

MEMO# 8110

August 2, 1996

REPORT OF SEC ADVISORY COMMITTEE ON CAPITAL FORMATION AND RELATED CONCEPT RELEASE

August 2, 1996 TO: CLOSED-END FUND COMMITTEE No. 24-96 SEC RULES COMMITTEE No. 86-96 RE: REPORT OF SEC ADVISORY COMMITTEE ON CAPITAL FORMATION AND RELATED CONCEPT RELEASE

_____ In February 1995, the Securities and Exchange Commission established The Advisory Committee on Capital Formation and Regulatory Processes in order to assist the SEC in evaluating the efficiency and effectiveness of the disclosure requirements under the federal securities laws relating to public offerings of securities, secondary market trading and corporate reporting. The Advisory Committee, chaired by Commissioner Steven M.H. Wallman, has published a Report recommending that the SEC establish a "company-based" registration system for corporate issuers that, among other things, would streamline the system of registration for issuers that meet certain eligibility requirements and that intend to offer their shares to the public. In conjunction with the Report, the SEC has published a Concept Release that seeks public comment on the recommendations made in the Report. A copy of the Reports Introduction and Summary and the Concept Release are attached. A copy of the full Report can be obtained from Melissa Magruder at the Institute (at 202/326-5823) or at the SECs World Wide Web site (at <http://www.sec.gov>). Comments on the Concept Release must be received by the SEC 60 days after its publication in the Federal Register. If there are any comments that you would like the Institute to include in a comment letter on the release, please contact the undersigned (at 202/326-5923 or gavis@ici.com) by September 1, 1996. The following is a brief summary of the recommendations in the Advisory Committees Report and of the SECs Concept Release. I. Advisory Committee Report The Advisory Committees primary objective was to assist the SEC in evaluating the efficacy of the regulatory process relating to the public offering of securities, securities market trading and corporate reporting. As part of its work, the Committee identified various regulatory costs and uncertainties that impede corporate issuers access to capital, including the complexities that arise from issuers need to distinguish between public and private and domestic and offshore transactions. The primary recommendation of the Committee with respect to these issues was that the SEC further its integrated disclosure system by establishing a regulatory system based on a "company registration" concept, in which the regulatory process is company-based, rather than transaction-based. The Report recommends that the SEC adopt a pilot company registration system that would be available initially only to corporate issuers that meet certain criteria (e.g., issuers with a minimum public float of \$75 million and a two-year public reporting history). If the pilot is successful, the system could be extended to smaller public companies. Under the Reports

recommendation, an eligible issuer could choose to use company registration in the following manner. The issuer could file, on a one-time basis, a short-form registration statement (deemed effective immediately) that could be used for all future types of securities offerings conducted by the issuer. The registration statement would incorporate by reference the issuers current and future reports filed under the Securities Exchange Act of 1934. At the time that the issuer wishes to offer its securities to the public, it would file transactional and updating disclosures with the SEC on a Form 8-K that would be incorporated by reference into its registration statement and subject to liability under Section 11 of the Securities Act of 1933. In "routine" securities offerings, the issuer could deliver to investors a confirmation or selling materials that incorporate information from the companys registration statement and filed reports. In "non-routine" offerings (e.g., those consisting of a single transaction increasing the companys outstanding voting securities by more than 20%), the issuer would be required to prepare and deliver a formal prospectus to investors. The issuer would be required to adopt certain "disclosure enhancements" that seek to improve the quality and timeliness of its disclosure provided to investors and markets. The Report recommends several enhancements, including the use of top management certifications or disclosure committee reports attesting to the integrity of periodic and current shareholder reports. The issuer generally would not be subject to different liability standards under the federal securities laws for the sale of securities using the company registration system. However, liability would be expanded to cover transactions by the issuer that are not now subject to Section 11 of the Securities Act, such as flowback of overseas offerings, private placements and other transactions deemed "exempt offerings."

II. Concept Release The SECs Concept Release seeks comment on the Advisory Committees Report as a whole, as well as each of its separate recommendations. The release seeks comment with respect to the following issues that either relate to or might be of interest to investment companies.

Quality of Ongoing Disclosure. The SEC solicits comments on whether a significant difference exists in the quality of disclosure between primary offering documents (issued under the Securities Act) and secondary market disclosure documents (issued under the Exchange Act). The release asks, if such a difference exists, what SEC action should be taken to address this concern? In addition, the SEC is seeking comment on whether there are particular aspects of secondary market disclosure that are in need of improvement or whether there are any enhancements that could be made to such disclosure (pp. 8-10 of the Concept Release).

Delivery of Prospectus Information to Investors. The release indicates that the prospectus delivery provisions of the federal securities laws are fulfilled in some cases by physical delivery of written prospectuses and in some cases by a mixture of physical delivery of transaction-specific information and constructive delivery (through the issuer incorporating the information by reference from filed documents) of company information. The release asks whether, with advances in technology and electronic communications, there are circumstances under which the SEC should allow issuers to constructively deliver to investors all offering information. The release indicates that, where constructive delivery is being used, "is there nevertheless a minimum amount of basic offering information not typically contained in a confirmation that the Commission should mandate be physically delivered, such as in a newly developed short-form profile prospectus, regardless of the nature of the offering or investor?" (pp. 10-13)

Timing of Delivery of Information. The release states that investors should be given sufficient time consider material information in making investment decisions. It notes that, under current SEC rules, prospectus delivery is required prior to or at the same time with the confirmation in primary offerings. Comment is solicited on whether investors in primary offerings by reporting companies receive transactional and material developments information in the traditional physical form in sufficient time to make informed investment decisions; and if not, what SEC action would be appropriate to

ensure that result? (pp. 13-14) Use of Written Communication Other than Prospectuses. The release requests comment on whether the SEC should allow corporate issuers more flexibility to inform investors of offerings by using written materials other than traditional prospectuses. In particular, the release asks whether the SEC should permit or require issuers to use a "simplified profile prospectus." (pp. 14-15) Timeliness of Disclosure to the Market. The release seeks comment on whether there is timely disclosure of all material information to the market with respect to shelf offerings by large corporate issuers. In particular, the SEC solicits comment on whether secondary market purchasers of a shelf registration offering are able to receive adequate information about the offering and the securities. (pp. 15-17) Finally, the release seeks comment on the scope of the Advisory Committees recommendation for a company registration system; on the various disclosure enhancements recommended in the Report; and on a recent proposal in the SECs Report of the Task Force on Disclosure Simplification (published in March 1996) to liberalize the shelf registration requirements for corporate issuers. Alexander C. Gavis Assistant Counsel
Attachments

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