

PUBLIC

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RESPONSE OF THE OFFICE OF CHIEF COUNSEL
DIVISION OF INVESTMENT MANAGEMENT

Our Ref. No. 93-117-CC
Kidder Peabody
Investment Trust
File No. 811-6292

We would not recommend any enforcement action to the Commission under Section 12(d)(3) of the Investment Company Act of 1940 (the "1940 Act") if Kidder, Peabody Asset Allocation Fund (the "Fund"), a series of Kidder, Peabody Investment Trust, a registered investment company, purchases common stock of General Electric Company ("GE") as described in your letter. 1/ Our position is based on the facts and representations stated in your letter, and your representation that Kidder Peabody's revenues amounted to 7.05% of GE's consolidated revenues in 1992, 6.13% in 1991, and 5.6% in 1990. 2/ You should note that different facts or representations may require a different conclusion. Moreover, this response expresses the Division's position on enforcement action only and does not purport to express any legal conclusions on the questions presented.



Kevin M. Broadwater
Attorney

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- 1/ See Dreyfus Index Fund (pub. avail. Mar. 31, 1992); IBM Mutual Funds, Inc. (pub. avail. May 18, 1990).
- 2/ Telephone conversation between Jon S. Rand and Kevin M. Broadwater, dated May 7, 1993.

WILLKIE FARR & GALLAGHER

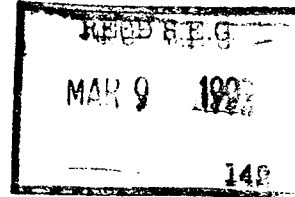
Jon S. Rand

New York
Washington, DC
London
Paris

Section	1 CA 12(d)(3)
Date	
Public Availability	5/14/93

1940 Act/Section 12(d)(3)
and Rule 12d3-1

March 8, 1993



VIA COURIER

Thomas S. Harman, Esq.
Chief Counsel
Division of Investment Management
Securities and Exchange Commission
Judiciary Plaza
450 Fifth Street, N.W.
Washington, D.C. 20549

Dear Mr. Harman:

On behalf of Kidder, Peabody Investment Trust, a Massachusetts business trust (the "Trust"), we respectfully request the assurance of the staff of the Division of Investment Management (the "Staff") of the Securities and Exchange Commission (the "Commission") that it will not recommend any enforcement action to the Commission under Section 12(d)(3) of the Investment Company Act of 1940, as amended (the "1940 Act"), or Rule 12d3-1 under the 1940 Act, if Kidder, Peabody Asset Allocation Fund, a series of the Trust (the "Fund"), invests in shares of common stock of General Electric Company ("GE") and effects brokerage transactions through Kidder, Peabody & Co., Incorporated ("Kidder, Peabody") in the manner described below.

Kidder, Peabody, a broker-dealer registered under the Securities Exchange Act of 1934 (the "Exchange Act"), serves as the distributor of the Fund's shares. Kidder Peabody Asset Management, Inc. ("KPAM"), a wholly-owned subsidiary of Kidder, Peabody, serves as the Fund's manager and investment adviser and is a registered investment adviser under the Investment Advisers Act of 1940, as amended. General Electric Capital Services, Inc., a wholly-owned subsidiary of GE, owns all of the outstanding stock of Kidder, Peabody Group Inc., the parent company of Kidder, Peabody.

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Except as described immediately below, this letter and the assurance we request is substantially similar to that granted in Letter re Dreyfus Index Fund; Peoples Index Fund, Inc.; Dreyfus Life and Annuity Index Fund, Inc.; Stagecoach Funds, Inc. -- Corporate Stock Fund and Asset Allocation Fund; and Overland Express Funds, Inc. -- Asset Allocation Fund (collectively, the "Dreyfus Funds") (pub. avail. March 31, 1992) (the "Dreyfus Letter"). We understand from a recent conversation with Mr. Lawrence Stoller of your office that the Staff has determined not to entertain additional no-action letters regarding the issue addressed in the Dreyfus Letter absent novel circumstances or issues. The Trust proposes to rely on the Dreyfus Letter but requests the Staff's assurances with respect to non-compliance with a condition expressed in the Dreyfus Letter -- that brokerage transactions not be effected through an affiliate of the Dreyfus Funds' investment adviser -- that appears not to be directly germane to the issues presented in that letter. As described below, the Trust believes that non-compliance with that condition would be consistent with the principals enunciated in that letter.

I. Background

A. Investment objectives and policies of the Fund

As described in the Fund's prospectus, the Fund follows an asset allocation strategy whereby KPAM allocates investments among three asset classes: common stocks and derivative instruments relating thereto (the "Stock Segment"), 30-day U.S. Treasury bills (the "Cash Segment"), and five-year U.S. Treasury Notes and derivative instruments relating thereto (the "Note Segment" and, together with the Stock Segment and the Cash Segment, the "Segments").

Investments allocated to the Stock Segment are not managed in the traditional sense by analyzing economic, financial and market conditions. Instead, KPAM currently selects stocks for investment by the Fund through the purchase of all of the stocks (other than GE stock) represented in the Standard & Poor's 500 Composite Stock Price Index (the "S&P 500") in approximately the same proportion as they are represented in the S&P 500 with the objective of matching, before deduction of operating expenses, the investment performance of the S&P 500.

The Fund allocates its assets among the Segments in accordance with an asset allocation model developed by Kidder, Peabody's Quantitative Research Group (the "Allocation Model"). The asset allocation mix for the Fund is determined

by KPAM at any given time on the basis of the published recommendations of the Allocation Model, except as described below, which are determined in light of a quantitative assessment of the expected performance of the Segments.

The Fund's assets are reallocated among the Segments based on the Allocation Model. If no reallocation is mandated, on the first business day of each month, any material amounts in each Segment in excess of the amount mandated by the Allocation Model resulting from appreciation or receipt of dividends, distributions, interest payments and proceeds from securities maturing are reallocated (or "rebalanced") to the extent practicable among the Segments so as to reestablish the recommended allocation among the Segments. Cash inflows to the Fund during a month are invested in, and cash outflows from the Fund during a month are derived from dispositions of assets in, each Segment on a pro rata basis. In order to manage the Fund's portfolio most effectively, cash flows into and out of the Stock Segment occurring between reallocations or monthly rebalancings are managed to the extent practicable through the use of stock index options, stock index futures contracts and options on stock index futures contracts. Similarly, cash flows into and out of the Note Segment occurring between reallocations or monthly rebalancings are managed to the extent practicable through the use of five-year U.S. Treasury Note futures contracts and options thereon.

The Fund deviates from the published recommendations of the Allocation Model only to the extent necessary (1) to maintain a limited amount of assets (not expected to exceed 2.00% of its total assets) in the Cash Segment in order to have highly liquid short-term securities available to pay Fund operating expenses and dividends and distributions on its shares and to meet anticipated redemptions of its shares and (2) to qualify as a regulated investment company for federal income tax purposes.

B. GE

GE is one of the largest and most diversified industrial corporations in the world. It has engaged in the development, manufacture, and marketing and servicing of a wide variety of products for the generation, transmission, distribution, control and utilization of electricity including a wide variety of high technology products including products used in aerospace, defense and medical diagnostic applications. Through wholly-owned subsidiaries, GE engages in

a broad spectrum of financial services, provides network and cable television services, operates television stations and furnishes domestic satellite communications. As of February 26, 1993, GE stock represented approximately 2.34% of the S&P 500 and, on a percentage basis, occupied the fourth largest position in the S&P 500.

C. Current policy of the Fund regarding the purchase of GE stock

The Fund currently does not purchase GE stock, but rather attempts to replicate the influence of GE stock on the performance of the S&P 500 by investing a greater amount of its assets in other stocks in the S&P 500, as well as other stocks not represented in the S&P 500, with similar industry and investment characteristics to those of GE stock. However, due to the size and diversity of GE, the Fund has discovered that it is quite difficult, if not impossible, to structure a portfolio that would match, before deduction of operating expenses, the investment performance of the S&P 500 without purchasing GE stock.

Since the Fund's commencement of operations on July 21, 1992, its portfolio has been committed substantially entirely to the Stock Segment. From that date through February 26, 1993, the performance of the Stock Segment has deviated from that of the S&P 500 by .47%, of which .20% is attributable to the difference between (1) the performance of GE stock and its effect on that of the S&P 500 and (2) the aggregate performance of the stocks purchased in an attempt to replicate the influence of GE stock on the performance of the S&P 500. The Trust regards this deviation as a significant impediment to the Fund's pursuit of the objective of the Stock Segment.

D. Use of brokers or dealers

KPAM selects brokers or dealers to execute securities transactions on behalf of the Fund by seeking the best overall terms available. In evaluating the best overall terms available, KPAM considers, among other things, the following factors: the financial condition and execution capability of the broker or dealer; the reasonableness of the commission, if any, for the specific transaction and on a continuing basis; and the brokerage and research services (as those terms are defined in Section 28(e) of the Exchange Act) provided to the Fund.

The Board of Trustees of the Trust has determined that, to the extent consistent with Section 11(a) of the Exchange Act and Rule 11a2-2(T) thereunder and Section 17(e) of the 1940 Act and Rule 17e-1 thereunder, transactions for the Fund may be effected through Kidder, Peabody if, in the judgment of KPAM, the use of Kidder, Peabody is likely to result in price and execution at least as favorable to the Fund as those obtainable through other qualified broker-dealers and if, in the transaction, Kidder, Peabody charges the Fund a fair and reasonable rate consistent with that charged to comparable unaffiliated customers in similar transactions. The Fund and Kidder, Peabody are, and intend to remain, in compliance with Section 17(e) of the 1940 Act and Rule 17e-1 thereunder and Section 11(a) of the Exchange Act and Rule 11a2-2(T) thereunder.

E. Proposed purchase of GE stock

The Fund proposes to purchase GE stock consistent with its policy of investing in stocks represented in the S&P 500, to the extent its assets are allocated to the Stock Segment. Thus, the Fund would purchase GE stock and would establish and maintain its position in GE stock, like all other stocks in the S&P 500, approximately in proportion to the percentage GE stock represents in the S&P 500. Purchases and sales of GE stock, therefore, would neither be volitional nor made on the basis of any fundamental or technical analysis of, or other similar specific information concerning, GE.

The Fund will not acquire GE stock except in a manner consistent with the following conditions:

1. When investments are allocated to the Stock Segment, the Fund will purchase GE stock and will establish and maintain its position in GE stock approximately in proportion to the percentage GE stock represents of the S&P 500, any variances being due to cash flows resulting from the continuous sale and redemption of Fund shares, or to stocks being added to or deleted from the S&P 500, before the Fund has rebalanced its portfolio in accordance with the new S&P 500 weightings or reallocated its investment in accordance with new recommendations generated by the Allocation Model.

2. KPAM will not intentionally allocate the Fund's investments among the Segments in order to influence the price of GE stock.

II. Discussion

Section 12(d)(3) generally prohibits an investment company from purchasing securities issued by a broker, dealer, investment adviser, or underwriter. Rule 12d3-1 exempts purchases of these securities from the prohibitions of Section 12(d)(3) under certain circumstances. However, paragraph (c) of Rule 12d3-1 prohibits an investment company from purchasing securities issued by its investment adviser, promoter, principal underwriter, or any affiliated person thereof that is in a securities related business. Rule 12d3-1(d)(3) defines "securities related business" as "a person who directly or indirectly is a broker, a dealer, engaged in the business of underwriting, an investment adviser registered under the Investment Advisers Act of 1940, as amended, or an investment adviser to a registered investment company." The Staff has expressed the view that a company may be "indirectly" a broker or investment adviser, within the meaning of "securities related business" in subparagraph (d)(3) of Rule 12d3-1, if it owns even a single share of the broker or adviser or of a parent company of the broker or adviser. See Letter re The Korea Fund, Inc. (pub. avail. May 16, 1985). Because KPAM and Kidder, Peabody are indirect subsidiaries of GE, the Fund's purchase of GE stock arguably may be prohibited under paragraph (c) of Rule 12d3-1.

The Staff has taken the position in the Dreyfus Letter that it would not recommend enforcement action to the Commission under Section 12(d)(3) and Rule 12d3-1 if the Dreyfus Funds, which were advised and distributed by subsidiaries of Wells Fargo & Co. ("WF"), purchased shares of WF common stock. The Dreyfus Funds included both index funds and funds that pursue an asset allocation strategy (the "Asset Allocation Funds") by allocating investments based on market conditions among common stocks, U.S. Treasury bonds and money market investments. The Staff's position was based on the Dreyfus Funds' representations that (i) the purchases of WF common stock would be non-volitional, in that the Dreyfus Funds would neither purchase nor sell WF common stock for any reason other than to match the performance of the S&P 500, (ii) their investment adviser and distributor would not allocate the Asset Allocation Funds' portfolios intentionally to influence the market price of the WF common stock, and (iii) the Dreyfus Funds would not execute brokerage transactions through any subsidiary of WF.

The operation of Rule 12d3-1 and the Staff's response in the Dreyfus Letter arguably prevents the Fund from effecting any brokerage transactions through Kidder, Peabody if the Fund

invests in GE stock in the manner set forth above and in the Dreyfus Letter, even though the Fund and Kidder, Peabody are in compliance with all of the requirements of the 1940 Act and the Exchange Act regarding the execution of brokerage transactions through affiliates of an investment company or its adviser. The Staff's position, therefore, could be interpreted as expanding the existing provisions of the 1940 Act and the Exchange Act that specifically regulate the execution of brokerage transactions of an investment company through an affiliate of the company's investment adviser or principal underwriter.

The Trust submits that Section 17(e) of the 1940 Act and Section 11(a) of the Exchange Act and the rules promulgated thereunder directly and adequately regulate the execution of brokerage transactions by an investment company through affiliates of the investment company or its adviser and protect against the possible conflicts that may result from an investment company's entering into a brokerage relationship with an affiliate. The Trust also submits that it is neither necessary nor appropriate to expand Section 12(d)(3) to regulate these transactions, particularly where the purchases and sales of the stock are non-volitional and the transactions, by assisting the Fund in pursuing its investment objective, are in the best interest of both the Fund and its shareholders.

Section 12(d)(3) has been viewed by the Staff as designed to curtail interrelationships among investment companies and brokers, dealers, underwriters and investment advisers and to eliminate, in practice, certain reciprocal practices between investment companies and securities related businesses. Investment Co. Act Release No. 13,725, [1984 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 83,479 at p. 86,538. For example, an investment adviser affiliated with a brokerage firm could advise a fund to invest in the stock of the brokerage firm or an affiliate of the brokerage firm to reward the firm for selling fund shares or to enhance the firm's profitability, even if the investment was not in the fund's best interests. Another example would be a broker's advising customers to invest in a particular fund because that fund invested in securities of the broker or an affiliate. See id. Indeed, none of the potential conflicts of interest that Section 12(d)(3) was designed to prevent could occur in this case, given that purchases of common stock by the Fund are non-volitional. In addition, the requirements of Section 17(e) of the 1940 Act and Section 11(a) of the Exchange Act

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and the rules thereunder protect against any potential conflicts resulting from an investment company's effecting brokerage transactions through its affiliate or an affiliate of its investment adviser. See United States v. Deutsch, 451 F.2d 98, 109 (2d Cir. 1971), cert. denied, 404 U.S. 1019 (1972).

The Trust submits that the facts and circumstances of the instant case support the same result as that reached by the Staff in the Dreyfus Letter, without requiring the Fund to represent that it will not effect brokerage transactions through Kidder, Peabody or any subsidiaries of GE.

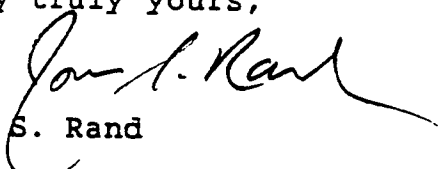
III. Conclusion

For the reasons described above, we believe that the proposed purchases of GE stock by the Fund and the execution of brokerage transactions by Kidder, Peabody, in the manner set forth above, are consistent with Section 12(d)(3) of the 1940 Act and are not contrary to the policies underlying the adoption of Rule 12d3-1 under the 1940 Act, and request the Staff's assurance that it will not recommend any enforcement action if the Fund purchases GE stock and continues to execute brokerage transactions through Kidder, Peabody in the manner described above.

* * *

Should members of the Staff have any questions or comments regarding this letter, they should contact the undersigned or Patricia E. Torrente of this office at (212) 935-8000.

Very truly yours,


Jon S. Rand

cc: Lawrence B. Stoller, Esq.
Patricia E. Torrente, Esq.