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July 30, 1985

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PREMERGER
NOTIFICATION
OFFICE

Wayne Kaplan, Esquire
Staff Attorney
Premerger Notification Office
Bureau of Competition
Federal Trade Commission
Washington, DC 20580

Dear Mr. Kaplan:

We are seeking your assistance in providing guidance to one of our clients with respect to the premerger notification requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("the Act"), 15 U.S.C. § 18a. The purpose of this letter is to provide you with the factual background concerning our request. We hope that once you have had an opportunity to review this letter, we will be able to schedule a meeting with you or other members of your office to discuss this matter, if necessary.

Our client is the sponsor of, adviser to, and underwriter for several open-end, diversified management investment companies (the "Funds") organized as corporations under the laws of one of the states and registered as investment companies with the Securities and Exchange Commission under the Investment Company Act of 1940. Although the Funds differ in certain respects, they nonetheless share the same fundamental characteristics:

1. Each Fund's investment policies limit portfolio investments to debt obligations of the United States (including its agencies and instrumentalities) and highly rated (e.g., "AA" or "AAA") dollar-denominated, straight debt obligations of corporate issuers (i.e., debt instruments that are not convertible into equity or voting securities).

2. Each Fund is prohibited from investing more than 5% of its total assets in the securities (i.e., debt

instruments) of any one issuer (other than the United States, as to which there is no restriction).

3. Each Fund is prohibited from making investments for the purpose of exercising control or management.

4. Each Fund is prohibited from altering any of the foregoing fundamental policies except by stockholder vote.

It appears that certain acquisitions of voting securities in each Fund may be subject to the notification and reporting provisions of the Act, notwithstanding that each Fund is a passive conduit for investments in straight debt obligations. As a practical matter, the fact that the acquisition of shares in a mutual fund is subject to the Act ordinarily would not pose a problem because such funds usually are widely held by a large group of comparatively small investors. Accordingly, it is usually clear that an acquisition of an interest in a mutual fund does not satisfy the jurisdictional requirements of the Act.

In the case of our client's Funds, however, the Funds are marketed primarily to a comparatively small group of sophisticated corporate investors as a vehicle, among other things, for professional money management. Although investors could invest cash directly in the underlying debt instuments, the Funds offer an alternative mechanism for sophisticated cash management. In addition, under certain circumstances, the Funds can provide investors with tax advantages which would not be available in the case of direct investment in comparable debt instruments. Because each of the institutional investors is a large corporation, and each of the Funds exceeds $10 million in assets, the size-of-the-parties test is met. The size-of-the-transaction test may be met whenever a given investor wishes to invest more than $15 million. The exemption for passive investments generally is not available because each institutional investor invariably acquires more than 10% of the Fund's voting securities. Finally, the exemption for institutional investors will not apply if the investor purchases more than $25 million of the Fund's voting securities and its shares represent more than 15% of the outstanding voting securities.

We would like to obtain a formal or informal interpretation from your office that the acquisition of voting securities in any mutual fund that invests only in straight debt obligations and is prohibited from investing for the purpose of exercising management or control is a transaction outside the scope of Section 7 of the Clayton Act, 18 U.S.C. § 18, and, a fortiori, the notification and reporting requirements of the Act should not apply. Because the Funds only invest in debt instruments, Section 7's prohibition against certain mergers and acquisitions of stock or assets would not apply to the Funds' acquisition of these debt obligations and, similarly, the premerger notification requirements of the Act also would not apply. Since the Funds only operate as an investment vehicle with respect to these debt instruments, Section 7's prohibition and the Act's notification requirement also should not be applicable to acquisitions of the Funds' voting securities. Moreover, Section 7's exemption for stock acquisitions made "solely for investment" would apply to both the Funds' investments and acquisitions of the Funds' shares. United States v. Tracinda Investment Corp., 477 F. Supp. 1093, 1098-1102 (C.D. Cal. 1979); Anaconda Co. v. Crane Co., 411 F. Supp. 1210, 1218 (S.D.N.Y. 1975).

We recognize that if a Fund's fundamental investment policies were amended to permit the acquisition of voting securities, any such acquisition would require compliance with the Act's notification requirements if the acquisition satisfied the Act's jurisdictional prerequisites and no exemption from the notification requirements were available. We also recognize that, to the extent any Fund invested in voting securities, investments in the Fund itself would properly be subject to the notification requirements of the Act. It is our view, however, that an investment in the Fund, where the Fund invests only in straight debt obligations, is, by definition, outside the scope of Section 7 and, therefore, outside the purview of the Act.

We would be willing to provide you with additional information or to meet with you and other members of your office to discuss the issues raised in this request.

Sincerely,

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[redacted] informed [redacted] that we can't exempt these transactions without a rule change. He will inform me later if his client wants to pursue such a possibility.
Wayne Kaplan 8/5/85