

MEMO# 1704

February 6, 1990

COURT OF APPEALS AFFIRMS DISMISSAL OF EXCESSIVE FEE AND OTHER CLAIMS IN MEYER CASE

February 6, 1990 TO: SEC RULES MEMBERS NO. 13-90 RE: COURT OF APPEALS AFFIRMS DISMISSAL OF EXCESSIVE FEE AND OTHER CLAIMS IN MEYER CASE

The U.S. Court of Appeals for the Second Circuit has affirmed the dismissal of the complaint in Meyer v. Oppenheimer Management Corp. A copy of the court's opinion is attached. The plaintiff in the case, a shareholder in a money market fund, had raised various claims relating to the fund's 12b-1 plan. The same plaintiff had previously filed suit alleging excessive advisory fees under Section 36(b). (That suit was settled when the adviser agreed to reduce its fees.) Shortly after the fund's shareholders approved the 12b-1 plan, the fund's investment adviser was sold. The plaintiff filed suit, alleging that fund directors and shareholders were not adequately informed when they approved the fund's 12b-1 plan (in that they were not informed of the impending sale of the adviser), that the plan constituted an "unfair burden" under Section 15(f) of the Investment Company Act, that the fund's advisory and distribution fees were excessive under Section 36(b) and that adoption of the plan violated the earlier stipulation of settlement. After a trial on remand, the district court entered judgment for the defendants on all claims other than the Section 36(b) claim. Last June, the district court dismissed the plaintiff's Section 36(b) claim. (See Memorandum to SEC Rules Members No. 30-89, dated June 20, 1989). In its opinion affirming the district court's decision, the court of appeals specifically endorsed its holding that 12b-1 payments need not be aggregated with advisory fees to determine the merits of a claim under Section 36(b). Although stating that costs of 12b-1 plans "are subject to review under Section 36(b)", the court went on to say that, "If the fee for each service viewed separately is not excessive in relation to the service rendered, then the sum of the two is also permissible." The court also rejected the plaintiff's claim that the 12b-1 plan involved an "unfair burden" to the fund under Section 15(f) in connection with the sale of the fund's investment adviser. The court found that since the 12b-1 plan was not adopted "as a result of" the sale of the adviser, it could not constitute a violation of Section 15(f). The court also rejected the plaintiff's claims that (1) the failure to inform the fund's directors and shareholders of the impending sale of the adviser deprived them of information needed in their consideration of the 12b-1 plan and (2) the 12b-1 plan violated the earlier stipulation of settlement. Craig S. Tyle Associate General Counsel Attachment -2-

abridged and therefore incomplete. Communications from the Institute do not constitute, and should not be considered a substitute for, legal advice.