INVESTMENT COMPANY INSTITUTE

MEMO# 9666

February 11, 1998

CFTC REPROPOSES RULE AMENDMENTS TO PERMIT BUNCHED ORDERS

1 See Memorandum to Investment Advisers Committee No. 11-93 and SEC Rules Committee No. 46-93 (May 11, 1993). 2 See Memorandum to Investment Advisers Committee No. 21-93 and SEC Rules Committee No. 67-93 (July 22, 1993). [9666] February 11, 1998 TO: INVESTMENT ADVISERS COMMITTEE No. 6-98 SEC RULES MEMBERS No. 10-98 RE: CFTC REPROPOSES RULE AMENDMENTS TO PERMIT BUNCHED ORDERS ____ Almost five years ago, the Commodity Futures Trading Commission ("CFTC") published for comment proposed rule amendments to permit bunching of futures or future options orders under certain circumstances.1 The Institute filed a comment letter supporting the general rationale of the proposal, but expressing concerns about various specific provisions.2 In response to the comments received from the Institute and others, the CFTC has revised the proposal and republished it for comment. A copy of the reproposing release, which is summarized below, is attached. Significantly, some of the revisions made by the CFTC have addressed concerns that were raised by the Institute in its comment letter on the original proposal. Comments on the revised proposal must be filed with the CFTC by March 9, 1998. Persons with comments they would like the Institute to consider including in a comment letter should provide them to Tamara Reed (202/326-5825 or tamara@ici.org) or Frances Stadler (202/326-5822 or frances@ici.org) of the Institute no later than February 23, 1998. The Revised Regulation: Eligible Orders, Account Managers, and Customers In order to facilitate institutional participation in the futures market, the CFTC has proposed to amend Regulation 1.35(a-1) to exempt from the customer account identification requirements of the Regulation, bunched futures or futures option orders placed by an eligible account manager on behalf of consenting eligible customer accounts as part of its management of a portfolio that also contains instruments that are not regulated by the CFTC. As in the original proposal, eligible account managers would include SEC-registered investment advisers, and SEC-registered investment companies would qualify as eligible institutional customers. Under the reproposal, however, an eligible order no longer need be an "intermarket" order. (The Institute raised concerns about this proposed requirement in its comment letter.) Instead, to be eligible, the order must be placed as part of the management of a portfolio also containing instruments which are either exempt or excluded from the CFTC's regulation (e.g., securities). Importantly, as originally proposed, the amendments would have prohibited certain persons from having any interest in an eligible account or in any related securities. As noted in the Institute's comment letter on the original proposal, "the practical effect of this requirement will be to disqualify most, if not all, investment advisers to investment companies from relying on the proposal." The revised version of the regulation provides that the specified persons, in the aggregate, may not have an interest of ten percent or more in any account that receives any part of an

eligible order. The Institute requests comment on whether this 10% test would be workable and, if not, what (if any) alternative solution we should recommend. The Revised Certification Requirement While the original proposal would have required, prior to placing an initial order, that the account manager certify various items in writing to the futures commission merchant (“FCM”) allocating the order, the reproposed version would only require the account manager to certify, in writing, to each FCM executing or allocating an eligible order that the account manager is aware of the provisions of the regulation and is, and will remain, in compliance with its requirements. Such certification would only be required once to each applicable FCM, not on an order-by-order basis. Allocation; Recordkeeping The allocation provisions of the regulation have been revised to require that allocations made pursuant to the regulation be fair and non-preferential, taking into account the effect on each relevant portfolio in the bunched order. Also, the recordkeeping provisions have been revised to ensure the maintenance of a complete audit trail from placement through order allocation and to streamline the documentation that would be required to be made available to the CFTC or the Department of Justice by an account manager. Finally, as with the prior proposed version of this regulation, the reproposal would require the account manager to make available, upon request of an eligible customer, data sufficient for that customer to compare its results with those of other relevant customers. Tamara Cain Reed Associate Counsel Attachment

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