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RESPONSE OF THE OFFICE OF CHIEF COUNSEL
DIVISION OF INVESTMENT MANAGEMENT

Our Ref. No. 92-642-CC
Dean Witter American
Value Fund, et al.
File No. 811-2978

In your letter dated November 10, 1992, you request our assurance that we would not recommend enforcement action to the Commission under Section 20(a) of the Investment Company Act of 1940 (the "1940 Act") and Rule 20a-1(a) thereunder if, under the circumstances described in your letter, the proxy statements for the special meetings of shareholders of certain registered investment companies advised by the Intercapital Division of Dean Witter Reynolds Inc. (the "Investment Manager"), 1/ are not accompanied or preceded by an annual report of each respective Fund for its last fiscal year ending prior to the special meeting containing the information required by Rule 14a-3(b) under the Securities Exchange Act of 1934 (the "1934 Act").

The Investment Manager manages forty-nine registered investment companies (the "DWR Funds"). Thirty-seven of the DWR Funds have fiscal years ending October 31 or earlier. All but one of the remaining twelve DWR Funds (the "Funds") 2/ have fiscal years ending on December 31; Multi-State has a fiscal year ending on November 30. The fiscal years of the DWR Funds are staggered throughout the year to minimize the accounting burden during any particular time period.

Sears, Roebuck and Co. announced that it plans to sell up to 20% of the shares of common stock of Dean Witter Financial Services Group Inc. to the public in connection with an overall restructuring of its business. The public offering is scheduled to occur in the early part of 1993. 3/ It is anticipated that

- 1/ Dean Witter Reynolds Inc. is presently a wholly-owned subsidiary of Dean Witter Financial Services Group Inc., itself a wholly-owned subsidiary of Sears, Roebuck and Co.
- 2/ The twelve Funds include Dean Witter American Value Fund, Dean Witter California Tax-Free Income Fund, Dean Witter Multi-State Municipal Series Trust ("Multi-State"), Dean Witter New York Tax-Free Income Fund, Dean Witter Tax-Exempt Securities Trust, Dean Witter U.S. Government Securities Trust, Dean Witter Utilities Fund, Dean Witter Variable Investment Series, Dean Witter/Sears California Tax-Free Daily Income Trust, Dean Witter/Sears New York Municipal Money Market Trust, Dean Witter/Sears Tax-Free Daily Income Trust, and Sears Tax-Exempt Reinvestment Fund.
- 3/ You represent that Sears, Roebuck and Co. determined the date of the public offering as part of its overall strategy to reorganize its business. The reasons for and scope of

the sale will be followed by a Spin-Off of the remaining 80% of Dean Witter Financial Services Group Inc. shares to Sears, Roebuck and Co. shareholders. As a result, Dean Witter Financial Services Group Inc. will become a publicly-owned company.

The DWR Funds and the Investment Manager have concluded that neither the public offering nor the Spin-Off will result in an "assignment" of the DWR Funds' advisory contracts, as defined in Section 2(a)(4) of the 1940 Act. Nonetheless, to eliminate any risk associated with the possibility that the public offering or the Spin-Off could be deemed to constitute an assignment, 4/ the DWR Funds have decided to voluntarily submit "new" advisory arrangements approved by their directors and trustees to a vote of shareholders prior to the scheduled date of the public offering. Directors and trustees will also be elected at the special meetings. 5/ Because it is considered crucial to the success of the public offering that the shareholders of the DWR Funds approve the "new" advisory arrangements prior to the public offering, you represent that the special meetings will be held on either January 12 or 13, 1993.

Rule 20a-1 under the 1940 Act prohibits persons from soliciting any proxy, consent, or authorization in respect of any security of which a registered investment company is the issuer,

the reorganization have been and continue to be subject to numerous business and market considerations not directly or solely related to Dean Witter Financial Services Group Inc. or the public offering.

- 4/ Section 15(a) makes it unlawful for any person to serve as an investment adviser to a registered investment company except pursuant to written contract which has been approved by the shareholders of the investment company. Section 15(a)(4) provides that an investment advisory contract with a registered investment company must, by its terms, automatically terminate in the event of its assignment.
- 5/ You state that the Investment Manager and the DWR Funds seek to obtain the safe harbor protection of Section 15(f) of the 1940 Act. Section 15(f) permits an investment adviser, or an affiliated person of the investment adviser, to receive compensation from a sale of the adviser's securities which results in an assignment of the advisory contract, provided, among other things, that for three years after the sale at least 75% of the members of the investment company's board of directors are not interested persons of the present or predecessor investment adviser. You represent that the current boards of the DWR Funds do not satisfy the foregoing condition. Consequently, you anticipate that new directors and trustees will have to be added to the boards.

except in compliance with Section 14(a) of the 1934 Act and the rules thereunder. Rule 14a-3(b) requires investment companies to deliver to shareholders prior to or with proxy statements for the election of directors annual reports containing financial statements for the last fiscal year. 6/ Rule 14a-1(e) defines "last fiscal year" as the last fiscal year ending prior to the date of the shareholder meeting for which proxies are solicited.

Because of the time required to prepare audited financial statements and the fact that each of the twelve Funds has a fiscal year ending on December 31 (November 30, in the case of Multi-State), you represent that each Fund's 1992 annual report is not expected to be available until March 1, 1993 (February 1, 1993, in the case of Multi-State). 7/ As a result, while all of the DWR Funds (except the twelve Funds) will comply with Rule 14a-3, it is not possible for the required annual reports of the Funds to precede or accompany the proxy statements for the special meetings to be held in January. 8/ Moreover, you represent that if each of the Funds is required to furnish a 1992 annual report prior to or concurrent with delivery of the proxy statements, the Funds will be forced to either (1) delay the mailing of proxy material for at least two months, resulting in a corresponding delay in the special meetings (with uncertain consequences for the public offering and the entire restructuring

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- 6/ You assert that the special meetings of the DWR Funds cannot accurately be characterized as annual meetings or as special meetings in lieu of annual meetings for purposes of Rule 14a-3(b) since the meetings are being called for the purpose of voting on the "new" investment advisory arrangements. Nevertheless, because Rule 14a-3(b) refers to any "annual (or special meeting in lieu of the annual) meeting . . . at which directors are to be elected," we believe that it applies to all meetings involving the election of directors, including meetings called primarily for other purposes, i.e., the approval of advisory contracts.
- 7/ You state that it generally takes auditors approximately two months to prepare and certify an investment company's financial statements included in its annual report.
- 8/ You state that, given the number of shareholders of the DWR Funds, a minimum of 60 days will be required following the mailing of proxy materials to reasonably assure that a quorum of shares of each DWR Fund will have returned executed proxy cards by the date of the special meetings. Consequently, the DWR Funds expect to first mail proxy material to shareholders no later than the middle of November 1992.

plan of Sears, Roebuck and Co.), 2/ or (2) not provide shareholders with an opportunity to vote for directors or trustees (a situation which may require that the Funds incur the added cost and expense of re-soliciting proxies at a later date).

In lieu of providing the required annual reports, you propose that each of the twelve Funds comply with the following conditions:

- 1) The Fund's proxy statement will be accompanied or preceded by the annual report of the Fund for the Fund's fiscal year next preceding the date of the special meeting. Such annual report will be dated no earlier than 16 months prior to the date of the special meeting, and will include: (i) an audited balance sheet of the Fund as of the end of the Fund's fiscal year next preceding the date of the special meeting, namely November 1, 1991 or December 1, 1991, as the case may be; and (ii) an audited statement of changes in the net assets of the Fund for the two most recent fiscal years of the Fund next preceding the date of the special meeting;
- 2) The Fund's proxy statement will be accompanied or preceded by the Fund's most recent semi-annual report;
- 3) The Fund's proxy statement will include a representation from the Fund's board of directors that, to its knowledge, there has been no material adverse change in the financial operations of the Fund since the date of the financial statements contained in the Fund's most recent semi-annual report; and
- 4) The Fund's proxy statement will include a statement that proxies solicited by the board of directors for the special meeting will not be voted for the election of directors unless (a) the Fund shall have received a certificate from the President of the Fund, dated the

2/ Stuart Strauss represented to the undersigned on Nov. 16, 1992 that the fiscal years of the DWR Funds are staggered throughout the calendar year in such a manner that fiscal year ends currently fall in every month except April. Thus, even if the special meetings were rescheduled until after the 1992 annual reports for the Funds could be made available to shareholders, the result would simply be that other DWR Funds would be faced with the same problem under Rule 20a-1(a). Accordingly, all of the DWR Funds could not solicit proxies in compliance with Rule 20a-1(a) for special meetings to be held on the same date at which directors are to be elected without the requested no-action relief.

date on which such vote is to be taken, that, to the knowledge of that officer, there has been no material adverse change in the financial operations of the Fund since the date of the unaudited financial statements included in the Fund's most recent semi-annual report, unless such material adverse change has been disclosed to shareholders in additional proxy solicitation materials, or (b) the Fund shall have mailed to all shareholders of record audited financial statements of the Fund in an annual report (in accordance with Section 30 of the 1940 Act) and given the shareholders an opportunity to revoke any proxies previously furnished. 10/

You also state that, for purposes of conditions 3 and 4 above, changes in a Fund's financial operations attributable to general market or economic conditions will not be taken into account by the board or the President of the Fund, respectively, in making their determinations, except to the extent that any such changes result from the Investment Manager's or board's improper performance of their responsibilities.

An important purpose of Section 14(a) is to ensure that shareholders have adequate financial information about the issuer to make informed decisions at a shareholder meeting. 11/ Consistent with Congress' intent, investment companies are subject to the proxy rules under the 1934 Act, including the annual report requirement. 12/ Consequently, we are not inclined to grant no-action relief to investment companies that do not

10/ These conditions are substantially similar to the conditions in Dreyfus Connecticut Municipal Money Market Fund and Dreyfus Michigan Municipal Money Market Fund (pub. avail. Dec. 5, 1990) ("Dreyfus") where the staff stated that it would not recommend any enforcement action under Rule 20a-2(a)(9) of the 1940 Act if, under certain circumstances, funds do not include the investment adviser's certified balance sheet with proxy materials.

11/ See S. Rep. No. 792, 73rd Cong., 2d Sess. 12 (1934) ("In order that the stockholder may have adequate knowledge as to the manner in which his interests are being served, it is essential that he be enlightened not only as to the financial condition of the corporation, but also as to the major questions of policy, which are decided at stockholders' meetings. Too often proxies are solicited without explanation to the stockholder of the real nature of the questions for which authority to cast his vote is sought.")

12/ See Rule 20a-1. See also Dreyfus.

comply with the requirements of Rule 14a-3 except in cases presenting compelling circumstances. We believe that the unique facts and circumstances presented in your letter are compelling.

Thus, on the basis of the unique facts and representations in your letter, we would not recommend that the Commission take any enforcement action under Section 20(a) or Rule 20a-1(a) if the Funds proceed with the mailing of proxy statements for the special meetings in the manner described in your letter. Because this position is based on the unique facts and representations in your letter, different facts or representations may require a different conclusion. Further, this response only expresses the Division's position on enforcement action and does not purport to express any legal conclusion of the questions presented.

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