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RESPONSE OF THE OFFICE OF CHIEF COUNSEL
DIVISION OF INVESTMENT MANAGEMENT

Our Ref. No. 96-77-CC
Munder Capital
Management
File No. 801-48394

Your letter of February 9, 1996 requests our assurance that we would not recommend enforcement action to the Commission under Rule 206(4)-1 under the Investment Advisers Act of 1940 ("Advisers Act") 1/ if the registered open-end management investment companies advised by Munder Capital Management ("Munder") provide information via the Internet about their recent portfolio purchase and sale transactions under the circumstances described in your letter.

According to the representations in your letter, Munder, a registered investment adviser, serves as adviser to The Munder Funds, Inc. and The Munder Funds Trust, representing in the aggregate 19 portfolios ("the Funds"). Munder also has various other institutional clients.

You state that Munder and the Funds have made information available on the Internet that they previously had made available in printed format. The information includes basic information about Munder's advisory organization, including information about the firm's history, investment philosophy, as well as background information on key personnel. You state that the information regarding the Funds includes the prospectuses of the Funds, information regarding Fund size, portfolio turnover rate, number of portfolio holdings, industry diversification, and top ten holdings, as well as advertising and supplemental sales literature.

In addition, Munder provides portfolio transaction information on a fund-by-fund basis. The portfolio transaction information reflects all new portfolio positions added or eliminated during the month. This information is updated on a monthly basis and made available at least 15 days after the end of each month. The presentation of the portfolio transaction information also discusses each portfolio company's business, along with the reasons the investment adviser found the security attractive or the adviser's rationale for selling the security.

1/ Rule 206(4)-1 deems certain investment adviser advertising practices to be fraudulent, deceptive, or manipulative. In particular, under paragraph (a)(2), investment advisers are prohibited from publishing, circulating, or distributing any advertisement that refers to their past specific recommendations that were or would have been profitable to any person. The rule, however, does permit an advertisement that meets certain conditions to set out or offer to furnish a list of all recommendations made by an investment adviser within the immediately preceding period of not less than one year.

The information includes disclosure that the information reflects all positions added or eliminated during a specified month. 2/

You believe that the portfolio transaction information is useful to existing fund shareholders, brokers, and potential investors. You assert that providing portfolio transaction information via the Internet is consistent with Commission efforts to provide mutual fund investors with material information regarding mutual funds and their investment performance. 3/

You assert that disclosure of fund portfolio transaction information should not be subject to or prohibited by Rule 206(4)-1 because the information that Munder and the Funds are providing is investment company sales literature, 4/ and not an advertisement for advisory services under Rule 206(4)-1(b). In support, you note that in National Association of Securities Dealers (pub. avail. Oct. 19, 1993), the staff suggested by

2/ A disclaimer is included stating that the information provided should not be considered as a recommendation to purchase or sell a particular security and that there is no assurance, as of the date of publication, that the securities purchased remain in a fund's portfolio or that securities sold have not been repurchased. Additionally, it is noted that the securities purchased do not represent a fund's entire portfolio and in the aggregate may represent a small percentage of a fund's portfolio.

3/ You note that mutual funds currently are required to report their portfolio holdings to shareholders at least semi-annually, pursuant to Section 30(d) of the Investment Company Act of 1940 ("1940 Act") and Rule 30d-1 thereunder. In addition, funds are required to include in their prospectuses or annual reports management's discussion of those factors, strategies and techniques that materially affected their performance during their most recently completed fiscal year. Item 5A of Form N-1A. The release proposing the management's discussion requirement mentioned the composition of the portfolio as one factor affecting performance that may be discussed. Investment Company Act Release No. 17294 at n.14 (Jan. 8, 1990).

4/ Supplemental sales literature must be preceded or accompanied by a final prospectus. You have represented that the distribution of prospectuses and sales literature through the Internet complies with the Commission's interpretative guidance regarding use of electronic media. Use of Electronic Media For Delivery Purposes, Securities Act Release No. 7233 (Oct. 6, 1995).

implication, in the context of testimonials, that Rule 206(4)-1 may not apply to mutual fund advertising. 5/

Rule 206(4)-1(b) broadly defines the term "advertisement" to include any communication addressed to more than one person that offers any investment advisory service with regard to securities. Materials designed to maintain existing clients or solicit new clients for the adviser are considered to be advertisements within Rule 206(4)-1. 6/ Generally, we would not view documents relating specifically to one or more investment companies, such as prospectuses, advertisements or sales literature, as designed to maintain existing clients or solicit new clients for the adviser unless the documents are directed to such persons or refer to advisory services that are offered to such persons. 7/ We therefore agree with your view that the portfolio transaction information, which reflects only services provided to the Funds and does not refer to services provided to Munder's other clients, should not be considered an advertisement for Munder's advisory services. 8/

Therefore, if the portfolio transaction information is made available via the Internet under the circumstances set forth in your letter and described above, we would not recommend that the Commission take enforcement action under Rule 206(4)-1. Because this response is based on the facts and representations in your

5/ Rule 206(4)-1(a)(1) prohibits the use, in any advertisement within the scope of the rule, of any direct or indirect reference to any testimonial concerning any services rendered by an adviser. The National Association of Securities Dealers letter did not treat testimonials in mutual fund advertising as subject to an absolute prohibition, such as that contained in Rule 206(4)-1(a)(1).

6/ See Denver Investment Advisors, Inc. (pub. avail. July 30, 1993); S.E.C. v. C.R. Richmond & Co., 565 F.2d 1101 (9th Cir. 1977); and Spear & Staff, 42 S.E.C. 549 (1965).

7/ Of course, such documents may be designed to solicit new shareholders for the fund, or may be providing information to existing fund shareholders.

8/ Because we agree with your contention that the portfolio transaction information is not an "advertisement" subject to 206(4)-1, we do not reach the question of whether it involves a recommendation within paragraph (a)(2). In addition, nothing in this letter addresses in any way the adequacy of any of the information provided on Munder's Web site under the Securities Act of 1933, the 1940 Act, or the National Association of Securities Dealers' Rules of Fair Practice.

letter, you should note that any different facts or representations might require a different conclusion.

Veena K. Jain

Veena K. Jain
Attorney

Munder Capital Management is a Delaware general partnership with principal offices at 480 Pierce Street, Birmingham, Michigan 48009. The firm was founded in 1985 to provide high-quality asset management services for institutional investors. As of August 31, 1995, Munder Capital and its affiliates managed over \$30 billion for various institutional clients, including investment companies, pension and profit sharing funds, foundations and insurance companies, as well as for high net worth individuals. Munder Capital ranks among the largest 3% of U.S. investment advisory firms.

The Funds consist of The Munder Funds, Inc., a Maryland corporation registered under the Investment Company Act of 1940 ("1940 Act"), as an open-end investment company and The Munder Funds Trust, a Massachusetts business trust, also registered under the 1940 Act as an open-end investment company. Each fund offers multiple classes of shares representing in the aggregate 19 portfolios, consisting of a variety of equity, fixed-income and money market funds. The Funds are a full family of mutual funds providing individual investors with a broad selection of investment choices to meet their investment needs. Munder Capital serves as the investment adviser to each of the portfolios. Funds Distributor, Inc., located at One Exchange Place, Boston, Massachusetts 02109, is the principal underwriter of the Funds' shares.

As the Staff is aware, many money management firms and mutual fund groups are making use of the information superhighway, providing clients and potential clients access to information in a manner that was previously unavailable. Users of the Internet can access a variety of information including investment primers, worksheets, fund documents including prospectuses and sales literature, share price and fund performance information and even hear recordings of portfolio managers talking about their portfolios.² Munder Capital and the Funds have made available on the Internet certain information that has previously been available only in printed format. With regard to Munder Capital, such information includes basic information on the advisory organization, including information about the firm's history, investment philosophy, as well as background information on key personnel. Information regarding the Funds includes the prospectuses of the Funds, information regarding Fund size, portfolio turnover rate, number of portfolio holdings, industry diversification, top ten holdings, as well as

² See "Now, The Superhighway Leads to Mutual Funds," The New York Times, August 13, 1995; "Marketing on the Internet: Money Managers Click On," Institutional Investors, Inc., Money Management Letter, June 19, 1995; "Why the Fund Home Pages Aren't Ready for Cybertime;" Kiplinger's Personal Finance Magazine, October 1995.

advertising and supplemental sales literature.³ The prospectuses and supplemental sales literature are made available pursuant to the conditions set forth in the SEC's Recent Release on the "Use of Electronic Media For Delivery Purposes."⁴ Any information that could be considered supplemental sales literature of the Funds is substantially the same as material that has been previously filed with the NASD. Any newly developed supplemental sale literature to be provided on the Internet will be filed with the NASD.

In addition to the information set forth above, Munder Capital and the Funds include, with respect to each fund, a portfolio commentary discussing market conditions, as well as information on recent fund portfolio transactions. This information is made available on a fund by fund basis which reflects all new portfolio positions added during the month and all portfolio positions eliminated during the month (unless the sale program has not been completed). This information would be updated on a monthly basis and made available at least 15 days or more after the end of each month. With regard to portfolio positions added during a month, information is provided on the portfolio company's business and the reasons the investment adviser found the security attractive. With regard to positions eliminated during the month, information is provided explaining the investment adviser's rationale for selling the security.

A disclaimer is included with such portfolio transaction information stating that the purchase and sale information provided should not be construed as a recommendation to purchase or sell a particular security and that there is no assurance that the securities purchased remain in a fund's portfolio or that securities sold have not been repurchased. Additionally, it is noted that the securities purchased do not represent a fund's entire portfolio and in the aggregate may represent a small percentage of a Fund's portfolio.

Our clients are of the view that providing access through the Internet to information regarding portfolio transactions to existing fund shareholders, brokers and potential investors provides useful information regarding management of the Funds. Indeed, it is our understanding that many investment advisers provide this type of information to institutional investors and market professionals. This information provides insight into how

³ Much of the information regarding the Funds would qualify as advertising permitted under Rules 134 and 482 of the Securities Act of 1983 and would not be required to be accompanied by the prospectuses of the Funds.

⁴ See Investment Company Act Release No. 21399 (October 6, 1995).

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the Funds are managed and the investment adviser's investment philosophy. Furthermore, providing this information is consistent with the SEC's efforts to provide mutual fund investors with material information regarding mutual funds and their investment performance. Funds are currently required to disclose their portfolio holdings pursuant to Section 30(d) of the 1940 Act and Rule 30d-1 thereunder, which requires that such information be provided to shareholders at least semi-annually. Mutual Fund prospectuses or their annual reports now must include management's discussion and analyses ("MD&A") of those factors, strategies and techniques that materially affected their performance during their most recently completed fiscal year.⁵ Additionally, the SEC recently required that funds disclose background information on mutual fund portfolio managers responsible for the day-to-day management of a fund's portfolio.⁶ Information regarding fund portfolio transactions is consistent with these efforts to make more information available to fund investors regarding how funds are managed.

The MD&A discussion is designed to help investors understand the nature of investment strategies being used by funds. In the release proposing the MD&A requirement, the SEC listed portfolio information as one of the various factors impacting performance that might be discussed. The release suggested that the types of portfolio information that could be discussed could include information regarding the composition of the portfolio, including types of issuers, types of securities, quality of portfolio securities, etc.⁷ Information regarding fund portfolio transactions is routinely reported to a fund's directors on a regular basis to assist them in evaluating the quality of portfolio management. There appears to be no reason why this information should not be made available to existing fund shareholders, brokers who sell fund shares and potential fund investors. Additionally, there appears to be no reason why this information cannot be provided in supplemental material when a fund's prospectus has been delivered electronically and the information is not presented in a misleading manner.

We seek to confirm our view that the disclosure of this information is not subject to or prohibited by Rule 206(4)-1 under the Investment Advisers Act of 1940 (the "Advisers Act"). Rule 206(4)-1(a) provides in part that:

⁵ See Item 5A. of Form N-1A.

⁶ See Item 5(c) of Form N-1A.

⁷ See Investment Company Act Release No. 17294 (January 8, 1990).

It shall constitute a fraudulent, deceptive, or manipulative act, practice or course of business within the meaning of Section 206(4) of the Act, for any investment adviser, directly or indirectly to publish, circulate or distribute any advertisement: ... (2) which refers, directly or indirectly, to past specific recommendations of such investment adviser which were or could have been profitable to any person: provided, however, that this shall not prohibit an advertisement which sets out or offers to finish a list of all recommendations made by such investment adviser within the immediately preceding period of not less than one year if such advertisement, and such list if it is furnished separately:

(A) State the name of each such security recommended, the date and nature of each such recommendation (e.g., whether to buy, sell or hold), the market price at that time, the price at which the recommendation was to be acted upon, and the market price of each such security as of the most recent practicable date, and (B) contain the following cautionary legend on the first page thereof in print or type as the largest print or type used in the body or text thereof:

"It shall not be assumed that recommendations made in the future will be profitable or will equal the performance of the securities in this list;"

Accordingly, Rule 206(4)-1 regards the selective disclosure of recommendations, which may refer only to recommendations which were or would have been profitable and ignores those which were or would have been unprofitable, as inherently misleading and deceptive.⁸

We believe that the disclosure of recent fund portfolio transactions should be regarded as outside the scope of Rule 206(4)-1. First, the disclosure of these transactions is not a recommendation by the Funds or their adviser to purchase or sell a particular security, but simply factual information regarding recent purchases and sales by the Funds. Indeed the information is accompanied by disclosure that such information should not be

⁸ See Investment Advisers Act Release No. 121 (November 2, 1961).

construed as a recommendation to purchase or sell a particular security.⁹ Moreover, the fund portfolio transaction information is not presented on a selective basis, but would reflect all purchase and sale transactions for a fund for a given period. Additionally, no reference would be made as to whether the purchase or sale transactions have been profitable to a fund. The purpose of Rule 206(4)-1(a)(2) is to prevent the use of selective recommendations which were or would have been profitable. The disclosure of the fund portfolio transaction information is not selective, it does not rise to the level of a recommendation, nor is there any reference to the profitability of any recommendation. The disclosure of the fund transaction information is comparable to the disclosure made by a number of fund's of their top ten holdings, and the disclosure by advisers of the top ten holdings in specified types of accounts under their management, which apparently are not regarded as recommendations prohibited by Rule 206(4)-1.

Moreover, we believe that an argument can be made that Rule 206(4)-1 is inapplicable in these circumstances. Rule 206(4)-1 by its terms applies to advertisements by investment advisers. The information in question involves investment company information, and, as such is not technically an investment adviser advertisement. In correspondence with the National Association of Securities Dealers, the SEC staff suggested by implication that Rule 206(4)-1 may not apply to mutual fund advertising in the context of testimonials. See National Association of Securities Dealers (available October 19, 1993).

⁹ We are aware that in Investment Advisers Act Release No. 1406 (March 16, 1994) the Commission stated in a footnote (See footnote 12) that each trade initiated by an adviser would constitute "advice." However, this statement was made in the context of the suitability of investment advice to advisory clients. The information on recent portfolio transactions would not constitute "advice" to anyone reviewing the material and this point will be emphasized by the accompanying disclaimer.

In sum, we believe that presentation of information regarding recent portfolio purchase and sale transactions of the Funds is not subject to or prohibited by Rule 206(4)-1. If you need further information about these matters, please contact me at (202) 626-3316 or Allan Mostoff at (202) 626-3310.

Sincerely,

A handwritten signature in cursive script, appearing to read "Paul F. Roye".

Paul F. Roye

cc: Robert G. Bagnall, Esquire
Senior Special Counsel