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§13(a)(1); 5(a)(1); 5(a)(2)

APR - 3 1997

PUBLIC

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

Our Ref. No. 97-132-CC
The Dessauer Global Equity Fund
File Nos. 811-7691; 333-7543

Your letter dated April 3, 1997, requests our assurance that we would not recommend enforcement action to the Commission under Section 13(a)(1) of the Investment Company Act of 1940 (the "1940 Act") against Guinness Flight Investment Management Limited of London, England and Pasadena, California ("Guinness Flight"), Dessauer Asset Management Company ("DAMCO"), or The Dessauer Global Equity Fund (the "Fund") if, upon the occurrence of certain events described in the Fund's prospectus, the Fund converts from a closed-end to an open-end investment company without seeking and obtaining authorization of the holders of a majority of the Fund's outstanding voting securities.

Facts

The Fund is a closed-end investment company that has filed a registration statement on Form N-2 with the Commission. The Fund will be managed jointly by Guinness Flight and DAMCO, both registered investment advisers. The Fund's investment objective is to seek capital growth through investments in companies organized in countries around the world.

You state that the Fund's Declaration of Trust includes a provision that requires the Fund to convert automatically from a closed-end to an open-end fund upon the occurrence of certain events (the "Automatic Conversion Provision").^{1/} Specifically, the Automatic Conversion Provision provides that the Fund will convert to an open-end fund if, at any time after the Fund has been in operation for 18 months, the Fund's shares trade at more than a specified discount to net asset value as calculated on the last business day of any week and for each of the next 14 business days thereafter. The Automatic Conversion Provision does not require that the Fund seek and obtain the authorization of the Fund's shareholders.^{2/}

You represent that, if and when the events specified by the Automatic Conversion Provision occur, the Fund's officers and trustees promptly will take all necessary steps to convert the

^{1/} You represent that the Automatic Conversion Provision is consistent with business trust law in the state in which the Fund is organized.

^{2/} You also represent that the Fund's Declaration of Trust provides that the Automatic Conversion Provision may be amended only upon approval of 80% or more of the Fund's outstanding voting securities.

Fund to an open-end investment company.^{3/} The disclosure in the Fund's registration statement on Form N-1A relating to the Fund's investment objective and policies will be substantially identical to the disclosure in the Fund's registration statement on Form N-2. You further represent that conversion of the Fund into an open-end investment company will not disadvantage the Fund or its shareholders because the Fund's investment operations prior to the conversion will be entirely consistent with the operations of an open-end investment company.^{4/}

Analysis

Section 5(a) of the 1940 Act classifies all management investment companies as either "open-end" or "closed-end" companies. Section 5(a)(1) defines an "open-end company" as "a management company which is offering for sale or has outstanding any redeemable security of which it is the issuer." Section 5(a)(2) defines a "closed-end company" as "any management company other than an open-end company." Section 13(a)(1) of the 1940 Act prohibits a management investment company from changing its subclassification as defined in Section 5(a)(1) or 5(a)(2) of the 1940 Act unless authorized by a vote of a majority of its outstanding voting securities.

Section 8(b) of the 1940 Act provides, in relevant part:

Every registered investment company shall file with the Commission . . . a registration statement . . . containing . . . (1) a recital of the policy of the registrant . . . consisting of a statement whether the registrant reserves freedom of action to engage in activities of such type, and if such freedom of action

^{3/} You represent that the conversion will be effected even if the Fund ceases to trade at a discount before the date the conversion is completed. Promptly after the Automatic Conversion Provision is triggered, a press release will be issued to announce that the Fund will convert as soon as reasonably possible to an open-end investment company, and to disclose the projected conversion date. You represent that the Fund promptly will take all steps necessary to convert to an open-end investment company, including the filing of a registration statement on Form N-1A.

^{4/} For example, in accordance with the Commission's position on illiquid investments by open-end investment companies, you represent that the Fund's registration statement will state that the Fund may not invest more than 15% of its net assets (at the time of investment) in illiquid assets. *Revisions of Guidelines to Form N-1A*, Investment Company Act Release No. 18612 (Mar. 12, 1992); Guide 4 to Form N-1A.

is reserved, a statement briefly indicating, insofar as is practicable, the extent to which the registrant intends to engage therein: (A) the classification and subclassifications, as defined in sections 4 and 5, within which the registrant proposes to operate

The legislative history of the 1940 Act suggests that Congress intended Sections 8 and 13 to require a fund to make adequate disclosure of its fundamental policies, and not change those policies without the approval of a majority of the fund's shareholders.^{5/} Section 8(b) was intended "to apprise the prospective purchaser of the investment company's security of [sic] the nature of its activities."^{6/} The language of Section 8(b)(1)(A) indicates that Congress intended to permit funds to retain a degree of flexibility with respect to their subclassifications, so long as the fund discloses all material facts with respect to its proposed activities, and the circumstances under which the flexibility will be exercised.^{7/} Congress enacted Section 13(a) to prevent an investment company from changing fundamental investment or management policies

^{5/} S. Rep. No. 1775, 76th Cong., 3d Sess. 13 (1940).

^{6/} *Investment Trusts and Investment Companies: Hearings on S. 3580 before the Senate Subcomm. on Banking and Currency, 76th Cong., 3d Sess., Part I, 188 (1940) ("Hearings on S. 3580")* (statement of David Schenker of the Securities and Exchange Commission). Mr. Schenker's testimony also referred to the requirements of Sections 5, 8(b)(1) and 13 as "integrally interrelated" so as to meet the "problem of disclosure to stockholders." *Id.* See also PaineWebber Series Trust (pub. avail. Nov. 12, 1987).

^{7/} *Cf. American Research and Dev. Corp. ("ARD"), 23 S.E.C. 481 (1946)*. ARD involved a closed-end fund that disclosed its intention to operate as a nondiversified company; pending the full investment of its assets, however, the fund would in fact be a diversified company. Once fully invested, the fund would automatically convert to the status of a nondiversified company. The Commission found that despite the requirement in Section 13(a) that shareholders approve changes to a fund's subclassification, such approval would not be necessary because the fund would be operating within the subclassification "which the registrant propose[d] to operate," as required by Section 8(b)(1). ARD at 490, quoting Section 8(b)(1). The Commission determined that apprising investors as to how the registrant intended to operate met the statutory purposes of Section 13(a)(1) of the 1940 Act because, if fully disclosed, there would be no substantial injury to the fund's shareholders.

without the knowledge and authorization of its shareholders.^{8/}

You represent that, in accordance with Section 8(b) (1) (A) of the 1940 Act, the Fund will disclose prominently in its prospectus the existence, terms and implications of the Automatic Conversion Provision. The Fund's prospectus also will explain clearly the differences between an open-end company and a closed-end company, including the differences in methods of distributing and redeeming shares of the Fund, and will disclose prominently any new fees that may be imposed on the Fund or its shareholders after the Conversion Date.

You acknowledge that, upon the occurrence of certain specified events, the Fund's subclassification under Section 5(a) would change without shareholder approval. You maintain, however, that this change would not occur in violation of Section 13(a) (1), but rather would be in accordance with the Fund's policy on its subclassification, as disclosed in the prospectus. You therefore maintain that, because the Fund is not changing its disclosed policies regarding its subclassification, no shareholder vote should be required. You also state that, because no material change in the investment operations of the Fund will occur as a result of or in connection with a conversion to open-end status, the concerns underlying Section 13(a) are not implicated.

We would not recommend enforcement action to the Commission under Section 13(a) (1) of the 1940 Act if the Fund converts from a closed-end to an open-end company upon the occurrence of the events specified in the Automatic Conversion Provision without the authorization of the majority of the Fund's outstanding voting securities. This response is based on the representations made in your letter, particularly the following:

- (1) the Fund's investment operations will not be changed in any material respect as a result of or in connection with the conversion;
- (2) the events that will trigger the conversion are entirely objective and readily verifiable;

^{8/} See, e.g., *Hearings on S. 3580* at 234 and 421. Prior to the enactment of the 1940 Act, there was no legal requirement for a management investment company to adhere to any announced investment policies or purposes. Such policies frequently were changed radically without shareholder approval and even without their knowledge. The shareholders of the company had no assurance of the stability of any announced investment policies and no vote in management's determination to change the company's existing policies. S. Rep. No. 1775, 76th Cong. 3d Sess. 7-8 (1940).

(3) the Automatic Conversion Provision will be included in the Fund's initial governing documents;

(4) the Fund's prospectus prominently will describe the Automatic Conversion Provision and the events that will trigger a conversion;

(5) the Automatic Conversion Provision may be amended only as specified in the Fund's prospectus; and

(6) the Fund's advertisements and sales literature, including dealer-only sales material, used to market shares of the Fund will discuss the Automatic Conversion Provision and the events that will trigger a conversion.

You should note that different facts or representations may require a different conclusion.^{9/}



Wendy Finck Friedlander
Senior Counsel

^{9/} This response is limited to the conversion of a fund from closed-end to open-end status, and expressly does not address any other instances in which shareholder approval is required by the 1940 Act.

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April 3, 1997

**Wendy Friedlander, Esq.
Division of Investment Management
U.S. Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, DC 20549**

Dear Wendy:

On behalf of our client, Guinness Flight Investment Management Limited of London, England and Pasadena, California ("Guinness Flight"), and Dessauer Asset Management Company ("DAMCO"), each a registered investment adviser, and The Dessauer Global Equity Fund, a closed-end investment company organized as a Delaware Business Trust (the "Fund"), we request that the staff take a no-action position on the issue herein discussed, which pertains to Sections 13(a)(1), 8(b)(1) and 5(a)(1) and (2) of the Investment Company Act of 1940, as amended (the "1940 Act").

The Fund filed a registration statement on Form N-2 with the Securities and Exchange Commission ("SEC") on July 3, 1996 (a copy of which is attached hereto). The Fund's investment objective is to seek long-term capital appreciation. The Fund will seek to achieve its investment objective by investing primarily in the securities of issuers that it believes are positioned to benefit from growth in the global economy. Generally, the companies in which the Fund intends to invest will be traded in the markets of, or will derive a substantial portion of their revenues from, business activities within North America (the U.S. and Canada), Western Europe, Asia and Japan. Under normal market conditions, the Fund will invest at least 65% of its total assets in a portfolio of equity securities of companies located in at least three different countries. The Fund will be managed jointly by DAMCO and Guinness Flight.

Although the Fund is classified as a closed-end investment company, its Declaration of Trust includes a provision that requires the Fund to convert under certain circumstances to an open-end investment company ("Automatic Conversion Provision"). The Declaration of Trust (including the above-mentioned provision) will be approved by the Board of Trustees at the Fund's organizational meeting. Delaware statutory law does not require approval by shareholders of a change of an investment company's status. Thus, at the time of conversion the Fund's current shareholders will not be asked to vote on the Fund's change from a closed-end to an open-end investment company.

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The Declaration of Trust provides that beginning after 18 months from the date of the initial public offering, the Fund will automatically convert into an open-end investment company if its shares close at a 5% or greater discount from the net asset value of the Fund as calculated on the last business day of any week and for each of the next 14 business days thereafter. A business day is any day that the New York Stock Exchange is open. This provision may be amended only by the affirmative vote of at least 80% of the Fund's outstanding voting securities. Once the Automatic Conversion Provision is triggered, the Fund may not continue as a closed-end investment company even if the Fund ceases to trade at a discount. Within one week thereafter, the Fund will file a registration statement on Form N-1A. The disclosure concerning the Fund's investment policies contained in the registration statement on Form N-1A will be substantially identical to the disclosure contained in the current registration statement on Form N-2.

The purpose of this letter is to request that the staff agree to take no enforcement action if the Fund reserves the freedom of action pursuant to Section 8(b)(1) of the 1940 Act to convert from a closed-end investment company to an open-end investment company under the above described circumstances.

Background

Generally, shares of open-end investment companies are redeemed by the issuer at net asset value. Shares of closed-end investment companies, on the other hand, are traded in secondary markets either on exchanges or over-the-counter and are not redeemed by the issuer. The market price of closed-end investment company shares can be significantly discounted from the net asset value of the shares. Accordingly, shareholders of closed-end investment companies who sell their shares in a secondary market may find that the price of their shares does not reflect the net asset value of the investment company.

To entice investors to purchase shares, many closed-end investment companies disclose in their prospectus that certain actions may be taken to minimize the discount of the shares, including, but not limited to, converting to an open-end investment company. However, many of these funds which make this claim never do convert to open-end status.

Recently the staff of the Division of Investment Management has received complaints from investors who allege that they have been misled in connection with the disclosure by closed-end investment companies which imply that they will convert to open-end status under certain circumstances. In a letter to the Investment Company Institute dated February 15, 1996, the staff stated that it believes that "vague references to the conditional or discretionary nature of the actions to be taken [to minimize a discount] may be misleading to investors." In this regard, the staff has undertaken to conduct an examination of the disclosure practices of closed-end investment companies regarding steps that may be taken to reduce unwieldy trading discounts.

In light of these current developments, the Fund has proposed an Automatic Conversion Provision which would be triggered by the occurrence of certain events. The Automatic Conversion Provision does not provide either Guinness Flight or DAMCO with the discretion to determine whether the Fund should convert to an open-end investment company and is not subject to change by vote of current shareholders (except by an amendment to the Declaration of Trust upon approval of 80% or more of the Fund's outstanding voting securities).

Legal Analysis

Section 8(b)(1) of the 1940 Act requires the registration statement of an investment company to recite its policy with respect to classification as a closed-end or open-end investment company. This recital should consist of a statement whether the investment company reserves the freedom of action to engage in certain activities, and if such freedom of action is reserved, a statement briefly indicating the extent to which the investment company intends to engage therein. Section 13(a)(1) of the 1940 Act prohibits a registered investment company from changing its subclassification as an open-end or closed-end investment company without a vote of a majority of its outstanding voting securities. These sections were promulgated to protect shareholders by preventing management from making changes in the basic character of an investment company which are contrary to the reasonable expectations of shareholders. (3 Frankel, Regulation of Money Managers § 26.1 at 217-218)

The concerns addressed by Congress in promulgating Sections 8(b)(1) and 13(a) of the 1940 Act will not be subverted by the Automatic Conversion Provision. Guinness Flight and DAMCO will prominently disclose in the Fund's Prospectus and in its marketing material that it is a closed-end investment company with the possibility of becoming an open-end investment company, thereby avoiding any surprises to shareholders of the Fund in converting to an open-end investment company. The Fund's prospectus will prominently disclose the details of the Automatic Conversion Provision and will explain the differences between an open-end investment company and a closed-end investment company including a discussion concerning the redemption of shares. Shareholders will be assured that the Fund's investment objectives, policies and techniques will not be changed. Any new fees (such as Rule 12b-1 distribution fees) that may be incurred by shareholders of an open-end investment company will be disclosed.

The Fund's advertisements and sales literature (including dealer-only sales material) will also describe the Automatic Conversion Provision, thereby providing potential investors (including those that purchase shares in a secondary market) with information concerning the mechanism for open-ending the Fund. Brokers selling shares of the Fund will be informed of and encouraged to discuss the Automatic Conversion Provision with their

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clients. In addition, once the Automatic Conversion Provision is triggered, a press release will be issued that informs the public that, in fact, the Fund will shortly convert to an open-end investment company.

We believe that the shareholders' best interests will be protected by permitting the Fund to automatically convert to an open-end investment company when a specified discount is reached and maintained for a specified number of trading days. Investors who purchase shares of a closed-end investment company in its initial public offering are exposed to a market risk because the shares of closed-end investment company typically trade at a discount to the net asset value of their portfolios. A conversion of a closed-end investment company to an open-end investment company would eliminate this discount. In addition, a shareholder of an open-end investment company can redeem at any time at net asset value.

Based on the above, it is our view that the spirit of Sections 8(b)(1) and 13(a)(1) will not be violated by the Fund's automatic conversion to an open-end investment company. Shareholders will be fully informed that the Fund is a closed-end investment company that will convert to an open-end investment company if certain specified events occur. The existing investment objective and policies of the Fund will continue after conversion to open-end status. The Fund will be managed by the same persons and in substantially the same manner. Any differences in the distribution methods of the Fund will be fully disclosed in the prospectus.

In conclusion, the Automatic Conversion Provision would be meaningless if an intervening event, were required prior to the Fund's conversion to an open-end investment company. Shareholders' interests are best protected by prohibiting any tampering by management or other shareholders. We believe the interests of shareholders and the concerns of the staff will be addressed by the Automatic Conversion Provision of the Fund and ask that the staff concur in our analysis.

If you have any questions or require any additional information please do not hesitate to call the undersigned at (212) 715-7514 or Louis Citron at (212) 715-7511.

Very truly yours,



Aviva L. Grossman