

**MEMO# 1361**

August 22, 1989

## **COURT OF APPEALS FINDS IN FAVOR OF FUTURES EXCHANGES IN INDEX PARTICIPATION CASE**

- 1 - August 22, 1989 TO: BOARD OF GOVERNORS NO. 51-89 RE: COURT OF APPEALS FINDS  
IN FAVOR OF FUTURES EXCHANGES IN INDEX PARTICIPATION CASE

The U.S. Court of Appeals for the Seventh Circuit has ruled in favor of the futures exchanges and found that the "index participations" approved for trading on three exchanges by the Securities and Exchange Commission constitute futures and are thus subject to exclusive regulation by the CFTC and able to be traded only on a futures exchange. The Institute had filed a petition for review of the SEC's approval, arguing that if the index participations were in fact securities, they were investment company securities and that the SEC erred in not giving effect to the Investment Company Act in its consideration of them. (See Memorandum to Board of Governors No. 35-89, dated June 2, 1989.) The Court of Appeals did not address the Institute's argument since it found the products were futures and, thus, not subject to regulation by the SEC. However, the Court noted that the SEC's argument as to why the Investment Company Act was inapplicable (the SEC's contention that there was no "issuer") also provided an example of an attribute common to most securities that index participations lack. (The Court concluded, however, that if index participations were futures, the CFTC would have exclusive authority, whether or not they were also securities.) A copy of the opinion is attached. We will keep you informed of developments. Craig S. Tyle  
Associate General Counsel Attachment