

MEMO# 18172

November 12, 2004

SEC SETTLES WITH FORMER EXECUTIVE OF FUND GROUP CHARGED WITH FACILITATING MARKET TIMING OF MUTUAL FUND SHARES

[18172] November 12, 2004 TO: BOARD OF GOVERNORS No. 75-04 CHIEF COMPLIANCE OFFICER COMMITTEE No. 24-04 COMPLIANCE ADVISORY COMMITTEE No. 109-04 SEC RULES MEMBERS No. 162-04 SMALL FUNDS MEMBERS No. 121-04 RE: SEC SETTLES WITH FORMER EXECUTIVE OF FUND GROUP CHARGED WITH FACILITATING MARKET TIMING OF MUTUAL FUND SHARES The Securities and Exchange Commission has issued an order making findings and imposing disgorgement, penalties, and remedial sanctions in an enforcement action charging the former chief executive officer, president, director and chief investment officer of a registered investment adviser to a group of mutual funds ("Funds") with securities fraud for facilitating marketing timing of certain of the Funds in contravention of the Funds' public disclosures.* The Respondent consented to the entry of the SEC Order without admitting or denying the SEC's findings. Findings The SEC Order finds that in October 2001, the adviser, through the Respondent, entered into a written agreement with a brokerage firm that allowed the broker's customer to time certain of the Funds. The arrangement provided that the customer could make up to three round trip securities trades per month, notwithstanding the five per year maximum set forth in the Funds' prospectus and the internal policies prohibiting market timing. As part of this arrangement, the SEC Order also finds that the customer agreed to make a long-term investment of \$10 million in a Fund founded and co-managed by the Respondent, which generated an additional \$27,000 in advisory fees for the adviser. According to the SEC Order, the Respondent did not determine whether market timing was consistent with the terms of the Funds' prospectus, even though she signed the registration statements that contained the prospectus. The SEC Order states that the Respondent failed to disclose the existence of the * See In the Matter of Nancy C. Tengler, SEC Release Nos. IA-2318 and IC-26651, Admin. Proc. File No. 3-11727 (Nov. 4, 2004) ("SEC Order"). The SEC Order also censures and imposes a cease and desist order against the Respondent. Copies of the SEC Order and accompanying press release describing the Fremont Investment Advisors, Inc. settlement are available at <http://www.sec.gov/litigation/admin/ia-2318.htm> and <http://www.sec.gov/news/press/2004-153.htm>, respectively. 2 market timing arrangement to the Funds' shareholders or to the independent directors of the Funds. As a result of the conduct generally described above, the SEC Order finds that the Respondent willfully violated: • the antifraud provisions of Sections 206(1) and 206(2) of the Investment Advisers Act of 1940 by entering into an arrangement with a market timer that was inconsistent with the Funds' prospectus disclosures and an internal policy of barring

investors from timing the Funds, and not disclosed to the Funds' board of directors or shareholders; and • Section 34(b) of the Investment Company Act of 1940, by making material misstatements and omissions in the Funds' prospectuses. The SEC Order also finds that the Respondent caused the adviser's violations of Section 17(d) of the Investment Company Act and Rule 17d-1 under that Act for effecting transactions in connection with joint arrangements in which the Funds were participants without filing an application with the SEC and obtaining an SEC order approving the transactions. Disgorgement, Civil Penalties and other Sanctions • The Respondent will pay \$27,000 in disgorgement and a civil money penalty of \$100,000. • The Respondent is suspended from association with any investment adviser for a period of six months. • The Respondent is prohibited from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor or principal underwriter for a period of six months. Jane G. Heinrichs Assistant Counsel

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