

ACT ICA
SECTION 3(a)(1)
RULE 3a-7
PUBLIC
AVAILABILITY 9/9/98

PUBLIC

September 9, 1998
Our Ref. No. 97- 448-CC
Credit Suisse First Boston Corporation
File No. 132-3

RESPONSE OF THE OFFICE OF CHIEF COUNSEL
DIVISION OF INVESTMENT MANAGEMENT

Your letter of May 28, 1997 requests assurance that the staff would not recommend enforcement action to the Commission if Credit Suisse First Boston Corporation ("CSFB") establishes a trust (the "Trust") in the manner described below without registering the Trust as an investment company under the Investment Company Act of 1940 (the "1940 Act") either on the basis that: (i) the Trust is not an investment company, as defined in Section 3(a)(1) of the 1940 Act, or (ii) the Trust may rely on Rule 3a-7 under the 1940 Act.

Facts

CSFB intends to establish a Trust that will hold U.S. Treasury inflation-indexed notes or bonds (the "Underlying Treasuries"). You represent that CSFB, or one or more of its affiliates, will acquire the Underlying Treasuries for deposit into the Trust either in the secondary market or directly from the Treasury Department. The Underlying Treasuries entitle the holder to a principal amount that is adjusted on a daily basis to reflect changes in the U.S. City Average All Items Consumer Price Index for All Urban Consumers (the "CPI"). Interest on the Underlying Treasuries is calculated as a fixed percentage of the CPI-adjusted value of the principal amount and is paid semiannually. The Trust will have an institutional trustee (the "Trustee") that will hold the Underlying Treasuries, collect payments made on the Underlying Treasuries, and distribute the payments to holders of the pass-through certificates (the "Certificates") representing interests in the Trust.

The Trust will issue two classes of Certificates, each of which will be entitled to a specified portion of the cash flow from the Underlying Treasuries. The Certificates either will be registered under the Securities Act of 1933, or will be issued in a private placement.¹ Class A Certificates will entitle holders to receive: (i) semiannual interest payments in an amount equal to the fixed interest rate accrued on the lesser of (a) the initial aggregate principal amount of the Underlying Treasuries and (b) the CPI-adjusted aggregate principal amount of the Underlying Treasuries, and (ii) a principal payment on the maturity date of the Certificates (which will be the maturity date of the Underlying Treasuries) equal to the initial aggregate principal amount of the Underlying Treasuries. Class B Certificates will entitle holders to receive: (i) the excess, if any, of the CPI-adjusted aggregate principal amount of the Underlying Treasuries over the initial aggregate principal amount of the Underlying Treasuries, and (ii) all interest on that excess amount. Each class of the Certificates will be issued in minimum denominations of at least \$500,000 principal amount, in the case of the Class A Certificates, or notional

¹ We take no position regarding the status of the Certificates under the Securities Act of 1933.

principal amount, in the case of the Class B Certificates.² You represent that CSFB or other securities dealers may make a secondary market in the Certificates, but are not obligated to do so.

You represent that holders may redeem the Certificates only if certain conditions are satisfied. Specifically, a holder must present both a Class A and a Class B Certificate to the Trustee. In addition, the holder must obtain from a nationally recognized investment bank a certificate dated not more than two business days prior to the proposed date of withdrawal. The certificate must state that, in the opinion of the investment bank, the aggregate market value of the Underlying Treasuries (or of that portion of the Underlying Treasuries represented by the Certificates presented for redemption) exceeds the aggregate market value of all of the outstanding Certificates (or of the Certificates presented for redemption) (the "Market Condition"). Upon redemption, the holder will receive its *pro rata* share of the Underlying Treasuries. Following redemption, a holder that has not redeemed all of its Certificates must retain at least \$500,000 principal amount (in the case of Class A Certificates) or notional principal amount (in the case of Class B Certificates) of each class of Certificates held.

Analysis

Section 3(a)(1) of the 1940 Act defines an investment company, in relevant part, as any issuer that "(A) is or holds itself out as being engaged primarily, or proposes to engage primarily, in the business of investing, reinvesting, or trading in securities" or "(C) is engaged or proposes to engage in the business of investing, reinvesting, owning, holding, or trading in securities, and owns or proposes to acquire investment securities having a value exceeding 40 per centum of the value of such issuer's total assets (exclusive of Government securities and cash items) on an unconsolidated basis."³ Subsection (A) of Section 3(a)(1) is intended to apply to issuers that are engaged *primarily* in investing, reinvesting, or trading in securities, while subsection (B) is intended to apply to issuers that are not engaged primarily in investing, reinvesting, or trading in

² You represent that the Certificates will be rated in the highest category assigned long-term debt by at least one nationally recognized statistical rating organization that is not an affiliated person of the Trust or of any person involved in the organization or operation of the Trust, as required by Rule 3a-7.

³ "Investment securities" are defined in Section 3(a)(2) of the 1940 Act to include all securities except government securities, securities issued by employees' securities companies, and securities issued by majority-owned subsidiaries of the owner that are not investment companies and are not relying on the exceptions from the definition of investment company in paragraph (1) or (7) of Section 3(c) of the 1940 Act. A "government security" is defined in Section 2(a)(16) of the 1940 Act to include, in relevant part, any security issued or guaranteed as to principal or interest by the United States.

securities, but nonetheless devote a substantial portion of their assets to investment securities.⁴

You assert that the Trust should not be considered an investment company within the meaning of subsection (A) of Section 3(a)(1) because it does not invest, reinvest, or trade in securities, but only passively holds a fixed portfolio of securities. In addition, you assert that the Trust should not be considered an investment company within the meaning of subsection (C) of Section 3(a)(1) because it owns or holds only government securities, which are not considered "investment securities." We disagree. We believe that even a completely passive trust may be considered to be engaged primarily in the business of investing in securities within the meaning of subsection (A) if it had an investment purpose in acquiring the securities that it holds, and engages in no business other than investing in securities that may be considered "primary."⁵ If a trust is engaged primarily in the business of investing in securities, it is an investment company even if it holds only government securities.⁶ If a trust may be considered an investment company under

⁴ See H.R. 2639, 76th Cong., 3d Sess. 11 (1940); *SEC v. Fifth Avenue Coach Lines, Inc.*, 289 F. Supp. 3, 27-28 (S.D.N.Y. 1968); *In the Matter of J.D. Gillespie*, 13 S.E.C. 470 (June 23, 1943). See also 1 Tamar Frankel, *The Regulation of Money Managers* 214 (1978).

⁵ See *Fifth Avenue Coach Lines*, 289 F. Supp. at 29-30 ("[T]he only business that [Fifth Avenue Coach Lines] can fairly be found to be primarily engaged in was the business of investing in securities. That was what it spent its money for. That is where its income came from. It had no other business which could reasonably be called 'primary.' . . . Th[e] word [invest] must be given its normal meaning, i.e., to put out money at risk in the hope of gain."); *Merrill Lynch, Pierce, Fenner & Smith, Inc.* (pub. avail. Oct. 28, 1982) (staff determined that a passive trust that held certificates of deposit was an investment company under subsection (A) of Section 3(a)(1)). See also Frankel, *supra* note 4, at 216, 219 (a company that purchases securities in sufficient quantities even for the first time, with the expectation of profits (as opposed to the keeping of cash ready for other purposes), is in the business of investing).

You assert that the Trust may be distinguished from a unit investment trust, because unit investment trusts are permitted to increase the size of their portfolios and sell portfolio securities to permit cash redemptions, activities in which the Trust will not engage. We do not believe that Congress intended to draw this distinction, however, because a passive trust that holds only government securities nonetheless may be subject to many of the abuses that the 1940 Act was intended to prevent. See, e.g., Sections 1(b), 9, 13, 19, 22(c), 26, and 37 of the 1940 Act, and Rule 22c-1 thereunder. See also Frankel, *supra* note 4, at 216.

⁶ Baker, Watts & Co. (pub. avail. Apr. 6, 1982).

subsection (A), it is irrelevant whether the trust would be considered an investment company under subsection (C).⁷

Alternatively, you assert that, even if the Trust may be considered an investment company within the meaning of Section 3(a), it may rely on Rule 3a-7. Rule 3a-7 excepts from the definition of investment company an issuer that "is engaged in the business of purchasing, or otherwise acquiring, and holding eligible assets and who does not issue redeemable securities (and in activities related or incidental thereto)," provided that certain conditions are met.⁸ Section 2(a)(32) of the 1940 Act defines "redeemable security" as any security, other than short-term paper, under the terms of which the holder, upon its presentation to the issuer, is entitled to receive approximately his proportionate share of the issuer's current net assets, or the cash equivalent thereof. Whether a structured finance company may be considered to issue redeemable securities depends on whether there are substantial restrictions on withdrawal.⁹ You believe that the Trust will not be issuing redeemable securities because Certificates will be offered only in denominations of \$500,000, and a holder may redeem Certificates only if it presents both a Class A and a Class B Certificate to the Trustee and obtains, no more than two days before withdrawal, a certificate from an investment bank stating that the Market Condition has been satisfied. In addition, following a redemption, a holder must retain at least \$500,000 principal or notional principal amount of each class of Certificate retained.

⁷ In the Matter of J.D. Gillespie, *supra* note 4, at 11 ("[S]ection [3(a)(1)(C)] is not applicable [to a situation in which a trust has been determined to be engaged primarily in the business of investing in government securities], being in the alternative to Section [3(a)(1)(A)] and being designed to describe other types of issues. Thus the exclusion of Government securities from the definition of investment securities in Section [3(a)(1)(C)] is irrelevant. The broader term "securities," used in Section [3(a)(1)(A)], obviously includes Government obligations.").

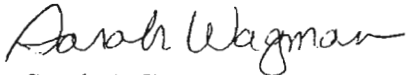
⁸ You also request relief with respect to two specific issues under Rule 3a-7. First, you assert that a Certificateholder's withdrawal of Underlying Treasuries, in the manner described above, would not violate the rule's condition, under subparagraph (a)(3), that the issuer dispose of eligible assets only if, among other things, the assets are not disposed of for the primary purpose of recognizing gains or decreasing losses resulting from market value changes. We agree that this clause is intended to address the intent of the *issuer*, rather than a securityholder, in disposing of assets and therefore would not be violated by a Certificateholder's withdrawal of Underlying Treasuries in the manner described above. See Investment Company Act Release No. 19105 (Nov. 19, 1992) (release adopting Rule 3a-7).

Second, you assert that both the Class A Certificates and the Class B Certificates may be considered "fixed income securities" within the meaning of the rule. We agree.

⁹ Brown & Wood (pub. avail. Feb. 24, 1994).

You represent that CSFB will sell the Certificates for a premium over the amount that CSFB or its affiliates paid for the Underlying Treasuries. You anticipate, therefore, that at the time that the Trust initially offers the Certificates for sale, the aggregate value of the Underlying Treasuries will be less than the aggregate value of the outstanding Certificates. Under those circumstances, the Market Condition would not be satisfied. In addition, you anticipate that, as a result of CSFB establishing and marketing the Trust, competition may result in a decrease in the premium at which the Certificates are expected to trade. For the Market Condition to be satisfied, however, the Certificates would have to trade at a discount, a situation that may be unlikely to occur.

Because we are unable to determine the likelihood that the Market Condition would be satisfied, we are unable to assure you that we would not recommend enforcement action to the Commission under Section 7 of the 1940 Act if the Trust does not register as an investment company under the 1940 Act in reliance on Rule 3a-7. Our position is based on the facts and representations in your letter, and different facts or circumstances may require a different conclusion.¹⁰



Sarah A. Wagman
Special Counsel

¹⁰ In taking this position, we are not concluding that the Certificates necessarily are redeemable securities for purposes of Rule 3a-7. Rather, your letter does not contain sufficiently specific facts about the operation of the Market Condition to permit us to determine whether the Certificates are redeemable securities.

In addition, we note that you no longer are requesting confidential treatment for your letter or this response. Telephone conversation of September 9, 1998 between Sarah A. Wagman and Scott M. Freeman, counsel to CSFB.

SIDLEY & AUSTIN
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

CHICAGO
DALLAS
LOS ANGELES

875 THIRD AVENUE
NEW YORK, NEW YORK 10022
TELEPHONE 212 906 2000
FACSIMILE 212 906 2021

FOUNDED 1866

WASHINGTON, D.C.
LONDON
SINGAPORE
TOKYO

WRITER'S DIRECT NUMBER

(212) 906-2358

Re: Sections 2(a)(32) and 3(a) of, and
Rule 3a-7 under, the Investment
Company Act of 1940

May 28, 1997

Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549

Attention: Office of Chief Counsel
Division of Investment Management

Ladies and Gentlemen:

We represent Credit Suisse First Boston Corporation ("CSFB") in connection with a proposed transaction involving the formation of a Delaware or other business trust (the "Trust"), into which would be deposited United States Treasury Inflation-Indexed Notes or Bonds (the "Underlying Treasuries"). The Trust would issue two classes of "pass-through" certificates, which would collectively represent a 100% beneficial ownership interest in the Trust (collectively, the "Offered Securities"), as described below.

On behalf of CSFB, we hereby respectfully request confirmation that the staff of the Division of Investment Management (the "Staff") of the Securities and Exchange Commission (the "Commission") would not recommend enforcement action to the Commission upon the facts set forth in this letter if the Trust did not register as an investment company under the Investment Company Act of 1940, as amended (the "1940 Act"), based on our opinion that the Trust either (i) would not be an "investment company" as such term is defined in Section 3 of the

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1940 Act or (ii) would qualify for the exclusion from the definition of "investment company" provided by Rule 3a-7 under the 1940 Act. As discussed below, we believe that the only significant issue under Rule 3a-7 is whether the Offered Securities would constitute "redeemable securities", in which case Rule 3a-7 would not be available for the Trust. We believe the Offered Securities would not constitute "redeemable securities" and, thus, even if the Trust were to be considered an "investment company" under Section 3 of the 1940 Act, the Trust should not be required to register as an investment company under the 1940 Act.

Description of the Proposed Transaction

General

CSFB, or one or more of its affiliates, would acquire Underlying Treasuries either in the secondary market or directly from the Treasury Department and deposit them into the Trust. The Trust will have an institutional trustee (the "Trustee") that, you may assume for purposes of this letter, will cause the Trust to comply with all the requirements of paragraph (a)(4) of Rule 3a-7. Under the Trust's organizational documents, the Trustee would not be permitted to invest, reinvest or trade the Underlying Treasuries, but instead would be required merely to hold them, collect payments made thereon and distribute such amounts to holders of the Offered Securities as described below.

The Trust would issue two separate classes (Class A and Class B) of Offered Securities. Each class of the Offered Securities would be issued in minimum denominations of at least \$500,000 principal amount (in the case of Class A) or notional principal amount (in the case of Class B). The Offered Securities would be either registered under the Securities Act of 1933, as amended (the "Securities Act"), or issued in private placements and eligible for resale under Rule 144A thereunder. In either case, the large minimum denomination would help ensure that only large institutions and other "accredited investors" purchase the Offered Securities. CSFB or other securities dealers may (but would not be obligated to) make a market in the Offered Securities.

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The Offered Securities would be rated in the highest category "assigned long-term debt . . . by at least one nationally recognized statistical rating organization that is not an affiliated person of the [Trust] or of any person involved in the organization or operation of the [Trust]", as required by, or would otherwise comply with, paragraph (a)(2) of Rule 3a-7. The Trust would not acquire "additional eligible assets", within the meaning of paragraph (a)(3) of Rule 3a-7, and would dispose of "eligible assets" only in connection with the withdrawal of the Underlying Treasuries, as described below, and only in accordance with the requirements of such paragraph (a)(3).¹

Description of the Underlying Treasuries

The Underlying Treasuries would be obligations of the United States of America backed by its full faith and credit and issued pursuant to authority vested in the Secretary of the Treasury under Chapter 31 of Title 31 of the United States Code. Each Underlying Treasury would entitle the Trust, as the holder thereof, to receive payments of interest on certain specified semiannual interest payment dates and of principal on a specified maturity date. The Underlying Treasuries would not be callable or redeemable.

The Underlying Treasuries entitle the holder thereof to receive a fixed percentage return (the "real" coupon) on a principal amount that is linked to the U.S. City Average All Items Consumer Price Index for All Urban Consumers (the "CPI"). More specifically, the principal amount of the Underlying Treasuries is adjusted daily for changes in the CPI by multiplying the initial principal amount thereof by the CPI ratio. The CPI ratio for any date is the CPI for that date divided by the CPI for the issue date. Interest on the Underlying Treasuries is a fixed percentage (determined at

In that regard, in our view, such withdrawals would not violate clause (iii) of such paragraph (a)(3), which requires that "the assets are not . . . disposed of for the primary purpose of recognizing gains or decreasing losses from market value changes", because such clause appears addressed to gains or losses realized by the issuer, rather than securityholders. We would appreciate confirmation of this view by the Staff.

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issuance thereof through a Dutch auction conducted by the Treasury Department) of the CPI-adjusted value of the principal and is paid semiannually.

For example, assuming an Underlying Treasury issued in June 1997 with a maturity date in June 2007, an initial principal amount of \$1,000 and a fixed interest rate of 3% per annum, if the CPI rises in the first year after issuance by 4% (i.e., the CPI ratio is 1.04), the principal amount of such Underlying Treasury will by the end of such year have increased by 4% to \$1,040. During such year, the holder of such Underlying Treasury will have received approximately \$31.20 of interest (consisting of the 3% fixed interest rate on the \$1,000 initial principal amount (\$30) plus 3% fixed interest on the \$40 increase in principal amount (approximately \$1.20²)). At maturity, the greater of the \$1,000 initial principal amount and the then CPI-adjusted principal amount of the Underlying Treasury will be paid; accordingly, holders of the Underlying Treasury are guaranteed to receive at least \$1,000 of principal regardless of any decrease in the CPI.³

On the first day of each month, the reference CPI will be the CPI for the third preceding calendar month. For every other day of the month, the reference CPI is determined by a linear interpolation between the reference CPI for the first of that particular month and the reference CPI for the first of the following month.

² This is an approximate amount because interest is in fact paid semiannually, rather than only at the end of the year. Thus, the first semiannual interest payment would be based upon the principal amount as adjusted at mid-year, and the second such payment would be based upon the principal amount as adjusted at the end of the year.

³ However, holders are not guaranteed interest payments on \$1,000 of principal (i.e., if on any interest payment date the CPI-adjusted principal amount is less than \$1,000, interest will be paid only on such lesser amount of principal).

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Each payment received by the Trust on the Underlying Treasuries would be distributed by the Trust on the date received to the holders of the Offered Securities as described below.⁴

Description of the Offered Securities

The Offered Securities would have the same maturity and virtually the same creditworthiness as the Underlying Treasuries.

The Class A Offered Securities would entitle the holders thereof to (i) semiannual interest payments in an amount equal to the fixed interest rate accrued on the lesser of (a) the initial aggregate principal amount of the Underlying Treasuries and (b) the CPI-adjusted aggregate principal amount of the Underlying Treasuries and (ii) a principal payment on the maturity date thereof (which would be the maturity date of the Underlying Treasuries) equal to the initial aggregate principal amount of the Underlying Treasuries. The Class B Offered Securities would be entitled to all other payments received by the Trust on the Underlying Treasuries, if any (i.e., the excess, if any, of the CPI-adjusted aggregate principal amount thereof over the initial aggregate principal amount thereof, plus all interest on any such excess). Using the example set forth above, by the first anniversary of issuance, the Class A Offered Securities would have received \$30 in semi-annual interest payments and would continue to be entitled to receive a principal payment of \$1,000 on the maturity date. The Class B Offered Securities would have received approximately \$1.20 of interest in two semiannual payments and would have an accrued value of

⁴ CSFB intends that either (i) all expenses of the Trust, including the fees of the Trustee, would be paid by CSFB or its affiliates, such that no moneys or assets of the Trust would be used to pay such expenses, or (ii) additional Treasury securities (the "Trust Expense Funding Securities") would be initially deposited into the Trust, such that the cash received thereon would be used to pay such expenses. In the latter case, payments on the Trust Expense Funding Securities would not be distributed to holders of the Offered Securities but would instead be used to pay the expenses of the Trust. Either arrangement would, of course, be fully described in the offering documents for the Offered Securities.

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principal payable on the maturity date, subject to adjustment to reflect future fluctuations of the CPI, of \$40.

The Class A Offered Securities would, as an economic matter, be the equivalent of a "plain vanilla" Treasury security (in our example, a \$1,000 ten-year note with a fixed 3% interest rate), except that if, on any interest payment date, the CPI-adjusted aggregate principal amount of the Underlying Treasuries is less than the initial aggregate principal amount thereof, the holders of the Class A Offered Securities would receive interest on such interest payment date based on the lower principal amount (constituting all the interest paid on such date on the Underlying Treasuries). The Class B Offered Securities would constitute an instrument whose value is dependent upon the value of the CPI; if the CPI did not increase after the issue date of the Class B Offered Securities, the Class B Offered Securities would have no value.

The proposed transaction, if implemented and depending upon its size, should make the market for United States Treasury Inflation-Indexed Notes and Bonds more liquid, in that the proposed program will require CSFB and/or its affiliates to purchase Underlying Treasuries in order to deposit them with the Trustee. In addition, the withdrawability feature discussed below should make the market more efficient for both the Offered Securities and the United States Treasury Inflation-Indexed Notes and Bonds.

The Underlying Treasuries are modeled by the Treasury Department on certain similar securities issued by the government of Canada and, to a lesser extent, the United Kingdom. CSFB understands that in both of those countries, such securities are relatively illiquid, resulting in such governments paying higher interest rates on such securities than they otherwise would. Therefore, the program should be in the interest of the Treasury Department to the extent it adds to the liquidity of the market for the Underlying Treasuries.

It should also be noted that shortly after certain investment banks began to "strip" regular, fixed rate, U.S. Treasury securities (in the mid-1980's) into interest-only and principal-only pieces (using custodial accounts but otherwise a

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process similar to the proposed program), the Treasury Department, recognizing that a market existed for such pieces, began to issue them itself under its STRIPS (Separate Trading of Registered Interest and Principal of Securities) program. That result could occur again in connection with CSFB's proposed new product because, although the Treasury's STRIPS program does not currently contemplate the issuance of a security like the Class B Offered Securities, the Treasury could amend its STRIPS program if CSFB's proposed program proves successful.

Withdrawal of Underlying Assets from the Trust

The holder of only a Class A Offered Security or Class B Offered Security would not be entitled to exchange such security for Underlying Treasuries. Only the holder of both a Class A and a Class B Offered Security would be entitled to do so, by surrendering both such securities to the Trustee and receiving from the Trustee (i.e., withdrawing from the Trust) such holder's pro rata share of the Underlying Treasuries.⁵ CSFB believes that prospective investors in the Offered Securities would insist on this feature in order to be comfortable that the aggregate market value of the Offered Securities would not deviate significantly from that of the Underlying Treasuries due to market inefficiencies.

CSFB proposes to condition the withdrawal rights of the holders (the "Market Condition") by requiring each withdrawing holder of both a Class A and a Class B Offered Security to obtain from a nationally recognized investment bank that regularly deals in Treasury securities a certificate (a "Market Certificate"), dated not more than two business days prior to the proposed date of withdrawal, to the effect that, in the opinion of such investment bank, the aggregate market value of the Underlying Treasuries (or of that portion of the Underlying Treasuries represented by the Offered Securities to be surrendered) exceeds the aggregate market value of all the outstanding Offered Securities (or of the Offered Securities to be surrendered), and otherwise in form and substance satisfactory to the Trustee. In

⁵ Such holder would also be required to pay a small fee to the Trustee to reimburse it for its expenses in connection with the exchange.

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addition, any such holder not exchanging all its Offered Securities for Underlying Treasuries would be required to retain at least \$500,000 principal amount (in the case of Class A) or notional principal amount (in the case of Class B) of each class of Offered Securities retained by it.

Legal Analysis

Section 3 of the 1940 Act

Section 3(a)⁶ of the 1940 Act provides in pertinent part:

"(a) (1) When used in this title, "investment company" means any issuer which--

(A) is or holds itself out as being engaged primarily, or proposes to engage primarily, in the business of investing, reinvesting, or trading in securities;
[or] . . .

(C) is engaged or proposes to engage in the business of investing, reinvesting, owning, holding, or trading in securities, and owns or proposes to acquire investment securities having a value exceeding 40 per centum of the value of such issuer's total assets (exclusive of Government securities and cash items) on an unconsolidated basis.

(2) As used in this section, "investment securities" includes all securities except (A) Government securities. . .".

Because the Trust would hold only the Underlying Treasuries, which are "government securities" (as defined in

⁶ In 1996 Congress amended the 1940 Act such that former Sections 3(a)(1) and 3(a)(3) are now Sections 3(a)(1)(A) and 3(a)(1)(C), respectively; the text of such sections, however, was not changed. References to the former sections in cited materials in the text have been conformed to the new nomenclature.

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Section 2(a)(16) of the 1940 Act) and therefore not "investment securities", the Trust would not fall within the definition of investment company in Section 3(a)(1)(C). The only issue, then, is whether the Trust could be viewed as falling within the definition of investment company under Section 3(a)(1)(A) of the 1940 Act. The Staff has stated that:

"[a]lthough Government securities are excluded in the determination of whether the investment securities that an issuer owns or proposes to acquire exceed 40% of its total assets for purposes of Section 3(a)[(1)(C)] of the Act, they are securities for purposes of determining, under Section 3(a)(1)[(A)], whether an issuer is engaged primarily in the business of investing in securities. Thus, an issuer could invest exclusively in Government securities, thereby owning no investment securities, and yet be an investment company under Section 3(a)(1)[(A)] of the Act."

Baker, Watts & Co. (May 6, 1982).

A critical factor in analyzing whether the Trust should be deemed an investment company under the 1940 Act is the distinction in language between Section 3(a)(1)(A) and Section 3(a)(1)(C). To fall within the definition of investment company under Section 3(a)(1)(A), an issuer must be "engaged primarily . . . in the business of investing, reinvesting, or trading in securities". Such activity is distinguishable from the Section 3(a)(1)(C) requirement of merely being "in the business of . . . owning [or] holding securities". In a situation where a holding company held securities issued by its non-investment company subsidiaries rather than investing or trading in the securities, the Staff stated that "it appears that [the holding company] would not be an investment company as defined in Section 3(a)(1)(A) because its primary business will be owning or holding securities rather than 'investing, reinvesting, or trading' in them, compare [sic] 'investing, reinvesting, owning, holding or trading' in Section 3(a)[(1)(C)]. . . ." United Asset Management Corp. (Nov. 2, 1981).

Section 3(a)(1)(A) contemplates an issuer engaging in investment and trading activities beyond merely owning or holding

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securities--a distinction the Staff explicitly recognized in United Asset Management Corp. The investment and trading in securities referred to in Section 3(a)(1)(A) would not occur in the proposed transaction described above because the Trust would be structured as a "pass-through entity" so that funds received by the Trustee in respect of the Underlying Treasuries would be used by the Trustee to pay all amounts due and payable on the Offered Securities, without the need for the Trustee ever to invest, reinvest or trade the securities in the Trust. Indeed, as described above, the Trustee would be prohibited from doing so and would be required merely to hold the government securities included in the Trust for the benefit of the holders of the Offered Securities.

"Owning" and "holding", when distinguished from "investing", "reinvesting" and "trading", imply passivity--a company owns or holds a portfolio whose composition remains unchanged. If the passive concepts of "owning" and "holding" fall within the notion of "investing, reinvesting, or trading" in securities, Sections 3(a)(1)(A) and 3(a)(1)(C) would cover nearly identical areas and Section 3(a)(1)(C) would be superfluous.

The legislative history of the 1940 Act indicates that Congress intended Section 3(a)(1)(A) to reach "typical" investment companies--those actively engaged in securities investment and trading activities of a sort the public would recognize as characteristic of investment companies. See Hearings Before the Subcommittee on Securities and Exchanges of the Subcommittee on Banking and Currency, 76th Cong., 3d Sess. 176 (1940) (testimony of David Schenker, SEC counsel primarily responsible for drafting the 1940 Act). In contrast, Congress intended the Section 3(a)(1)(C) definition to reach investment companies that, while not conforming to the popular conception of an investment company, nonetheless placed such a substantial portion of their assets into securities that investors in them might need the same protections of the 1940 Act. *Id.* However, Congress excluded parent holding companies with subsidiaries that are not themselves investment companies from the Section 3(a)(1)(C) definition by excluding, along with government securities, the securities issued by such subsidiaries from the definition of "investment securities" in Section 3(a)(2). This exclusion of parent holding companies would not be effective if

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such companies, despite their passive holding of the securities of their subsidiaries, were viewed as falling within the Section 3(a)(1)(A) definition.

Commission decisions have endorsed this view of Section 3(a)(1)(A). In Atlantic Coast Line Co., 11 S.E.C. 661 (1942), the Commission held that an issuer that had held securities with a value exceeding forty percent of its assets for many years and without material change was not an investment company under Section 3(a)(1)(A), but fell within the definition of Section 3(a)(1)(C). *Id.* at 664. The Commission stated that an issuer is not a Section 3(a)(1)(A) investment company where its portfolio "has in fact been inactive". *Id.* at 663. See also Gray Line Corp., 44 S.E.C. 314 (1970) (owning or holding securities is a "relatively inactive business").

To fall within the Section 3(a)(1)(A) investment company definition, an issuer must also be or propose to be "engaged primarily" in the business of investing, reinvesting or trading in securities. The determination of an issuer's primary engagement is a factual matter focusing on the nature of its business. See *Certain Prima Facie Investment Companies*, SEC Investment Company Act Release No. 10,937 (Nov. 13, 1979). The Commission has stated that in deciding this question it considers an issuer's historical development, its public representations of policy, the activity of its officers and directors, the nature of its present assets, and the sources of its present income. *Id.*

While the assets in the Trust would be securities, we believe that it would be incorrect to describe the Trust as being "engaged primarily" (or, for that matter, at all) in the business of investing, reinvesting or trading in securities. The U.S. government securities that would be deposited in the Trust would not be managed. The Trust would act merely as a conduit, making required payments to holders of the Offered Securities from amounts received on the Underlying Treasuries. Even if an argument could be conceived that somehow the Trust initially "invested" in the Underlying Treasuries (which seems contrary to the fact that the Trust would as a practical matter not exist until the deposit of the Underlying Treasuries were effected), it is difficult to see how the Trust thereafter could be said to be "engaged primarily" in the "business of investing, reinvesting or

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trading in securities", as distinct from the business of owning or holding securities.

Numerous persons requesting a no-action position from the Staff have made arguments virtually identical to the foregoing concerning the distinction between Section 3(a)(1)(A) and Section 3(a)(1)(C). See, e.g., Stephen B. Flood [Chair/Committee on Securities Regulation, the Association of the Bar of the City of New York] (Feb. 2, 1987); First Capital Surety Corporation (Sept. 5, 1996); New York Life Settlement Corporation (Dec. 22, 1995); General Electric Capital Corporation Structured Settlement Program (July 6, 1993); Allstate Life Insurance Company Structured Settlement Trust (Jan. 4, 1993); Merrill Lynch, Pierce, Fenner & Smith Incorporated (Oct. 28, 1992); Dean Witter Principal Guaranteed Fund III L.P. (July 23, 1992); Merrill Lynch Capital Markets Structured Investments Group (Oct. 16, 1989); Leaseway Transportation Corp. (Feb. 22, 1988); and Centex Corporation (Nov. 20, 1986).

In most of those requests, after distinguishing the provisions of Section 3(a)(1)(A) and Section 3(a)(1)(C) and arguing that the issuer in question was not covered by the former because of the passive nature of its activities and was not covered by the latter because its assets consisted entirely or largely of government securities and cash, the writer went on to distinguish such issuer from a unit investment trust, which is, pursuant to Section 4 of the 1940 Act, one of the three principal categories of investment companies.

We understand that the Staff previously has taken the position that the lack of management of a portfolio of securities does not necessarily preclude regulation under the 1940 Act and, to support its position, has pointed to the inclusion of unit investment trusts (which generally have fixed portfolios of securities that are not managed) as among the types of investment companies regulated under the 1940 Act. See generally, Gem Savings Association (Aug. 12, 1983) and Merrill Lynch, Pierce, Fenner & Smith Incorporated (Oct. 28, 1982).

Although a "unit investment trust", as defined in Section 4 of the 1940 Act, is subject to registration and regulation under that Act, an issuer will not fall within that

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definition unless it first falls within the definition of investment company under Section 3.⁷ In other words, an issuer that would be categorized as a "unit investment trust" under Section 4, were it an investment company under Section 3, does not somehow become subject to registration and regulation under the 1940 Act unless it first meets the definition of investment company under Section 3, even if such issuer otherwise resembles a unit investment trust. Further, in light of the discussion above, an issuer that owns and holds a fixed portfolio of securities cannot be said to be in the business of "investing, reinvesting and trading" in securities and, therefore, cannot be characterized as an investment company under Section 3(a)(1)(A). Accordingly, an issuer that owns and holds a fixed portfolio of securities may be characterized as an investment company only if it falls within the definition contained in Section 3(a)(1)(C) (or, of course, Section 3(a)(1)(B), which is irrelevant for purposes of this letter). If such an issuer owns and holds a fixed portfolio of government securities (as defined in Section 2(a)(16) of the 1940 Act), it will not fall within that definition, even if that entity otherwise resembles a unit investment trust.

Thus, a government bond mutual fund, which continually trades government bonds, is clearly an investment company because it falls within the definition under Section 3(a)(1)(A); a unit investment trust that owns and holds, but does not trade, corporate debt securities is an investment company because it falls within the definition under Section 3(a)(1)(C); but an issuer that passively owns and holds only government securities is not an investment company under Section 3 and therefore is not

⁷ Section 4 of the 1940 Act states that "investment companies are divided into three principal classes, defined as follows" and then goes on to define, in addition to unit investment trusts, face-amount certificate companies and management companies. The definition of each such class of investment company begins "[such class] means an investment company" which Accordingly, if an issuer is not an investment company as defined in Section 3 of the 1940 Act, Section 4's classification of investment companies is irrelevant.

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a unit investment trust under Section 4, regardless of whether it otherwise resembles a unit investment trust.⁸

Accordingly, we believe that the Trust, which would merely own and hold government securities, would not be an investment company within the meaning of the 1940 Act.⁹

Rule 3a-7

Even if the Trust were to be considered an "investment company" under Section 3 of the 1940 Act, in our view the Trust

⁸ A number of the unit investment trusts that are registered under the 1940 Act and that hold only government securities may be deemed to be investment companies under Section 3(a)(1)(A) because, among other things, they are permitted to increase the size of their portfolios (the business of investing) and to sell their portfolio securities to permit cash redemptions (the business of trading). See, e.g., The Merrill Lynch Fund of Stripped ("Zero") U.S. Treasury Securities, Series A, B, C, D, E, F, G, H, I, J and K (a Unit Investment Trust) (Post-Effective Amendment No. 13 to Registration Statement on Form S-6 (filed April 24, 1997)) and The Stripped ("Zero") U.S. Treasury Securities Fund Provident Mutual Series A (Post-Effective Amendment No. 14 to Registration Statement on Form S-6 (filed April 25, 1997)).

⁹ Our analysis is not inconsistent with the Staff's position in Gem Savings Association and Merrill Lynch, Pierce, Fenner & Smith Incorporated, supra. In those letters, both issuers, despite their passive activities and lack of management, were in the business of holding or owning securities within the meaning of Section 3(a)(1)(C). Those issuers, however, held industrial development bonds and bank certificates of deposit, respectively, neither of which constitutes "government securities"; thus, each issuer was an investment company within the meaning of Section 3(a)(1)(C). In contrast, the Trust, which would also be in the business of owning and holding securities, would own and hold only government securities. Accordingly, the Trust would not be an investment company within the meaning of the 1940 Act.

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would qualify for the exclusion from the definition of "investment company" provided by Rule 3a-7 under the 1940 Act.

We believe that the only significant issue with respect to whether the Trust may rely on the exclusion from the definition of "investment company" provided by Rule 3a-7 is whether the Offered Securities would constitute "redeemable securities".¹⁰ The availability of such exclusion provided by Rule 3a-7 is limited to issuers who do not issue redeemable securities. A redeemable security is defined in Section 2(a)(32) of the 1940 Act as:

"any security, other than short-term paper, under the terms of which the holder, upon its presentation to the issuer or to a person designated by the issuer, is entitled (whether absolutely or only out of surplus) to receive approximately his proportionate share of the issuer's current net assets, or the cash equivalent thereof".

Based on the restrictions on withdrawals from the Trust described above, it is our opinion that the Trust would not be issuing redeemable securities within the meaning of Section 2(a)(32).

There are two substantial conditions that a holder of Class A or Class B Offered Securities would have to satisfy prior to being entitled to exchange such Offered Securities for a pro

¹⁰ We note that (i) the Underlying Treasuries would constitute "eligible assets" within the meaning of paragraph (b)(1) of Rule 3a-7, (ii) the Trust would be engaged in the business of purchasing, or otherwise acquiring, and holding such eligible assets, (iii) the Class A Offered Securities, and, in our view, the Class B Offered Securities, would be "fixed income securities" within the meaning of paragraph (b)(2) of Rule 3a-7 (we would appreciate confirmation of this view by the Staff), (iv) as noted above, the Trust would comply with paragraph (a)(2) of Rule 3a-7, relating to the ratings of the Offered Securities, (v) as noted above, the Trust would comply with paragraph (a)(3) of Rule 3a-7 and (vi) as noted above, the Trust and the Trustee will comply with paragraph (a)(4) of Rule 3a-7. Accordingly, the only significant issue under Rule 3a-7 is whether the Offered Securities are "redeemable securities".

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rata share of the Underlying Treasuries. First, such holder must hold both Class A and Class B Offered Securities. Holding either the Class A or Class B Offered Securities alone would not entitle the holder to withdraw any of the Underlying Treasuries. In Brown & Wood (Feb. 24, 1994), the Staff noted that such a dual-class structure, where securities of each class much be presented in order to withdraw the underlying assets of the issuer, did not by itself mean that such securities were not "redeemable securities". Notwithstanding the definition thereof in Section 2(a)(32) that refers to "any security . . . which . . . upon its presentation to the issuer" entitles the holder to withdraw, which would seem to require that the holder be able to present only one security, rather than two, in order to withdraw, the Staff stated that:

"Whether a structured financing program issues redeemable securities in the circumstances you describe [i.e., presentation of both classes of securities required for withdrawal of the underlying assets] will depend on whether there are substantial enough restrictions on an investor's ability to withdraw portfolio securities. The Division considers the following factors to be important to this determination: (1) whether an investor's withdrawal right is conditional or absolute, [note omitted] (2) whether the issuer offers the matching securities for sale to investors at the same time or only at different times, (3) whether and how often the issuer sponsors activities (such as auctions and mandatory tender features) designed to facilitate an investor's ability to acquire the matching security or securities and present them for withdrawal, (4) whether the amount of portfolio securities that an investor can withdraw from the program at any one time is limited or unlimited, [note omitted] (5) how often an investor can withdraw portfolio securities from the program, [note omitted] (6) whether or not there is a holding period requirement, [note omitted] (7) the denomination of the securities and the minimum amount needed to withdraw portfolio securities, [note omitted] and (8) how the withdrawal right feature is presented to investors."

With regard to these eight factors, we note that:

- (1) most importantly, each investor's withdrawal right is

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conditional in that it would be subject to the Market Condition as described above, (2) the Trust may offer the Class A and Class B Offered Securities for sale to investors at the same time, (3) the Trust would not sponsor activities (such as auctions and mandatory tender features) designed to facilitate an investor's ability to acquire the matching Offered Securities; instead, an investor would be required to purchase or otherwise acquire the matching Offered Securities in the secondary market, (4) the amount of Underlying Treasuries that an investor can withdraw at any one time would be unlimited (subject to (7) below), (5) how often an investor can withdraw Underlying Treasuries would be limited by the Market Condition, (6) there would be no holding period requirement, (7) the minimum denomination of the Offered Securities would be \$500,000 and any investor not exchanging all its Offered Securities for Underlying Treasuries would be required to retain at least \$500,000 principal amount or notional principal amount, as the case may be, of each class of Offered Securities retained by it, and (8) the withdrawal right feature would be described in reasonable detail in the prospectus or private placement memorandum pursuant to which the Offered Securities are offered to investors.

The Market Condition, including the requirement that an investor obtain a Market Certificate from a nationally recognized investment bank, is a substantial restriction on a holder's ability to withdraw its pro rata share of the Underlying Treasuries. While it is true that an investor may want to withdraw the Underlying Treasuries if the aggregate value thereof exceeds the aggregate value of the Offered Securities, it is by no means true that that is the only situation in which an investor would want to withdraw. Investors also might want to withdraw the Underlying Treasuries in circumstances where their aggregate value is either equal to or less than the aggregate value of the Offered Securities. For example, CSFB expects the market for the Underlying Treasuries to always be more liquid than the market for the Offered Securities. Accordingly, a holder of Offered Securities might desire to exchange them for more liquid Underlying Treasuries even if such Underlying Treasuries had the same, or perhaps a lower, value. However, such holder would be prohibited from effecting such exchange due to such holder's inability to satisfy the Market Condition.

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Moreover, at the time of the proposed transaction, the aggregate value of the Underlying Treasuries should be less than that of the Offered Securities (otherwise, CSFB would have no incentive to structure the transaction¹¹). In that case, the Market Condition would not be satisfied and withdrawals would not be permitted. In fact, in CSFB's view, as the market becomes familiar with the Offered Securities and, if the proposed transaction is successful, as additional, similar transactions are effected by CSFB or possibly others (including, perhaps, the Treasury Department, as discussed above), the excess value of the Offered Securities over the Underlying Treasuries should decrease and, in an efficient market, virtually disappear (this is what happened in the market for "stripped" Treasury securities in the mid-1980's). Throughout this period, CSFB would not expect withdrawal to be permitted because the Market Condition would not be satisfied. Accordingly, the Market Condition should be viewed as substantial indeed.

In addition, we believe that it is helpful to analyze the prohibition on issuing redeemable securities contained in Rule 3a-7 in light of the Staff's interpretation of the scope of the phrase "redeemable securities" under other sections of the 1940 Act. Prior to 1970, the availability of the Section 3(c)(5)(C) exemption under the 1940 Act was not conditioned on not being engaged in the business of issuing redeemable securities. The legislative history of the 1970 amendment that added that condition states that "[t]he amendment applies only to those companies which purport to model themselves after open-end companies by issuing a security redeemable at the option of the holder". 1970 U.S.C.C.A.N. 4933 The Trust does not purport to model itself after an open-end company; nor do the proposed operations of the Trust resemble those of a typical open-end company, which is engaged in the continuous offering and repurchase of securities.

¹¹ CSFB would sell the Offered Securities for a premium over the amount it or its affiliates paid to acquire the Underlying Treasuries.

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Based on the preceding analysis, we respectfully request that the Staff confirm that it would not recommend enforcement action to the Commission if the Trust did not register as an investment company in reliance upon our opinion that the Trust either (i) would not be an "investment company" as such term is defined in Section 3 of the 1940 Act or (ii) would qualify for the exclusion from the definition of "investment company" under Section 3(a) of the 1940 Act provided by Rule 3a-7.

We hereby request that this letter and the Staff's response thereto be afforded confidential treatment for a period of 120 days from the date a response to this letter is sent to us and that publication of this letter be delayed until the expiration of such period, as contemplated by 17 CFR 200.81(b). The reason for our request is that premature disclosure of the letter could compromise CSFB's business objectives by alerting its competitors to the details of its confidential new product plans before it has had the opportunity to put those plans into effect.

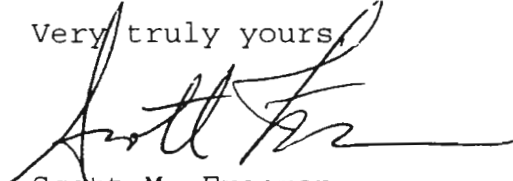
If you have any questions or comments about this request or if you desire further information concerning this matter, please call the undersigned collect at (212) 906-2358. Also, we would appreciate a phone call from you if you are considering issuing an unfavorable response to this request.

In accordance with Release No. 33-6269 of the Commission, we have enclosed an original and seven copies of this letter, and the specific subsections of the particular statute to which this letter pertains are indicated in the upper right-hand corner of the first page of this letter and each copy.

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Please acknowledge receipt of the foregoing by stamping the enclosed receipt copy of this letter and returning it in the self-addressed, stamped envelope enclosed for that purpose.

Very truly yours,



Scott M. Freeman

cc: Gina Hubbell
Credit Suisse First Boston Corporation