

issued by open-end investment companies. Applicants state that such restrictions are set forth in the Plan, which would be included primarily to benefit the Eligible Trustees and would not adversely affect the interests of the trustees or of any shareholder.

4. Section 22(g) prohibits registered open-end investment companies from issuing any of their securities for services or for property other than cash or securities. This provision prevents the dilution of equity and voting power that may result when securities are issued for consideration that is not readily valued. Applicants believe that the Plan would merely provide for deferral of payment of such fees and thus should be viewed as being issued not in return for services but in return for a Fund not being required to pay such fees on a current basis.

5. Section 13(a)(3) provides that no registered investment company shall, unless authorized by the vote of a majority of its outstanding voting securities, deviate from any investment policy that is changeable only if authorized by shareholder vote. The relief requested from section 13(a)(3) would extend only to existing Investment Companies. Applicants believe that relief from section 13(a)(3) is appropriate to enable the affected Investment Companies to invest in Designated Shares without a shareholder vote. Applicants will provide notice to shareholders in the prospectus of each affected Investment Company of the Deferred Fees under the Plan. The value of the Designated Shares will be *de minimis* in relation to the total net assets of the respective Investment Company, and will at all times equal the value of the Investment Company's obligations to pay deferred fees.

6. Rule 2a-7 imposes certain restrictions on the investments of "money market funds," as defined under the rule, that would prohibit a Fund that is a money market Fund from investing in the shares of any other Fund. Applicants believe that the requested exemption would permit the Funds to achieve an exact matching of Designated Shares with the deemed investments of the Deferral Accounts, thereby ensuring that the deferred fees would not affect net asset value.

7. Section 6(c) provides, in relevant part, that the SEC may, conditionally or unconditionally, by order, exempt any person or class of persons from any provision of the Act or from any rule thereunder, if such exemption is necessary or appropriate in the public interest, consistent with the protection of investors, and consistent with the

purposes fairly intended by the policy and provisions of the Act. Applicants submit that the relief requested from the above provisions satisfies this standard.

8. Section 17(a)(1) generally prohibits an affiliated person, or an affiliated person of an affiliated person, of a registered investment company from selling any security to such registered investment company. The Adviser is an affiliated person of each of the Fund's portfolios pursuant to section 2(a)(3)(E) of the Act. Each portfolio may be treated as an affiliated person of each other portfolio by reason of being under the common control of the Adviser.<sup>4</sup> The sale by a portfolio of any security to any other portfolio of any Fund would therefore be subject to the prohibitions of section 17(a)(1). Applicants assert that section 17(a)(1) was designed to prevent, among other things, sponsors of investment companies from using investment company assets as capital for enterprises with which they were associated or to acquire controlling interest in such enterprises. Applicants submit that the sale of securities issued by the Funds pursuant to the Plan does not implicate the concerns of Congress in enacting this section, but merely would facilitate the matching of each Fund's liability for deferred trustees' fees with the Designated Shares that would determine the amount of such Fund's liability.

9. Section 17(b) authorizes the SEC to exempt a proposed transaction from section 217(a) if evidence establishes that the terms of the transaction, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching on the part of any person concerned, the transaction is consistent with the policies of the registered investment company, and the general purposes of the Act. Applicants assert that the proposed transaction satisfies the criteria of section 17(b). The finding that the terms of the transaction are consistent with the policies of the registered investment company is predicated on the assumption that relief is granted from section 13(a)(3). Applicants also request relief from section 17(a)(1) under section 6(c) to the extent necessary to implement the Deferred Fees under the Plan on an ongoing basis.<sup>5</sup>

<sup>4</sup> Section 2(a)(3)(C) of the Act defines the term "affiliated person" of another person to include any person directly or indirectly controlling, controlled by, or under common control with such other person.

<sup>5</sup> Section 17(b) may permit only a single transaction, rather than a series of on-going transactions, to be exempted from section 17(a). See *Keystone Custodian Funds, Inc.*, 21 S.E.C. 295 (1945).

10. Section 17(d) and rule 17d-1 generally prohibit a registered investment company's joint or joint and several participation with an affiliated person in a transaction in connection with any joint enterprise or other joint arrangement or profit-sharing plan "on a basis different from or less advantageous than that of" the affiliated person. Eligible Trustees will not receive a benefit, directly or indirectly, that would otherwise inure to a Fund or its shareholders. Eligible Trustees will receive tax deferral but the Plan otherwise will maintain the parties, viewed both separately and in their relationship to one another, in the same position as if the deferred fees were paid on a current basis. When all payments have been made to a Eligible Trustee, the Eligible Trustee will be no better off, relative to the Funds, than if he or she had received trustee fees on a current basis and invested them in Designated Shares.

#### Applicants' Conditions

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

1. With respect to the relief requested from rule 2a-7, any money market Fund that values its assets by the amortized cost method will buy and hold Designated Shares that determine the value of Deferral Accounts to achieve an exact match between the liability of any such Fund to pay compensation deferrals and the assets that offset that liability.

2. If a Fund purchases Designated Shares issued by an affiliated Fund, the Fund will vote such shares in proportion to the votes of all other shareholders of such affiliated Fund.

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

Margaret H. McFarland,

*Deputy Secretary.*

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BILLING CODE 8010-01-M

[Rel. No. IC-21598; 812-9762]

#### The One Hundred Fund, Inc., et al.; Notice of Application

December 13, 1995.

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

**ACTION:** Notice of Application for Exemption under the Investment Company Act of 1940 (the "Act").

**APPLICANTS:** The One Hundred Fund, Inc., dba Berger 100 Fund (the "100 Fund"), Berger One Hundred and One

Fund, Inc. (the "101 Fund"), and Berger Investment Portfolio Trust (the "Trust") (collectively, the "Funds"), and Berger Associates, Inc. ("BAI").

**RELEVANT ACTION SECTIONS:** Order requested under section 6(c) of the Act for an exemption from sections 13(a)(2), 13(a)(3), 18(f)(1), 22(f), and 22(g) of the Act; and under sections 6(c) and 17(b) of the Act for an exemption from section 17(a)(1) of the Act; and pursuant to section 17(d) of the Act and rule 17d-1 thereunder.

**SUMMARY OF APPLICATION:** Applicants request an order that would permit the applicant investment companies to enter into deferred compensation arrangements with their independent directors.

**FILING DATES:** The application was filed on September 13, 1995 and amended on November 30, 1995. Applicant's counsel has stated in a letter dated December 12, 1995 that an amendment, the substance of which is incorporated herein, will be filed during the notice period.

**HEARING OR NOTIFICATION OF HEARING:** An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on January 8, 1996 and should be accompanied by proof of service on the applicants, 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 SEC's Secretary.

**ADDRESSES:** Secretary, SEC, 450 Fifth Street, N.W., Washington, D.C. 20549. Applicants, 210 University Boulevard, Denver, Colorado 80206.

**FOR FURTHER INFORMATION CONTACT:** David W. Grim, Law Clerk, at (202) 942-0571, or Robert A. Robertson, Branch Chief, 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 from the SEC's Public Reference Branch.

#### Applicants' Representations

1. Each of the Funds is a registered open-end management investment company. BAI serves as the investment adviser to each of the Funds. Applicants request that the exemption also apply to

any registered open-end investment company for which BAI, or any entity under common control with or controlled by BAI, subsequently serves as investment adviser.

2. Each Fund has a board of trustees or board of directors. Each board has ten members, eight of whom are not "interested persons" within the meaning of section 2(a)(19) of the Act ("independent directors"). Each independent director receives an annual fee plus a meeting attendance fee. No director who is an interested person of a Fund receives any remuneration from such Fund.

3. Applicants request relief so that the Funds may offer their independent directors deferred compensation plans (each, a "Plan"). Each Fund's Plan will be administered by its board or by such person or persons as the board may designate to carry out administrative functions under the Plan (the "Administrator"). Each Plan would permit independent directors of a Fund annually to elect to defer receipt of all or a portion of their fees. This election would enable the independent directors to defer payment of income taxes on such fees.

4. Under the Plans, the Administrator shall maintain a book entry account (an "Account") with respect to each deferral election by an independent director and shall credit to that Account an amount equal to all compensation deferred by the independent director under such election, as of the date such fees would have been paid to such independent director absent such deferral. The value of an Account will be equal to the value such account would have had if the amount credited to it had been invested and reinvested in certain designated securities (the "Designated Shares"). The Designated Shares for an Account will be shares of one or more of the Funds or a money market fund approved by the board of the Fund on which such independent director serves (the "Investment Funds"), as designated by the participating independent director. The money market fund currently proposed to be included as an Investment Fund is the Cash Account Trust, for which Kemper Financial Services, Inc. acts as investment adviser, and for which BAI provides sub-administration services. The Cash Account Trust is not an "affiliated person" of the Funds, as such term is defined in section 2(a)(3) of the Act. Each Account shall be credited or charged with book adjustments representing all interest, dividends, and other earnings and all gains and losses that would have been realized had such

account been invested in the Underlying Shares.

5. The amounts paid to the independent directors under the Plans are expected to be insignificant in comparison to the total net assets of the Funds. Each Plan provides that a Fund's obligation to make payments from an Account will be a general obligation of the Fund and payments made pursuant to each Plan will be made from the Fund's general assets and property. With respect to the obligations created under the Plans, the relationship of an independent director to a Fund will be that of a general unsecured creditor.

6. The Plans do not create an obligation of a Fund to any independent director of a Fund to purchase, hold, or dispose of any investments. If a Fund should choose to purchase investments in order to cover its obligations under a proposed Plan, any and all such investments will continue to be part of the general assets and property of such Fund. In this regard, a Fund may purchase its own shares or the shares of any other Investment Fund to cover its obligations.

7. Under the Plans, an independent director may specify that his or her deferred fees be distributed in whole or in part commencing on (a) a date at least five years following the deferral election, or (b) the date on which the independent director ceases to be a member of the board, but not later than such cessation date. Deferred payments will be made in a lump sum or in monthly or quarterly installments over a period not to exceed ten years, as elected by the independent director. In the event of the independent director's death, amounts payable under a Plan will be payable to his or her designated beneficiary, or, in the absence of such a beneficiary, to his or her estate. In all other events, the independent director's right to receive payments cannot be transferred, assigned, pledged, subjected to garnishment or otherwise alienated.

8. The Plans will not obligate any Fund to retain the services of an independent director, nor will they obligate any Fund to pay any (or any particular level of) director's fees to any director.

#### Applicants' Legal Analysis

1. Applicants request an order under section 6(c) of the Act for an exemption from sections 13(a)(2), 13(a)(3), 18(f)(1), 22(f), and 22(g) of the Act to permit the Funds to enter into deferred fee arrangements with their independent directors; under sections 6(c) and 17(b) of the Act for an exemption from section 17(a)(1) to permit the Investment Funds to sell securities issued by them to

participating Funds; and pursuant to section 17(d) of the Act and rule 17d-1 thereunder to permit the Funds to engage in certain joint transactions incident to such deferred fee arrangements.

2. Section 6(c) provides that the SEC may exempt any person, security, or transaction from any provision of the Act, if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

3. Section 18(f)(1) generally prohibits a registered open-end investment company from issuing senior securities. Section 13(a)(2) requires that a registered investment company obtain shareholder authorization before issuing any senior security not contemplated by the recitals of policy in its registration statement. The Plans would result in the issuance of a senior security only if it was an obligation or instrument "similar" to a bond, debenture or note, and it evidenced indebtedness. In any event, applicants state that the Plans possess none of the characteristics of senior securities that led Congress to enact these sections. The Plans would not confuse investors, make it difficult for them to value their shares or convey a false impression of safety. Further, the Plans would not be inconsistent with the theory of mutuality of risk.

4. Section 22(f) prohibits undisclosed restrictions on the transferability or negotiability of redeemable securities issued by open-end investment companies. The Plans would set forth any restrictions on transferability or negotiability, and such restrictions are primarily to benefit the participating directors and would not adversely affect the interests of the independent directors or of any Fund shareholder.

5. Section 22(g) prohibits registered open-end investment companies from issuing any of their securities for services or for property other than cash or securities. These provisions prevent the dilution of equity and voting power that may result when securities are issued for consideration that is not readily valued. Applicants believe that the Plans would provide for deferral of payment of fees and thus should be viewed as being issued not in return for services but in return for a Fund not being required to pay such fees on a current basis.

6. Section 13(a)(3) provides that no registered investment company shall, unless authorized by the vote of a majority of its outstanding voting securities, deviate from any investment policy that is changeable only if

authorized by shareholder vote. Each of the existing Funds has limitations on its ability to purchase securities issued by other investment companies. Any relief granted from section 13(a)(3) would extend only to the existing Funds.

Applicants believe that an exemption is appropriate to enable the existing Funds to invest in Designated Shares without a shareholder vote. Applicants will provide notice to shareholders of the deferred fee arrangements with the independent directors in their registration statements. The value of the Designated Shares will be *de minimis* in relation to the total net assets of the respective Fund. Changes in the value of the Designated Shares will not affect the value of shareholders' investments. Applicants believe that permitting the Funds to invest in Designated Shares without shareholder approval, therefore, would result in no harm to shareholders.

7. Section 17(a)(1) generally prohibits an affiliated person of a registered investment company from selling any security to such registered investment company, except in limited circumstances. Funds that are advised by the same entity may be "affiliated persons" of one another by reason of being under the common control of their adviser. Applicants believe that an exemption from this provision would not implicate Congress' concerns in enacting the section, but would facilitate the matching of each Fund's liability for deferred directors' fees with the Designated Shares that would determine the amount of such Fund's liability.

8. Section 17(b) authorizes the SEC to exempt a proposed transaction from section 17(a) if evidence establishes that: (a) The terms of the transaction, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching; (b) the transaction is consistent with the policy of each registered investment company concerned; and (c) the transaction is consistent with the general purposes of the Act. Because section 17(b) may apply only to a specific proposed transaction, applicants also request an order under section 6(c) so that relief will apply to a class of transactions. Applicants believe that the proposed transactions satisfy the criteria of sections 6(c) and 17(b).

9. Section 17(d) of the Act prohibits affiliated persons from participating in joint transactions with a registered investment company in contravention of rules and regulations prescribed by the SEC. Rule 17d-1 under the Act prohibits affiliated persons of a registered investment company from

entering into joint transactions with the investment company unless the SEC has granted an order permitting the transaction after considering whether the participation of such investment company is consistent with the provisions, policies, and purposes of the Act and the extent to which such participation is on a basis different from or less advantageous than that of other participants. Under the Plans, participating independent directors would not receive a benefit that otherwise would inure to a Fund or its shareholders. The effect of the Plans is to defer the payment of compensation that a Fund otherwise would be obligated to pay on a current basis as services are performed by its independent directors. Applicants also believe that the Funds' ability to recruit and retain highly qualified independent directors would be enhanced if they were able to offer their independent directors the option of deferred payment of their directors' fees.

#### Applicants' Condition

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

1. If a Fund purchases Designated Shares issued by itself, an affiliated Fund, or any other fund which has been approved as an Investment Fund, the purchasing Fund will vote such shares in proportion to the votes of all other holders of shares of such Fund, affiliated Fund, or other Investment Fund.

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

Jonathan G. Katz,  
Secretary.

[FR Doc. 95-30859 Filed 12-19-95; 8:45 am]

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[Release No. 35-26432]

#### Filings Under the Public Utility Holding Company Act of 1935, as Amended ("Act")

December 15, 1995.

Notice is hereby given that the following filing(s) has/have been made with the Commission pursuant to provisions of the Act and rules promulgated thereunder. All interested persons are referred to the application(s) and/or declaration(s) for complete statements of the proposed transaction(s) summarized below. The application(s) and/or declaration(s) and any amendments thereto is/are available for public inspection through the