

**MEMO# 15549**

January 15, 2003

## **U.S. SUPREME COURT DENIES CERTIORARI IN SECTION 36(B) CASE**

[15549] January 15, 2003 TO: CLOSED-END INVESTMENT COMPANY MEMBERS No. 4-03  
DIRECTOR SERVICES COMMITTEE No. 1-03 SEC RULES MEMBERS No. 6-03 RE: U.S.  
SUPREME COURT DENIES CERTIORARI IN SECTION 36(B) CASE The U.S. Supreme Court has denied certiorari in a case alleging breach of fiduciary duty under Section 36(b) of the Investment Company Act of 1940 (the “Act”).<sup>1</sup> The plaintiff, a fund shareholder, had alleged that the adviser breached its fiduciary duty by collecting fees pursuant to advisory and distribution agreements that were not approved by a board that was at least 40% independent, as required under the Act. He claimed that the directors of the fund were not independent because they served on the boards of other funds managed by the adviser and received large aggregate compensation for their combined service. The shareholder further argued that the adviser breached its fiduciary duty because the fees were excessive. The lower court dismissed the case and the U.S. Court of Appeals for the Third Circuit upheld the dismissal.<sup>2</sup> In its petition for a writ of certiorari, the shareholder argued that the appeals court improperly adopted a heightened pleading standard for the Section 36(b) claim. According to the filing, the standard applied by the court substantially limits access to relief under this section by requiring that complaints plead evidence of “control” not publicly available. The Supreme Court denied the writ of certiorari, thereby signaling its unwillingness to review the appeals court’s ruling in this case. Marguerite C. Bateman Senior Associate Counsel 1 *Krantz v. Prudential Investments Fund Management LLC*, No. 02-835 (U.S. Supreme Court, January 13, 2003). 2 See Memorandum to Closed-End Investment Company Members No. 45-02, Director Services Committee No. 7-02 and SEC Rules Members No. 80-02, dated September 25, 2002.