

MEMO# 14462

February 14, 2002

ICI FILES COMMENT LETTER WITH SEC ON PROPOSED AMENDMENTS TO NASDR'S RULES RELATING TO COMMUNICATIONS WITH THE PUBLIC

[14462] February 14, 2002 TO: ADVERTISING COMPLIANCE ADVISORY COMMITTEE No. 7-02 CLOSED-END INVESTMENT COMPANY COMMITTEE No. 9-02 SEC RULES COMMITTEE No. 17-02 UNIT INVESTMENT TRUST COMMITTEE No. 8-02 RE: ICI FILES COMMENT LETTER WITH SEC ON PROPOSED AMENDMENTS TO NASDR'S RULES RELATING TO COMMUNICATIONS WITH THE PUBLIC As we previously informed you, in December 2001, the Securities and Exchange Commission published for comment proposed amendments to NASD Regulation, Inc.'s rules relating to communications with the public.¹ In response to the SEC's request for comment, the Institute filed the attached letter. Our letter, which is briefly summarized below, is substantially similar to the draft letter we circulated earlier this month.²

I. OVERVIEW OF COMMENT LETTER The Institute's letter generally supports the proposed revisions. It particularly notes our support for revisions in the proposal that would, for the first time, distinguish communications directed to institutional investors from those directed to retail customers and provide different regulatory treatment for each class of communications. After these general comments of support, the letter commends NASDR for incorporating many of our previous comments into the current version of the rules but recommends that the additional revisions discussed in the letter be made.

II. SUMMARY OF COMMENTS The letter divides our recommendations on the proposal into two groups - specific comments, which are directed towards individual provisions in proposed Rules 2210 and 2211, ¹ See Memorandum to Advertising Compliance Advisory Committee No. 1-02, Closed-End Investment Company Committee No. 1-02, SEC Rules Committee No. 1-02, and Unit Investment Trust Committee No. 1-02 (January 4, 2002). ² See Memorandum to Advertising Compliance Advisory Committee No. 5-02, Closed-End Investment Company Committee No. 6-02, SEC Rules Committee No. 12-02, and Unit Investment Trust Committee No. 5-02 (February 1, 2002). 2 and which include comments in our previous comment letter that have not yet been incorporated into the rules; and general comments, which relate to NASDR's regulation of communications with the public. Our specific comments include the following recommendations:

- The proposed definition of "independently prepared reprint" in Rule 2210(a)(6) should be revised to: (1) clarify the "affiliate" test applicable to an article reprint that discusses an investment company portfolio security; and (2) clarify the rule's application to excerpts.
- The requirement in proposed Rule 2210(c)(3)(A) that members file backup ranking and comparison material should be eliminated. Instead, such backup material should be filed only when requested by NASDR staff either because it is not readily available or because the member has used

ranking or comparison material inappropriately. • Proposed Rule 2210(c)(4)(B), which authorizes NASDR to impose pre-use filing requirements on members subject to certain conditions, should be revised to reinstate provisions from the current version of this rule that: (1) require NASDR to make certain findings prior to imposing such pre-use filing requirements; and (2) limit the duration of the pre-use filing requirement to a period not to exceed one year. • Proposed Rule 2210(c)(7) should be amended to exclude generic fund advertisements and shareholder reports from the rule's filing requirements. • The treatment of hypothetical illustrations of mathematical principles under Rule 2210(d)(1)(D) should be clarified. • The definition of "institutional investor" proposed in Rule 2211(a)(3) should be revised to: (1) include qualified retirement plans beyond those covered by Section 401 of the Internal Revenue Code; (2) lower the proposed \$50 million asset threshold; and (3) clarify the definition relating to persons acting solely on behalf of an institutional investor. • The definition of "existing retail customer" proposed in Rule 2211(a)(4) should be revised to clarify the scope of the rule with respect to affiliates and persons with an actual or beneficial interest in an account. Our general comments include the following two recommendations:³ • NASDR should use the adoption of these revisions as an opportunity to emphasize to its staff the need for consistent interpretation of and comment on materials prepared under the rules. • The Commission should set a date certain by which NASDR must accommodate electronic filing of advertisements and sales literature. ³ Deleted from the final letter was the general comment in the draft letter recommending that the SEC not require compliance with the revised rules for at least 90 days from their effective date. We determined that a transition period is not necessary because the proposal, if adopted, would liberalize the regulatory requirements imposed on members' communications with the public. ³ Tamara K. Reed Associate Counsel
Attachment (in .pdf format)