STOEL RIVES LLP

ATTORNEYS AT LAW

900 S.W. Fifth Avenue, Suite 2600
Portland, Oregon 97204
main 503.224.3380
fax 503.220.2480
www.stoel.com

BRENDAN N. O'SCANNLAIN
Direct (503) 294-9886
bnoscannlain@stoel.com

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Via Facsimile and UPS

Douglas J. Scheidt, Esq.
Associate Director and Chief Counsel
Division of Investment Management
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: Washington Capital Joint Master Trust

Dear Mr. Scheidt:

On behalf of our client, Washington Capital Management, Inc., we hereby request that the Staff of the Division of Investment Management (the "Staff") of the Securities and Exchange Commission (the "Commission") confirm that the Staff would not recommend that the Commission take any enforcement action against Washington Capital Management, Inc. or Bank of New York Trust Company, N.A. if Washington Capital Joint Master Trust (the "Trust") does not register as an investment company under the Investment Company Act of 1940, as amended (the "1940 Act"), under the circumstances described below. We are requesting relief under Section 7(b) of the 1940 Act.

I. Background

The Trust is organized as a trust under the laws of the state of Washington and is qualified and tax-exempt as a group trust under the provisions of IRS Revenue Ruling 81-100. The Trust's investors are exclusively pension, profit sharing, or other retirement plans qualified under Section 401(a) of the Internal Revenue Code of 1986, as amended (the "Code"), investing through trusts that are tax-exempt under Section 501(a) of the Code, government plans,[1] and

[1] The term "government plan" means, in accordance with Code section 401(a)(24), (i) a governmental plan within the meaning of Code section 414(d), (ii) an eligible deferred compensation plan within the meaning of Code section 457(b), or (iii) the Government of the United States, the government of any State or political subdivision thereof, or any agency or any

certain individual retirement accounts.[2] Accordingly, the Trust is subject to applicable provisions of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). The investment manager for the Trust is Washington Capital Management, Inc., a Washington corporation, and an investment adviser registered with the Commission under the Investment Advisers Act of 1940 ("Investment Manager"). The Investment Manager established the Trust in 1982 and should therefore be considered the depositor of the Trust. The Trust does not have a board of trustees or board of directors. The Trust's trustee is The Bank of New York Trust Company, N.A. (the "Trustee"). The Trustee serves as a "directed trustee" under ERISA and is subject to removal with or without cause by the Investment Manager. The Trustee holds legal title to the assets of the Trust and executes directions for the purchase and sale of assets received from the Investment Manager.

The Trust relies on an exemption from the registration requirements for an investment company under Section 3(c)(1) of the 1940 Act. The Trust has established 9 separate investment funds, or portfolios. The separate portfolios consist of a small cap growth fund, a mid cap growth fund, a large cap value fund, a fixed income fund, a short term income fund, two mortgage income funds, a real estate equity fund, and a balanced fund composed of units of the other investment funds established by the Trust.

Ownership interests in the Trust are composed of units of non-voting beneficial interests representing an investor's allocated proportionate, undivided shares of one or more investment funds ("Units"). Holders of Units in any investment fund own Units in that investment fund only, and are not otherwise deemed to own Units in any other investment fund of the Trust unless the holder has specifically made an investment in such investment fund. As of August 31, 2006, there were 71 investors in the Trust's investment funds. The number of investors in each of the Trust's investment funds varies, and several investors are invested in more than one investment fund. The smallest number of investors in any investment fund is five and the largest number of investors in any investment fund is 40.

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instrumentality of the foregoing, who enters into a trust or contract to satisfy an obligation to provide a benefit under a plan described in Code Section 818(a).

[2] The individual retirement accounts ("IRA") includes an IRA under Code Section 408(a), a deemed IRA under Code Section 408(q), or a Roth IRA under Code Section 408A, provided such IRA is tax exempt under applicable provisions of the Code.

II. Discussion

A. Prior Commission No-Action Letter

In the *Coutts Global Fund* no-action letter (publicly available April 11, 1994), the Staff took a no-action position in the case of an "umbrella" trust that sponsored or issued separate investment funds or portfolios ("sub-funds") under the trust, and counted investors on a sub-fund by sub-fund basis, subject to certain conditions. The trust at issue in *Coutts Global Fund* was an Irish "umbrella unit trust," similar to a domestic series company or master trust, that offered units of beneficial interests in 14 sub-funds. As with the Trust, the units of beneficial interests issued by the Irish umbrella trust represented an undivided share in the property of a discrete sub-fund. In addition, under Irish law, each sub-fund was treated as a separate legal trust having a common trustee. Only the assets of a particular sub-fund could be applied to discharge claims of that sub-fund, and those assets could not be applied to discharge claims of any other sub-fund. The Staff agreed not to recommend any enforcement action if the umbrella trust's investment manager applied the 100-beneficial-owner limit on a sub-fund-by-sub-fund basis, subject to integration principles that may require two or more sub-funds with similar investment strategies, portfolio investments, and risk-return profiles to be collapsed and treated as a single issuer. The Coutts Global Fund umbrella trust was a foreign issuer privately offering units of beneficial interests to investors in the United States. The Commission has interpreted the Section 3(c)(1) 100 shareholder limit to apply to foreign funds making a private offering in the United States.[3] Accordingly, each sub-fund in the Coutts Global Fund umbrella trust was limited to having no more than 100 U.S. investors, subject to integration principles.

B. Washington State Law Treatment of Trusts and Separate Investment Funds Issued by a Trust

Although the issuer in *Coutts Global Fund* was a foreign issuer, the principles for treating each sub-fund as a separate issuer for purposes of Section 3(c)(1) apply to a domestic master trust or series company. The Trust is analogous to a "series company", and Units of each separate series or sub-fund represent an undivided share only in the property of that particular fund only and not the property of any other investment fund in the Trust. Under the terms of the Trust's Declaration of Trust, each investment fund in the Trust is a separate trust account in which investors' money is commingled and invested as a single fund. Each investment fund is separately held, managed, administered, valued, invested, distributed, audited, accounted for, and

[3] Release No. IA-2333 (December 2, 2004) at note 226.

otherwise dealt with as a separate entity. The beneficial interest held by an investor represents the investor's allocated proportionate undivided share of an investment fund. The Trust's Declaration of Trust also provides that the assets of each investment fund may be applied to discharge the expenses, losses, liabilities and damages (each a "claim") solely of that investment fund, and not of any other investment fund in the Trust. There is a common trustee and investors in a particular investment fund have no ownership or other interest in any other investment fund offered by the Trust. Washington law is silent, specifically, on whether each separate investment fund is treated or recognized as a separate entity. However, Washington law provides that the trustor of a trust, by the provisions of the trust, may alter any or all of the privileges and powers granted by Washington statutes governing the powers of a trustee, and may add privileges and powers to those granted by statute.[4] Moreover, Washington law provides that if any specific provision of the cited Washington statutes governing a trust conflict with the provisions of the trust, the provisions of the trust control.[5] Accordingly, we believe State law defers to the terms of the trust instrument as to whether to recognize separate investment funds of a trust as separate entities. Although Washington law does not specify whether a person having a claim against an investment fund offered by a trust would have recourse against any other investment fund offered by such trust, we believe the specific terms of the Trust and Washington law's deference[6] to the provisions of the Trust would preclude any person having a claim against a particular investment fund from attaching the assets of any other investment fund of the Trust.

Although the Staff has not publicly applied the reasoning in *Coutts Global Fund* to grant similar relief to a domestic master trust or series company, it would be inconsistent from a policy standpoint to allow a foreign umbrella trust privately offering its securities in the United States to count investors on a sub-fund by sub-fund basis but not a domestic master trust with an identical structure governed by State law that we believe recognizes separate investment funds as similar to sub-funds in an umbrella trust under Irish law.

III. Issue

Assuming that the Staff's reasoning in *Coutts Global Fund* applies to a domestic master trust or series company, the issue not addressed in *Coutts Global Fund* is whether each sub-fund in a

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[4] R.C.W. 11.97.010

[5] *Id.*

[6] *Id.*

master trust or separate series of a series company may rely on different exclusions from the definition of an investment company under Section 3(c) of the 1940 Act.

The Trust is considering the creation of additional investment funds under the Trust open only to investment by "qualified purchasers" as defined in Section 2(a)(51) of the 1940 Act.[7] In addition, one or more of the Trust's three investment funds that invest in real estate interests may qualify for an exclusion from the definition of an investment company under Section 3(c)(5)(C).[8] The remaining investment funds in the Trust would continue to rely on Section 3(c)(1), subject to integration principles.

We ask that the Staff concur in our view, based on the reasoning articulated in *Coutts Global Fund*, that each of the Trust's separate investment funds may rely on different exceptions to the definition of an investment company under Section 3(c) of the 1940 Act rather than requiring **all** of the Trust's separate investment funds to rely on the same exception (*e.g.*, Section 3(c)(1), which each of the sub-funds in the Coutts Global Fund umbrella trust relied on).[9] We are aware

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[7] Any such investment funds open only to qualified purchasers would rely on the exclusion from the definition of any investment company under Section 3(c)(7). Section 3(c)(7) of the 1940 Act excepts from the definition of an investment company (and, accordingly, an exemption from registration under the 1940 Act) any issuer with outstanding securities owned exclusively by "qualified purchasers," as defined in Section 2a-51 of the 1940 Act, and that is not making or proposing to make a public offering of securities. Unlike Section 3(c)(1), the exception under Section 3(c)(7) has no limitation on the number of purchasers in the fund (although certain issuers with a class of equity securities held by 500 or more persons are required to register the securities under Section 12(g)(1) of the Securities Exchange Act of 1934). Under Section 3(c)(7)(E) of the 1940 Act, an issuer relying on the exception under Section 3(c)(1) and an issuer relying on the exception under Section 3(c)(7) established by the same promoter will not be integrated for purposes of determining whether the outstanding securities of the Section 3(c)(1) issuer are owned by more than 100 persons or whether the outstanding securities of the Section 3(c)(7) issuer are owned by persons that are not "qualified purchasers."

[8] This exception is primarily relied on by entities engaged in purchasing mortgages and other liens on or interests in real estate, subject to certain conditions such as not being engaged in the business of issuing redeemable securities.

[9] The *Coutts Global Fund* letter did not specifically address whether each sub-fund could rely on a different exception to the definition of an investment company under Section 3(c) of the

of the Staff's long line of no-action letters articulating integration principles and its announcement that it will no longer respond to letters dealing with issues of integration unless they present novel or unusual issues.[10] Accordingly, we are not requesting the Staff to provide no-action relief with respect to whether any of the Trust's separate investment funds or portfolios would be integrated.

If the Trust creates additional investment funds that rely on different exceptions from the definition of an investment company under Section 3(c) of the 1940 Act (rather than relying on the same exception (e.g., Section 3(c)(1) for each separate fund)), the Trust is at risk, in the absence of contrary authority, that the Commission could integrate some of the Trust's investment funds by disallowing each portfolio's reliance on separate exceptions under Section 3(c) of the 1940 Act, and causing the 100 investor limit of Section 3(c)(1) to be exceeded (assuming the Trust's total number of investors exceeds 100 at the time).

Based on the Staff's reasoning in *Coutts Global Fund*, we believe separate sub-funds or portfolios in a domestic master trust or series company (in which each investment fund is recognized under state law as a separate entity) such as the Trust, should be allowed to rely on different exceptions to the definition of an investment company under Section 3(c) of the 1940 Act rather than requiring each separate investment fund to rely on the same exception (*e.g.*, Section 3(c)(1)).

The Investment Manager could achieve its desired result and organize, for example, a separate trust for each sub-fund or group of sub-funds relying on the same exemption under the 1940 Act. It could also organize any of the real estate-related investment funds as separate legal entities (a limited partnership or limited liability company, etc.) that rely on the exception to the definition of an investment company under Section 3(c)(5)(C) (assuming their investments qualify). For many of the same reasons offered by counsel to Coutts Global Fund, however, requiring all the sub-funds of a domestic trust or series company to rely on the same exception to the definition of an investment company would penalize the use of an efficient format such as the Trust. Using one trust to hold, manage and administer the assets of the separate investment funds in the Trust results in efficiencies for investors, the Investment Manager and the Trust's service providers,

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1940 Act. Our review of subsequent no-action letters and releases from the Commission did not uncover or reveal any extension or application of the reasoning in *Coutts Global Fund* to any similar circumstance.

[10] See *Shoreline Fund L.P.* (pub. avail. April 11, 1994).

and limits expenses. For example, if additional separate trusts or entities were created by the Investment Manager, the Investment Manager would have to file multiple Form 5500 reports with the U.S. Department of Labor each year. Adding such additional trusts or entities would require additional audit, legal and compliance expenses to create and maintain each of the investment funds organized as separate legal entities. In addition, Trust investors who are currently invested in multiple funds in the Trust would be required to execute and maintain separate legal and investment documents for each separate trust or other entity in which they are invested. Finally, creating multiple separate trusts would result in additional fees for recordkeeping and other services payable by each separate trust to the trustee.

The Staff's recommendation not to take any enforcement action if separate sub-funds in a master trust rely on different exceptions from the definition of an investment company under Section 3(c) would be consistent with the Commission's and the Division of Investment Management's practice of regulating each sub-fund in a domestic series company as a separate investment company.[11] If the Staff grants the requested relief to treat separate investment funds in a domestic master trust as distinct and separate—as the Staff did in the case of an Irish umbrella trust in *Coutts Global Fund*—then we believe it would be consistent to allow each investment fund in the Trust to rely on its own exclusion from the definition of an investment company under Section 3(c).

Given the harsh consequences if the Section 3(c)(1) 100 investor limitation is exceeded (resulting in violation of several sections of the 1940 Act), we are requesting relief under Section 7(b) of the 1940 Act and your concurrence that each of the Trust's separate investment funds may rely on different exclusions from the definition of an investment company under Section 3(c) of the 1940 Act (such as Sections 3(c)(1), 3(c)(7) and 3(c)(5)(C)), subject to integration principles.

If you should have any questions concerning the above matter, please feel free to call me at (503) 294-9886.

Sincerely yours,

Brendan N. O'Scannlain
Stoel Rives LLP

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[11] See *Coutts Global Fund*, n. 5 (citing as an example Rule 17a-7 under the 1940 Act).