

MEMO# 15292

October 23, 2002

SEC SANCTIONS A FUND AND ITS ADVISER FOR STALE FUND PERFORMANCE INFORMATION ON THE FUND'S WEBSITE

[15292] October 23, 2002 TO: ADVERTISING COMPLIANCE ADVISORY COMMITTEE No. 20-02 COMPLIANCE ADVISORY COMMITTEE No. 92-02 INVESTMENT ADVISERS COMMITTEE No. 23-02 SEC RULES COMMITTEE No. 86-02 RE: SEC SANCTIONS A FUND AND ITS ADVISER FOR STALE FUND PERFORMANCE INFORMATION ON THE FUND'S WEBSITE The Securities and Exchange Commission recently sanctioned a registered investment company for willfully violating, and its adviser and the sole shareholder of the adviser for willful aiding and abetting the fund's violation of, Section 17(a)(2) of the Securities Act of 1933 and Section 34(b) of the Investment Company Act based upon the Commission find that the fund's website contained stale performance information.* In particular, the SEC found that the website advertising the mutual fund prominently proclaimed returns for the fund of 422% from inception through March 10, 2000. These returns, while factually accurate, were rendered misleading by the fund's failure to disclose that between March 10, 2000 and September 30, 2000, the most recent calendar quarter, the returns were only 191%. In imposing sanctions on the respondents, the Commission's Order noted that in 1998, following an examination by the Commission's staff, the fund had been notified that the performance results posted on the fund's website were not current to the most recent calendar quarter. At the time, the fund's attorney advised the Commission's staff that, going forward, the fund would "at the end of each calendar quarter either remove or update any performance data on its website." The Order also noted that, with respect to the 2000 stale performance information, while other portions of the website had been changed as recently as November 2000, the March 2000 performance information had not been modified. Based upon its findings, the Commission fined the adviser's sole shareholder \$20,000 and the fund, the adviser, and the adviser's sole shareholder were required to enter into an undertaking to:

- Make a written representation to the SEC's District Office, on a quarterly basis for the period of five years from the date of the Order, confirming that any and all websites for any and all series of shares of the fund do not include any performance

* See In re The Thurlow Funds, Inc., Thurlow Capital Management, Inc., and Thomas F. Thurlow, SEC Release No. 33-8136, IA-2065, IC-25761 (October 2, 2002). 2 history, either graphic or textual. In the alternative, if such performance history is included on the website, the respondents must retain, for a period of five years, an independent consultant, not unacceptable to the staff of the Commission, to verify that any performance figures included in the website are current and in compliance with the rules and regulations under the Federal securities laws, and to make quarterly reports

concerning those verifications to the staff of the Commission. This portion of the Order also requires any independent consultant retained by the respondents to enter into an agreement precluding it from entering into any employment, consultant, attorney-client, auditing, or other professional relationship with the respondents, or any of their present or former affiliates, directors, officers, employees, or agents, acting in their capacity as such, for a period of two years from completion of the engagement. All firms with which the independent consultant is affiliated are also precluded from having any other professional relationship with the respondents or any of their present or former affiliates, directors, officers, employees or agents unless they first obtain the prior written consent of the SEC's District Office; • Within thirty days of the date of the Order, mail a copy of it, together with a cover letter in a form not unacceptable to the staff of the Commission, to each of the fund's existing shareholders; • Maintain a link to the Commission's Order on the home page of any and all websites for any and all series of shares of the fund, in a form not unacceptable to the staff of the Commission, for twelve months from the date of the Order; and • File written verifications with the Commission affirming compliance with these conditions. Tamara K. Salmon Senior Associate Counsel

Copyright © by the Investment Company Institute. All rights reserved. Information may be abridged and therefore incomplete. Communications from the Institute do not constitute, and should not be considered a substitute for, legal advice.