

**From:** Request@ip-10-170-24-29.ec2.internal  
**Sent:** Thursday, May 17, 2018 1:17 PM  
**To:** foiapa  
**Subject:** Request for Document from McDonough, Brandon

Mr. Brandon T McDonough McDonough  
80 S 8th St  
4600  
Minneapolis, Minnesota 55402  
United States



6122563270  
[bmcDonough@nka.com](mailto:bmcDonough@nka.com)  
Nichols Kaster PLLP

Request:  
COMP\_NAME: American Bar Retirement Association  
DOC\_DATE: 12/31/1991  
TYPE: NO ACT (No Action Letter)  
COMMENTS: No action letter pertaining to the ABA Retirement Funds program issued on Dec. 31, 1991 and incoming letter.  
FEE\_AUTHORIZED: Other Amount \$: \$100  
FEE\_WAIVER\_REQUESTED: No  
EXPEDITED\_SERVICE\_REQUESTED: No



UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
STATION PLACE  
100 F STREET, NE  
WASHINGTON, DC 20549-2465

Office of FOIA Services

June 13, 2018

Mr. Brandon T. McDonough  
Nichols Kaster PLLP  
80 S. 8th Street, #4600  
Minneapolis, MN 55402

RE: Freedom of Information Act (FOIA), 5 U.S.C. § 552  
Request No. 18-02006-FOIA

Dear Mr. McDonough:

This letter is in response to your request, dated and received in this office on May 17, 2018, for access to a No Action Letter pertaining to the ABA Retirement Funds program issued on December 31, 1991 and incoming letter.

The search for responsive records has resulted in the retrieval of 31 pages of records that pertain to your request. They are being provided to you in their entirety with this letter.

As shown on the enclosed invoice, the processing fee is \$61.00 in accordance with our fee schedule. You may use our [Online Payment](#) option to pay by debit or credit card. If paying by mail, checks or money orders should be made payable to the SEC and a copy of the invoice should be mailed to our payment address: Enterprise Services Center, HQ Bldg., Room 181, AMZ-341, 6500 South MacArthur Boulevard, Oklahoma City, OK 73169. Please refer to the following link for detailed instructions on how to remit payments. <http://www.sec.gov/about/offices/ofm.htm>

If you have any questions, please contact me at [neilsonc@sec.gov](mailto:neilsonc@sec.gov) or (202) 551-3149. You may also contact me at [foiapa@sec.gov](mailto:foiapa@sec.gov) or (202) 551-7900. You also have the right to seek assistance from Dave Henshall as a FOIA Public Liaison or contact the Office of Government Information Services (OGIS) for dispute resolution services. OGIS can be reached at 1-877-684-6448 or [Archives.gov](http://Archives.gov) or via e-mail at [ogis@nara.gov](mailto:ogis@nara.gov).

Sincerely,

A handwritten signature in black ink, appearing to read "C. Neilson".

Curtis Neilson  
FOIA Research Specialist

Enclosures



No Act

132.3 American Bar  
Association members  
Retirement Program

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A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS  
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BOSTON, MASSACHUSETTS 02109-2881

91 27 6367

TELEPHONE (617) 570-1000  
TELECOPIER (617) 523-1231  
TELEX 84-0340  
CABLE - GOODPROCT, BOSTON

PROCESSED BY

December 12, 1991

JAN 24 1992

Office of Chief Counsel  
Division of Corporate Management  
Section of Exchange Commission  
450 Fifth Street, N.W.  
Washington, D.C. 20549

Act	FEA 7 1934
Section	3(a)(4)
Rule	
Public	
Availability	12/31/91

Re: American Bar Association Members Retirement Program

Ladies and Gentlemen:

Enclosed please find one original and seven copies of our request for a no-action letter (the "Request Letter") on behalf of State Street Bank and Trust Company ("State Street") relating to the American Bar Association Members Retirement Program (the "ABRA Program"). An original and seven copies of this request are simultaneously being transmitted to the Office of Chief Counsel of the Division of Corporation Finance for its review. The Request Letter amends and restates the no-action letter request dated June 10, 1991 (the "June 10, 1991 Letter") that we previously submitted to you on the above subject. This Request Letter, as so amended and restated, has been done at your request, and this Request Letter replaces the June 10, 1991 Letter, as supplemented by a letter to you dated November 6, 1991 (the "November 6, 1991 Letter"). In this regard, we request that the June 10, 1991 Letter and the November 6, 1991 Letter be withdrawn from consideration by you.

For confidential business reasons, we request, on behalf of State Street, that the staff accord confidential treatment to the Request Letter and that the staff's response to the Request Letter not be made available to the public until the expiration of 120 days after the issuance thereof. As noted in the last paragraph of the Request Letter, we are also requesting that you provide expedited review and that you telephone the undersigned, charges collect, to discuss your preliminary

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Office of Chief Counsel  
Division of Investment Management  
December 12, 1991  
Page 2

findings with respect to the Request Letter prior to issuing the written response thereto. Please note that State Street will begin administering the ABRA Program beginning on January 1, 1992, and that we are requesting a response before that date.

Please do not hesitate to call the undersigned or Philip H. Newman of this office at (617) 570-1000, charges collect, if you have any questions or require any additional information. Your attention to the matter is appreciated.

Sincerely,

*Raymond P. Boulanger*

Raymond P. Boulanger

RPB:vlq

Enclosure

cc: Thomas S. Harman, Esq.  
Dorothy Donohue, Esq.  
Monica Parry, Esq.  
Philip H. Newman, Esq.

YP-3755/S

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1933 Act/Section 3(a)(2)  
1940 Act/Section 3(c)(11)

December 12, 1991

Office of Chief Counsel  
Division of Corporation Finance  
Securities and Exchange Commission  
450 Fifth Street, N.W.  
Washington, D.C. 20549

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

Ladies and Gentlemen:

The American Bar Retirement Association ("ABRA") sponsors the American Bar Association Members Retirement Program (the "ABRA Program") to provide a comprehensive retirement program to its members and members of certain affiliated organizations. For over twenty years, The Equitable Life Assurance Society of The United States, a New York mutual life insurance company ("Equitable"), has provided administrative services and investment options for the ABRA Program. Equitable has relied on the position first adopted by the staff (the "Staff") of the Securities and Exchange Commission (the "Commission") in a 1967 no-action letter to Equitable and confirmed in a 1981 no-action letter to Equitable<sup>/1/</sup> that the American Bar Association Members Retirement Trust (the "Master

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<sup>/1/</sup> Equitable Life Assurance Society of The United States, SEC No-Action Letter (1967); Equitable Life Assurance Society of The United States, SEC No-Action Letter (July 20, 1981) (the "Equitable No-Action Letters").

## GOODWIN, PROCTER & HOAR

Securities and Exchange Commission  
December 12, 1991  
Page 2

Trust") and the American Bar Association Members Pooled Trust for Retirement Plans (the "Pooled Trust" and, collectively with the Master Trust, the "ABA Members Trusts") do not require registration under the Investment Company Act of 1940, as amended (the "1940 Act"), and interests therein do not require registration under the Securities Act of 1933, as amended (the "1933 Act").

Effective as of January 1, 1992, State Street Bank and Trust Company ("State Street") will replace Equitable as the provider of administrative services and investment options for the ABRA Program. On behalf of State Street, on June 10, 1991, we filed a request for a no-action letter with respect to the ABRA Program. Subsequently, in discussions with the Office of Chief Counsel of the Division of Investment Management in November 1991, we were asked to amend and restate our letter of June 10, 1991 to provide certain additional information. On behalf of State Street, we hereby submit this amended and restated letter and respectfully request that the Staff confirm that it will not recommend enforcement action by the Commission if State Street replaces Equitable as the provider of administrative services and investment options for the ABRA Program without registration of the ABA Members Trusts under the 1940 Act or interests therein under the 1933 Act, as described herein.

### I. STATEMENT OF FACTS.

ABRA is an Illinois not-for-profit corporation organized by the American Bar Association (the "ABA") to sponsor retirement programs for qualified individuals and employers who are members of the ABA or certain affiliated organizations (such qualified individuals and employers being referred to herein collectively as "Members"). The ABRA Program is a comprehensive retirement program that provides tax-qualified forms of employee pension benefit plans, a variety of investment options (the "Investment Options") for the assets of tax-qualified employee benefit plans, and related recordkeeping and administrative services.

ABRA has notified Equitable that the group annuity contract through which Equitable provides Investment Options under the ABRA Program (the "Group Annuity Contract") will be amended to terminate the offering of Investment Options by Equitable under the ABRA Program on December 31, 1991, and that the agreement pursuant to which Equitable provides administrative services to the ABRA Program also will terminate as of such date.

## **GOODWIN, PROCTER & HOAR**

**Securities and Exchange Commission**

**December 12, 1991**

**Page 3**

Beginning on January 1, 1992, State Street will replace Equitable in making available Investment Options under the ABRA Program and will provide marketing, administrative and recordkeeping services for the ABRA Program.

State Street is a trust company established in 1891 under the laws of The Commonwealth of Massachusetts and is a wholly-owned subsidiary of State Street Boston Corporation, a federal bank holding company. State Street is subject to the supervision and examination of the Massachusetts Commissioner of Banks and the Federal Deposit Insurance Corporation, which insures State Street's deposits. State Street is also a member of the Federal Reserve System and subject to supervision and examination by the Board of Governors of the Federal Reserve System. As of September 30, 1991, State Street and its affiliates world-wide had over \$1.0 trillion of assets in trust or under custody and over \$83 billion of assets under management.

Following the transition from Equitable to State Street, the overall structure of the ABRA Program will remain the same, subject to certain variations, resulting primarily from the fact that State Street is a bank while Equitable is an insurance company.<sup>/2/</sup> These variations do not, in our opinion, affect the basis for, or the position adopted by the Staff in, the Equitable No-Action Letters.

### **A. Pension and Profit-Sharing Plans.**

Members who elect to participate in the ABRA Program may do so either through their own individually designed retirement plans ("Individually Designed Plans") or by adopting a plan established in accordance with one or both of two master plans sponsored by ABRA (the "ABA Members Plans"). Plans participating in the ABRA Program ("Plans") may be plans for the benefit of employees of a corporation or plans covering one or more employees within the meaning of Section 401(c)(1) of the Internal Revenue Code of 1986, as amended ("Keogh Plans").

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<sup>/2/</sup> The legislative history relating to Section 3(c)(11) of the 1940 Act indicates that Congress intended to "grant banks and insurance companies equal treatment under the Federal securities laws to the extent that they compete with each other to serve as funding media for employees' pension or profit-sharing plans." House Committee Report No. 91-1382 (1970), page 18.



## GOODWIN, PROCTER & HOAR

Securities and Exchange Commission

December 12, 1991

Page 4

The ABA Members Plans are master plans designed to allow qualified employers ("Employers") to establish and maintain employee benefit plans that are qualified under Section 401(a) of the Internal Revenue Code of 1986, as amended (the "Code"). The forms of the ABA Members Plans have previously been determined by the Internal Revenue Service (the "IRS") to be qualified under Section 401(a) of the Code. The forms of ABA Members Plans have recently been amended to comply with tax law changes, including the requirements of the Tax Reform Act of 1986, and the regulations promulgated thereunder, and to reflect changes in anticipation of the transition from Equitable, an insurance company, to State Street, a bank. The amended forms of ABA Members Plans are in the process of submission to the IRS for a favorable opinion that each such amended form is acceptable under Section 401 of the Code for use by Employers for the benefit of their employees. It is anticipated that favorable opinion letters will be obtained with respect to the forms of ABA Members Plans, as amended.

Individually Designed Plans are employee benefit plans established and maintained by Employers in forms that differ from the ABA Members Plans. The trustees of each Individually Designed Plan must represent that the Plan is qualified under Section 401(a) of the Code to be eligible to participate in the ABRA Program. Thus, all Plans participating in the ABRA Program must meet the requirements for qualification under Section 401 of the Code.

### B. ABA Members Trusts.

Assets of Plans adopted under the ABA Members Plans are held in trust in accordance with the provisions of the Master Trust and assets of Individually Designed Plans invested under the ABRA Program are held in trust in accordance with the provisions of the Pooled Trust. Such assets are held in trust for the exclusive benefit of qualified individuals and employees (collectively with their beneficiaries, "Participants") of Employers. Currently, the individual members of the ABRA Board of Directors serve as trustees of each of the ABA Members Trusts. Effective as of January 1, 1992, State Street will become sole trustee of each of the ABA Members Trusts.

The ABA Members Trusts have previously been determined by the IRS to be tax-exempt trusts under Section 501(a) of the Code. In anticipation of the transition to State Street and in connection with the amendment of the ABA Members Plans, the ABA Members Trusts have also been amended to reflect such

**GOODWIN, PROCTER & HOAR**

Securities and Exchange Commission  
December 12, 1991  
Page 5

transition as well as changes in federal tax laws and are in the process of submission to the IRS for a favorable opinion letter (in the case of the Master Trust) and a favorable ruling (in the case of the Pooled Trust) that the amendments will not affect their tax-exempt status. It is anticipated that a favorable opinion letter and a favorable ruling will be obtained with respect to the tax-exempt status of the Master Trust and Pooled Trust, respectively, each as amended.

We understand that the ABA Members Trusts were established originally to permit the trustees of such trusts, in accordance with New York insurance law, to serve as the holders of nominal title to interests in the Group Annuity Contract through which Equitable has provided Investment Options. We also understand that Equitable's position, as articulated in the Equitable No-Action Letters, has been that the ABA Members Trusts provide an administrative convenience and that the ABA Members Trusts have no economic substance separate and apart from the underlying Investment Options. Currently, the trustees of the ABA Members Trusts exercise no discretion with respect to the investment of assets contributed in accordance with the Plans. All such assets are invested in accordance with the instructions of the specific Employer or Participant, depending on the terms of the applicable Plan.<sup>/3/</sup> Furthermore, at the time assets are contributed under the Plans and received by or on behalf of the trustees of the ABA Members Trusts, the assets are immediately passed through to the underlying Investment Option provided by Equitable. In reliance upon the Equitable No-Action Letters, the ABA Members Trusts have not been registered under the 1940 Act and interests therein have not been registered under the 1933 Act.

The relationship of the ABA Members Trusts to the Plans and the Participants therein and the underlying Investment Options will not change as a result of the introduction of State Street to the ABRA Program. After the transition to State Street, the ABA Members Trusts will remain in existence to permit State Street, as trustee, to hold nominal title to all assets invested in Investment Options, including Investment Options provided by Equitable through the Group Annuity Contract.

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<sup>/3/</sup> In accordance with the terms of some Plans, both before and after the transition to State Street, some Employers will make such investment choices; however, we refer herein only to Participants to avoid confusion.

GOODWIN, PROCTER & HOAR

Securities and Exchange Commission

December 12, 1991

Page 6

State Street as Trustee of the ABA Members Trusts will be the nominal holder of the Group Annuity Contract until the assets thereunder are liquidated and distributed in accordance with instructions provided by or on behalf of Participants. The ABA Members Trusts will also permit the ABRA Program to be operated on a basis consistent with prior practice, with a convenient mechanism for the immediate movement of assets for the benefit of Participants and Plans. Furthermore, the ABA Members Trusts will provide an efficient means for a single trustee on an ongoing basis to maintain both Plan and Participant recordkeeping for the ABRA Program.

After the transition to State Street, when a contribution to the ABRA Program is made on behalf of a Participant or Plan, such contribution will immediately be passed through to specific underlying Investment Options, in accordance with the investment allocation instructions provided by or on behalf of the Participant or Plan and, thereafter, the Participant or Plan will have a beneficial interest only in those specific Investment Options. Each Participant account or Plan account will be accounted for separately under the ABA Members Trusts and there will be no commingling of assets. The ABA Members Trusts will not be separate investments for Participants or Plans, and the ABA Members Trusts will not alter the nature of, or risks associated with, the underlying Investment Options.<sup>/4/</sup> As is the case under the ABRA Program as administered by Equitable, the ABA Members Trusts will have no economic substance separate and apart from the underlying Investment Options.

In addition, the continued existence of the ABA Members Trusts after January 1, 1992 will facilitate the smooth transition of the ABRA Program from Equitable to State Street. ABRA and State Street have chosen to maintain the structure of the ABRA Program, including the ABA Members Trusts, because they believe that to do otherwise would create additional administrative and operational burdens and costs for

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<sup>/4/</sup> In this respect, the ABA Members Trusts differ from group trusts, such as those discussed in The Provident Bank, SEC No-Action Letter (available September 24, 1991). In such group trusts, assets contributed by participating plans are commingled such that each participating plan holds a pro rata interest in all assets of such trust. Thus, a group trust is generally a separate investment in a pool of assets.



## GOODWIN, PROCTER & HOAR

Securities and Exchange Commission

December 12, 1991

Page 7

Participants, Plans and Employers, including technical issues related to the compliance of Plans with the Tax Reform Act of 1986 and newly promulgated regulations thereunder, without commensurate benefits to Participants and Employers.

Finally, after the transition to State Street, certain fees under the ABRA Program will be borne by Investment Options and certain other fees will be borne on a per-Plan or per-Participant basis. No fees will be borne by the ABA Members Trusts. Fees charged based on the value of assets in the various Investment Options will consist of the program expense fee, trustee or custodian fees, management or advisory fees and investment-related administrative fees. All such asset-based fees will be charged to the appropriate Investment Option and paid as an operating expense thereof or reflected as a reduction in income accruing thereon, prior to the allocation of income (or loss) to Plan accounts and Participant accounts under the ABA Members Trusts. Other fees under the ABRA Program relate to administration and recordkeeping in connection with the Plans and, therefore, will be assessed on a per-Participant or per-Plan basis. These fees include record maintenance and report fees, actuarial fees, and fees to obtain annuity quotes. These fees will either be billed directly to, and paid directly by, the Employer or Plan receiving the services or will be charged to the specific Plan or Participant and paid thereby through the withdrawal of assets from one or more Investment Options held on behalf of such Plan or Participant. In either case, the charge will be borne only by the specific Plan or Participant, as the case may be, receiving the services to which the charge relates. All fees charged in connection with the ABRA Program either will relate to the Investment Options and related services, in which case they will be borne directly by the Investment Options, or to the Plans and related services, in which case they will be borne by the specific Plan, Participant or Employer receiving the services. Thus, no fees will be borne by the ABA Members Trusts. In addition, just as the ABA Members Trusts will not commingle assets of Plans for investment purposes, the ABA Members Trusts will not commingle assets of Plans for purposes of charging or assessing any fees or expenses.

### C. Investment Options.

#### 1. Equitable Investment Options.

Prior to January 1, 1992, Participants may choose to invest assets contributed to the ABRA Program in a variety of

## GOODWIN, PROCTER & HOAR

Securities and Exchange Commission

December 12, 1991

Page 8

Investment Options offered by Equitable pursuant to the Group Annuity Contract. Under the Group Annuity Contract, Equitable offers interests in three separate accounts that invest primarily in equity securities or a combination of debt and equity securities (the "Equitable Market Value Accounts"). Equitable retains investment managers in connection with the investment of the assets of the Equitable Market Value Accounts. Equitable also offers a separate account that invests primarily in real estate (the "Equitable Real Estate Account"). Also under the Group Annuity Contract, Equitable offers a money market guarantee account (the "Equitable Money Market Account") and guaranteed rate accounts generally of three and five years in duration, both of which are part of Equitable's general account, the assets of which are subject to the claims of Equitable's general creditors.

Equitable registers under the 1933 Act those interests in the Equitable Market Value Accounts and Equitable Real Estate Account that are sold to entities for which there is no exemption from registration, such as Keogh Plans that do not qualify under Rule 180 of the 1933 Act. Guaranteed rate accounts and the Equitable Money Market Account are issued by Equitable without registration under the 1933 Act in reliance upon the exemption provided for such contracts under Section 3(a)(8) of the 1933 Act. We understand that Equitable delivers a prospectus describing the ABRA Program and all of the Investment Options that it offers pursuant to the Group Annuity Contract to all Employers and Participants, including those whose interests in Investment Options are not required to be registered.

### 2. State Street Investment Options.

Beginning January 1, 1992, Participants may choose to invest assets contributed to the ABRA Program in a variety of Investment Options that will be made available by State Street, with varying strategies designed to replicate certain of the Investment Options presently offered by Equitable under the ABRA Program. State Street has established the American Bar Association Members/State Street Collective Trust (the "Collective Trust"), consisting of a series of bank-maintained collective trust funds (the "Funds") to be offered as Investment Options under the ABRA Program beginning as of January 1, 1992. Each Fund under the Collective Trust will be

**GOODWIN, PROCTER & HOAR**

Securities and Exchange Commission

December 12, 1991

Page 9

a collective trust fund maintained by State Street for the exclusive benefit of Participants in the ABRA Program.<sup>/5/</sup>

Three of the Funds will invest primarily in equity securities or combinations of equity and debt securities (the "Market Value Funds"). The investment objectives and policies of the Market Value Funds are substantially the same as the investment objectives and policies of the Equitable Market Value Accounts. For each Market Value Fund, State Street has designated one or more investment advisors ("Investment Advisors") both to make recommendations to State Street regarding appropriate investments for the respective Market Value Fund and to suggest brokers to execute the transactions, all in accordance with the terms of the Investment Advisor agreements.<sup>/6/</sup> State Street will monitor and evaluate the overall performance of each Investment Advisor and may, from time to time, appoint or remove an Investment Advisor or change the allocation of assets in a Fund among Investment Advisors if there are multiple Investment Advisors to a Fund. State Street will in all events maintain "substantial investment responsibility" over such Funds (see Section II-A, infra).

State Street will also offer a short term fixed investment fund (the "Enhanced Short Term Investment Fund") having an investment objective similar to that of the Equitable Money Market Account.<sup>/7/</sup> The Enhanced Short Term Investment Fund

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/5/ In contrast to the ABA Members Trusts, the Collective Trust, including each Fund established thereunder, is a typical "group trust" in which assets contributed by participating Plans are commingled, as described above in note 4.

/6/ Initially, the Investment Advisors to each Market Value Fund will be the same entities that presently serve as investment managers to the corresponding Equitable Market Value Account.

/7/ Instead of holding nominal title to interests in the Equitable Money Market Account, the assets of which are subject to the claims of Equitable's general creditors, after December 31, 1991, State Street, as trustee of the ABA Members Trusts, will hold, for the benefit of Participants, nominal title to interests in the Enhanced Short Term Investment Fund. The Enhanced Short Term Investment Fund, which is a diversified collective trust fund established by State Street, will not be subject to the claims of State Street's general creditors.

**GOODWIN, PROCTER & HOAR**

Securities and Exchange Commission

December 12, 1991

Page 10

will invest primarily in high quality money market instruments with the overall portfolio having an average weighted maturity of not more than 120 days, with the objective of providing high current income consistent with the preservation of capital. The Enhanced Short Term Investment Fund will make such investments either directly in such instruments or indirectly through collective trust funds maintained by State Street for collective investment and reinvestment in such instruments.

In addition, State Street will offer as an Investment Option a new fund (the "Blended Rate Fund") that will invest primarily in investment contracts issued by insurance companies, investment contracts and certificates of deposit issued by banks or trust companies, and money market instruments. The Blended Rate Fund will generally maintain a portfolio with a longer average weighted maturity than that of the Enhanced Short Term Investment Fund. Like the Enhanced Short Term Investment Fund, the Blended Rate Fund may make investments either directly or indirectly through collective investment funds maintained by State Street.<sup>/8/</sup>

On January 1, 1992, cash and assets held in each Equitable Market Value Account will be transferred to the corresponding Market Value Fund and cash equal to the value of Participants' interests in the Equitable Money Market Account will be transferred to the Enhanced Short Term Investment Fund. On January 1, 1992, the Blended Rate Fund will have no assets.

Due to the illiquidity of the assets held in the Equitable Real Estate Account, assets held in this separate account will

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<sup>/8/</sup> The fund declaration establishing each Fund under the ABRA Program precludes State Street from receiving additional trustee, management, custodian and related fees, expenses or deductions with respect to Participants, Plans and Employers under the ABRA Program, and no fee will be assessed against the Funds by reason of the participation in such other collective investment funds maintained by State Street. In addition, even if the terms of the Funds did not prohibit the assessment of duplicate fees, the Employee Retirement Income Security Act of 1974, as amended ("ERISA") prohibits State Street from making such an assessment under the self-dealing restrictions of Section 406. Thus, investments made by a Fund in other collective trusts maintained by State Street do not increase trustee, management, custodian and related fees payable to State Street in connection with the Collective Trust. Furthermore, no advisory fees will be paid to any advisor to any such other collective investment funds.



## GOODWIN, PROCTER & HOAR

Securities and Exchange Commission  
December 12, 1991  
Page 11

not be transferred to the Collective Trust. The assets of the Equitable Real Estate Account will continue to be managed by Equitable. Nominal title to interests in the Equitable Real Estate Account will continue to be held (through the Group Annuity Contract) by State Street as trustee of the ABA Members Trusts for the benefit of Participants. Following the transition to State Street, Participants will no longer be permitted to make contributions or transfers into the Equitable Real Estate Account.

Assets held in the Equitable guaranteed rate accounts that have not matured by January 1, 1992 will continue to be invested with Equitable and State Street, as trustee of the ABA Members Trusts, will be the nominal holder of such accounts on behalf of Participants until such accounts mature. As these accounts mature, Participants will have the opportunity to invest the proceeds in the various Investment Options then available under the ABRA Program. After the transition to State Street, Participants will no longer be permitted to make contributions or transfers into the Equitable guaranteed rate accounts; however, Participants may wish to continue to invest in guaranteed investment contracts that constitute insurance policies within the meaning of Section 3(a)(8) of the 1933 Act. On behalf of Participants, State Street, as trustee of the ABA Members Trusts, will enter into such contracts with one or more insurance companies that meet certain credit quality standards and State Street as trustee will hold nominal title to such contracts for the benefit of Participants. As is the case with the ABRA Program as presently administered by Equitable, such contracts and the interests therein will not be registered under the 1940 Act or the 1933 Act.

### D. Role of State Street.

State Street is the sole trustee of the Collective Trust, with exclusive management and control over the assets thereof. As of January 1, 1992, State Street will also become sole trustee of each of the ABA Members Trusts. In addition, State Street and ABRA have entered into an Administrative and Investment Services Agreement (the "Administrative Services Agreement") effective as of January 1, 1992, pursuant to which State Street will assume certain administrative and enrollment responsibilities with respect to the ABRA Program. The Administrative Services Agreement will replace the administrative agreement that exists between ABRA and Equitable.

State Street will act as trustee of the Collective Trust, performing investment management and custodial functions for each of the Funds under the Collective Trust, and will be

## GOODWIN, PROCTER & HOAR

Securities and Exchange Commission

December 12, 1991

Page 12

responsible for the investment of all assets allocated to the Funds. In return for its services with respect to a Fund, State Street will receive a fee based on the value of the assets invested in such Fund. As the provider of administrative and enrollment services in accordance with the Administrative Services Agreement, State Street will also receive a program expense fee assessed on the value of assets in the Investment Options and certain enrollment and administrative fees assessed on a per-Participant or per-Plan basis. The amount of fees that State Street is permitted to charge under the ABRA Program was negotiated by ABRA and State Street, and State Street is not permitted to increase its fees without the agreement of ABRA and notice to Participants and Employers. In the aggregate, based on estimated average net assets under the ABRA Program of \$1,624,000,000, State Street would receive fees equal to approximately \$10,500,000 on an annual basis./9/

Under the Administrative Services Agreement, State Street will assume responsibility for all administrative and enrollment functions with respect to the ABRA Program as of January 1, 1992. The Administrative Services Agreement provides that State Street will receive and process all contributions to, transfers between, and distributions or withdrawals from, Investment Options. State Street will be required to maintain all Plan, Participant and Investment Option records in connection with the ABRA Program, prepare and mail all reports, respond to Participant and Employer inquiries and handle all other administrative functions currently performed by Equitable. In accordance with procedures set forth in the Administrative Services Agreement, State Street exercises ultimate discretion over the establishment and termination of Investment Options made available through the

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/9/ The estimate of fees is based on an estimate of assets under the ABRA Program described more fully in the prospectus ("Prospectus") relating to interests in the Collective Trust registered under the 1933 Act, together with an estimate of non-recurring fees. This estimate of fees does not include fees (estimated at less than \$1,900,000 on an annual basis), which will be paid to Investment Advisors. We understand that comparable compensation was paid to such entities as investment managers under Equitable's administration of the ABRA Program.

## GOODWIN, PROCTER & HOAR

Securities and Exchange Commission  
December 12, 1991  
Page 13

Collective Trust and the engagement and removal of Investment Advisors. The Administrative Services Agreement also provides that as of January 1, 1992, State Street will be responsible for determining that the offering and maintenance of Investment Options complies with all applicable employee benefit, securities, banking and insurance laws and regulations. Under the Administrative Services Agreement, State Street is also responsible for marketing and promoting the ABRA Program. These marketing and promotional activities will include direct mail advertising to Members, placing print advertisements in various national and state legal publications and providing information at national and state bar association meetings. All such marketing and promotional activities will thus be targeted only to the limited audience consisting of Members and Participants, rather than to the public at large.<sup>/10/</sup> All such activities will be conducted in strict compliance with applicable federal and state securities and banking laws.

Interests in the Funds will be sold without a sales load and without any asset-based distribution fees or contingent deferred sales fees. Thus, State Street will receive no direct compensation for sales of interests in the Funds. Furthermore, no direct or special incentive compensation will be paid to any employee of State Street in connection with such sales, although some employees of State Street, including some of those involved with the ABRA Program, may be eligible for performance bonuses on an annual basis. Such performance bonuses paid by State Street may be based on a variety of factors. However, such bonuses will not be based upon the number or value of the Units of the Funds sold by any such employee.

### E. Role of ABRA.

As sponsor of the ABRA Program, ABRA is responsible for the design of the ABRA Program, the maintenance of the ABA Members

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<sup>/10/</sup> Under Internal Revenue Service rules, a trade or professional association such as ABRA is eligible to act as a sponsoring organization of a master plan, provided that such plans are marketed only to its members or members of certain affiliated organizations for use in their capacity as adopting employers. See Section 5, Rev. Proc. 89-9, I.R.B. 1989-6, February 6, 1989, modified by Section 6, Rev. Proc. 90-20, I.R.B. 1990-15, April 9, 1990.

## GOODWIN, PROCTER & HOAR

Securities and Exchange Commission  
December 12, 1991  
Page 14

Plans and the ABA Members Trusts, and the designation of certain Investment Options to be made available under the ABRA Program. ABRA will monitor State Street's administration and marketing of the ABRA Program and will approve the hiring by State Street of certain other major service providers, such as actuaries. As part of its responsibilities, ABRA has reviewed and approved the fees payable in connection with the ABRA Program and has negotiated the terms and conditions of the documents establishing the respective rights and obligations of State Street and ABRA. ABRA may terminate the Administrative Services Agreement prior to the end of its term in certain circumstances, including failure by State Street to satisfy certain service standards or standards regarding its financial condition.

ABRA has the right to make recommendations to State Street regarding the addition or deletion of Funds as Investment Options. ABRA, with the assistance of a consultant, will monitor the performance of State Street and its Investment Advisors and may make recommendations to State Street regarding the engagement and termination of Investment Advisors. State Street has agreed to give full good faith consideration to all such recommendations from ABRA, although State Street retains exclusive management and control over Funds and Investment Advisors. ABRA may direct State Street to establish or terminate certain other Investment Options. In specified cases when State Street fails to satisfy minimum investment performance standards, ABRA also has certain additional rights to delete a Fund as an Investment Option or to direct the establishment of another Investment Option that is not a Fund. ABRA's duties will not include responsibility for marketing or administration of the ABRA Program or the supervision of State Street's investment decisions. As has been the case under Equitable's administration of the ABRA Program, for its services as sponsor of the Program, ABRA receives an asset-based program sponsor fee./11/

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/11/ Based on the estimate of \$1,624,000,000 in assets under the ABRA Program described in the Prospectus, the fees payable to ABRA would be approximately \$1,100,000 on an annual basis.



## GOODWIN, PROCTER & HOAR

Securities and Exchange Commission  
December 12, 1991  
Page 15

### II. LEGAL ANALYSIS.

#### A. Application of Securities Laws to the Collective Trust.

##### 1. 1940 Act.

Section 3(c)(11) of the 1940 Act excludes from the definition of investment company "any employees' . . . pension, or profit-sharing trust which meets the requirements for qualification under Section 401 of the Internal Revenue Code of 1986; . . . or any collective trust fund maintained by a bank consisting solely of assets of such trusts." For a collective trust fund to be excluded from the definition of an "investment company" under Section 3(c)(11), and therefore exempt from registration under the 1940 Act, three criteria must be satisfied.

First, the entity maintaining the collective trust fund must be a statutorily defined "bank." Section 2(a)(5) of the 1940 Act defines the term "bank" to mean "a member bank of the Federal Reserve System . . ." As noted above, State Street is a member bank of the Federal Reserve System and therefore is a "bank" for purposes of Section 3(c)(11) of the 1940 Act./12/

Second, the collective trust fund must be "maintained" by a bank. To "maintain" a collective trust fund, a bank must exercise "substantial investment responsibility" over such fund. Employee Benefit Plans, Securities Act Release No. 6188, Fed. Sec. L. Rep. (CCH) ¶1051, 2073-22 (February 1, 1980) ("Release No. 33-6188"); see also Brown Brothers Harriman & Co., SEC No-Action Letter (available November 29, 1984) and Huntington National Bank, SEC No-Action Letter (available March 9, 1988). Pursuant to Section 3.03 of the Declaration of Trust of the Collective Trust, "the Funds shall be under the exclusive management and control of the Trustee," which is State Street. In addition, State Street will make all investments for certain of the Funds and will have ultimate discretion over all investments made for the Equity Funds in accordance with the Collective Trust and the investment advisor

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/12/ State Street also satisfies the Section 2(a)(5) definition of "bank" by virtue of the fact that it is a banking institution doing business under the laws of The Commonwealth of Massachusetts, a substantial portion of the business of which consists of receiving deposits and exercising fiduciary powers.

## GOODWIN, PROCTER & HOAR

Securities and Exchange Commission  
December 12, 1991  
Page 16

agreements. Thus, State Street will satisfy the "substantial investment responsibility" test and, therefore, the Funds will be "maintained" by State Street.

Third, Section 3(c)(11) requires that the collective trust fund must consist solely of assets of trusts for employees' stock bonus, pension, or profit-sharing plans that are qualified under Section 401 of the Code. Since the Funds will consist solely of assets of the ABA Members Trusts, which are trusts for employees' pension and profit-sharing plans that are qualified under Section 401 of the Code, the Funds will satisfy this final requirement of Section 3(c)(11).

Because the Funds will satisfy the requirements of Section 3(c)(11), the Collective Trust will not be an "investment company" under Section 3 of the 1940 Act and therefore will be exempt from registration under the 1940 Act.

### 2. 1933 Act.

As discussed below, interests in the Collective Trust maintained by State Street to be issued with respect to certain Keogh Plans will be registered under the 1933 Act.

Section 3(a)(2) of the 1933 Act, using language similar to that set forth in Section 3(c)(11) of the 1940 Act, provides an exemption for interests and participations in a collective trust fund maintained by a bank which are issued in connection with qualified pension or profit-sharing plans. However, Section 3(a)(2) also provides that this exemption does not apply to a collective trust fund that includes the assets of any plan "which covers employees some or all of whom are employees with the meaning of Section 401(c)(1) of [the] Code." Thus, the exemption does not apply to interests in a collective trust fund to the extent that such fund includes the assets of Keogh Plans.<sup>/13/</sup> Therefore, interests in the Funds will be exempt from registration under the 1933 Act pursuant to

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<sup>/13/</sup> The commingling of assets that are exempt under Section 3(a)(2) with assets of Keogh Plans does not affect the exemption with respect to such qualified assets. Employee Benefit Plans, Securities Act Release No. 6281, Fed. Sec. L. Rep. (CCH) ¶1052, 2073-37 (January 15, 1981); Thomas D. Murray, SEC No-Action Letter (available December 7, 1981).

**GOODWIN, PROCTER & HOAR**

Securities and Exchange Commission

December 12, 1991

Page 17

Section 3(a)(2) of the 1933 Act to the extent that such interests are issued in connection with Plans that are not Keogh Plans.

Section 3(a)(2) of the 1933 Act authorizes the Commission to exempt from Section 5 of the 1933 Act any interest or participation issued in connection with a Keogh Plan. The Commission has exercised this authority by promulgating Rule 180, which exempts interests in a collective trust fund maintained by a bank from registration under the 1933 Act to the extent that such interests are issued in connection with Keogh Plans meeting the sophistication requirements of Rule 180. State Street intends to obtain from each Keogh Plan that proposes to participate in the ABRA Program written representations designed to determine whether such Plan meets the requirements of Rule 180. Such representations will provide State Street with reasonable grounds for belief that those Keogh Plans which make adequate representations qualify under Rule 180. State Street does not intend to register under the 1933 Act interests in the Collective Trust that are issued to the ABA Members Trusts with respect to Keogh Plans that are qualified under Rule 180.

State Street intends to make the ABRA Program available to Keogh Plans that do not qualify under Rule 180. Interests in the Collective Trust to be issued with respect to such non-qualified Keogh Plans will be registered under the 1933 Act.<sup>/14/</sup> The Prospectus will provide disclosure with respect to all Investment Options offered by State Street, including those Investment Options the interests in which are not required to be registered, and will also provide a description of all aspects of the ABRA Program to ensure that Employers and Participants receive all information that is material to a decision to participate in the ABRA Program. The Prospectus will be provided to all Employers and Participants.

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<sup>/14/</sup> State Street maintains various collective trust funds, all interests in which are exempt from registration under the 1933 Act pursuant to Section 3(a)(2) of the 1933 Act. As noted above in Section I-C-2, State Street anticipates that a portion of the assets of the Funds may be invested in one or more of such collective trust funds. The investment by the Funds in such collective trust funds will not cause the interests in such collective trust funds to require registration under the 1933 Act. See Bank of New York, SEC No-Action Letter (available May 11, 1979).

**GOODWIN, PROCTER & HOAR**

Securities and Exchange Commission  
December 12, 1991  
Page 18

**B. Application of Securities Laws to ABA Members Trusts.**

**1. No separate securities.**

The ABA Members Trusts are an administrative mechanism with no economic substance. As such, the ABA Members Trusts do not bear the attributes of securities as described in the federal securities laws and judicial and administrative interpretations thereof.

Pursuant to Sections 3(a) and 2(a)(22) of the 1940 Act, an entity is not an "investment company" and therefore is not required to register under the 1940 Act unless such entity is an "issuer" of "securities." Similarly, pursuant to Section 5 of the 1933 Act, a contract or arrangement is not subject to the requirements of the 1933 Act, including the registration provisions thereof, unless such contract or arrangement is a "security," as defined in Section 2(1) of the 1933 Act. The ABA Members Trusts do not require registration under the 1940 Act and interests therein do not require registration under the 1933 Act because such interests are not securities separate from the interests in the Investment Options.

An interest in an employee benefit plan is a security under federal securities laws if such interest is an "investment contract". International Brotherhood of Teamsters v. Daniel, 439 U.S. 551 (1979). The Supreme Court, in Daniel, applied the test first enunciated in SEC v. W.J. Howey<sup>/15/</sup> to determine whether an interest in an employee benefit plan is an investment contract. The Court held that an interest in an employee benefit plan is not an investment contract unless, judging by the economic reality of the transaction, "the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others." 328 U.S. at 301. The Supreme Court observed that "the 'touchstone' of the Howey test is the presence of an investment in a common venture premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others." Daniel, 439 U.S. at 561 (quoting United Housing Foundation, Inc. v. Forman, 421 U.S. 837, 852 (1975)).

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/15/ 328 U.S. 293 (1946).



## GOODWIN, PROCTER & HOAR

Securities and Exchange Commission  
December 12, 1991  
Page 19

Under the ABRA Program, investments will be made in the Collective Trust with a reasonable expectation of profits to come from the managerial efforts of State Street, as trustee exercising exclusive management and control over the assets of the Collective Trust. The interests in the Collective Trust, therefore, are securities and are required to be registered under the 1933 Act to the extent that an exemption from registration is not otherwise available. See Section II-A-2, supra.

Conversely, the duties of State Street as trustee of the ABA Members Trusts and as the provider of recordkeeping and administrative services under the Administrative Services Agreement are not entrepreneurial or managerial in nature. The ABA Members Trusts and the Administrative Services Agreement merely set forth certain procedures, rights and responsibilities of the parties involved in the ABRA Program, facilitate recordkeeping and administration and provide a mechanism for the immediate transfer of assets between Participants and the Investment Options. Consequently, Participants and Employers cannot have a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of State Street or any other party in connection with the ABA Members Trusts. Therefore, interests in the ABA Members Trusts do not constitute securities separate from the interests of Participants in the Investment Options, and the ABA Members Trusts do not require registration under the 1940 Act and interests therein do not require registration under the 1933 Act.

### 2. Single Investment Decision.

The Commission has determined with respect to employee benefit plans, that "from the employee's standpoint, his interest in the plan is inseparable from his aliquot share of the plan's interest in the funding vehicle." Employee Benefit Plans, Securities Act Release No. 6188, February 1, 1980, Fed. Sec. L. Rep. (CCH) ¶1051 at p. 2073-21-22. The Commission concluded that "[i]n light of . . . the negative effects on many plans which . . . might flow from a narrow construction of Section 3(a)(2), the Staff will continue to view the exemption as being applicable to both interests in funding vehicles and interests in plans." Id. at 2073-22. Moreover, the Commission has explicitly acknowledged this position of the Staff to be applicable to Keogh plans:

**GOODWIN, PROCTER & HOAR**

Securities and Exchange Commission

December 12, 1991

Page 20

Although the interests of participants in voluntary, contributory Keogh plans are deemed to be securities, the staff has not required the separate registration of such interests. Most plans can rely on an exemption from registration for the offer and sale of employee interests. For those relatively few plans that do not have a readily available exemption, the staff, as a matter of administrative discretion, will not require such interests to be registered.

Id. at 2073-12./16/

The Commission's position with respect to the non-registration of employee benefit plans and interests in Keogh Plans applies equally to interests in the ABA Members Trusts. The ABA Members Trusts provide a convenient means of maintaining records of each Participant's or Employer's interests in the underlying Investment Options and a mechanism for the immediate transfer of assets between Participants and the Investment Options. From a Participant's standpoint, an interest in the ABRA Program, including the ABA Members Trusts, is inseparable from the Participant's interests in the underlying Investment Options which, to the extent required, will be registered under the 1933 Act.

All Members, Employers and Participants considering participation in the ABRA Program will be provided with the Prospectus describing all aspects of the ABRA Program and its administration, including (1) each Investment Option that is available through the ABRA Program, (2) the Collective Trust and State Street's investment responsibilities thereunder, (3) the ABA Members Plans and the ABA Members Trusts, and (4) the administrative and enrollment functions performed by State Street. Employers electing to participate in the ABRA Program will make a single investment decision regarding whether to participate in the ABRA Program as a whole, including the Investment Options available through the ABRA

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/16/ Consistent with the position adopted by the Commission in Release No. 33-6188 and also consistent with the present operation of the ABRA Program, interests in the Plans will not be registered under the 1933 Act.

## GOODWIN PROCTER & HOAR

Securities and Exchange Commission  
December 12, 1991  
Page 21

Program. If a Participant has the opportunity to choose whether to participate in the ABRA Program after it has been adopted by the Employer, the Participant will also make only a single investment decision. Participants cannot make the decision to hold an interest in the ABA Members Trusts without holding an equivalent interest in the Investment Options under the ABRA Program. Under these circumstances, it would be of no benefit to Employers and Participants if the ABA Members Trusts were registered under the 1940 Act and interests therein were registered under the 1933 Act. The registration and delivery of a separate prospectus with respect to the ABA Members Trusts and interests therein to each Participant and Employer would generate substantial administrative costs and may cause confusion on the part of Participants and Employers. These additional administrative costs would indirectly reduce the retirement benefits payable to Participants and would not provide Participants with any additional protections.

### 3. Regulation of the ABRA Program

As a conduit for the transfer of assets from Plans to Investment Options, the ABA Members Trusts are merely one element of a comprehensive program, all aspects of which are subject to regulation. In addition to the application of federal and state securities laws to the Collective Trust and interests therein, State Street's operation of the ABRA Program is subject to the requirements of ERISA and the Code, and State Street is subject to supervision by three separate bank regulatory authorities. In light of the comprehensive regulation that will apply to all aspects of the ABRA Program, as administered by State Street, there is nothing to be gained by requiring registration of the ABA Members Trusts under the 1940 Act or the interests therein under the 1933 Act.

ERISA was enacted specifically to regulate pension and profit-sharing plans, such as the Plans under the ABRA Program. Among other requirements, ERISA establishes fiduciary standards, investment diversification requirements, reporting and disclosure obligations and prohibitions on self dealing. The ABRA Program is designed to meet all of the requirements of ERISA. State Street will be subject to the fiduciary standards of ERISA in carrying out its duties and responsibilities in connection with the ABRA Program and, in the event of any violation, will be subject to the remedies, sanctions and judicial rights of action created under ERISA. In addition, the Code imposes a variety of requirements that the ABRA Program must satisfy to provide tax-qualified Plans and tax-exempt trusts to Employers.

## GOODWIN, PROCTER & HOAR

Securities and Exchange Commission  
December 12, 1991  
Page 22

### 4. Consistent With Previous Staff Positions.

The ABA Members Trusts (or their predecessors) have been part of the ABRA Program for over twenty years. In reliance upon the Equitable No-Action Letters, the ABA Members Trusts have not been not registered under the 1940 Act and interests therein have not been registered under the 1933 Act. Ten years ago, in affirming its position that no registration of the ABA Members Trusts under the 1940 Act and interests therein under the 1933 Act is required, the Staff of the Division of Investment Management stated as follows:

We base our response upon the following factors contained in your letters: the underlying units of interest in Equitable are either registered under the 1933 Act or exempt from registration; Equitable, a registered broker-dealer, rather than the trusts is responsible for all promotional, marketing, and enrollment functions with respect to the group annuity contracts; Equitable receives all plan contributions, prepares and mails reports, and handles other administrative functions; no investment decisions are made by an association or any of its trustees; Equitable pays all benefits provided by the plans directly to participants; Equitable receives nearly all the fees paid in connection with the plans; the trustees' general oversight of the plans does not include responsibility for marketing or administration, or supervision of Equitable's investment decisions; all assets . . . managed by a registered investment adviser other than Equitable are, under New York Insurance Law, owned by Equitable; and under ERISA Equitable is directly liable to plan sponsors and participants regarding plan assets controlled by it as investment manager.

Equitable Life Assurance Society of The United States, SEC No-Action Letter (July 20, 1981).

After the transition to State Street as of January 1, 1992, the ABRA Program will continue to be administered in a manner



## GOODWIN, PROCTER & HOAR

Securities and Exchange Commission  
December 12, 1991  
Page 23

consistent in all material respects with these factors. The underlying units of interest in the Collective Trust either will be registered under the 1933 Act or exempt from registration. State Street, a bank that is not required to register as a broker-dealer under federal securities laws, rather than the ABA Members Trusts, will be responsible for all promotional, marketing, and enrollment functions, receive all plan contributions, prepare and mail all reports and handle all other administrative functions. State Street will receive all contributions to the ABRA Program, prepare and mail reports and handle other administrative functions. No investment decisions will be made by ABRA or any other association, or any of their directors, and State Street will pay or arrange for the payment of all benefits provided by applicable Plans directly to the Participants. State Street will receive substantially all of the fees paid in connection with the ABRA Program, and the ABRA directors' general oversight of the ABRA Program will not include responsibility for marketing and administration or supervision of State Street's investment decisions. All assets will be held in trust by State Street in its capacity as trustee; and, under ERISA, State Street will be directly responsible to Plan sponsors and Participants with respect to all Plan assets, within the meaning of ERISA, that are invested in the ABRA Program.

As noted above, the Equitable No-Action Letter dated July 20, 1981 recites as one of several conditions to its conclusion that "Equitable, a registered broker-dealer, rather than [the ABA Members Trusts] is responsible for all promotional, marketing and enrollment functions." After January 1, 1992, State Street will be responsible for all such promotional, marketing and enrollment functions. Equitable or an affiliate thereof, in performing these functions, was functioning as a broker-dealer under the Securities Exchange Act of 1934, as amended (the "1934 Act"), and, therefore, was required to be registered as a broker-dealer under such Act. State Street will be performing comparable functions but, as a bank (as such term is defined in Section 3(a)(6) of the 1934 Act), is not a broker-dealer under Sections 3(a)(4) and (5) of the 1934 Act and is, therefore, exempt from registration as a broker-dealer under such Act. Both before and after the transition, neither the ABA Members Trusts nor ABRA is or will be responsible for, or engaged in, promotional, marketing and enrollment functions in connection with the ABRA Program; rather, such functions are and will continue to be conducted in compliance with the 1934 Act by an entity that satisfies the requirements of such Act pursuant to registration or exemption

## GOODWIN, PROCTER & HOAR

Securities and Exchange Commission  
December 12, 1991  
Page 24

from registration. Moreover, State Street's promotional and marketing activities will be targeted to a limited audience and neither State Street nor its employees will receive any brokerage or special compensation in connection with such activities. Thus, in these circumstances, we believe that the distinction between an insurance company, which is required to register as a broker-dealer under the 1934 Act, and a bank, which is exempt from such registration, should not affect the Staff's position with respect to the ABRA Program as originally stated in the Equitable No-Action Letters.

Because the structure of the ABRA Program as it relates to the ABA Members Trusts and Plans will not change in any material way, the no-action position of the Staff in the Equitable No-Action Letters should continue to apply to the ABRA Program under State Street's administration. Furthermore, since 1981 the Staff also adopted no-action positions with respect to programs containing similar trust arrangements in The Life Insurance Co. of Virginia, SEC No-Action Letter (available February 6, 1985) and ICMA Retirement Trust, SEC No-Action Letter (available February 7, 1983). Consistent with the Staff's prior no-action positions, and for the policy, legal and other reasons set forth above, it is our opinion that the ABA Members Trusts will not require registration under the 1940 Act and interests therein will not require registration under the 1933 Act following the transition to State Street.

### III. Requested Staff Position.

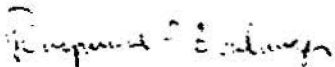
Based on the legal analysis in the Equitable No-Action Letters, the Staff identified certain factors as the basis for the position that the ABA Members Trusts need not be registered under the 1940 Act and interests therein need not be registered under the 1933 Act. After the transition to State Street, the ABRA Program will continue to be administered in a manner consistent in all material respects with these factors. Apart from the positions previously taken by the Staff, as a matter of law and policy, there is no basis or rationale for requiring registration of the ABA Members Trusts under the 1940 Act or the interests therein under the 1933 Act. Accordingly, on behalf of State Street we respectfully request that the Staff affirm that it will not recommend enforcement action if the ABRA Program is administered by State Street in the manner described in this amended and restated letter without registration of the ABA Members Trusts under the 1940 Act or interests therein under the 1933 Act.

**GOODWIN, PROCTER & HOAR**

Securities and Exchange Commission  
December 12, 1991  
Page 25

State Street intends to begin making sales of interests in the Funds on January 1, 1992. Consequently, time is of the essence and we respectfully request, on behalf of State Street, that the Staff expedite consideration of this amended and restated request. We also request that you telephone Raymond P. Boulanger or Philip H. Newman of this office at (617) 570-1000, charges collect, to discuss your preliminary findings with respect to this letter prior to issuing a formal response. Please do not hesitate to call either Mr. Boulanger or Mr. Newman if you have any questions or if you need any additional information. Your assistance in this matter is greatly appreciated.

Very truly yours,

  
Raymond P. Boulanger

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**PUBLIC**

**81 DEC 1991**

**RESPONSE OF THE OFFICE OF CHIEF COUNSEL  
DIVISION OF INVESTMENT MANAGEMENT**

Our Ref. No. 91-287-CC  
American Bar  
Retirement Association  
File No. 132-3

Your letter of December 12, 1991, requests our assurance that we would not recommend that the Commission take enforcement action if State Street Bank and Trust Company ("State Street") replaces The Equitable Life Assurance Society of the United States ("Equitable") as the provider of certain investment and administrative services to the American Bar Retirement Association ("ABRA") without registration of the ABA Members Trusts under the Investment Company Act of 1940 ("1940 Act") or the interests therein under the Securities Act of 1933.

ABRA sponsors the American Bar Association Members Retirement Program. Members may participate in the Program through their own retirement plan or by adopting a master plan sponsored by ABRA. Participants who adopt an ABRA-sponsored plan contribute assets to the American Bar Association Members Retirement Trust. Participants who use their own retirement plan contribute assets to the American Bar Association Members Pooled Trust for Retirement Plans (together, the "Members Trusts"). You state that "the ABA Members Trusts will have no economic substance separate and apart from the underlying Investment Options," and that participant contributions will immediately be passed through the Members Trusts to the selected investment option. The Members Trusts provide an administrative convenience for the program provider.

Equitable currently provides certain investment and administrative services to the ABRA Program through a group annuity contract. 1/ State Street will replace Equitable as the provider of these services to the ABRA Program on January 1, 1992. 2/ State Street will retain the Members Trusts, and will establish a collective trust, the American Bar Association Members/State Street Collective Trust, consisting of a series of bank-maintained collective trust funds to be offered as investment options under the ABRA Program. Most of the

- 1/ Under New York insurance law, Equitable is not permitted to hold the group annuity contract through which participants' assets are invested. The Members Trusts were established to permit the trustees of the Members Trusts to hold the group annuity contract. The Members Trusts are not registered under the 1940 Act.
- 2/ State Street is a member bank of the Federal Reserve System and a "bank" within the meaning of Section 3(a)(6) of the Securities Exchange Act of 1934 ("Exchange Act").



investments made through the group annuity contract will be transferred to corresponding investment options under the collective trust. 3/ State Street will replace the ABRA directors as trustee for the Members Trusts, and will hold the Equitable group annuity contract until all of the assets invested through the contract have either been transferred to the collective trust or liquidated and distributed to participants. You state that the Enhanced Short Term Investment Fund and the Blended Rate Fund, two investment options under the collective trust, may invest in other collective trust funds maintained by State Street, but that these investments do not increase any fees payable by the funds. 4/

You state that State Street intends to continue the Members Trusts because: (1) the Members Trusts will allow State Street to hold nominal title to all of the assets invested in the underlying investment options; (2) State Street, as trustee of the Members Trusts, will hold the group annuity contract until all of the assets invested through the contract are either transferred or liquidated and distributed to participants; (3) the use of the Members Trusts will facilitate the smooth transition from Equitable to State Street. The Members Trusts provide a convenient mechanism for the immediate movement of assets and permit a single trustee, on an ongoing basis, to maintain Program and participant records; and (4) restructuring the ABRA Program would create additional administrative and operational burdens and costs for participants, plans, and

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3/ Equitable will continue to manage the assets in the real estate and guaranteed rate accounts. The interests in these two accounts offered under the group annuity contract will be transferred to the Members Trusts, and State Street, as trustee for the Members Trusts, will hold, for the benefit of participants, nominal title to the interests in these accounts. The assets in the real estate account are illiquid, and participants will not be permitted to invest in this account after State Street becomes the ABRA Program provider. As participants withdraw their investments from the real estate account, they may select an investment option under the collective trust. Participants will not be permitted to invest in the guaranteed rate accounts after State Street becomes the ABRA Program provider. As the guaranteed rate accounts mature, participants may select another investment option under the collective trust.

4/ This differs from Provident Bank (pub. avail. Sept. 24, 1991), where a bank proposed that group trusts would invest in collective funds and did not represent that there would be no layering of fees.

employers.

We would not recommend enforcement action to the Commission if State Street succeeds Equitable as the provider of certain investment and administrative services to the ABRA program. Our response is conditioned, in part, upon the following:

(1) the Members Trusts have no economic substance and participant contributions will pass immediately through the Members Trusts for investment in the underlying investment options. State Street will maintain the Members Trusts as an administrative convenience. Other than performing these administrative services, the Members Trusts will do nothing else except hold, for the benefit of participants, nominal title to the interests in the real estate and guaranteed rate contracts accounts and the assets invested in the investment options.

(2) State Street will provide all marketing and enrollment functions, receive plan contributions, prepare all reports, and provide all administrative services to the ABRA Program. State Street will target its marketing activities to a limited audience. Neither State Street nor its employees will receive any brokerage or special compensation for promotional, marketing, or enrollment activities. State Street may pay a performance bonus to some of its employees, including some of those involved with the ABRA Program. These bonuses may be based on a variety of factors. However, these bonuses will not be based upon the number or value of the interests in the collective trust funds an employee sells.

(3) State Street will receive nearly all of the fees paid in connection with the ABRA Program. 5/ No fees will be borne by the Members Trusts. Some of the collective trust funds under the collective trust may invest in other collective trust funds maintained by State Street, but these investments do not increase any fees payable to State Street in connection with the collective trust. 6/ State Street will receive a fee for its activities as sponsor of the ABRA Program on a per-plan or per-participant program basis for record maintenance, reporting,

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5/ The ABRA Directors will receive a fee for monitoring State Street's administration and marketing efforts and the performance of State Street and its investment advisers.

6/ In a telephone conversation on December 19, 1991, Raymond Boulanger represented to Thomas Harman, Dorothy Donohue, and Monica Parry that State Street will not invest assets of ABRA collective trust funds in collective trust funds maintained by other banks.

actuarial, and related services, and an asset-based fee for trustee, management, and administrative services; and


(4) Your representation as counsel that the collective trust will satisfy the requirements for exception from registration under Section 3(c)(11) of the 1940 Act.

The Division of Corporation Finance has asked us to advise you that it would not recommend enforcement action to the Commission if State Street, in reliance upon your opinion as counsel that registration is not required, administers the Program as described in your amended and restated letter without registration under the Securities Act of 1933.

The Division of Market Regulation has asked us to advise you as follows:

The activities of State Street, as described herein, with respect to the ABRA program could be viewed as constituting those of a broker or dealer as defined in Sections 3(a)(4) and 3(a)(5) of the Exchange Act, respectively. The Division notes, however, that Sections 3(a)(4) and 3(a)(5) of the Exchange Act currently exclude banks. You represent that State Street is a bank as defined in Section 3(a)(6) of the Exchange Act. Accordingly, the Division expresses no opinion on whether the activities of State Street otherwise would require it to register as a broker-dealer.

Because this position is based on the representations made to the Divisions in your letter, you should note that any different facts or representations may require a different conclusion. Further, this response expresses the Divisions' positions on enforcement action only, and does not purport to express any legal conclusions on the issues presented.

  
Monica L. Parry  
Attorney