

PUBLIC

ACT Sec. Act of 1933, ICA
SECTION 34(b)
RULE 34b-1, 482
PUBLIC
AVAILABILITY 2/7/97

Our Ref. No. 96-423-CC
RESPONSE OF THE OFFICE OF CHIEF COUNSEL ITT Hartford Mutual Funds
DIVISION OF INVESTMENT MANAGEMENT File No. 811-7589

Your letter of October 25, 1996 requests assurance that the staff would not recommend enforcement action to the Commission if certain portfolios (the "Public Funds") of ITT Hartford Mutual Funds, Inc. ("ITT Hartford"), a newly registered open-end investment company, include in advertisements or supplemental sales literature the performance information of other registered investment companies (the "Insurance Funds") that are managed by the same adviser and sub-adviser as the Public Funds.

Facts

The Insurance Funds are registered investment companies that serve as funding vehicles for ITT Hartford's variable insurance products. Each Insurance Fund is advised by Hartford Investment Management Company ("Hartford"), and those Insurance Funds that retain a sub-adviser are sub-advised by Wellington Management Company ("Wellington"). You state that the Public Funds were created because current tax laws preclude ITT Hartford from offering the Insurance Funds to the public. You represent that each Public Fund will have substantially similar investment objectives, policies, and strategies as a corresponding Insurance Fund, will be advised by Hartford and, when Wellington is the sub-adviser for the corresponding Insurance Fund, also will be sub-advised by Wellington.

You state that the prospectus for each Public Fund currently includes information regarding the performance of the corresponding Insurance Fund in accordance with the staff's position in Nicholas-Applegate Mutual Funds ("Nicholas-Applegate I") (pub. avail. Aug. 6, 1996) and Bramwell Growth Fund ("Bramwell") (pub. avail. Aug. 7, 1996). You request relief so that each Public Fund may include performance information of the corresponding Insurance Fund in advertisements complying with the provisions of Rule 482 under the Securities Act of 1933 (the "Securities Act") and supplemental sales literature complying with the provisions of Rule 34b-1 under the Investment Company Act of 1940 (the "Investment Company Act"). 1/ You assert that investors may find performance data about an adviser's other

1/ You represent that advertisements or supplemental sales literature will present the standardized total return of the Insurance Funds in accordance with the requirements of Form N-1A. Telephone conversation of January 10, 1997 between Sarah A. Wagman and Thomas C. Mira, counsel to the Public Funds.

funds to be useful information when contemplating an investment.

In particular, you make the following representations: (i) advertisements or supplemental sales literature will prominently disclose that the Insurance Fund's performance is not the Public Fund's own performance, and should not be considered indicative of the past or future performance of the Public Fund; (ii) advertisements or supplemental sales literature will prominently disclose that Insurance Fund performance should not be considered a substitute for the Public Fund's performance; (iii) with respect to a Public Fund that has its own performance history, the Insurance Fund performance information will be provided in addition to the performance information of the Public Fund, and will be presented no more prominently than the Public Fund's performance; (iv) advertisements or supplemental sales literature will clearly explain the nature and purpose of the Insurance Fund performance information; and (v) advertisements or supplemental sales literature will disclose all material differences between the Insurance Fund and the Public Fund and will include any other disclosure that may be necessary to ensure that Insurance Fund performance information is not presented in a misleading manner. 2/

Analysis

In Nicholas-Applegate I, the staff confirmed that neither Section 34(b) of the Investment Company Act nor Section 206 of the Investment Advisers Act of 1940 would prohibit a fund from including in its prospectus performance information regarding private accounts managed by the fund's adviser that had substantially similar investment objectives, policies, and strategies, provided that the information was not presented in a misleading manner and did not obscure or impede understanding of information that is required to be included in the fund's prospectus (including the fund's own performance information). In Bramwell Growth Fund (pub. avail. Aug. 7, 1996), the staff took the same position with respect to the inclusion in a fund's prospectus of standardized total return information of another registered investment company previously managed by the fund's portfolio manager that had substantially similar investment objectives and policies. 3/ In each of these letters,

2/ Telephone conversation of January 10, 1997 between Sarah A. Wagman and Thomas C. Mira, counsel to the Public Funds.

3/ We note that the facts presented here, and in Nicholas-Applegate I and Bramwell, differ from those in MassMutual Institutional Funds ("MassMutual") (pub. avail. Sept. 28, 1995). MassMutual addressed the case in which an unregistered account is converted into a registered fund with substantially similar

(continued...)

however, the staff declined to express any view regarding the inclusion in a fund's Rule 482 advertisements or supplemental sales literature of performance information of other accounts managed by the fund's adviser.

Rule 482 under the Securities Act requires, among other things, that if an open-end management investment company (other than a money market fund) includes fund performance information in an advertisement, it must include standardized total return information in accordance with paragraph (e)(3) of the rule. Rule 34b-1 under the Investment Company Act provides that sales literature containing fund performance information will be deemed misleading unless it includes, among other things, the total return calculations required by paragraph (e)(3) of Rule 482. Rule 482 and Rule 34b-1 are intended to standardize the calculation and presentation of fund performance information in advertisements or supplemental sales literature to prevent the use of misleading information, and to facilitate the comparison of funds by investors. 4/

Neither Rule 482 nor Rule 34b-1 by its terms prohibits a fund from including in its advertisements or sales literature performance information relating to other accounts managed by the fund's adviser, so long as the information is not presented in a misleading manner. The Commission has expressed the view that Rule 482 should be read as precluding "performance information about any related entity to the fund such as its adviser . . . where the use of such performance is intended as a substitute for the performance of the fund." 5/

You maintain that, because a Public Fund may, in accordance with Nicholas-Applegate I and Bramwell, present the performance information of an Insurance Fund in the Public Fund's prospectus in a manner that is not misleading, the identical information

3/(...continued)

investment objectives, policies, and strategies. In MassMutual, the staff granted no-action relief to a registered fund that sought to include, as part of the fund's own performance information, the performance information of the unregistered account for the period prior to the effectiveness of the fund's registration statement. Here, the Insurance Funds are not the predecessors of the Public Funds, so the performance information of the Insurance Funds can be presented only in addition to, and not as part of, the Public Funds' own performance information.

4/ See Investment Company Act Release No. 16245 (Feb. 2, 1988) (release adopting amendments to Rule 482 and adopting Rule 34b-1) (the "Adopting Release").

5/ Id. at n.31 (emphasis added).

would be no more likely to mislead investors when presented in the Public Fund's advertisements or sales literature. You also maintain that your proposal is consistent with Rule 482 because the Insurance Funds' performance information would be presented in addition to, rather than as a substitute for, the Public Funds' own performance information, and would be accompanied by prominent disclosure stating that the performance is not the Public Funds' own performance.

We believe that neither Rule 482, Section 34(b), nor Rule 34b-1 prohibits a Public Fund from including in its advertisements or supplemental sales literature the performance information of an Insurance Fund that has substantially similar investment objectives, policies, and strategies, provided that the performance is not presented in a misleading manner and is not presented as a substitute for the Public Fund's own performance. Accordingly, we would not recommend enforcement action to the Commission if the Public Funds include performance information of the Insurance Funds in advertisements or supplemental sales literature in accordance with your representations. Our conclusion is based particularly on the following facts and representations, each of which is designed to ensure that the Insurance Fund performance information would not be presented as a substitute for the Public Fund's performance information:

- (i) advertisements or supplemental sales literature will prominently disclose that the Insurance Fund performance is not the Public Fund's own performance, and should not be considered indicative of the past or future performance of the Public Fund;
- (ii) advertisements or supplemental sales literature will prominently disclose that Insurance Fund performance should not be considered a substitute for the Public Fund's performance;
- (iii) with respect to a Public Fund that has its own performance history, the Insurance Fund performance information will be provided in addition to the performance information of the Public Fund, and will be presented no more prominently than the Public Fund's performance;
- (iv) advertisements or supplemental sales literature will clearly explain the nature and purpose of the Insurance Fund performance information; and
- (v) advertisements or supplemental sales literature will disclose all material differences between an Insurance Fund and a Public Fund and will include any other disclosure that may be necessary to ensure that Insurance Fund performance information is not presented in a misleading manner.

You should note that any different facts or representations might require a different conclusion. 6/

This response supersedes positions taken by the Division of Investment Management in 1993 that presenting performance information regarding an adviser's other accounts is inconsistent with the requirements of Rule 482, and that other account performance information may be used in supplemental sales literature only when the fund itself does not have any performance history. 7/ Upon reconsideration, we believe that this earlier position is inconsistent with both the Commission's statement in the 1988 release adopting amendments to Rule 482 8/ and the Commission's long-standing position that whether information in a fund's advertisements or sales literature is misleading, for purposes of the federal securities laws, depends on the totality of the circumstances, including the manner in which it is presented. 9/

Sarah Wagman
Sarah A. Wagman
Attorney

6/ This response should not be construed as providing no-action assurance with respect to any particular presentation of the performance of the Insurance Funds.

In addition, we note that the National Association of Securities Dealers, Inc. (the "NASD") has taken the position that the use of advertisements and sales literature that include performance information regarding an adviser's other accounts may be a violation of its Conduct Rules. NASD Regulatory and Compliance Alert at 7-8 (June 1992). Our response does not address the status of your proposal under the NASD Conduct Rules.

7/ See Letter from Carolyn B. Lewis, Assistant Director, Securities and Exchange Commission, Division of Investment Management, to Registrants (Feb. 22, 1993) (citing footnote 31 of the Adopting Release).

8/ See supra notes 4-5 and accompanying text.

9/ See, e.g., Investment Company Act Release No. 10621 (Mar. 8, 1979) (withdrawing the Commission's Statement of Policy on investment company sales literature) ("[w]hat is or is not misleading in sales literature may depend greatly on the totality of the circumstances, including the context in which it is used and the sophistication of the investor.").

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Rule 482 under the Securities
Act of 1933
Rule 34b-1 under the Investment
Company Act of 1940

Re: ITT Hartford Mutual Funds, Inc.

Dear Mr. Murphy:

We are writing on behalf of ITT Hartford Mutual Funds, Inc. (the "Company") a newly registered open-end investment company under the Investment Company Act of 1940 ("1940 Act") presently comprised of eight portfolios. We are writing to request the assurance of the Staff of the Securities and Exchange Commission (the "Commission") that it will not recommend enforcement action to the Commission if, in advertisements and supplemental sales literature relating to six of the Company's portfolios for periods prior to the establishment of the Company, the Company uses the historical performance of six corresponding investment companies which serve as funding media for ITT Hartford's variable insurance products (the "Insurance Funds").

Each Insurance Fund is available only as an investment option in connection with variable annuity and variable life insurance contracts issued by ITT Hartford and its affiliates. The Company has a currently effective registration statement under the 1940 Act and the Securities Act of 1933 ("1933 Act") pursuant to which it offers shares of its portfolios to the public. Six of the eight portfolios currently being offered will each have substantially similar investment objectives, policies and strategies as a corresponding Insurance Fund (those six public funds are hereinafter referred to as the "Public Funds") and each such Public Fund will have the same investment adviser (Hartford Investment Management Company) and sub-adviser (Wellington Management Company, which is the only entity that serves as sub-adviser to the Insurance Funds or the Public Funds) as a corresponding Insurance Fund. The creation of the Public Funds was necessitated by current tax laws and related interpretations which preclude ITT Hartford from offering the Insurance Funds to

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the public; otherwise, ITT Hartford would simply offer the Insurance Funds in a public offering and would not have been required to create new funds.

Since the Public Funds have no prior operating history, the Company believes that the performance history of the Insurance Funds (after which the Public Funds have been modeled) is an extremely important piece of information that should be made known to prospective investors. In the Company's view, the use of this performance information would greatly enhance investors' ability to assess the desirability of an investment in one or more of the Public Funds. While past performance cannot, of course, guarantee future performance, it can hardly be gainsaid that an investment adviser's performance record is nonetheless of critical importance to prospective investors. In fact, the performance history of the Insurance Funds is presently set forth in the Company's currently effective prospectus^{1/} in reliance on *Growth Stock Outlook Trust, Inc.*^{2/} Obviously, the *Growth Stock Outlook* letter and related Staff interpretations indicate an acknowledgment that this type of performance information is important to prospective investors. However, while it is clear that such performance data may be used in a prospectus, it is unclear whether this information can be used in advertisements and sales literature. A limitation to the effect that the Insurance Funds' performance history may not be used in advertisements and sales literature would mean that such data could be used only in the body of a prospectus thereby creating an unnecessary obstacle to investors' ability to easily locate and understand this significant information. As the Company believes this performance data to be one of the single most important disclosure items regarding the Public Funds that can be made to prospective investors at this time, the Company further believes that such data should be entitled to a fair degree of prominence. Thus, the Company proposes to use the Insurance Funds' performance history in advertisements and supplemental sales literature for the Public Funds, as discussed herein.

With respect to advertisements subject to Rule 482, we believe that an anomalous result is reached when information contained in an effective prospectus cannot be set forth in an advertisement subject to Rule 482 where the basic requirement applicable to such advertisements is that the substance of the information contained therein be set forth in the relevant prospectus. We are mindful of footnote 31 to the release adopting amendments to Rule 482^{3/} wherein the Commission stated that it would not be appropriate to use performance information of any "related entity" where the use of such performance is intended as a "substitute" for the performance of the

^{1/} See File No. 333-2381.

^{2/} (pub. avail. April 15, 1986).

^{3/} IC Rel. No. 16245 (Feb. 2, 1988).

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fund to which an advertisement relates. While we are not aware of any published interpretations on the issue of what would constitute substitute performance in this context, we propose to use the Insurance Funds' performance data only in Rule 482 advertisements containing sufficient narrative disclosure to fully explain the nature and purpose of the performance shown. In other words, there would be sufficient narrative disclosure (or a legend) in sufficiently prominent print to make clear that the performance shown is the Insurance Funds' performance and not the performance of the Public Funds or performance that investors can expect to enjoy. As such, we do not believe that the Insurance Funds' performance should or would be viewed as intending to "substitute" for the performance of the Public Funds, but rather, merely as meaningful information which an investor ought to know about the demonstrated ability of an investment adviser in substantially comparable situations when considering whether to buy shares of a Public Fund. In addition, the Company will ensure that the Insurance Funds' performance will be given no greater prominence than the Public Funds' performance. Further, as to the Company's prospectus which will form the foundation for advertisements pertaining to the Public Funds, the Company will comply with all requirements of Form N-1A relating to the use of performance data and will otherwise comply with Section 34(b) of the 1940 Act.^{4/}

As to supplemental sales literature, if sales literature is preceded or accompanied by a prospectus and the substance of the information reflected therein is actually extracted from an effective prospectus (as would be the case here), we do not see how such sales literature could fairly be deemed to be misleading or otherwise inconsistent with the applicable provisions of the Federal securities laws. In this regard, we note that any such sales literature will comply with the provisions of Rule 34b-1 under the 1940 Act. Accordingly, we propose that the Public Funds be permitted to disseminate sales literature showing the performance of the Insurance Funds provided that any such literature is preceded or accompanied by the Company's effective prospectus and contains sufficient narrative disclosure (or a legend) to fully explain the nature, purpose and limitations of the performance information shown. And, as with advertisements, the Insurance Funds' performance would be given no greater prominence than any performance of the Public Funds that may be shown.

We believe that the use of the Insurance Funds' performance in advertisements and sales literature would simply provide prospective investors with basic, needed information in a readily understandable fashion and that such investors would be poorly served by a position that would limit the Company's ability to make this information readily available to them. Moreover, we do not believe our proposal raises any concerns that an adviser would be able to selectively use the performance of one or more funds already in existence in order to attract investors to a new fund.

^{4/} See, e.g., *Nicholas-Applegate Mutual Funds* (pub. avail. Aug. 6, 1996), *infra* n. 6 and accompanying text.

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The concern that an adviser may create and operate funds for the purpose of establishing a selective "track" record -- also known as creating "incubator" funds -- has no application to the facts at hand. Specifically, we note that the Insurance Funds were created and have been operated for the sole purpose of funding variable annuity and life insurance contracts issued by ITT Hartford; as noted, but for existing interpretations of the tax code which preclude the sale of an investment company's shares to both public shareholders and variable contract owners, ITT Hartford would have simply offered the Insurance Funds to the public and would not have created the Company. Thus, the "need" to use the Insurance Funds' performance arises only because current interpretations of the tax code required ITT Hartford to create new funds in order to make a public offering. We believe this "limitation" -- that the funds whose performance will be shown could not legally have been offered to prospective investors of the funds to which the advertisements or sales literature would relate -- ensures that a favorable disposition of this no-action request could not be interpreted as allowing the use of the performance history of any incubator funds.

We also believe that the granting of the requested no-action position would be consistent with recent no-action letters relating to the use of past performance of similarly managed accounts in the prospectus of registered open-end funds. For example, the Staff recently granted no-action relief to permit a registered open-end company, the Bramwell Growth Fund, to use the prior performance of another open-end fund in its prospectus where the Bramwell Growth Fund's portfolio manager had previously served as portfolio manager to the fund whose performance was proposed to be used, notwithstanding that the two funds had different investment advisers.²¹ In connection with this no-action request, it was represented (among other things) that the investment objectives, policies and strategies of the two funds were similar in all material respects and that the Board of Directors of the Bramwell Growth Fund would periodically review the continued use of the subject performance data in order to ensure its continued relevance. The requesting letter pointed out that in the Release adopting the Rule 482 amendments which require a fund to show total return over a 10 year period (or the life of a fund if shorter), the Commission stated the presentation of such long-term performance data permits investors to evaluate fund performance over different phases of business cycles and to assess fund volatility. In taking the requested no-action position the Staff noted that the use of an adviser's performance in a prospectus with respect to similarly managed accounts is not prohibited by the federal securities laws or rules thereunder, provided that such performance data is not presented in a misleading manner and does not obscure or impede understanding of information that is required to be in the prospectus.

²¹ *Bramwell Growth Fund* (pub. avail. Aug. 7, 1996).

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In *Nicholas-Applegate Mutual Funds*,⁴ the Staff granted no-action relief to permit an open-end investment company, with respect to the prospectus for each of its portfolios, to use performance information regarding other accounts managed by such portfolios' investment adviser after the first year of each portfolio's operations. The prior position of the Staff had been that performance of similarly managed accounts may be used only in a prospectus during a fund's first year of operations. The requesting letter argued (among other things) that the inclusion of such performance information beyond a fund's first year of operations would provide investors with more complete and accurate information on which to base their investment decisions. As with the *Bramwell* letter, it was represented that the fund's Board would remain responsible for reviewing the continued use of the prior performance information in the fund's prospectus. In granting the *Nicholas-Applegate* no-action request, the Staff again noted that a fund may use "non-required" information in its prospectus as long as such information is not misleading and does not obscure or impede understanding of required information.

We believe the *Bramwell* and *Nicholas-Applegate* no-action letters clearly evidence a Staff recognition that past performance history of an investment adviser with respect to similarly managed accounts is important information that would be of interest to prospective investors. We further believe that the same rationale supporting the Staff's decision to extend no-action relief to include the *Bramwell* and *Nicholas-Applegate* situations applies to the facts at hand. If this type of performance data would be of interest to prospective investors in the context of a prospectus, in our view it follows that the Company should be able to apprise prospective investors of such information through advertisements and sales literature; particularly since the subject performance data will be set forth in the Company's prospectus in a manner that is not misleading and does not obscure or impede understanding of any required information. Moreover, as noted in the incoming letters in *Bramwell* and *Nicholas-Applegate*, an investment's adviser's long-term performance record with respect to similarly managed accounts provides prospective investors with more accurate information on which to base their investment decisions. Thus, we submit that the Staff should grant no-action relief to the extent necessary to permit the Company to use the Insurance Funds' performance history in advertisements and sales literature pertaining to the Public Funds and that such a position would promote the interests of full and fair disclosure. In connection with the use of the Insurance Funds' performance history in the Company's prospectus as well as in advertisements and sales literature, the Company's Board of Directors will periodically review the use of this data for its continued relevance and to ensure that it complies with applicable requirements of Form N-1A and the federal securities laws.

⁴ (pub. avail. Aug. 6, 1996).

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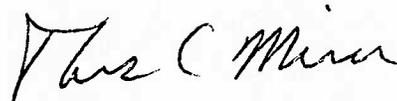
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We submit that no useful purpose would be served by precluding the Company from using the Insurance Funds' performance in advertisements and sales literature and that investors reading an advertisement or a piece of sales literature pertaining to the Public Funds would very much want to know (and should be entitled to know) how the investment adviser performed when managing registered investment companies after which such Public Funds have been modeled.^{2/} We do not believe a prospective investor should be required to "find" the performance data in the prospectus in order to be apprised of this highly relevant information. Simply put, we believe that this information should be readily available to investors and that a Staff position which impedes the availability of this data would not serve the interests of the investing public. Accordingly, we request that the Staff inform us that it will not recommend that the Commission take enforcement action if advertisements and sales literature of the Public Funds show the performance history of the Insurance Funds as discussed herein.

If you have any questions or need any further information, please contact the undersigned at (202) 965-8158 or Sydney Mendelsohn at (202) 965-8157.

Sincerely,



Thomas C. Mira

Wdc#:2303

^{2/} We note that the Staff appears to have already taken the view that this type of performance data may be used in supplemental sales literature. Specifically, in the February 22, 1993 Letter to Registrants the Staff noted that "[t]he performance of related funds and private accounts may only be used in a prospectus or Statement of Additional Information or accompanying sales literature in the case where the fund itself does not have any performance history." See Letter from Carolyn B. Lewis, Assistant Director, SEC Division of Investment Management, to Registrants (Feb. 22, 1993). We are seeking no-action assurance with respect to sales literature to resolve any uncertainty that may exist in that regard.