

PUBLIC

26 MAY 1994

Our Ref. No. 93-366-CC
Donaldson, Lufkin &
Jenrette Securities
Corporation
File No. 132-3

RESPONSE OF THE OFFICE OF CHIEF COUNSEL
DIVISION OF INVESTMENT MANAGEMENT

Your letter of April 22, 1994 requests that we concur in your opinion that (1) a trust ("Trust") to be formed by Donaldson, Lufkin & Jenrette Securities Corporation or an affiliate thereof ("DLJ") need not register as an investment company under the Investment Company Act of 1940 ("1940 Act") in reliance on Rule 3a-7 thereunder, 1/ and (2) money market funds relying on Rule 2a-7 under the 1940 Act may purchase certificates issued by the Trust ("Certificates"). 2/

The Trust will purchase auction rate preferred stock ("Preferred Stock") issued by a registered closed-end investment company ("Fund") that invests primarily in tax-exempt municipal obligations. 3/ The Trust will invest only in Preferred Stock that is rated in the highest rating category for preferred stock by at least one nationally recognized statistical rating organization ("NRSRO"). The Trust proposes to issue Certificates intended for sale to institutional investors, including money market funds, in an offering under Section 4(2) of the Securities Act of 1933. The Certificates, too, will be rated by an NRSRO in the highest category for preferred stock, and also will be rated in the highest category for short-term debt obligations.

The Fund will pay dividends on the Preferred Stock at a rate determined at periodic auctions, which will occur at annual or longer intervals. The trustee will use the Preferred Stock dividends to pay distributions on the Certificates. DLJ, in its capacity as remarketing agent for the Certificates, will adjust the distribution rate on a periodic basis, depending on market conditions. The Trust will terminate on or before the next

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- 1/ Rule 3a-7 excludes from the definition of "investment company" any issuer that pools certain financial assets and issues securities backed by those assets.
 - 2/ Rule 2a-7 requires all open-end management investment companies that hold themselves out as money market funds to meet certain maturity, quality, currency, and diversification requirements. Under Rule 2a-7, money market funds may use the amortized cost method of valuation or the penny-rounding method of pricing to value their assets if they meet the rule's risk-limiting conditions.
 - 3/ You state that, under Section 852(b)(5) of the Internal Revenue Code, the Fund thus would be eligible to pay exempt-interest dividends.

auction of the Preferred Stock following creation of the Trust. When the Trust terminates, the trustee will sell the Preferred Stock at auction and use the proceeds to pay the Certificate holders the stated amount of the Certificates plus accumulated distributions.

A bank unaffiliated with DLJ ("Bank") will issue a tender option pursuant to which Certificate holders may tender their Certificates to the Bank at periodic intervals (weekly, monthly, quarterly, or semi-annually) at a price equal to the stated amount of the Certificate plus accumulated distributions. The remarketing agent will use its best efforts to resell in the secondary market all Certificates tendered to the Bank. In addition to issuing the tender option, the Bank will operate a credit facility for the benefit of the Certificate holders, which will run to (a) the remarketing agent to secure payments due upon exercise of a tender option, and (b) the trustee to secure payments due when the Certificates mature. 4/

To qualify under Rule 3a-7, an issuer may not issue redeemable securities. Section 2(a)(32) of the 1940 Act defines redeemable security as any security, other than short-term paper, under the terms of which the holder, upon its presentation to the issuer or to a person designated by the issuer, is entitled to receive approximately his proportionate share of the issuer's current net assets, or the cash equivalent thereof. You assert that the Certificates are not redeemable securities because the Certificates may not be tendered to the Trust, but only to the Bank, which is not a person designated by the issuer within the meaning of Section 2(a)(32). We agree. 5/

4/ The credit facility will terminate if any of the following events occur: (a) the Fund's board of directors fails to declare a regular dividend on the Preferred Stock at a rate determined at the previous auction, (b) the Fund fails to pay any declared dividend on the Preferred Stock, (c) the Preferred Stock is substantially downgraded by an NRSRO, or (d) it is determined that any portion of the dividends on the Preferred Stock does not qualify as tax-exempt.

5/ You also state that the Certificates should not be considered redeemable because the tender option entitles the holder to the face amount of the Certificate plus accumulated distributions, as opposed to the holder's proportionate share of the Trust's net assets or the cash equivalent thereof. We believe, however, that the Certificates' net asset value (or its equivalent) can be calculated by reference to their face amount plus accumulated distributions. See United States Property
(continued...)

Rule 3a-7(a) also requires an issuer to engage in the business of purchasing, or otherwise acquiring, and holding "eligible assets." Paragraph (b)(1) of the rule defines eligible assets as "financial assets, either fixed or revolving, that by their terms convert into cash within a finite time period" You believe that the Preferred Stock qualifies as an eligible asset because Preferred Stock holders can obtain the liquidation preference or the stated amount of their stock through the auction process, thus enabling them to receive a specific amount of cash on a specific date. The auction feature, however, does not transform the Preferred Stock into a self-liquidating asset because the Preferred Stock remains outstanding after it is sold at auction. We do not agree, therefore, that the Preferred Stock qualifies as an eligible asset for purposes of Rule 3a-7. 6/

Rule 2a-7 requires that a money market fund limit its investments to those "eligible securities," as defined in the rule, that present minimal credit risks. Paragraph (c)(3)(ii) of Rule 2a-7 states that the eligibility of a demand instrument subject to a conditional demand feature is determined by reference to both the short-term ratings of the demand instrument (the Certificates) and the long-term debt ratings of either the demand instrument or the securities underlying the demand instrument (the Preferred Stock). You represent that the

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Investments, NV (pub. avail. May 1, 1989) (the net asset value of bonds can be ascertained by reference to their face value plus accrued and unpaid interest); American Home Finance Corp. (pub. avail. May 11, 1981) (bonds considered non-redeemable because investors faced substantial restrictions on obtaining their principal plus accrued interest).

Nor do we agree with your assertion that the Certificates should be excluded from the definition of redeemable security because they are similar to short-term paper. The Certificates do not meet the definition of short-term paper under Section 2(a)(38) of the 1940 Act. They are not notes, drafts, bills of exchange, or banker's acceptances, and, in any event, are of an investment (not a commercial) character. See Bank of Oregon (pub. avail. Dec. 20, 1979) (Section 2(a)(38) suggests that the definition of short-term paper is limited to securities of a commercial rather than an investment character).

6/ See Brown & Wood (pub. avail. Feb. 24, 1994) (cumulative preferred stock with no predetermined liquidation date is not an eligible asset).

Certificates will receive "the highest preferred stock rating." You acknowledge, however, that, unlike a long-term debt rating, a preferred stock rating does not reflect the issuer's capacity to repay principal when due. The Certificates thus will not carry the requisite debt ratings. 7/ Therefore, we do not agree that the Certificates qualify as eligible securities for purposes of Rule 2a-7.

For the reasons discussed above, we do not believe that the Trust may rely on Rule 3a-7, or that money market funds relying on Rule 2a-7 may purchase Certificates issued by the Trust.

Finally, your request for confidential treatment under 17 C.F.R. 81(b) has been granted until the earlier of 120 days from the date of this letter or the date of any disclosure of facts sufficient to reveal the essence of the no-action request or this response. Please inform this office if this information is made public in any fashion prior to the expiration of the 120-day period.

Barbara Chretien-Dar ^{AED}
Barbara Chretien-Dar
Attorney

7/ Nor do we believe that the Certificates could be considered to be of comparable quality to eligible securities that have been rated based on the issuer's capacity to repay principal.

CHAPMAN AND CUTLER

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April 22, 1994

Investment Company Act of 1940:
Rule 2a-7
Rule 3a-7
Section 2(a) (32)

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

Attention: Office of Chief Counsel
Division of Investment Management

ACT ICA
SECTION -
RULE 2a-7; ~~3a-7~~
PUBLIC
AVAILABILITY 9-23-94

Re: Donaldson, Lufkin & Jenrette Securities Corporation

Ladies/Gentlemen:

On behalf of Donaldson, Lufkin & Jenrette Securities Corporation ("DLJ"), we hereby request that the staff of the Division of Investment Management concur in our opinion that:

(i) certificates (the "Certificates") representing interests in a trust (the "Trust") to be formed by DLJ or an affiliate of DLJ may be offered and sold, and the Trust may be organized and operated, without registration under the Investment Company Act of 1940, as amended (the "Investment Company Act"), by virtue of Rule 3a-7 thereunder; and

(ii) the Certificates may be purchased by money market funds which rely on Rule 2a-7 under the Investment Company Act to use the amortized cost method of valuation or the penny-rounding method of pricing to compute price per share.

THE PROPOSED TRANSACTION

A. THE TRUST

DLJ proposes to establish the Trust pursuant to a trust agreement (the "Trust Agreement") between DLJ or an affiliate of DLJ, as sponsor of the Trust and remarketing agent, and an unaffiliated trustee, for the purpose of issuing the Certificates which represent interests in preferred stock (the "Preferred Stock") issued by a closed-end management investment company (the "Fund") which is registered under the Investment Company Act

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CHAPMAN AND CUTLER

and which invests primarily in tax-exempt municipal obligations and, accordingly, is eligible to pay exempt-interest dividends, as defined in Section 852(b)(5) of the Internal Revenue Code of 1986 (the "*Code*"), to its shareholders. The Preferred Stock will be sold to the Trust by DLJ or directly by the Fund at a price which is expected to be equal to the liquidation preference or stated amount thereof, plus any accumulated dividends thereon. In connection with the establishment of the Trust, the Preferred Stock will be transferred into the Trust and the Certificates will be issued and sold to institutional investors in an offering exempt from the registration requirements of the Securities Act pursuant to Section 4(2) thereof. The trustee will be a bank or trust company which is not affiliated with DLJ or the Bank (as hereinafter defined).

The Trust will be a passive, fixed investment trust. The selection of Preferred Stock to be sold to the Trust will be made before the Trust comes into existence. The Trust will serve solely as a means of holding the Preferred Stock on behalf of the holders of the Certificates (the "*Holder*s") and the Trustee will have no discretionary authority as to the liquidation of the Preferred Stock, the acquisition of additional Preferred Stock or any other assets after the Trust comes into existence, or the reinvestment of moneys held in the Trust. The Trust will not engage in any investment activity with respect to the Preferred Stock or any of the proceeds thereof or otherwise (except that the Trustee will be directed in the governing trust instrument to temporarily invest payments received on the Preferred Stock in short-term tax-exempt securities until they are passed through to the Holders on the next succeeding Certificate Distribution Date, as hereinafter defined). Payments and collections with respect to the Preferred Stock will be passed through to the Holders periodically as described herein.

DLJ or an affiliate of DLJ, as sponsor of the Trust (the "*Sponsor*"), will purchase a certificate (the "*Sponsor Certificate*") with a face amount equal to approximately 1% of the total liquidation preference or stated amount of the Preferred Stock in the Trust. The Sponsor will purchase the Sponsor Certificate concurrently with the formation of the Trust and the deposit of the Preferred Stock into the Trust. Any transfer of an interest in a Certificate will be subject to the prior consent of the Sponsor.

The Trust will terminate upon the occurrence of certain events including the failure of the Fund's board of directors to declare a regular dividend on the Preferred Stock, the failure of the Fund to pay any declared dividend on the related dividend payment date, the resignation of the Sponsor as sponsor of the Trust if no successor sponsor is appointed, or certain bankruptcy events relating to the Sponsor. In any event, the Trust will terminate on or prior to the auction date with respect to the Preferred Stock next succeeding the date on which the Trust is created.

As discussed above, because the Fund primarily invests in tax-exempt municipal obligations, it is anticipated that the dividends paid by the Fund will generally qualify as exempt-interest dividends pursuant to Section 852(b)(5) of the Code and will be excludible from gross income by the recipient of such dividends for that reason. Section 852(b)(5) of the Code provides that a regulated investment company may designate a dividend paid by it, or part of such dividend, as an exempt-interest dividend and that an exempt-interest dividend

CHAPMAN AND CUTLER

shall be treated by the shareholders of the regulated investment company as an item of interest excludable from gross income. Some portion of the dividends of the Fund may be characterized as taxable ordinary dividends or capital gain dividends (to the extent the Fund generates taxable income or capital gains). The Trust is intended to qualify as a partnership for federal income tax purposes and the Certificates are intended to be classified as partnership interests for federal income tax purposes. Under the partnership rules of the Code, a partner's distributive share of income of the partnership retains its character in the hands of its partners. Thus, pursuant to the partnership rules of the Code, a holder of a Certificate will be allocated its distributive share of the dividends paid by the Fund that are characterized as exempt-interest dividends. As a result, the tax-exempt income distributed to investors holding Certificates should retain its tax-exempt character.

B. THE PREFERRED STOCK

The Preferred Stock which will be sold to the Trust will be auction rate preferred stock issued by the Fund. Typically, such Preferred Stock entitles the holder thereof to participate with prospective purchasers in an auction of the Preferred Stock on dates (the "*Auction Dates*") which occur at specified intervals (e.g., weekly). The rate at which dividends accumulate (the "*Dividend Rate*") on the Preferred Stock for the period (the "*Rate Period*") commencing on any Auction Date is determined through the auction process on such Auction Date and continues in effect until the Dividend Rate is determined on the next succeeding Auction Date. Dividends which qualify under the Code as exempt-interest dividends are typically paid on such Preferred Stock on a weekly basis. The Preferred Stock which is deposited into the Trust will be rated in the highest rating category for preferred stock by at least one nationally recognized statistical rating organization.

The Fund document which establishes the rights and preferences of the Preferred Stock will permit the Fund to designate that a Rate Period with respect to the Preferred Stock is longer than the standard weekly period. In many cases, the document with respect to a particular Fund provides that this period may be as long as five years. The Dividend Rate for Preferred Stock in such a mode is typically set at a rate which is higher than the current rate on Preferred Stock would be in a weekly mode. Dividends on Preferred Stock in a longer mode may be paid on a quarterly basis. The Preferred Stock which will be deposited in the Trust will be Preferred Stock which is in a Rate Period mode of one year or longer.

Municipal obligations generally bear lower interest rates than taxable debt obligations because holders of municipal obligations are not subject to regular federal income tax on the interest earned on such obligations. Only interest with respect to obligations issued by states or political subdivisions thereof, so-called "on behalf of" organizations and political subdivisions of certain U.S. possessions can qualify as tax-exempt for federal income tax purposes. Thus, interest paid on an obligation issued by any other entity, including a closed-end fund, is subject to tax (although dividends payable with respect to shares of stock in a mutual fund which qualify as exempt-interest dividends as discussed above and distributions with respect to pass-through entities such as partnerships, grantor trusts and S corporations can qualify as tax-exempt). As a result, interest paid with respect to debt issued by a closed-

CHAPMAN AND CUTLER

end fund would be taxable. Because the interest rates on taxable debt are, as a general matter, higher than the interest rates on tax-exempt obligations, it would not ordinarily be economically advantageous for a closed-end fund holding tax-exempt municipal obligations to issue taxable debt to finance such holdings. In any event, the Trust will not hold Preferred Stock issued by a closed-end fund which has long-term debt outstanding.

C. THE CERTIFICATES

The Certificates will be offered in denominations of \$100,000 and integral multiples thereof and will evidence the right to receive payments made on in the corpus of the Trust, which will be comprised of the Preferred Stock. The aggregate face amount of all Certificates and the Sponsor Certificate issued by the Trust will be equal to the total liquidation preference or stated amount of the Preferred Stock in the Trust.

Distributions on the Certificates (*the "Certificate Distributions"*) will be payable out of amounts received by the Trustee on the Preferred Stock. Certificate Distributions will be paid to Holders on periodic dates which will approximately correspond to the dates on which dividends are paid on the Preferred Stock (each such date being a "*Certificate Distribution Date*"), possibly adjusted by a few days for practical administrative reasons. The Certificates will evidence the right to receive Certificate Distributions in an amount equal to interest on the face amount of the Certificates at a rate (*the "Distribution Rate"*) which will be adjusted on periodic (*e.g.*, weekly, monthly, quarterly, or semi-annually) dates (each such date being a "*Rate Determination Date*"). It is expected that the Distribution Rate will approximate the rate of interest paid on tax-exempt debt instruments with a short-term credit rating similar to the ratings on the Certificates. The Distribution Rate for the initial distribution period will be established by DLJ or an affiliate of DLJ upon pricing of the Certificates. Thereafter, the Distribution Rate for each period (*the "Certificate Rate Periods"*) between the dates upon which the Certificates may be tendered for purchase (each a "*Purchase Date*"), as described below, will be determined by DLJ or an affiliate of DLJ, in its capacity as Remarketing Agent, a specified number of days (in no event less than seven days) prior to each such purchase date for such Certificate Rate Period. The Remarketing Agent will establish the Distribution Rate at the rate which will be necessary, in the view of the Remarketing Agent, for the Certificates to be sold at the face amount thereof plus any accumulated Certificate Distributions thereon on the applicable Purchase Date. In no event, however, will the Distribution Rate exceed the dividend rate on the Preferred Stock less the expenses of the Trust.

The Certificates will be redeemed, in whole or in part, in the event the Preferred Stock is redeemed by the Fund. The redemption price of the Certificates will be equal to the face amount thereof plus any accumulated Certificate Distributions thereon to the date of redemption. In the event the Certificates are redeemed only in part, the Certificates to be redeemed will be selected by the Trustee by lot. Certificate Holders will have the option to receive a specified percentage (*e.g.* 5%) of any redemption premium received by the Trust upon the redemption of any Preferred Stock.

CHAPMAN AND CUTLER

The Certificates will mature, and the face amount thereof will be payable, on a date (the "*Maturity Date*") which is on or prior to the Auction Date with respect to the Preferred Stock next succeeding the date on which the Trust is created. On or prior to the Maturity Date, the Trustee will liquidate the Preferred Stock to provide funds to pay the face amount of the Certificates, plus any accumulated Certificate Distributions thereon, on the Maturity Date. To the extent that the proceeds of such sale are insufficient to pay such amounts on the Maturity Date and a Credit Facility and Tender Option Termination Event (as described below) has not occurred, such amounts will be provided by the Bank pursuant to the Credit Facility described below. Certificate Holders will have the option to receive a specified percentage (*e.g.* 5%) of any gain received by the Trust upon the sale of the Preferred Stock.

D. THE CREDIT FACILITY

Payments of the purchase price of any Certificates tendered for purchase as described below and payments on the Certificates on the Maturity Date will be secured by a bank (the "*Bank*") pursuant to a credit facility (the "*Credit Facility*") issued by the Bank under conditions that will result in the Certificates being rated by a nationally recognized statistical rating organization in the highest rating category for short-term debt obligations. The Certificates will also be rated in the highest rating category for preferred stock by a nationally recognized statistical rating organization. The Bank will not be affiliated with DLJ or the Trust. For providing the Credit Facility the Bank will be paid a fee, equal to a percentage of the face amount of the outstanding Certificates, out of the assets of the Trust.

The Credit Facility will be directed (i) to the Trustee for the benefit of the Holders to secure all payments on the Maturity Date with respect to the Certificates and (ii) to the Remarketing Agent for the benefit of the holders of the Certificates to secure the payment of the purchase price of the Certificates upon exercise of a Tender Option (as hereinafter described), provided that a Credit Facility and Tender Option Termination Event has not occurred. The Credit Facility will be available to pay the purchase price of tendered Certificates only to the extent that such Certificates have not been remarketed by the Remarketing Agent on or prior to the date of purchase. In the event the Credit Facility is drawn upon to pay the purchase price of tendered Certificates, the Bank will become the owner of the Certificates which were the subject of the drawing at the time of such drawing. Amounts paid pursuant to a drawing under the Credit Facility to provide the purchase price of tendered Certificates will be required to be reimbursed by the Sponsor to the Bank from its own funds within a specified period of time pursuant to a reimbursement agreement. Upon the reimbursement to the Bank by the Sponsor of amounts drawn under the Credit Facility, the Sponsor will become the owner of the Certificates which were the subject of such drawing. Consequently, the Certificates will remain outstanding in the event of a drawing under the Credit Facility and the subsequent reimbursement of the amount of such drawing by the Sponsor. The Remarketing Agent will continue to attempt to remarket any Certificates held by the Bank or the Sponsor as a result of a drawing under the Credit Facility.

Upon the termination of the Trust, the Certificates will be subject to mandatory purchase by the Trust. As a result of the mandatory purchase of Certificates in connection

CHAPMAN AND CUTLER

with the termination of the Trust, the Certificates will be canceled. The Credit Facility will be available to pay the purchase price of Certificates subject to mandatory purchase, provided that a Credit Facility and Tender Option Termination Event has not occurred. In the event the Credit Facility is drawn upon to pay the purchase price of Certificates subject to mandatory purchase, the amount of such drawing will be required to be reimbursed by the Sponsor to the Bank from its own funds pursuant to the reimbursement agreement. Consequently, in the absence of a Credit Facility and Tender Option Termination Event, the Sponsor, and not the holders of the Certificates, will bear the risk that the market value of the Preferred Stock at the time of the termination of the Trust will be below the amount necessary to return the face amount of the Certificates to the holders thereof.

The obligations of the Bank under the Credit Facility will be "conditional" in the sense that upon the occurrence of certain events, the Credit Facility will terminate. The events upon which the Credit Facility will terminate ("*Credit Facility and Tender Option Termination Events*") are: (i) the failure of the board of directors of the Fund to declare a regular dividend on the Preferred Stock at the dividend rate determined in the previous auction of the Preferred Stock; (ii) the failure of the Fund to pay any declared dividend on the Preferred Stock on the related dividend payment date; (iii) a substantial downgrading in the rating of the Preferred Stock by a nationally recognized statistical rating organization; and (iv) a determination that any portion of the dividends paid on the Preferred Stock which are designated by the Fund to its shareholders as exempt-interest dividends do not qualify as such for Federal income tax purposes. Upon the occurrence of any such specified event, the Certificates will remain outstanding, without the benefit of the Credit Facility. Upon any redemption of the Certificates subsequent to the occurrence of a Credit Facility and Tender Option Termination Event, the source of funds available to pay the redemption price of the Certificates will not include the Credit Facility. If a Credit Facility and Tender Option Termination Event has occurred prior to the Maturity Date, the source of funds available to pay the face amount of, and any accumulated Certificate Distributions on, the Certificates will not include the Credit Facility.

E. THE TENDER OPTION AND THE REMARKETING AGREEMENT

While the Holders will not have the right to present Certificates for redemption by the Trust, the Bank will agree, subject to the conditions set forth below, to purchase Certificates at a price equal to the face amount thereof plus any accumulated Certificate Distributions, on each Purchase Date pursuant to a tender option (the "*Tender Option*") issued by the Bank to the Holders. If a Rate Determination Date does not coincide with a Distribution Date, then the purchase price of Certificates which are sold pursuant to the Tender Option will include any accumulated but unpaid Certificate Distributions thereon. The agreement of the Bank to purchase Certificates pursuant to the Tender Option will be secured by the Credit Facility, will run to the Remarketing Agent for the benefit of the Holders and will be separate from, and will not be a part of, the obligations of the Trust and the Trustee to the Holders. Pursuant to the Reimbursement Agreement, the Sponsor will be obligated to reimburse the Bank for amounts paid out under the Credit Facility to fund the Tender Option.

CHAPMAN AND CUTLER

It is anticipated by the Remarketing Agent that, if the Distribution Rate on the Certificates for any forthcoming Certificate Rate Period is not competitive with tax-exempt debt obligations of similar maturity and comparable credit in the market, Holders will tend to exercise their Tender Option prior to the commencement of such Certificate Rate Period. The Remarketing Agent will determine and announce each new Distribution Rate on a date which is sufficiently in advance of the commencement of each Certificate Rate Period to allow the Holders time to exercise the Tender Option if they are not satisfied with the new Distribution Rate.

If a Holder exercises its Tender Option, the Remarketing Agent will use its best efforts to resell tendered Certificates bearing the new Certificate Distribution Rate in the secondary market at the face amount thereof plus accumulated Distributions thereon for settlement on the Purchase Date with respect to which the Certificates shall have been tendered for purchase. The Holders who sell their Certificates pursuant to an exercise of the Tender Option will receive the face amount of the Certificate sold plus any accumulated Certificate Distributions thereon.

In the event that the Remarketing Agent is not successful in reselling in the secondary market any Certificate with respect to which the Tender Option is exercised, the purchase price of those Certificates will be paid by the Bank in an amount equal to the face amount thereof plus any accumulated Certificate Distributions thereon. The Remarketing Agent's experience with tax-exempt securities bearing interest at rates comparable to the Distribution Rate which the Certificates will bear is such that the Remarketing Agent expects to be able to remarket the Certificates at one hundred percent of their face amount, plus any accumulated Certificate Distributions thereon, without the necessity for utilization of the obligation of the Bank to repurchase the Certificates. Moreover, in its capacity as a registered broker-dealer, the Remarketing Agent, may, but will not be obligated to, acquire for its own account any Certificates which are delivered to it but are not resold.

The Tender Option will be "conditional" in the sense that it will terminate upon the occurrence of a Credit Facility and Tender Option Termination Event. Upon the occurrence of any such event, the Tender Option will immediately terminate without any right of a Holder to exercise its Tender Option upon such termination. If the Certificates are not yet subject to redemption, they will remain outstanding, without the benefit of the Tender Option, and the Distribution Rate will be reset periodically (e.g., weekly, monthly, quarterly or semi-annually) at a rate equal to a predetermined index rate set forth in the Trust Agreement.

F. TRUSTEE, BANK AND REMARKETING AGENT FEES AND SPONSOR DISTRIBUTION

The positive rate differential between the dividend rate on the Preferred Stock and the Distribution Rate will, after deducting the Trustee's fees, the Remarketing Agent's fees and the Bank's fees, and any other expenses of the Trust, be paid to the Sponsor as a distribution on the Sponsor Certificate (such amount being hereinafter referred to as the "*Sponsor Distribution*"). In no event will the Distribution Rate on the Certificates exceed the dividend

CHAPMAN AND CUTLER

rate on the Preferred Stock, less the fees of the Trustee, the Remarketing Agent, the Bank and any other expenses of the Trust.

G. INITIAL MARKETING OF THE CERTIFICATES

It is anticipated that the Certificates will be offered and sold to institutional investors in an offering exempt from the registration requirements of the Securities Act pursuant to Section 4(2) thereof. Investors will pay the purchase price for the Certificates in full at the time of their purchase. The offering and sale will be made pursuant to an offering document which will be given to each offeree and each purchaser and which will contain appropriate disclosures regarding the transaction, the Trust, the Certificates, the Distribution Rate, the Preferred Stock, the Fund, the Bank, the Credit Facility, the Tender Option, DLJ and any applicable affiliates and other matters material to the transaction.

The Certificates will be marketed on the basis of the ability of the Bank to provide for payment of all payments on the Maturity Date with respect to the Certificates and the payment of all obligations pursuant to the Tender Option. It is anticipated that, in making investment decisions with respect to the Certificates, purchasers of the Certificates will rely on the creditworthiness of the Bank, as well as the Trust's and the Fund's financial condition. DLJ anticipates that the primary market for the Certificates will be institutional investors that have a need for short-term, high quality, tax-exempt obligations, including tax-exempt money market funds.

LEGAL ANALYSIS

A. RULE 3a-7

Rule 3a-7 promulgated under the Investment Company Act provides that any issuer who is engaged in the business of purchasing, or otherwise acquiring, and holding eligible assets and who does not issue redeemable securities, will not be deemed to be an investment company, provided that certain other specified conditions are met. For the reasons set forth below, we believe that the Trust will fall within the exception from the definition of an investment company contained in Rule 3a-7.

Redeemable Securities. Section 2(a)(32) of the Investment Company Act defines "redeemable security" as any security, other than short-term paper, under the terms of which the holder, upon its presentation to the issuer or a person designated by the issuer, is entitled (whether absolutely or only out of surplus) to receive approximately his proportionate share of the issuer's current net assets, or the cash equivalent thereof. In footnote 24 of the release which adopted Rule 3a-7 (the "Adopting Release") the Commission indicated that counsel concerned about whether a security would be a redeemable security under Rule 3a-7 should examine the no-action letters under Section 3(c)(5) of the Investment Company Act for guidance. In a series of no-action letters under Section 3(c)(5), the staff of the Division of Investment Management has concluded that securities subject to liquidity puts similar to the Tender Option are not redeemable securities

CHAPMAN AND CUTLER

for purposes of Section 3(c)(5). See *LaQuinta Motor Inns* (avail. January 4, 1989); *Shearson Lehman/American Express Inc.* (avail. March 20, 1985); *McDonald and Company Securities* (avail. December 14, 1983). The Certificates are similar in all material respects to the securities which were the subject of such letters.

In this regard, we note that:

(i) the purchase price payable upon the exercise of the Tender Option will be the face amount of the Certificates plus any accumulated Certificate Distributions thereon, rather than the Holder's proportionate share of the Trust's net assets, or the cash equivalent thereof, as is contemplated in the definition of redeemable securities;

(ii) the Tender Option will not be issued by the Trust or the Trustee, but rather will be an obligation of the Bank, which will not be the issuer, or a person designated by the issuer, of the Certificates;

(iii) the Certificates will not be redeemed pursuant to exercise of the Tender Option, and, therefore, the activities associated with the exercise of the Tender Option will leave the Certificates outstanding; and

(iv) the Certificates will be purchased and remarketed pursuant to the obligations of the Remarketing Agent and the Bank only at certain designated times (e.g., the first business day of each week, month, calendar quarter or six months) and not at any specific time after "*presentation*" by the Holder as is contemplated in the definition of redeemable securities in Section 2(a)(32) of the Investment Company Act.

For these reasons we believe that the Certificates clearly lack certain of the essential elements contained in the definition of "redeemable security". In addition, the manner in which the Distribution Rate will be determined and the periodic right of the Holders, through exercise of the Tender Option, to require the purchase of the Certificates on each Purchase Date will give the Certificates effective characteristics of "short-term paper," which is excluded from the definition of redeemable securities. Accordingly, we do not believe that the Certificates should be deemed to be redeemable securities for purposes of Rule 3a-7.

Eligible Assets. The exception from the definition of an investment company provided by Rule 3a-7 is available only to issuers which are "engaged in the business of purchasing, or otherwise acquiring and holding eligible assets. . ." "Eligible assets" is defined in Rule 3a-7 as "financial assets, either fixed or revolving, that by their terms convert into cash within a definite time period plus any rights or other assets designed to assure the servicing or timely distribution of proceeds to security holders." The Preferred Stock will, by its terms, convert into cash within a definite period of time. Dividends will be payable on the Preferred Stock on each Dividend Payment Date. The liquidation preference or stated amount of the Preferred Stock can be recovered by a holder thereof at the end of each Rate Period through the auction process. The Fund instrument establishing

CHAPMAN AND CUTLER

the Preferred Stock will provide that the holder thereof is entitled to participate in an auction at the end of each Rate Period for such Preferred Stock. In an auction, a holder of Preferred Stock (i.e., the Trust) may submit an order to the auction agent to sell the Preferred Stock in the auction without regard to the Dividend Rate for the next succeeding Rate Period which is determined through the auction procedure. Sales of Preferred Stock in the auction will be effected at a price which is equal to the liquidation preference or stated amount of the Preferred Stock. Accordingly, the terms of the Preferred Stock provide a mechanism whereby a holder may receive a specific amount of cash for its Preferred Stock on a specific date.

While the definition of eligible assets does not specifically identify particular types of assets, the Commission stated in the Adopting Release that the definition is intended to include *all* of the assets provided as examples in Rule 3a-7 as originally proposed, including notes, bonds, debentures, evidences of indebtedness, certificates of deposit, leases, installment contracts, interest rate swaps, repurchase agreements, guaranteed investment contracts, accounts receivables, chattel paper, *cumulative preferred stock*, guarantees, annuities, and participation's, or beneficial interest in any of the foregoing, and *any other assets that serve solely to support the credit of the issuer's securities*, such as letters of credit, guarantees and cash collateral accounts. The Commission also stated that the definition includes *liquidity arrangements* that support the payment of the securities and the underlying assets. In a recent interpretive letter, the staff of the Division of Investment Management took the position that cumulative preferred stock that has no predetermined liquidation date is not an eligible asset under rule 3a-7. See *Kenneth T. Cole* (avail. February 24, 1994). The Preferred Stock which will be deposited in the Trust is distinguishable from the preferred stock which was the subject of such letter because, by its terms, it converts into cash within a definite time period through the auction mechanism described above. Accordingly, we believe that the Preferred Stock is an "eligible asset" as defined in Rule 3a-7. Additionally, should the Credit Facility be deemed to be an asset of the Trust, we believe that it is an asset that serves solely to support the credit of the Trust and a liquidity arrangement that supports the payment of the Certificates and, therefore, an "eligible asset" as defined in Rule 3a-7.

Fixed-Income Securities. Subparagraph (a)(1) of Rule 3a-7 requires an issuer relying on Rule 3a-7 to issue fixed-income securities or other securities which entitle their holders to receive payments that depend primarily on the cash flow from eligible assets. The definition of "fixed-income securities" includes any security that entitles the holder thereof to receive a stated principal amount and interest on a principal amount calculated through remarketing of the security. The Certificates entitle the Holders to receive the face amount thereof plus any accumulated Certificate Distributions thereon upon exercise of the Tender Option by the Holders, provided that a Credit Facility and Tender Option Termination Event has not occurred. The Distribution Rate at which Certificate Distributions accumulate on the Certificates is determined by the Remarketing Agent in connection with the remarketing of any tendered Certificates or, in the absence of the tender of any Certificates for purchase on a given Purchase Date, by reference to remarketings of similar securities. Upon the occurrence of a Credit Facility and Tender Option Termination Event, the Distribution Rate will be set by reference to a predetermined index rate. The index rate will not reference

CHAPMAN AND CUTLER

any change in the market value or fair value of the Preferred Stock. The definition of "fixed-income securities" also includes any security that entitles the holder thereof to receive a stated principal amount and interest on a principal amount calculated by reference to a "standard" which does not reference any change in the market value or fair value of eligible assets. Accordingly, we believe that the Certificates are "fixed-income securities" as that term is defined in Rule 3a-7 and, consequently, the Trust will comply with subparagraph (a)(1) of Rule 3a-7.

Rating Requirements. Subparagraph (a)(2) of Rule 3a-7 requires that, with certain exceptions, securities sold by an issuer relying on Rule 3a-7 or any underwriter thereof are fixed income securities rated, at the time of initial sale, in one of the four highest rating categories of long-term debt *or in an equivalent short-term category* by at least one nationally recognized statistical rating organization that is not an affiliate of the issuer or any person involved in the organization or operation of the issuer. The Certificates will be rated in the highest short-term debt rating category by an unaffiliated nationally recognized statistical rating organization. One of the exceptions to the rating requirement is that any securities may be sold to persons involved in the organization or operation of the issuer. DLJ, as sponsor of the Trust, will be involved in all aspects of the organization of the Trust. Accordingly, the sale of an unrated Sponsor Certificate to the Sponsor will fall within the aforementioned exception to the rating requirement.

Acquisition/Disposition of Eligible Assets. Subparagraph (a)(3) of Rule 3a-7 prohibits any issuer relying on Rule 3a-7 from acquiring additional eligible assets, or disposing of eligible assets, unless:

- (i) the assets are acquired or disposed of in accordance with the terms and conditions set forth in the agreements, indentures, or other instruments pursuant to which the issuer's securities are issued;
- (ii) the acquisition or disposition of the assets does not result in a downgrading in the rating of the issuer's outstanding fixed-income securities; and
- (iii) the assets are not acquired or disposed of for the primary purpose of recognizing gains or decreasing losses resulting from market value changes.

The trust will not acquire any Preferred Stock subsequent to the initial deposit of Preferred Stock in connection with the formation of the Trust. The Trust will only dispose of Preferred Stock in connection with the termination of the Trust or the redemption of Preferred Stock by the Fund. The Trust may temporarily invest payments received on the Preferred Stock in short-term tax-exempt securities which fall within the definition of eligible assets. However, any disposition of Preferred Stock and any acquisition or disposition of short-term tax-exempt securities will be effected in accordance with the terms and conditions of the Trust Agreement, will not result in a downgrading of the Certificates, and will not be effected for the primary purpose of recognizing gains or decreasing losses resulting from market value changes. Accordingly, we believe that the Trust will be in compliance with the requirements of subparagraph (a)(3) of Rule 3a-7.

CHAPMAN AND CUTLER

The Trustee. Subparagraph (a)(4) of Rule 3a-7 imposes certain requirements with respect to the appointment of a trustee by any issuer which relies on Rule 3a-7. For purposes of this no-action request, you may assume that the Trust will comply with the provisions of subparagraph (a)(4) of Rule 3a-7.

B. RULE 2a-7

Rule 2a-7 under the Investment Company Act generally provides that an investment company may utilize the amortized cost method of valuing its portfolio securities or the penny-rounding method of pricing its shares if, among other requirements, it does not purchase any instrument with a remaining maturity of greater than 397 calendar days and maintains a dollar-weighted average portfolio maturity of not more than 90 days. The maturity of a portfolio instrument is generally deemed to be the period remaining until the date noted on the face of the instrument as the date on which the principal amount must be paid. However, a "variable rate instrument" that is subject to a "demand feature" is deemed to have a maturity equal to the longer of the period remaining until the next readjustment of the interest rate or the period remaining until the principal amount can be recovered through demand.

Under Rule 2a-7, a "variable rate instrument" is a security the terms of which provide for the adjustment of its interest rate on set dates (such as the last day of a month or calendar quarter) and which, upon such adjustment, can reasonably be expected to have a market value that approximates its par value. The Trust Agreement will provide that Certificate Distributions accumulate on the Certificates at the Certificate Rate. The Certificate Rate will be reset periodically (e.g., weekly, monthly, quarterly or semi-annually) by the Remarketing Agent at the rate which will be necessary, in the view of the Remarketing Agent, for the Certificates to be sold at the face amount thereof (plus any accumulated Certificate Distributions thereon) on the applicable Purchase Date.

Under Rule 2a-7, a "demand feature" is a put that entitles the holder of a security to receive the principal amount of the underlying security or securities and that may be exercised either (1) at any time on no more than 30 days' notice or (2) at specified intervals not exceeding 397 calendar days and upon no more than 30 days' notice. Each Holder of a Certificate will have the right, through exercise of the Tender Option, to have its Certificate purchased on any Purchase Date at the face amount thereof, plus any accumulated Certificate Distributions thereon. The purchase price of any tendered Certificate will be paid from the proceeds of the remarketing of such Certificate or, in the absence of a successful remarketing, from funds provided by the Bank pursuant to the Credit Facility. The right to tender a Certificate for purchase pursuant to the Tender Option will be exercisable on periodic dates (e.g., weekly, monthly, quarterly or semi-annually) which will in no event be greater than 397 calendar days. The notice required prior to the purchase of any Certificate on any Purchase Date will be at least seven, but in no event greater than 30, calendar days.

The staff of the Division of Investment Management has acknowledged that a bond subject to a tender option which is subject to certain conditions may be treated as a "variable rate instrument" subject to a "demand feature" under the maturity shortening provisions of

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CHAPMAN AND CUTLER

Rule 2a-7. See *Nuveen Advisory Corp.* (avail. September 4, 1990). However, under the *Nuveen Advisory Corp.* letter, in order for a money market fund to treat such a tender option bond as a variable rate instrument subject to a demand feature, the money market fund must satisfy certain conditions:

(i) the fund must not purchase any security subject to such a tender option unless the tender option is exercisable by the fund within one year of the date of such purchase upon no more than 30 days' notice and thereafter exercisable by the fund no less frequently than annually upon no more than 30 days' notice;

(ii) the fund must not purchase any security subject to such a tender option unless, at the time of such purchase, the fund's investment adviser reasonably expects (a) based upon its assessment of current and historical interest rate trends, that prevailing short-term, tax-exempt rates will not exceed the maximum interest rate on such security at the time of the next rate adjustment on the security subject to the tender option, and (b) that the circumstances that would result in the termination of the tender option would not occur prior to the time of the next tender opportunity;

(iii) at the time of each tender opportunity, the fund must exercise the tender option with respect to the security unless the fund's investment adviser reasonably believes (a) based upon its assessment of current and historical interest rate trends, that short-term, tax-exempt rates will not exceed the maximum interest rate on such security at the time of the next rate adjustment on the security subject to the tender option, and (b) that the circumstances that would result in the termination of the tender option would not occur prior to the time of the next tender opportunity;

(iv) the fund must exercise the tender option with respect to the security, or otherwise dispose of the security, prior to the time the tender option is scheduled to expire pursuant to the terms of the agreement under which the tender option is granted;

(v) the fund must otherwise comply with the provisions of Rule 2a-7 in connection with the purchase of the security subject to the tender option, including, without limitation, the requisite determinations in connection with the purchase of the security subject to the tender option, including, without limitation, the requisite determinations by the fund's board of directors with respect to the quality of such security; and

(vi) in the event of a default on the underlying security, or the termination of the tender option agreement, the fund must look to the maturity date of the underlying security for purposes of compliance with Rule 2a-7.

We believe that money market funds could reasonably make comparable determinations in connection with an investment in the Certificates. For the foregoing reasons, we believe that the Certificates should be treated as "variable rate instruments" subject to a "demand feature" for purposes of Rule 2a-7.

CHAPMAN AND CUTLER

Rule 2a-7 provides that an investment company utilizing the amortized cost method of valuing its portfolio securities or the penny-rounding method of pricing its shares must limit its portfolio investments to those United States dollar-denominated instruments that its board of directors determines present minimal credit risks and which at the time of acquisition are "eligible securities." The definition of "eligible security" contained in Rule 2a-7 includes a security with a remaining maturity of 397 days or less that is rated by a nationally recognized statistical rating organization (if only one such organization is rating such security) in one of the two highest rating categories for short-term debt obligations.

Rule 2a-7(c)(3)(ii) provides that a demand instrument that does not have an "unconditional demand feature" is not an "eligible security" unless it meets the requirements for being an eligible security, and, in addition, the demand instrument has been rated in one of the two highest rating categories for long-term debt obligations. An unconditional demand feature is a demand feature that by its terms would be readily exercisable in the event of a default in payment of principal or interest on the underlying security. We believe that the Tender Option would not be deemed to be an unconditional demand feature because of the circumstances in which the Tender Option will terminate (e.g., the failure of the fund's board of directors to declare a regular dividend on the Preferred Stock or the failure of the fund to pay any declared dividend on the related distribution date). Consequently, it appears to be necessary that the Certificates (i.e., the "demand instrument" being purchased by funds relying on Rule 2a-7) have received a long-term rating by a nationally recognized statistical rating organization. Therefore, it will be a condition precedent to the issuance of the Certificates that they receive the highest preferred stock rating by a nationally recognized statistical rating organization.

A preferred stock rating differs from a long-term debt rating in that the former rates an issuer's willingness and capacity to declare and pay dividends on the security in question whereas the latter rates an issuer's willingness and capacity to pay principal and interest on the security. Thus, the long-term rating on the Certificates would rate the Trust's ability to make Certificate Distribution payments on the Certificates but would not rate the Trust's ability to repay the Certificates' face amount on the Maturity Date. However, the Credit Facility would be available to pay such amounts, provided that a Credit Facility and Tender Option Termination Event had not occurred prior to the Maturity Date.

In the event that a Credit Facility and Tender Option Termination Event occurs, the Trustee will be required to liquidate the Preferred Stock and distribute the proceeds to the Holders of the Certificates. It is unlikely that the Trustee will be able to liquidate the Preferred Stock at a price at least equal to the liquidation preference or stated amount thereof. Thus, upon the occurrence of a Credit Facility and Tender Option Termination Event, a money market fund which owns Certificates could receive less than the face amount of its Certificates in connection with the redemption thereof. However, this is similar to the situation faced by a money market fund which owns tender option bonds upon the occurrence of an event which could result in the termination of the tender option. In such a situation it is unlikely that the bond held by the money market fund would continue to be an "eligible security." As a result, the money market fund would be required to dispose of the bond pursuant to paragraph (c)(5)(ii) of Rule 2a-7, absent a finding by the fund's board of

CHAPMAN AND CUTLER

directors that disposal of the bond would not be in the best interests of the fund. It is unlikely that the fund would be able to liquidate the bond at a price at least equal to the principal amount thereof. Thus, upon the occurrence of an event which could result in the termination of the tender option, a money market fund which owns a tender option bond could receive less than the principal amount of such bond in connection with the liquidation thereof.

It appears to us that the staff's response in *Nuveen Advisory Corp.* was premised, in part, upon the conclusion that a money market fund can monitor the likelihood that an event which can result in the termination of a tender option will occur and exercise the tender option or otherwise dispose of the security if, in the money market fund's judgment, such an event could occur prior to the time of the next tender opportunity. It does not appear that the staff's position was based upon the position that upon the occurrence of such an event, a money market fund could eventually recover the principal amount of the security at maturity. Accordingly, it is our view that an issuer's ability to repay the principal amount of a security at maturity should not be essential to the long-term credit analysis of a demand instrument subject to a conditional demand feature if such security would not be an eligible security upon the termination of the demand feature. Rather, it is the issuer's capacity to make ongoing payments on the security in question which is relevant. The preferred stock rating assigned to the Certificates will rate the Trust's capacity to make scheduled payments on the Certificates, based primarily upon the Fund's capacity to make scheduled dividend payments on the Preferred Stock. For these reasons, we believe that the Certificates should qualify as eligible securities for purposes of Rule 2a-7.

CONCLUSION

On the basis of the foregoing, we respectfully request that the staff of the Division of Investment Management concur in our opinion that:

(i) the Certificates may be offered and sold, and the Trust may be organized and operated, without registration under the Investment Company Act by virtue of Rule 3a-7 thereunder; and

(ii) the Certificates may be purchased by money market funds which rely on Rule 2a-7 under the Investment Company Act to use the amortized cost method of valuation or the penny-rounding method of pricing to compute price per share.

Because DLJ is anxious to proceed with the offering of the Certificates, we would appreciate a response to the request made herein as promptly as may be practicable. If for any reason the response to such request may be unfavorable, we respectfully request the opportunity to discuss with the staff the reasons for such response prior to the issuance by the staff of a formal response. Pursuant to 17 C.F.R. Section 200.81(b), we respectfully request confidential treatment of this request and the staff's response thereto until 120 days after the date of the staff's response, or such earlier date that the staff is advised that the information in this letter (and the staff's response thereto) has been made public. In accordance with your request, this letter is intended to restate our prior letter to the Division

CHAPMAN AND CUTLER

of Investment Management. If you require additional facts or wish to discuss this matter further, please do not hesitate to call the undersigned collect at (312) 845-2976 or in my absence, Vincent M. Aquilino of this office at (312) 845-3702.

Very truly yours,

CHAPMAN AND CUTLER

By: Scott Jardine
Scott Jardine

WSJ/maz

cc: Vincent M. Aquilino
Michael Hannah

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