

**MEMO# 2569**

February 28, 1991

## **MUTUAL FUND TIMING SERVICE AND ITS PRINCIPAL VIOLATED SECTIONS 5(B)(1) AND 5(C) OF THE 1933 ACT IN CONNECTION WITH FORMATION OF MUTUAL FUND**

February 28, 1991 TO: SEC RULES MEMBERS NO. 15-91 CLOSED-END FUND MEMBERS NO. 13-91 RE: MUTUAL FUND TIMING SERVICE AND ITS PRINCIPAL VIOLATED SECTIONS 5(b)(1) AND 5(c) OF THE 1933 ACT IN CONNECTION WITH FORMATION OF MUTUAL FUND

The United States District Court for the District of Oregon recently granted the SEC's motion for partial summary judgment against a mutual fund timing service and its principal for violations of Sections 5(b)(1) and 5(c) of the Securities Act of 1933 in connection with the formation of a new mutual fund. A copy of the court's opinion and order is attached. The court ruled that a notice sent to clients regarding a meeting about the new mutual fund, stating that the fund would offer greater safety, improved performance and lower costs, and a brochure distributed at the meeting discussing the fund and its benefits, constituted offers to sell. These offers violated Section 5(c) because they were made before a registration statement relating to the fund's securities had been filed. After filing a registration statement but before it became effective, the defendants sent a letter to clients indicating that the fund would commence operations soon, claiming that a hypothetical portfolio outperformed the stock market and contending that the fund would be "the safest equity fund in the country and may also be the best in performance." The court found that this letter was an offer to sell securities, and further found that it constituted a prospectus which failed to conform to Section 10, thus violating Section 5(b)(1). Finally, a postcard sent to clients after the effective date of the registration statement again touting the fund's safety, high returns and lower costs also violated Section 5(b)(1) because it too was found to be a prospectus not meeting the requirements of Section 10, and it was not accompanied with or preceded by a Section 10 prospectus. Frances M. Stadler Assistant General Counsel