

MEMO# 16682

October 17, 2003

SEC AND NEW YORK ENFORCEMENT ACTIONS AGAINST MUTUAL FUND EXECUTIVE IN CONNECTION WITH MARKET TIMING AND LATE TRADING ACTIVITIES

[16682] October 17, 2003 TO: COMPLIANCE ADVISORY COMMITTEE No. 88-03 INTERNATIONAL MEMBERS No. 37-03 SEC RULES MEMBERS No. 142-03 RE: SEC AND NEW YORK ENFORCEMENT ACTIONS AGAINST MUTUAL FUND EXECUTIVE IN CONNECTION WITH MARKET TIMING AND LATE TRADING ACTIVITIES The Securities and Exchange Commission and the Office of the New York State Attorney General announced the filing of a federal administrative proceeding and state criminal charges against a former mutual fund management company executive for violations related to market timing and late trading.¹ The actions are based on the fund executive's alleged conduct in permitting select investors to engage in market timing and late trading activities and hindering the Attorney General's investigation into these matters. SEC Administrative Proceeding In the administrative proceeding, the SEC issued an order in which it found that the fund executive authorized select investors to engage in market timing activities in certain funds in exchange for their promise to maintain at least 20 percent of their investment at the firm in "buy-and-hold" positions (often referred to as "sticky assets") in certain other funds. The order also found that those investors who attempted to time the funds without the fund executive's approval and corresponding "buy and hold" assets commitment were asked to redeem their investment in the funds. The order further found that the fund executive was aware that the fund's prospectus and statement of additional information did not disclose that some investors were treated differently based upon whether they had entered into timing agreements in exchange for buy and hold positions. Finally, the order found that by authorizing these timing agreements, the fund executive willfully violated Section 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, Sections 206(1) and 206(2) of the Investment Advisers Act of 1940, and Section 34(b) of the Investment Company Act of 1940. ¹ For a copy of the Commission's action, see In the Matter of James Patrick Connelly Jr., which can be found on the Commission's website at: <http://www.sec.gov/litigation/admin/33-8304.htm>. For a copy of the New York State Attorney General's felony complaint and a press release relating to both actions, see the Office of the Attorney General's website at: http://www.oag.state.ny.us/press/2003/oct/oct16a_03.html. ² Without admitting or denying the findings, the fund executive consented to the Commission's order, which does the

following: (1) requires the fund executive to cease and desist from committing or causing any violations and any future violations of Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, Sections 206(1) and 206(2) of the Advisers Act, and Section 34(b) of the Investment Company Act; (2) requires the fund executive to pay a civil money penalty in the amount of \$400,000; and (3) bars the fund executive from association with any broker, dealer, or investment adviser, and prohibits him 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. New York State Attorney General's Criminal Proceeding In the criminal proceeding, the fund executive pled guilty to the crime of tampering with physical evidence, a class E felony. According to the felony complaint, the New York State Attorney General had served a subpoena on the fund executive's firm demanding information and production of documents related to late trading practices. The complaint indicates that the fund executive was aware of late trading by a firm client but told an outside counsel and others that the firm did not have any clients engaged in late trading as defined in the subpoena. The complaint further states that the fund executive directed his subordinates to delete certain e-mails called for by the Attorney General's subpoena, and to falsely report to outside counsel facts relevant to the investigation and his own culpability. Barry E. Simmons Associate Counsel

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