

**PUBLIC**

RESPONSE OF THE OFFICE OF  
INVESTMENT COMPANY REGULATION  
(Ref. No. 95-3-ICR) AND  
THE OFFICE OF CHIEF COUNSEL  
(Ref. No. 95-27-CC)  
DIVISION OF INVESTMENT MANAGEMENT

PaineWebber Incorporated;  
Mitchell Hutchins Asset  
Management Inc.; the  
Kidder Peabody family of  
funds; and Kidder, Peabody  
Investment Trust (File Nos.  
812-8026 and 812-7714;  
Ref. No. 93-117-CC)

In your letter of January 17, 1995, you state that on October 17, 1994, Paine Webber Group Inc. ("PWG"), the parent of PaineWebber Incorporated ("PaineWebber") and Mitchell Hutchins Asset Management Inc. ("Mitchell Hutchins"), entered into an asset purchase agreement with Kidder Peabody Group Inc. ("KPG") and its parent, General Electric Company ("GE"). The agreement provides for the purchase by PWG and certain of its subsidiaries of certain assets of KPG and its subsidiaries (the "Transaction"). The closing of the Transaction was divided into several phases. The phase of the closing relating to the investment management business (the "Closing") is scheduled to take place on or about January 30, 1995, at which time most of the assets of the subsidiaries providing investment advisory and distribution services to the Kidder Peabody family of funds (the "KP Funds") are expected to be transferred to PWG and its subsidiaries. 1/

You state that the KP Funds have been granted orders exempting them from sections 2(a)(32), 2(a)(35), 18(f), 18(g), 18(i), 22(c), and 22(d) of the Investment Company Act of 1940 (the "Act") and rule 22c-1 thereunder (the "Exemptive Orders"). 2/ The Exemptive Orders permit the KP Funds to establish a multiple class distribution system and assess and waive a contingent deferred sales charge. Kidder, Peabody & Co. Incorporated ("KP&Co."), a wholly-owned subsidiary of KPG, is the distributor of the KP Funds. Kidder Peabody Asset Management,

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1/ The KP Funds are Kidder, Peabody Investment Trust; Kidder, Peabody Investment Trust II; Kidder, Peabody Investment Trust III; Kidder, Peabody Municipal Money Market Series; Kidder, Peabody California Tax Exempt Money Fund; Kidder, Peabody Premium Account Fund; Kidder, Peabody Equity Income Fund, Inc.; Kidder, Peabody Government Income Fund, Inc.; Kidder, Peabody Government Money Fund, Inc.; Kidder, Peabody Cash Reserve Fund, Inc.; Kidder, Peabody Tax Exempt Money Fund, Inc.; Institutional Series Trust; and Liquid Institutional Reserves.

2/ Kidder Peabody California Tax Exempt Money Fund, Investment Company Act Release Nos. 19226 (Jan. 22, 1993) (notice) and 19269 (Feb. 17, 1993) (order); Liquid Institutional Reserves, Investment Company Act Release Nos. 18409 (Nov. 15, 1991) (notice) and 18435 (Dec. 10, 1991) (order).

Inc. ("KPAM"), a wholly-owned subsidiary of KPG, is the adviser to the KP Funds. KP&Co. and KPAM are subject to certain conditions imposed by the Exemptive Orders in their respective capacities as distributor and adviser. After consummation of the Transaction, PaineWebber or Mitchell Hutchins, rather than KP&Co. and KPAM, will serve as distributor and adviser of the KP Funds.

You also state that Kidder Peabody Asset Allocation Fund (the "Fund"), a series of Kidder, Peabody Investment Trust (the "Trust"), has received assurances from the Division that the staff would not recommend any enforcement action to the Commission under section 12(d)(3) of the Act if the Fund purchased shares of common stock of GE, an affiliated person of the KP Funds, under the conditions of the Trust's letter of March 8, 1993. 3/

#### Exemptive Orders

You state that PWG will not acquire the entities to which the Exemptive Orders were issued. In addition, PaineWebber and Mitchell Hutchins are not parties to the Exemptive Orders, and therefore those orders are not applicable to them. You state, however, that the Exemptive Orders are essential to the continued operations of the KP Funds. You further state that PaineWebber and Mitchell Hutchins have filed an application with the Commission in which they request an exemptive order (the "Renewal Order") that would effectively continue the relief previously granted in the Exemptive Orders. 4/

You request assurance that the Division of Investment Management will not recommend that the Commission take enforcement action if the KP Funds, PaineWebber and Mitchell Hutchins rely on the Exemptive Orders pending receipt by PaineWebber and Mitchell Hutchins of the Renewal Order. PaineWebber and Mitchell Hutchins specifically agree that, pending receipt of the Renewal Order, they will comply with the terms and conditions of the Exemptive Orders as though such terms and conditions were imposed directly on them. 5/

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3/ Kidder, Peabody Investment Trust (pub. avail. May 14, 1993) (the "May 14, 1993 Letter").

4/ PaineWebber America Fund, File No. 812-9394.

5/ In footnote 7 of your letter, you state that "because the Exemptive Orders apply to registered investment companies organized in the future that are in the same 'group of investment companies' (as defined in Rule 11a-3) as the KP Funds, it is proposed that any such new registered investment companies could  
(continued...)

Based on the facts and representations in your letter, we would not recommend that the Commission take enforcement action against the KP Funds, PaineWebber or Mitchell Hutchins if, pending the issuance of the Renewal Order the KP Funds, PaineWebber and Mitchell Hutchins rely on the Exemptive Orders. In particular, we base our position upon your representation that PaineWebber and Mitchell Hutchins will comply with the terms and conditions of the Exemptive Orders as though such terms and conditions were imposed directly on them. This assurance, however, is not a substitute for exemptive relief. Accordingly, with respect to the Exemptive Orders, this assurance shall be effective until the earlier of final action by the Commission on the application for the Renewal Order or one year from the date of this letter.

#### Previous No-Action Letter

You request assurance that the Division will not recommend that the Commission take enforcement action under section 12(d)(3) of the Act if the Fund purchases common stock of GE as described in your letter of January 17, 1995. In particular, you ask that we concur in your opinion that the Fund may continue to rely on the May 14, 1993 Letter.

You state that after the consummation of the Transaction, PWG, the parent of PaineWebber and Mitchell Hutchins, will be an affiliated person of GE as defined in section 2(a)(3)(B) of the Act as a result of GE's ownership of more than 5% of PWG's common stock. You represent that, except for the change of identity of the Fund's investment adviser and distributor, and the different affiliation between GE and PWG and its subsidiaries relative to GE's affiliation with KP&Co., the representations in the May 14, 1993 Letter remain unchanged in all material respects.

Based on the facts and representations in your letter, we would not recommend that the Commission take any enforcement

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5/(...continued)

rely on the Exemptive Orders, subject to those orders' terms and conditions, pending receipt of the order sought under the [p]ending [a]pplication." We believe that any investment companies created after the Closing that wish to implement a multi-class distribution system should do so based on existing multi-class orders granted to PaineWebber and Mitchell Hutchins. Accordingly, the assurance we express herein is limited to the KP Funds in existence as of the Closing.

action under section 12(d)(3) of the Act if the Fund purchases common stock of GE as described in your letter.

\* \* \* \* \*

This response expresses the Division's position on enforcement action only, and does not purport to express any legal conclusions on the questions presented. Facts or conditions different from those presented in your letter might require a different conclusion. Moreover, this letter provides no assurance that the Commission will issue the Renewal Order.

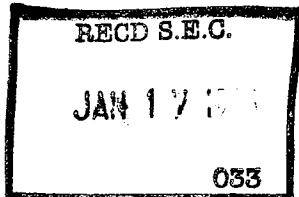
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January 27, 1995



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January 17, 1995

1940 Act Sections 2(a)(32),
2(a)(35), 12(d)(3), 18(f), 18(g),
18(i), 22(c), 22(d), and
Rule 12d3-1 and Rule 22c-1

Elizabeth G. Osterman, Esq.
Assistant Director
Office of Investment Company Regulation
Division of Investment Management, Stop 10-6
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450 Fifth Street, N.W.
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ACT ICA-40
SECTION 12(d)(3), 18(k)
RULE
PUBLIC
AVAILABILITY 01/27/95

Heidi Stam, Esq
Assistant Chief Counsel
Division of Investment Management, Stop 10-6
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549

Re: No-Action Request on behalf of PaineWebber Incorporated,
Mitchell Hutchins Asset Management Inc., the Kidder
Peabody family of funds, and Kidder, Peabody Investment
Trust

Dear Meses. Osterman and Stam:

On behalf of PaineWebber Incorporated ("PaineWebber"),
Mitchell Hutchins Asset Management Inc. ("Mitchell Hutchins"),
and the Kidder Peabody family of funds<sup>1/</sup> ("KP Funds") we hereby

1/ The Kidder Peabody Funds are Kidder, Peabody California Tax
Exempt Money Fund; Kidder, Peabody Cash Reserve Fund, Inc.;
Kidder, Peabody Equity Income Fund, Inc.; Kidder, Peabody
Government Income Fund, Inc.; Kidder, Peabody Government Money
Fund, Inc.; Kidder, Peabody Investment Trust; Kidder, Peabody
(continued...)

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request that the Staff of the Division of Investment Management ("Staff") advise us that it will not recommend that the Securities and Exchange Commission (the "Commission") take enforcement action against PaineWebber, Mitchell Hutchins or the KP Funds, under the Investment Company Act of 1940, as amended ("1940 Act"), if, under the circumstances described below, PaineWebber, Mitchell Hutchins and the KP Funds rely upon two existing exemptive orders permitting the KP Funds, Kidder Peabody Asset Management, Inc. ("KPAM") and Kidder, Peabody & Co. Incorporated ("KP&Co.") to offer and sell multiple classes of shares, including a class subject to a contingent deferred sales charge ("CDSC"), pending receipt by PaineWebber and Mitchell Hutchins of an exemptive order of the Commission permitting PaineWebber and Mitchell Hutchins to offer and sell multiple classes of shares of the open-end management investment companies now advised and distributed by PaineWebber and Mitchell Hutchins ("PW Funds") and the KP Funds. As described further below, the PW Funds, PaineWebber and Mitchell Hutchins have filed an application with the Commission seeking an order that, if granted, would encompass and expand the exemptive relief previously granted by the Commission to both the PW Funds and the KP Funds and thereby, among other things, allow those Funds to institute consistent systems for offering multiple classes of shares.

In addition to the foregoing assurances, on behalf of Kidder, Peabody Investment Trust (the "Trust"), we hereby request that the Staff advise us that it will not recommend that the Commission take enforcement action against the Trust, PaineWebber and Mitchell Hutchins under the 1940 Act, if Kidder Peabody Asset Allocation Fund, a series of the Trust (the "Fund"), continues to invest in shares of common stock of General Electric Company, an affiliated person of the KP Funds ("GE"), under the conditions described below. The Staff previously granted such assurances to the Trust in 1993.<sup>2/</sup>

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<sup>1/</sup>(...continued)

Investment Trust II; Kidder, Peabody Investment Trust, III; Kidder, Peabody Municipal Money Market Series; Kidder, Peabody Premium Account Fund; Kidder, Peabody Tax Exempt Money Fund, Inc.; Liquid Institutional Reserves; and Institutional Series Trust.

<sup>2/</sup> See Kidder, Peabody Investment Trust (pub. avail. May 14, 1993).

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### BACKGROUND

On October 17, 1994, Paine Webber Group Inc. ("PWG"), the parent of PaineWebber and Mitchell Hutchins, entered into an asset purchase agreement (the "Asset Purchase Agreement") with Kidder Peabody Group Inc. ("KPG") and its parent, GE. That agreement provides for the purchase by PWG and certain of its subsidiaries of certain assets of KPG and KPG's subsidiaries. Under the terms of the agreement, PWG was, among other things, to issue certain securities, including common stock, convertible preferred stock, and redeemable preferred stock, to GE in consideration for KPG's assets (the "Transaction"). The Transaction's closing was divided into several phases over a period of a few months. At each phase, KPG transferred a part of its business assets to PWG pursuant to the Asset Purchase Agreement. The phase of the closing relating to the investment management business is scheduled to take place on or about January 30, 1995 (the "Closing"), at which time most of the assets of the subsidiaries providing investment advisory and distribution services to the KP Funds are expected to be transferred to PWG and its subsidiaries. Thus, the issues presented in this request for no action assurances arise at the Closing. As a result of the Transaction, GE presently holds approximately 22% of the currently outstanding PWG common stock and certain convertible preferred shares, which, if and when converted in full, could result in GE being the beneficial owner of slightly more than 25% of PWG's then-outstanding common stock. GE has agreed to numerous restrictions on its activities which PWG believes should result in GE being a non-controlling shareholder of PWG.<sup>3/</sup>

KPAM, an investment adviser wholly owned by KP&Co., is the adviser to thirteen registered management investment companies, known as the KP Funds, with over twenty portfolios. KP&Co. is the distributor of the KP Funds. PaineWebber and Mitchell Hutchins currently serve as adviser to and distributor of over twenty-five registered management investment companies, with over fifty portfolios, known as the PW Funds. Following the Closing, PaineWebber and Mitchell Hutchins propose to serve the KP Funds in those capacities, subject to approval by the KP Funds' boards of directors or trustees. On December 14 and December 16, 1994,

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<sup>3/</sup> GE, PWG and Mitchell Hutchins expect to file an exemptive application requesting an order pursuant to Section 2(a)(9) of the 1940 Act, declaring that the presumption that GE controls PWG arising under Section 2(a)(9) has been rebutted primarily on the basis of the restrictions on GE's activities referred to above.

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the KP Funds' boards approved these matters, among others related to the Transaction. Shareholder approval of the proposed advisory contracts will be sought as soon as practicable.

**PART 1: 1940 Act Sections 2(a)(32), 2(a)(35), 18(f), 18(g), 18(i), 22(c), 22(d), and Rule 22c-1**

**A. The Exemptive Orders**

The Commission has granted orders of exemption to the KP Funds for relief from Sections 2(a)(32), 2(a)(35), 18(f), 18(g), 18(i), 22(c), 22(d) of the 1940 Act and Rule 22c-1 thereunder relating to the establishment of a multiple class system and CDSC (the "Exemptive Orders").<sup>4/</sup> KP&Co., in its capacity as distributor, was included as an applicant in such matters and, accordingly, is subject to certain conditions imposed by the Exemptive Orders. It is now contemplated, after the consummation of the Transaction, that PaineWebber or Mitchell Hutchins, rather than KP&Co., will serve as distributor of the KP Funds.<sup>5/</sup> Because the Transaction is structured as an asset purchase, PWG will not be acquiring the entity to which an Exemptive Order was issued, nor has PWG, or its subsidiaries, PaineWebber and Mitchell Hutchins, formally undertaken specifically to meet the conditions that were imposed on that entity in the Exemptive Orders. Accordingly, the Exemptive Orders may not be available automatically to PaineWebber and Mitchell Hutchins, but their

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<sup>4/</sup> Eleven of the KP Funds rely on an exemptive order relating to the establishment of a multiple class system and CDSC: Kidder Peabody California Tax Exempt Money Fund, et al., 1940 Act Release Nos. 19226 (January 22, 1993) (Notice) and 19269 (February 17, 1993) (Order). One of the KP Funds relies on a separate exemptive order relating solely to the establishment of a multiple class system: Liquid Institutional Reserves, et al., 1940 Act Release Nos. 18409 (November 15, 1991) (Notice) and 18435 (December 10, 1991) (Order). Institutional Series Trust ("IST") was not a party to either of these exemptive orders, however the exemptive relief granted in those orders, by their terms, apply to IST. With the exception of these exemptive orders, other orders that were issued by the Commission to the KP Funds and KP&Co. are no longer necessary as a result of subsequently issued exemptive orders or subsequent Commission rulemaking under the 1940 Act.

<sup>5/</sup> PaineWebber will serve as distributor of the KP Funds which are money market funds, and Mitchell Hutchins will serve as distributor of the other KP Funds.



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reliance on the Exemptive Orders is essential for the continued operations of the KP Funds.<sup>6/</sup> PaineWebber and Mitchell Hutchins, therefore, filed an application (the "Pending Application") with the Commission on December 21, 1994, requesting an exemptive order ("Renewal Order") that would effectively continue the exemptive relief previously granted to the KP Funds and KP&Co. by the Commission in the Exemptive Orders.

B. Analysis

PaineWebber, Mitchell Hutchins and the KP Funds propose that, pending receipt of the order sought under the Pending Application, those entities would rely on the Exemptive Orders and would be subject to their terms and conditions.<sup>7/</sup> PaineWebber and Mitchell Hutchins specifically agree that, pending receipt of the Renewal Order, they will comply with the terms and conditions in the Exemptive Orders imposed on KP&Co., as though such terms and conditions were imposed directly on them. The parties agree that the Staff no-action position shall remain in effect until the date on which final action is taken on the Pending Application.

We believe that the KP Funds should be permitted to continue relying on the Exemptive Orders because the factors supporting their issuance remain applicable and the operation of the KP Funds' multiple class system under the Exemptive Orders will not change, even though the KP Funds will have a different distributor after the Transaction. We also believe that PaineWebber and Mitchell Hutchins should be permitted to rely on the Exemptive Orders because PaineWebber and Mitchell Hutchins

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<sup>6/</sup> We believe that the KP Funds can continue to rely upon the exemptions granted in the Exemptive Orders. Because the identities of the KP Funds will not change as a result of the Transaction, we believe that they can continue to rely on the Exemptive Orders even after the Closing. Nonetheless, the KP Funds are included as parties to this no-action request solely because the Exemptive Orders at issue involve their securities.

<sup>7/</sup> In addition, because the Exemptive Orders apply to registered investment companies organized in the future that are in the same "group of investment companies" (as defined in Rule 11a-3) as the KP Funds, it is proposed that any such new registered investment companies could rely on the Exemptive Orders, subject to those orders' terms and conditions, pending receipt of the order sought under the Pending Application.

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will abide by those orders' protective conditions currently applicable to KPAM and KP&Co. Moreover, because, as described above, substantially all of KPG's assets are being transferred to PWG for consideration valued at more than \$650 million for valid business reasons, we do not believe that a question can be raised that the Transaction was occasioned by a desire on the part of PWG, PaineWebber or Mitchell Hutchins to acquire use of the Exemptive Orders.

The Staff previously has taken "no-action" positions in similar situations involving various parties who sought to continue to rely on exemptive orders despite changes in circumstances similar to those involved here.<sup>8/</sup>

**PART II. 1940 Act Section 12(d)(3) and Rule 12d3-1**

In a letter dated March 14, 1993, the Staff assured the Trust that it would not recommend any enforcement action to the Commission under Section 12(d)(3) of the 1940 Act if the Fund purchased common stock of GE as described in the Trust's letter dated March 8, 1993. The Staff's position was based on the facts in that letter and the Trust's representation that KP&Co.'s revenues amounted to 7.05% of GE's consolidated revenues in 1992,

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<sup>8/</sup> See The Kent Funds (pub. avail. February 15, 1994) (pending receipt of renewal order, investment company can rely on order granted to former distributor); Shearson Lehman Brothers and Smith Barney Harris Upham (pub. avail. June 8, 1993) (pending receipt of renewal orders, investment company can rely on orders granted to former distributor/underwriter); The PNC Fund (pub. avail. April 2, 1993) (pending receipt of amended order, investment company can rely on order granted to former distributor); Cigna Funds Group (pub. avail. July 13, 1992) (investment companies with a new sponsor can rely on exemptive order relating to deferred compensation for non-interested trustees even though the order was granted to their previous sponsor for investment companies sponsored by such sponsor); Merrill Lynch Federal Securities Trust (pub. avail. Sept. 26, 1991) (investment company can rely on exemptive order permitting dual distribution system without seeking to amend order even though order did not originally apply to investment company); First Boston Corporation (pub. avail. July 3, 1991) (newly created funding corporation can rely on order exempting a substantially equivalent, but separate, funding corporation from registration without seeking separate order); and Federated Investors, Inc. (pub. avail. Sept. 22, 1989) (reorganized entities can rely on order that only applied to predecessors).

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6.13% in 1991, and 5.6% in 1990. Because PW anticipates, after the Closing, that PWG's revenues will amount to a similar minority portion of GE's revenues, the Trust requests Staff assurances that it may continue to rely on the March 14, 1993 letter.

As noted in the initial no action letter, Section 12(d)(3) of the 1940 Act generally prohibits an investment company from purchasing securities issued by a broker, dealer, investment adviser, or underwriter. Rule 12d3-1 exempts purchases of such securities from the prohibitions of Section 12(d)(3) under certain circumstances. However, paragraph (c) of Rule 12d3-1 prohibits an investment company from purchasing securities issued by any affiliated person of the fund's investment adviser or distributor that is in a securities-related business.

After the consummation of the Transaction, PWG, the parent company of PaineWebber and Mitchell Hutchins, will be an affiliated person of GE as defined in Section 2(a)(3)(B) of the 1940 Act as a result of GE's ownership of more than 5% of PWG's common stock. In addition, GE could be deemed to be engaged indirectly in a securities-related business because of its ownership of PWG common stock. Accordingly, the Fund's purchase of GE stock arguably may be prohibited under paragraph (c) of Rule 12d3-1 because GE is indirectly an affiliated person of the Fund's investment adviser and distributor and GE could be deemed to be engaged indirectly in a securities-related business by virtue of its ownership of PWG common stock.

The Staff previously granted no action assurances to the Trust allowing it to purchase GE Stock where GE was a controlling person and parent of KP&Co., a company in a securities-related business. As a result of the Transaction, GE is an affiliate of PWG. Thus, the Trust, PaineWebber and Mitchell Hutchins request that the Staff continue not to recommend that enforcement action be brought under Section 12(d)(3) of the 1940 Act, and Rule 12d3-1 thereunder, if the Fund continues to purchase common stock of GE. Except for the change of identity of the Fund's investment adviser and distributor, and the different affiliation between GE and PWG and its subsidiaries relative to GE's affiliation with KP&Co., the representations in the initial no action letter remain unchanged in all material respects. The Trust's letter indicated that the Fund intended to utilize its distributor as an executing broker in certain cases. After the Closing, the Fund may similarly effect brokerage transactions through PaineWebber pursuant to procedures adopted under Rule 17e-1. The Fund, PaineWebber and Mitchell Hutchins assert that

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they will acquire GE stock only in accordance with the conditions that were stated in the Trust's letter.

For the above reasons, we believe that the Fund should be able to continue to purchase GE stock. The Staff previously has taken a "no action position" in a situation involving a party who sought to rely on a prior no action letter.<sup>2/</sup>

**III. CONCLUSION**

For the reasons stated above, and, subject (1) to the condition that the KP Funds, PaineWebber and Mitchell Hutchins will comply with the terms and conditions of the Exemptive Orders pending receipt of the order sought by the Pending Application, and (2) to the condition (a) that all representations concerning the circumstances under which GE common stock may be purchased by the Fund made in the original request for no action remain true, except for the identity of the Fund's investment adviser and, distributor, and the indirect affiliation between GE and PWG and (b) that the Fund will continue to abide by the conditions stated in the request for no action, we respectfully request that the Staff advise that it will not recommend that the Commission take enforcement action if (1) the KP Funds, PaineWebber and Mitchell Hutchins rely on the Exemptive Orders pending receipt by PaineWebber and Mitchell Hutchins of an order as requested by the Pending Application, and (2) the Fund continues to invest in shares of common stock of GE, and effects brokerage transactions through PaineWebber and Mitchell Hutchins.

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<sup>2/</sup> See Investors Bank and Trust Company (pub. avail. July 20, 1992) (bank sought to rely upon a no action letter previously issued to another bank where the first bank had acquired the other bank's mutual fund custody business).

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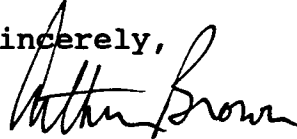
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Should you have any questions regarding this request, please contact the undersigned at (202) 778-9046 or Stephanie Djinis at (202) 778-9252.

Sincerely,

A handwritten signature in cursive script that reads "Arthur J. Brown". The signature is written in dark ink and is positioned below the word "Sincerely,".

Arthur J. Brown