

**MEMO# 11034**

June 3, 1999

# **COURT DISMISSES SEVERAL CLAIMS UNDER THE INVESTMENT COMPANY ACT AGAINST CLOSED-END FUNDS, ADVISER, AFFILIATED BROKER-DEALER AND DIRECTORS**

\* Green v. Nuveen Advisory Corp., No. 97 C 5255 (N.D. Ill. 1999). [11034] June 3, 1999 TO: CLOSED-END INVESTMENT COMPANY MEMBERS No. 21-99 DIRECTOR SERVICES COMMITTEE No. 16-99 SEC RULES MEMBERS No. 36-99 RE: COURT DISMISSES SEVERAL CLAIMS UNDER THE INVESTMENT COMPANY ACT AGAINST CLOSED-END FUNDS, ADVISER, AFFILIATED BROKER-DEALER AND DIRECTORS

The United States District Court for the Northern District of Illinois has dismissed several counts of a complaint originally filed by certain shareholders against several closed-end funds, their investment adviser, an affiliated broker-dealer, and two directors of the funds and the adviser.\* The complaint alleged that the funds' compensation agreements with the adviser and an auction agent create a conflict of interest by encouraging the full leveraging of the funds' assets, in violation of Sections 8(e), 34(b), 36(a) and 36(b) of the Investment Company Act of 1940. In addition, the complaint included counts of common law deceit and breach of fiduciary duty. The court dismissed without prejudice the two counts of the complaint that alleged violations of Sections 8(e), 34(b) and 36(a) on the basis that these claims should have been pleaded derivatively. The court concluded that the shareholders' alleged injuries were not distinct from those of any other common shareholder in the funds. Thus, under both Massachusetts and Minnesota law, the shareholders were barred from directly bringing claims that belonged to the corporation. The court also dismissed without prejudice the common law counts on this basis. In addition, the court dismissed the count alleging violations of Section 36(b) with respect to all defendants except the adviser, because only the adviser received compensation for advisory services. The court rejected the plaintiffs' arguments that affiliated persons could also be held liable under Section 36(b), noting that the complaint did not allege that any of the other defendants received compensation for advisory services. The court, however, rejected the defendant's arguments that the count should be dismissed as to all defendants on the basis that (1) the plaintiffs did not allege that the compensation is excessive; and (2) the plaintiffs did not suffer damages within one year of the filing of the complaint. Finally, the court denied class certification. As to the proposed plaintiff class, the court concluded that the plaintiffs failed to prove that a class action would be superior to other forms of adjudication. The court noted that any recovery in an action under Section 36(b) would go to the funds and could

not exceed the amount of compensation paid by the funds during the year preceding the commencement of the action. Certification of the defendant class was denied because only one defendant remained after the court's dismissal of all counts against the other defendants. A copy of the court's opinion is attached. Amy B.R. Lancellotta Senior Counsel  
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