[Pub. Avail.: Feb. 8, 1993]

Our Ref. No. 93-55-CC
Dean Witter, Discover & Co.
File No. 132-3

RESPONSE OF THE OFFICE OF CHIEF COUNSEL
DIVISION OF INVESTMENT MANAGEMENT

Your letters of February 2 and 8, 1993, ask us to concur in your opinion that certain transactions involving Sears, Roebuck & Co. ("Sears") and its wholly owned subsidiary, Dean Witter, Discover & Co. ("DWD"), will not result in an assignment of advisory contracts for purposes of Sections 2(a)(4), 15(a) or 15(f) of the Investment Company Act of 1940 (the "1940 Act"), or Sections 202(a)(1) or 205(a)(2) of the Investment Advisers Act of 1940 (the "Advisers Act").

DWD wholly owns Dean Witter Reynolds, Inc. ("DWR") which, in turn, wholly owns Dean Witter Intercapital, Inc. ("Intercapital"). DWR and Intercapital are registered under the Advisers Act. DWR is an investment adviser to certain non-investment company clients. Intercapital is an investment adviser to a number of registered investment companies (the "Funds"), as well as to individuals and other institutions. In September 1992, Sears announced plans to (1) publicly offer up to 20% of DWD common stock (the "IPO"), and (2) spin off the remaining 80% of DWD common stock to Sears shareholders (the "Spin-off"). As a result, DWD will become a publicly held company, owned principally by Sears shareholders, the same shareholders who already own DWD indirectly.

You state that neither the IPO nor the Spin-off will result in any change in the personnel responsible for the management or operations of DWR or Intercapital. You also state that Sears has never exercised control over the actual management or policies of Intercapital or DWR with respect to the Funds or other advisory clients. 1/

The 1940 Act and the Advisers Act contain similar provisions regarding the assignment of advisory contracts. Section 15(a)(4) of the 1940 Act generally states that an advisory contract with a registered investment company must provide for the contract's automatic termination in the event of its assignment. If the advisory contract is terminated, a majority of the investment company's shareholders must approve a new contract. Similarly, Section 205(a)(2) of the Advisers Act generally provides that an advisory contract may not be assigned without the client's

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1/ Sears principally has been a source of capital for DWD, and the two companies have shared certain services, such as computer facilities.

consent. Section 15(a)(4) and Section 205(a)(2) were designed to prevent trafficking of investment advisory contracts. 2/

Section 2(a)(4) of the 1940 Act and Section 202(a)(1) of the Advisers Act define the term "assignment" to include any direct or indirect transfer of a "controlling" block of the assignor's outstanding voting securities by a securityholder of the assignor. The staff has interpreted the term "assignment" in the same manner for purposes of both Acts. 3/

Section 2(a)(9) of the 1940 Act and Section 202(a)(12) of the Advisers Act define "control" as the ability to exercise a controlling influence over the management or policies of a company. Section 2(a)(9) creates a presumption of control if a person owns more than 25% of a company's voting securities. It also creates a presumption of non-control if a person owns less than 25% of a company's voting securities. 4/

The IPO will result in the sale of, at most, 20% of the DWD common stock, and therefore will not be presumed to involve the transfer of a controlling block of stock. Further, you represent that the IPO will be widely dispersed. The agreement among underwriters syndicate wire and the underwriting agreements for the IPO provide that no single investor may purchase more than 10% of the offering. As a result, no investor may purchase more than 2% of DWD stock through the IPO. Accordingly, we concur with your view that the IPO will not cause an assignment of advisory contracts as defined in Sections 2(a)(4) and 202(a)(1). Therefore, the IPO will not trigger the requirements of Section 15(a)(4) of the 1940 Act or Section 205(a)(2) of the Advisers Act. 5/

2/ Hearings on S. 3580 before a Subcommittee of the Senate Committee on Banking and Currency, 76th Cong., 3d Sess. 253 (1940) (statement of David Schenker); Investment Company Act and Investment Advisers Act of 1940, S. Rep. No. 1775, 76th Cong., 3d Sess. 22 (1940).

3/ See Investment Advisers Act Rel. No. 1034 (Sept. 11, 1986) (adopting Rule 202(a)(1)-1)(where the Commission noted the staff's consistent interpretation of "assignment" under the Acts).

4/ The Advisers Act does not contain an analogous provision.

5/ See Finomic Investment Fund, Inc. (pub. avail. Nov. 13, 1973)(transfer of less than 25% of stock of adviser's parent did not constitute the transfer of a controlling interest and therefore did not cause an assignment).

Nor do we believe that the Spin-off of 80% of DWD stock will cause an assignment of advisory contracts as defined in Sections 2(a)(4) or 202(a)(1). The same persons who currently own DWD common stock indirectly through Sears will own the stock directly after the Spin-off. Thus, there will be no transfer of a controlling block of securities. 6/ Accordingly, we concur with your conclusion that the Spin-off will not trigger the requirements of Sections 15(a)(4) or 205(a)(2).

You have also asked whether the IPO or the Spin-off will cause an assignment for purposes of Section 15(f) of the 1940 Act. Section 15(f) generally permits an investment adviser to a registered investment company, or an affiliated person of the adviser, to receive a benefit in connection with a sale of securities of, or other interest in, the adviser that results in an assignment of an investment advisory contract, if certain conditions are met. Because neither the IPO nor the Spin-off will cause an assignment as that term is defined in Section 2(a)(4), we concur with your view that the transactions will not trigger the requirements of Section 15(f).

Our view that the IPO and the Spin-off will not cause an assignment of any advisory contracts arises from the particular facts and representations in your letters and should not be interpreted as a general statement that these types of transactions do not result in an "assignment" under the 1940 Act or the Advisers Act. Finally, because the determination of what constitutes an assignment involves a factual inquiry that is difficult to address in the context of no-action and interpretive letters, the staff continues to adhere to its policy of not responding to letters in this area unless they raise novel or unusual issues.

Lawrence P. Stadulis

Lawrence P. Stadulis
Special Counsel

6/ See Funds, Inc. (pub. avail. Apr. 21, 1972) (proportionate distribution of the adviser subsidiary's stock to the shareholders of the parent did not constitute a transfer of control).

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Investment Company Act of 1940
Section 2(a)(4)
Section 15(a)
Section 15(f)
Investment Advisers Act of 1940
Section 202(a)(1)
Section 205(a)(2)

February 2, 1993

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

Ladies and Gentlemen:

We are writing on behalf of Dean Witter, Discover & Co. ("DWD"), Dean Witter Reynolds Inc. ("DWR"), Dean Witter InterCapital Inc. ("InterCapital") and Sears, Roebuck and Co. ("Sears") to request that the staff of the Division of Investment Management (the "Division") of the Securities and Exchange Commission (the "Commission") confirm that Sections 15(a) and 15(f) of the Investment Company Act of 1940 (the "Investment Company Act"), and Section 205(a)(2) of the Investment Advisers Act of 1940 (the "Advisers Act"), are not, by operation of the

term "assignment" as defined in Section 2(a)(4) of the Investment Company Act and Section 202(a)(1) of the Advisers Act, respectively, appropriately interpreted so as to apply to the transactions described herein.

I. FACTS

DWR is one of the largest registered broker-dealers in the United States, servicing both individual and institutional accounts. InterCapital, a wholly-owned subsidiary of DWR, acts as investment adviser or sub-adviser to over 50 investment companies (collectively, the "Funds") registered under the Investment Company Act, including both Funds sponsored by Dean Witter (the "Dean Witter Funds") and Funds sponsored by others.[1] In addition, DWR and InterCapital each render investment advisory services to institutional and individual clients and to employee benefit plans and endowment funds ("non-Fund advisory clients").

Sears, a publicly traded New York corporation, originated from an enterprise established in 1886. The principal business groups of Sears and its consolidated subsidiaries are: (1) Sears Merchandise Group, which is among the largest retailers in the world, on the basis of sales of merchandise and services, (2) Allstate Insurance Group ("Allstate"), which includes property-liability insurance and life insurance, (3) Coldwell Banker Real Estate Group ("Coldwell Banker"), which invests in,

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[1] Another subsidiary of DWR, Dean Witter Distributors Inc., acts as a distributor of numerous mutual funds, including the Funds.

develops and manages real estate, performs residential real estate brokerage and related services, and engages in the formation and sale of mortgage-related securities and mortgage banking, and (4) DWD, the direct parent company of DWR.

DWD, a wholly-owned subsidiary of Sears, was acquired by Sears in a two step transaction completed on December 31, 1981. As the sole shareholder, Sears controls DWD by, among other things, providing financing for certain of DWD's business operations, reviewing and approving business plans and compensation plans and exercising ultimate control over the business activities of DWD through its power to elect and remove any or all of DWD's directors. In light of the above, Sears has direct control of its subsidiary, DWD.

On September 29, 1992, Sears announced plans to sell, through a primary initial public offering, up to 20% of the shares of Common Stock of DWD to the public. A registration statement on Form S-1 with respect to such offering was filed with the Commission on December 21, 1992. It is anticipated that the sale will be followed by a spin-off of the remaining 80% of DWD shares to Sears shareholders. (The proposed public offering is herein referred to as the "IPO" and the subsequent spin-off is herein referred to as the "Spin-Off"). As a result, DWD will become a publicly-owned company. Sears also plans to sell certain of its Coldwell Banker holdings and, through a primary

initial public offering, to offer publicly a 20% stake in Allstate.

The proposed transactions will result in no change in actual management or control of DWR or InterCapital, or in either the operations of the Funds or the provision of investment advice to non-Fund advisory clients. Most important, 80% of the shares of DWD will be spun off to Sears shareholders, the same persons who now own them indirectly through their ownership of Sears. The transactions will not result in any change in the way in which the Funds are managed or operated, or in the personnel of InterCapital who are charged with performing such management or operational functions. Similarly, the proposed transactions will not result in any change in the advisory personnel of DWR or InterCapital who render investment advice to non-Fund advisory clients. In addition, each of the directors of DWR and InterCapital already hold positions as directors or officers of DWD.[2]

It is also important that at no previous time did Sears exercise control over the actual management or policies of

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[2] Sears and DWD have agreed that, during the period from the closing date of the IPO to the effective date of the Spin-Off, Sears will designate five of DWD's six directors, the remaining director to be DWD's Chief Executive Officer. After the Spin-Off, it is expected that a majority of DWD's board of directors will consist of directors not designated by Sears. The proposed changes in DWD's board of directors are not intended to affect in any way the operations of the Funds or the provision of investment advice to non-Fund advisory clients of DWR or InterCapital.

InterCapital with respect to the Funds or of either DWR or InterCapital with respect to non-Fund advisory clients. The relationship with Sears has yielded primarily two types of benefits to DWD as a wholly-owned subsidiary of Sears. Sears has been a source of capital to DWD, often through the use of the borrowing power of Sears. In addition, Sears has shared certain types of services, e.g. computer facilities, with DWD. Subsequent to the Spin-Off, DWD will have to arrange for its own financing and will have to pay for shared services or make other arrangements. It is anticipated that DWD will be able to arrange for any needed financing, including financing related to distribution payments pursuant to Rule 12b-1 under the Investment Company Act, on satisfactory terms. Similarly, DWD should not find itself unable to obtain any desired services. Thus, it is not expected that the potential end of the Sears role will affect materially the ability of InterCapital to perform its duties on behalf of the Funds in the same manner it is now doing, nor will the termination of the Sears affiliation affect materially the ability of DWR or InterCapital to render investment advice to non-Fund advisory clients.

II. LEGAL ANALYSIS

As noted above, we are making the instant request under Sections 202(a)(1) and 205(a)(2) of the Advisers Act, as well as Sections 2(a)(4), 15(a) and 15(f) of the Investment Company Act. Our discussion below, however, focuses primarily on the

Investment Company Act provisions as they are, in substance and purpose, virtually the same as the relevant Advisers Act provisions. The Division has previously indicated that the term "assignment" should generally be interpreted in the same way under both statutes. See Spears, Benzak, Salman & Farrell, Inc. (pub. avail. January 21, 1986); Templeton Investment Counsel Ltd. (pub. avail. January 22, 1986). Compare Rule 202(a)(1)-1 under the Advisers Act with Rule 2a-6 under the Investment Company Act (Rules 202(a)(1)-1 and 2a-6 define an assignment in substantially the same fashion).

A. Section 15(a)

Section 15(a) of the Investment Company Act provides, in pertinent part, that:

> It shall be unlawful for any person to serve or act as investment adviser of a registered investment company, except pursuant to a written contract, which contract, whether with such registered company or with an investment adviser of such registered company, has been approved by the vote of a majority of the outstanding voting securities of such registered company, and --
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> * * * *
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> (4) Provides, in substance, for its automatic termination in the event of its assignment.

The purpose of Section 15(a) is to prevent "trafficking" in investment advisory contracts, i.e., the sale of the adviser's fiduciary office to another person or persons. As described by David Schenker, counsel to the Commission's Investment Trust

Study, in his statement on S.3580, the Senate's original version of the legislation that became the Investment Company Act:

> Let me discuss [Section 15(a)(4)] at this point. . . . Here you have a situation where a person assumes a fiduciary obligation; he is the manager of other people's money. If he is through with the job, he ought to go home. However, instead of that they take these 10-year contracts which they have the right to assign to someone else.
>
> This provision says that the management contract is personal, that it cannot be assigned, and that you cannot turn over the management of other people's money to someone else.

See *Investment Trusts and Investment Companies: Hearings on S.3580 before a Subcomm. of the Senate Comm. on Banking and Currency,* 76th Cong. 3d Sess. 253 (1939) (statement of David Schenker)(emphasis added).

That theme was echoed by the General Counsel of the Commission, in an opinion rendered shortly after the passage of the Investment Company Act:

> The legislative history of Section 15 manifests a clear Congressional intention to prevent all trafficking in investment advisory contracts and to prevent an investment adviser from transferring his fiduciary obligations by turning over the management of the stockholders' money to a different person. That intention is effectuated by the requirement in Section 15(a) that every investment advisory contract made after March 15, 1940, must provide for its automatic termination upon assignment. . . .

See Investment Company Act Release No. 354 (1942).[3] Thus,

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[3] The opinion itself held that the sale of an investment advisory contract for profit would constitute a gross abuse of trust, notwithstanding that the new advisory arrangements were to be approved both by stockholders and directors. Such an abuse was deemed to exist regardless of the form of the sale, including the transfer of a controlling block of (continued...)

Section 15(a)(4) furthers the more general Congressional finding set forth in Section 1(b)(6) of the Act, which declares it against the public interest ". . . when the control or management [of investment companies] is transferred without the consent of their security holders."

If either the IPO or the Spin-Off were deemed to be an assignment within the meaning of Section 15(a), the consequences would be dramatic. The existing investment advisory and sub-advisory agreements with respect to the Funds would be deemed to have terminated upon such assignment, and the continued receipt of advisory compensation by InterCapital would be jeopardized unless "new" contracts were approved by Fund shareholders prior to the transaction.[4] That is, the advisory function performed subsequent to the transaction would be considered as being

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[3](...continued)
the adviser's securities. As discussed below, Section 15(f), adopted in 1975, clarifies that such a sale is permissible, under certain conditions.

[4] Section 47 of the Investment Company Act provides that "any contract that is made, or whose performance involves, a violation of the [Investment Company Act] is unenforceable by either party . . . unless a court finds that under the circumstances enforcement would produce a more equitable result . . . .". Similarly, absent the approval of non-Fund advisory clients, the existence of an assignment would terminate the advisory agreements of DWR and InterCapital with respect to such clients under Section 205(a)(2) of the Advisers Act.

performed under a "new" contract which, under Section 15(a), must be approved initially by shareholders.[5]

We do not believe, however, that either the IPO or the Spin-Off results in an assignment as that term is defined in the Investment Company Act. Section 2(a)(4) of the Investment Company Act includes as an assignment, among other things, "any direct or indirect transfer... of a controlling block of the assignor's outstanding voting securities by a security holder of the assignor...."[6] Section 2(a)(9) creates a presumption that such control lies in any person owning beneficially, directly or through one or more controlled companies, more than 25% of the voting securities of an issuer, and a negative presumption for

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[5] While the Dean Witter Funds do not believe that either transaction results in an assignment, the "new" advisory arrangements with InterCapital have been approved by their directors or trustees and have been submitted by such directors or trustees to a vote of shareholders. The shareholders of the Dean Witter Funds approved the advisory arrangements at meetings of shareholders held on January 12, 1993, and January 13, 1993. Resolution of the issue of assignment is, however, important with respect to InterCapital's sub-advisory arrangements (where shareholder approval of the new arrangements is not being sought) and to the applicability of Section 15(f) of the Investment Company Act, described below.

[6] Section 202(a)(1) of the Advisers Act, in pertinent part, contains a substantially identical definition.

amounts of 25% or less.[7] Either presumption may be rebutted by an order of the Commission.

In addition, Rule 2a-6 under the Investment Company Act, among other things, provides that a transaction which does not result in a change of actual control or management of an investment adviser should not be deemed an assignment.[8] The Rule was meant to exclude from the definition of an assignment situations where, particularly because of a modification of corporate structure, there may be deemed to be a transfer of a controlling block of the adviser's stock, but where the transfer does not affect actual control or management of the adviser. See Investment Company Act Release No. 10809 (August 6, 1979) (proposing Rule 2a-6). It is our view that neither of the

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[7] Specifically, Section 2(a)(9) provides:

> (9) "Control" means the power the exercise a controlling influence over the management or policies of a company, unless such power is solely the result of an official position with such company.
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> Any person who owns beneficially, either directly or through one or more controlled companies, more than 25% per centum of the voting securities of a company shall be presumed to control such company. Any person who does not so own more than 25 per centum of the voting securities of any company shall be presumed not to control such company. A natural person shall be presumed not to be a controlled person within the meaning of this title. Any such presumption may be rebutted by evidence, but except as hereinafter provided, shall continue until a determination to the contrary made by the Commission by order either on its own motion or on application by an interested person. . . .

[8] Rule 202(a)(1)-1 under the Advisers Act contains a similar provision.

proposed transactions constitutes an assignment under these provisions.

The IPO. The IPO is proposed to consist only of 20% of the stock of DWD and, consequently, is presumed under the language of Section 2(a)(9) not to constitute a transfer of control. See also Wilheim v. Murchison, 342 F.2d 33, 39 (2d Cir. 1965), cert. denied, 382 U.S. 840 (1966). That presumption is further supported by the expectation that the offering will be widely dispersed. In addition, the Division has previously taken "no-action" positions regarding the issue of assignment even where greater than 25% of the adviser's securities were offered to the public, provided that the previous owner or owners remained in actual control of the adviser. See Templeton Investment Counsel Ltd. (pub. avail. January 22, 1986) (a public offering of 33-1/3%); Central Corporate Reports Service, Inc. (pub. avail. March 9, 1981) (subsequent to a public offering, the largest shareholder retained 49.9%).[9] In addition, in a going private transaction, the converse of the present situation, the Division found no assignment where only 24% of the shares were publicly held. See Wellington Management Co. (pub. avail. November 29,

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[9] The Division's response in Central Corporate Reports Service, Inc. was issued under Section 205(a)(2) of the Investment Advisers Act of 1940, which parallels Section 15(a)(4). Similarly, the absence of a presumption in the Advisers Act like that contained in Section 2(a)(9) does not cause the IPO to result in assignment for purposes of the Advisers Act; the determinative fact is that the IPO results in no change of control of DWR or InterCapital.

1979). As discussed more fully above and in connection with the Spin-Off below, there will be no actual change in control as a result of the transactions.

The Spin-Off. The Spin-Off, while comprising 80% of the stock of DWD, should be viewed as not constituting an assignment for two reasons. First, while there appear to be no definitive Commission or Division positions on the issue, we believe that no assignment may be deemed to occur under Section 15(a) of the Investment Company Act (or Section 205(a)(2) of the Advisers Act) unless (1) there is a transfer of control to another person or persons and (2) such person(s) may be viewed as having obtained the control so transferred. Neither of those elements will be present in the Spin-Off. As described in greater detail below in connection with Rule 2a-6, there will be no transfer of control since the net result of the Spin-Off will be merely that persons owning shares of DWD indirectly through Sears will hold such shares directly. In addition, the change in the form of ownership of DWD will not constitute a change in control as there will be no person receiving such control. Second, the Spin-Off should be viewed as falling within the provisions of Rule 2a-6 under the Investment Company Act (and Rule 202(a)(1)-1 under the Advisers Act), discussed above; the Spin-Off will not result in a change of actual control or management of InterCapital, with respect to Fund advisory activities (or of DWR or InterCapital, with respect to non-Fund advisory clients).

The need to have a recipient of control (i.e., a recipient of more than a 25% interest in the adviser) for there to be an assignment seems apparent from the language of the statute, as well as from legislative history and purposes of Section 15(a). Section 15(a), by its terms, provides for the termination of an advisory contract only in the event of an assignment which, by reference to Section 2(a)(4), requires that there be a transfer of control. Thus, the Section requires that there be an assignee or transferee for there to be a termination. Where there is no recipient of control, there is no such party. In addition, as indicated above, the Section clearly was designed to prevent the transfer of the advisory relationship to another party without shareholder approval, such as might occur upon the sale of a controlling block of the adviser's securities to that other party. It is not expected that the Spin-Off would result in any person owning beneficially greater than 25% of the voting securities of DWD. The DWD shares will be distributed to Sears shareholders, and there are no present holders of Sears securities who, upon such distribution, are expected to own in excess of 25% of DWD stock. Thus, the Spin-Off, as an interpretative matter, should not be viewed as a transfer of control under Section 15(a).

To our knowledge, neither the Commission nor the Division has interpreted Section 15(a), or the definition of an assignment as used therein, expressly in the manner set forth above. As

stated below, however, in at least one letter, the Commission staff apparently recognized that, to have an assignment, there must be a new person or persons receiving control. See Funds, Inc. (pub. avail. April 21, 1972).[10] In addition, at least one court apparently has recognized that a dispersal of ownership of a previous control block does not constitute a transfer of control; the court found persuasive the absence of a transferee obtaining control. See Herzog v. Russell, 483 F. Supp. 1346, 1356 (E.D.N.Y. 1979) in which the court stated:

> Even if the public offering [of 19% of the stock of Franklin Resources Inc. ("Resources"), an investment adviser to a registered investment company] is integrated with the private placements to constitute a single transfer of more than 33% of the stock of Resources, this would still not be sufficient to constitute a sale of control. No single individual or related group of individuals received anywhere near 25% of the stock of Resources as a result of these transactions, and thus none could be said to have received control under §2(a)(9) of the Act."

On the other hand, certain previous letters of the Division in response to requests for no-action advice, while not directly on point, have contained language which appears inconsistent with such a construction of the statute. In Finomic Investment Fund Inc. and Investment Advisors Inc. (pub. avail. November 19, 1973) ("Finomic") and Lowry Management Corp. (pub. avail. February 20, 1984), quoting Finomic in the context of an assignment issue under the Advisers Act, the Division stated, without further analysis, that "the assignment definition sections do not require

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[10] See note 12 infra and accompanying text.

that the controlling block be transferred to any one person, merely that it leave the hands of a security holder." (emphasis added).

Even if the Division does not agree that there can be no assignment without a recipient of control, the Spin-Off should be deemed outside the purview of Sections 15(a) and 2(a)(4) both by appropriate construction of the Sections and by virtue of Rule 2a-6, discussed above. Rule 2a-6 is a definitional rule under the Investment Company Act, not solely an exemptive rule.[11] Thus, if a transfer in excess of 25% of the securities of an issuer does not result in a change of actual control or management of the investment adviser, the transfer is, by definition, deemed not to be an assignment for purposes of Section 15(a). The Spin-Off is just such a transfer and, accordingly, should be viewed by the Division as an interpretative matter to be outside the definition of an assignment.

The absence of a change in control by reason of the Spin-Off is apparent. In the first place, the Spin-Off will result in the stock of DWD being distributed to the shareholders of Sears, the

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[11] Rule 2a-6 was adopted under Section 38(a) of the Investment Company Act, which gives the Commission the authority to define technical terms contained in the Investment Company Act, as well as Section 6(c), which permits general exemptive rulemaking. In contrast, Rule 15a-4 under the Investment Company Act, which was proposed and adopted together with Rule 2a-6, was promulgated solely under Section 6(c). See Investment Company Act Release No. 11005 (January 2, 1980) (release adopting Rules 2a-6 and 15a-4.)

same persons who immediately prior to the Spin-Off will be in ultimate control of DWD; since DWD is a wholly-owned subsidiary of Sears, Sears shareholders are appropriately viewed as already controlling DWD indirectly. No change of control will be created by the fact that Sears shareholders will own directly what they now own indirectly. Thus, there is no transfer of the type which should be viewed by operation of Section 2(a)(4) as an assignment under Section 15(a). The Commission staff acknowledged, in effect, this very argument by counsel in a virtually identical situation in its response to a no-action request in Funds, Inc. (pub. avail. April 21, 1972).[12] That response alluded to the arguments of counsel, stating that:

> As I understand the facts as now presented, the shares of Funds [the investment adviser's parent], a wholly owned subsidiary of Lincoln, would be distributed by Lincoln to its shareholders in proportion to their current shareholdings. As expressed in your letter of January 19, 1972, this spin off of Funds' shares would be effected as a part of a reorganization to be affected between Lincoln and Illinois Central Industries, Inc. As such, the shares of Funds would be owned by the same persons who now indirectly own them through their share ownership of Lincoln. Investment Advisory [the investment adviser] would still be wholly owned by Funds, and the personnel of both Funds and Investment Advisory would remain substantially the same, particularly with respect to the research and analyst staffs.

But Cf. Babson Organization, Inc. (pub. avail. April 26, 1973) (the Division declined to take a no-action position with respect

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[12] Funds, Inc., which was issued prior to the adoption of Rule 2a-6, dealt with Sections 202(a)(1) and 205(a)(2) of the Advisers Act which, as noted earlier, are analogs of Sections 2(a)(4) and 15(a)(4).

to the transfer of an investment adviser's securities to the holders of certificates of a voting trust with respect to such securities).

There also is no change in actual management or control from the viewpoint of the operations of the Funds or InterCapital. As noted above, the Spin-Off will not result in any change in the way in which the Funds are managed or operated, or in the personnel of InterCapital who are charged with performing such management or operational functions. (Similarly, the Spin-Off will not affect the advisory operations or personnel of DWR or InterCapital related to non-Fund advisory clients.)

In addition, the fact that DWD will become a publicly owned company rather than a wholly-owned subsidiary of Sears will not impact DWD in any other way that may be viewed as an actual change of control, let alone a trafficking, of InterCapital advisory or sub-advisory contracts with respect to the Funds. As previously discussed, Sears has never directly exercised actual control over the management or policies of InterCapital generally, or with respect to the Funds (nor has such control been exercised with respect to non-Fund advisory clients of DWR or InterCapital). Sears has yielded primarily two types of benefits to DWD as a wholly-owned subsidiary of Sears. Sears has been a source of capital to DWD and has shared certain types of services with DWD. It is anticipated that subsequent to the Spin-Off, DWD will be fully able to arrange for its own financing

(including financing of Rule 12b-1 expenses) and either to pay for shared services or make other arrangements. Moreover, any change in the financing activities of DWD should not change materially the ability of InterCapital (or DWR) to perform its advisory duties in the same manner it is now doing.

In sum, there is nothing inherent in the Spin-Off that violates the spirit of Section 15(a)(4) or Rule 2a-6. That DWD and InterCapital (as well as DWR) will be essentially the same entities as they are now negates any inference that there has been a transfer of control.

B. Section 15(f)

Section 15(f), in effect, sets forth the circumstances under which an investment adviser to a registered investment company, or affiliated person of such an adviser, may receive a benefit in connection with a sale of securities of, or other interest in, the adviser which results in an assignment of an investment advisory contract. Specifically, Section 15(f)(1) provides:

> An investment adviser . . . of a registered investment company or an affiliated person of such investment adviser . . . may receive any amount or benefit in connection with a sale of securities of, or a sale of any other interest in, such investment adviser . . . which results in an assignment of an investment advisory contract with such company if--
>
> (A) For a period of three years after the time of such action, at least 75 per centum of the members of the board of directors of such registered company . . . (or successor thereto, by reorganization or otherwise) are not (i) interested persons of the investment adviser of

> such company . . . or (ii) interested persons of the predecessor investment adviser . . .; and
>
> (B) There is not imposed an unfair burden on such company as a result of such transactions or any express or implied terms, conditions, or understandings applicable thereto.

Section 2(a)(3) of the Investment Company Act, in effect, includes as an affiliated person of the investment adviser any person directly or indirectly controlling, controlled by, or under common control with the adviser. See Section 2(a)(3)(C). Thus, Section 15(f) would encompass any benefit received by Sears or DWD in connection with any assignment of the advisory or sub-advisory contracts of InterCapital, which is controlled by Sears and DWD.

Section 15(f) was adopted as part of the Securities Acts Amendments of 1975, 89 Stat. 166, P.L. 94-29, (June 4, 1975) to resolve the uncertainty surrounding the circumstances under which an investment adviser to an investment company may receive any profit upon the transfer of its business.[13] See H.R. Rep. No. 123, 94th Cong., 1st Sess. 90 (1975); S. Rep. No. 75, 94th Cong., 1st Sess. 71 (1975) (the "Senate Report"). The conditions of Section 15(f)(1) generally are designed to prevent any unfair

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[13] The uncertainty that Congress sought to address was a result of certain prior decisions, particularly, Rosenfeld v. Black, 445 F.2d 1337 (2d Cir. 1971). While Section 15(f) may be categorized theoretically as a safe harbor, the interpretation that we request would affirm that, as a practical matter, compliance with the provisions of the Section is unnecessary with respect to the proposed transactions.

burden from being imposed on the investment company in connection with the transaction. See Senate Report at 140.

We have considered the potential argument that the Section applies to the proposed transactions. Such a theory would likely be based on the assertion that the Spin-Off constitutes an assignment of the advisory contracts between InterCapital and the Funds, and that while neither InterCapital nor any affiliated person thereof received any financial benefit in connection with that assignment, such a benefit may be found to exist if the Spin-Off is integrated with the IPO. Both Sears and DWD will receive a financial benefit in connection with the IPO, and each of these entities may be viewed as an affiliated person of InterCapital by virtue of their control over that company.[14] If Section 15(f) is deemed to apply, there may be an issue to the extent that, by the time of the IPO, the boards of directors or trustees of the Dean Witter Funds may not have determined the precise manner in which such boards would be reconstituted in order to comply with Section 15(f)(1)(A). Thus, if the Division agrees that the Section is inapplicable, it would preserve the flexibility to conduct the IPO in accordance with the proposed schedule.

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[14] As noted above, the definition of an affiliated person of an investment adviser includes any person controlling the adviser. Section 2(a)(9) of the Act, described further above, presumes such control to lie in anyone owning more than 25% of the voting securities of the adviser.

For the reasons described more fully above, we believe neither the IPO nor the Spin-Off constitutes an assignment. Consequently, Section 15(f) should not be deemed to apply to the proposed transactions. Regarding the Spin-Off, we recognize that one basis for finding an assignment to be absent is the application of Rule 2a-6, and that the Rule purports to exclude certain transactions from being an assignment solely for purposes of Section 15(a) (and Section 15(b)) of the Investment Company Act. However, Rule 2a-6 should be equally applicable under Section 15(f). The Division apparently recognized this argument in at least one no-action letter; the incoming request asserted that Rule 2a-6 should apply in the context of Section 15(f). See Rodecker & Company Investment Brokers, Inc. (pub. avail. July 28, 1986). The Division did not in that letter disagree with the requestor's legal analysis. In any event, even without the Rule, we do not believe the proposed transactions fall within the statutory meaning of the term "assignment".

In addition, even assuming that the Spin-Off is considered an assignment, it may be viewed as outside the purview of Section 15(f) because no benefit will be conferred upon InterCapital or its affiliated persons "in connection with" such assignment. The financial benefits of the proposed transactions could be construed to arise in connection with the IPO which, as discussed above, is presumed not to constitute a change in control. DWD will receive the proceeds of the IPO, which will be used to repay

debt to Sears. No similar benefits are received in connection with the Spin-Off. Only if one takes the position that the IPO and Spin-Off should be viewed as a single transaction for purposes of Section 15(f) would compliance with the Section be necessary. It is submitted, however, that such an extension of the literal wording of the Section is inappropriate in the present situation.

There is no reason not to recognize that the IPO and Spin-Off are separate transactions. The IPO and Spin-Off are not by their terms interdependent transactions; e.g., the IPO may take place even if the proposed Spin-Off does not. There is no unfair burden placed on the Funds by the proposed transactions. Neither the IPO nor the Spin-Off results in any payment of any kind by the Funds. Moreover, since DWD and its subsidiaries will remain essentially the same after the transactions as before, both in their management and in the nature of their operations particularly with respect to the Funds, the Funds will not be operated in any different way by virtue of the transactions, nor will there be any implicit understanding with a third party regarding portfolio transactions such as might be presumed to be an unfair burden under the Section.[15]

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[15] Section 15(f)(2)(B) provides:

> For the purpose of paragraph (1)(B) of [Section 15(f)(1)], an unfair burden on a registered investment company includes any arrangement, during the two-year period after the date on which any such transaction
>
> (continued...)

CONCLUSION

For the reasons set forth more fully above, we request that the Division issue an interpretation that neither the provisions of Sections 15(a) and 15(f) of the Investment Company Act, nor those of Section 205(a)(2) of the Advisers Act, are, by reason of the operation of the definition of an assignment contained in Section 2(a)(4) of the Investment Company Act or in Section 202(a)(1) of the Advisers Act, applicable to the IPO or the Spin-Off. The IPO is statutorily presumed not to constitute an assignment such as might implicate those provisions. In addition, neither the IPO nor the Spin-Off is an assignment within the language or purposes of those Sections, and such a conclusion is further mandated by Rule 2a-6 under the Investment Company Act and Rule 202(a)(1)-1 under the Advisers Act.

The instant request is of the utmost importance to DWD, DWR, InterCapital and Sears, as well as to the Funds and the non-Fund advisory clients for which InterCapital or DWR acts as investment adviser (or sub-adviser). Consequently, we respectfully request

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[15](...continued)

> occurs, whereby the investment adviser ... trustee or predecessor or successor investment advisers or any interested person of any such adviser ... receives or is entitled to receive any compensation directly or indirectly (i) from any person in connection with the purchase or sale of securities or other property to, from, or on behalf of such company, other than bona fide ordinary compensation as principal underwriter for such company, or (ii) from such company or its security holders for other than bona fide investment advisory or other services.

that the Division act on the instant request as promptly as possible. We further request that if the Division determines not to grant this interpretation or determines to issue a response in the form of a no-action letter that it contact either of Thomas R. Smith, Jr. ((212) 839-5535) or Brian M. Kaplowitz ((212) 839-5370) before taking such action. Thank you for your consideration of this matter.

Very truly yours,

Brown & Wood

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February 8, 1993

Office of Chief Counsel
Division of Investment Management
U.S. Securities and Exchange Commission
450 Fifth Street, N.W.
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Ladies and Gentlemen:

At your request, this letter is intended to supplement our prior submission on behalf of Dean Witter, Discover & Co., et al., dated February 2, 1993, seeking an interpretation of certain provisions of the Investment Company Act of 1940 and the Investment Advisers Act of 1940. We hereby confirm that both the agreement among underwriters syndicate wire and the underwriting agreements contain a provision that no single purchaser may purchase greater than 10% of the offering. The net effect of those provisions is that no single purchaser may, as a result of the IPO, acquire greater than two percent of the stock of DWD. If I can be of any further assistance to you, please feel free to call me at (212) 839-5370.

Sincerely,

Brian M. Kaplowitz

Brian M. Kaplowitz