SUMMARY OF COMMENTS BY CORPORATION, FINANCE AND SECURITIES LAW SECTION TO SEC REGARDING AMENDMENTS TO RULE 485 UNDER THE SECURITIES ACT OF 1933

This letter is submitted in response to Investment Company Act Release No. 19722 (the "release")(1933 Act Release No. 7015) soliciting comments on proposals to: (1) amend Rule 485 under the Securities Act of 1933 (the "1933 Act"), (2) adopt Rule 485(a) under the 1933 Act as new Rule 486 under that Act, (3) rescind current Rule 486 under the 1933 Act, (4) amend Forms N-SAR, N-1A, N-2, N-3 and N-4, and (5) make technical and conforming amendments to other rules under the 1933 Act and the Investment Company Act of 1940 (the "Act").

The Release proposes such changes to Rule 485 as expanding the list of purposes for which an investment company can file a post-effective amendment under paragraph (b) and eliminating the list of material events in that paragraph that cannot be disclosed for the first time in such a filing. The most significant change being proposed to Rule 485 is the addition of new paragraph (e) which would prohibit the use of the Rule in connection with amendments that would add new investment portfolios or series to a management investment company of the series type. The amendments proposed for the various forms and other rules represent conforming changes that would be necessary if Rule 485 is amended.

The Section's letter generally supports the proposed changes but strongly opposes the addition of new paragraph (e) on the grounds that the new paragraph would eliminate the ability of certain management investment companies (mutual funds) to have certain post-effective amendments to their 1933 Act registration statements become effective automatically by lapse of time. The letter argues that the loss of automatic effectiveness for certain post-effective amendments would pose a hardship for such mutual funds and that the SEC's goal of increasing the time available for its staff to review such filings can be better reached by other means. The Section's letter also proposes to add two items to the list in paragraph (b) of Rule 485 of purposes for which an investment company can file a post-effective amendment under paragraph (b).

LETTER OF COMMENT OF THE SECTION ON
CORPORATION, FINANCE AND SECURITIES LAW
OF THE DISTRICT OF COLUMBIA BAR REGARDING
SEC RELEASE NO. IC-19722
(FILE NO. S7-26-93)

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Steering Committee of the
Section on Corporation,
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__ November, 1993

STANDARD DISCLAIMER

The views expressed herein represent only those of the Section on Corporation, Finance and Securities Law of the District of Columbia Bar and not those of the District of Columbia Bar or of its Board of Governors.

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* Ms. Bridgman and Mr. Kirsch did not take part in the review or approval of this comment letter.

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November __, 1993

Mr. Jonathan G. Katz
Secretary
Mail Stop 6-9
U.S. Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549

Re: File No. S7-26-93

Dear Mr. Katz:

This letter is submitted in response to Investment Company Act Release No. 19722 (Sept. 21, 1993) (the "Release"). These comments have been prepared by the Investment Management Committee (the "Committee") of the Corporation, Finance and Securities Law Section ("CF&SL") of the District of Columbia Bar ("D.C. Bar").[1/] The CF&SL Steering Committee has authorized the submission of this letter.

The Release published for public comment proposals to: (1) amend Rule 485 under the Securities Act of 1933 (the "1933 Act"), (2) adopt proposed Rule 485a under the 1933 Act as new Rule 486 under the 1933 Act, (3) rescind current Rule 486 under the 1933 Act, (4) amend Forms N-SAR, N-1A, N-2, N-3 and N-4, and (5) make technical and conforming amendments to other rules under the 1933 Act and the Investment Company Act of 1940 (the "Act"). This letter offers our comments on the proposal to amend Rule 485.

The Committee welcomes this opportunity to provide comments to the Securities and Exchange Commission (the "Commission") on the proposed amendments to Rule 485. Generally, although our comments may be consistent with, and expand upon, what

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[1/] The views expressed herein represent only those of the Section of Corporation, Finance and Securities Law of the District of Columbia Bar and not those of the D.C. Bar or of its Board of Governors.

other commenters may say to the Commission on the issues discussed, we believe that our comments also reflect our experiences as counsel to investment companies and/or their directors and to investment advisers, brokers, dealers, banks, insurance companies and other financial institutions.

Proposed Revisions to Paragraph (b) of Rule 485

In general, the Committee supports the adoption of the proposed changes to paragraph (b)(1) and (b)(2) of current Rule 485. In particular, we agree with the Commission that the list of obviously material events in paragraph (b)(2) of the current Rule need not be included in any amended Rule. In addition, we have the following comments on proposed new paragraph (b)(1).

Sub-Paragraph (b)(1)(iii). Sub-Paragraph (b)(1)(iii) should be revised to provide that a management investment company or a unit investment trust may file an amendment under Rule 485(b) for the purpose of including financial statements in a registration statement in compliance with Rules 3-12 or 3-18 of Regulation S-X. As proposed in the Release, sub-paragraph (b)(1)(iii) provides only that an investment company may file an amendment for the purpose of bringing financial statements up to date under Section 10(a)(3) of the 1933 Act. Section 10(a)(3) generally requires that financial statements used in a registration statement be no more than sixteen months old. The proposed language of sub-paragraph (b)(1)(iii) is too limiting.

There are circumstances in which, for example, a management investment company might file an amendment under Rule 485(a) that it expects to become effective more than 245 days (135 days in the case of a unit investment trust) after the date of the company's balance sheet, and therefore, pursuant to Rule 3-18 (or Rule 3-12) of Regulation S-X, it must include interim financial statements in the amendment. In some of these instances, such interim financial statements are not available at the time of filing the post-effective amendment. Where this is the case, an investment company should be permitted to file an amendment under Rule 485(b) prior to the effectiveness of the amendment previously filed under Rule 485(a) in order to bring its financial statements up to date in compliance with

Rule 3-12 or Rule 3-18. The Committee therefore requests that sub-paragraph (b)(1)(iii) be revised to read as follows:

> (iii) Bringing the financial statements up to date under Section 10(a)(3) of the Securities Act of 1933 or Rule 3-12 or Rule 3-18 of Regulation S-X.

Sub-Paragraph (b)(1)(vii). The Committee believes that the "materiality" standard expressed in proposed new sub-paragraph (b)(1)(iii) is an appropriate standard for determining whether a post-effective amendment may be filed pursuant to paragraph (b). This standard has, with some exceptions, proved generally workable over many years. Although it is sometimes difficult if not impossible to definitively determine whether a contemplated disclosure change or addition reflects a material or a non-material event or change, it is the sense of the Committee that most practitioners have found this standard workable. In any event, it is also the sense of the Committee that establishing a more exact standard could create as many difficulties as it eliminates.

Nevertheless, the Committee believes that it would be appropriate for the Commission to provide additional general guidance for applying the "materiality" standard, given the potential consequences to a registrant if the Commission disagrees with the registrant's determination that it may rely on paragraph (b). In this regard, it is the Committee's perception that, under the current Rule, a significant or primary factor in determining whether disclosure reflecting an event or change is material is whether there is a reasonable basis for concluding that the Commission staff should have an opportunity to review the disclosure because it concerns either a possible regulatory issue or a topic that the staff has expressed a desire to review (for example, disclosure of relatively novel investment techniques or new types of investments, as contrasted with well-established "boilerplate" disclosure of long-standing investment management practices). The Committee requests that the Commission confirm that registrants should continue to view this factor as a primary consideration in determining whether an event or change is "material" for purposes of sub-paragraph (b)(1)(vii).

Sub-Paragraph (b)(1)(ix). The Release did not propose a sub-paragraph (b)(1)(ix) but the Committee recommends that such a sub-paragraph be added to include in the list of purposes for which registrants may file under Rule 485(b), post-effective amendments made by a separate account (as defined in Rule 0-1(e) under the Act) registered as a unit investment trust (a "UIT separate account") to include additional sub-accounts (or investment divisions) that would each hold the shares of an underlying management investment company or unit investment trust. In addition, the Committee recommends that such a sub-paragraph (b)(1)(x) also permit a UIT separate account to file under paragraph (b) when adding or revising disclosure describing an underlying investment company when such company adds to or revises corresponding disclosure in its registration statement or prospectus.

Disclosure in a registration statement of a UIT separate account relating to underlying investment vehicles amounts to an omitting prospectus for the underlying vehicle.[2/] Indeed, in virtually all cases, such disclosure is taken directly out of the prospectus for the underlying investment company. In light of the fact that the Commission staff has ample opportunity to review disclosure in the registration statement for the underlying vehicle, and the fact that the UIT separate account cannot, as a practical matter, alter that disclosure (at least not unilaterally[3/]), the Committee believes that no useful public policy purpose would be served by not permitting UIT separate accounts to use Rule 485(b) to increase the number of underlying investment vehicles that they offer, or to conform their registration statement disclosure to that of underlying investment vehicles.

2/ See Inv. Co. Act Rel. No. 14575 (June 14, 1985) (release adopting Forms N-3 and N-4), text accompanying note 48.

3/ Often management investment companies and unit investment trusts serving as underlying investment vehicles for UIT separate accounts are managed or operated by organizations not affiliated with the separate account or have different fiscal years (and hence, different filing timetables) than the separate accounts. Therefore, coordinating such changes can be difficult and requires the cooperation of the underlying investment vehicle.

Post-Effective Amendments Adding New Investment Portfolios to Series Companies

The Committee strongly objects to the inclusion of proposed new paragraph (e) in any amended version of Rule 485. If the Commission adopts the amendments to Rule 485 as proposed in the Release, new paragraph (e) would prevent the use of the Rule by open-end management investment companies of the series type (as described in Section 18(f)(2) of the Act) to add new series or investment portfolios. Instead, post-effective amendments by such companies for this purpose could only become effective under Section 8(c) of the 1933 Act upon acceleration by the Commission's staff pursuant to delegated authority.

We understand from the Release that the Commission believes that the present sixty to eighty day period for an amendment to become automatically effective pursuant to Rule 485(a) does not provide an adequate opportunity for the staff to complete the disclosure review process. As explained in the Release, the proposed addition of new paragraph (e) would effectively provide the staff with as much time to review an amendment adding a new series as it would have to review a new initial registration statement.

A number of the Committee's members believe that, in all but the most unusual circumstances, sixty to eighty days should be sufficient time for the Commission's staff to review all types of post-effective amendments, including those by which new series or investment portfolios are added to investment companies of the series type. These practitioners suggest that certain administrative practices may be the source of the staff's difficulties in reviewing post-effective amendments within these time parameters. Such practices include, for example, the staff's conducting "de novo" or other substantial review of amendments rather than just reviewing marked portions of amendments that indicate changes made from the most recent prior amendment, and otherwise declining to grant selective review in cases where such review is appropriate. Notwithstanding our concern about the length of time necessary for a post-effective amendment to become effective, the Committee's recommendation reflects its concern with the more fundamental problem raised by proposed new paragraph (e): the loss of

automatic effectiveness for certain post-effective amendments.

We urge the Commission not to adopt proposed new paragraph (e) for three reasons. First, we believe that the issue of insufficient staff review time can be equally well addressed by increasing the minimum time period before effectiveness under Rule 485(a) as it can be by establishing an indefinite period for such review. The advantages to registrants and others of automatic effectiveness need not be sacrificed in order to provide the staff with more review time. Second, we believe that the Commission has sufficient authority under Rule 485(c) to prohibit the effectiveness of an amendment adding a series that is incomplete or inaccurate. Third, we believe that the loss of automatic effectiveness may have unintended adverse consequences in connection with Section 8 of the 1933 Act.

Review Period. The Committee recommends that the Commission consider extending the current sixty day minimum review period for a post-effective amendment that adds a new series, rather than adopting what amounts to an indefinite review period. We understand the difficulties involved in thoroughly reviewing a new series (or several new series) being added to a registration statement by post-effective amendment. Sometimes the work involved approaches that necessary to review an initial registration statement. Nevertheless, most post-effective amendments filed for this purpose do not require the Commission staff to review disclosure beyond that relating to the investment objectives and techniques (and attendant risks) of the new portfolio. In this regard, the Commission staff generally also reviews and comments on new initial registration statements within sixty days of filing. The Committee believes that by extending the minimum period for effectiveness of post-effective amendments adding new series beyond the current sixty days, the Commission could afford its staff enough time to review such filings.

The Committee greatly prefers a longer minimum period for automatic effectiveness to an indefinite period, because registrants (and their affiliates) require an element of reasonable certainty as to the effective date of an amendment adding a new series. For example, if disclosure for a new series is

added to the prospectus of an existing company, and the financial information for one or more series of the company is due to become stale, the registrant needs to have a reasonably definite date for effectiveness. In this scenario under the current Rule, the registrant may file a post-effective amendment containing updated financial information sixty days before the current information becomes stale and be assured that the addition of the new series will not prevent the registrant having an updated prospectus in a timely manner. In this scenario under the proposed amended Rule, the registrant would have to file two separate post-effective amendments to obtain the same degree of certainty.

In part V of the Release, the Commission states that the proposed amendments to Rule 485 "would not impose any significant new costs on funds," and invites specific comment on this assessment. In response, the Committee maintains that the absence of an element of reasonable certainty as to the effective date of an amendment adding a new series would impose significant additional costs on management investment companies and their affiliates. In today's intensely competitive financial services marketplace, the inability to establish in advance a firm schedule for launching new investment portfolios would increase the expense of launching such portfolios, and would disadvantage management investment companies vis-a-vis competing investment products.

On a related point, the Committee is also concerned that removing the automatic effectiveness of certain post-effective amendments may leave registrants with the impression that responsibility for ensuring compliance with disclosure requirements of the federal securities laws is being shifted from the registrant to the Commission's staff. The adopting release for Rule 485 (formerly Rule 465[4/]) states that a principal objective of automatic effectiveness for all filings is to permit registrants to assume greater responsibility for compliance with disclosure requirements. We do not believe that the necessity of increasing staff review time of certain post-effective amendments warrants a departure from that principle, unless there is no other reasonable way to provide that review time. More

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4/ 1933 Act Release No. 6229 (Aug. 25, 1980).

review time, rather than greater uncertainty, appears to us to be a better response to this necessity.

Remedies. To the extent that the rationale behind proposed new paragraph (e) is to restrict a registrant's ability to use the automatic effectiveness provisions of Rule 485 to avoid making disclosures reasonably requested by the Commission staff (or to otherwise circumvent the review process), we believe that the Commission already possesses sufficient authority to prohibit the effectiveness of an amendment adding a new series that contains incomplete or inaccurate disclosure. Paragraph (c) of Rule 485 currently permits the Commission to suspend the effectiveness of any amendment filed pursuant to paragraph (a) of the Rule that is incomplete or inaccurate in any material respect. We believe that the threat of such action by the Commission (together with the Commission staff's ability to request a "delaying" amendment to a paragraph (a) filing) should be sufficient to deter almost all registrants from filing deficient registration statements or, in the worst cases, cause a registrant to withdraw or amend any deficient filing. Moreover, if the Commission later determined that an amendment was still incomplete or inaccurate, it could thereafter pursue available remedies.

Unintended Consequences. One consequence of including proposed new paragraph (e) in Rule 485 may well be to encourage investment company complexes to establish new portfolios as separate registrants in order to avail themselves of Section 8(a) of the 1933 Act. Reliance on Section 8(c) of the 1933 Act, as contemplated by the Release for use with post-effective amendments adding new series or portfolios, would be distinctly less advantageous to issuers than reliance on Section 8(a). If investment company complexes responded in this manner to the adoption of proposed new paragraph (e), the Commission's staff would ultimately have to review far more disclosure per new portfolio than they do now.

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In conclusion, the Committee generally supports the efforts of the Commission and its staff to amend Rule 485, replace Rule 486 with another Rule 486, make corresponding changes to Forms N-SAR, N-1A, N-2,

N-3 and N-4, and make technical and conforming amendments to other rules under the 1933 Act and the Act in an effort to respond to developments over the many years since Rule 485 was adopted. We specifically support, with some minor modification, the changes proposed by the Commission to paragraph (b) of the Rule. Nevertheless, for the reasons outlined above, the Committee strongly opposes the proposed addition of new paragraph (e) to the Rule, and urges the Commission and its staff to reevaluate its decision to include the paragraph in any amended Rule 485. We would welcome the opportunity to respond to any questions or comments.

Sincerely,

Investment Management Committee;
Corporation, Finance and
Securities Law Section

Thomas C. Mira, Esq., Chairman

David S. Goldstein, Esq., Chairman
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