

**MEMO# 4681**

April 7, 1993

## **RECEIPT OF SOFT DOLLAR CREDITS FROM UNDERWRITING CONCESSIONS**

April 7, 1993 TO: SEC RULES COMMITTEE NO. 33-93 RE: RECEIPT OF SOFT DOLLAR CREDITS  
FROM UNDERWRITING CONCESSIONS

\_\_\_\_\_ A member of the Committee recently raised an issue regarding the propriety of an investment adviser receiving soft dollar credits from underwriting concessions paid to broker-dealers in connection with the purchase of shares by mutual funds in a fixed price offering. Attached is a letter from the member on the subject. In a fixed price offering, underwriting purchases are generally effected as principal trades, and members of the syndicate are paid a selling concession for the shares sold (which is included in the fixed price). This offering process at one fixed price is required under Section 24 of the NASD Rules of Fair Practice, which has been interpreted to permit a member to provide bona fide research in return for selling concessions from purchases in fixed price offerings. While it is clear that the use of soft dollars for underwriting concessions is permitted under the NASD Rules of Fair Practice, it is not clear whether it would be permissible under the federal securities laws. Section 28(e) of the Exchange Act provides a safe harbor for certain soft dollar arrangements. The SEC has taken the position that Section 28(e) is not applicable to principal trades conducted in the secondary market. However, the SEC has never addressed the issue of whether purchases in a fixed price offering are protected under Section 28(e). It is also unclear whether the use of soft dollars for underwriting concessions would be prohibited under Section 17(e)(1) of the 1940 Act, which prohibits an affiliated person of a fund, acting as an agent, from receiving any compensation for the purchase or sale of any property to or from the fund, except in certain situations that are not relevant for these purposes. In an interpretive release on Section 28(e), the SEC stated that receipt of compensation by a fund's adviser pursuant to a soft dollar arrangement in connection with the purchase or sale of any securities to or from the fund arguably would violate Section 17(e)(1). However, if the receipt of such compensation is within the safe harbor of Section 28(e), the prohibition of Section 17(e)(1) would not apply. We will discuss the propriety of receiving soft dollar credits from underwriting concessions under the federal securities laws at the April 22nd SEC Rules Committee meeting. Amy B.R. Lancellotta Associate Counsel Attachment