

**MEMO# 2343**

November 21, 1990

## **AMENDED COMPLAINT CURES DEFECTS IN CLAIMS UNDER SECTIONS 20(A) AND 34(B) OF THE 1940 ACT**

1 \* The references in the opinion attached hereto to Section 33(b) of the 1940 Act appear to be in error. The confusion probably results from the fact that the full statutory cite for Section 34(b) of the 1940 Act is 15 U.S.C. Section 80a-33(b). The earlier opinion mistakenly referred to Section 30(b) in several instances when it clearly was discussing Section 34(b).

November 21, 1990 TO: CLOSED-END FUND MEMBERS NO. 45-90 SEC RULES MEMBERS NO. 79-90 RE: AMENDED COMPLAINT CURES DEFECTS IN CLAIMS UNDER SECTIONS 20(a) AND 34(b) OF THE 1940 ACT \_\_\_\_\_

Several months ago, we notified you about a case brought in the United States District Court for the Southern District of New York against a mutual fund and certain affiliated parties alleging, among other things, violations of Sections 20(a) and 34(b)\*1 of the Investment Company Act of 1940 in connection with the fund's distribution of a proxy statement seeking approval of a change in its investment objective and policies. See Memorandum to Closed-End Fund Members No. 8-90; Memorandum to SEC Rules Members No. 12-90, dated February 5, 1990. As we then indicated, the proposed change was approved by fund shareholders at their annual meeting. About six months later, the fund notified its shareholders that the Board of Directors had determined to stop sales and liquidate the fund. The plaintiffs subsequently redeemed their shares, allegedly at a substantial loss. They sued the fund claiming, among other things, that the fund's proxy statement and subsequently issued prospectus were misleading in violation of Sections 20(a) and 34(b) of the 1940 Act, respectively, because they failed to disclose that the Board could liquidate and close the fund. As noted in our earlier memorandum, the court dismissed those claims on the ground that the plaintiffs did not allege that the defendants, at the times of issuing the proxy and prospectus, had plans to liquidate the fund which they failed to disclose. The court also dismissed the plaintiffs' claims under Sections 13(a)(4) and 25(a) of the 1940 Act, finding no private right of action under those provisions. Subsequently, the plaintiffs filed an amended complaint reasserting the four claims described above. In response, defendants moved to dismiss those claims. In a recent opinion, a copy of which is attached, the court denied defendants' motion to dismiss the claims under Sections 20(a) and 34(b), stating that "[t]he amended complaint attempts to cure the initial pleading deficiencies by alleging that defendants were seeking the power to liquidate in the June 1988 proxy solicitation and the October 1988 prospectus and by alleging upon information and belief that defendants contemplated the use of and intended to use such power at the time.... Such pleading would appear to meet the Court's requirement in its earlier opinion." Defendants' motion to dismiss was denied without prejudice to defendants making a similar motion upon completion of discovery. In addition, the court dismissed the reasserted claims under

Sections 13(a)(4) and 25(a) "for the reasons set forth in its earlier opinion." We will keep you informed of developments. Frances M. Stadler Assistant General Counsel Attachment

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