

MEMO# 16926

December 30, 2003

INSTITUTE COMMENT LETTER ON SEC PROPOSAL TO PERMIT INCLUSION OF SECURITY HOLDER NOMINEES FOR DIRECTOR IN COMPANY PROXY MATERIALS

[16926] December 30, 2003 TO: SEC RULES MEMBERS No. 198-03 CLOSED-END INVESTMENT COMPANY MEMBERS No. 116-03 DIRECTORS' COMMITTEE No. 25-03 RE: INSTITUTE COMMENT LETTER ON SEC PROPOSAL TO PERMIT INCLUSION OF SECURITY HOLDER NOMINEES FOR DIRECTOR IN COMPANY PROXY MATERIALS As we previously informed you, the Securities and Exchange Commission recently proposed for comment new rules that would conditionally require companies to include in their proxy statements security holder nominees for election as director.¹ The Institute has prepared a comment letter on the proposal. A copy of the letter is attached and is briefly summarized below. In summary, the letter makes the following points. • The letter recommends revising the proposal to require that a company be subject to the proposed security holder nomination procedure if, in an election of directors, 35% of the votes cast are withheld from half of the company's nominees on any given proxy statement, as opposed to a single nominee. • The letter recommends that the Commission require that a direct access proposal receive more than two-thirds of the votes cast by shareholders on the proposal, provided that at least 50% of shares outstanding have been voted on the proposal. • The letter strongly recommends that the Commission not adopt a third triggering event relating to the failure to implement a proposal under Rule 14a-8. • The letter recommends that all security holder(s), including mutual fund security holders, be required to file on Schedule 13G upon reaching the more than 5% beneficial ownership threshold. 1 See Institute Memorandum to Closed-End Investment Company Members No.83-03, SEC Rules Members No. 145-03 [16692], dated October 22, 2003; and Institute Memorandum to Director Services Committee No. 20-03 [16703], dated October 28, 2003. 2 • The letter supports requiring each person that is a security holder nominee not to be an "interested person" of the investment company under Section 2(a)(19) of the Investment Company Act. • The letter recommends that, with respect to any security holder nominee that does not receive at least 10 percent of votes present and eligible to vote at the security holder meeting the first time the nominee appears on the company's proxy statement, a company be permitted to exclude that nominee from the company's proxy statement for the next two calendar years. • The letter requests that the Commission include a statement in any adopting release that investment company by-laws, validly adopted under relevant state law, may continue to establish qualifications for director nominees, consistent with

Commission rules. • The letter supports the aspect of the proposal that would require companies to examine the required information regarding the nominating security holder(s) and any nominees and determine whether they have complied with proposed Rule 14a- 11 and whether the nominee satisfies each of the requirements of the proposed procedure. • The letter recommends not requiring companies to include information in proxy statements about a person that was put forward for nomination by a security holder(s) when that person is not eligible for nomination under Rule 14a-11. • The letter supports requiring investment companies to provide disclosure on Form N-CSR regarding the occurrence of any nominating procedure triggering events. • The letter strongly urges that the Commission permit investment companies to use a method other than disclosure on Form 8-K to disclose the date by which a security holder(s) must submit notice of its intent to require the investment company to include that security holder's nominee on the investment company's proxy statement. • The letter supports providing limited exemptions from the proxy rules for nominating security holder(s) to enable them to communicate with other security holders for the purpose of: forming a nominating security holder group; and soliciting support for a security holder nominee placed on the company's proxy statement. • The letter supports the Commission's decision not to view a security holder(s) as having acquired securities for the purpose of influencing the control of the company by virtue of nominating a director under proposed Rule 14a-11, soliciting on behalf of that candidate, or having that candidate elected. • The letter supports excluding from Rule 16a-1(a)(1)'s definition of 10% owner a nominating security holder group. 3 • The letter strongly supports including both a provision in Rule 14a-11 and a statement in any adopting release making clear that the nominating security holder or group, not the company, would be liable for any false or misleading statements included in the notice to the company and any disclosure based thereon in the proxy statement. Dorothy M. Donohue Associate Counsel Note: Not all recipients receive the attachment. To obtain a copy of the attachment, please visit our members website (<http://members.ici.org>) and search for memo 16926, or call the ICI Library at (202) 326-8304 and request the attachment for memo 16926. Attachment (in .pdf format)