulation S to offers and sales of registered open-end investment companies and unit investment trust are due by June 25, 1990. Please provide me with any comments you may have by June 8, 1990 . Frances M. Stadler Assistant General Counsel Attachment

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