

MEMO# 1189

June 2, 1989

INSTITUTE BRIEF SUBMITTED IN ACTION ON INDEX PARTICIPATIONS

June 2, 1989 TO: BOARD OF GOVERNORS NO. 35-89 RE: INSTITUTE BRIEF SUBMITTED IN ACTION ON INDEX PARTICIPATIONS

Attached is a copy of the brief filed by the Institute in its action before the U.S. Court of Appeals for the Seventh Circuit challenging the approval by the Securities and Exchange Commission of "index participations". Index participations are products offered by stock exchanges that provide investors with an interest in a selected portfolio of stocks (such as the S&P 500) and enable them to receive capital gains or losses and dividends based on the underlying portfolio. In its brief, the Institute argues that the index participations constitute investment companies and that the SEC erred in not giving effect to the Investment Company Act in its consideration of these products. The Institute initially filed its Petition for Review in the Third Circuit, but the action was transferred to the Seventh Circuit, where it was consolidated with actions commenced by two futures exchanges. The future exchanges are seeking review of the SEC's actions on the grounds that the index participations are futures, rather than securities, and thus subject to regulation by the CFTC. The Court of Appeals has denied motions by the Institute and the futures exchanges for a stay of the SEC's order pending its consideration of the case, but it did order an expedited briefing schedule. Oral argument is scheduled for June 9. We will keep you informed of developments. Craig S. Tyle
Assistant General Counsel

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