

MEMO# 1264

July 17, 1989

PROPOSED RULE 144A

July 17, 1989 TO: SEC RULES COMMITTEE NO. 39-89 INTERNATIONAL FUNDS TASK FORCE NO. 5-89 INVESTMENT ADVISERS COMMITTEE NO. 27-89 UNIT INVESTMENT TRUST COMMITTEE NO. 35-89 RE: PROPOSED RULE 144A

Attached is the SEC release reproposing Rule 144A which would provide a safe harbor exemption from registration under the Securities Act of 1933 (the "1933 Act") for resales of restricted securities to specified institutional buyers. The Rule was initially proposed on October 25, 1988. (See Memorandum to SEC Rules Committee No. 69-88, International Funds Task Force No. 9-88 and Investment Advisers Committee No. 29-88, dated November 10, 1988.) The Commission has also reproposed amendments to Rules 144 and 145 to redefine the required holding period for restricted securities. As initially proposed, the Rule would have provided an exemption for three tiers of transactions. The first tier would have permitted resales to "qualified institutional buyers," while the other tiers would have allowed resales to a broader group of institutional buyers. The Commission is now proposing to implement the Rule in stages. Thus, the revised proposed Rule establishes an exemption only for transactions under the "qualified institutional buyer" tier. The reproposal includes several revisions to the "qualified institutional buyer" ("QIB") exemption as originally proposed. The most significant change is that a QIB now would be defined as an institution which had at the conclusion of its most recent fiscal year assets invested in securities that were purchased for more than \$100 million. For this purpose, the term "security" has the same meaning as under the 1933 Act. In addition, the \$100 million threshold is based on the purchase price, as opposed to the market value, of the securities. In the original proposal, QIBs were defined as institutions with total assets in excess of \$100 million. In the case of an investment company which is part of a "family of funds," the investment company's status as a QIB would be determined on the basis of the aggregate assets of the family. Under the reproposed Rule, the definition of a "family of funds" has been revised to include only funds that share the same investment adviser, while the initial proposal included two or more funds which share the same investment adviser or principal underwriter and hold themselves out to investors as related companies. The status of investment advisers as QIBs would, as originally proposed, be determined by aggregating both proprietary and discretionary assets under management. The reproposal also revokes the availability of the exemption for securities that, when issued, were of the same class as securities listed on a U.S. securities exchange or quoted on NASDAQ. In addition, issuers who are non-reporting companies under the Securities Exchange Act of 1934 will now be required under the reproposal to provide specified information to buyers. The reproposal also includes certain resale restrictions applicable to securities of non-reporting foreign private issuers sold in reliance on Rule 144A which are of the same class as securities traded in the U.S. The reproposal further revises the proposed amendments to Rules 144 and 145 to preclude "tracking" of holding periods for securities of non-reporting foreign private issuers. On a

related issue, the attached release notes that the Commission is considering revising its position that restricted securities are per se illiquid, so that if Rule 144A is adopted, mutual funds and UITs would not be required to treat such securities as illiquid for purposes of the investment limitations on purchases of illiquid securities. Under the reproposal, the determination of the liquidity of Rule 144A securities would be a question of fact for the board of directors to determine based upon the trading market for the specific security. The comment period for the reproposal ends on September 12, 1989. Please provide me with your comments for inclusion in the Institute's comment letter by August 18, 1989. Amy B. Rosenblum Assistant General Counsel Attachment

Copyright © by the Investment Company Institute. All rights reserved. Information may be abridged and therefore incomplete. Communications from the Institute do not constitute, and should not be considered a substitute for, legal advice.