

**MEMO# 8725**

March 14, 1997

# **SEC REQUIRES CLOSED-END FUND TO INCLUDE SHAREHOLDER PROPOSAL REQUESTING BOARD TO SOLICIT PROPOSALS FOR NEW INVESTMENT ADVISER**

March 14, 1997 TO: CLOSED-END INVESTMENT COMPANY COMMITTEE No. 9-97 SEC RULES COMMITTEE No. 31-97 RE: SEC REQUIRES CLOSED-END FUND TO INCLUDE SHAREHOLDER PROPOSAL REQUESTING BOARD TO SOLICIT PROPOSALS FOR NEW INVESTMENT ADVISER

The SEC staff recently required a closed-end fund to include in its proxy statement a shareholder proposal requesting that the fund's board consider soliciting competitive proposals for a new investment adviser for the fund. A copy of the letter is attached. The SEC staff stated that this shareholder proposal may not be omitted from the proxy statement, rejecting each of three arguments by the fund. First, the staff stated that the proposal may not be omitted pursuant to Rule 14a-8(c)(7) under the Securities Exchange Act of 1934, which permits exclusion of a proposal that "deals with a matter relating to the conduct of the ordinary business operations" of the fund. According to the letter, this rule permits exclusion of proposals dealing with "business matters that are mundane in nature and do not involve any substantial policy or other considerations." The staff found that the proposal does not deal with the ordinary operations of the fund, and that [t]he solicitation of competitive proposals for a new investment adviser goes beyond the actions required of the directors in fulfilling their fiduciary and statutory duties. The Board is asked to not only consider the information reasonably necessary to evaluate the terms of the advisory contract, but to affirmatively seek bids from other investment advisers. Thus, the Proponents request to seek bids is not mundane in nature and involves substantial policy and other considerations. Second, the fund argued that Rule 14a-8(c)(10) permits exclusion of the proposal as moot, because the fund's board regularly and recently reviewed the existing investment advisory arrangement. This review included analysis of advisory fees paid in the industry and the relative performance of investment advisers, and, according to the fund, was "exactly the sort of review that the Proposed Resolution would have them perform." The SEC staff rejected this analysis, stating that unless the board actually had solicited competitive bids for a new investment adviser, the shareholder proposal was not moot. Finally, the fund argued that the proposal may be excluded under Rule 14a-8(c)(1), because it is not a proper subject for action by shareholders. The fund described the proposal as a mandate that constituted an unlawful intrusion on the board's discretionary authority. The staff stated that this deficiency in the proposal could be cured by revising the

proposal to request that the board consider soliciting bids for a new adviser. The staff allowed the shareholder proponents seven days to revise the proposal accordingly. Dorothy M. Donohue Assistant Counsel Attachment (in .pdf format)

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