

**MEMO# 17974**

September 10, 2004

# **DRAFT INSTITUTE NO-ACTION REQUEST REGARDING APPLICATION OF RULE 38A-1 TO CLOSED-END FUND UNDERWRITING SYNDICATE MEMBERS; YOUR COMMENTS REQUESTED BY SEPTEMBER 15TH**

[17974] September 10, 2004 TO: CLOSED-END INVESTMENT COMPANY COMMITTEE No. 36-04 RE: DRAFT INSTITUTE NO-ACTION REQUEST REGARDING APPLICATION OF RULE 38a-1 TO CLOSED-END FUND UNDERWRITING SYNDICATE MEMBERS; YOUR COMMENTS REQUESTED BY SEPTEMBER 15TH The Institute has prepared the attached draft no-action letter requesting that the staff of the Division of Investment Management provide assurances that they would not recommend any enforcement action to the Securities and Exchange Commission if closed-end funds do not comply with Rule 38a-1 under the Investment Company Act of 1940 with respect to underwriting syndicate members. The draft letter is summarized below. In light of the October 5th compliance date for Rule 38a-1, we would like to submit the no-action request to the staff as soon as possible. Therefore, please provide any comments on the draft letter to the undersigned by phone (202-218-3563), fax (202-326-5827), or e-mail [ddonohue@ici.org](mailto:ddonohue@ici.org) or to Frances Stadler by phone (202-326-5822), fax (202-326-5827) or email ([frances@ici.org](mailto:frances@ici.org)) as soon as possible but no later than Wednesday, September 15th. The draft letter asserts that the application of Rule 38a-1 to closed-end fund principal underwriters raises serious practical issues without providing corresponding benefits. The letter describes the closed-end fund underwriting process, and points out that it is unnecessary for closed-end funds to comply with Rule 38a-1 with respect to their syndicate members because closed-end fund syndicate members do not have an ongoing relationship with the fund after its shares are sold to investors and the fund commences operations. It also explains that it would be extremely difficult for closed-end funds to comply with Rule 38a-1 because of the large number of syndicate members involved and because the precise make-up of the Institute's underwriting syndicate often is not finalized until the pricing date. The letter states that given the limited nature of the relationship that syndicate members have with a closed-end fund and the brevity of this relationship, applying Rule 38a-1 to closed-end fund syndicate members will not provide any benefit. The draft letter states that it is appropriate for the Commission staff to provide no-action relief under Rule 38a-1 if funds comply with the provisions of the rule concerning principal underwriters only with respect to any "person who undertakes regularly to serve or act. . . as 2 principal underwriter."1 It points out that

while this approach would exclude members of a closed-end fund underwriting syndicate, including members that are affiliated with the fund (or the fund's investment adviser), from Rule 38a-1, it would continue to require compliance oversight of principal underwriters who do have an ongoing relationship with a fund. Dorothy M. Donohue Associate Counsel Attachment (in .pdf format) 1 See Section 15(c) of the Investment Company Act (which requires that a fund's independent directors approve a contract pursuant to which a person undertakes regularly to serve as principal underwriter).

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