

ACT ICA, IAA  
SECTION 2(b), 202(b)  
RULE \_\_\_\_\_  
PUBLIC  
AVAILABILITY 3/3/98

March 3, 1998  
Our Ref. No. 98-65-CC  
Public Employees' Retirement  
Board of the State of Oregon  
File No. 132-3

RESPONSE OF THE OFFICE OF CHIEF COUNSEL  
DIVISION OF INVESTMENT MANAGEMENT

By letter dated February 10, 1998, you request our assurance that we would not recommend enforcement action to the Commission if, as more fully described in your letter, plans of local governments within the State of Oregon (the "State") that meet the definition of "eligible deferred compensation plan" in Section 457 of the Internal Revenue Code of 1986, as amended ("Section 457 plans" and the "Code," respectively) were to participate in a program authorized by Oregon state law under which the assets of these Oregon local government plans would be commingled with the assets of the State deferred compensation plan in a fund (the "Fund"): (i) without registering the Fund with the Commission as an investment company in reliance upon Section 2(b) of the Investment Company Act of 1940 (the "Investment Company Act"); and (ii) without registering the interests in the Fund under the Securities Act of 1933 (the "Securities Act") in reliance on Section 3(a)(2) of the Securities Act, or under the Securities Exchange Act of 1934 (the "Exchange Act") in reliance on Section 3(a)(12) of the Exchange Act.

**Background**

You note that Congress amended Section 457 of the Code to require that Section 457 plans be fully funded and that assets of such plans "be held in trust for the exclusive benefit of participants and their beneficiaries."<sup>1</sup> You state that since 1991, legislation has authorized the Oregon Investment Council (the "Council") to allow local governments to invest monies in the investment program established by the Council for the State deferred compensation plan. Until recently, however, there had not been a structure in place to facilitate such investments. You represent that the State legislature enacted a bill that amended the law to, among other things, (i) place the assets of the State's Section 457 plan in a trust and create the Fund to hold and invest the trust's assets, and (ii) allow local government Section 457 plans to deposit assets in the Fund.

While the legislation does not expressly state that the Fund is an instrumentality of the State, you represent that State law provides for various investment funds that are in the custody and control of the State treasurer and under the investment oversight of the Council, and are segregated from the State general fund. You represent that the legislation adds the Fund as

---

<sup>1</sup> See Sections 1448(a) and (b) of the Small Business Job Protection Act of 1996, P.L. 104-188 (1996). You note that prior to the amendment, assets and income of Section 457 plans were the property of the public employer sponsoring the Section 457 plan and thus could be reached by creditors of the sponsor.

another such fund. You further represent that the Fund was created by State statute and is controlled by State officials acting in their official capacities.

### **Section 2(b) of the Investment Company Act**

Section 2(b) of the Investment Company Act generally provides that, unless otherwise specified, the provisions of the Act shall not apply to a state, any political subdivision of a state, or any agency, authority, or instrumentality of a state, or any corporation which is wholly owned, directly or indirectly, by any of the foregoing, or officers, agents, or employees of any of the foregoing acting in the course of their official duties. You believe that the Fund may rely on the Section 2(b) exclusion from the Investment Company Act because it is an instrumentality of the State and local governments. You represent that the creation, authorization and control of the Fund will be entirely under the auspices of local and State governmental entities. You maintain that the recent amendment to Section 457 of the Code, which requires Section 457 plan assets to be held for the exclusive benefit of plan participants, should not alter the staff's analysis of Section 457 plans under Section 2(b).<sup>2</sup>

Whether an entity is a political subdivision, agency, authority or instrumentality of a state ("State Entity"), and whether an individual is an officer, agent or employee of a state or a State Entity, is determined by reference to state law. If, under state law, an issuer is a State Entity, then the issuer is excluded from regulation as an investment company under Section 2(b) of the Investment Company Act, regardless of how it is structured or operated.<sup>3</sup>

---

<sup>2</sup> One of the many factors that the staff relied on in its response to ICMA Retirement Trust (pub. avail. Feb. 7, 1983) was that, in accordance with Section 457 of the Code, plan assets were the property of the employer. Upon further reflection, however, we have concluded that the issue of whether plan assets are the property of the sponsoring employer or the participant employees is not relevant to determining whether a fund is an instrumentality of a state. *Cf.* Colorado Prepaid Tuition Fund by the Colorado Student Obligation Bond Authority (pub. avail. Sept. 12, 1997) ("*Colorado*") (in a prepaid tuition program, the contributions made to the program could be transferred to another beneficiary or refunded under certain circumstances).

<sup>3</sup> *Colorado, supra* note 2. You have not asked for our views concerning the status of the Council under Section 202(b) of the Investment Advisers Act of 1940 ("Advisers Act"), but we also note that the issue of whether the officers, agents and employees of a state or a State Entity may rely on the exclusion from the definition of "investment adviser" in Section 202(b) of the Advisers Act in connection with activities performed in the course of their official duties is determined by reference to state law.

Based on the facts and representations in your letter, the staff of the Division of Investment Management would not recommend enforcement action to the Commission under Section 7 of the Investment Company Act if the Fund does not register with the Commission under the Investment Company Act in reliance on Section 2(b) of that Act.

Having stated its views on this subject, and because the crucial inquiries in this area concern questions of state law, the Division of Investment Management will not respond to letters regarding the status under Section 2(b) of the Investment Company Act of Section 457 plans or entities administering such plans, unless the letters raise a novel or unique issue of federal law.<sup>4</sup>

### **Section 3(a)(2) of the Securities Act and Section 3(a)(12) of the Exchange Act**

The Division of Corporation Finance has asked us to inform you that it would not recommend enforcement action to the Commission if, in reliance on your opinion as counsel that the exemptions from registration provided by Section 3(a)(2) of the Securities Act and Section 3(a)(12) of the Exchange Act are available, interests in the Fund are offered in the manner and for the purposes described in your letter without compliance with the registration requirements of the respective Acts. The Division of Market Regulation has asked us to inform you that it concurs in this position with respect to the Exchange Act.

The Divisions of Corporation Finance and Market Regulation (the "Divisions") positions are based on the facts and representations in your letter. Any different facts or circumstances may require different conclusions. Further, this response expresses the positions of the Divisions on enforcement action only and does not express any legal conclusion on the questions presented.

  
Sarah A. Buescher  
Senior Counsel

---

<sup>4</sup> The Division of Investment Management also will not respond to letters regarding the status under Section 202(b) of the Advisers Act of officers, agents and employees of Section 457 plans or entities administering such plans, unless the letters raise a novel or unique issue of federal law.

**JONES, DAY, REAVIS & POGUE**

ATLANTA  
BRUSSELS  
CHICAGO  
CLEVELAND  
COLUMBUS  
DALLAS  
FRANKFURT  
GENEVA  
HONG KONG  
IRVINE  
LONDON  
LOS ANGELES  
NEW DELHI  
PARIS  
PITTSBURGH  
RIYADH  
TAIPEI  
TOKYO  
WASHINGTON

599 LEXINGTON AVENUE  
NEW YORK, NEW YORK 10022

TELEPHONE: 212-326-3939  
TELEX: 237013 JDRP UR  
CABLE: JONESDAY NEWYORK  
FACSIMILE: 212-755-7306  
WRITER'S DIRECT NUMBER:

049550-000-002

(212) 326-3417

February 10, 1998

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

Catherine T. Dixon  
Chief Counsel  
Division of Corporation Finance  
Securities and Exchange Commission  
450 Fifth Street, N.W.  
Washington, D.C. 20549

Re: Section 3(a)(2) of the Securities Act of 1933;  
Section 3(a)(12) of the Securities Exchange Act of 1934;  
Section 2(b) of the Investment Company Act of 1940

Ladies and Gentlemen:

We are writing on behalf of our client, the Public Employees' Retirement Board (the "Board") of the State of Oregon and the Oregon Investment Council (the "Council"), to respectfully request that the staff (the "Staff") of the Securities and Exchange Commission (the "Commission") agree not to recommend enforcement action to the Commission if plans of local governments within the State of Oregon meeting the definition of "eligible deferred compensation plan" in Section 457 of the Internal Revenue Code of 1986, as amended, (the "Code") were to participate in a program authorized by Oregon state law under which the assets of these Oregon local government plans would be commingled with those assets of the State of Oregon deferred compensation plan in a fund (the "Fund"), without registering the Fund under the Investment Company Act of 1940 (the "1940 Act") or the interests therein under the Securities Act of 1933 (the "1933 Act") or the Securities Exchange Act of 1934 (the "1934 Act").

More particularly, we respectfully request that the Staff concur in our opinion that investment by Oregon state and local government established Section 457 governmental plans (*i.e.*, governmental plans established pursuant to Section 457 of the Code) in the Fund may be made in reliance on the exemptions from registration afforded under Section 3(a)(2) of the 1933 Act and Section 3(a)(12) of the 1934 Act as a security issued by a public instrumentality of the State of Oregon and the local governmental entities that participate in the Fund, and the exception from regulation as an investment company afforded under Section 2(b) of the 1940 Act.<sup>1</sup>

## I. STATEMENT OF FACTS

Section 457 plans are deferred compensation plans established by various governmental units described in Code Section 457(e)(1)(A) ("Section 457 Plans" or "Plans").<sup>2</sup> In accordance with the recent amendments of the Code contained in Section 1448(a) and (b) of the Small Business Job Protection Act of 1996, Public Law 104-188, Section 457(g)(1) of the Code now requires that such government plans be fully-funded. A Section 457 Plan must now provide that all assets and income accumulated under the Plan "be held in trust for the exclusive benefit of participants and their beneficiaries." Previously, such assets and income were the property of the public employer sponsoring such a Plan with the result that such Plans were unfunded and employee income deferrals could be reached by creditors of the Plan sponsor. Now, any local or State government that deposits monies for its deferred compensation plan in a fund must provide that such deposits are for the exclusive benefit of the covered public employees, and are no longer assets of the employer itself.

Since 1991, the State of Oregon's statutes have authorized the Council to allow local governments to invest monies in the investment program established by the Council for the state deferred compensation plan, but there was no structure in place to facilitate such investment by local governments. Beginning in November of 1996 the state investment program and services were modified to accommodate local government participation. Even with such modifications, the State of Oregon will not permit local government participation until a local government's plan complies with the requirements of Section 457 of the Code. The Oregon State Treasurer introduced a bill in the legislature of the State of Oregon to amend the current laws to place the State of Oregon's Plan assets into a trust and create this separate Fund to hold and invest the

---

<sup>1</sup> For convenience, we occasionally refer in this letter to the exception from regulation as an investment company afforded in Section 3(c)(11) of the Investment Company Act as an "exemption."

<sup>2</sup> Section 457(e)(1)(A) defines the term "eligible employer", for purposes of the definition of "eligible deferred compensation plan" in Section 457(b), to mean any "State, political subdivision of a State, and any agency or instrumentality of a State or political subdivision of a State."

deferred compensation trust assets. This bill would also facilitate the means by which local governments may invest monies through the state investment program and also authorize Oregon local government deferred compensation plans to deposit into the Fund all or a part of their deferred compensation funds to be commingled and invested with those of the State of Oregon deferred compensation plan. The bill was signed into law on May 30, 1997 as Chapter 00179 of the Oregon Revised Statutes (the "Act"). A copy of the Act is enclosed herewith. For the purposes of the statute, a "local government deferred compensation plan" is defined as a Section 457 Plan that is established and administered by a local government. Under Oregon law, local governments are "any city, county, municipal or public corporation, any political subdivision of the state [of Oregon] or any instrumentality thereof, or an agency created by two or more such political subdivisions to provide themselves governmental services." Under the law, such local government plans must satisfy the requirements of Section 457 under the Code and may be required to provide evidence of such compliance to the Council, the Board and the Public Employees' Retirement System (the "System").

By way of background the System was created by Oregon Revised Statute (ORS) 238.600 and is, therefore, an instrumentality of the State of Oregon. The governing authority of the System is the Board. ORS 238.630. The Board consists of 11 members who are appointed by the Governor and subject to confirmation by the Oregon Senate. The Board consists of: (i) three public members who are not employed by a public employer, (ii) two members who are employees of a participating public employer in a management position, (iii) two members who hold an elective office in the governing body of a participating employer, (iv) four members who are public employees or (v) in lieu of the preceding four members in item (iv) one member who is a retired employee. ORS 238.640. The Board appoints the director of the System and adopts the rules and policies under which the System operates. ORS 238.630. The Board is a board of the State of Oregon and subject to all of the statutes applicable to state agencies, boards and commissions.

The director of the System is an employee of the State of Oregon. He is responsible for running the day to day operations of the System and hiring all personnel. ORS 238.645. All of the employees of the System are employees of the State of Oregon. The System is an agency of the State of Oregon and is subject to all of the statutes applicable to state agencies, boards and commissions.

Except for the Oregon Legislative Assembly, there are no persons outside the Board or the System who have any interest in or control over the System. The System is created by ORS and the legislative assembly may enact laws governing the System.

The Act does not expressly state that the Fund is an instrumentality of the State of Oregon. It does provide, however, that the Fund shall be held by the State Treasurer, who shall be custodian of the Fund. The Act also provides that the State of Oregon, the State Treasurer,

the Council, the System and the officers and employees of the Board are immune from civil action for alleged breaches of their duties in administering the Fund and are protected by the limitations on liability under the Oregon Tort Claims Act and indemnified against personal liability due to any losses suffered by a State plan participant or a local government plan participant for violations of federal or state securities laws in the supplementation or administration of the Act. Such immunity clauses are common in the creation of public instrumentalities of state government.

The ORS provides that there are twenty four investment funds that are in the custody and control of the State Treasurer and under the investment oversight of the Council. ORS 293.701. The listed funds are segregated from the state general fund (used for the general operations of the state) for specific purposes. They consist of monies held in trust for various purposes or monies belonging to the State of Oregon or local governments. The Act adds the Fund as the twenty-fifth such fund.

Employee participants that have money in the Fund will be limited to either employees of the State of Oregon or employees of local governments in Oregon. Each employee's individual contribution will be collected by his or her employer and then the contributions will be forwarded to the Fund. For State of Oregon employees, money is withheld by the payroll officer and forwarded to the System. The System aggregates the deferred amounts from different state agencies and forwards them to State Street Bank and Trust Company as custodian and record keeper ("State Street"). State Street allocates the money among the nine categories of investment options pursuant to the participant's instructions and then further divides the money, based on the state's instructions, among the investment vehicles that comprise each investment option. For local government employees, the local government will send its employee's moneys directly to State Street as agent. State Street will then distribute those amounts among the investment options according to instructions received from each employee or employer. State Street will then follow the same process that it does with state employee moneys. State Street will send a report back to both the state and the local government confirming how the moneys were allocated among the investment options and investment vehicles.

The System will track each State of Oregon employee's individual account balance and the balance of each local government entity that participates in the investment fund. At the option of the local government, the System will also track individual account balances for the local government's employees or the local government will perform that function itself. No employee of the State or any local government that participates in the Fund has any control over the particular investments that comprise the investment option that such employee has selected.

The local governments will not have any control over the Fund. The control of the Fund is exclusively in the hands of the Council and the Oregon State Treasurer. ORS 293.716, 293.731. The Council consists of five voting members: (i) three members who have experience in the investment field and may not hold any other public office and who are appointed by the

Governor and confirmed by the Oregon Senate, (ii) the Oregon State Treasurer, (iii) one public member who also serves on the Board and is appointed by the Governor and confirmed by the Oregon Senate, and (iv) the Director of the System (who has no voting power). ORS 293.706. The Council is responsible for formulating investment policies for the Fund. ORS 293.731. The Oregon State Treasurer, and his staff, function as the investment officer for the Council and carry out the investment policies established by the Council. ORS 293.716. The Council is an entity of the State of Oregon and subject to the same statutes as other agencies, boards or commissions of the State of Oregon. The Council has a statutory duty to make the investment funds under its control as "productive as possible" and to invest the funds "as a prudent investor would do, under the circumstances then prevailing and in light of the purposes, terms, distribution requirements and laws governing each investment fund." ORS 293.721, 293.726.

The administrative and investment functions related to the Fund will be split between the previously described agencies of the State of Oregon. The Board will be responsible for formulating rules related to the administration of non-investment issues in connection with the Fund. For instance, the Board may adopt rules that set forth the criteria which a local government plan must meet before it may contribute monies to the Fund. Only those local government deferred compensation plans satisfying the eligibility standards established by the Board may participate in the Fund. As previously described the Board is a statutorily created body whose duties include adopting rules governing the State of Oregon's retirement system and adopting and monitoring policies governing the administrative aspects of the State's deferred compensation plan, and the participation of local governments in the Fund.

The System is the agency of the State of Oregon that carries out the rules adopted by the Board. The System will be responsible for the day to day record keeping and related aspects of the local governments' participation in the Fund.

The Council is the sole instrumentality responsible for the investment of monies deposited in the Fund. As previously described the Council is a statutorily created body of the State of Oregon. The Council is responsible for formulating all investment policies and procedures related to the investment of monies held in the Fund, subject to the prudence and fiduciary standards imposed by Oregon statutes on the Council. The Council is solely responsible for the investment, reinvestment, acquisition, retention, management and disposition of investments held by the Fund. To obtain investment advice from persons other than employees of the State, the Council may enter into arrangements with one or more registered investment advisors. Such investment advisors may, in the discretion of the Council, be removed and replaced by other investment advisors selected by the Council.

The State Treasurer is the custodian of the Fund. See Act Section 4.

The System values the assets of the Fund's various investment options daily and the accounts of each participant are credited daily with cash contributions or increases or decreases in market value. Each participant's interest in each investment option is accounted for using units of participation in such investment option. The moneys to be invested in the investment options are transferred on a daily basis. The moneys are wired through State Street as the custodian and record keeper of the investment options. The participating plans may deposit and withdraw moneys on a daily basis.

There are no service charges for withdrawal of moneys or for making deposits in the investment options. There are, however, fees charged for administration of the Fund, such as charges for the management of the investment options.

Information on the investment options provided to each employee participant is as follows:

- (1) A core booklet describing the investment options generally.
- (2) An Investment Option Sheet for each of the investment options that identifies the composition of the option, the objective, primary investments, risk measurement, performance benchmark, the option investment strategies and risk considerations.
- (3) An explanation of the total fee structure for the investment options.
- (4) An Acknowledgment Form, which is required to be signed by each participant when enrolling in the plan, and before any salary is deferred into the Plan. The form includes a risk statement and lists the investment options available for selection.
- (5) There are prospectuses or similar disclosure documents of each of the underlying mutual funds or insurance company separate accounts, which comprise the investment options, that are available upon request at the Plan Administrator's Office for participants.
- (6) Performance figures on the investment options are provided monthly through a 1-800 number for participants to call. These same figures are available upon request from the System and on the Oregon PERS Web Site. These figures include prior month, previous quarter, and year to date. Benchmark performance (e.g., S&P 500, Russell 2000), is also provided for 1, 3 and 5 years. Performance figures are net of all fees.
- (7) Participants receive a quarterly statement from the Plan, which identifies the investment options, opening balance, contributions, earnings, transfers,

withdrawals (if any) and closing balance. This statement also includes account information, contributions posted for the quarter, investment allocations, investment results for last 3 months, year-to-date and last 12 months and an explanation of statement. Statements are also generally available on demand by participants.

(8) The plan is audited on an annual basis by the Oregon Secretary of State Audits Division. Accounts are reconciled daily by the record keeper and monthly by the Administrator.

The information set forth as items (1) through (4) above are provided to employees prior to enrollment in the plan either through an employee workshop or upon request of the employee. If there were a change to one of the investment options such as the fees described in the materials provided to an employee or a change in one of the underlying investment vehicles, such a change would be reflected in revisions to the materials provided to employees prior to enrollment. For employees already enrolled in the plan, such changes would be described in a newsletter that is mailed to employees with their quarterly statement. In addition, participants receive updates on the performance of all of the investment options as part of their quarterly statements. The statements show quarterly, one year and three year performance.

The interest held in the Fund by the state plan and local government plans is authorized by the Act that creates the Fund for the purpose of holding and investing the assets of the state deferred compensation plan and the assets of the deferred compensation plans of participating local governments. See Section 3 of the Act. The nine investment options are authorized by section 5 of the Act and the Council policies and programs (see attached).

ORS 293.701 through 293.820 establish the investment standards by which the Council may invest assets of the Fund as well as numerous other state funds. It is subject to a general standard of prudence, diversification, duty of reasonable care, duty of loyalty and impartiality, prudence in selecting agents, and a duty of care in incurring reasonable cost. See Act Section 22, ORS 293.726.

The Fund was created by state statute and is owned and controlled by state officials acting as such, including the State Treasurer, the members of the Council and the members of the Board. The State of Oregon is therefore the legal owner of the Fund. The participants in the Fund are limited to (i) the State of Oregon deferred compensation plan (see Section 8 of the Act) and (ii) local government established deferred compensation plans that are qualified under Code Section 457 that agree to abide by the policies and procedures established by the Council for the administration of the Fund (See Section 15 of the Act.). The participants in the plan are beneficiaries of the trust and therefore have a beneficial interest in the trust, but they do not "own" or have legal title to the trust assets. For example Section 7(7) of the Act provides that

Douglas Scheidt  
Catherine T. Dixon  
February 10, 1998  
Page -8-

JONES, DAY, REAVIS & POGUE

participants in the State plan, may not assign, anticipate, donate, sell, transfer, pledge or encumber their rights in the state deferred compensation Plan. With respect to local governments, they each legally own the assets of their respective trusts. When the trust assets are placed in the Fund, they are still "owned" by the state or the local government contributing moneys to the Fund. The Fund does not conduct any activities other than the investment and reinvestment of the moneys contributed to it by state and local government deferred compensation plans.

The fees for the plan are paid at several levels. First, the insurance companies who provide the mutual funds that make up each investment option deduct the amount of their fees from the daily market value of the fund. This net value is then transmitted to State Street. State Street then deducts its fee from the value of the assets. State Street also deducts the administrative fee that is charged by the System to administer the deferred compensation plan. The System fee is 17 basis points. (The System is authorized by statute to charge up to 2% of the value of the Fund for its fee, but it has never done so). After the insurance company fees, State Street fees and System fees have been deducted from the market value of an investment option the allocated value of the investment option is posted to the individual participant accounts.

The Oregon Secretary of State's audit report is a public document. As a matter of law, ORS 297.216, it is provided to the Governor and as a matter of course it is provided to the Board, the Deferred Compensation Advisory Committee (a public advisory entity) and executive management of the System. It is also available to the legislature, the general public, the press, and any participant who requests a copy. The financial statements of the Fund will appear as part of the financial statements of the State of Oregon as part of the general category of "Fiduciary Funds-Trust and Agency Funds" and further clarified therein as "Expendable Trust Fund", that is one in which the corpus is expendable. The System is responsible for reporting on the Fund as part of its agency funds. This treatment is consistent with the accounting principles applicable to the financial statements of the State of Oregon.

In our opinion, if the Fund is structured and operated as set forth above, the interests in the Fund would be exempt from registration under Section 3(a)(2) of the 1933 Act and Section 3(a)(12) of the 1934 Act because such interests would be issued by a public instrumentality of the State of Oregon and each local governmental entity participant, and the Fund would be exempt from registration under Section 2(b) of the 1940 Act. In addition in our opinion each of the interests in the state or local government deferred compensation plans which participates in the Fund is exempt from registration under Section 3(a)(2) of the 1933 Act and Section 3(a)(12) of the 1934 Act because it is an interest in an instrumentality of the State of Oregon or a political subdivision of the State of Oregon and such deferred compensation plans would be exempt from registration under Section 2(b) of the 1940 Act because it would be a public instrumentality of the local and state governments.

## II. LEGAL ARGUMENT

Section 3(a)(2) of the 1933 Act provides an exemption from registration for securities issued by "any state of the United States, or by any political subdivision of a State or Territory, or by any public instrumentality of one or more States or Territories . . . ." Similarly, Section 3(a)(12) of the 1934 Act provides an exemption for securities issued by a state, a political subdivision thereof or a public instrumentality of either of the foregoing. Section 2(b) of the 1940 Act states that no provision of that Act shall be applicable to "a State, or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing . . . ."

The Staff in a number of no-action responses has found that collective trusts and investment vehicles established for the benefit of local government units can rely on the foregoing exemptions. Several no action requests were granted by the Staff with regard to entities organized for the investment of retirement funds of public employers. No Action Letter, ICMA Retirement Trust (Available February 7, 1983). In similar contexts, no action requests have also been granted by the Staff of the Commission with regard to an entity organized for the benefit of local government units in Pennsylvania (No Action Letter, Pennsylvania Local Government Investment Trust (Available March 2, 1981)). See also No Action Letter, State of New Jersey Cash Management Fund (Available January 30, 1978); No Action Letter, Massachusetts Municipal Depository Trust (Available May 23, 1977), No Action Letter, Wisconsin Investment Trust (Available January 16, 1987), and No Action Letter, Colorado Prepaid Tuition Fund (Available September 12, 1997).

In other no action letters the staff has agreed with the analysis made by or on behalf of various state agencies and instrumentalities that trust funds managed by state officials pursuant to applicable state law for essential governmental purposes, should be exempt from registration under Section 3(a)(2) of the 1933 Act and Section 2(b) of the 1940 Act. See Parental Savings Trust Fund (Available March 24, 1997), Missouri Family Trust Fund (Available September 22, 1992), Finance Authority of Maine (Available February 4, 1994) and Government Development Bank for Puerto Rico (Available July 21, 1995). In Parental Savings Trust Fund it was stated to the Staff that interests in the trust fund created by the North Carolina Education Assistance Authority should be exempt under Section 3(a)(2) of the 1933 Act as a public instrumentality because of the following factors: (i) the limited purpose of the Trust Fund, (ii) the essential governmental function served, (iii) the accountability of the State for the Trust Fund, (iv) the limited transferability of a participant's interest, and (v) the limited circumstances for participant withdrawal. All of these elements are present with respect to the establishment and operation of the Fund by the State Treasurer, the Board, the Council and its employees. We therefore believe that the Fund should similarly be considered a public instrumentality and that interests therein should be exempt from registration under Section 3(a)(2) of the 1933 Act.

The Fund should be similarly considered as a government instrumentality exempt from registration under the federal securities laws because it will be created by the State of Oregon pursuant to enabling legislation and will require the specific authorizations of the local governments, agencies or instrumentalities. Participation in the Fund will be strictly limited to Oregon state and local government deferred compensation plans that meet the criteria established by the Board. The Fund will be a legal adjunct to the Section 457 Plans of those local government sponsors that choose to participate. The administration of the Fund will be subject to oversight by the Board. It will be administered on a day to day basis by employees of the State of Oregon through the System or by third parties hired by the System from time to time. The investment of monies in the Fund will be managed by the Council, a state body, and carried out by employees of the office of the Oregon State Treasurer or by investment managers retained from time to time by the Council as agents of the Council. Thus, the creation, authorization and control of the Fund will be entirely under the auspices and control of local and state governmental entities.

Each local government deferred compensation plan that is a participant in the Fund should itself be considered to be an instrumentality of the local government because each such plan is administered, managed and controlled by the relevant government authority even though employees of such governments derive certain benefits from these deferred compensation plans. See No Action Letter, ICMA Retirement Trust (available February 7, 1983).

The recent change to Section 457 of the Code, making such government plans for the exclusive benefit of the participants, rather than for the benefit of public employers, should not alter the Staff's position that funds such as the one created in this instance are public instrumentalities. Each of the participants in the Section 457 Plans at issue are employees of local government entities or of the State of Oregon. The recent amendment of Section 457 was designed to limit the ability of the general creditors of a governmental entity to make claims on the assets of such Plans. In Senate Report No. 104-281, the Finance Committee set forth its reasoning for proposing this change to Section 457 of the Code. The report stated that:

The Committee is concerned about the potential for employees of certain State and local governments to lose significant portions of their retirement savings because their employer has chosen to provide benefits through an unfunded deferred compensation plan rather than a qualified pension plan. Therefore, the Committee finds it appropriate to require that benefits under a section 457 plan of a State and local government should be held in a trust . . . to insulate the retirement benefits of employees from the claims of the employer's creditors.

Thus, the clear intent of Congress was to provide state and local employees with added protection in terms of the assets in these Plans.

Douglas Scheidt  
Catherine T. Dixon  
February 10, 1998  
Page -11-

It would be incongruous that Congress intended for such a change to result in a determination that such funds could no longer be considered instrumentalities of governmental entities for the purposes of federal securities laws, as such a change would expose such employees and their Plans to the significant additional burdens and expenses of registration and regulatory compliance under the 1933 Act, the 1934 Act and the 1940 Act. A key purpose of the Fund is to enable local government deferred compensation plans, which otherwise are too small or unsophisticated, to use the expertise and economies of scale that are available to the State of Oregon for the benefit of employees of local governments. Otherwise, such local governmental deferred compensation plans might be obligated either to manage deferred compensation plan assets with employees lacking appropriate experience and levels of expertise or to retain outside investment advisors who may charge considerably greater fees for managing relatively smaller pools of assets.

The purpose of the Act and the establishment of the Fund is to carry out an important governmental function for the public employers, both at the state and local level. While public employers need experienced and qualified employees, they are often at a disadvantage in recruiting and keeping such employees vis-a-vis private industry because they are unable to match the salaries offered by private companies. In order to recruit and keep quality employees, public employers need to offer them attractive deferred compensation plans. For small and medium-size governmental units, attractive plans can be established only by obtaining the benefits from economies of scale through the commingling of investments and centralization of plan functions. As a result, the governmental entities, while no longer owning the assets of the Section 457 Plan, still receive a clear benefit by being able to offer a centrally invested plan to their employees.

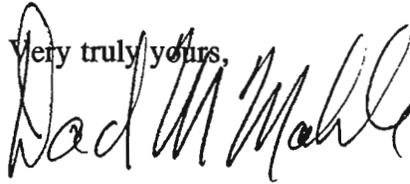
### III. CONCLUSION

Thus, on the basis of the facts and applicable laws, our opinion is that the Fund is a public instrumentality of the State of Oregon and the local government entities, and accordingly, the registration requirements of the 1933 Act and the 1934 Act are not applicable to the interests of the Section 457 Plans in the Fund by reason of the exemptions set forth in Section 3(a)(2) of the 1933 Act and Section 3(a)(12) of the 1934 Act as securities issued by a public instrumentality of the State of Oregon and the local governmental entity, respectively, and that the Fund is not an investment company within the meaning of the 1940 Act by reason of the exemption set forth in Section 2(b) thereof. In addition, in our opinion each of the interests in state or local government deferred compensation plans which participates in the Fund is exempt from registration under Section 3(a)(2) of the 1933 Act and Section 3(a)(12) of the 1934 Act because it is an interest in an instrumentality of the State of Oregon or a political subdivision of the State of Oregon and such deferred compensation plans would be exempt from registration under Section 2(b) of the 1940 Act.

Douglas Scheidt  
Catherine T. Dixon  
February 10, 1998  
Page -12-

JONES, DAY, REAVIS & POGUE

We respectfully request that you advise us that you will not recommend enforcement action to the Commission if the Fund operates in the manner hereinabove described in reliance on our advice that the exemptions from the 1933 Act, 1934 Act and the 1940 Act hereinabove noted are in fact applicable.

Very truly yours,  


David M. Mahle