

MEMO# 2315

November 8, 1990

INSTITUTE COMMENTS ON PROPOSED NEW MEXICO RULES

November 8, 1990 TO: STATE LIAISON COMMITTEE NO. 27-90 UNIT INVESTMENT TRUST COMMITTEE NO. 49-90 INVESTMENT ADVISERS COMMITTEE NO. 38-90 RE: INSTITUTE COMMENTS ON PROPOSED NEW MEXICO RULES

As we previously informed you, the New Mexico Securities Division recently asked for comments regarding a comprehensive package of proposed rules. (See Memorandum to State Liaison Committee No. 22-90 and Unit Investment Trust Committee No. 43-90, dated September 19, 1990.) The Institute submitted an extensive comment letter that recognized the ability of the Director to promulgate rules that are necessary to carry out the provisions of the New Mexico Securities Act. However certain of the proposed rules clearly extend beyond the scope of the authority of the Director and are not in the public interest and appropriate for the protection of investors or consistent with the purposes fairly intended by the Act. SECURITIES PROVISIONS A major portion of the Institute's comment letter focused on the scope of the Director's ability to limit the blue chip exemption from registration for certain types of investment companies and/or deny certain investment companies the ability to register their securities. The Institute opposed such rules as beyond the scope of the authority of the Director. The Institute also sought clarification of the term "sales charges" in proposed Rules 4.400.C. and 5.133.C.2. These rules would limit the sales charges or load, including all compensation to distributors, brokers, dealers and agents, in connection with the sale of securities of a mutual fund to 9% of the offering price. As written, the proposed rules could be construed to include asset-based sales charges under Rule 12b-1. The Institute noted that 12b-1 fees are not assessed on an investor's original purchase, but are an expense of the fund as a whole. As such, 12b-1 fees should not be construed to be "compensation to distributors, brokers, dealers or agents". The Institute further requested clarification of the procedure to claim the blue chip exemption for unit investment trusts. As written, proposed Rule 5.133.C. requires the annual payment of a fee to claim the blue chip exemption without making a distinction between mutual funds and unit trusts. The Institute recommended that the provision be amended to exclude unit trusts from the annual filing and fee payment requirement. In addition, the Institute further recommended that the Division consider adopting the Uniform Notice of Intention to Sell Securities for both mutual funds and unit trusts claiming the blue chip exemption. For purposes of the statutory manual exemption provided for in Section 58-13B-27C(1) of the Act, proposed Rule 5.203 states that "no manual has been approved by the director". Inasmuch as most unit investment trusts rely on the manual exemption for resales of units of unit trusts, the Institute recommended that the proposed rule be amended to approve the use of Moody's Bank & Finance Manual for the purpose of the statutory manual exemption. In the alternative, the Institute recommended that the Division specifically provide an exemption

for resales of units of unit trusts. INVESTMENT ADVISER PROVISIONS The Institute also stated that the proposed expansion of the definition of "investment adviser" to include those who hold themselves out as investment advisers was beyond the scope of the director's authority. In addition, the Institute requested that New Mexico allow passage of the Series 63 examination to satisfy the Series 65 examination requirement. We also recommended that any Series 65 examination requirement be postponed until the current problems associated with the examination are resolved. The Institute made various recommendations regarding the reporting requirements and rules of conduct in the proposed regulations. Finally, we recommended that the rules regarding "branch offices" be revised such that only one supervisor need be designated in the state as a whole rather than one supervisor per "branch office". * * * A copy of the Institute's comment letter is attached. The Institute also testified at the hearing on the proposed rules before the New Mexico Securities Division. We will keep you further advised of developments. Patricia Louie Assistant General Counsel Attachment

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