

PUBLIC

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RESPONSE OF THE OFFICE OF CHIEF COUNSEL
DIVISION OF INVESTMENT MANAGEMENT

Our Ref. No. 95-672-CC
G.T. Global Growth
Series et al.
File No. 811-2699

Your letter of November 1, 1995 requests our assurance that we would not recommend enforcement action to the Commission if certain registered investment companies (the "Funds") advised by G.T. Capital Management, Inc. ("G.T. Capital") do not treat Mr. Frank S. Bayley, a director or trustee of each of the Funds, as an "interested person" of the Funds under subparagraphs (A)(iii) and (B)(iv) of Section 2(a)(19) of the Investment Company Act of 1940 (the "1940 Act").¹

G.T. Capital and G.T. Global Financial Services, Inc. ("G.T. Financial"), which serves as principal underwriter for certain of the Funds, are indirect, wholly owned subsidiaries (as defined in Section 2(a)(43) of the 1940 Act) of the Prince of Liechtenstein Foundation (the "Foundation"). The Bank in Liechtenstein Aktiengesellschaft (the "Bank") also is a wholly owned subsidiary of the Foundation. The Bank thus is under common control with the Funds' adviser and the principal underwriter of certain of the Funds.

In addition to being a director or trustee of each of the Funds, Mr. Bayley is a partner in the San Francisco office of the law firm of Baker & McKenzie. Baker & McKenzie's Hong Kong office has rendered and may continue to render legal services, primarily regarding tax matters, to the Bank. You state that the legal work performed for the Bank by Baker & McKenzie was not related, directly or indirectly, to G.T. Capital, G.T. Financial, or the Funds.² You further state that Mr. Bayley has no professional or business relationship with the Funds, G.T. Capital, G.T. Financial, or any of their affiliates, other than his positions as a director or trustee of the Funds.

Section 10 of the 1940 Act generally permits no more than 60% of the members of an investment company's board of directors

¹ The request is made on behalf of the following Funds: G.T. Global Growth Series, G.T. Global Variable Investment Series, G.T. Global Variable Investment Trust, G.T. Global Developing Markets Fund, Inc., G.T. Investment Funds, Inc., G.T. Investment Portfolios, Inc., G.T. Greater Europe Fund, Global High Income Portfolio, Global Investment Portfolio, and Growth Portfolio.

² Mr. Bayley has represented that the fees paid by the Bank to Baker & McKenzie amounted to less than 1/300 of 1% of the firm's total revenue for the past year, and that the firm currently anticipates that the percentage of its total revenue that is received from the Bank will not exceed this level in the future.

to be interested persons of the investment company. Section 2(a)(19)(A)(iii) of the 1940 Act includes within the definition of "interested person" of an investment company "any interested person of any investment adviser of or principal underwriter for such company." Section 2(a)(19)(B)(iv) in turn defines "interested person" of an investment adviser of or principal underwriter for any investment company to include "any person or partner or employee of any person who at any time since the beginning of the last two completed fiscal years of such investment company has acted as legal counsel for such investment adviser or principal underwriter."

Mr. Bayley has never acted as legal counsel for the Funds' investment adviser or principal underwriter, nor is he the partner or the employee of a person who has provided such legal counsel. You nonetheless request our view with respect to whether the Funds should treat Mr. Bayley as an interested person because of a position taken by the staff in Vestaur Securities, Inc. (pub. avail. Jan. 4, 1973) ("Vestaur"). In Vestaur, the staff indicated that a person (or the partner of a person) who had acted as counsel to a bank that was under common control with a fund's adviser would be considered an interested person of the fund within the meaning of Section 2(a)(19).³ You believe instead that Section 2(a)(19)(B)(iv) should be interpreted in accordance with its plain meaning and therefore should not be extended to a person (or the partner of a person) who has served as legal counsel to an affiliate of a fund's adviser or principal underwriter.⁴

³ The staff stated without explanation that "[f]or the purpose of this analysis, we consider the [a]dviser and the [b]ank as one entity," but nonetheless granted no-action relief on policy grounds, provided that neither the director nor his law firm would represent the bank in the future. In contrast to Vestaur, the staff recently stated that, absent substantial policy reasons, we generally will not consider affiliated companies to be a single entity. See Salomon Brothers, Inc. (pub. avail. May 25, 1995). We note, however, that if intermediaries were created for the purpose of altering a person's status under Section 2(a)(19), the staff would consider whether there was a violation of Section 48(a) of the 1940 Act.

⁴ In this regard, you ask the staff to compare the language of subparagraph (B)(iv) of Section 2(a)(19) to other provisions of this section, such as subparagraphs (A)(v) and (B)(v), which expressly include affiliated persons of a registered broker or dealer within the definition of interested person. Moreover, other provisions of the 1940 Act, such as Sections 17(a) and 17(j), expressly apply to affiliated persons of

(continued...)

The legislative history of Section 2(a)(19) supports the conclusion that subparagraph (B)(iv) does not include a person in Mr. Bayley's position, particularly when the statutory language ultimately enacted is compared with the recommendations made in the Commission's Report on The Public Policy Implications of Investment Company Growth (the "PPI Report").⁵ The PPI Report recommended adding Section 2(a)(19) because certain "close relationships [with fund management] derogate from directors' ability to represent effectively the interests of shareholders."⁶ While the PPI Report did not specifically recommend that the definition of interested person include legal counsel to the fund, its adviser, or principal underwriter, it did recommend a general provision that would have included within the definition "any person who . . . has, or has had within the past 3 years, any material business or professional relationship with affiliated persons [of the fund] and their affiliated persons."⁷

Congress appears to have implemented this recommendation in the following manner. Persons (and partners and employees of persons) who serve as legal counsel to the fund, its adviser, or its principal underwriter are classified as interested persons in subparagraphs (A)(iv) and (B)(iv). Those individuals who have other types of material business or professional relationships with the fund, its adviser or its principal underwriter are covered by subparagraphs (A)(vi) and (B)(vi) of Section 2(a)(19). These provisions authorize the Commission to issue orders declaring a person to be an interested person of a fund or its investment adviser or principal underwriter because the person has or has had a material business or professional relationship with the fund, adviser or underwriter, or their controlling persons.⁸ Congress required the Commission to issue a formal order before a person can be considered an interested person because of his or her material business or professional relationships, to "eliminate any danger of inadvertent violations

⁴ (...continued)

advisers and principal underwriters for registered investment companies, as well as to the advisers and underwriters themselves.

⁵ Securities and Exchange Commission, Report on the Public Policy Implications of Investment Company Growth, H.R. Rep. No. 2337, 89th Cong., 2d Sess. (1966).

⁶ Id. at 334.

⁷ Id.

⁸ Section 2(a)(19)(A)(vi) and (B)(vi).

of the requirements of the [1940 Act]"⁹ which were likely because of the subjective nature of the standard.¹⁰ Therefore, while Congress determined through subparagraph (B)(iv) to classify as interested persons all persons (and partners and employees of persons) who serve as legal counsel to the fund, its adviser or principal underwriter, we believe that persons who serve as legal counsel to an affiliate of a fund's adviser or principal underwriter fall outside subparagraph (B)(iv); the classification of such persons is more appropriately determined by reference to subparagraph (B)(vi) of the section.¹¹

In light of the foregoing, and based on the facts and representations set forth in your letter, we would not recommend enforcement action to the Commission if the Funds do not treat Mr. Bayley as an interested person under subparagraphs (A)(iii) and (B)(iv) of Section 2(a)(19).¹² You should note that

⁹ S. Rep. No. 184, 91st Cong., 1st Sess. 34 (1969).

¹⁰ See Mutual Fund Legislation of 1967: Hearings on S. 1659 Before the Senate Comm. on Banking and Currency, 90th Cong., 1st Sess. 314-16 (1967) (Exhibit A to statement of Robert L. Augenblick, President and General Counsel, Investment Company Institute) (raising concerns about vagueness of the PPI Report's recommended provision on material business relationships).

¹¹ The staff believes that it generally is not appropriate to respond to no-action requests under subparagraph (B)(vi) of Section 2(a)(19). Better Investing Fund, Inc. (pub. avail. June 15, 1988); Daniel Calabria (pub. avail. Sept. 12, 1984). We therefore express no view whether Mr. Bayley would be considered an interested person under subparagraph (B)(vi).

¹² We note that courts may consider the genuine independence of a board of directors, apart from the directors' classification under Section 2(a)(19), in determining whether there has been a breach of fiduciary duty by the fund's management within the meaning of Section 36 of the 1940 Act. See Joel H. Goldberg, Disinterested Directors, Independent Directors and the Investment Company Act of 1940, 9 Loy. U. Chi. L.J. 565, 567, 579-80 (1978) (discussing Tannenbaum v. Zeller, 552 F.2d 402 (2d Cir.), cert. denied, 434 U.S. 934 (1977)).

different facts or circumstances might require a different conclusion.

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ACT 1940 Act
SECTION 2(a)(19)
RULE _____
PUBLIC
AVAILABILITY public 2/2/96

November 1, 1995

1940 Act Section 2(a)(19)

Office of Chief Counsel
Division of Investment Management
Securities and Exchange Commission
Judiciary Plaza
450 Fifth Street, N.W.
Washington, D.C. 20549

Re: No-Action Request on behalf of
G.T. Global Growth Series, et al.

Dear Sir/Madam:

On behalf of G.T. Global Growth Series, G.T. Global Variable Investment Series, G.T. Global Variable Investment Trust, G.T. Global Developing Markets Fund, Inc., G.T. Investment Funds, Inc., G.T. Investment Portfolios, Inc., G.T. Greater Europe Fund, Global High Income Portfolio, Global Investment Portfolio, Growth Portfolio (referred to hereinafter collectively as the "Funds" and individually as a "Fund") and Frank S. Bayley (referred to hereinafter collectively as the "Applicants"), we hereby request that the Staff of the Division of Investment Management ("Staff") advise us that it will not recommend that the Securities and Exchange Commission (the "Commission") take enforcement action against the Funds, under Section 2(a)(19) of the Investment Company Act of 1940, as amended ("1940 Act"), if the Funds were to treat Mr. Bayley as an independent director/trustee and that the Staff confirm our interpretation that under the facts presented, the Funds can treat Mr. Bayley as a director/trustee who is not an interested person of the Funds as that term is defined in Section 2(a)(19) of the 1940 Act.

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I. Background

G.T. Global Growth Series, G.T. Global Variable Investment Series, G.T. Global Variable Investment Trust, G.T. Investment Funds, Inc., G.T. Investment Portfolios, Inc., Global High Income Portfolio, Global Investment Portfolio, and Growth Portfolio are open-end management investment companies registered under the 1940 Act. G.T. Greater Europe Fund and G.T. Global Developing Markets Fund, Inc. are closed-end management investment companies registered under the 1940 Act. G.T. Capital Management, Inc. ("G.T. Capital") serves as investment adviser for each Fund. G.T. Global Financial Services, Inc. ("G.T. Financial") serves as the distributor or principal underwriter for those open-end companies that publicly offer and sell their shares on an ongoing basis. G.T. Capital and G.T. Financial are each part of the G.T. Group, a global investment advisory organization. G.T. Capital and G.T. Financial are wholly owned by G.T. Capital Holdings, Inc., which is in turn wholly owned by G.T. Holding Luxembourg S.A. G.T. Holding Luxembourg S.A. is wholly owned by BIL GT Group Limited, which is in turn 99.7% owned by the Prince of Liechtenstein Foundation. The Prince of Liechtenstein Foundation is wholly owned by the Princely Family of Liechtenstein.

Frank S. Bayley has served as either a director or trustee (referred to hereinafter collectively as a "director") for each Fund since 1984, or as of the commencement of operations in the case of Funds that were organized after 1984. Throughout his tenure, the Funds have treated Mr. Bayley as an independent director because he is not an "interested person" of the Funds as that term is defined in Section 2(a)(19) of the 1940 Act. Mr. Bayley is also a partner of Baker & McKenzie, a law firm with offices worldwide. Mr. Bayley joined the firm's San Francisco, California, office as a partner in 1986. Baker & McKenzie is the world's largest law firm with more than fifty offices and more than 500 partners. As discussed more fully below, the law firm's Hong Kong office has acted and may continue to act as legal counsel to the Bank in Liechtenstein Aktiengesellschaft ("Bank in Liechtenstein"). Bank in Liechtenstein is controlled by the Prince of Liechtenstein Foundation, which, as noted above, also controls BIL G.T. Group Limited.

Commencing in December 1994, Baker & McKenzie's Hong Kong office rendered legal services to Bank in Liechtenstein pursuant to a limited engagement regarding various matters primarily involving tax advice for clients or potential clients of the Bank in Liechtenstein. Baker & McKenzie's Hong Kong office may render similar legal services to Bank in Liechtenstein in the future, although the firm has not been retained for any such engagement.

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Mr. Bayley has advised the Boards of Directors/Trustees (referred to hereinafter collectively as the "Boards") of the Funds that he is not involved in, in any way responsible for, or, other than in the most general terms, familiar with, any matters relating to Baker & McKenzie's representation of Bank in Liechtenstein. All such matters were, or are, handled by another partner who is not a partner at the same office in which Mr. Bayley works. Mr. Bayley did not help the firm's Hong Kong office obtain Bank in Liechtenstein as a client. Mr. Bayley was not even aware that Bank in Liechtenstein was in the process of retaining the firm's Hong Kong office. The legal work performed by his firm was unrelated directly or indirectly to G.T. Capital, G.T. Financial or the Funds. Mr. Bayley has represented that the fees billed and paid to Baker & McKenzie's Hong Kong office by Bank in Liechtenstein represented or are expected to represent less than 1/300 of 1% of the firm's total revenues for the past year and that the office currently anticipates that the percentage of the firm's total revenues received from Bank in Liechtenstein in future years will not exceed 1/300 of 1% of the firm's total revenues. Mr. Bayley's financial interest in the revenues of Baker & McKenzie is less than 1/10 of 1%.

Mr. Bayley has no professional or business relationships with Bank in Liechtenstein or any of its affiliates other than his position as a director of the Funds. Furthermore, Mr. Bayley has never participated in Baker & McKenzie's representation of Bank in Liechtenstein. Therefore, there has never been any direct contact between Bank in Liechtenstein and Mr. Bayley except in connection with Mr. Bayley's service as a director of the Funds.

II. Discussion

Section 2(a)(19)(A) of the 1940 Act defines "interested person" with respect to an investment company, as relevant here, to include:

(iii) any interested person of any investment adviser of or principal underwriter for such company.

Section 2(a)(19)(B) of the 1940 Act defines "interested person" with respect to an investment adviser of or principal underwriter for any investment company to include:

(iv) any person or partner or employee of any person who at any time since the beginning of the last two completed fiscal years of such investment company has acted as legal counsel for such investment adviser or principal underwriter.

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Mr. Bayley does not fall within the terms of either of these statutory provisions. Neither Mr. Bayley nor any of the law offices of Baker & McKenzie has at any time acted as legal counsel for the investment adviser to the Funds (G.T. Capital) or the principal underwriter for those open-end companies that publicly offer and sell their shares on an ongoing basis (G.T. Financial). Thus, Mr. Bayley is neither a "person" nor a "partner. . . of any person" who has acted as legal counsel for G.T. Capital or G.T. Financial.

In light of the Staff's previous interpretations of Section 2(a)(19), we seek the Staff's confirmation that Mr. Bayley can continue to be treated as a Fund director who is not an "interested person" of any of the Funds. In particular, the Staff has previously taken the position that a director of an investment company who has provided, or is a partner of someone who has provided, legal services to a person under common control with the investment adviser of the investment company, and therefore is an affiliated person of the investment adviser as that term is used in Section 2(a)(3)(C) of the 1940 Act^{1/}, may be deemed an interested person of the investment company within the meaning of Section 2(a)(19)(A)(iii).^{2/} Under such a rationale, Mr. Bayley could be considered an "interested person" of the Funds, G.T. Capital and G.T. Financial merely because Baker & McKenzie's Hong Kong Office has provided legal services, and may continue to do so in the future, to an entity which is an

^{1/} "Affiliated Person" of another person means (A) any person directly or indirectly owning, controlling, or holding with power to vote, 5 per centum or more of the outstanding voting securities of such other person; (B) any person 5 per centum or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by such person; (C) any person directly or indirectly controlling, controlled by, or under common control with, such other person; (D) any officer, director, partner, copartner, or employee of such other person; (E) if such other person is an investment company, any investment adviser thereof or any member of an advisory board thereof; and (F) if such other person is an unincorporated investment company not having a board of directors, the depositor thereof.

^{2/} Vestaur Securities, Inc. 1973 SEC No-Act Lexis 3780 (Jan. 4, 1973).

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affiliated person, or an affiliated person of an affiliated person, of the Funds, G.T. Capital and G.T. Financial.^{3/}

It is our opinion that the express terms of Section 2(a)(19) do not reach such relationships. Further, we believe that Congress did not intend for the term "interested person" of an investment company to encompass them. The 1970 Amendments to the 1940 Act devised the term "interested person" of an investment company and of an investment adviser or principal underwriter to cover the many individuals who are affiliated persons of the investment company and other individuals who might not be independent of the investment company's management. For example, Section 2(a)(19) includes within the category of persons defined as "interested persons" of an investment company those who are registered as broker-dealers or affiliated persons of such broker-dealers. Also included are persons who have acted as legal counsel to the investment company, its investment adviser or principal underwriter and partners of such persons. The fact that the 1970 Amendments did not include persons, or partners or employees of such persons, who have acted as legal counsel for affiliated persons of an investment company, its investment adviser or principal underwriter when that formulation was used elsewhere in Section 2(a)(19), strongly supports the proposition that Congress did not intend for Section 2(a)(19) to reach that far.

The legislative history of the 1970 Amendments itself does not reflect any policy which calls for extending the definition of "interested persons" to include persons other than those having "strong ties" to the managers of an investment company or "substantial business or professional relationships with the investment company or its adviser-underwriter . . ." (S. Rep. No. 184, 91st Cong., 1st Sess. 32 (1969)). Neither Mr. Bayley nor any partner of any office of Baker & McKenzie has "strong ties" to G.T. Capital or G.T. Financial, or "substantial business or professional relationships" with these entities or the Funds other than as a director of the latter. Therefore, there is no ground on which to base a belief that Baker & McKenzie's representation of Bank in Liechtenstein has impaired or would impair in any manner or otherwise affect Mr. Bayley's ability to exercise sound independent business judgment in the fulfillment

^{3/} We note that one fund complex, following the issuance of the Vestaur letter, sought and obtained exemptive relief from Section 2(a)(19) for a director whose law firm provided legal services to an insurance trade group which included the investment adviser to the fund. IDS Mutual, Inc., et al., 1940 Act Release Nos. 14526 (May 17, 1985) and 14573 (June 12, 1985).

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of his fiduciary duties and obligations as an independent director of the Funds.

III. Conclusion

It is respectfully submitted that Section 2(a)(19)(A)(iii) cannot be read to include Mr. Bayley as an interested person of the Funds by reason of the aforesaid facts and that Congress did not intend Sections 2(a)(19)(A)(iii) and 2(a)(19)(B)(iv) be construed in such a way as to deem Mr. Bayley an interested person of the Funds, G.T. Capital or G.T. Financial. Moreover, Mr. Bayley does not have the kind of ties to the investment manager or underwriter of the Funds that were of concern to Congress in 1970. Accordingly, we respectfully request that the Staff assure the Funds that it will not recommend that the Commission take enforcement action against the Funds if the Funds were to continue to treat Mr. Bayley as an independent director with respect to Section 2(a)(19) of the 1940 Act and confirm our interpretation that under the facts presented Mr. Bayley is not an interested person of the Funds as that term is defined in Section 2(a)(19) of the 1940 Act and that the Funds can treat him accordingly.

Should you have any questions regarding this request, please contact the undersigned at (202) 778-9046.

Sincerely,

Arthur J. Brown ⁰⁰⁹
Arthur J. Brown