

**MEMO# 11725**

March 13, 2000

# **DRAFT COMMENT LETTER ON SEC PROPOSED SELECTIVE DISCLOSURE AND INSIDER TRADING RULES**

1 See Memorandum to Closed-End Investment Company Committee No. 52-99 and SEC Rules Committee No. 113-99, dated December 29, 1999 (transmitting Securities Act Release No. 7787 (Dec. 20, 1999), 64 FR 72590 (Dec. 28, 1999)). 1 [11725] March 13, 2000  
TO: CLOSED-END INVESTMENT COMPANY COMMITTEE No. 9-00 SEC RULES COMMITTEE No. 40-00 RE: DRAFT COMMENT LETTER ON SEC PROPOSED SELECTIVE DISCLOSURE AND INSIDER TRADING RULES

Attached for your review is a draft of the Institute's comment letter on the Securities and Exchange Commission's proposed new rules relating to selective disclosure (Regulation FD) and insider trading (Rules 10b5-1 and 10b5-2).<sup>1</sup> The Institute's draft comment letter, which reflects members' comments discussed during a conference call held on February 16, is summarized below. Comments on the proposed rules must be filed with the SEC by March 29, 2000. Please provide your comments on the draft letter to Amy Lancellotta (phone: 202/326-5824, email: amy@ici.org, or fax: 202/326-5827) or Dore Zornada (phone: 202/326-5819, email: dvanslyke@ici.org, or fax: 202/326-5839) no later than March 22, 2000. The SEC has proposed new rules to address three issues: (1) the selective disclosure by issuers of material nonpublic information; (2) whether insider trading liability depends on a trader's "use" or "knowing possession" of material nonpublic information; and (3) when the breach of a family or other non-business relationship may give rise to liability under the "misappropriation" theory of insider trading. First, proposed Regulation FD (Fair Disclosure) would require that whenever an issuer, or any person acting on its behalf, discloses material nonpublic information to any person outside the issuer, the issuer must simultaneously (for intentional disclosures) or promptly (for non-intentional disclosures) make public disclosure of that same information. Second, proposed Rule 10b5-1 would state the general principle that insider trading liability arises when a person trades while "aware" of material nonpublic information, but it also provides four exceptions to this liability. Finally, proposed Rule 10b5-2 would set forth a non-exclusive definition of three circumstances in which a person receiving information has a duty of trust or confidence for purposes of the "misappropriation" theory of insider trading. The Institute's draft comment letter generally supports the objectives of proposed Regulation FD, but expresses concern that, as drafted, it may have unintended marketplace consequences. Accordingly, the letter makes specific recommendations that would allow the SEC to address its concerns about the dissemination of nonpublic information without restricting the necessary exchange of information in the marketplace. In particular, the letter recommends that, instead of a "materiality" standard, Regulation FD be limited to those types of information that are

2especially likely to have a significant impact on the price of an issuer's securities. The letter includes a list of specific types of information that typically should be disseminated broadly before they are addressed with any one segment of the market. We also recommend that the Commission adopt a "use" rather than an "awareness" standard for insider trading liability in proposed Rule 10b5-1, in light of the potential problems an "awareness" standard would present in situations such as participation on a creditors' rights committee. Additionally, we recommend that the breadth of proposed Rule 10b5-2 be narrowed by requiring the existence of a tangible confidentiality commitment before the misappropriation theory is made applicable to the use of such confidential information.

Doretha VanSlyke Zornada Assistant Counsel Attachment

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