

PUBLIC

APR 10 1992

RESPONSE OF THE OFFICES OF CHIEF COUNSEL
DIVISION OF INVESTMENT MANAGEMENT and
DIVISION OF CORPORATION FINANCE

Our Ref. No. 92-45-CC
Wall Street Preferred
Money Managers, Inc.
File No. 801-38475

Your letter of January 23, 1992, requests our assurance that we would not recommend enforcement action to the Commission if Wall Street Preferred Money Managers, Inc. ("Wall Street Preferred"), a registered investment adviser and broker-dealer, offers an investment management service (the "Service") as described in your letter without registering the investment accounts and related services under the Investment Company Act of 1940 (the "1940 Act") and without registering the accounts under the Securities Act of 1933 (the "1933 Act").

Wall Street Preferred proposes to offer the Service to entities, such as corporations and pension and profit sharing plans, and to individuals, including customers of institutions that are clients of Wall Street Investor Services ("WSIS"). 1/ The Service will provide customers with access to the investment advice of various money managers ("Money Managers") selected by Wall Street Preferred, each of whom will specialize in a particular area. Each customer must have a minimum account of \$100,000 with Wall Street Preferred to be eligible to participate in the program. 2/ Customers will be asked to specify their desired rate of return, acceptable degree of risk, liquidity requirements, and any securities not to be purchased for their account. 3/ Wall Street Preferred will match each customer's individual financial circumstances, needs, objectives, and

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- 1/ WSIS, a registered broker-dealer and an affiliate of Wall Street Preferred, provides full service and discount brokerage services to banks, savings and loan associations, savings banks, and credit unions.
 - 2/ Each customer will receive a brochure for both Wall Street Preferred and the Money Managers, which meets the requirements of rule 204-3 (the "brochure" rule) under the Investment Advisers Act of 1940 (the "Advisers Act"). Clients referred by a Solicitor will receive the separate written disclosure document required under rule 206(4)-3 of the Advisers Act.
 - 3/ When the Commission proposed rule 3a-4, it stated that an essential feature of individualization was a client's ability to exclude particular securities from his account. See Investment Company Act Release No. 11391 (Oct. 10, 1980). In the staff's view, an arrangement may not be sufficiently individualized to qualify for no-action relief unless investors have the opportunity and authority to exclude certain securities from an otherwise discretionary account. See Morgan, Keegan & Company (pub. avail. Oct. 2, 1990); Qualivest Capital Management, Inc. (pub. avail. July 30, 1990).

instructions with each investment recommendation of the appropriate Money Managers and will determine the asset allocation of a customer's account among Money Managers. 4/

Wall Street Preferred will have discretionary trading authority and will coordinate all trading recommendations for a particular account. Except for selecting securities, 5/ Wall Street Preferred will be responsible for all aspects of portfolio management, such as achieving diversification of a customer's overall portfolio (through asset allocation), screening recommendations for customer suitability and excluded securities, and determining a customer's buying power for a particular recommendation. 6/ Wall Street Preferred will continuously evaluate the Money Manager's overall investment strategy and performance and may terminate a Money Manager for unsatisfactory performance. Wall Street Preferred will reallocate customers' assets as necessary to reflect changes in market conditions, a customer's investment objectives, or a customer's financial condition. Wall Street Preferred will not otherwise exercise any influence over any Money Manager's securities selection process.

Each Money Manager will employ his usual screening, modeling or other techniques in formulating securities recommendations and

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- 4/ With the assistance of a computerized program, Wall Street Preferred will develop a rating for each investor that reflects the customer's investment objectives and willingness to take risks. On the basis of the rating and the customer's account size, Wall Street Preferred will determine the asset allocation.
- 5/ Even where a fiduciary does not select particular securities, it still may be liable for violations of securities laws committed by a third party adviser who selects the investments. Rolf v. Blyth, Eastman Dillon & Co., 570 F.2d 38 (2d Cir.), cert. denied, 439 U.S. 1039 (1978) (registered representative breached its fiduciary duty by providing reassurances to client as to the investment strategy of third party investment adviser without basis and in reckless disregard of their truth or falsity).
- 6/ If a recommended security is unsuitable for a particular client or has been designated to be excluded from a portfolio, Wall Street Preferred will consult with the Money Manager as to whether there is an appropriate alternative. See Manning and Napier Advisors, Inc. (pub. avail. Nov. 22, 1989) (individualized discretionary investment management service includes suitability determinations by the investment adviser or sub-adviser in advance of each transaction).

determining the timing of market purchases or sales. These techniques will necessarily vary substantially among the Money Managers because of their differing areas of expertise and because no Money Manager is affiliated with any other Money Manager or with Wall Street Preferred. Money Managers may require varying degrees of specific customer data depending on their investment methods, but generally will have no direct contact with customers.

Alex. Brown & Sons, Incorporated ("Alex Brown") will serve as clearing broker and custodian. WSIS will assure that all customers receive best price and best execution. 7/ In a telephone conversation with the undersigned on March 27, 1991, Deborah Bielicke of your firm represented that WSIS's use of an executing broker other than Alex Brown to obtain best execution would not affect the customers' custodial arrangement with Alex Brown. The executing broker would deliver securities to Alex Brown, which is obligated to accept them under a clearing agreement with WSIS. WSIS would pay any fee charged for such delivery.

Customers may choose to have cash balances invested in a money market fund sold by Alex Brown and advised by an affiliate thereof or another money market fund from a menu prepared by Wall Street Preferred. Some of those funds may pay Wall Street Preferred a 12b-1 fee. 8/

7/ An investment adviser with discretion over a client's account generally has a duty to obtain the best price and execution for each transaction. Please note that in obtaining best execution "the determinative factor is not the lowest possible commission cost but whether the transaction represents the best qualitative execution for the managed account." Securities Exchange Act Release No. 23170 (Apr. 23, 1986) (interpretive release concerning soft dollars). We express no opinion as to whether the proposed arrangement satisfies an adviser's obligation to act in the best interest of its client, including its duty to obtain best price and execution.

8/ You should note that, if temporary investments in money market funds cannot be said to have been within the contemplation of an investment adviser and its client, i.e., if it was contemplated that the adviser for its fee would provide all the investment advisory services for the management of the client's account, the use of any money market fund, affiliated or not, for temporary investment would be unauthorized and in violation of Section 206 of the Advisers Act because it would result in the client's paying twice for the same service. See United Missouri Bank of Kansas City (pub. avail. May 11, 1990) note 2; E.F. Hutton &

Customers will receive materials describing in one location all fees to be charged for the Service and explaining that any money market fund will, unless waived, incur a separate management fee.

On the basis of the facts and circumstances described in your letter and the telephone conversation referred to above, but without necessarily agreeing with your legal analysis, the Division of Investment Management and the Division of Corporation Finance ^{9/} would not recommend enforcement action to the Commission if the Service is offered without registration of the investment accounts and related services under the 1940 Act and of the accounts under the 1933 Act, provided that:

- (1) Alex Brown will hold the securities in a customer's account in nominee name only for ministerial purposes (such as facilitating securities transactions).
- (2) Alex Brown will record and keep track of, on a customer-by-customer basis, the securities each customer beneficially owns.
- (3) Each customer will retain any rights under the federal securities laws to proceed directly against the issuer of any underlying security in his account and would not, because of participation in the arrangement, be obligated to join Wall Street Preferred, Alex Brown, the Money Managers, or any other beneficial owner participating in the Service as a condition precedent to proceeding against any issuer.
- (4) A customer's beneficial interest in a security does not represent an undivided interest in all the securities legally held by the custodian with respect to these accounts, but rather represents the direct and beneficial ownership of the securities held in that customer's account.
- (5) Each customer will receive notification of each transaction in his account, at least monthly, as described in your letter, and has the absolute right to withdraw, hypothecate, vote, or pledge securities in his account and may close his account at any time.

Company, Inc. (pub. avail. Nov. 17, 1983).

^{9/} The Division of Market Regulation expresses no opinion on the accuracy of counsel's interpretation of the requirements of Rule 10b-10 under the Securities Exchange Act of 1934, as set forth on pages 9 and 17 (footnote 18) of counsel's supplemental letter dated January 23, 1992.

- (6) Each customer will have the opportunity and authority to instruct Wall Street Preferred to refrain from purchasing securities that otherwise might be purchased for his account.
- (7) Wall Street Preferred will perform the individualized investment services, and customers will receive all of the disclosures described in your letter.
- (8) Except for temporary investment of cash balances in customer accounts in shares of a money market fund chosen by each customer, the Service will not involve recommendations concerning, or the purchase and sale of, shares of investment companies.

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

Having stated our views on when a discretionary investment management service and the related accounts need not register under the 1940 Act and the accounts need not register under the 1933 Act, 10/ the Divisions no longer will respond to requests for no-action assurance with respect to those advisory services that (except for temporary investment of cash balances in money market funds) exclude investment company shares from clients' portfolios, unless they present novel or unusual issues.

Barbara Chretien-Dar
Barbara Chretien-Dar
Attorney, Division of Investment Management

Cecilia D. Blye
Cecilia D. Blye
Special Counsel, Division of Corporation Finance

10/ See e.g. Morgan, Keegan & Company (pub. avail. Oct. 2, 1990); Qualivest Capital Management, Inc. (pub. avail. July 30, 1990); United Missouri Bank of Kansas City (pub. avail. May 5, 1990); Manning & Napier Advisors, Inc. (pub. avail. Oct. 19, 1989); Jefferies & Co. (pub. avail. July 16, 1989); Shearson/American Express (pub. avail. July 13, 1983).

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January 23, 1992

Act	I CA-40	RECD S.E.C.
Section	3(a)	JAN 24 1992
Rule		141
Public	4/10/92	1940 Act/ Section 3(a)

Federal Express

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

Re: Individualized Investment Management Service -
Wall Street Preferred Money Managers, Inc.

Dear Sir:

We serve as legal counsel to Wall Street Preferred Money Managers, Inc. ("WSPMM"). On behalf of WSPMM, we respectfully request assurance that the staff would not recommend any enforcement action to the Securities and Exchange Commission if WSPMM were to offer an investment management service in the manner discussed in this letter, without registration of the investment accounts and related services under the Investment Company Act of 1940, as amended (the "1940 Act") and without registration of such accounts under the Securities Act of 1933, as amended (the "1933 Act"). This letter supersedes our previous no-action request dated March 29, 1991 and supplemental correspondence dated August 12, 1991.

BACKGROUND

WSPMM and the Investment Management Service

WSPMM is an investment adviser registered under the Investment Advisers Act of 1940, as amended (the "Advisers Act"), a broker-dealer registered under the Securities Exchange Act of 1934, as amended (the "1934 Act") and a member of the National Association of Securities Dealers, Inc. ("NASD"). WSPMM is affiliated with Wall Street Investor Services ("WSIS"), a broker-dealer registered under the 1934 Act and a member of the NASD and the New York Stock Exchange, Inc. ("NYSE"), whose primary business consists of providing full service and discount brokerage services to its clients.

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Clients of WSIS include, without limitation, institutions such as federal and state chartered banks, savings and loan associations, savings banks and credit unions ("WSIS Institutional Clients") and their customers. WSPMM proposes to offer an individualized investment management service (the "Service") to individuals, corporations, pension and profit sharing plans and other entities. Customers may contact WSPMM directly to participate in the Service or WSPMM may offer the Service through financial institutions (including WSIS Institutional Clients), financial planners, pension consultants or other entities (the "Solicitors") who will assist WSPMM in marketing the Service, as more fully discussed below. Through the Service, WSPMM will make available to customers the advice and recommendations of several highly regarded money managers (the "Money Managers") selected by WSPMM, who might not otherwise be accessible to such customers. WSPMM will impose a minimum initial account requirement of \$100,000 for participation in the Service. Although WSPMM will initially offer the Service primarily to customers of existing WSIS Institutional Clients, it anticipates expanding the Service to other qualified, potential customers.

Marketing the Service

WSPMM may solicit customers for the Service directly through its officers and employees located at its headquarters in New York City. WSPMM presently has no branch offices and its affiliate, WSIS, does not presently maintain any retail sales offices except for branch offices on the premises of WSIS Institutional Clients. Accordingly, WSPMM may rely on Solicitors to refer potential customers to the Service and to assist WSPMM in marketing the Service.¹ An important function of the Solicitor is to help WSPMM

¹ At the request of the staff of the Division of Market Regulation, we have considered whether the limited functions of WSIS Institutional Clients and their employees in connection with the Service raise an issue under section 15(b) of the 1934 Act. See Part V, "Discussion and Legal Analysis."

Although the staff has not raised this issue, we have also considered whether the Solicitors may be deemed to be investment advisers because of their participation in the Service. As more fully described above, the Solicitors' activities are strictly limited to activities contemplated by Rule 206(4)-3 and, in our view, do not constitute "engaging in the business of advising others" within the meaning of section 202(a)(11) of the Advisers Act.

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identify customers who meet the minimum account requirements and might benefit from the Service. Initially, Solicitors will consist primarily of WSIS Institutional Clients. WSPMM and each Solicitor will enter into the written contract required by Rule 206(4)-3 of the Advisers Act, each Solicitor will provide customers with the written disclosure document required by that rule and WSPMM will ensure that the arrangement complies with all other applicable requirements of the rule.

Solicitor Employee Involvement

If customers are referred to WSPMM through a Solicitor, then employees of the Solicitor may have limited direct contact with WSPMM customers in connection with the Service in addition to their regular employment duties on behalf of the Solicitor. Such employees will perform purely clerical or ministerial functions such as distributing promotional literature and account applications and questionnaire forms to customers, providing clerical assistance to customers in completing such forms and directing customers to qualified representatives of WSPMM to obtain additional information regarding the Service. Employees of a Solicitor (other than dual employees of WSIS and a WSIS Institutional Client as described below) will not provide investment advice, recommend securities transactions, accept or transmit orders for securities transactions or handle any questions that might require familiarity with, or the exercise of judgment regarding, securities or the securities industry. Such questions will be directed to qualified representatives of WSPMM. WSPMM will furnish conduct manuals for employees of Solicitors specifying the limits of their activities related to the Service. WSPMM and Solicitors will take steps to ensure compliance with such conduct manuals.

In certain instances, Solicitors that are also WSIS Institutional Clients may be participants in other securities marketing programs of WSIS. Some of WSIS's securities marketing programs involve the use of registered representatives who are dually employed by WSIS and the WSIS Institutional Client and other programs involve the use of registered representatives who are solely employed by WSIS. In such instances, the dual employee or sole employee registered representative of WSIS may be located in the WSIS branch office located on the premises of the WSIS Institutional Client through which the WSPMM Service is also made

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available to customers.² Unregistered employees of the WSIS Institutional Client may refer customers to such WSIS registered representatives, who may (in addition to their regular duties relating to the WSIS program) handle investment advisory matters on behalf of WSPMM to the extent they are qualified to do so as registered representatives.³ Registered representative activities related to the Service may include, for example, describing the Service, conducting customer interviews required by Rule 3a-4, explaining WSPMM's proposed asset allocation to the customer and reviewing monthly statements of account and performance reports. Registered representatives will not accept or transmit any orders for securities transactions related to the Service, as all brokerage activities related to the Service will be conducted at WSIS's headquarters in New York.

Unregistered employees of Solicitors will not receive from WSPMM or any affiliate of WSPMM any referral fees or other compensation relating to the Service, nor will WSPMM have any arrangement or understanding with any Solicitor to indirectly provide such compensation.

Opening an Account

Potential customers of the Service must first complete a detailed Investor Questionnaire designed to provide WSPMM with information about the financial circumstances and investment objectives of the customer. Customers will be asked to specify, among other things, the rate of return they seek, the degree of

²In addition to being dually employed by the WSIS Institutional Client and WSIS, such dual employees may be both a "person associated with a broker or dealer" within the meaning of Section 3(a)(18) of the Exchange Act with respect to WSIS and, when performing functions relating to the WSPMM Service, a "person associated with an investment adviser" within the meaning of Section 202(a)(17) of the Advisers Act with respect to WSPMM.

³The arrangement where registered representatives of WSIS (either dual or sole employees) are located at the offices on the premises of a WSIS Institutional Client and perform functions relating to the WSPMM Service will only be permitted in states in which a registered representative is permitted under state law to be associated with more than one broker-dealer or investment adviser.

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risk they find acceptable and their liquidity requirements. Customers will be allowed to specify securities they do not wish to have purchased for their accounts. After WSPMM makes an initial determination that the Service is suitable for the customer, the customer must submit the following forms and agreements before an account will be opened: WSIS's standard forms for new brokerage accounts (unless the customer chooses to use another broker)⁴, an investment advisory agreement with WSPMM and if a Solicitor referred the customer to WSPMM, an acknowledgement that the customer has received the separate disclosure document required by Rule 206(4)-3 of the Advisers Act and a "brochure" with respect to both WSPMM and the Money Managers that meets the requirements of Rule 204-3 of the Advisers Act. Customers that use WSIS as broker will not enter into individual custody agreements because WSIS has entered into a standard clearing arrangement with Alex. Brown & Sons, Incorporated ("Alex Brown") that encompasses custody, as described below. Customers who open margin accounts will enter into a separate agreement with Alex Brown and Alex Brown will be responsible for any applicable capital requirements. WSPMM will enter into subadvisory agreements with each of the Money Managers. Customers will not enter into separate advisory agreements with the Money Managers.

Asset Allocation and Asset Management

WSPMM will structure individual customer accounts based on the individual needs of the customer. With the assistance of a computerized program, WSPMM will formulate a rating for each Investor Questionnaire that signifies the customer's investment objectives and willingness to take risks. Based on this rating and the customer's account size, WSPMM will determine how a customer's assets should be allocated (e.g., 50% stocks, 30% bonds and 20% government securities). WSPMM has not developed any predetermined "model"

⁴WSPMM is currently registered as a broker-dealer with the SEC, NASD and a handful of states. WSIS, on the other hand, is registered as a broker-dealer in all fifty states, the District of Columbia and Puerto Rico. WSPMM does not wish to incur the costs and burdens of registering as a broker-dealer in all fifty states. Therefore, it is now contemplated that WSIS will perform all brokerage services related to the Service and WSPMM will perform advisory services only.

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portfolios at the asset allocation level.⁵ A qualified WSPMM representative will discuss the proposed allocation with the customer in person if practicable or by telephone. WSPMM may modify its suggested portfolio structure based upon the customer's input. WSPMM will reallocate a customer's assets whenever necessary to reflect changes in the customer's investment objectives, financial circumstances or market conditions. A WSPMM representative will discuss proposed modifications with the customer when such changes are triggered by changes in the individual needs of that customer; however, WSPMM may shift assets at any time without prior customer consultation in order to respond quickly to market changes. Money Managers will play no role in the asset allocation process.

WSPMM is a recently established advisory firm that does not presently have the capability to generate internal research on specific securities selections. Accordingly, the customer accounts created by WSPMM will be comprised of securities selected by a team of independent professional Money Managers selected by WSPMM. Each Money Manager is a registered investment adviser with substantial experience in the industry. Each Money Manager has developed a particular style or specialty that WSPMM has determined is suitable for customers of the Service. WSPMM will allocate customer assets among the Money Managers in accordance with each customer's needs and investment objectives, as well as market conditions. WSPMM will advise Money Managers of the number and size of accounts available for them to manage.⁶ Money Managers will, of course,

⁵ For example, WSPMM has not developed one model for customers whose primary goal is capital appreciation and one model for customers whose primary goal is current income. WSPMM's system will allow it to customize the structure of each customer's portfolio in any combination that it deems advisable. Furthermore, WSPMM will not impose limits on a client's investment objectives. Cf. Shearson/American Express, Inc. (pub. avail. July 13, 1983) ("Shearson") (management service only available to customers with an investment objective of long-term capital appreciation). WSPMM believes it has the capability to accommodate virtually any investment objective through the asset allocation process.

⁶ Money Managers will always have access to more detailed information upon request. WSPMM does not believe it is necessary to make individual customer data available to all Money Managers as a regular part of the Service. For the purposes of the Service, each Money Manager has been chosen for his expertise in a

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know the investment objective of assets allocated to them (because they specialize in one particular type of security or style). Each Money Manager will employ his usual screening, modeling or other techniques in formulating securities recommendations and determining the timing of market purchases or sales. Such techniques will necessarily vary substantially among the Money Managers because of their differing areas of expertise and since no Money Manager is affiliated with any other Money Manager or with WSPMM. Money Managers may require varying degrees of specific customer data depending on their investment methods. WSPMM will exercise no influence over any Money Manager's securities selection process.

Thus, WSPMM has externalized the securities selection function only. The Money Managers serve in a role that is functionally equivalent to the in-house research divisions of large brokerage houses. WSPMM will assume responsibility for all other aspects of portfolio management, such as achieving diversification of a customer's overall portfolio (through asset allocation), screening out recommendations that may not be suitable for a customer or that the customer has excluded from his portfolio, and determining whether each customer has sufficient buying power to make recommended purchases. WSPMM will continuously monitor customer accounts, evaluate Money Manager recommendations and make investments only after determining that they are suitable for each customer.⁷ If

particular area. For example, Money Manager A may specialize in NYSE listed growth stocks and Money Manager B may specialize in limited maturity debt instruments. All assets placed with Manager A would have a goal of capital appreciation with limited risk and all assets placed with Manager B would have an income oriented goal. If a customer desires both capital appreciation and current income, then WSPMM will allocate a portion of the customer's assets to each Money Manager. If Money Manager A is recommending IBM stock for long term capital appreciation, then his stock recommendation would not vary even if he knew more detailed information about each customer. This approach is consistent with industry practice. See note 16.

⁷ WSPMM anticipates that virtually all communications between WSPMM and the Money Managers will take place via telephone and that few written authorizations will be used. Upon receipt of Money Manager recommendations, WSPMM will screen affected accounts (via computer) for special instructions or limits placed on the

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WSPMM determines that a recommended security is not suitable for a particular customer or if a customer has excluded a recommended security, then WSPMM will consult with the appropriate Money Manager to determine whether another selection might be appropriate. Such conferences will generally take place by telephone and may require WSPMM to make individual customer data available to the Money Manager. WSPMM may reject or modify Money Manager recommendations; however, WSPMM anticipates that it will follow Money Manager recommendations in most instances because of their expertise. WSPMM does not anticipate making securities selections, although it is not precluded from doing so. WSPMM will continuously evaluate the Money Managers' investment strategy and performance and may terminate Money Managers for unsatisfactory performance.

Brokerage

WSIS will act as introducing broker for transactions in customer accounts, unless the customer chooses to use a different broker. Agreements with customers will permit selection of brokers other than WSIS. WSIS will charge customers transaction-based brokerage commissions. WSIS anticipates that it will be able to obtain discounted institutional rates because of its ability to batch orders. Customers will be advised that selection of another broker could result in the loss of possible cost savings obtainable by WSIS through volume discounts on batched orders. WSIS expects to execute most transactions for accounts of customers using the Service and will assure that all customers receive best price and best execution. If necessary to obtain best execution, WSIS will use executing brokers other than Alex Brown, including brokers that may be affiliated with or have an established relationship with a Money Manager. WSIS does not expect to initiate trading recommendations. Thus, all trading recommendations originate with the Money Managers, who will not reap any benefits from brokerage commissions, except to the extent that affiliated brokers of Money Managers are used to obtain "best execution". There will be no explicit or implicit agreement or understanding between WSPMM and any Money Manager regarding the number of transactions that must

account by the customer or WSPMM. WSPMM portfolio managers will review the holdings of each account, as well as updated customer data, on a regular basis. Certain events, such as a change in the customer's financial circumstances, would trigger an immediate and complete review of the account.

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occur in an account. WSIS or its clearing broker will provide (i) monthly statements of account activity and holdings (including detail of each transaction for that month), (ii) quarterly statements of account performance and (iii) annual information showing account portfolio turnover rates and the amount of brokerage commissions incurred, stated in dollars and as a percentage of assets under management. Upon written request, WSPMM or its clearing broker will furnish individual confirmations to customers for an additional charge.

Each customer will receive written disclosures regarding the potential for adverse interests and conflicts of interest arising out of WSPMM's role as investment adviser and WSIS's role as introducing broker, and will have consented to such arrangement before WSIS will effect any transactions for that customer's account.

Custody

WSIS has a standard clearing agreement with Alex Brown, a broker-dealer registered under the 1934 Act and a member of the New York Stock Exchange. Alex Brown is not currently affiliated with WSIS, WSPMM or any of the Money Managers.⁸ Under the agreement, Alex Brown will provide clearing and custody services for accounts introduced by WSIS, in accordance with standard industry practice.⁹ The commission retained by Alex Brown encompasses all such services provided by Alex Brown. Because of this standing clearing arrangement with Alex Brown, customers will not enter into individual custody agreements. Alex Brown will maintain one or more separate accounts for each customer, depending on the number of Money Managers utilized by that customer. Customers will have the option to select another custodian. Neither WSPMM, the Money Managers nor

⁸ Alex Brown and WSIS have had discussions about Alex Brown acquiring a subordinated demand note of WSIS in accordance with NYSE rules. Even if Alex Brown were deemed to be an "affiliate" of WSPMM by virtue of such interest, Rule 206(4)-2 of the Advisers Act would not be applicable because Alex Brown is a broker-dealer subject to Rule 15(c)3-1 of the 1934 Act.

⁹ See Manning and Napier Advisors, Inc. (pub. avail. October 22, 1989) ("Manning I") (describing current industry practices with respect to custody).

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any affiliate of WSPMM will act as custodian for any of the assets managed in the Service.

Customer agreements with WSPMM and WSIS agreements with the custodian will ensure that customers will be the legal and beneficial owners of the securities in their accounts and will retain all rights to withdraw, vote, pledge and hypothecate such securities and may close their accounts at any time. Alex Brown will maintain individual custody accounts and records identifying each customer as the individual owner of securities purchased for such customer's account. Eligible securities will be held through Alex Brown's account at The Depository Trust Company. Securities will not be held in the name of WSPMM or WSIS.

Customers will provide instructions regarding the investment of cash balances in their accounts; neither Alex Brown, WSPMM or Money Managers will have discretion regarding the investment of such cash balances. Customers may choose to have cash balances invested in a money market mutual fund offered by Alex Brown or in another money market fund chosen by the customer from a menu prepared by WSPMM. In some cases, WSPMM may receive 12b-1 fees with respect to a fund selected by a customer. Informational materials provided to customers prior to opening an account will disclose the existence of such fees. Customers will be provided in advance the prospectus for the money market fund they select. WSPMM anticipates that shares of money market funds utilized for the temporary investment of cash balances will be held in nominee name for ministerial purposes, in accordance with industry practice.

Fees and Information

The proposed fee structure of the Service is not a "wrap fee",¹⁰ but consists of two distinct components. First, WSPMM will charge an asset based fee to customers for managing the assets in their accounts. This fee will be charged quarterly, in advance, at the approximate rate of one and one-half percent (1-1/2%) per annum of the assets under management. WSPMM may negotiate different rates with certain Money Managers or in special circumstances. WSPMM anticipates that the fee will be allocated during the first year as follows: one-half to the Solicitor, one-third to the Money

¹⁰ Cf. Jeffries and Company (pub. avail. June 16, 1989) ("Jeffries"); Shearson.

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Managers (apportioned according to the amount of assets under their management), and one-sixth to WSPMM. In subsequent years, the allocation between the Solicitor and WSPMM will change, with WSPMM receiving a larger share of the fee. Solicitors will receive a relatively high fee during the first year because they are the initial source of the customer base for the Service and their efforts will play a role in getting the Service started. For ERISA accounts, allocation of fees will be made only in accordance with the restrictions imposed on transactions with "plan fiduciaries." Customers may close their account at any time and will not incur a termination fee. The second component is a "customary" brokerage fee that consists of transaction based charges. WSIS will retain a portion of the brokerage charge as introducing broker and Alex Brown will retain the remainder of the commission for its role as executing and clearing broker and custodian. Customers that elect to choose their own broker or custodian will incur only the asset based management fee and will incur whatever brokerage or custody charges that the selected broker or custodian charges.

WSPMM will provide each customer with written materials describing all fees to be charged for the Service and the method of allocating those fees among the Solicitors, WSPMM and the Money Managers. The materials will disclose in one location all such fees and explain that any money market fund in which customer funds are temporarily invested will generally incur a separate management fee. Advance notification of any changes in these fee arrangements will be provided to customers.

Each account statement will contain a notice instructing customers to notify WSPMM immediately of any change in their investment objectives or financial circumstances. WSPMM representatives will be available during normal business hours to discuss with customers matters concerning their accounts. Money Managers may be made available to customers upon request. At least quarterly, a representative of WSPMM will communicate with each customer regarding such customer's account, needs and objectives. From time to time, WSPMM will also provide customers with Investment Letters, which may, for example, highlight a particular Money Manager or a current market trend.

DISCUSSION AND LEGAL AUTHORITIES

We are of the opinion that neither the Service nor the accounts will constitute an "investment company" within the meaning of the 1940 Act and, accordingly, the separate account of each cus-

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tomer will not constitute a security within the meaning of the 1933 Act.¹¹ The proposed Service incorporates the two essential features of proposed Rule 3a-4 and prior favorable no-action letters based on similar factual representations: individualized treatment and an absence of pooled client assets.

I. Individualized Treatment

A. Overview.

The Divisions of Investment Management and Corporate Finance have issued a series of favorable no-action letters under factual circumstances that are not materially different from the description of the Service contained herein (collectively the "Prior Letters").¹² Each Prior Letter generally involves a registered investment adviser (or a "bank" that is exempt from the Advisers Act)¹³ (the "Adviser") that engages in the business of monitoring and evaluating the services and performance of other registered investment advisers (the "Subadvisers"). Although the program structures and the duties of the Adviser and Subadvisers vary substantially among the Prior Letters, the Adviser often provides most of the initial and ongoing customer contact, formulates the customer's investment objectives, chooses (or helps the customer choose) a Subadviser and monitors the performance of the Subadvisers. The Subadvisers, on the other hand, are usually vested with investment

¹¹ The Division of Corporation Finance has indicated that if proposed Rule 3a-4 were adopted, it would take the view that discretionary advisory arrangements meeting the requirements of the rule should not be regarded themselves as securities for purposes of the 1933 Act. S.E.C. Investment Company Act Release No. 11391 (1980) Fed.Sec.L.Rep. ¶82,662 (October 1980), at n.15. Accordingly, we have not presented independent arguments under the 1933 Act.

¹² See e.g. Morgan, Keegan and Company (pub. avail. October 2, 1990) ("Morgan-Keegan"); Qualivest Capital Management, Inc. (pub. avail. June 21, 1990 ("Qualivest")); United Missouri Bank of Kansas City, n.a. (pub. avail. May 11, 1990) ("UMB"); Manning I; Jeffries; and Shearson.

¹³ See, e.g. Jeffries.

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discretion over customer assets allocated to them.¹⁴ We believe that the Prior Letters cited above are dispositive of the issue of whether the Service provides sufficient individualization notwithstanding that (i) WSPMM (as opposed to the Money Managers) will shoulder the primary burden of meeting the tests of individualized treatment set forth in proposed Rule 3a-4¹⁵ and Prior Letters and (ii) WSPMM will retain discretionary trading authority over customer accounts.

¹⁴ In this connection, it appears that, in most cases, the Adviser assigns a customer's entire account to one Subadviser in lieu of employing an asset allocation process similar to the process employed by WSPMM. See, e.g. UMB, Jeffries. To our knowledge, the Qualivest letter is the only Prior Letter that expressly employs an asset allocation process similar to the process described in this letter. (To our knowledge, other discretionary management services - that apparently have not requested no-action relief - do employ outside consultants in this manner.) We do not believe, however, that this structural difference provides any basis for distinguishing other Prior Letters with respect to determining whether the requisite degree of individualization is present. In fact, our view is that the asset allocation process described herein allows WSPMM to achieve greater "customization" of customer portfolios at the Adviser level. Therefore, if the degree of individualization that is present at the Money Manager level is within the parameters of the degree of individualization that is present at the Subadviser level in other Prior Letters, then there is no meaningful basis for distinguishing Prior Letters on a structural basis. As discussed in subsection "B", we believe that the WSPMM program is within the parameters of Prior Letters with respect to this issue.

¹⁵ Proposed Rule 3a-4 under the 1940 Act exempts certain individualized investment management services from investment company status, notwithstanding that the accounts so managed are discretionary and may receive substantially the same investment advice. S.E.C. Investment Company Act Release No. 11391 (1980) Fed.Sec.L.Rep. (CCH) ¶82, 662 (October 1980) (hereinafter "Release No. 11391"). Although the proposed rule has not been adopted, it has formed the primary basis of the staff's no-action position in Prior Letters.

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B. Continuous Advice.

Proposed Rule 3a-4(a) requires the investment manager to furnish continuous advice as to the investment of funds on the basis of the individual needs of each customer. Neither the proposed rule nor Release 11391 define the term "investment manager" or provide explicit guidance on whether, in the context of the Prior Letters and the proposed Service, the term encompasses Advisers or Subadvisers. Most Prior Letters contemplate that both the Adviser and the Subadviser will take the individual needs of the customer into account in performing their respective functions. With respect to the Subadvisers, this requirement is met by providing Subadvisers with access to individual customer data as a regular part of the program and representing that they will consider such information in making investment decisions. See, e.g. Qualivest; Jeffries.

The fact that customer data is not always made available to each Money Manager in the instant case, however, is not fatal to a finding of individualization. We rely in particular on the UMB letter. In that letter, neither the applicant's request nor the staff's response contained a representation that the Subadviser would have regular access to customer data. In fact, applicant expressly stated that "[a]lthough it is not expected that the [Subadviser] will make an independent determination of each Client's individual needs, the Adviser will determine that the assets which Clients have placed, or will place, in an Account will be invested by a Manager whose investment approach is appropriate for each such Client's financial situation, investment goals and objectives and individual needs." (emphasis added). That letter stated that the Adviser's (i.e. WSPMM's counterpart) recommendation of a Subadviser and the Subadviser's investment approach were based on the individual needs of the customer. The UMB letter implies that each investment decision made by the Subadviser is not necessarily based on the individual needs of each customer, but is based principally on the customer's investment objective. Clearly, the activities performed by WSPMM, as previously described, provide the same degree of individualization at the Subadviser level that is present in the UMB letter. More importantly, it should not matter at what level individualization occurs; only that it does occur.

The UMB letter, as well as each of the Prior Letters cited in footnote 12 above, admits that uniformity of trading may result among customers with similar investment objectives. Similarly, WSPMM customer portfolios may own the same securities selections, but only to the extent that the customers have the same investment

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objectives. WSPMM customer portfolios arguably will vary to a greater extent than customer portfolios in Prior Letters because of WSPMM's asset allocation process and because the Service is not limited to only one (or a limited number) of investment objectives.¹⁶ In accordance with several Prior Letters, customer portfolios will vary based on the customer's right to modify WSPMM's suggested allocation of assets, the customer's right to exclude specified securities, the customer's right to request distributions of dividends and income (rather than reinvestment), the size of the account, partial liquidations, the date the account is opened and market conditions. See, e.g. UMB; Manning. A requirement that Money Managers must recommend different securities to customers with the same investment objective is contrary to common industry practice and could result in a breach of the Money Manager's fiduciary duty to his customer.¹⁷

¹⁶ For example, two customers that open an account with WSPMM on the same day would have substantially similar portfolios only if all of the following events occurred: each customer had identical investment objectives and risk preferences (i.e. each customer achieved an identical score on the Investor Questionnaire), each customer deposited the same amount of cash, neither customer exercised his right to modify the suggested asset allocation of WSPMM and neither customer exercised his right to exclude specified securities. Further, some services offer only a very limited range of investment objectives. See, e.g. Shearson (long-term capital appreciation) and Manning I (three different growth objectives).

¹⁷ "The emphasis on giving different customers different investment advice in order to avoid registration seems exaggerated in view of the way in which many portfolio managers operate . . . Many portfolio managers, even those for large institutions, determine as of a given moment upon the same securities to be recommended to customers having the same objectives. This approach should not be discouraged since in this way each customer gets the best advice which the investment manager has to offer." Securities and Exchange Commission, Advisory Committee on Investment Management Services for Individual Investors, "Small Account Investment Management Services, Recommendations for Clearer Guidelines" (January 18, 1973) at p. 21 (the "Advisory Committee Report").

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C. Customer Contact

Proposed Rule 3a-4(b) requires that a person who is authorized to make investment decisions regarding a customer account: (1) at the opening of the account, and at least annually thereafter, interview the customer regarding the customer's financial situation and individual needs; (2) at least quarterly, attempt to determine whether there has been any change in the customer's financial situation and individual needs; (3) at least quarterly, provide the customer with a statement of account; and (4) during normal business hours, be reasonably available to the customer for consultation regarding the administration of the customer's account and financial situation or investment needs. As previously described, WSPMM will be the primary customer contact and will perform each of the activities listed above. Money Managers generally will not consult with or otherwise have direct contact with customers; however, Money Managers may be provided access to customer data solicited by WSPMM and may be made available to customers on request. The Divisions have previously granted no-action assurance to a program in which the customer's sole contact consisted of a representative of the Adviser and not the Subadviser. See Jeffries. In another Prior Letter, the customer's primary contact consisted of a financial consultant (WSPMM's counterpart); however, portfolio managers would be available upon request. See Shearson. Because WSPMM will play a more active role than Advisers in Prior Letters and customer assets may be apportioned among several Money Managers, WSPMM believes it can provide better customer assistance than the Money Managers.

D. Indicia of Ownership

Proposed Rule 3a-4(c) requires that customers of the investment manager maintain, to the extent reasonable and practicable, every indicia of ownership of funds subject to investment management, including: (1) the right to withdraw, hypothecate, vote or pledge securities; and (2) receipt of a notification of each securities transaction. As previously indicated, customers will have the right to withdraw, hypothecate, vote or pledge securities. Customers will receive a monthly statement of account that details each transaction. The staff has previously given no-action assurance with respect to a discretionary advisory service in which the notification requirement of Rule 3a-4(c) was satisfied by making individual confirmations available upon request, so long as customers received a monthly statement detailing each transaction. See

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Jeffries; Manning and Napier Advisers, Inc. (pub. avail. April 24, 1990).¹⁸

E. Specified Securities

As required by proposed Rule 3a-4(d), WSPMM will refrain from purchasing securities otherwise recommended by the Money Managers if the customer has specifically excluded these securities from its portfolio.

F. Investment Discretion

The fact that WSPMM will retain discretionary trading authority should not alter the above analysis. The purpose of vesting investment discretion in WSPMM is to facilitate WSPMM's monitoring function. Because WSPMM will allocate a customer's assets among several Money Managers, there is a greater need to centralize the brokerage function than in Prior Letters where a customer's account is assigned to a single Subadviser. Since each Money Manager in the Service will not be aware of recommendations of other Money Managers to the same customer, WSPMM serves the important function of coordinating all recommendations for a particular account. This function is clearly not necessary where a customer's account is allocated to a single Subadviser. Furthermore, this centralization of trading authority will not increase uniformity of recommendations because trading recommendations will continue to originate from several independent Money Managers. WSPMM will not have the ability to influence Money Manager recommendations.

II. "Mass Merchandising"

We have also considered whether the proposed Service is within the Commission's area of concern that "large scale solicitations of relatively small accounts" which provide "substantially the same advice to clients can become functionally indistinguishable from an investment company." Investment Company Act Release No. 7423 (October 12, 1972). As discussed above, the Service will not provide substantially the same advice to all customers. The proposed minimum account size of \$100,000, however, comes within the

¹⁸Broker-dealers executing transactions placed by WSPMM are subject to Rule 10b-10 of the 1934 Act. WSPMM, in its capacity as discretionary account manager, would receive such confirmations.

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Advisory Committee's definition of a "small account".¹⁹ Three factors are relevant in determining whether a program involves "large scale solicitations":

1. **Account Size.** Account size is arguably relevant because smaller account sizes are more accessible to the "general public". Other Prior Letters that have involved similar (or smaller) account sizes have received no-action assurance and are not materially distinguishable from the WSPMM program.²⁰
2. **Client Base.** The Service, like other Prior Letters, is offered to wealthy individuals and pension and profit-sharing plans.
3. **Advertising.** The Commission has indicated that active advertising through the mass media may be inconsistent with the rendering of individual advice. See Advisory Committee Report, supra note 17, at pp. 16-19. WSPMM will not use mass marketing tools, but will market the Service to a limited group of qualified potential customers. Solicitors, such as WSIS Institutional Clients, will assist WSPMM in identifying customers that can meet the minimum account requirements and benefit from the Service. WSPMM will not, for example, mail sales literature to every customer of a WSIS Institutional Client or to the public in general. Given the large minimum account requirement, mass solicitations of the Service would, in any event, not be cost justified.

¹⁹ The Advisory Committee defined a small account as an account below \$200,000. See Advisory Committee Report, supra note 17.

²⁰ See Manning I (\$100,000); Morgan-Keegan (\$50,000); and Shearson (\$50,000). The UMB letter stated that minimum account sizes may be imposed; however, the amount was not specified and the staff did not request such information. The Jeffries letter did not specify whether minimum account sizes would be imposed. The Qualivest letter imposed a minimum account size of \$5,000,000. Although the Qualivest service resembles the asset allocation structure of the proposed Service, we do not believe that this factor is relevant to a determination of whether "individualization" is present. See note 14.

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None of the three factors discussed above are present in the WSPMM program to any greater degree than in Prior Letters.

III. Pooling Issues

In previous letters, the Division has raised concerns about pooling of customer assets at the advisory, brokerage, and custodial levels. See, e.g., Balliet, Blackstock & Stearns, Inc. (pub. avail. August 19, 1987) ("Balliet"); Paley & Ganz (pub. avail. December 6, 1982); Qualivest; UMB; and Jeffries. The proposed Service may raise these concerns because it is anticipated that, in most cases, WSPMM's affiliate, WSIS, will act as broker of record and Alex Brown will act as both clearing broker and custodian. The Division has previously approved other arrangements involving directed brokerage or custody, subject to certain conditions and disclosures. See Qualivest; UMB; Manning I and Jeffries.

Alex Brown will meet the four "custodian conditions": (a) the securities in the customer's account would be held in nominee name by the custodian only for ministerial purposes; (b) the custodian will record, and keep track of, on a customer by customer basis, the securities each customer beneficially owns; (c) a customer's beneficial interest in a security will not represent an undivided interest in all the securities legally held by the custodian with respect to such account, but rather will represent a direct and beneficial interest in the securities held in that account; (d) each customer will retain any available rights under the federal securities laws to proceed directly against the issuer of any underlying security in its account and would not, because of participation in the arrangement, be obligated to join WSPMM, Alex Brown, the Money Managers, or any other beneficial owner participating in the Service as a condition precedent to proceeding against any issuer. See, e.g., Qualivest, UMB, Manning I and Jeffries.

Customers may select another broker or custodian. In the event that a customer chooses another custodian, he will be required to represent that he has made arrangements for the custodian to provide monthly statements that satisfy the notification requirements of Rule 3a-4 in the manner described herein and that custody arrangements will satisfy the four conditions listed above. See Qualivest. WSPMM will disclose to customers before they begin using the Service that custodians who usually provide quarterly statements may charge an additional fee for providing statements on a monthly basis. Id. WSPMM will disclose to customers choosing

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another broker that they may forego possible savings due to WSPMM's ability to batch orders and negotiate a volume discount. Alex Brown's investment of cash balances in money market funds will not raise the "fund of funds" issue for the following reasons: the customer will select the money market fund of his choice from a list provided by WSPMM; neither Alex Brown, WSPMM, nor the Money Managers will have discretion with respect to cash balances; and the Service will not otherwise invest in shares of investment companies.²¹ In order to meet the Division's concerns regarding a layering of costs to investors, WSPMM will disclose the existence of any additional fees charged by the money market fund. See, UMB at n. 3; Qualivest at n. 2.

IV. Conflicts

Under Section 206 of the Advisers Act, a potential conflict of interest exists whenever an adviser (or an affiliate) receives transaction-based brokerage fees. See UMB. WSPMM believes that the origination of trading recommendations with an unaffiliated party (the Money Managers will not generally utilize an affiliated broker unless necessary for best execution) mitigates the potential conflict. The Division has not objected to the receipt of transaction-based brokerage in a similar service where trading recommendations originated with a committee within the company rather than an unaffiliated manager. See Morgan-Keegan. Similarly, the UMB letter contemplated the adviser acting as the broker of record as well. WSPMM believes its role as introducing broker will enhance its ability to monitor customer account activity to assure suitability of investments. In addition, WSPMM expects that transactional costs to customers will be less than charges for the same level of brokerage, execution and investment advisory service

²¹ In the Balliet letter, the Division took the position that the use of nominee accounts with certain mutual funds as discretionary investment vehicles raised the possibility of pooling and the functional equivalent of a "fund of funds". Prior letters have discussed the "fund of funds" issue, including concerns under Section 12(d) of the 1940 Act, at length. See UMB, Qualivest. Without necessarily agreeing with the policy arguments presented in those letters, the Division has conditioned previous no-action assurance on the factors listed above. See UMB, n. 3-4 and accompanying text; Qualivest, n. 6-8 and accompanying text; and National Deferred Compensation, Inc. (pub. avail. August 31, 1987).

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available outside the Service, because of this centralization of functions. In any event, the staff has always taken the position that it expresses no opinion on whether the arrangement satisfies the duty of best execution. See, e.g., UMB, Jeffries and Morgan-Keegan. Nevertheless, each customer will receive written disclosures regarding the potential for adverse interest and conflicts of interest, and will have consented to such arrangement before WSIS will effect any transactions for the account.

WSIS will effect all brokerage transactions in accordance with applicable law, including its fiduciary obligation to obtain best execution and its obligation to make certain disclosures. In addition, WSPMM recognizes that trades effected by its affiliate WSIS, a member of the NYSE, will be subject to §11(a) of the 1934 Act and regulations promulgated thereunder and WSIS will take all necessary steps to comply with those requirements.

V. 1934 Act Issues

In our view, the manner in which Solicitors and their employees (other than dual employees of WSIS and a WSIS Institutional Client who are registered representatives of WSIS) perform limited clerical and ministerial functions relative to the Service does not require registration of either the Solicitor or any such employee as a "broker" under Section 15 of the 1934 Act.²² Section 3(a)(4) of the 1934 Act defines "broker" as a person "engaged in the business of effecting transactions in securities for the account of others."

²²Neither the Solicitors nor their employees are "dealers" within the meaning of Section 3(a)(5) of the 1934 Act as a result of their functions relative to the Service, which do not involve buying or selling securities for their own account. Solicitors that are "banks" within the meaning of Section 3(a)(6) of the 1934 Act are, of course, expressly excluded from the definition of "broker" in Section 3(a)(4) of the 1934 Act. The analysis herein as to Solicitors therefore applies only to those that are not banks.

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The definitional phrase "engaged in the business" indicates a "regularity of participation in purchasing and selling securities."²³ To be a broker, the business engaged in must involve effecting transactions in securities.²⁴ A key element in determining whether a person is a broker is commission compensation demonstrating success in effecting securities transactions for the account of others.²⁵ In the situation where one party is only a "finder" for a broker-dealer, such as the Solicitors in the present case, the finder is clearly not a broker-dealer when the finder does not effect transactions but merely brings together a buyer and seller (i.e. through a referral), even though the finder may induce the purchase and sale of securities.²⁶

The staff has previously considered the issue of whether a solicitor that receives a referral fee pursuant to Rule 206(4)-3 of the Advisers Act must register as a broker under Section 15 of the

²³ VI L. Loss and J. Seligman, Securities Regulation 2980 (1990) (emphasis supplied) (hereinafter "Loss"); citing SEC v. National Executive Planners, Ltd., 503 F.Supp. 1066, 1073 (M.D.N.C. 1980); Massachusetts Fin. Serv., Inc. v. Securities Investor Protection Corp., 411 F.Supp. 411, 415 (D. Mass. 1976). See also 15 D. Lipton, Broker-Dealer Regulation §1.04, at 1-16 and note 1 (1991) (hereinafter "Lipton").

²⁴ Christian Bonds, Inc., SEC No-Action Letter (avail. Aug. 27, 1971) (business assisting churches in organizing programs to sell bonds but not participating in selling efforts was not required to register as a broker-dealer).

²⁵ 15 Lipton, supra note 23, §1.04, at 1-20.1.

²⁶ VI Loss, supra note 23, at 3004. See Colonial Equities Corporation (pub. avail. June 28, 1980) ("Colonial"). In the Colonial letter, insurance agencies and their employees identified prospective investors, gathered financial information and introduced or referred them to a broker-dealer selling interests in real estate limited partnerships. The agency received a "screening fee" for each referral and, when the broker-dealer decided to pursue the referral through a meeting with the prospective investor, it paid the insurance agency an additional "introduction fee"; however, no compensation was based on net brokerage commissions generated from any resulting sales.

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1934 Act.²⁷ In the Redmond letter, the staff granted no-action assurance with respect to an arrangement in which certain tax preparers and accountants referred clients to a registered investment adviser. The investment adviser paid the tax preparers a one-time referral fee that varied based on the size of the customer's account. The Redmond letter emphasized two factors: (i) the limited activities of the solicitors; and (ii) a referral fee that was unrelated to the amount of commissions or compensation received by the broker.

As described herein, the role of Solicitors in the Service will only involve referring customers to WSPMM for investment management services in accordance with Rule 206(4)-3. Once the referral is made, the Solicitors will have little or no continuing contact with customers relating to the Service. Any subsequent transactions in securities will be effected only after a customer is accepted by WSPMM and the customer's account is allocated to the Money Managers. Any subsequent securities transactions will be effected on behalf of the customer through WSIS or another broker without consultation with or other involvement by the Solicitor or its employees (including dual employees). While the Solicitors are arguably linked to a process that may lead to securities transactions, the staff's position in the Redmond letter clearly indicates that greater involvement in the process is required in order to meet the "effecting transactions" requirement.

Further, commission compensation, an essential element of being "engaged in the business" of a broker, is not present in the Service's fee structure. See Redmond, Colonial. The Solicitors' compensation is not based on brokerage commissions earned from customers' accounts but on assets under management. The fee will not be affected by the volume or frequency of securities transactions if any. WSPMM will pay no compensation to Solicitors or their employees relating to execution of securities transactions. In fact, the Solicitor will receive no economic benefit from any securities transactions for a customer through the Service.²⁸

²⁷Redmond Associates, Incorporated (pub. avail. January 12, 1985) ("Redmond").

²⁸In the event the investment advice given to all customers referred to the WSPMM Service by the Solicitor is implemented and the resulting investments or transactions are successful so that the Solicitor's customers' aggregate assets under management

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Given the limited nature of the activities of the Solicitors and their employees (other than dual employees of a WSIS Institutional Client) and the lack of transaction or commission related compensation, our view is that neither the Solicitors nor their employees must register as a broker under the 1934 Act. Additionally, such employees will not be an "associated person" of a broker within the meaning of Section 3(a)(18) of the 1934 Act as a result of their functions relating to the Service. Employees will not be employed by or controlled by a broker and will not receive any direct or indirect compensation from a broker. Both of these elements must be present in order to find that a person is "engaged in the business of effecting transactions in securities". Solicitors will be subject to the Advisers Act to the extent that they are "persons associated with an investment adviser" and the arrangement must comply with Rule 206(4)-3 of the Advisers Act. Therefore, regulation under both the Advisers Act and the 1934 Act would be duplicative.

CONCLUSION

Based on the foregoing, our view is that the accounts described above should not be deemed to establish an investment company under the 1940 Act, or to create a security, the offering of which must be registered or exempted under the 1933 Act. We therefore request confirmation that the Division of Investment Management would not recommend any enforcement action if the accounts are offered as described herein without registration under the 1940 Act. A copy of this letter is being furnished concurrently to the Division of Corporate Finance and a no-action position is requested from that Division to the effect that the accounts and the services provided in connection with the accounts may be offered without registration under the 1933 Act.

The Service has been structured so as to comply with our understanding of applicable laws, regulations and staff interpretations. Since the Service is a material component of the business of WSPMM (and not just a contemplated sideline), an adverse deter-

through the Service increase, the Solicitor's referral fees (based on assets under management for customers referred) could, of course, be higher. Such account growth may, however, reflect factors other than transactional activity such as appreciation of securities that are held, general economic conditions and market trends.

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mination with respect to this request would have a calamitous effect on WSPMM. We therefore request an opportunity to discuss this matter further with the staff in the event an adverse determination is contemplated, so that we may consider whether any modifications to the Service are appropriate to enable it to operate in conformity with reasonable staff requirements. In view of the amount of time that has elapsed since our original request, WSPMM is understandably anxious for an expeditious, as well as favorable, resolution. We are available to meet with the staff in Washington or by telephone to finalize this matter. Please telephone the undersigned or Mr. John F. Marvin at 816/842-3132 with any questions regarding this request.

Very truly yours,

WATSON, ESS, MARSHALL & ENGGAS

By 
Deborah E. Bielicke

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