

PUBLIC

SEP 22 1992

RESPONSE OF THE OFFICE OF CHIEF COUNSEL
DIVISION OF INVESTMENT MANAGEMENT

Our Ref. No. 92-415-CC
Missouri Family
Trust Fund
File No. 132-3

By letters dated July 24, 1991, and July 20, August 3, and August 13, 1992, you seek our assurance that we would not recommend that the Commission take enforcement action if (1) the Missouri Family Trust Fund (the "Trust") does not register under the Investment Company Act of 1940 (the "1940 Act"), in reliance on Section 2(b) of the 1940 Act; and (2) neither the Trustees of the Trust (the "Board") nor the Trust representatives who sell trust accounts (the "Representatives") register under the Investment Advisers Act of 1940 (the "Advisers Act"), in reliance on Section 202(b) of the Advisers Act. 1/

The Trust was created directly by statute adopted by the Missouri legislature in 1989, and amended in 1991 (the "Statute"), which declared the Trust "an instrumentality of the State." 2/ The Trust's Board consists of nine members appointed by the Governor with the advice and consent of the State Senate. The Board is required to report annually to the Governor and to both State legislative houses. The Trust is exempt from federal taxation by virtue of an IRS ruling dated May 7, 1992, and from state taxation by provision of the Statute. 3/

The Trust provides a vehicle through which private donors can make contributions to provide financial assistance to a designated individual with a mental or physical impairment (the "Beneficiary"). All Trust contributions are administered together, but a separate account is established for each

1/ Section 2(b) and Section 202(b) respectively provide that the 1940 Act and the Advisers Act do not apply to the United States, a State, or any political subdivision of a State, or any agency, authority or instrumentality of any one or more of the foregoing, and to any officer, agent or employee of the foregoing acting in the course of his official duty.

2/ See Mo. Rev. Stat. §§402.200 through 402.225 (Supp. 1992).

3/ Your 1991 letter also describes a successor trust, which receives the original contribution made on behalf of a Beneficiary after the Beneficiary no longer participates in the Trust, and a charitable trust, which receives the unused income from a contribution in the event that the donor revokes a contribution. You request our advice only with respect to the status of the Trust under the 1940 Act. We therefore express no opinion as to any issues concerning the successor or charitable trusts.

Beneficiary (collectively, the "Accounts"). 4/ The Trust's income, net of administrative expenses, is allocated to the Accounts in proportion to the contribution made on each Beneficiary's behalf. The Board is responsible for administering the Trust, and pooling and investing contributions made to the Trust. 5/ The Statute prohibits Board members from collecting compensation for any services provided on behalf of the Trust, although they may be reimbursed for actual expenses. 6/

The offer and sale of Accounts is and will continue to be undertaken solely by Representatives acting in the course of their official duties as agents of the Trust. The Representatives perform other duties on behalf of the Trust as well. They do not receive any commission or remuneration for these solicitations.

On the basis of the facts and representations contained in your letters and the telephone conversation, we would not

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- 4/ Currently, employees of the Missouri Department of Mental Health carry out the Trust's routine administrative tasks, such as recordkeeping. In the event this arrangement terminates for any reason, the Trust will hire employees to perform these functions. Telephone conversation, dated September 10, 1992, between Amy R. Doberman and Mary Anne O'Connell (the "telephone conversation").
- 5/ At the time a donor makes a contribution, he or she may name a co-trustee to act with the Board on the Beneficiary's behalf. The Trust, with the consent of the co-trustee, agrees on the amount of income to be used to provide a Beneficiary with benefits. The co-trustee also may choose among several mutual funds, preselected by the Board, in which to invest the donated funds. The Statute prohibits co-trustees from collecting compensation for any services provided on behalf of the Trust, but permits reimbursement for actual expenses. You represent that all co-trustees either will be excluded from the definition of investment adviser, exempt from registration under Section 203(b)(3) of the Advisers Act, or, if necessary, will register under the Advisers Act. Accordingly, you have not asked and therefore we express no opinion with respect to the co-trustees' status under the Advisers Act.
- 6/ The statute does permit payment of reasonable compensation for services rendered by a trust company that serves as a trustee. You represent, however, that no appointment of a trust company has been made or is planned. Accordingly, you have not asked and therefore we express no opinion with respect to status under the Advisers Act of a trust company that may serve as a trustee of the Trust.

recommend any enforcement action to the Commission if the Trust, a "public instrumentality," does not register under the 1940 Act in reliance on Section 2(b). 7/ Similarly, we would not recommend any enforcement action to the Commission if Board members and the Representatives, as officers, agents or employees of a public instrumentality, do not register under the Advisers Act in reliance on Section 202(b). In reaching the foregoing conclusions, we note particularly that: (1) the Trust was created specifically by the Missouri legislature to be a "public instrumentality;" and (2) Board members are appointed by the State governor and subject to confirmation by the State Senate, and must report annually to both the Governor and the State legislature.

The Division of Market Regulation has asked us to inform you that, based on the facts and representations in your letters, it will not recommend any enforcement action to the Commission under Section 15(a) of the Securities Exchange Act of 1934 (the "Exchange Act") if the Trust or the Representatives offer and sell the Accounts as you describe, without registering with the Commission as brokers or municipal securities dealers under Section 15(b) or Section 15B(a) of the Exchange Act, respectively.

The Division of Corporation Finance has asked us to inform you that, on the basis of the facts presented, it will not recommend any enforcement action to the Commission if the Trust, in reliance upon your opinion as counsel that the exemption from registration provided by Section 3(a)(2) of the Securities Act of 1933 (the "Securities Act") and the exemption provided by Section 304(a)(4)(A) of the Trust Indenture Act of 1939 (the "Trust Indenture Act") are available, offers and sells Accounts in the manner and for the purposes described in your letters without compliance with the registration requirements of the Securities Act or qualification provisions of the Trust Indenture Act.

7/ See Florida Prepaid College Program/Florida Prepaid Postsecondary Education Expense Program and Trust Fund (pub. avail. Sept. 12, 1990); State of Ohio/Ohio Tuition Trust Authority (pub. avail. Aug. 6, 1990); State of Michigan/Michigan Education Trust (pub. avail. June 30, 1988).

You should note that the Divisions' positions are based on the facts and representations in your letters and the telephone conversation and that any different facts or representations might require a different conclusion.

Amy R. Doberman

Amy R. Doberman
Senior Attorney

STINSON, MAG & FIZZELL

1201 WALNUT STREET
P. O. Box 419251
KANSAS CITY, MISSOURI
64141-6251

TELEPHONE
(816) 842-8600
WRITER'S DIRECT DIAL NUMBER
(816) 691-

FACSIMILE
(816) 691-3495

THE EAST BUILDING
7500 WEST 110TH STREET
OVERLAND PARK, KANSAS 66210-2329

July 24, 1991

FEDERAL EXPRESS

	<u>ACT</u>	<u>SECTION</u>
Office of the Chief Counsel <i>ICA-40</i>	1933	3(a)(2)
Division of Corporation Finance	1934	15(a)
Securities and Exchange Commission <i>2(b)</i>	1934	15B
450 Fifth Street, N.W.	1939	304(a)(4)
Washington, D.C. 20549	1940C	2(b)

Public Availability *9/22/92*
Re: Missouri Family Trust Fund

Ladies and Gentlemen:

This letter is written on behalf of the Missouri Family Trust fund (the "Trust"), a non-profit trust established by state statute to permit private funding of benefits for persons with certain mental or physical impairments. The Trust requests certain interpretative or "no action" positions from the staff (the "Staff") of the Securities and Exchange Commission (the "Commission") with respect to the contemplated offering by the Trust of trust accounts (the "Accounts"), described below. Pursuant to Release No. 33-5127, as modified by Release No. 33-6269, the sections of the federal securities statutes to which this letter relates are identified in the upper right-hand corner. Enclosed are seven copies of this letter, together with exhibits, which the Staff of your Division ordinarily requires, and four additional copies of this letter and exhibits, one for each statutory section (after the first such section) identified above.

Background

The Trust was created by a statute adopted by the Missouri state legislature in 1989 which became effective on September 29, 1989, when the Director of the Missouri Department of Mental Health ("DMH") notified the Revisor of Statutes of the State of Missouri (the "State") that DMH had received administrative assurances from the Social Security Administration and the Health Care Financing Administration that participation in the Trust would not jeopardize a beneficiary's eligibility for public assistance. The statute establishing the Trust was amended during the 1991 session of the Missouri Legislature. The amendment was signed by the Governor on July 7, 1991 and became effective at that time, pursuant to an emergency clause. A copy

of the statute, as amended (the "Act") is enclosed with this letter as Exhibit A. References to statutory sections or paragraphs not attributed to another statute refer to sections or paragraphs of the Act.

The Act is designed to encourage the provision by family and friends of supplemental medical, social and other services to persons with a mental or physical impairment without the loss of other publicly-funded benefits and programs. See §§ 402.199.2; 402.205.1. The Act seeks to achieve its purpose through a program to be administered by the board of trustees of the Trust (the "Board"). Under this program, relatives and other interested persons will be able to set aside funds that will be available to cover expenses not covered by governmental benefit programs for handicapped State residents. The Act contemplates that contributions received by the Trust will be pooled and invested as the Board deems appropriate, with the appropriate portion of the Fund allocated to an Account for the lifetime beneficiary specified by the donor (the "Beneficiary"). Only a person with "a mental or physical impairment ... verified by medical findings ... that substantially limits one or more major life activities ..." is eligible to be a designated Beneficiary. See § 402.200(4).

Trust Administration

The Trust may accept contributions from any source (other than from a Beneficiary and his or her spouse). See § 402.215.2(1). At the time a contribution is made the donor may designate a Beneficiary, and also may name a cotrustee (including the donor) to act with the Board on behalf of the Beneficiary. See § 402.215.2(2). A Beneficiary is not eligible to be a cotrustee. All contributions (and any earnings) are administered as one trust, but a separate Account is established for each Beneficiary. The income earned by the Trust, after deducting administrative expenses, is allocated to the Accounts in proportion to the contribution made on behalf of each Beneficiary (reduced by any distributions). See § 402.215.2(1).

The Board, with the consent of the cotrustee, if any, determines when proceeds of an Account will be used to provide benefits to a Beneficiary, as well as the nature and type of benefits to be provided. Procedures are established for handling any dispute between the Board and the cotrustees with respect to use of Account funds for a Beneficiary. See § 402.215.2(3).

Trustees of a successor trust (the "Successor Trust") are designated by the donor at the time of the original contribution. The Successor Trust is administered by its trustees, and not as part of the Trust. The Successor Trust is available to receive the original contribution (or a portion

thereof) under certain circumstances where the Beneficiary no longer participates in the Trust, (described below). Thereafter, the Successor Trust is used to provide benefits for the Beneficiary for the rest of his or her life. After the Beneficiary's death, the remaining principal and accumulated income of the Successor Trust is distributed to such person or persons as the donor designates. See § 402.215.2(9).

Any donor, during his lifetime, may revoke any contribution to the Trust. If at the time of revocation, the Beneficiary has not received any benefits from the Account, the entire original contribution (as defined in § 402.200(7)) is returned to the donor. If the Beneficiary has received any benefits from the Account, ninety percent of the original contribution, reduced by any distributions, will be returned to the donor. If the entire original contribution is not returned to the donor, the balance is deposited in a separate fund (the "Charitable Trust"). In either event, all income on the Account not previously used for the benefit of the Beneficiary is deposited in the Charitable Trust. See § 402.215.2(4). The Charitable Trust is administered as part of the Fund, but as a separate Account. The income attributable to the Charitable Trust is used to provide benefits for individuals who are eligible to be Beneficiaries, but who either have no immediate family or whose immediate family, in the opinion of the Board, is financially unable to make a contribution to the Trust sufficient to provide benefits. Beneficiaries of the Charitable Trust are selected by the Board. See § 402.215.2(10).

Any cotrustee, other than the original donor, may, upon written notice to the Trust, seek to withdraw the original contribution, reduced by any distributions. If the Board determines that the reason for withdrawal is sufficient, the Board distributes to the trustee of the Successor Trust the applicable portion of the original contribution. See § 402.215.2(5). In the event that a Beneficiary moves from the State or otherwise ceases to be eligible for services provided by the State Department of Mental Health, the Board may terminate that Beneficiary's Account and distribute the applicable portion (ranging from 75% to 90%) of the original contribution, to the trustee of the Successor Trust. See § 402.215.2(6). The trustee of the Successor Trust holds, administers and distributes the principal and income of the Successor Trust for the maintenance, support, health, education and general well-being of the Beneficiary. See § 402.215.2(9).

If the Beneficiary dies before receiving any benefits provided by the Account, the entire original contribution is distributed to such person or persons as the donor shall have designated. Any undistributed net income is deposited in the Charitable Trust. If at the time of the Beneficiary's death, the

Office of the Chief Counsel
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Page 4

Beneficiary had received benefits provided by the use of the Account funds, fifty percent of the original contribution, reduced by any distributions, is distributed to such person or persons as the donor designated, and the balance of the Account is distributed to Charitable Trust. See § 402.215.2(8).

Except for the rights to revoke the Account described above, no donor or cotrustee has the right to sell, assign, convey, or otherwise encumber, any interest in an Account. See § 402.217.2. Further, no Beneficiary has any vested or property right in the Trust or the power to convey or transfer any interest in the Trust or an Account. See § 402.217.1. In no event does the donor or a trustee ever receive more than the donor's original contribution. "Original Contribution" is defined to exclude any appreciation in value, from any source, and can not include more than the total of the contributions made to an Account. See § 402.200(7).

The Trust

The Trust is a public body corporate and politic, although intended to function independently, through its Board. See § 402.210.1. The Act requires that the nine-member Board be appointed by the Governor of the State, with the advice and consent of the State Senate, from among specified categories of nominees. The Board members serve for fixed, staggered terms, ranging from one to three years. See § 402.210.1. The Board is required to account annually to the State's Governor, the president pro tempore of the Senate and the Speaker of the House of Representatives. See § 402.210.5. Board meetings are subject to the provisions of the State's Open Meetings Act (see § 402.210.4), and Board members are entitled to coverage by the State Legal Expense Fund. See Opinion 112-90 of William Webster, Missouri Attorney General, a copy of which is attached as Exhibit B.

The Act provides that the property, income and operations of the Trust are exempt from all taxation by the State and any political subdivision thereof. See § 402.205.3. The Trust also is exempt from federal income taxation under the Internal Revenue Code. The Board has applied for revenue rulings from the Internal Revenue Service regarding the tax exempt status of both the Trust and the Charitable Trust. A positive response is anticipated within ninety days. We will be happy to provide copies of those rulings upon receipt.

Discussion

Given the purpose for which Accounts are intended to be established, their lack of transferability, the limited circumstances under which they may be terminated, and the fact that the donor can never receive any of the income on his initial contribution (or investment), we do not believe that the Accounts should properly be deemed "securities" for purposes of any of the federal securities laws identified above.

In any event, however, given the nature and organization of the Trust, its purposes and the significant governmental functions intended to be performed by it, its accountability to the State and the other factors described above, we believe the Trust is a "public instrumentality" of the State and, thus, that the Accounts (if deemed to be securities) are exempt from registration under the Securities Act of 1933 pursuant to § 3(a)(2) thereof, by virtue of being issued by such an "instrumentality." For the same reason, we believe that the Accounts are exempted from the provisions of the Trust Indenture Act of 1939 by § 304(a)(4)(A) thereof. We also believe that the Accounts (if deemed to be securities) are "municipal securities" as defined in § 3(a)(29) of the Securities Exchange Act of 1934 and, therefore, by virtue of the provisions of § 3(d) of that statute, that Board members or officers or other employees of the Trust who, acting in the course of their official duties as such, offer or "sell" the Accounts on behalf of the Trust, would not be "brokers" (including "municipal securities brokers"), as defined in that statute, solely by reason of such activity, nor would the Trust be deemed a "dealer" or "municipal securities dealer" solely by reason of establishing the Accounts or by offering or "selling" them through the Board members. Finally, in light of § 2(b) of the Investment Company Act of 1940, which provides that no provision of that title shall apply to a state or any instrumentality of a state, we believe that, despite the investment activity contemplated by the Trust, the Trust is not required to register as an investment company under that statute.

The legislative history of § 3(a)(2) of the Securities Act supports our conclusions. In 1934, the pertinent portion of that section, which previously exempted securities issued by "any State of the United States, or by any political subdivision of a State or Territory, or by any public instrumentality of one or more States or Territories exercising an essential governmental function," was amended to delete the phrase "exercising an essential governmental function." The Conference Report concerning that amendment indicates that it was adopted for the purpose of extending "the scope of the public instrumentality exemption to expanding activities in which governments are engaging." H.R. Rep. No. 1838 (Conference Report), 73rd Cong., 2d

Sess. 40 (1934). The importance of providing basic support for persons with a substantial mental or physical impairment long has been recognized in this country. Under these circumstances, we believe the functions to be performed by the Trust would render it a "public instrumentality" even under the prior version of § 3(a)(2), as well as under the 1934 version currently in effect. Further, we believe that the term "instrumentality of a state" as used in § 3(a)(29) of the Securities Exchange Act and § 2(b) of the Investment Company Act is most properly interpreted consistently with § 3(a)(2) of the Securities Act, in light of the nearly contemporaneous enactment of these statutes and their similar purposes. We believe our conclusions also are supported by the Commission's determination in Michigan Education Trust (available June 30, 1988). For your convenience, a copy of that no-action letter request is attached as Exhibit C.

Conclusion

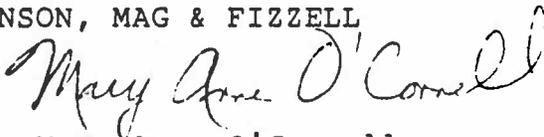
We hereby respectfully request the Staff's concurrence with our opinion that the above-described offering of the Accounts may proceed (i) without registration of the Accounts under the Securities Act, (ii) without use or qualification of an indenture or indenture trustee under the Trust Indenture Act, (iii) without registration of the Trust as an investment company under the Investment Company Act, and (iv) without registration of the Trust as a dealer or municipal securities dealer or of its Board members, officers or employees as brokers or municipal securities brokers under the Securities Exchange Act.

In the event that the Staff is not inclined to provide concurrence with our views, we request an opportunity to discuss the matter prior to any final decision. If any Staff member of your Division or of any other Division to which you may consider it appropriate to refer certain of these requests has any questions or requires further information, please contact the undersigned at (816) 691-3190. In any case, we would appreciate being informed, by letter or telephone call, of the identity of the Staff member(s) assigned to consider this letter.

Very truly yours,

STINSON, MAG & FIZZELL

By .


Mary Anne O'Connell

MAOC/laa
Enclosures
cc: Mr. Gerald Zafft

STINSON, MAG & FIZZELL

1201 WALNUT STREET
P. O. Box 419251
KANSAS CITY, MISSOURI
64141-6251

THE MAST BUILDING
7500 WEST 110TH STREET
OVERLAND PARK, KANSAS 66210-2329

TELEPHONE
(816) 842-8600
WRITER'S DIRECT DIAL NUMBER
(816) 691-3190

FACSIMILE
(816) 691-3495

July 20, 1992

Securities & Exchange Commission
450 5th Street, N.W.
Washington, D.C. 20549

Attention: Mr. Thomas Harman

Re: Missouri Family Trust Fund -
No-Action Letter Request dated
July 24, 1991

Dear Mr. Harman:

This letter is submitted in response to my telephone conversations with Mr. Stoller and Mr. Dill with respect to the above-captioned no-action letter request. Enclosed are copies of determination letters from the Internal Revenue Service stating that the Missouri Family Board of Trustees (the "Board"), which administers the Missouri Family Trust Fund (the "Fund"), and the Charitable Trust of the Missouri Family Trust (the "Charitable Trust") are exempt from federal income taxation pursuant to Section 5601(c)(3) of the Internal Revenue Code.

As noted in my letter dated July 24, 1991, contributions to the Fund, although allocated to individual accounts, will be pooled for investment and will be invested by the Board in its discretion. This will confirm that those investments may include purchases of securities.

Representatives of the Fund have confirmed to us that solicitation of participations in the Fund and the offer and sale of accounts will be undertaken solely by representatives of the Fund (possibly including members of the Board) acting in the course of their official duties. Any such representatives of the Fund will perform services on behalf of the Fund otherwise than in connection with such solicitation. No commissions or remuneration will be paid for such solicitation. In fact, Section 402.210.2 of the Missouri Revised Statutes provides that no Board member, trustee or individual co-trustee of any account established under the Fund will receive compensation for services (other than reimbursement for necessary expenses actually incurred). That statute does permit payment of "reasonable compensation" for

July 20, 1992

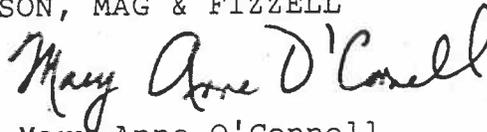
services to any trust company serving as a trustee. It would appear, therefore, that Section 202(b) of the Investment Advisers Act would render the provisions of that statute inapplicable to any natural person serving as an officer, trustee, Board member or other agent of the Fund or the Charitable Trust.

If any staff member of your Division, or of any other Division, has any additional questions or requires further information, please contact me at (816) 691-3190.

Very truly yours,

STINSON, MAG & FIZZELL

By


Mary Anne O'Connell

MAOC/sr

cc: Mr. Lawrence B. Stoller - Mail Stop 10-6
Mr. Alex Dill
Mr. Gerald Zafft

STINSON, MAG & FIZZELL

1201 WALNUT STREET
P. O. Box 419251
KANSAS CITY, MISSOURI
64141-6251

FACSIMILE
(816) 691-3495

THE MAST BUILDING
7500 WEST 110TH STREET
OVERLAND PARK, KANSAS 66210-2329

TELEPHONE
(816) 842-8600
WRITER'S DIRECT DIAL NUMBER
(816) 891-3190

August 3, 1992

VIA FACSIMILE - 202-504-2395

Ms. Amy Doberman
Securities & Exchange Commission
450 5th Street, N.W.
Washington, D.C. 20549

Re: Missouri Family Trust -
No-Action Letter Request

Dear Ms. Doberman:

This letter will confirm our telephone conversation of earlier today. A representative of the Missouri Family Trust confirmed to me today that the trust has not appointed a trust company trustee, and has no intention to do so. Mr. Jerry Zafft advised me that the provision for a trust company trustee and for compensation to any such entity may be deleted in the next amendment to the statute as it was included based on a belief that such a structure was necessary to comply with securities laws. In any event, the Missouri Family Trust does not seek a no-action position or advice on the issue of whether a trust company serving as a trustee to the Trust is required to register as an investment adviser under the Investment Advisers Act of 1940.

Very truly yours,

STINSON, MAG & FIZZELL

By

Mary Anne O'Connell
Mary Anne O'Connell

MAOC/sr

cc: Mr. Jerry Zafft

STINSON, MAG & FIZZELL

1201 WALNUT STREET
P. O. Box 419251
KANSAS CITY, MISSOURI
64141-6251

TELEPHONE
(816) 842-8600
WRITER'S DIRECT DIAL NUMBER
(816) 891-3190

FACSIMILE
(816) 891-3498

THE MAST BUILDING
7800 WEST 110TH STREET
OVERLAND PARK, KANSAS 66210-2328

August 13, 1992

VIA FACSIMILE - 202-504-2395

Ms. Amy Doberman
Securities & Exchange Commission
450 5th Street, N.W.
Washington, D.C. 20549

Re: Missouri Family Trust Fund

Dear Ms. Doberman:

This will confirm our telephone conversation of yesterday regarding the role of a co-trustee. As you are aware, a donor to the Missouri Family Trust Fund (the "Fund") may designate one or more co-trustees (who may be the donor or other individuals) to act together with the Fund's Board of Trustees on behalf of the beneficiary named by the donor. The co-trustee, in addition to determining how funds from the beneficiary's accounts are used for the benefit of the beneficiary, also may make some investment decisions for that account. Under the current investment policy adopted by the Fund's Board, a co-trustee may direct that up to 90% of the amount over \$5,000 in the account be invested in one of two money market funds or one of five mutual funds selected by the Board of Trustees. The co-trustee may change the investment option periodically. In addition, a co-trustee may direct that stock contributed to the Fund continue to be held without being sold until the co-trustee designates otherwise or until the Board of Trustees determines that the investment is either unsafe or insecure or that the sale of the stock is in the best interest of the account.

A representative of the Fund has represented to us that all co-trustees will either be excluded from the definition of "investment adviser" under the Investment Advisers Act of 1940 (the "Advisers Act"), will be exempt from registration under the Advisers Act pursuant to Section 203(b)(3) of the Advisers Act or will be registered as investment advisers under the Advisers Act. Accordingly, the Fund does not request the Commission's opinion on the status of co-trustees under the Advisers Act.

Ms. Amy Doberman

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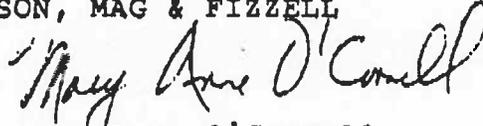
August 13, 1992

If you, or any other Staff member of your division has additional questions, or if you require further information, please contact me. We appreciate your assistance.

Very truly yours,

STINSON, MAG & FIZZELL

By


Mary Anne O'Connell

MAOC/sr

cc: Mr. Gerald J. Zafft