

CONFIDENTIAL

11 MAY 1990

Our Ref. No. 89-733-CC
United Missouri Bank
of Kansas City, n.a.
File No. 132-3

RESPONSE OF THE OFFICE OF CHIEF COUNSEL
DIVISION OF INVESTMENT MANAGEMENT

Your letter, dated November 20, 1989, requests our assurance that we would not recommend any enforcement action to the Commission with respect to the offering of discretionary investment management accounts (the "accounts") as described in your letter without registration of such accounts under the Investment Company Act of 1940 (the "1940 Act") and without registration of such accounts and services provided in connection with them under the Securities Act of 1933 (the "Securities Act").

You state that United Missouri Bank, n.a. ("UMB"), a full-service national banking association, proposes to provide custodial and recordkeeping services to clients of a number of unaffiliated investment advisers ("Advisers" or, individually, "Adviser") registered under the Investment Advisers Act of 1940 ("Advisers Act") in connection with accounts established by the clients through the Advisers. Each client would enter into an investment advisory agreement with the client's Adviser and a custody agreement with UMB and would open an account with UMB (not in the form of a trust account). ^{1/} On the basis of the individual needs of the client, the Adviser would recommend other registered investment advisers (the "Managers" or, individually, "Manager") to the client and provide the client with essential information about each such Manager. The client would then select a Manager to whom the client would grant discretionary trading authority over the securities and assets in the client's account.

The Adviser will not permit any person to open an account if it determines that the client has chosen a Manager whose approach is not appropriate for that client in light of his stated financial situation, investment goals and objectives and other needs. Once an account is opened, the client will be permitted to maintain that account only so long as the Adviser determines that the Manager's approach and corresponding type of investments are appropriate for the client. In a telephone conversation with Hope Lewis of the staff on April 4, 1990, David Tucker of your firm confirmed that the Manager will make no investments for any client until after the Adviser has determined, in the manner described in your letter, the client's individual needs, investment objectives, and special

^{1/} Your letter states that UMB will be acting solely as custodian with respect to client accounts.

instructions, and the Adviser has concluded that all of the investments to be made for the client's account will be suitable. 2/

The Adviser would receive current information with respect to all transactions in the client's account and would receive duplicate copies of all confirmations and reports sent to clients. The Adviser would also maintain frequent communication with the Manager in order to monitor and evaluate the Manager with respect to consistency of strategy, approach, and key personnel. The Adviser would close an account if it determines that a client's current financial situation or individual needs are inconsistent with the Manager's approach or the particular investments held in the account. You state that each client would receive individualized treatment from the Adviser, retain ownership of each security in its Account, and receive "prompt, transaction by transaction confirmations of each transaction in [its] Account, monthly statements of account, and quarterly performance reports." Each client will receive a brochure with respect to both the Adviser and Manager that meets the requirements of the brochure rule, Rule 204-3 under the Advisers Act.

With respect to acting as custodian, UMB would maintain individual custody accounts and records identifying each client as the individual owner of the securities purchased for that client's account. Eligible securities would generally be held through UMB's account at The Depository Trust Company. Clients will provide instructions to UMB regarding the investment of cash balances in the account pursuant to the custody agreement. UMB intends to aggregate orders for client investments of cash balances and to hold such investments in the name of UMB or its nominee for the benefit of the clients.

It is anticipated that clients will generally instruct UMB to use cash balances to purchase shares of a money market fund for which UMB acts as custodian ("UMB Fund"), although the client may elect to have cash balances invested in an unaffiliated money market fund. 3/ You assert that the proposed arrangement, which

2/ See Manning & Napier Advisors, Inc. (pub. avail. Nov. 22, 1989) (individualized discretionary investment management service provided by a registered investment adviser and its sub-adviser).

3/ You should note that, if temporary investments in money market funds cannot be said to have been within the contemplation of an investment adviser and its client, *i.e.*, if it was contemplated that the adviser for its fee would provide all the investment advisory services for the
(continued...)

involves the investment of a client's assets in shares of a money market fund, is distinguishable from the arrangement in Balliet, Blackstock & Stearns, Inc. (pub. avail. Aug. 19, 1987) ("Balliet"). In Balliet, the staff declined to take a no-action position with respect to the use by an advisory firm of nominee accounts with various mutual funds as discretionary vehicles for the firm's clients where the advisory firm, acting as custodian, also would hold client securities in nominee name and provide substantially similar advice to client accounts. The arrangement suggested the possibility of "pooling" and the functional equivalent of a "fund of funds." In support of your argument, you note that: each client itself will provide instructions on where to invest cash balances; neither the Adviser nor the Manager will have any discretion with respect to the investment vehicle chosen for the investment of cash balances; and UMB has no discretion with respect to any client's investments. 4/ In addition, in a telephone conversation with

3/(...continued)

management of the client's account, the use of any money market fund, affiliated or not, for temporary investments would be unauthorized and in violation of Section 206 of the Advisers Act because it would result in the client's paying twice for the same service. See E.F. Hutton & Company, Inc. (pub. avail. Nov. 17, 1983).

Section 206 of the Advisers Act, in relevant part, makes it unlawful for any investment adviser, by use of the mails or any means or instrumentality of interstate commerce, to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client or to engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative.

4/ See National Deferred Compensation, Inc. (pub. avail. Aug. 31, 1987). In that letter, National Deferred Compensation, Inc. ("NDC") and related entities established and administered certain employer-sponsored payroll reduction or deduction plans in which a participating employee would have the option of investing in fixed annuity contracts, variable annuities, or no-load mutual funds. NDC requested the staff's assurance that it would not recommend enforcement action if the arrangement was not registered as an investment company under the 1940 Act. As part of the arrangement, a registered investment adviser would provide individualized advice to participants, participants' accounts would be separately and individually maintained by a custodian (that would hold client shares in nominee name), and each participant would retain the right to withdraw,
(continued...)

Hope Lewis of the staff on April 23, 1990, David Tucker of your firm confirmed that, on a daily basis, UMB will sweep all cash balances in a client's account into the money market fund chosen by the client and not into any other kind of investment (such as, for example, certificates of deposit, overnight repurchase agreements, or banker's acceptances). 5/

Certain Advisers that are also registered as broker-dealers or representatives of registered broker-dealers may act as "broker of record" (i.e., as introducing broker) with respect to their clients' securities transactions. Those Advisers will receive trade instructions from the Managers and, subject to the Adviser's fiduciary duties and monitoring function, will place the transaction orders with a clearing broker. 6/ You state that any Adviser that acts as broker of record also will provide separate disclosure regarding the potential for adverse interests and conflicts of interest and will obtain the client's written

4/ (...continued)

hypothecate, vote, or pledge the securities in his or her account. The staff granted no-action relief based on the facts and representations in that letter, particularly that, except for the custodian's limited discretion to redeem mutual fund shares to pay expenses, neither the adviser nor its related entities would have discretion to make initial investments or to change investments.

7/ In a telephone conversation with Hope Lewis of the staff on May 7, 1990, David Tucker of your firm represented that no Adviser or Manager would invest a client's assets in a UMB common trust fund.

6/ In general, investment advisers that are also broker-dealers or registered representatives of broker-dealers have a duty to inform their investment advisory clients of their ability to seek executions of transactions recommended by them through broker-dealer firms other than the one with which they are associated. See Don P. Matheson (pub. avail. Sept. 1, 1976). See also Investment Advisers Act Rel. No. 1092 (Oct. 8, 1987) ("Release 1092") (discussing the applicability of the Advisers Act to financial planners). If, in the course of rendering advisory services, an investment adviser recommends that a client effect transactions through its broker-dealer employer, the applicable antifraud provisions of the federal securities laws require full disclosure of the nature and extent of all adverse interests, including the amount of any compensation the adviser will receive from its broker-dealer employer in connection with such transactions. See Release 1092; David P. Atkinson (pub. avail. Aug. 1, 1977).

consent prior to the commencement of such an arrangement. The Manager will have the authority to use an unaffiliated broker if necessary to obtain best execution.

The Advisers that act as brokers of record will receive a portion of the related brokerage commissions. 7/ It is expected that Advisers that do not act as broker of record will receive an asset-based fee from the client. Advisers that act as broker of record may or may not receive such a fee in addition to a portion of the related brokerage commissions. The Manager is compensated based upon a percentage of assets under management. UMB's fees are paid by the client and may be based upon a percentage of assets under custody or the number of transactions in the client's account. Each prospective client will receive brochures from the Adviser and the Manager, related agreements, the UMB Fund prospectus (or that of another money market fund selected by the client), and informational materials that describe the material features of the account, including all fees that will be charged to the client and the fees that UMB receives as custodian of the UMB Fund. 8/ In a telephone conversation with Hope Lewis

7/ You have not requested, nor do we express, any opinion on whether the proposed brokerage arrangements would satisfy the duty to obtain "best execution." We note, however, that an investment adviser has a fiduciary relationship with its clients that requires fair dealing, in general, and disinterested advice, in particular. This requires at a minimum that the investment adviser have a reasonable belief that a transaction recommended by the adviser is in the client's interest. See, for example, subparagraph (c) of Rule 206(3)-2 (the agency cross transaction rule), which provides that the rule shall not be construed as relieving the obligation of an adviser to act in the best interests of the client, including the duty to obtain best price and execution. Section 206 of the Advisers Act requires that the fee arrangement described in your letter be disclosed to the client to enable him to evaluate the investment adviser's motivation in giving the advice. See SEC v. Capital Gains Research Bureau, 375 U.S. 180 (1963); Arleen W. Hughes, 27 SEC 629 (1948); Robert Cashmore Associates (pub. avail. Sept. 28, 1983); Rocky Mountain Financial Planning, Inc. (pub. avail. March 28, 1983).

8/ Because of the multiplicity of fees present, we think it important to note that the staff believes that an investment adviser who charges a fee for his services larger than that normally charged by other advisers (taking into consideration factors such as the size, location, and nature of the advisory businesses to be compared) has a duty to disclose to his clients that the same or similar services
(continued...)

of the staff on April 23, 1990, David Tucker represented that all fees associated with the proposed arrangement, including advisory fees, brokerage arrangements, custodial fees (including the custodial fees that UMB earns from the UMB Fund), and money market fund fees, will be disclosed to each client in one document in one place.

It is contemplated that an Adviser that has made arrangements with its clients to act as broker of record will generally effect securities transactions on behalf of those clients, provided that the Manager agrees that execution is acceptable and brokerage and research services are reasonable in relation to the price paid for such services. 9/ In a telephone conversation with Hope Lewis of the staff on April 23, 1990, David Tucker of your firm confirmed that each Manager will exercise its fiduciary duty to obtain best execution of each client's transactions under the circumstances of the particular transaction even if to do so would require the use of a broker other than a client's broker of record. You represent that there will be no agreement between the Adviser and the Manager regarding the number of securities transactions that must occur in an account and the Adviser will annually provide the client

8/ (...continued)

may be available at a lower fee. See Shareholder Services Corp. (pub. avail. Feb. 3, 1989); Alan E. Pekelner (pub. avail. June 6, 1977). We believe that all fiduciaries that are a party to these arrangements must consider the aggregate fees and services in observing this duty.

9/ The staff has expressed the opinion that Section 28(e) of the Securities Exchange Act of 1934 ("Exchange Act") was not intended to exclude from its coverage the payment of commissions made in good faith to an introducing broker for execution and clearing services performed in whole or in part by the introducing broker's normal and legitimate correspondent. Becker Securities Corp. (pub. avail. May 28, 1976). With respect to such correspondent relationships, the staff contemplated that the "introducing broker would be engaged in securities activities of a more extensive nature than merely the receipt of commissions paid to it by other broker-dealers for 'research services' provided to money managers." Data Exchange Securities (pub. avail. April 20, 1981). See also Securities Exchange Act Rel. No. 23170 (April 23, 1986) (interpretive release concerning the scope of Section 28(e) of the Exchange Act and related matters); SEI Financial Services (pub. avail. Dec. 14, 1983) (broker correspondent relationship that involved the provision of certain services did not preclude reliance on Section 28(e)).

with the account's portfolio turnover rate and the amount of brokerage commissions incurred, stated as a dollar amount and as a percentage of assets under management. You also represent that the use of an Adviser as broker of record is subject to the Adviser's and Manager's determination and reasonable belief that the arrangement is in the client's interest and that the client could reasonably benefit from the arrangement, consistent with the degree of knowledge each of them possesses regarding the client's individual needs, as discussed above. 10/ You state that the Advisers that use this arrangement generally believe that their involvement in the portfolio securities trading function enables them to provide the added benefit of monitoring their clients' accounts more closely 11/ at a transactional cost to their clients that will generally be no more than transaction charges that the client would otherwise incur for the same level of brokerage, execution, and research services provided outside of the arrangement. 12/

10/ Generally, if a client chooses to direct its brokerage to a broker other than the one through which the client's adviser will execute orders for its other clients, the adviser must disclose to that client that the client would forego any benefit from savings on execution costs that the adviser could obtain for its other clients through, for example, negotiating volume commission discounts on batched orders. See Mark Bailey and Co., Investment Advisers Act Rel. No. 1105 (Feb. 24, 1988).

11/ It is our understanding that each Adviser, whether or not it acts as broker of record, would "be completely up-to-date as to all transactions in the Client's Account" and would close an account if it determines that the client's current financial situation or individual needs are inconsistent with the approach of the Manager of the client's account or the particular investments held in the account.

12/ Cf. Investment Company Act Rel. No. 10740 (June 20, 1979) (rescinding Rule 17e-1 under the 1940 Act); Investment Company Act Rel. No. 10606 (February 27, 1979) (proposing rescission of Rule 17e-1 under the 1940 Act); Securities Exchange Act Rel. No. 13662 (June 23, 1977) ("Release 13662") (discussing off-board trading restrictions). Release 13662 cites Thomson & McKinnon, 43 SEC 785 (1968), and Delaware Management Company, Inc., 43 SEC 392 (1967), for the proposition that an investment adviser is prohibited from interpositioning a broker-dealer between a pool of assets managed by him and a market maker in situations where that broker or pool of assets could deal directly with the market maker on as favorable a basis and the

(continued...)

Finally, to aid the staff in monitoring the implications of the provision of the services described in your letter, you have agreed that UMB will provide to the staff promptly, upon request, the names of the Advisers and Managers that participate in these arrangements.

We would not recommend any enforcement action to the Commission if the proposed accounts are offered as described in your letter without registration under the 1940 Act provided that:

- (1) Except with respect to the investment of cash balances in the money market fund chosen by the client (as more fully described in your letter), the securities in a client's account would be held in nominee name by the custodian only for ministerial purposes (such as facilitating security transactions);
- (2) UMB will record, and keep track of, on a client-by-client basis, the securities each client beneficially owns;
- (3) A client's beneficial interest in a security does not represent an undivided interest in all the securities legally held by the custodian with respect to these accounts, but rather represents a direct and beneficial interest in the securities held in that client's account;
- (4) Each client will retain any available rights under the federal securities laws to proceed directly against the issuer of any underlying security in its account and would not, because of participation in the arrangement, be obligated to join UMB, the Adviser, the Manager, or any other beneficial owner participating in the service as a condition precedent to proceeding against any issuer;

12/(...continued)

interpositioned broker performs no bona fide function in connection with the transaction. The decision in Thomson & McKinnon states that, where a broker "interposes another broker-dealer between himself and a third broker-dealer, he prima facie has not met" the obligation to obtain the most favorable price for his customer and he has "the burden of showing that the customer's total cost or proceeds of the transaction is the most favorable obtainable under the circumstances." 43 SEC at 789.

- (5) Each client will receive notification of each transaction in its account as described in your letter and has the absolute right to withdraw, hypothecate, vote, or pledge securities in its account and may close its account at any time;
- (6) The Advisers and Managers will perform the individualized investment services described in your letter; and
- (7) Except with respect to the investment of cash balances in client accounts in shares of a money market fund chosen by each client (as more fully described in your letter), the arrangement will not involve recommendations concerning, or the purchase and sale of, shares of investment companies. 13/

Because our position is based on the facts and representations in your letter and in your telephone conversations with the staff and on the conditions listed above, you should note that any different facts or circumstances may require a different conclusion. Further, this response expresses the Division's position on enforcement action only and does not purport to express any legal conclusions on the issues presented.

The Division of Corporation Finance ("Division") has asked us to inform you as follows. Based on the facts presented, the Division would not recommend enforcement action to the Commission if UMB, in reliance upon your opinion as counsel that registration is not required, offers the accounts and services in the manner described in your letter without compliance with the registration provisions of the Securities Act.

Because this position is based upon the representations made to the Division in your letter, it should be noted that any different facts or conditions might require a different conclusion. Further, this response merely expresses the Division's position on enforcement action and does not purport to express any legal conclusion on the question presented.


L. Hope Lewis
Attorney

13/ See Balliet.

PUBLIC

JAN 23 1995

RESPONSE OF THE OFFICE OF CHIEF COUNSEL
DIVISION OF INVESTMENT MANAGEMENT

Our Ref. No. 92-577-CC
United Missouri Bank
of Kansas City, n.a.
File No. 132-3

By letter dated January 23, 1995, you asked the staff to modify the no-action relief provided in United Missouri Bank of Kansas City, n.a. (pub. avail. May 11, 1990) ("Prior Letter"). In that letter, the Division of Investment Management stated that it would not recommend that the Commission take any enforcement action if discretionary investment management accounts for which United Missouri Bank of Kansas City, n.a. ("UMB") provided custodial and recordkeeping services were not registered under the Investment Company Act of 1940 ("1940 Act"). 1/ As described in the Prior Letter, UMB holds clients' securities in nominee name. You state that the discretionary investment management program currently does not make available investment company shares for purchase or sale. 2/ One of the investment advisers who participates in the program now wants to recommend that its clients invest in shares of investment companies. Accordingly, UMB requests that the staff modify the Prior Letter to permit UMB to hold investment company shares in nominee name.

You state that UMB would reduce custodial costs and improve service by maintaining an omnibus account with each investment company whose shares would be available for purchase through the program. UMB would separately maintain records indicating the beneficial ownership of each client. Clients would retain all indicia of ownership of their investment company shares. Specifically, (1) clients would receive confirmations of each transaction, monthly account statements, and quarterly performance reports; (2) UMB would ensure that clients receive prospectuses and periodic reports; (3) UMB would ensure that clients receive proxy statements in a timely fashion and would be able to vote their shares; and (4) clients would be able to terminate their account(s) at any time and liquidate their holdings.

In Balliet, Blackstock & Stearns, Inc. (pub. avail. Aug. 19, 1987) ("Balliet"), the staff took the view that holding investment company shares in nominee name suggested a pooling, and when coupled with investment discretion and the offering of substantially similar investment advice, it suggested the

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- 1/ The Division of Corporation Finance also stated that it would not recommend enforcement action to the Commission if UMB offered the accounts and services as described without registration under the Securities Act of 1933.
- 2/ The only exception is that program clients are permitted to direct their cash balances to be invested in money market funds.

functional equivalent of a fund of funds. 3/ You state that UMB's situation is distinguishable from that in Balliet because UMB is an independent third-party custodian and does not have investment discretion with respect to the clients' accounts.

We have reconsidered the Balliet letter, and have determined that the position taken in that letter regarding the holding of investment company shares in nominee name no longer represents the views of the Division. Therefore, we would not consider a discretionary investment management program that makes available for purchase investment company shares to be an investment company solely because those shares are held in nominee name. Our position is based on our acknowledgement that nominee name arrangements generally are administrative mechanisms for recording and facilitating transfer of ownership, and on the Commission's policy of encouraging the holding of securities in nominee name to promote the establishment of centralized clearance and settlement systems and the elimination of certificated securities. 4/ Further, we believe that this position applies to any discretionary investment management program regardless of which entity holds the investment company shares in nominee name.

Accordingly, we would not recommend enforcement action to the Commission if UMB modifies the arrangement described in the Prior Letter to include the purchase and sale of investment company shares, provided that the arrangement is otherwise operated in accordance with your January 23, 1995 letter and the Prior Letter.

The Division of Corporation Finance has asked us to inform you that, based on the facts presented in the January 23, 1995 letter and the Prior Letter, it would not recommend enforcement action to the Commission if UMB, in reliance on your opinion of

3/ The staff subsequently has granted no-action relief to discretionary investment management programs that offer for purchase investment company shares only if the shares are held directly in each client's name. See WestAmerica Investment Company (pub. avail. Nov. 26, 1991); Rushmore Investment Advisers, Ltd. (pub. avail. Feb. 1, 1991).

4/ See Final Report of the Securities and Exchange Commission on the Practice of Recording the Ownership of Securities in the Records of the Issuer in Other Than the Name of the Beneficial Owner of Such Securities (December 3, 1976).

counsel that registration is not required, offers the accounts and services described in your letters without compliance with the registration provisions of the Securities Act of 1933.

Jana M. Cayne

Jana M. Cayne
Attorney

Founded 1887
By I.N. Watson

January 23, 1995

VIA TELECOPY: 202-504-2395

1010 Grand Avenue
Kansas City, Missouri
64106-2271
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Ms. Jana Cayne
Securities and Exchange Commission
450 Fifth Street
Washington, D.C. 20549-1004

File No.	ICA-40
Section	
Rule	3a-4
Public Availability	1/23/95

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Direct Dial

RE: Ref. No. 89-7633-CC
UMB Bank, n.a., formerly known as United Missouri Bank of
Kansas City, n.a.,
File No. 132-3: Requested Amendment

Dear Ms. Cayne:

Enclosed per your request is a copy of the letter we originally sent in the above-referenced matter on September 28, 1992, dated as of today's date. We look forward to receiving the response via telecopy today as you indicated.

If you have any questions, please feel free to call me.

Sincerely,

WATSON & MARSHALL L.C.

Diane Beers

Diane M. Beers

DMB/om

Enclosures

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913-782-2350
Facsimile
913-782-2012

January 23, 1995

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Direct Dial

FEDERAL EXPRESS

Jack W. Murphy, Esq.
Office of Chief Counsel
Division of Investment Management
Securities and Exchange Commission
450 Fifth Street
Stop 5-2
Washington, D.C. 20549-1004

1940 Act/
Section 3(a)

Re: Ref. No. 89-733-CC
UMB Bank, n.a., formerly known as United Missouri Bank of
Kansas City, n.a.,
File No. 132-3: Requested Amendment

Dear Sir:

We represent UMB Bank, n.a., formerly known as United Missouri Bank of Kansas City, n.a., ("UMB"). By letter dated May 11, 1990, the staff of the Divisions of Investment Management and Corporation Finance (the "Divisions") granted certain no-action assurance to UMB with respect to the offering of discretionary investment management accounts, as described more fully in that letter (the "UMB Letter"), without registration of such accounts and the related services under the Investment Company Act of 1940, as amended (the "1940 Act") and without registration of the accounts under the Securities Act of 1933, as amended (the "1933 Act").

On behalf of UMB, we respectfully request a limited amendment of the UMB Letter. To expedite consideration of this request, we have not reiterated herein the information contained in the UMB Letter, but instead attach that letter as Exhibit A hereto and incorporate it herein by reference.¹ (We are not unmindful of the fact that in the past applicants have been required to restate

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¹ Capitalized terms used and not defined herein are intended to have the meaning ascribed to them in the UMB Letter.

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Jack W. Murphy, Esq.
Office of Chief Counsel
Securities and Exchange Commission
Washington, D.C.
January 23, 1995
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in their entirety, no-action letters as to which amendments or clarifications were sought. We ask, however, that you reconsider that approach in this circumstance – a specific, unambiguous and limited amendment – in the interest of efficiency and economy for your staff and our client.)

Request and Background

The amendment requested hereby is simply that condition (7) of the UMB Letter, appearing on Page 9 thereof, be deleted. That condition states:

Except with respect to the investment of cash balances in client accounts in shares of a money market fund chosen by each client (as more fully described in your letter), the arrangement will not involve recommendations concerning, or the purchase and sale of, shares of investment companies.

The reason for requesting this amendment is that one of the Advisers participating in the program which is the subject of the UMB Letter would like to make available shares of investment companies as investment opportunities for participants in that program.

The description of UMB's services in connection with this program is set forth in Exhibit A. With respect to this amendment request, the following information is offered to supplement and clarify such description:

As custodian, to reduce costs and facilitate expedited service, UMB would maintain an omnibus account at each investment company whose shares would be purchased by clients of the program, but would separately maintain records indicating the beneficial ownership of each client. UMB would take the following steps to ensure that clients retained all indicia of ownership of their investment company shares:

- 1) Clients would receive transaction by transaction confirmations of each transaction, monthly statements of account and quarterly performance reports, all as described in Exhibit A;

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Securities and Exchange Commission
Washington, D.C.
January 23, 1995
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- 2 UMB would ensure that clients receive the periodic reports to shareholders for each investment company in which the client has an interest;
- 3) UMB would ensure that clients receive proxy statements in a timely fashion. Neither UMB nor any Adviser would vote client proxies that are not returned to the respective fund by clients;
- 4) As indicated in Exhibit A, clients could terminate their Account at any time and upon termination, the client could request and obtain liquidation of his or her portfolio or delivery of securities.

We believe that under the facts and circumstances presented, and in light of the prior positions taken by the staff, amendment of the UMB Letter to delete the condition referred to above is not materially inconsistent with the policies expressed and implicit in that letter. We therefore respectfully request that you consent to such an amendment and confirm that this change in the program would not change the "no-action" position stated in the UMB Letter.

DISCUSSION

The Balliet letter² is the seminal no-action letter with respect to the offering of mutual fund shares in a discretionary asset management service. In that letter, the staff of the Divisions declined to take a no-action position with respect to the use by an advisory firm of nominee accounts with various mutual funds as discretionary vehicles for the firm's clients where the advisory firm, acting as custodian, also would hold client securities in nominee name. The Balliet letter has spawned a long line of no-action letters in which the applicants successfully distinguished the Balliet letter on one of two bases:

² Balliet, Blackstock & Stearns, Incorporated (publicly available August 19, 1987).

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Securities and Exchange Commission
Washington, D.C.
January 23, 1995
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- 1) The investment adviser had discretionary authority; however, mutual fund shares would not be held in nominee name;³
- 2) Mutual fund shares were to be held in nominee name; however, the investment adviser would not have discretionary authority.⁴

It is our view that the offering of investment company shares by the Advisers in the UMB program, who have discretionary authority over the Accounts, is not inconsistent with Balliet and the other letters cited, and does not raise the "fund of funds" concerns that prompted the enactment of the 1970 amendments to Section 12(d)(1) of the 1940 Act so long as the shares are held in nominee name by UMB, an independent third-party custodian, and UMB has no discretion over assets in the Account.

Unlike the Balliet letter, in which the same party that exercised discretion (the adviser) also maintained nominee accounts at various mutual fund complexes, in the UMB situation these functions will be divided between two independent parties. Under no circumstances will participating Advisers hold customers' funds or securities and under no circumstances will UMB have any discretionary authority over any assets in the Account. UMB will hold shares in nominee name solely for administrative purposes. Except for its agreement with the Advisers to provide recordkeeping and custodial services for the Accounts, UMB is not otherwise affiliated with any Adviser.

Perhaps more importantly, the UMB arrangement does not raise any of the concerns that prompted the enactment of the 1970 amendments to Section 12(d)(1) of the 1940 Act. In summary, those concerns were:

³ See, e.g., Rushmore Investment Advisors, Limited (publicly available February 1, 1991); Manning & Napier Advisors, Incorporated (publicly available April 24, 1990); Strategic Advisers, Incorporated (publicly available December 13, 1988); Scudder Fund Management Service (publicly available August 17, 1988).

⁴See, e.g., Atlantic Bank of New York (publicly available June 7, 1991).

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Securities and Exchange Commission
Washington, D.C.
January 23, 1995
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- 1) the acquisition of voting control of the investment adviser;
- 2) undue influence over portfolio management through the threat of large scale redemptions and loss of advisory fees to the adviser and the disruption of orderly management of the investment company through the maintenance of large cash balances to meet potential redemptions;⁵
- 3) structural complexity which makes it difficult for the shareholder to appraise the true value of his security; and
- 4) duplication of sales charges and advisory fees and administrative costs.⁶

The proposed arrangement does not raise the first and second concerns because neither UMB nor any Adviser will have the authority to vote fund shares and therefore will not have the ability to influence portfolio management. "Structural complexity" is not a concern because shareholders will receive appropriate disclosures and will receive prospectuses, shareholder reports and proxy materials of each fund. There will be no duplication of costs because the Advisers do not charge sales fees and the fees paid to the Advisers will be for

⁵ See, Phoenix Series Fund (publicly available October 28, 1991). Arguably, any adviser that has discretion over a large number of accounts has the ability to effect large scale redemptions. The fact that shares are held in an omnibus account by a third party custodian does not increase this concern.

⁶ 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.

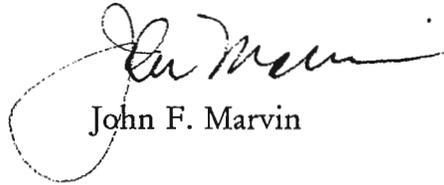
Jack W. Murphy, Esq.
Office of Chief Counsel
Securities and Exchange Commission
Washington, D.C.
January 23, 1995
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separate, value-added functions -- the selection and timing of mutual fund investments.

Based on the foregoing, we respectfully request that the staff confirm it would not recommend any enforcement action to the Commission if UMB were to proceed under the UMB Letter, amended as described herein to delete the restrictions on the purchase and sale of shares of investment companies.

Please call the undersigned if you have any questions regarding this request.

Very truly yours,

A handwritten signature in black ink, appearing to read "John F. Marvin", written in a cursive style. The signature is positioned above the printed name.

John F. Marvin

JFM:blk
Enclosure: as noted

cc: Office of Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
Washington, D.C.