

**PUBLIC**

7 NOV 1994

RESPONSE OF THE OFFICE OF CHIEF COUNSEL  
DIVISION OF INVESTMENT MANAGEMENT

Our Ref. No. 94-693-CC  
Transamerica Series,  
Inc.  
File No. 811-5254

By letter dated October 20, 1994, 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 ("1940 Act") or Rule 20a-1(a) thereunder if Transamerica Series, Inc. ("TSI"), a registered open-end management investment company, holds shareholder meetings for each of its series for the election of directors without first sending to the shareholders of each series that series' respective annual report for the last fiscal year ended prior to the meeting date. 1/

The Commission recently revised the proxy rules for investment companies. 2/ The amendments, among other things, eliminate the requirement that investment company proxy statements for the election of directors be accompanied or preceded by the investment company's annual report for its last fiscal year ended prior to the meeting. 3/ While the amendments do not become effective until November 23, 1994, we would not recommend enforcement action to the Commission if TSI does not provide the shareholders of each series with that series' respective annual report for the fiscal year ended October 31, 1994 and does not comply with the conditions described in your

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- 1/ TSI consists of six series, each of which has a fiscal year ending on October 31. While TSI has one combined proxy statement, each series will produce a separate annual report, and each series will have a separate shareholder meeting.
- 2/ See Investment Company Act Rel. No. 20614 (Oct. 13, 1994) ("Release"), 59 Fed. Reg. 52689 (Oct. 19, 1994).
- 3/ Item 22(a)(3)(iii) of Schedule A of the Securities Exchange Act of 1934 as amended requires, in lieu of the annual report, inclusion in the proxy statement of a prominent statement that funds will furnish, without charge, their most recent annual and semi-annual reports on request. In addition, the amendment requires funds to provide requesting shareholders with a copy of the requested report by first class mail or other means designed to assure prompt delivery, within three business days of the request. See Release at 32, 59 Fed. Reg. at 52,697.

letter. This relief is conditioned on TSI complying with the requirements of Item 22(a)(3)(iii) of Schedule 14A of the Securities Exchange Act of 1934, as recently amended. 4/

*Jana M. Cayne*  
Jana M. Cayne  
Attorney

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4/ Ronald Feiman confirmed in a telephone conversation with Dorothy Donohue on November 2, 1994 that TSI would comply with recently amended Item 22(a)(3)(iii) of Schedule 14A.

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Section  
File 20a-1  
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1940 Act/Rule 20a-1

October 20, 1994

Office of Chief Counsel  
Division of Investment Management  
Securities and Exchange Commission  
450 Fifth Street, N.W.  
Washington, D.C. 20549

Re: Transamerica Series, Inc.

Madame/Sir:

As you may be aware, on October 14, 1994 Transamerica Asset Management Group, Inc. ("Transamerica"), an indirect wholly-owned subsidiary of Transamerica Corporation ("Transamerica Corporation") entered into an agreement to sell all the common stock of its wholly-owned subsidiary Transamerica Fund Management Company ("TFMC"), to a subsidiary of John Hancock Mutual Life Insurance Company, The Berkeley Financial Group ("Berkeley"). It is proposed that, upon completion of the transaction (the "Acquisition"), John Hancock Advisers, Inc. ("John Hancock Advisers"), a wholly-owned subsidiary of Berkeley, which shall have retained key personnel of TFMC, shall enter into advisory contracts to

manage each registered investment company currently managed by TFMC (collectively, the "Transamerica Funds").

As more fully described below, Transamerica, TFMC, and Transamerica Series, Inc. ("TSI"), a Maryland corporation having six series of shares (the "TSI Series"), each of which is operated as a separate registered investment company, request confirmation that the Division of Investment Management of the Securities and Exchange Commission (the "Commission") would not recommend enforcement action to the Commission if, under the circumstances described herein, TSI's combined proxy statement for the meetings at which shareholders of each of the TSI Series (together, the "Meeting") will consider certain proposals in connection with the Acquisition, is not accompanied or preceded by TSI's annual report for its fiscal year ending most recently prior to the Meeting.<sup>1</sup>

#### I. FACTS

TFMC acts as investment adviser and administrator to each of the eight Transamerica Funds, which, as of September 30, 1994, comprised an aggregate of seventeen managed portfolios and had aggregate assets of approximately \$ 3 billion, and approximately 142,152 shareholders. The Transamerica Funds' fiscal year ends are staggered throughout the year to minimize the accounting burden during any particular fiscal period.

Since the Acquisition will result in an "assignment" (as defined in Section 2(a)(4) of the Investment Company Act of 1940 Act (the "1940 Act")) of TFMC's investment management agreements, TSI will submit a proposal to shareholders of the TSI Series to approve new investment management contracts between TSI, on behalf of each of the

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<sup>1/</sup> The requested relief is substantially similar to that granted in Dreyfus California Tax Exempt Bond Fund, Inc. et al. (pub. avail. June 9, 1994) and Dean Witter American Value Fund, et al (pub. avail. November 18, 1992).

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TSI Series, and John Hancock Advisers. The new management contracts of the TSI Series have been approved by the Board of Directors. The Acquisition is conditioned on obtaining the necessary approvals for new investment management contracts and for new distribution plans pursuant to Rule 12b-1 under the 1940 Act for all eight Transamerica Funds, including TSI, and all seventeen managed portfolios thereof, including the six TSI Series. Consequently it is necessary to hold the Meeting promptly. The other Transamerica Funds have called shareholders meetings for December 16, 1994 and TSI has authorized calling a meeting for the same date, subject to receipt of an affirmative response to the request contained in this letter.

TSI anticipates that, given, among other things, the number of shareholders of the TSI Series, at least 40 days will be required following the mailing of proxy materials to the shareholders to be reasonably certain of assuring that a number of shareholders representing a quorum of shares of each TSI Series will have returned executed proxy cards by the date of the Meeting. Accordingly, TSI expects to mail proxy materials to shareholders during the first seven days of November, 1994.

Transamerica Corporation intends to pay the costs of soliciting proxies, except that fees and expenses of any outside solicitors and the printing and postage expenses related to the preparation of the proxy statement will be shared by Transamerica Corporation and Berkeley, provided that Berkeley's share of any such expenses with respect to all the Transamerica Funds shall not exceed \$375,000.

In connection with the Acquisition, the shareholders will also be asked to elect the directors of TSI. Since TSI is a Maryland corporation, it is not legally required to hold annual meetings for the election of Board members. Nevertheless, such action would benefit TSI as it will provide maximum flexibility to add new Board members

thereafter without having to incur the expense of conducting another shareholders meeting for such purpose.<sup>2</sup>

The Acquisition is expected to be consummated prior to December 31, 1994. Transamerica Corporation determined the date of the closing as part of its overall business plan to sell TFMC. Rule 14a-3(b) ("Rule 14a-3") under the Securities Exchange Act of 1934, as amended (the "1934 Act"), if applied to TSI could force a delay of the Acquisition by a number of weeks, which Transamerica, Berkeley and TSI believe would be detrimental to the interests of the parties to the Acquisition and the shareholders of the TSI Series. Hence, TSI is requesting relief from Rule 20a-1 under the 1940 Act and Rule 14a-3 upon the conditions set forth herein.

## II. INTERPRETATION OF RULE 14a-3

Rule 20a-1(a) under the 1940 Act provides, in pertinent part, that: "No person shall solicit or permit the use of his name to solicit any proxy, consent or authorization in respect of any security of which a registered investment company is the issuer, except upon compliance with . . . all rules and regulations adopted pursuant to Section 14(a) of the Securities Exchange Act of 1934 that would be applicable to such solicitation if it were made in respect

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<sup>2/</sup> Section 16(a) of the 1940 Act permits vacancies in the Board of Directors which occur between meetings to be filled by the Board without a shareholder vote provided that immediately after filling such vacancy at least two-thirds of the directors have been elected by shareholders. While it is noted that the particular slate of directors proposed for election at the Meeting would require a shareholder vote under Section 16(a), the slate has been proposed by the disinterested directors of TSI in view of the requirements of Section 15(f)(1)(A) of the 1940 Act in connection with the Acquisition and is thus beneficial to TSI and incidental to the Meeting's primary purpose.

of a security registered on a national securities exchange.  
. . . ."

Rule 14a-3(b) under the Securities Exchange Act of 1934 (the "1934 Act") provides, in relevant part, that:

if the solicitation [of any proxy, consent or authorization] is made on behalf of the registrant and relates to an annual (or special meeting in lieu of the annual) meeting of security holders . . . , at which directors are to be elected, each proxy statement . . . shall be accompanied or preceded by an annual report to security holders. . . .

As noted above, the Meeting is being called, among other things, for the purpose of voting on the investment management contracts and distributions plans. Absent the need for such a vote, the Meeting would not be held. Because Board members will be elected at the Meeting, under state law, the Meeting may be considered an annual meeting. Rule 14a-3(b)(1) then requires that the annual report of each TSI Series include an audited balance sheet as of the end of the last fiscal year and an audited statement of changes in net assets for the two most recent fiscal years. The "last fiscal year" is defined in Rule 14a-1(e) as the last fiscal year which ends prior to the date of the shareholder meeting.

Each TSI Series' fiscal year ends on October 31. Thus, if Rule 14a-3 is applied strictly, TSI would be required to furnish annual reports for the TSI Series with respect to the fiscal year ending October 31, 1994. However, auditors typically require approximately two months to prepare and certify an investment company's financial

statements included in its annual report.<sup>3</sup> Therefore, the 1994 annual report for each TSI Series is not expected to be available until early 1995.

### III. LEGAL AND POLICY ARGUMENTS

Regulation S-X permits the use of unaudited financial statements when audited financial statements, as a practical matter, cannot be generated on a timely basis. In particular, Rule 3-18 of Regulation S-X provides limited relief from the requirement that audited financial statements as of the "last fiscal year" of the registrant be provided by permitting the use of interim unaudited financial statements (in addition to the most recent available audited statements) where the filing is made within 60 days after the end of the registrant's most recent fiscal year.<sup>4</sup> We believe that this Rule could be applied to provide TSI with relief from Rule 14a-3 under the circumstances herein described.<sup>5</sup>

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<sup>3/</sup> See supra note 1 and Dreyfus Connecticut Municipal Money Market Fund and Dreyfus Michigan Municipal Money Market Fund (pub. avail. December 5, 1990).

<sup>4/</sup> Rule 3-12 of Regulation S-X provides limited relief from the requirement that audited financial statements be provided in a proxy statement of non-investment company registrants under circumstances where the proposed mailing date of a proxy statement (as opposed to the meeting date) falls within 90 days after the end of the fiscal year.

<sup>5/</sup> Rule 14a-3(b) (1) provides that the required financial statements be prepared in accordance with Regulation S-X, "except that the provisions of Article 3, other than Rules 3-03(e), 3-04 and 3-20 and Article 11 shall not apply." That provision, in our view, may reasonably be interpreted to eliminate certain requirements which otherwise would have been unduly burdensome with regard to the preparation of annual reports and should not be read as restricting issuers from relying upon the permissive provi-

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Read literally, Rule 3-18 applies only to financial statements required to be included in a registration statement or proxy statement and not to the financial statements included in an annual report which are not part of the proxy materials filed with the Commission. Yet the Rule obviously reflects a determination that, in the absence of available audited financial statements, unaudited financial statements are adequate to enable shareholders to make an informed decision in the context of financially driven transactions, such as the Acquisition. We believe the same financial statements also should be appropriate where proxies are solicited for the election of Board members. This seems particularly true under the circumstances presented here where the election of Board members is incidental to the Meeting's primary purpose.

As noted above, if TSI is required to furnish 1994 annual reports along with or before delivery of proxy materials, TSI would be forced to delay the mailing of the proxy materials for a considerable period, resulting in a corresponding delay in the Meeting with uncertain consequences for the timing of the Acquisition.<sup>6</sup>

#### IV. APPLICABLE CONDITIONS

TSI has advised that, as a condition to the requested relief, the Proxy Statement sent to shareholders of each of the TSI Series:

1. Will be accompanied or preceded by the annual report for the fiscal year ended October 31, 1993. This annual report will be dated no earlier than 16 months before the Meeting date, and will include: (i) an audited balance sheet of such Series as of October 31, 1993; and (ii) an

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sions of such article respecting the delivery of unaudited financial statements in the absence of audited financial statements.

<sup>6/</sup> See Dean Witter American Value Fund supra note 1.

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audited statement of changes in the net assets of such Series for the two fiscal years ended October 31, 1993 and October 31, 1992;

2. Will be accompanied or preceded by most recent semi-annual report for such Series;

3. Will include a representation from TSI that there has been no material adverse change in the financial operations of such Series since the date of the financial statements contained in its most recent semi-annual report; and

4. Will include a statement that proxies solicited by TSI's Board for the meeting will not be voted for the election of Board members unless (a) TSI shall have received a certificate from its President, dated the date on which such vote is to be taken, that, to the best of his knowledge, there has been no material adverse change in the financial operations of each TSI Series since the date of the unaudited financial statements included in such Series' most recent semi-annual report, unless such material adverse change has been disclosed to shareholders in additional proxy solicitation material, or (b) TSI shall have mailed to all shareholders of record audited financial statements of such Series in an annual report (in accordance with Section 30 of the 1940 Act) and given the shareholders of such Series an opportunity to revoke any proxies previously furnished.

For purposes of conditions 3 and 4 above, changes attributable to general market or economic conditions will not be taken into account except to the extent that any such changes result from TFMC's or the Board's improper performance of its responsibilities.

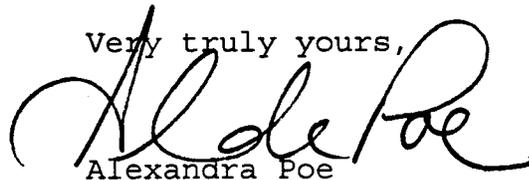
## V. CONCLUSION

Based upon the foregoing, we respectfully request that the staff grant the no-action relief requested. If you have any questions, please call the undersigned at the number noted above. If, based upon this letter, you believe

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that the staff will not be inclined to grant the relief requested, please call the undersigned at the number above immediately.

Very truly yours,

A handwritten signature in black ink, appearing to read "Alexandra Poe". The signature is fluid and cursive, with a large initial "A" and a long, sweeping tail.

Alexandra Poe

AP/bif