

United States. Duke further states that the Non-U.S. Utilities are not qualified to do business in any state of the United States, nor is any Non-U.S. Utility a public-utility company operating in the United States.

Duke states that its domestic utility operations are, and will continue to be, fully separated from Duke's foreign operations. Duke further states that it will not seek recovery through higher rates to its domestic regulated utility customers for any possible loss it might sustain by reason of the proposed investment in the Non-U.S. Utilities or for any inadequate returns on that investment.

Duke asserts that an unqualified section 3(b) exemption of the Non-U.S. Utilities would entitle Duke and its subsidiary companies that directly or indirectly hold interests in the Non-U.S. Utilities ("Intermediate Subsidiaries") to the exemption provided by rule 10 of the Act. Duke and the Intermediate Subsidiaries intend to rely upon rule 10(a)(1) to provide an exemption insofar as each is a holding company. Further, Duke and the Intermediate Subsidiaries intend to rely upon rule 11(b)(1), to provide an exemption from the approval requirements of sections 9(a)(2) and 10 to which Duke and its Intermediate Subsidiaries would otherwise be subject.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. IC-25407; 812-12664]

### Commonfund Institutional Funds, et al.; Notice of Application

February 1, 2002.

**AGENCY:** Securities and Exchange Commission ("Commission").

**ACTION:** Notice of application for an order under sections 6(c), 12(d)(1)(f), and 17(b) of the Investment Company Act of 1940 ("Act") for exemptions from sections 12(d)(1)(A) and (B) and 17(a) of the Act, and under section 17(d) of the Act and rule 17d-1 thereunder to permit certain joint transactions.

*Summary of Application:* Applicants request an order to permit certain registered open-end management investment companies to invest uninvested cash and cash collateral in

one or more affiliated money market funds and/or short-term bond funds.

**Applicants:** Commonfund Institutional Funds (the "Company") and Commonfund Asset Management Company, Inc. ("Comanco").

**Filing Dates:** The application was filed on October 18, 2001 and amended on January 31, 2002.

**Hearing or Notification of Hearing:** An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicant with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on February 26, 2002, and should be accompanied by proof of service on applicant, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

**ADDRESSES:** Secretary, Commission, 450 Fifth Street, NW., Washington, DC 20549-0609. Applicants: John W. Auchincloss, General Counsel, Commonfund Institutional Funds, 15 Old Danbury Road, PO Box 812, Wilton, CT 06897-0812.

**FOR FURTHER INFORMATION CONTACT:** Jaee F. Hahn, Senior Counsel, at (202) 942-0614, or Nadya B. Roytblat, Assistant Director, at (202) 942-0564 (Division of Investment Management, Office of Investment Company Regulation).

**SUPPLEMENTARY INFORMATION:** The following is a summary of the application. The complete application may be obtained for a fee at the Commission's Public Reference Branch, 450 Fifth Street, NW., Washington, DC 20549-0102 (tel. 202-942-8090).

#### Applicants' Representations

1. The Company is organized as a Delaware business trust and registered under the Act as an open-end management investment company. The Company currently consists of eight investment portfolios ("Funds"), including CIF Short Duration Fund ("Short Duration Fund").<sup>1</sup> Comanco, an

<sup>1</sup> All investment companies that currently intend to rely on the requested relief have been named as applicants and any existing or future registered open-end management investment company that may rely on the requested relief in the future will do so only in accordance with the terms and conditions of the application. The applicants are also seeking relief for any registered open-end management investment company or series thereof that is currently, or in the future may be advised

indirect, wholly owned subsidiary of The Common Fund for Nonprofit Organizations, serves as investment adviser for the Company, and is registered under the Investment Advisers Act of 1940.

2. Each Fund has, or may be expected to have, uninvested cash in an account at its custodian ("Uninvested Cash"). Uninvested Cash may result from a variety of sources, such as dividends or interest received on portfolio securities, unsettled securities transactions, reserves held for investment purposes, scheduled maturity of investments, proceeds from liquidation of investment securities, dividend payments, or money received from investors. Certain of the Funds may also participate in a securities lending program under which the Fund may lend its portfolio securities to registered broker-dealers or other institutional investors. The loans will be continuously secured by collateral equal at all times to at least the market value of the securities loaned. Collateral for these loans may include cash ("Cash Collateral," and together with Uninvested Cash, "Cash Balances").

3. Applicants request relief to permit certain of the Funds (the "Investing Funds") to use Cash Balances to purchase shares of the Short Duration Fund, as well as any future Fund that operates as a money market fund in accordance with Rule 2a-7 under the Act ("Money Market Fund" and together with the Short Duration Fund, the "Cash Management Funds"), and the Cash Management Funds to sell their shares to, and redeem their shares from, each of the Investing Funds. The Short Duration Fund seeks current income with some price appreciation, each consistent with liquidity and safety of principal, by investing in fixed income securities, and generally will maintain an effective duration of one year or less. Investment of Cash Balances in shares of the Cash Management Funds will be made only to the extent consistent with such Investing Fund's investment restrictions and policies as set forth in its prospectus and statement of additional information. Applicants believe that the proposed transactions will result in higher yields, increased investment opportunities, reduced transaction costs, increased returns, reduced administrative burdens, enhanced liquidity, and increased diversification.

by the Adviser, as defined below (included in the term "Funds"). Comanco and any person controlling, controlled by or under common control with Comanco that currently or in the future serves as investment adviser to a fund are collectively referred to as the "Adviser".

### Applicants' Legal Analysis

1. Section 12(d)(1)(A) of the Act provides that no registered investment company may acquire securities of another investment company if such securities represent more than 3% of the acquired company's outstanding voting stock, more than 5% of the acquiring company's total assets, or if such securities, together with the securities of other acquired investment companies, represent more than 10% of the acquiring company's total assets. Section 12(d)(1)(B) of the Act provides that no registered open-end investment company may sell its securities to another investment company if the sale will cause the acquiring company to own more than 3% of the acquired company's voting stock, or if the sale will cause more than 10% of the acquired company's voting stock to be owned by investment companies.

2. Section 12(d)(1)(f) of the Act authorizes the Commission to exempt any person, security or transaction (or classes thereof) from any provision of section 12(d)(1) if, and to the extent that, the exemption is consistent with the public interest and the protection of investors. Applicants request an exemption from the provisions of sections 12(d)(1)(A) and (B) to the extent necessary to permit each Investing Fund to invest Cash Balances in the Cash Management Funds.

3. Applicants state that the proposed arrangement would not result in the abuses that section 12(d)(1)(A) and (B) were intended to prevent. Applicants state that because each Cash Management Fund will maintain a highly liquid portfolio, an Investing Fund will not be in a position to gain undue influence over a Cash Management Fund through threat of redemption. Applicants also represent that the proposed arrangement will not result in an inappropriate layering of fees because shares of the Cash Management Funds sold to the Investing Funds will not be subject to a sales load, redemption fee, distribution fee under a plan adopted in accordance with rule 12b-1 or service fee (as defined in rule 2830(b)(9) of the National Association of Securities Dealers, Inc. ("NASD") Conduct Rules) or, if such shares are subject to any such fees in the future, the Adviser will waive its advisory fee for each Investing Fund in an amount that offsets the amount of such fees incurred by the Investing Fund. Applicants state that if a Cash Management Fund offers more than one class of securities, each Investing Fund will invest only in the class with the lowest expense ratio (taking into

account the expected impact of the Investing Fund's investment) at the time of the investment. Before the next meeting of the board of directors (the "Board") of an Investing Fund is held for the purpose of voting on an advisory contract under section 15(a) of the Act, the Adviser to the Investing Fund will provide the Board with specific information regarding the approximate cost to the Adviser of, or portion of the advisory fee attributable to, managing the assets of the Investing Fund that can be expected to be invested in the Cash Management Funds. In connection with approving any advisory contract for an Investing Fund, the Board, including a majority of the directors who are not "interested persons," as defined in section 2(a)(19) of the Act ("Independent Directors") will consider to what extent, if any, the advisory fees charged to each Investing Fund by the Adviser should be reduced to account for reduced services provided to the Investing Fund by the Adviser as a result of Uninvested Cash being invested in a Cash Management Fund. Applicants represent that no Cash Management Fund whose shares are held by an Investing Fund will acquire securities of any other investment company in excess of the limitations contained in section 12(d)(1)(A) of the Act.

4. Section 17(a) of the Act makes it unlawful for any affiliated person of a registered investment company, acting as principal, to sell or purchase any security to or from the company. Section 2(a)(3) of the Act defines an "affiliated person" of an investment company to include the investment adviser, any person that owns 5% or more of the outstanding voting securities of that company, and any person directly or indirectly controlling, controlled by, or under common control with the investment company. Applicants state that each of the Investing Funds may be deemed to be under common control, and therefore affiliated persons of each other, because they have a common investment adviser or their investment advisers may be under common control. In addition, applicants submit that because an Investing Fund could acquire 5% or more of the outstanding voting shares of a Cash Management Fund, such Investing Fund might be deemed an affiliated person of the Cash Management Fund. Accordingly, applicants state that the sale of shares of the Cash Management Fund to the Investing Funds, and the redemption of such shares by the Investing Funds, may be prohibited under section 17(a).

5. Section 17(b) of the Act authorizes the Commission to exempt a proposed transaction from section 17(a) of the Act if the terms of the proposed transaction, including the consideration to be paid or received, are fair and reasonable and do not involve overreaching on the part of any person concerned, the proposed transaction is consistent with the policies of each registered investment company involved, and with the general purposes of the Act. Section 6(c) of the Act provides, in part, that the Commission may exempt any person, security or transaction, or any class or classes of persons, securities or transactions, from any provision of the Act if, and to the extent that such exemption is necessary or appropriate in the public interest and is consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

6. Applicants submit that their request for relief to permit the purchase and redemption of Cash Management Fund shares by the Investing Funds satisfies the standards of sections 17(b) and 6(c) of the Act. Applicants state that the investment by the Investing Funds in shares of the Cash Management Funds will be on the same terms and on the same basis as any other shareholders, and that the consideration paid and received by the Investing Funds on the sale and redemption of shares of a Cash Management Fund will be based on the Cash Management Fund's net asset value per share. In addition, under the proposed transactions, the Investing Funds will retain their ability to invest their Cash Balances directly in money market instruments or short-term instruments as authorized by their respective investment objectives and policies, if they believe they can obtain a higher rate of return, or for any other reason. Applicants also state that each of the Cash Management Funds reserves the right to discontinue selling shares to any of the Investing Funds if the management of the Cash Management Fund determines that such sales would adversely affect its portfolio management and operations.

7. Section 17(d) of the Act and rule 17d-1 thereunder prohibit an affiliated person of an investment company, acting as principal, from participating in or effecting any transaction in connection with any joint enterprise or joint arrangement in which the investment company participates, unless the Commission has issued an order authorizing the arrangement. Applicants state that each Investing Fund (by purchasing shares of the Cash Management Funds), each Adviser of an

Investing Fund (by managing the assets of the Investing Funds invested in the Cash Management Funds), and each Cash Management Fund (by selling shares to and redeeming them from the Investing Funds) could be deemed to be participants in a joint enterprise or other joint arrangement within the meaning of section 17(d) of the Act and rule 17d-1 thereunder.

8. Rule 17d-1 permits the Commission to approve a proposed joint transaction covered by the terms of section 17(d) of the Act. In determining whether to approve a transaction, the Commission will consider whether the proposed transaction is consistent with the provisions, policies, and purposes of the Act, and the extent to which the participation is on a basis different from or less advantageous than that of other participants. Applicants submit that the proposed transactions meet these standards because the investments by the Investing Funds in shares of the Cash Management Funds will be on the same basis and will be indistinguishable from any other shareholder account maintained by the same class of the Cash Management Funds, and the transactions will be consistent with the Act.

#### Applicants' Conditions

Applicants agree that any order granting the requested relief shall be subject to the following conditions:

1. Shares of the Cash Management Funds sold to and redeemed by the Investing Funds will not be subject to a sales load, redemption fee, distribution fee adopted in accordance with rule 12b-1 under the Act, or service fee (as defined in rule 2830(b)(9) of the NASD Conduct Rules), or if such shares are subject to any such fee, the Adviser will waive its advisory fee for each Investing Fund in an amount that offsets the amount of such fees incurred by the Investing Fund.

2. Before the next meeting of the Board of the Investing Funds is held for purposes of voting on an advisory contract under section 15 of the Act, the Adviser to the Investing Funds will provide the Board with specific information regarding the approximate cost to the Adviser of, or portion of the advisory fee under the existing advisory contract attributable to, managing the Uninvested Cash of the Investing Fund that can be expected to be invested in the Cash Management Funds. Before approving any advisory contract for an Investing Fund, the Board of the Investing Fund, including a majority of the Independent Directors, shall consider to what extent, if any, the advisory fees charged to the Investing

Fund by the Adviser should be reduced to account for reduced services provided to the Investing Fund by the Adviser as a result of Uninvested Cash being invested in the Cash Management Fund. The minute books of the Investing Fund will record fully the Board's considerations in approving the advisory contract, including the considerations referred to above.

3. Each of the Investing Funds will invest Uninvested Cash in, and hold share of, the Cash Management Funds only to the extent that the Investing Fund's aggregate investment of Uninvested Cash in the Cash Management Funds does not exceed 25 percent of the Investing Fund's total assets. For purposes of this limitation, each Investing Fund or series thereof will be treated as a separate investment company.

4. Investment of Cash Balances in shares of the Cash Management Funds will be in accordance with each Investing Fund's respective investment restrictions, if any, and will be consistent with each Investing Fund's policies as set forth in its prospectus and statement of additional information. No Investing Fund that relies on rule 2a-7 under the Act will invest in a Cash Management Fund that is not a Money Market Fund.

5. No Cash Management Fund shall acquire securities of any investment company in excess of the limits contained in section 12(d)(1)(A) of the Act.

6. Each Investing Fund and Cash Management Fund that may rely on the order shall be advised by the Adviser.

7. Before a Fund may participate in a Securities Lending Program, a majority of the Board, including a majority of the Independent Directors, will approve the Fund's participation in the Securities Lending Program. Such directors also will evaluate the securities lending arrangement and its results no less frequently than annually and determine that any investment of Cash Collateral in the Cash Management Funds is in the best interests of the shareholders of the Fund.

For the Commission, by the Division of Investment Management, under delegated authority.

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

### Sunshine Act Meeting

**FEDERAL REGISTER CITATION OF PREVIOUS ANNOUNCEMENT:** (67 FR 4297, January 29, 2002)

**STATUS:** Closed Meeting.

**PLACE:** 450 Fifth Street, NW., Washington, D.C.

**DATE AND TIME OF PREVIOUSLY ANNOUNCED MEETING:** Wednesday, February 6, 2002 at 10 a.m.

**CHANGE IN THE MEETING:** Cancellation of Meeting/Additional Meetings.

The closed meeting scheduled for Wednesday, February 6, 2002, has been cancelled, and rescheduled for Thursday, February 7, 2002, at 10 a.m. Additional closed meetings will be held on Tuesday, February 12, 2002 and Thursday, February 14, 2002, at 10:00 a.m.

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the closed meetings. Certain staff members who have an interest in the matters may also be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(3), (5), (7), (9)(B), and (10) and 17 CFR 200.402(a)(3) (5), (7), 9(ii) and (10), permit consideration of the scheduled matters at the closed meetings.

The subject matters of the closed meeting scheduled for Tuesday, February 12, 2002, will be:

Litigation matter;  
Institution and settlement of injunctive actions;  
Institution and settlement of administrative proceedings of an enforcement nature;  
Formal orders of investigation; and  
adjudicatory matters.

The subject matters of the closed meeting scheduled for Thursday, February 14, 2002, will be:

Institution and settlement of injunctive actions;  
Institution and settlement of administrative proceedings of an enforcement nature; and  
Formal orders of investigation.

At times, changes in Commission priorities require alterations in the scheduling of meeting items. For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact:

The Office of the Secretary at (202) 942-7070.