

**MEMO# 18489**

February 2, 2005

## **INSTITUTE LETTER ON SECURITIES ACT REFORM PROPOSALS**

[18489] February 2, 2005 TO: CLOSED-END INVESTMENT COMPANY MEMBERS No. 8-05 EQUITY MARKETS ADVISORY COMMITTEE No. 10-05 FIXED-INCOME ADVISORY COMMITTEE No. 4-05 SEC RULES MEMBERS No. 21-05 RE: INSTITUTE LETTER ON SECURITIES ACT REFORM PROPOSALS The Institute filed a comment letter with the Securities and Exchange Commission on proposed modifications to the registration, communications, and offering processes under the Securities Act of 1933.\* The most significant aspects of the letter are summarized below, and a copy of the letter is attached. The letter reflects the views of our members as both investors and issuers. Other than the liability provisions discussed below, most of the proposals do not apply to investment companies as issuers because mutual funds are subject to a separate securities offering framework governing registration, prospectuses, and communications. The letter urges the Commission to evaluate and develop recommendations to improve the mutual fund offering and disclosure regime in the context of a comprehensive proposal focused on funds. The letter notes that the current proposals provide a constructive framework and starting point for considering such reforms.

**Liability Provisions** The proposals clarify seller liability for purposes of Sections 12(a)(2) and 17(a)(2) of the Securities Act and issuer liability under Section 12(a)(2). This aspect of the proposals would apply to the offer and sale of mutual fund shares. In view of the differences between mutual funds and other issuers, the letter recommends that the Commission reconsider its proposed interpretive rule and liability proposals as they would apply to mutual funds. Instead, the letter recommends that the Commission consider all related issues in a separate rulemaking initiative specifically tailored to funds. \* SEC Release Nos. 33-8501, 34-50624, and IC-26649 (Nov. 3, 2004), 69 Fed. Reg. 67392 (Nov. 17, 2004). See Memorandum to Closed-End Investment Company Members No. 73-04, Equity Markets Advisory Committee No. 45-04, Fixed-Income Advisory Committee No. 13-04 and SEC Rules Members No. 163-04, dated November 15, 2004 [18189].

**2 Prospectus Delivery Reforms** The letter strongly supports the proposed “access equals delivery” model for satisfying the final prospectus delivery obligations under the Securities Act. The letter notes that an “access equals delivery” model would benefit investors by facilitating tailored disclosures to investors depending on their level of investment experience and interest. For example, certain information could be provided to investors at the point of sale and other more detailed information could be made available on a public website.

**Communications During the Offering Process** The letter supports the proposals that would update and liberalize permitted offering activity and communications by substantially revising the long-standing “gun-jumping” restrictions under the Securities Act. The letter notes that the proposals would result in significant benefits to investors by encouraging issuers to provide increased information to investors on a more current and ongoing basis. Specifically, the letter supports the proposals that would create safe harbors for ongoing communications during

an offering and communications prior to filing a registration statement. The letter recommends, however, that the Commission reconsider and clarify certain conditions of the safe harbors. As a way to increase the information provided to investors, the letter also supports the proposals to permit, under specified conditions, issuers and other offering participants to use a new type of written communication called a "free writing prospectus" after the filing of the registration statement. The letter states, however, the Institute's concern with the potential cross-liability of offering participants for the free writing prospectuses of other participants. To encourage issuers and other offering participants to use free writing prospectuses, the letter recommends that the Commission clarify the circumstances under which participants in an offering could be liable for the free writing prospectuses of other participants. Jane G. Heinrichs Assistant Counsel Attachment (in .pdf format) Note: Not all recipients receive the attachment. To obtain a copy of the attachment, please visit our members website (<http://members.ici.org>) and search for memo 18489, or call the ICI Library at (202) 326-8304 and request the attachment for memo 18489.

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