

MEMO# 12754

October 19, 2000

COURT AFFIRMS DISMISSAL OF CLASS ACTIONS ALLEGING BREACH OF FIDUCIARY DUTY AGAINST FUND DIRECTORS AND INVESTMENT ADVISERS

[12754] October 19, 2000 TO: BOARD OF GOVERNORS No. 59-00 CLOSED-END INVESTMENT COMPANY COMMITTEE No. 27-00 DIRECTOR SERVICES COMMITTEE No. 15-00 SEC RULES COMMITTEE No. 122-00 RE: COURT AFFIRMS DISMISSAL OF CLASS ACTIONS ALLEGING BREACH OF FIDUCIARY DUTY AGAINST FUND DIRECTORS AND INVESTMENT ADVISERS The U.S. Court of Appeals for the Second Circuit has affirmed the judgment of the U.S. District Court for the Southern District of New York, granting defendants' motion to dismiss the plaintiff's class action complaints against three closed-end funds.¹ The original actions asserted breach of fiduciary duty claims under Section 36(a) of the Investment Company Act of 1940 against the funds' directors and investment advisers. The district court dismissed the actions, finding that the claims were derivative in nature and, as a result, the shareholder was required to make a demand on the funds' directors prior to bringing a suit or to show that such a demand would be futile.² The plaintiff appealed that decision to the U.S. Court of Appeals for the Second Circuit, arguing that the dismissal was erroneous because her action is direct, not derivative. The Investment Company Institute had submitted a brief as amicus curiae in the class actions, in which it asserted that there is no implied private right of action under Section 36(a).³ The Institute's brief responded to an amicus curiae brief filed by the U.S. Securities and Exchange Commission in the class actions, in which the SEC asked the court to hold "that investment companies as well as shareholders have an implied right of action under Section 36(a) of the Investment Company Act." In its decision, the circuit court did not address the issue of whether or not there is an implied private right of action under Section 36(a). Rather, the circuit court affirmed for substantially the reasons stated by the district court, namely that plaintiff's "action was 1 *Marquit v. Williams, et. al.*, Case No. 00-7085(L) (2d Cir. October 13, 2000) (copy attached). 2 See Memorandum to Closed-End Investment Company Committee No. 7-00; Director Services Committee No. 6-00; and SEC Rules Committee No. 24-00, dated February 23, 2000 (transmitting the district court's opinion). 3 See Memorandum to Board of Governors No. 51-00; Closed-End Investment Company Committee No. 23-00; Director Services Committee No. 12-00; and SEC Rules Committee No. 109-00, dated August 23, 2000 (transmitting the Institute's amicus brief). 2 derivative in nature and that Marquit had not pled that demand on the Funds' directors would have been futile." Doretha VanSlyke Zornada Assistant Counsel Attachment Attachment (in .pdf format)

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