

**MEMO# 16868**

December 10, 2003

# **INSTITUTE DRAFT COMMENT LETTER ON SEC PROPOSAL TO PERMIT INCLUSION OF SECURITY HOLDER NOMINEES FOR DIRECTOR IN COMPANY PROXY MATERIALS; YOUR VIEWS REQUESTED BY DECEMBER 17TH**

[16868] December 10, 2003 TO: CLOSED-END INVESTMENT COMPANY COMMITTEE No. 65-03 DIRECTOR SERVICES COMMITTEE No. 23-03 SEC RULES COMMITTEE No. 101-03 RE: INSTITUTE DRAFT COMMENT LETTER ON SEC PROPOSAL TO PERMIT INCLUSION OF SECURITY HOLDER NOMINEES FOR DIRECTOR IN COMPANY PROXY MATERIALS; YOUR VIEWS REQUESTED BY DECEMBER 17TH 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.<sup>1</sup> Comments on the proposal are due to the SEC no later than December 22nd. If you have any comments on the draft comment letter, please contact me no later than December 17th by phone at 202. 218-3563, fax at 202.326-5827, or email at ddonohue@ici.org. In summary, the draft letter makes the following points. • The draft 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. • The draft letter recommends that the Commission require that a direct access proposal receive more than 50% of the votes cast by shareholders on the proposal, provided that at least two-thirds of shares outstanding have been voted on the proposal. • The draft letter strongly recommends that the Commission not subject a company to the nomination procedure if: (a) a security holder(s) holding more than 1% of a company's securities for at least one year submits a proposal under Rule 14a-8 (other than a direct access proposal); (b) the proposal receives more than 50% of the votes cast by security holders on the proposal; and (c) the 1 See Institute Memorandum to Closed-End Investment Company Committee No. 55-03, SEC Rules Committee No. 85-03 [16681], dated October 22, 2003; Institute Memorandum to Director Services Committee No. 20-03 [16703], dated October 28, 2003. 2 company's board of directors fails to implement the proposal by the 120th day prior to the date that the company mailed its proxy materials for the succeeding shareholder meeting. • The draft letter recommends that all security holder(s), including investment company security holders, be required to file on Schedule 13G upon reaching the more than 5% beneficial ownership threshold. • The draft letter supports requiring each

person that is a security holder nominee of an investment company not to be an “interested person” of that company under Section 2(a)(19) of the Investment Company Act. • The draft 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 draft 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 require qualifications for director nominees, consistent with Commission rules. • The draft letter supports the aspect of the proposal that would require companies to examine the required information provided by the nominating security holder(s) and any nominees and determine whether they have complied with proposed Rule 14a-11. • The draft letter recommends not requiring companies to include information in proxy statements about a person who was put forward for nomination by a security holder(s) but is not eligible for nomination under Rule 14a-11. • The draft letter supports requiring investment companies to provide disclosure on Form N-CSR regarding the occurrence of any nominating procedure triggering events. • The draft letter strongly urges the Commission not to require an investment company that did not hold an annual meeting during the prior year, or that changed the date of the meeting more than 30 days from the prior year’s meeting, to disclose on Form 8-K the date by which a security holder(s) must submit notice of its intent to require that the investment company include that security holder’s nominee on the investment company’s proxy statement. • The draft 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. 3 • The draft 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 draft letter supports excluding from Rule 16a-1(a)(1)’s definition of 10% owner a nominating security holder group. The draft 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 Attachment (in .pdf format)