ACT 1CA; 1AA; 1933 Act
SECTION 34(b); 206; 5(b)
RULE 34b-1(1CA); Rule 482
PUBLIC AVAILABILITY August 28, 2000

August 28, 2000
Our Ref. No. 20008251329
Janus Adviser Series
File No. 811-9885

RESPONSE OF THE OFFICE OF CHIEF COUNSEL
DIVISION OF INVESTMENT MANAGEMENT

Your letter dated July 17, 2000, requests our assurance that we would not recommend enforcement action to the Commission under Section 5(b) of the Securities Act of 1933 ("1933 Act"), Section 34(b) of the Investment Company Act of 1940 ("1940 Act") or Section 206 of the Investment Advisers Act of 1940 ("Advisers Act") if Janus Adviser Series ("Adviser Series"), an open-end investment company organized by Janus Capital Corporation ("Janus Capital"), presents standardized performance information, and performance information in response to certain items of Form N-1A, for each of ten series of Adviser Series which includes performance information for periods prior to the date that Adviser Series' registration statement becomes effective. Specifically, ten of the series of Adviser Series will be formed from the spin-off of an existing class of ten corresponding series of Janus Aspen Series ("Aspen Series"), a registered open-end investment company. You seek to include the performance information of a spun-off class of a series of Aspen Series as, among other things, part of the standardized performance information of the corresponding series of Adviser Series.

BACKGROUND

You state that Aspen Series currently consists of ten series, each of which offers to the public three classes, the Institutional Shares class (collectively, for all ten series, the "Institutional Classes"), the Retirement Shares class (collectively, for all ten series, the "Retirement Classes") and the Service Shares class (collectively, for all ten series, the "Service Classes").[1] The Institutional Classes commenced operations in 1993 and are sold primarily to life insurance separate accounts to serve as an investment option under variable life insurance and annuity contracts. The Retirement Classes commenced operations on May 1, 1997, and are sold primarily to qualified retirement plans. The Service Classes commenced operations on December 31, 1999, and are sold primarily to life insurance separate accounts to serve as an investment option under variable life insurance and annuity contracts. The Retirement Classes charge a .25% administration fee and a .25% fee under a Rule 12b-1 plan. The Service Classes charge a .25% fee under a Rule 12b-1 plan. The Institutional Classes impose no such fees. Class-specific expenses are allocated only to the relevant classes, and the three classes have different dividend and capital gain distributions. You state that because of the differences in fees, expenses and distributions, the classes have different net asset values and different performance information. The Retirement Classes, Institutional Classes and the Service Classes present their own performance information in their respective prospectuses, statements of additional information, advertisements and sales literature.

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[1] You state that Aspen Series had established Retirement Shares for an eleventh series, the High-Yield Portfolio, but no Retirement Shares of that series were publicly sold. You also state that Aspen Series has three additional series but does not offer the Retirement Shares class for those three series.

You state that the Retirement Classes have certain regulatory limitations imposed on them because the Institutional Classes and the Service Classes are sold to insurance company separate accounts as investment options for variable insurance contracts. Specifically, you state that Aspen Series must comply with Section 817(h) of the Internal Revenue Code and the regulations thereunder which prevent sales of shares of any fund underlying variable insurance contracts (such as Aspen Series) to investors other than insurance companies and certain qualified retirement plans.[2] To remove this limitation from the Retirement Classes and to expand the pool of potential investors, you state that Aspen Series will spin-off the Aspen Series Retirement Class of each of ten series to form ten newly created series of Adviser Series (each a "Fund"), each of which will operate in the same manner as the Retirement Classes currently operate.

You assert that the Funds should be permitted to carry over the performance information of the Retirement Classes and to present the carried-over performance information as part of the standardized performance information of the Funds in each Fund's registration statement, advertisements or sales literature or as part of performance information in each Fund's prospectus in response to certain items of Form N-1A.[3] You represent that Adviser Series will disclose, when presenting this performance information, that each Fund was previously organized as a Retirement Class of Aspen Series, the performance information of each Fund includes performance of the Retirement Class of Aspen Series and the date that each fund commenced operations.

ANALYSIS

Section 34(b) of the 1940 Act, in pertinent part, makes it unlawful for any person to make any untrue statement of a material fact in any fund's registration statement or other document filed pursuant to the 1940 Act,[4] or to omit to state any fact necessary to prevent the

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[2] You state that Janus Capital and many of the sponsors of the qualified plans currently investing in the Retirement Classes believe that plan sponsors and participants want to invest more than qualified retirement plan assets in the Retirement Classes. You state, for example, that plan sponsors have expressed a desire to use Retirement Classes in their non-qualified plans so that they have the same options in both their qualified and non-qualified plans.

[3] You have not asked, and we express no view regarding, any other issues raised under the 1940 Act by the spin-off.

[4] Section 24(b) of the 1940 Act, in pertinent part, makes it unlawful for a fund to transmit any advertisement or other sales literature addressed to or intended for distribution to prospective investors unless three copies of the full text thereof have been filed with the

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statements made therein from being materially misleading. Section 206 of the Advisers Act, among other things, makes it unlawful for any investment adviser to employ any device, scheme, or artifice to defraud any client or prospective client or to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client.

If a fund includes performance information in its registration statement, advertisements or sales literature, it must present that information in accordance with "standardized" requirements.[5] In particular, Item 21(b) of Form N-1A requires a fund that advertises its performance information to disclose in its registration statement its performance information calculated in accordance with the standardized method set forth in that item. Similarly, Rule 482 under the 1933 Act provides, among other things, that if an open-end management investment company (other than a money market fund) includes its performance in an advertisement, it must include standardized total return information in accordance with paragraph (e)(3) of the rule. Rule 34b-1 under the 1940 Act also provides that mutual fund sales literature (e.g., supplemental sales literature accompanied or preceded by a statutory prospectus, and pamphlets or other written sales material) containing fund performance information must include, among other things, the total return calculations required by paragraph (e)(3) of Rule 482.

Commission or are filed with the Commission within ten days thereafter. Rule 24b-3 under the 1940 Act generally provides that any advertisement or sales literature filed with the National Association of Securities Dealers, Inc., shall be deemed filed with the Commission for purposes of Section 24(b) of the 1940 Act.

[5] A fund must calculate its standardized performance information in accordance with the requirements of Item 21 of Form N-1A. A fund may present non-standardized performance information in its registration statement, advertisements or sales literature, provided that, among other things, the non-standardized performance information contains all elements of return and is accompanied by the required standardized performance information. See Rule 482(e)(4) under the 1933 Act; Item 21(b)(4) of Form N-1A. See also Investment Company Act Release No. 15315, at § VI (Sept. 17, 1986) ("Proposing Release") (Rule 34b-1 does "not make the standardized performance data the exclusive performance data in sales literature").

We disagree with your assertion that, absent the requested relief, current shareholders of the Retirement Classes would "see the performance information of their chosen investment options wiped away." We note that, among other things, the Funds could supplementally present the Retirement Classes' performance information as non-standardized performance information in each Fund's registration statement, advertisements and sales literature, provided that appropriate standardized performance information and disclosure also is presented.

In addition, certain items of Form N-1A generally require the presentation of standardized and certain other performance information (collectively, "required Form N-1A performance information") in a fund's prospectus. Specifically, Item 2(c)(2)(iii) of Form N-1A requires a fund that has annual returns for at least one calendar year to provide a table showing the fund's average annual total returns calculated in accordance with Item 21(b)(1). Item 2(c)(2)(ii) of Form N-1A also requires a fund that has annual returns for at least one calendar year to provide a bar chart showing the fund's annual total returns for each of the last 10 calendar years (or for the life of the fund, if less than 10 years).[6] Item 5(b) of Form N-1A requires that a fund include in its prospectus (unless the fund is a money market fund or the information is included in the fund's latest annual shareholder report) management's discussion of fund performance, including a line graph comparing the initial and subsequent account values at the end of each of the most recently completed 10 fiscal years of the fund (or for the life of the fund, if less than 10 years), and a table, placed within or next to the graph, providing the fund's average annual total returns calculated in accordance with Item 21(b)(1). Finally, Item 9 of Form N-1A requires the presentation of certain financial highlights, including a fund's total return for the past five years (or for the period of the fund's operations, if less than five years).

A mutual fund generally may not present its standardized performance information in its registration statement, advertisements or sales literature, or include its required Form N-1A performance information in its prospectus, for a period prior to the effective date of the fund's registration statement. Specifically, Item 21(b)(1) of Form N-1A requires a fund that advertises performance information to disclose in its registration statement the fund's standardized performance information for prescribed one-, five- and ten-year periods or "for the periods the Fund has been in operation."[7] Rule 482(e) under the 1933 Act provides that mutual fund advertisements (other than money market funds) containing performance information must include standardized quotations of average annual total return calculated in accordance with Item

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[6] Unlike the standardized performance information required to be presented in the table by Item 2(c)(2)(iii) of Form N-1A, the annual total returns disclosure required in the bar chart by Item 2(c)(2)(ii) of Form N-1A does not reflect the deduction of sales loads or account fees and is presented for only a single class of a multiple class fund. See Item 2(c)(2) of Form N-1A, Instructions 1.(a) and 3.(a).

[7] The term "Fund" is defined in Form N-1A as "the Registrant or a separate Series of the Registrant," and the term "Registrant" is defined in Form N-1A as "an open-end management investment company registered" under the 1940 Act. See Form N-1A, General Instruction A. Accordingly, we interpret the phrase "for the periods the Fund has been in operations" to be subsequent to the effective date of a fund's registration statement.

21(b)(1) of Form N-1A for one-, five- and ten-year periods from the date that the fund's registration statement became effective.[8] Similarly, Item 2(c)(2), Item 5(b)(1) and Item 9 of Form N-1A generally require a mutual fund to present its required Form N-1A performance information "only for periods subsequent to the effective date of the Fund's registration statement."[9] Accordingly, Rule 482(e), Rule 34b-1[10] and Form N-1A do not permit a mutual fund to present standardized performance information in its registration statement, advertisements[11] or sales

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[8] See Rule 482(e)(3) under the 1933 Act (if a mutual fund's registration statement has been in effect for less than any of those periods, the period during which the fund's registration statement has been in effect must be substituted for the period or periods otherwise required). See also Investment Company Act Release No. 16245, at § II.9.(a) (Feb. 2, 1988) ("Adopting Release") (Rule 482 standardized performance information is limited "to periods subsequent to effectiveness of the fund's registration statement").

[9] Item 5(b)(2) of Form N-1A requires a fund to disclose its average annual total returns for specified periods calculated in accordance with Item 21(b)(1). As noted above, under Item 21(b)(1), a fund may not present its standardized performance information for periods prior to the effective date of its registration statement. See supra note 7 and accompanying text.

[10] Rule 34b-1 "extend[s] the standardization requirements [of Rule 482] to fund sales literature containing performance data." See Adopting Release, supra note 8, at § III. Accordingly, the Rule 482 limitation that a mutual fund may not present standardized performance information using a starting date before the effective date of its registration statement applies to the presentation of standardized performance information in a fund's sales literature.

[11] Section 5(b)(1) of the 1933 Act makes it unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to carry or transmit any prospectus relating to any security with respect to which a registration statement has been filed unless such prospectus meets the requirements of Section 10 of the 1933 Act. A mutual fund advertisement that complies with the requirements of Rule 482 under the 1933 Act is deemed to constitute a prospectus under Section 10(b) of the 1933 Act for the purpose of Section 5(b)(1). As noted above, see supra note 8 and accompanying text, Rule 482 provides that a mutual fund may not present its standardized performance information using a starting date before the effective date of its registration statement. As a result, the use of an advertisement presenting standardized performance information using a starting date other than that permitted by Rule 482 could result in a violation of Section 5(b)(1) of the 1933 Act because the advertisement would not meet the requirements of Section 10 of the 1933 Act.

literature, or to present required Form N-1A information in its prospectus,[12] using a starting date before the effective date of its registration statement.

We previously have explained that the requirement that standardized performance data not include periods prior to a mutual fund's registration is intended, in part, to preclude an adviser from establishing a number of funds for the purpose of generating performance data, and then registering those "incubator funds" with the best performance records so that the newly registered funds can use that performance.[13] In addition, the Commission has noted in the release adopting

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[12] Section 5(b)(2) of the 1933 Act makes it unlawful for any person, directly or indirectly, to carry or cause to be carried through the mails or in interstate commerce any security for the purpose of sale or for delivery after sale, unless accompanied or preceded by a prospectus meeting the requirements of Section 10(a) of the 1933 Act. Form N-1A, Part A, sets forth the information required to be included in a mutual fund's Section 10(a) prospectus. As noted above, see supra note 9 and accompanying text, the required Form N-1A performance information, which is included in Part A of Form N-1A, may not include performance information using a starting date before the effective date of its registration statement. Additionally, Form N-1A explicitly states that a fund may not include disclosure in Item 2 other than that required or permitted by that item. See Form N-1A, General Instruction B.3.(b). Consequently, the presentation of performance information in response to the required Form N-1A performance information in a fund's prospectus using a starting date before the effective date of its registration statement could result in a violation of Section 5(b)(2) of the 1933 Act because the prospectus would not meet the requirements of Section 10(a) of the 1933 Act.

[13] See MassMutual Institutional Funds (pub. avail. Sept. 28, 1995) ("MassMutual"). See also Letter from Jack W. Murphy to William Greene (Feb. 3, 1997). In MassMutual, we agreed not to recommend enforcement action to the Commission if an open-end series investment company included, as part of its standardized performance information, the performance information of the unregistered investment accounts that converted into and registered under the 1940 Act to become the series. MassMutual involved unregistered accounts, created for purposes entirely unrelated to the establishment of a performance record, that were to be converted into series of a registered fund with substantially similar investment objectives, policies and strategies as the predecessor accounts.

You argue that the Funds should be permitted to carry forward the performance information of the Retirement Classes based on our position in MassMutual. Our position in MassMutual, however, was based on all of the facts and representations set forth in that letter. In MassMutual, substantially all of the assets of each unregistered predecessor account were transferred to a corresponding successor fund, after which the unregistered predecessor accounts were terminated. In contrast with MassMutual, you acknowledge that substantially all of the

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amendments to Rule 482 that a fund would not be permitted to advertise its performance prior to the effectiveness of its registration statement because "funds are likely to be managed differently before they are offered to the public."[14]

You contend that the Funds' proposed use of the performance of the Retirement Classes does not implicate the primary concerns against permitting a fund to present standardized performance information and required Form N-1A performance information prior to the effective date of the fund's registration statement. Specifically, you represent that: (1) the reorganization has not been proposed in order to use the prior existing performance information but rather to eliminate an impediment to the ability of the Retirement Classes to meet their investors' needs and to sell their shares to other types of investors; and (2) the Retirement Classes were previously part of a registered investment company and were subject to the same investment restrictions imposed by the 1940 Act as those that will be imposed on the Funds. Accordingly, you assert that your proposal does not implicate the primary concerns underlying the requirement that standardized performance information not include periods before a fund's registration.

You also assert that the Funds will operate, for all practical purposes, as the continuation of the Retirement Classes. Specifically, you represent the following: (1) on the date of the reorganization, assets equal to the value of all of the outstanding shares of the Retirement Class of each of the ten series of Aspen Series will be transferred to a corresponding Fund;[15] (2) each Fund will have the same investment adviser and the same investment objectives, policies and restrictions as the corresponding series of Aspen Series; (3) the portfolio composition of each Fund will be substantially the same as the portfolio composition (except as to amounts of securities) of the corresponding series of Aspen Series immediately prior to the reorganization;[16]

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assets of each series of Aspen Series will not be transferred to the corresponding Fund and each series of Aspen Series will continue to operate after the spin-off. We do not agree, therefore, that our position in MassMutual applies to your proposal.

[14] See Adopting Release, supra note 8, at § II.9.(a).

[15] You state that each Fund will have the same shareholders as the Retirement Class of the corresponding series of Aspen Series. Each shareholder will receive, on the date of the reorganization, Fund shares with the same value as the Retirement Class shares that the shareholder previously held.

[16] You represent that the assets transferred to each Fund will include a pro rata share of each securities position in the corresponding series of Aspen Series immediately prior to the reorganization except for (1) securities that are subject to restrictions on resale or transfer, such as private placement securities, and (2) rounding off to eliminate fractional shares and odd lots of securities. You state that, in other words, you generally will allocate to each Fund full lots of

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(4) no Fund will have any pre-existing assets or a performance history; and (5) after the spin-off, Aspen Series will no longer have any Retirement Classes. You also state that the Retirement Class for each series of Aspen Series has its own performance history, and each class currently presents its own financial highlights in its prospectus.[17] Essentially, you contend that the spin-off of the Retirement Classes is not a fundamental change in the operations of the Retirement Classes, and, as a continuation of the Retirement Classes, the Funds should not abandon the past performance of the Retirement Classes.[18]

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securities (rather than odd lots and fractional shares), and you generally will not allocate to each Fund private placement securities.

[17] The Division views the spin-off of a class of shares of a fund, as described in your letter, into a newly formed investment company (a "shell investment company") as a reorganization of the class into the shell investment company. As such, the class is deemed to be the accounting survivor for financial reporting purposes and must carry over the fund's financial statements and the class's financial highlights. You represent that Adviser Series will include in, or incorporate by reference into, Adviser Series' initial registration statement on Form N-1A the financial highlights of the Aspen Series Retirement Classes and the financial statements of Aspen Series to satisfy the requirements of Items 9 and 22 of Form N-1A. You also represent that the financial statements will be prepared in accordance with, and cover the periods required by Regulation S-X, Articles 3 and 6, and Rule 30d-1 under the 1940 Act. Because this reorganization also includes a change in fiscal year-end, audited financial statements of Aspen Series and financial highlights of Aspen Series Retirement Classes for the period since the Aspen Series' previous audited financial statements and financial highlights through the date of the proposed reorganization will be added to the Adviser Series registration statement on a timely basis. You represent that Adviser Series will include in, or, if appropriate, incorporate by reference into, subsequent filings the financial statements of Aspen Series and financial highlights of Aspen Series Retirement Classes for all prior periods required by Regulation S-X and Form N-1A. Any questions regarding the treatment of accounting issues in this letter should be directed to John S. Capone, Chief Accountant, or Brian D. Bullard or Kenneth B. Robins, Assistant Chief Accountants, in the Division's Office of the Chief Accountant at 202-942-0590.

[18] Cf. Comstock Partners Strategy Fund, Inc. (pub. avail. Apr. 6, 1995) (conversion from a closed-end fund to an open-end fund, by itself, is not such a fundamental change that would justify, under Rule 482(e), the elimination of prior performance); Zweig Series Trust (pub. avail. Jan. 10, 1990) (fund may not exclude performance information when new investment adviser has common officers with prior investment adviser); The Fairmont Fund Trust (pub. avail. Dec. 9, 1988) (fund's change from a non-diversified, aggressive trading fund to a diversified, balanced fund would not warrant, under Rule 482(e), the exclusion of the fund's standardized performance information for the period prior to the management change).

We agree that, as described in your letter, the Funds' proposed use of the performance information of the Retirement Classes does not implicate the primary concerns against permitting a fund to present performance information prior to the effective date of the fund's registration statement. We also agree that, as described in your letter, the Funds effectively will operate as a continuation of the Retirement Classes such that the performance history of the Retirement Classes may be carried forward. Accordingly, we would not recommend enforcement action to the Commission under Section 5(b) of the 1933 Act, Section 34(b) of the 1940 Act, or Section 206 of the Advisers Act if Adviser Series includes standardized performance information in each Fund's registration statement, advertisements or sales literature, or includes required Form N-1A performance information in its prospectus that includes performance information of the Retirement Classes prior to the date that Adviser Series' registration statement becomes effective.[19] Our position is based on the facts and representations contained in your letter. Our position is limited solely to the spin-off of an entire class of an existing registered fund and does not address the use of performance information by a fund that is formed by carving out a portion of a predecessor class. You should note that any different facts or representations might require a different conclusion.[20]

Brent J. Fields
Senior Counsel

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[19] We believe that a Fund that includes the performance information of the corresponding Retirement Class in its standardized performance information and required Form N-1A performance information may not subsequently exclude that performance information, absent the Fund undergoing a fundamental change in operations. See, e.g., Unified Funds (pub. avail. Apr. 23, 1991); John Hancock Asset Allocation Trust (pub. avail. Jan. 3, 1991); Founders Fund, Inc. (pub. avail. Oct. 15, 1990). We also note that a mutual fund that is created by the spin-off of a class of another fund and that presents its performance information but fails to disclose adequately the performance of the predecessor class (for example, as supplemental, non-standardized performance information in the fund's registration statement, advertisements or sales literature) could be deemed to have omitted to state a fact necessary in order to make the statements in its registration statement, advertisements or sales literature not materially misleading.

[20] This response should not be construed as providing no-action assurance with respect to any particular presentation of the performance of the Funds.

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July 17, 2000

Douglas J. Scheidt, Esq.
Associate Director and Chief Counsel
Division of Investment Management
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549

Re: Janus Adviser Series

Dear Mr. Scheidt:

On behalf of Janus Capital Corporation ("Janus Capital"), we hereby request that the staff of the Securities and Exchange Commission (the "Staff") provide its assurance that it would not recommend enforcement action under Section 5(b) of the Securities Act of 1933 (the "1933 Act"), Section 34(b) of the Investment Company Act of 1940 (the "1940 Act") or Section 206 of the Investment Advisers Act of 1940 (the "Advisers Act"), if Janus Adviser Series ("Adviser Series"), a new open-end investment company organized by Janus Capital, presents standardized performance information and performance information in response to certain items of Form N-1A (collectively, "performance information") as described in this letter.

Janus Aspen Series ("Aspen Series"), a registered open-end investment company, intends to spin off one class to the new Adviser Series (the "Planned Reorganization"). Adviser Series would resemble in all material respects the spun-off class. Given that Adviser Series will be the continuation of that class, we believe that the only meaningful and complete presentation of Adviser Series' investment performance will be to include the class' existing performance prior to the Planned Reorganization. Accordingly, we propose to carry over the class' existing performance information when the Planned Reorganization occurs. After the Planned Reorganization, Adviser Series would then include the carried-over performance when calculating its own performance information.

I. Background

Aspen Series is a registered open-end investment company that currently consists of ten series having three classes (each, a "Fund"), the Institutional Shares class (collectively for all Funds, the "Institutional Classes"), the Retirement Shares class (collectively for all Funds, the "Retirement Classes") and the Services Shares class (collectively for all Funds, the "Service Classes").[1] Janus Capital serves as investment adviser to all of the Aspen Series Funds.

Aspen Series' three classes are each aimed at different groups of investors. The Institutional Classes, which commenced operations in 1993, are sold primarily to life insurance separate accounts to serve as investment options under variable life insurance and annuity contracts. The Retirement Classes, which commenced operations on May 1, 1997, are sold to qualified retirement plans. The Service Classes commenced operations on December 31, 1999, and, like the Institutional Classes, are sold primarily to life insurance separate accounts to serve as investment options under variable life insurance and annuity contracts. Each class is offered pursuant to a separate prospectus and statement of additional information. There is no exchange privilege between the classes. As of December 31, 1999, the Retirement Classes had approximately $380 million in assets.

The three classes have different fee structures. Specifically, the Retirement Classes charge a 0.25% administration fee and a 0.25% fee under a Rule 12b-1 plan. The Service Classes charge a 0.25% fee under a Rule 12b-1 plan. The Institutional Class imposes no such fees. Class-specific expenses are allocated only to the relevant class, and the three classes also have different dividend and capital gain distributions. As a result of these differences in fees, expenses, and distributions, the classes have different net asset values and different performance information.

Each class presents its own performance information in its respective prospectus, statement of additional information, and advertising and supplemental sales literature. Performance information for the Institutional Classes reflects the classes' actual historical performance from the date each Fund commenced operations. Performance information for the Retirement Classes reflects the classes' actual historical performance for the period since

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[1] Aspen Series had established a Retirement Shares class for an eleventh series, the High-Yield Portfolio, but no Retirement Shares of that series were publicly sold. Aspen Series has three additional series, but none of those three series has a Retirement Shares class.

they commenced operations on May 1, 1997, and also includes the Institutional Classes' historical performance for the period each Fund commenced operations until April 30, 1997, restated, pursuant to Quest for Value Dual Purpose Fund, Inc. (pub. avail. Feb. 28, 1997), to reflect the Retirement Classes' fees and expenses (without waivers or reimbursements) disclosed in the initial prospectus for the Retirement Classes dated May 1, 1997.[2]

II. The Planned Reorganization

Because the Institutional Classes and the Service Classes are sold to insurance company separate accounts as an investment option for variable insurance contracts, the Retirement Classes are subject to limits that do not apply to most other funds. Specifically, Section 817(h) of the Internal Revenue Code and the regulations thereunder prevent sales of shares of a fund underlying variable insurance contracts, including Aspen Series, to investors other than insurance companies and certain qualified retirement plans. This limitation has become a problem for Aspen Series and its investors. Janus Capital and many of the sponsors of the qualified plans currently investing in the Retirement Classes believe that plan sponsors and participants want to invest more than qualified retirement plan assets in the Retirement Classes. For example, plan sponsors have expressed a desire to use the Retirement Classes in their non-qualified plans so that they have the same options in both their qualified and non-qualified plans. In addition, Janus Capital would like to be able to expand the pool of potential investors generally.

The Planned Reorganization is designed to give the Retirement Classes the ability to respond to these requests of plan sponsors and to allow generally for greater growth of the Retirement Classes. In the Planned Reorganization, Aspen Series would spin off the Retirement Classes to form the newly-created Adviser Series, which will operate in the same manner as the Retirement Classes currently do. Under this Planned Reorganization, assets of each Fund equal to the value of all outstanding shares of the Retirement Class of that Fund will be transferred to a corresponding new Adviser Series Fund, which will have no preexisting assets or performance history, and all Retirement Class shareholders will have their shares replaced by Adviser Series shares of equal value.

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[2] Three Funds commenced operations on or after May 1, 1997. The Retirement Class performance information for these Funds therefore consists solely of the class' actual historical performance. Performance information for the Service Classes is calculated in a manner similar to that used for the Retirement Classes.

When the Planned Reorganization is complete, Aspen Series will no longer have any Retirement Classes. Instead, Adviser Series will operate, for all practical purposes, as the continuation of the Retirement Classes, which it will resemble in all material respects:

- Each Adviser Series Fund will have the same shareholders as the Retirement Class of the corresponding Aspen Series Fund. On the date of the Planned Reorganization, each shareholder will receive Adviser Series shares with the same value as the Retirement Class shares that the shareholder previously held.

- Each Adviser Series Fund will have the same investment adviser and the same investment objectives, policies, and restrictions as the corresponding Aspen Series Fund.

- The assets transferred to each Adviser Series Fund will include a pro-rata share of each securities position in the corresponding Aspen Series Fund immediately prior to the Planned Reorganization except for (1) securities that are subject to restrictions on resale or transfer, such as private placement securities, and (2) rounding off to eliminate fractional shares and odd lots of securities. In other words, each Aspen Series Fund generally will allocate to its corresponding Adviser Series Fund full lots of securities (rather than odd lots and fractional shares) and each Aspen Series Fund generally will not allocate to its corresponding Adviser Series Fund private placement securities.

- Adviser Series will have exactly the same fee structure as the Retirement Classes. In addition, Janus Capital has agreed to limit the overall expenses of each Adviser Series Fund to the overall expense ratio of the corresponding Retirement Class as a date set prior to the Planned Reorganization. Janus Capital will be contractually obligated to keep these expense limitations in place for three years following the Planned Reorganization. Thus, Adviser Series' expense ratios after the Planned Reorganization will be no greater than the current Retirement Classes' expense ratios, and will be guaranteed not to increase for at least three years.

- The charter documents, bylaws, and advisory agreements of Adviser Series will be substantially the same as those of Aspen Series; and the distribution agreement and plan of Adviser Series will be substantially the same as those of the Retirement Classes. Moreover, Adviser Series will have the same directors and the same officers as Aspen Series.

- The Retirement Class of each Aspen Series Fund currently presents its own financial highlights in its prospectus, and the Adviser Series registration statement will carry forward financial information from Aspen Series.[3]

In sum, the Planned Reorganization will have little, if any, practical effect on the Retirement Classes and their shareholders, other than to eliminate the restrictions on potential investors.

III. Relevant Statutes and Rules

Any mutual fund presenting performance information in a registration statement, advertisement or sales literature must include standardized performance information calculated in accordance with Item 21(b) of Form N-1A. See Rule 482 under the 1933 Act and Rule 34b-1 under the 1940 Act. Items 2(c)(2)(ii), 2(c)(2)(iii), 5(b), and 9 of Form N-1A require the presentation of certain standardized and other performance information in a fund's prospectus (or, in some cases, in the annual report) (collectively, the "required form N-1A performance information"). In general, these rules and form items require that standardized performance information and required Form N-1A performance information include performance only for periods after the effective date of the fund's registration statement. Including performance information prior to the effective date of a fund's

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[3]Adviser Series will include in, or incorporate by reference into, its initial registration statement on Form N-1A, the financial statements of Aspen Series and the financial highlights of the Retirement Classes of Aspen Series to satisfy the requirements of Items 9 and 22 of Form N-1A. The financial statements will be prepared in accordance with, and cover the periods required by, Regulation S-X, Articles 3 and 6, and Rule 30d-1 under the 1940 Act. Audited financial statements of Aspen Series and financial highlights of the Retirement Classes of Aspen Series for the period since the Aspen Series previous audited financial statements and financial highlights through the date of the Planned Reorganization will be added to the Adviser Series registration statement on a timely basis. Adviser Series will include in, or, if appropriate, incorporate by reference into, subsequent filings the financial statements of Aspen Series and financial highlights of the Retirement Classes of Aspen Series for all periods required by Regulation S-X and Form N-1A.

registration statement could be viewed as a violation of Section 34(b) of the 1940 Act, Section 206 of the Advisers Act and/or Section 5(b) of the 1933 Act.

IV. The Relief Requested

We seek the Staff's assurance that it would not recommend enforcement action under Section 5(b) of the 1933 Act, Section 34(b) of the 1940 Act or Section 206 of the Advisers Act, if, when calculating performance information, Adviser Series were to include the performance of the Retirement Classes. In addition to any other required disclosure, Adviser Series would disclose in presenting its performance information that its Funds were previously organized as the Retirement Classes of Aspen Series, that performance information includes performance during that period, and the date each Fund commenced operations.

As we explain below, we believe that Adviser Series is obligated – and in any case should be permitted – to carry over the performance of the Retirement Classes because the Planned Reorganization is not a fundamental change in the Retirement Classes. In fact, stripping the Retirement Classes of their performance history and requiring their successor, Adviser Series, to state that it has no performance history would be unfair to current Retirement Class shareholders, misleading to new investors, and inconsistent with prior no-action letters.

V. Analysis

A. Adviser Series Is Required to Use the Performance History of the Retirement Classes.

We believe that when Adviser Series calculates its performance information, it should include the performance of its predecessor, the Retirement Classes. Otherwise, current shareholders of the Retirement Classes would see the performance information of their chosen investment options wiped away. That investment performance record is important to shareholders – both the retirement plan sponsors, who select the investment options available to participants, and to the plan participants themselves, who must select and monitor the investment options designed to fund their retirement needs. Eliminating the performance history would also be potentially misleading to new investors. Doing so would suggest that Adviser Series was started from scratch, and it would ignore the performance of its predecessors, the Retirement Classes.

Carrying forward the Retirement Classes performance to Adviser Series is also consistent with no-action precedent. The Staff has repeatedly declared that "it is inappropriate to exclude performance information except in certain limited cases in which a fund undergoes a fundamental change in operations." Quest for Value Dual Purpose Fund (pub. avail. Feb. 28, 1997). Examples of these types of "fundamental change" include:

- a new investment adviser unaffiliated with the previous investment adviser, see Unified Funds (pub. avail. Apr. 23, 1991); Philadelphia Fund, Inc. (pub. avail. Oct. 17, 1989);

- a change from a tax-exempt money market fund to an asset allocation fund, see John Hancock Asset Allocation Trust (pub. avail. Jan. 3, 1991); and

- a change from an unmanaged unit investment trust to a managed open-end investment company, see Founders Fund, Inc. (pub. avail. Oct. 15, 1990).

In contrast, none of the following situations constituted a fundamental change justifying the abandonment of performance history:

- a new investment adviser having common officers with the prior investment adviser, see Zweig Series Trust (pub. avail. Jan. 10, 1990);

- a change in investment strategies, see Fairmont Fund Trust (pub. avail. Dec. 9, 1988); and

- a change from a closed-end fund to an open-end fund where that change is unaccompanied by any material change in the fund's investment program or management, see Comstock Partners Strategy Fund, Inc. (pub. avail. Apr. 6, 1995).

The Planned Reorganization in no way resembles the types of fundamental changes described above that justify a fund abandoning its past performance. Adviser Series will operate as the continuation of the Retirement Classes with no material change in investment program or management. Aside from the change in name and their receipt and consideration of a proxy solicitation in connection with the Planned Reorganization, Retirement Class shareholders may be hard-pressed to notice any change in operations, let alone a fundamental change. Without such a fundamental change, Adviser Series should continue using the Retirement Classes' performance history.

In fact, to conclude otherwise would raise the specter of the very abuses that the Commission sought to prevent through the standardized performance requirements of Rule 482 and that the Staff seeks to prevent by requiring that funds retain their performance records even when they make non-fundamental changes. A multiple class fund with poor performance that wished to abandon that performance could do so in part by spinning off a class into a new fund. That "new" fund could then start with a clean performance slate and no obligation to inform investors of its prior poor performance history. This would be exactly the type of situation the Staff has sought to avoid in the no-action letters cited above.

B. Even if Not Required, Adviser Series Should Be Permitted to Use the Performance of the Retirement Classes.

Even if the Adviser Series was not required to carry over the Retirement Classes' performance, it should be permitted to do so. A number of no-action letters permit a successor fund to carry over predecessor fund performance. As we discuss below, those letters also support carrying over performance in connection with the Planned Reorganization.

In determining whether a new fund may use the historical performance of a predecessor fund, the Staff has put particular emphasis on the resemblance between the new fund and any predecessor fund. For example, in North American Security Trust (pub. avail. Aug. 5, 1994), which involved the merger of several predecessor funds into one fund, the Staff addressed which of the predecessor funds, if any, should provide the performance data to the new fund. The Staff stated in this context:

> "In determining whether a surviving fund, or a new fund resulting from a reorganization, may use the historical performance of one of several predecessor funds, funds should compare the attributes of the surviving or new fund and the predecessor funds to determine which predecessor fund, if any, the surviving or new fund most closely resembles. Among other factors, funds should compare the various fund's investment advisers; investment objectives, policies, and restrictions; expense structures and expense ratios; asset size; and fund composition."

Consideration of these factors demonstrates that Adviser Series resembles the Retirement Classes in all material respects. Prior to the Planned Reorganization, Adviser Series will have no assets and no performance history. After the reorganization, the Adviser Series Funds will have the same investment adviser; the same investment objectives, policies, and restrictions; the same expense structures and expense ratios; the same asset size,

and substantially the same portfolio composition as the Retirement Classes. Although the Adviser Series Funds will initially be smaller than the Aspen Series Funds, Janus Capital does not believe that fact will have a material effect on portfolio management or performance because its trading practices allow it to allocate trades efficiently, even with smaller Funds. Accordingly, Adviser Series should be permitted to use the Retirement Classes' performance history.

In MassMutual Institutional Funds (pub. avail. Sept. 28, 1995), the Staff granted no-action relief to permit certain funds to use the performance data of predecessor separate investment accounts ("SIAs"). The SIAs were not registered under the Investment Company Act of 1940, and the new funds were not treated as successors to the SIAs for accounting purposes. Nonetheless, the new funds were "effectively ... continuations of" the SIAs because they acquired the SIAs' assets. In granting relief, the Staff emphasized its reliance on the funds' representations that each fund would be "managed in a manner that is in all material respects equivalent to the management of the corresponding" separate investment account, and that the funds "were created for purposes entirely unrelated to the establishment of a performance record."

These same factors militate in favor of granting the requested relief in the present case. As we have described, Adviser Series is in all material respects the continuation of the Retirement Classes and will continue to operate the new Funds in the same manner. The Retirement Classes are part of a registered investment company and are subject to the same restrictions imposed by the 1940 Act as those that will be imposed on the new Funds. Moreover, Janus Capital and Aspen Series have proposed the reorganization not to establish a performance record – which the Retirement Classes already have – but to eliminate an impediment to the Retirement Classes' ability to meet their investors' needs and to sell their shares to other types of investors. For these reasons, the Staff's reasoning in MassMutual also supports granting the relief sought here.[4]

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[4] Because Adviser Series will operate as the continuation of the Retirement Classes, the Staff's position regarding the use of performance information in connection with "clone" funds does not apply here. In three 1997 no-action letters, the staff permitted funds to include in advertisements and supplemental sales literature performance information about private accounts or mutual funds managed in the same manner as the funds being offered by the advertisements or supplemental sales literature. Pursuant to those no-action letters, the performance information must be accompanied by the performance of the fund itself. Nicholas-Applegate Mutual Funds (pub. avail. Feb. 7, 1997); GE Funds (pub. avail. Feb. 7,

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Unlike the situation described in the above no-action letters, the Retirement Classes consist of one class of Aspen Series, and Aspen Series' other classes – the Institutional Classes and the Service Classes – will continue to exist, be offered to investors, and have a performance history. In our view, however, this distinction should not affect the analysis. Most importantly, since the inception of the Retirement Classes, the Institutional Classes and Retirement Classes have had different performance histories and different net asset values because of their differences in fee structure. The recently created Service Classes also have different performance histories and different net asset values than the other two classes. Each of the three classes is offered pursuant to a separate prospectus and is directed toward different groups of investors. Each prospectus provides different performance information. The Planned Reorganization will not affect the performance information of the Investment Classes or the Service Classes. Meanwhile, each Adviser Series Fund will have the same investment composition as the corresponding Aspen Series Fund had prior to the reorganization and will continue to be managed in the same way.

C. Carrying Over the Performance Would Be Permitted in the Analogous Situation With a Master-Feeder Arrangement.

If Aspen Series had been established as a master-feeder arrangement, rather than a multiple class arrangement, performance would carry over through a similar reorganization. Suppose that the Retirement Class of each Aspen Series Fund were a feeder fund whose investment policies permit it to seek its investment objective either through direct investment in the appropriate securities or through investment in a master fund with the same investment objective. Suppose this hypothetical "Retirement Feeder Fund" invests in the also

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1997); ITT Hartford Mutual Funds (pub. avail. Feb. 7, 1997). For example, ITT Hartford Mutual Funds involved new retail mutual funds that were designed as clones of existing insurance products funds. There was no reorganization of the existing insurance products funds. No assets were transferred from the insurance products funds to the new retail funds, and no shareholders of the insurance products funds became shareholders of the new retail funds. In those three letters, the Staff distinguished MassMutual because it involved a reorganization where the new fund was a successor to the previous fund. Just as in MassMutual, the Planned Reorganization will involve a transfer of assets from the predecessor fund to the successor fund, which will have the same shareholders, the same adviser and the same investment program.

hypothetical "Aspen Master Fund." (The Aspen Master Fund also sells its shares to the hypothetical "Institutional Feeder Fund" and "Service Feeder Fund.") At some point the Retirement Feeder Fund determines that it is in its best interest to invest directly in the appropriate securities. It accomplishes this change by acquiring the same portfolio of securities that it previously owned indirectly through the Aspen Master Fund. If this were the sole change, the Retirement Feeder Fund would not – and could not – abandon its performance history. That is because the Retirement Feeder Fund would continue to exist and there would have been no fundamental change.

The Staff has made clear on previous occasions that "[i]t is the policy of the Division of Investment Management to treat master-feeder and multiple class arrangements comparably, unless there is a compelling reason not to do so." IDS Financial Corp. (pub. avail. Dec. 19, 1994), at n.6; see also Exemption for Open-End Management Investment Companies Issuing Multiple Classes of Shares; Disclosure by Multiple Class and Master-Feeder Funds; Class Voting on Distribution Plans, Inv. Co. Rel. No. 20915 (Feb. 23, 1995) (Rule 18f-3 adopting release) (noting that "master-feeder structures are functionally similar to multiple class funds" and adopting "disclosure requirements [that] apply equally to multiple class and master-feeder funds"). The Planned Reorganization is substantially similar to this master-feeder hypothetical. Just as performance should carry over if Aspen Series were organized in a master-feeder arrangement, performance should carry over in its multiple class arrangement. There is no compelling reason to treat the two differently.

D. Granting No-Action Relief Here Will Not Enable New Investment Companies to Create Misleading Performance Information.

The Commission and Staff have expressed concern about the use by investment advisers of "incubator funds" and similar methods to generate misleading performance information for new funds. As the Staff explained in MassMutual, "[t]he requirement that standardized performance data not include periods prior to a fund's registration is intended in part to preclude an adviser from establishing a number of funds for the purposes of generating performance data, and then registering those 'incubator funds' with the best performance records so that the newly registered funds can use that performance." As noted in MassMutual, the adopting release to the 1988 amendments to Rule 482 stated that a fund could not advertise performance information prior to the effectiveness of its registration statement because "funds are likely to be managed differently before they are offered to the public." Advertising by Investment Companies, Inv. Co. Act Rel. No. 16245 (Feb. 2, 1988).

The Planned Reorganization does not involve any potential for these types of abuses. The Retirement Classes have been publicly offered and available to qualified plans since

May 1997, and has grown to more than $380 million in assets. The Retirement Classes' current shareholders will remain shareholders of Adviser Series. No change in investment practices will occur because of the Planned Reorganization, and expenses cannot increase for at least three years after the reorganization. In addition, as discussed earlier, the Planned Reorganization is not intended to establish a performance record – which the Retirement Classes already have – but to eliminate a restriction on the types of investors that may choose the Retirement Classes. Under these circumstances, the types of abuses that the Commission seeks to prevent cannot arise.

Conclusion

For the reasons stated in this letter, we respectfully request that the Staff provide its assurance that it will not recommend enforcement action to the Commission if Adviser Series calculates and presents performance information as proposed.

Please contact us if we can provide any additional information.

Yours truly,

Christopher E. Palmer
Michael K. Isenman