



FLORIDA
INTERNATIONAL
BANKERS
ASSOCIATION

Lourdes Gonzalez, Esq.
Assistant Chief Counsel for Sales Practices
Division of Trading and Markets
U.S. Securities and Exchange Commission
100 F Street NE
Washington, D.C. 20549-1090

March 18, 2019

Re: Release No. 34-83062
File No. S7-07-18
Proposed Regulation Best Interest

Dear Lourdes,

Thank you for your kind attention to FIBA's comment letter. We appreciate the opportunity to follow-up on our conversations and provide the Commission an example of regulatory support for the use of non-English language documentation.

By definition, cross-border clients reside outside of the U.S. Many brokers communicate with those clients in a language other than English to facilitate the relationship. As a corollary and to further disclosure and understanding by the clients, many firms with international clients will often use non-English documentation.

Providing cross-border clients with materials in a language they understand is both practical and consistent with the objectives of disclosure. The practice has long-standing regulatory support. Since at least 1991, the Commission has expressly not objected to the use of foreign language documentation as a disclosure enhancement. See, The Phoenix Funds, SEC No Action Letter (10/2/91). (Appendix A)

FIBA's concern is that if Plain English is sustained as English-only, a valuable quality of disclosure enhancement will be lost. FIBA fears that the "Plain-English" requirement of proposed Reg BI may in fact hinder disclosure to the extent that it is interpreted to mean "English-only."

As ever, we thank you for your keen interest and courtesies.

Sincerely,

David Schwartz
President & CEO
Florida International Bankers Association

1991 WL 243176 (S.E.C. No - Action Letter)

(SEC No-Action Letter)

The Phoenix Funds

Publicly Available October 28, 1991

SEC LETTER

***1 1940 Act / s 12(d)(1)(B)**

October 28, 1991

Publicly Available October 28, 1991

Your letter dated October 23, 1991, requests assurance that we would not recommend enforcement action to the Commission under Section 12(d)(1)(B) of the Investment Company Act of 1940 (the “1940 Act”) if three registered open-end investment companies, Phoenix Series Fund, Phoenix Total Return Fund, Inc., and Phoenix Multi-Portfolio Fund (collectively, the “Funds”) sell their respective shares to foreign investors through foreign banks in amounts that, in the aggregate, may exceed the limitations in Section 12(d)(1)(B).⁵

You state that the distributor of the Funds, Phoenix Equity Planning Corporation (“Equity Planning”) proposes to sell Fund shares to banks located and organized in various European countries. Although the foreign banks would be the recordholders of the Fund shares, the foreign banks would purchase those Fund shares on a non-discretionary basis and only at the instruction of their customers.⁶

Section 12(d)(1)(B) restricts sales by a registered, open-end investment company to any other investment company. You note that a foreign bank may be an investment company,⁷ and that under the proposed selling arrangements the foreign banks may purchase Fund shares in amounts exceeding the limitations of Section 12(d)(1)(B). However, you state that although Section 12(d)(1)(B) may restrict the sale of investment company shares to foreign banks, the potential abuses Congress sought to eliminate through Section 12(d)(1) are not present in the case of sales of Fund shares to foreign banks.⁸

***2** In 1970, Congress amended Section 12(d)(1) to prohibit the creation and operation of most “fund of funds,” i.e., holding companies which invest primarily in the securities of other investment companies. Section 12(d)(1) addresses four potential abuses by fund holding companies:

- the acquisition of voting control of the investment company;
- undue influence over portfolio management through the “threat of large scale redemptions” and “loss of advisory fees” to the adviser, and the disruption of the orderly management of the investment company through the maintenance of large cash balances to meet potential redemptions;
- the complexity of the structure with the resultant difficulty on the part of the uninitiated shareholder in appraising the true value of his security; and
- the layering of sales charges, advisory fees, and administrative costs.⁹

With respect to the first and second abuses noted above, you state that because foreign banks will purchase Fund shares only at the instruction of their customers, and will not exercise any discretionary authority over those shares, the foreign

banks will not exercise control with respect to their total blocks of Fund shares and would have no economic interest in controlling the Funds or their investment policies.

You state that complexity of structure will not be a concern because each foreign bank has agreed to make clear to its customers that, although the bank is the recordholder of their Fund shares, they, as beneficial shareholders, will have all of the rights of shareholders set forth in the prospectuses for the Funds. The banks also will distribute the relevant Fund prospectuses, shareholder reports, and applicable sales literature (translated into the appropriate language) to the customers who have purchased Fund shares.

With respect to the layering of charges, you state that there will be no “fund of funds” levying additional charges. You represent that the prospectuses for the Funds will clearly disclose all relevant charges.¹⁰ You further represent that if the foreign banks decide to assess charges in connection with the administration of their customer accounts, those charges will be imposed on a customer-by-customer basis, and the Funds will supplement the foreign language prospectuses to clearly explain those charges.

*3 Accordingly, on the basis of the facts and representations in your letter, and without necessarily agreeing with your legal analysis, we would not recommend that the Commission take enforcement action if the Funds sell their respective shares to foreign investors through foreign banks in the manner described in your letter. However, any different facts and circumstances may require a different conclusion. This response expresses the Division's position on enforcement action only, and does not express any legal conclusions on the question presented.

Patrice M. Pitts
Attorney

October 23, 1991
Thomas S. Harman, Esq.
Chief Counsel
Division of Investment Management
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549
RE: Requestor: The Phoenix Funds

RE:1940 Act Section 12(d)(1)(B)

Dear Mr. Harman:

We request that you advise us that the Division will not recommend that the Commission take enforcement action against the Phoenix Series Fund, Phoenix Total Return Fund, Inc. or Phoenix Multi-Portfolio Fund (the “Phoenix Funds”) if they sell Fund shares to foreign investors through foreign banks in amounts that, in the aggregate, may be in excess of the limitations in Section 12(d)(1)(B) of the Investment Company Act of 1940 (“1940 Act”). At the request of the SEC staff, we have requested that our original October 31, 1990 letter request (“October letter”) be withdrawn and that this letter be filed in its place. This letter is identical to the October letter except that it includes information requested by the staff regarding the operation of bank accounts and analysis regarding the issue of affiliated persons under 1940 Act Sections 2(a)(3) and 17.

THE PHOENIX FUNDS

The Phoenix Funds are open-end, diversified, management investment companies organized as Massachusetts business trusts or Massachusetts corporations and are registered as “investment companies” under the 1940 Act. Two of the Phoenix Funds are organized and operated as “series” type investment companies. Together, the Phoenix Funds represent \$1.8 billion in assets and are segregated into twelve different investment portfolios each with different investment objectives, policies and restrictions. Phoenix Investment Counsel, Inc. is the investment adviser to the Phoenix Funds. Shares of the Funds are currently offered to individual and institutional investors and various tax-qualified plans in the United States.

PROPOSED SALES OF SHARES TO FOREIGN BANKS

The distributor of the Phoenix Funds, Phoenix Equity Planning Corporation, (“Equity Planning”) has, through foreign broker-dealers, received substantial indications of interest from foreign banks seeking to invest, as agents on behalf of their bank customers, in the Phoenix Funds. Accordingly, Equity Planning proposes to sell Fund shares in various European countries to banks located and organized in those countries. Although the foreign banks will be the owners of record, they will be purchasing shares only on a non-discretionary basis when instructed to do so by their customers. Each customer will maintain an account at the bank for investing in the Phoenix Funds and the bank will not have any discretionary control over any of the funds in these customer accounts. Equity Planning plans to enter into selling agreements with foreign entities who are registered as broker-dealers under the Securities Act of 1934 (“1934 Act”) and who are also members of the National Association of Securities Dealers, Inc. (“NASD”). The broker-dealers will sell Fund shares to the banks under the provisions of these agreements. Pursuant to these arrangements, foreign banks may seek to make purchases of shares of the Phoenix Funds on behalf of foreign investors in excess of the limitations contained in 1940 Act Section 12(d)(1)(B).¹

SECTION 12(d)(1)(B)

*4 The definition of “investment company” under the 1940 Act can be read to encompass foreign banks.² For this reason, 1940 Act Rule 12d1-1 was recently adopted to permit registered investment companies to purchase the securities of foreign banks and insurance companies, without regard to the limitation provisions in Section 12(d)(1)(A) of the Act. However, Rule 12d1-1 only addressed the ability of registered investment companies to purchase the securities of foreign banks and insurance companies and not their ability to sell shares to those entities and the limitations on such sales contained in Section 12(d)(1)(B).

Therefore, the sale of Phoenix Fund shares through foreign banks, where the banks are the record owners, may raise questions as to whether the banks are subject to the limitations in Section 12(d)(1)(B). This section imposes limits on the amount of securities of a registered open-end investment company that may be acquired by a single “investment company” or group of “investment companies.” Specifically, a registered investment company may not sell its shares to any other “investment company” if, after the sale:

(a) more than 3% of its voting shares would be owned by the acquiring “investment company”; or

(b) more than 10% of its voting shares would be owned by the acquiring “investment company” and other “investment companies” related to the acquiring “investment company.”

For the reasons set forth below, we do not believe that Section 12(d)(1)(B) should apply to purchases by foreign banks under the proposed arrangements.³

BASIS FOR “NO ACTION” REQUEST

*5 Even assuming that record ownership by the foreign banks raised a question as to the applicability of Section 12(d)(1)(B) to the proposed sales, we do not believe that the dangers of fund holding companies, which Congress sought to eliminate when enacting the 1970 amendments to Section 12(d)(1), are present in this situation. Indeed, the Commission has acknowledged the inapplicability of Section 12(d)(1) to foreign banks with the enactment of Rule 12d1-1.⁴ If foreign banks are not considered investment companies for purposes of purchases by U.S. registered funds of the banks' securities, then those banks should not be considered to be investment companies for purposes of their purchases, as agents for their customers, of securities of U.S. registered funds. In addition, the Division has previously taken somewhat comparable “no action” positions with respect to investments by various foreign entities. See *The Cheapside Dollar Fund Limited* (available Dec. 15, 1971); *Frank Russell Investment Company* (available Jan. 3, 1984); *Frank Russell Investment Company* (available Oct. 20, 1986); and *Templeton Growth Fund, Ltd.* (available Feb. 4, 1987).

DISCUSSION

The 1970 amendments to Section 12(d)(1) were designed to deal with the problems of so-called “funds of funds.” The Section was intended to address abuses relating to the acquisition of voting control of the investment company; undue influence over portfolio management through the threat of large-scale redemptions and loss of advisory fees; the disruption of orderly management of the investment company through the maintenance of large cash balances to meet potential redemptions; the complexity of the structure with the resultant difficulty on the part of the uninitiated shareholder in appraising the true value of his shares; and the layering of sales charges, advisory fees and administrative costs.

Investment in the Phoenix Funds shares by foreign banks does not present any of the controlling shareholder dangers. The foreign banks will be purchasing the shares only upon instructions from their customers and will not exercise any discretionary authority. The banks will not be exercising control with respect to their total blocks of shares and would have no economic interest in controlling the Funds or their investment policies. In this respect, purchases by the foreign banks raise fewer concerns than do purchases by institutional investors acting on their own behalf or investment advisers with discretionary authority.

With respect to concerns of complexity, each bank has agreed to make clear to its customers that although the bank is the record owner of their shares, they will have all of the rights of shareholders as set forth in the prospectuses for the Funds. For example, the banks will disclose to their customers that they have proxy voting instruction rights and the right to proceed directly against the Funds in any legal action. The banks will also receive and distribute to their customers all Phoenix Funds prospectuses, shareholder reports and applicable sales literature translated into the appropriate foreign language. All sales literature will be filed with the NASD prior to use. Accordingly, both the banks and their customers should have no difficulty in understanding the nature of their investment. With respect to the layering of charges, there will be no “fund of funds” levying additional charges. The Phoenix Funds will continue to clearly disclose all relevant charges in the prospectuses and sales loads will not be in excess of the maximums permitted under SEC and NASD rules. If the foreign banks decide to impose any additional charges in connection with the administration of their customer accounts, the Phoenix Funds will supplement the foreign language prospectuses to be used with such customers to clearly explain those charges.

*6 It is clear that the potential specific abuses which concerned Congress and the Commission will not be present in the case of sales by the Phoenix Funds to foreign banks.

CONCLUSION

We do not believe that mere record ownership by the foreign banks under the circumstances presented should result in the foreign banks being deemed to be “investment companies” within the literal scope of Section 12(d)(1), and, even if they are so deemed, the sale of investment company shares to foreign banks acting as agents for their customers does not give rise to the abuses Section 12(d)(1) was designed to prohibit. Recently enacted Rule 12d1–1 under the 1940 Act clarified that foreign banks were not intended to be subject to Section 12(d)(1)(A) restrictions. The rule thus allows registered investment companies to invest in foreign banks' and insurance companies' securities without regard to Section 12(d)(1) restrictions. Commenters on Rule 12d1–1 have suggested that the rule's exemption should be extended to registered investment companies selling their shares to such entities and, according to the adopting Release, this suggestion will be considered for future action.

Accordingly, based on the foregoing, we respectfully request that the staff advise us that it would not recommend any enforcement action to the Commission if the Phoenix Funds sell shares to foreign banks under the circumstances described in this letter in excess of the limits contained in 1940 Act Section 12(d)(1)(B).

Very truly yours,

Patricia O. McLaughlin Counsel
The Phoenix Funds
PHOENIX MUTUAL LIFE INSURANCE COMPANY
One American Row
Hartford, CT 06115
(203) 275-5000

Footnotes

- 5 Section 12(d)(1)(B) makes it unlawful for any registered open-end investment company (the “acquired company”), its principal underwriter, or any broker or dealer registered under the Securities Exchange Act of 1934 to sell or otherwise dispose of any security issued by the acquired company to any other investment company (the “acquiring company”) if, immediately after the sale: (i) the acquiring investment company and any company or companies controlled by it will own in the aggregate more than 3 percent of the acquired company's total outstanding voting shares; or (ii) the acquiring company and other investment companies and companies controlled by them will own in the aggregate more than 10 percent of the acquired company's total outstanding voting shares.
- 6 You note that a foreign bank will be the recordholder of the Fund shares and, consequently, a bank's investments on behalf of customers could render it an “affiliated person” (as that term is defined in Section 2(a)(3) of the 1940 Act) of any of the Funds if it owned more than five percent of the outstanding securities of any of the Funds. We agree. You do not request the staff's views, and we express no opinion, on the applicability of Section 17(a) of the 1940 Act to the Funds' proposal.
- 7 To the extent that a foreign bank “is engaged ... in the business of investing, reinvesting, owning, holding, or trading in securities and owns or proposes to acquire investment securities having a value exceeding 40 per centum of the value of [its] total assets[.]” it may be an “investment company” under Section 3(a)(3). Although Section 3(c)(3) of the 1940 Act expressly excludes banks from the definition of investment company, the term “bank,” as defined in Section 2(a)(5), does not include foreign banks. Investment Company Act [Rel. No. 17682 \(Aug. 9, 1990\)](#) (proposal to amend Rule 6c–9).
- 8 You state that because the banks will not exercise discretionary authority over their customers' accounts, the proposed arrangements do not raise questions of whether the aggregation of those accounts would result in the creation of separate securities or one or more separate investment companies.
- 9 The 1970 amendments to the 1940 Act, among other things, responded to concerns about the mutual fund industry raised by the Commission in its 1966 report, *Public Policy Implications of Investment Company Growth* (reprinted in H.R.Rep. No. 2337, 89th Cong., 2d Sess. 314–24 (1966)). House Comm. on Interstate & Foreign Commerce, *Investment Company Amendments of 1970*, H.R.Rep. No. 1382, 91st Cong., 2d Sess. 2–3 & 10–11.
- 10 You note that sales loads will not exceed the maximums permitted under the rules of both the Commission and the National Association of Securities Dealers.
- 1 Because the foreign banks will be the record owners, their investments on behalf of customers could also cause a bank to become an “affiliated person” of a Phoenix Fund as that term is defined in 1940 Act Section 2(a)(3) if it owned more than 5 percent of a Fund's outstanding securities. However, this should not raise any issue with respect to 1940 Act Section 17(a) because under that section an affiliated person may purchase securities of which the seller is issuer. Accordingly, we are not requesting the staff's views on this issue.

- 2 1940 Act Section 3(a)(3) defines “investment company” to include any issuer which “is engaged ... in the business of investing ... in securities and owns or proposes to acquire investment securities having a value exceeding 40 percent of the value of such issuer's total assets.” To the extent that foreign banks are involved in investing in securities they may be deemed to be investment companies under the 1940 Act. Section 3(c)(3) of the Act specifically excludes “banks” from being deemed to be investment companies but the Act's definition of the term “bank” does not include foreign banks.
- 3 Moreover, we do not believe the proposed arrangements raise any significant question as to whether the aggregation of customers' accounts at the banks would result in the creation of separate securities or one or more separate investment companies because the banks will not have any discretionary authority. See *National Deferred Compensation* (available Aug. 31, 1987); and cf. *Qualivest Capital Management, Inc.* (available July 30, 1990); *Strategic Advisors, Inc.* (available Dec. 13, 1988); and *No Load Timing Service, Inc.* (available Nov. 28, 1983). In each of the latter three instances, unlike the facts of the situation presented, the sponsor had and exercised discretionary investment authority. Similarly, the staff position regarding Section 12(d)(1) in *Balliett, Blackstock & Stearns* (available Aug. 19, 1987) is not relevant to our request because of the absence of discretionary authority on the part of the foreign banks, and the different foreign circumstances presented here. In any event, the arrangement would comply in all relevant material respects with SEC staff positions in the “mini-account” area. Accordingly, we are not requesting the staff's views on this issue.
- 4 The Release adopting Rule 12d1-1 states that “the Commission has long recognized that most foreign banks ... are very unlike domestic investment companies, and need not be regulated in the same manner.”

1991 WL 243176 (S.E.C. No - Action Letter)

PUBLIC

28 OCT 1991 000054

Our Ref. No. 91-092-CC
The Phoenix Funds
File Nos. 811-810,
811-1442, and
811-5436

RESPONSE OF THE OFFICE OF CHIEF COUNSEL
DIVISION OF INVESTMENT MANAGEMENT

Your letter dated October 23, 1991, requests assurance that we would not recommend enforcement action to the Commission under Section 12(d)(1)(B) of the Investment Company Act of 1940 (the "1940 Act") if three registered open-end investment companies, Phoenix Series Fund, Phoenix Total Return Fund, Inc., and Phoenix Multi-Portfolio Fund (collectively, the "Funds") sell their respective shares to foreign investors through foreign banks in amounts that, in the aggregate, may exceed the limitations in Section 12(d)(1)(B). 1/

You state that the distributor of the Funds, Phoenix Equity Planning Corporation ("Equity Planning") proposes to sell Fund shares to banks located and organized in various European countries. Although the foreign banks would be the recordholders of the Fund shares, the foreign banks would purchase those Fund shares on a non-discretionary basis and only at the instruction of their customers. 2/

Section 12(d)(1)(B) restricts sales by a registered, open-end investment company to any other investment company. You note that a foreign bank may be an investment company, 3/ and that under the

1/ Section 12(d)(1)(B) makes it unlawful for any registered open-end investment company (the "acquired company"), its principal underwriter, or any broker or dealer registered under the Securities Exchange Act of 1934 to sell or otherwise dispose of any security issued by the acquired company to any other investment company (the "acquiring company") if, immediately after the sale: (i) the acquiring investment company and any company or companies controlled by it will own in the aggregate more than 3 percent of the acquired company's total outstanding voting shares; or (ii) the acquiring company and other investment companies and companies controlled by them will own in the aggregate more than 10 percent of the acquired company's total outstanding voting shares.

2/ You note that a foreign bank will be the recordholder of the Fund shares and, consequently, a bank's investments on behalf of customers could render it an "affiliated person" (as that term is defined in Section 2(a)(3) of the 1940 Act) of any of the Funds if it owned more than five percent of the outstanding securities of any of the Funds. We agree. You do not request the staff's views, and we express no opinion, on the applicability of Section 17(a) of the 1940 Act to the Funds' proposal.

3/ To the extent that a foreign bank "is engaged...in the business of investing, reinvesting, owning, holding, or trading in securities and owns or proposes to acquire

(continued...)

proposed selling arrangements the foreign banks may purchase Fund shares in amounts exceeding the limitations of Section 12(d)(1)(B). However, you state that although Section 12(d)(1)(B) may restrict the sale of investment company shares to foreign banks, the potential abuses Congress sought to eliminate through Section 12(d)(1) are not present in the case of sales of Fund shares to foreign banks. 4/

In 1970, Congress amended Section 12(d)(1) to prohibit the creation and operation of most "fund of funds," *i.e.*, holding companies which invest primarily in the securities of other investment companies. Section 12(d)(1) addresses four potential abuses by fund holding companies:

- the acquisition of voting control of the investment company;
- undue influence over portfolio management through the "threat of large scale redemptions" and "loss of advisory fees" to the adviser, and the disruption of the orderly management of the investment company through the maintenance of large cash balances to meet potential redemptions;
- the complexity of the structure with the resultant difficulty on the part of the uninitiated shareholder in appraising the true value of his security; and
- the layering of sales charges, advisory fees, and administrative costs. 5/

3/ (...continued)

investment securities having a value exceeding 40 per centum of the value of [its] total assets[,] it may be an "investment company" under Section 3(a)(3). Although Section 3(c)(3) of the 1940 Act expressly excludes banks from the definition of investment company, the term "bank," as defined in Section 2(a)(5), does not include foreign banks. Investment Company Act Rel. No. 17682 (Aug. 9, 1990) (proposal to amend Rule 6c-9).

4/ You state that because the banks will not exercise discretionary authority over their customers' accounts, the proposed arrangements do not raise questions of whether the aggregation of those accounts would result in the creation of separate securities or one or more separate investment companies.

5/ The 1970 amendments to the 1940 Act, among other things, responded to concerns about the mutual fund industry raised by the Commission in its 1966 report, Public Policy Implications of Investment Company Growth (reprinted in H.R. Rep. No. 2337, 89th Cong., 2d Sess. 314-24 (1966)). House Comm. on Interstate & Foreign Commerce, Investment Company Amendments of 1970, H.R. Rep. No. 1382, 91st Cong., 2d Sess.

(continued...)

With respect to the first and second abuses noted above, you state that because foreign banks will purchase Fund shares only at the instruction of their customers, and will not exercise any discretionary authority over those shares, the foreign banks will not exercise control with respect to their total blocks of Fund shares and would have no economic interest in controlling the Funds or their investment policies.

You state that complexity of structure will not be a concern because each foreign bank has agreed to make clear to its customers that, although the bank is the recordholder of their Fund shares, they, as beneficial shareholders, will have all of the rights of shareholders set forth in the prospectuses for the Funds. The banks also will distribute the relevant Fund prospectuses, shareholder reports, and applicable sales literature (translated into the appropriate language) to the customers who have purchased Fund shares.

With respect to the layering of charges, you state that there will be no "fund of funds" levying additional charges. You represent that the prospectuses for the Funds will clearly disclose all relevant charges. 6/ You further represent that if the foreign banks decide to assess charges in connection with the administration of their customer accounts, those charges will be imposed on a customer-by-customer basis, and the Funds will supplement the foreign language prospectuses to clearly explain those charges.

Accordingly, on the basis of the facts and representations in your letter, and without necessarily agreeing with your legal analysis, we would not recommend that the Commission take enforcement action if the Funds sell their respective shares to foreign investors through foreign banks in the manner described in your letter. However, any different facts and circumstances may require a different conclusion. This response expresses the Division's position on enforcement action only, and does not express any legal conclusions on the question presented.



Patrice M. Pitts
Attorney

5/ (...continued)
2-3 & 10-11.

6/ You note that sales loads will not exceed the maximums permitted under the rules of both the Commission and the National Association of Securities Dealers.

The PHOENIX

Public Information Board
October 23, 1991

Thomas S. Harman, Esq.
Chief Counsel
Division of Investment Management
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549

RE: Requestor: The Phoenix Funds
1940 Act Section 12(d)(1)(B)

Dear Mr. Harman:

We request that you advise us that the Division will not recommend that the Commission take enforcement action against the Phoenix Series Fund, Phoenix Total Return Fund, Inc. or Phoenix Multi-Portfolio Fund (the "Phoenix Funds") if they sell Fund shares to foreign investors through foreign banks in amounts that, in the aggregate, may be in excess of the limitations in Section 12(d)(1)(B) of the Investment Company Act of 1940 ("1940 Act"). At the request of the SEC staff, we have requested that our original October 31, 1990 letter request ("October letter") be withdrawn and that this letter be filed in its place. This letter is identical to the October letter except that it includes information requested by the staff regarding the operation of bank accounts and analysis regarding the issue of affiliated persons under 1940 Act Sections 2(a)(3) and 17.

THE PHOENIX FUNDS

The Phoenix Funds are open-end, diversified, management investment companies organized as Massachusetts business trusts or Massachusetts corporations and are registered as "investment companies" under the 1940 Act. Two of the Phoenix Funds are organized and operated as "series" type investment companies. Together, the Phoenix Funds represent \$1.8 billion in assets and are segregated into twelve different investment portfolios each with different investment objectives, policies and restrictions. Phoenix Investment Counsel, Inc. is the investment adviser to the Phoenix Funds. Shares of the Funds are currently offered to individual and institutional investors and various tax-qualified plans in the United States.

PROPOSED SALES OF SHARES TO FOREIGN BANKS

The distributor of the Phoenix Funds, Phoenix Equity Planning Corporation, ("Equity Planning") has, through foreign broker-dealers, received substantial indications of interest from foreign banks seeking to invest, as agents on behalf of their bank customers, in the Phoenix Funds. Accordingly, Equity Planning proposes to sell Fund shares in various European countries to banks located and organized in those countries. Although the foreign banks will be the owners of record, they will be purchasing shares only on a non-discretionary basis when instructed to do so by their customers. Each customer will maintain an account at the bank for investing in the Phoenix Funds and the bank will not have any discretionary

Securities & Exchange Commission
Division of Investment Management
October 23, 1991

Page 2

control over any of the funds in these customer accounts. Equity Planning plans to enter into selling agreements with foreign entities who are registered as broker-dealers under the Securities Act of 1934 ("1934 Act") and who are also members of the National Association of Securities Dealers, Inc. ("NASD"). The broker-dealers will sell Fund shares to the banks under the provisions of these agreements. Pursuant to these arrangements, foreign banks may seek to make purchases of shares of the Phoenix Funds on behalf of foreign investors in excess of the limitations contained in 1940 Act Section 12(d)(1)(B).¹

SECTION 12(d)(1)(B)

The definition of "investment company" under the 1940 Act can be read to encompass foreign banks.² For this reason, 1940 Act Rule 12d1-1 was recently adopted to permit registered investment companies to purchase the securities of foreign banks and insurance companies, without regard to the limitation provisions in Section 12(d)(1)(A) of the Act. However, Rule 12d1-1 only addressed the ability of registered investment companies to purchase the securities of foreign banks and insurance companies and not their ability to sell shares to those entities and the limitations on such sales contained in Section 12(d)(1)(B).

Therefore, the sale of Phoenix Fund shares through foreign banks, where the banks are the record owners, may raise questions as to whether the banks are subject to the limitations in Section 12(d)(1)(B). This section imposes limits on the amount of securities of a registered open-end investment company that may be acquired by a single "investment company" or group of "investment companies." Specifically, a registered investment company may not sell its shares to any other "investment company" if, after the sale:

- (a) more than 3% of its voting shares would be owned by the acquiring "investment company"; or
- (b) more than 10% of its voting shares would be owned by the acquiring "investment company" and other "investment companies" related to the acquiring "investment company."

¹ Because the foreign banks will be the record owners, their investments on behalf of customers could also cause a bank to become an "affiliated person" of a Phoenix Fund as that term is defined in 1940 Act Section 2(a)(3) if it owned more than 5 percent of a Fund's outstanding securities. However, this should not raise any issue with respect to 1940 Act Section 17(a) because under that section an affiliated person may purchase securities of which the seller is issuer. Accordingly, we are not requesting the staff's views on this issue.

² 1940 Act Section 3(a)(3) defines "investment company" to include any issuer which "is engaged...in the business of investing...in securities and owns or proposes to acquire investment securities having a value exceeding 40 percent of the value of such issuer's total assets." To the extent that foreign banks are involved in investing in securities they may be deemed to be investment companies under the 1940 Act. Section 3(c)(3) of the Act specifically excludes "banks" from being deemed to be investment companies but the Act's definition of the term "bank" does not include foreign banks.

Securities & Exchange Commission
Division of Investment Management
October 23, 1991

Page 3

For the reasons set forth below, we do not believe that Section 12(d)(1)(B) should apply to purchases by foreign banks under the proposed arrangements.³

BASIS FOR "NO ACTION" REQUEST

Even assuming that record ownership by the foreign banks raised a question as to the applicability of Section 12(d)(1)(B) to the proposed sales, we do not believe that the dangers of fund holding companies, which Congress sought to eliminate when enacting the 1970 amendments to Section 12(d)(1), are present in this situation. Indeed, the Commission has acknowledged the inapplicability of Section 12(d)(1) to foreign banks with the enactment of Rule 12d1-1.⁴ If foreign banks are not considered investment companies for purposes of purchases by U.S. registered funds of the banks' securities, then those banks should not be considered to be investment companies for purposes of their purchases, as agents for their customers, of securities of U.S. registered funds. In addition, the Division has previously taken somewhat comparable "no action" positions with respect to investments by various foreign entities. See *The Cheapside Dollar Fund Limited* (available Dec. 15, 1971); *Frank Russell Investment Company* (available Jan. 3, 1984); *Frank Russell Investment Company* (available Oct. 20, 1986); and *Temp'eton Growth Fund, Ltd.* (available Feb. 4, 1987).

DISCUSSION

The 1970 amendments to Section 12(d)(1) were designed to deal with the problems of so-called "funds of funds." The Section was intended to address abuses relating to the acquisition of voting control of the investment company; undue influence over portfolio management through the threat of large-scale redemptions and loss of advisory fees; the

³Moreover, we do not believe the proposed arrangements raise any significant question as to whether the aggregation of customers' accounts at the banks would result in the creation of separate securities or one or more separate investment companies because the banks will not have any discretionary authority. See *National Deferred Compensation* (available Aug. 31, 1987); and cf. *Qualivest Capital Management, Inc.* (available July 30, 1990); *Strategic Advisors, Inc.* (available Dec. 13, 1988); and *No Load Timing Service, Inc.* (available Nov. 28, 1983). In each of the latter three instances, unlike the facts of the situation presented, the sponsor had and exercised discretionary investment authority. Similarly, the staff position regarding Section 12(d)(1) in *Balliett, Blackstock & Stearns* (available Aug. 19, 1987) is not relevant to our request because of the absence of discretionary authority on the part of the foreign banks, and the different foreign circumstances presented here. In any event, the arrangement would comply in all relevant material respects with SEC staff positions in the "mini-account" area. Accordingly, we are not requesting the staff's views on this issue.

⁴The Release adopting Rule 12d1-1 states that "the Commission has long recognized that most foreign banks...are very unlike domestic investment companies, and need not be regulated in the same manner."

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disruption of orderly management of the investment company through the maintenance of large cash balances to meet potential redemptions; the complexity of the structure with the resultant difficulty on the part of the uninitiated shareholder in appraising the true value of his shares; and the layering of sales charges, advisory fees and administrative costs.

Investment in the Phoenix Funds shares by foreign banks does not present any of the controlling shareholder dangers. The foreign banks will be purchasing the shares only upon instructions from their customers and will not exercise any discretionary authority. The banks will not be exercising control with respect to their total blocks of shares and would have no economic interest in controlling the Funds or their investment policies. In this respect, purchases by the foreign banks raise fewer concerns than do purchases by institutional investors acting on their own behalf or investment advisers with discretionary authority.

With respect to concerns of complexity, each bank has agreed to make clear to its customers that although the bank is the record owner of their shares, they will have all of the rights of shareholders as set forth in the prospectuses for the Funds. For example, the banks will disclose to their customers that they have proxy voting instruction rights and the right to proceed directly against the Funds in any legal action. The banks will also receive and distribute to their customers all Phoenix Funds prospectuses, shareholder reports and applicable sales literature translated into the appropriate foreign language. All sales literature will be filed with the NASD prior to use. Accordingly, both the banks and their customers should have no difficulty in understanding the nature of their investment. With respect to the layering of charges, there will be no "fund of funds" levying additional charges. The Phoenix Funds will continue to clearly disclose all relevant charges in the prospectuses and sales loads will not be in excess of the maximums permitted under SEC and NASD rules. If the foreign banks decide to impose any additional charges in connection with the administration of their customer accounts, the Phoenix Funds will supplement the foreign language prospectuses to be used with such customers to clearly explain those charges.

It is clear that the potential specific abuses which concerned Congress and the Commission will not be present in the case of sales by the Phoenix Funds to foreign banks.

CONCLUSION

We do not believe that mere record ownership by the foreign banks under the circumstances presented should result in the foreign banks being deemed to be "investment companies" within the literal scope of Section 12(d)(1), and, even if they are so deemed, the sale of investment company shares to foreign banks acting as agents for their customers does not give rise to the abuses Section 12(d)(1) was designed to prohibit. Recently enacted Rule 12d1-1 under the 1940 Act clarified that foreign banks were not intended to be subject to Section 12(d)(1)(A) restrictions. The rule thus allows registered investment companies to invest in foreign banks' and insurance companies' securities without regard to Section 12(d)(1) restrictions. Commenters on Rule 12d1-1 have suggested that the rule's exemption should

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be extended to registered investment companies selling their shares to such entities and, according to the adopting Release, this suggestion will be considered for future action.

Accordingly, based on the foregoing, we respectfully request that the staff advise us that it would not recommend any enforcement action to the Commission if the Phoenix Funds sell shares to foreign banks under the circumstances described in this letter in excess of the limits contained in 1940 Act Section 12(d)(1)(B).

Very truly yours,



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The Phoenix Funds

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