income tax and New York City's personal income tax.

7. The Board found that participation in the Reorganization was in the best interests of the relevant Fund and that the interests of the existing shareholders of each relevant Fund would not be diluted as a result of the Reorganization. The Board considered a number of factors in authorizing the Reorganization including: (a) The compatibility of the Funds' investment objectives, management policies and restrictions, as well as shareholder services offered by the respective Funds; (b) the comparative investment performance of the Funds; (c) the terms and conditions of the Reorganization; (d) the Funds' expense ratios; (e) the increased tax liability to shareholders in the Acquired Funds who invest to reduce their state and local tax liabilities; (f) the Acquired Funds' inability to attract larger levels of assets; (g) the costs to the Funds of the Reorganization; and (h) alternatives to the Reorganization. The Reorganization is expected to be tax-free to shareholders of the Acquired Funds and each Fund will bear its *pro rata* share of Reorganization expenses.

8. On June 12, 1998, the Acquiring Fund filed with the SEC a registration statement on Form N–14 containing a preliminary combined prospectus/proxy statement for the Reorganization. On July 24, 1998, the Acquiring Fund filed the final prospectus/proxy statement with the SEC and mailed it to shareholders on July 27, 1998. The shareholders of the Acquired Funds held a joint special meeting on September 15, 1998, which was adjourned until September 29, 1998, and approved the Reorganization.

9. The Reorganization is subject to a number of conditions including: (a) Each Fund will have received an opinion of counsel stating, among other things, that the Reorganization will not result in federal income tax liability for the Fund or its shareholders; (b) the Acquired Funds' shareholders will have approved the Reorganization; and (c) the Funds will have received from the SEC an order exempting the Reorganization from the provisions of section 17(a) of the Act. Applicant agrees not to make any material changes to the Plans of Reorganization without prior SEC approval.

Applicant's Legal Analysis

1. Section 17(a) of the Act generally prohibits an affiliated person of a registered investment company, or any affiliated person of the person, acting as principal, from selling any security to, or purchasing any security from the company. Section 2(a)(3) of the Act defines the term ''affiliated person'' of another person to include (a) any person directly or indirectly owning, controlling, or holding with power to vote, 5% or more of the outstanding voting securities of the other person; (b) any person 5% or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by the other person; (c) any person directly or indirectly controlling, controlled by, or under common control with, the other person; and (d) if the other person is an investment company, any investment adviser of the person.

2. Rule 17a–8 under the Act exempts from the prohibitions of section 17(a) of the Act mergers, consolidations, or purchases or sales of substantially all of the assets of registered investment companies that are affiliated persons solely by reason of having a ''common investment adviser, common directors, and/or common officers,'' provided that certain conditions are satisfied.

3. Applicant believes that it cannot rely on rule 17a–8 under the Act because the Acquiring and Acquired Funds may be affiliated for reasons other than those set forth in the rule. The Funds may be affiliated persons of Mellon because Mellon and its affiliates, as fiduciaries for their customers, own of record more than 5% of the outstanding securities of the Funds. Mellon, in turn, is an affiliated person of an affiliated person of the funds because its wholly-owned subsidiary serves as investment adviser to the Funds.

4. Section 17(b) of the Act provides that the SEC may exempt a transaction from section 17(a) of the Act if evidence establishes that (a) the terms of the proposed transaction, including the consideration to be paid, are reasonable and fair and do not involve overreaching on the part of any person concerned; (b) the proposed transaction is consistent with the policy of each registered investment company concerned; and (c) the proposed transaction is consistent with the general purposes of the Act.

5. Applicant requests an order under section 17(b) of the Act exempting it from section 17(a) of the Act to the extent necessary to consummate the Reorganization. Applicant submits that the Reorganization satisfies the provisions of section 17(b) of the Act. Applicant states that its Board has determined that the Reorganization is in the best interests of the shareholders of the Acquiring and the Acquired Funds and that the interests of the existing shareholders will not be diluted as a result of the Reorganization. In addition, applicant states that the exchange of the Acquired Funds' shares for shares of the Acquiring Funds will be based on the relative net asset values.

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

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 98–28167 Filed 10–20–98; 8:45 am]

BILLING CODE 8010–01–M

SECURITIES AND EXCHANGE COMMISSION

[Rel. No. IC–23486; International Series Release No. 1162; 812–10998]

Formus Communications, Inc., et al.; Notice of Application

October 14, 1998.

AGENCY: Securities and Exchange Commission (''SEC'').

ACTION: Notice of application for an order under section 6(c) of the Investment Company Act of 1940 (the ''Act'').

SUMMARY OF APPLICATION: The order would permit applicants and certain of their controlled companies to participate in certain foreign telecommunication ventures without being subject to the provisions of the Act.

APPLICANTS: Forums Communications, Inc. (''Formus'') and Formus International, Inc. (''FII'').

FILING DATES: The application was filed on February 6, 1998. Applicants have agreed to file an amendment during the notice period, the substance of which is included in this notice.

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 November 9, 1998, and should be accompanied by proof of service on 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 may request notification of a hearing by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 Fifth Street, N.W., Washington, D.C. 20549. Applicants, 720 South Colorado

Boulevard, Suite 600N, Denver, Colorado 80246.

FOR FURTHER INFORMATION CONTACT: J. Amanda Machen, Senior Counsel, at (202) 942–7120, or Christine Y. Greenlees, Branch Chief, at (202) 942–0564 (Division of Investment Management, Office of Investment Company Regulations).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee at the SEC's Public Reference Branch, 450 Fifth Street, N.W., Washington, D.C. 20549 (tel. 202–942–8090).

Applicants' Representations

1. Formus, a Delaware corporation, was organied in 1996 to acquire local multipoint distribution services (''LMDS'') licenses in the United States and comparable spectrum in certain international markets, and to build, own, and operate telecommunications systems based on these licenses. Formus conducts its foreign operations primarily through FII, a wholly-owned subsidiary. In the future, Formus may acquire and hold interests in foreign telecommunications ventures through subsidiaries other than FII.

2. FII, a Delaware corporation, is engaged through its subsidiaries in the acquisition, development, operation, and management of integrated voice, video, and data services through the development of LMDS and LMDS-like wireless networks in selected markets primarily outside the United States. At present, FII's primary focus is on doing business in European, Latin American and Asian/Pacific countries that have a market economy, stable political environment, and favorable regulatory framework. FII generally forms a separate subsidiary for each country in which it operates a LMDS system,[1] which then forms a subsidiary to acquire licenses and build and operate the LMDS system within the respective country. FII typically works with local partners who are knowledgeable about local governmental regulations and local business practices. FII currently holds interests in telecommunications entities in Ecuador, Poland, New Zealand and Germany.

3. Formus and FII request relief to permit them and each entity that is now or in the future controlled by, or under common control with, Formus or FII (each, including Formus and FII, a ''Covered Entity'') to engage, either directly or indirectly through subsidiaries, in certain foreign telecommunications ventures without being subject to the provisions of the Act. For purposes of the application, applicants represent that ''foreign telecommunications venture'' means any and all activities outside the United States involving: communications; media; the creation, storage, and transmission of analog or digital voice, video, or data; programming, including entertainment, news, information, and home shopping services; broadband and satellite distribution; over the air broadcast; telecommunications; wireless and wireline distribution and telephony; network construction; design, operation, and ownership of related transport construction; and any and all related similar activities, services, and assets.

4. Applicants participate in foreign telecommunications ventures in either of two ways. In one, an applicant, directly or through one or more other Covered Entities, invests in a foreign telecommunications company. ''Foreign telecommunications company,'' as used in the application, means any corporation, partnership, joint venture, association, joint stock company, limited liability company, or other form of organization (i) substantially all of whose operations are conducted outside of the United States, (ii) that owns the assets of a foreign telecommunications venture (which may consist of capital assets or stock of operating subsidiaries), and (iii) whose business primarily relates to, or whose operations consist primarily of, the ownership, development, and operation of, or the provision of managment or operational services relating to, foreign telecommunications ventures. An applicant, directly or through one or more other Covered Entities, acquires a substantial interest in the foreign telecommunications company, and provides active developmental assistance to the foreign telecommunications company. For purposes of the application, applicants represent that ''substantial interest'' means any ownership interest that represents at least a 10% economic or voting interest. In addition, applicants represent that ''active developmental assistance'' means material involvement in the creation, development or operation of, the provision of material managerial, advisory, technical, or operations services relating to, or significant input on material decisions affecting the development or operations of, a foreign telecommunications venture.

5. The second way applicants participate in foreign telecommunications ventures is to invest, either directly or through one or more other Covered Entities, in a telecommunications partnership. Applicants represent that, for purposes of the application, a ''telecommunications partnership'' means any partnership, joint venture, limited liability company or other unincorporated association (i) substantially all of whose operations are conducted outside the United States, and (ii) whose purpose is to acquire interests in, and to develop, operate, or provide management services to, one or more foreign telecommunications companies. Representatives of an applicant or other Covered Entity participate on the management committee or similar governing body of the telecommunications partnership. An applicant, directly or through one or more other Covered Entities, acquires a substantial interest in the telecommunications partnership which, in turn, directly or through one or more subsidiaries, acquires a substantial interest in one or more foreign telecommunications companies. An applicant or another Covered Entity, either directly or through the telecommunications partnership, would provide active developmental assistance to the foreign telecommunications ventures of the telecommunications partnership.

6. Applicants represent that providing ''active developmental assistance'' requires an applicant or other Covered Entity to be or have been materially involved in providing such assistance. Thus, an applicant or another Covered Entity may rely on the exemptive order even though it no longer provides active developmental assistance so long as it continues to have a substantial interest in the foreign telecommunications venture, which is past the developmental stage, and a Covered Entity provided active developmental assistance during the venture's developmental stage. Similarly, if a Covered Entity acquires a substantial interest in a foreign telecommunications venture after the development stage and a Covered Entity provides active developmental assistance to the foreign telecommunications venture, then the first Covered Entity may continue to rely on the exemptive order, even though active developmental assistance ceases, so long as the first Covered Entity continues to have a substantial interest in the venture, and (i) the business of the foreign telecommunications venture was significantly enhanced by the active developmental assistance of a Covered Entity or (ii) such foreign

[1] The subsidiary may be organized and operated in the United States.

telecommunications venture (x) is merged or combined with, or acquired by, a company in the same or a related business, or (y) effects an initial public offering of voting stock.

7. Applicants represent that Formus, FII, or another Covered Entity provides active developmental assistance to each foreign telecommunications venture in which it takes a substantial interest by either developing, conducting, or expanding the venture's operations. A Covered Entity gives assistance in four areas: network design and engineering; purchase of goods and services; recruitment and training of personnel; and the deployment and operations of telecommunication ventures.

8. Network design and engineering services may begin before a bid is submitted for an LMDS-like license, and continue until completion of network build out. LMDS systems are based on radio transmission of signals from one point to another. Therefore, transmitters, or ''cell sites,'' must be placed at strategic sites within a transmission area, or ''cell.'' To permit efficient transmission of signals, cell sites are typically on the tallest buildings within a cell. Employees of a Covered Entity, with the assistance of consultants hired and supervised by such employees, survey both the physical layout of a service area as well as the demographics of potential end-users within an area. The location of cell sites and the hardware and software used in building a particular network are based on the interplay between the physical area serviced (*i.e.*, the availability of appropriate cell sites) and the needs of the users in that area. For example, if a cell is dominated by businesses, network design will be different from the design for an area dominated by individual users. Design also takes into account any regulatory limitations. Applicants state, for example, that the license held in a particular country may be limited to television transmission while in another country it may cover any and all services that could be transmitted on a particular bandwidth. Another factor considered by the Covered Entity's employees is preexisting competition from other transmission systems (for example, cable television systems). System design also includes specifications for the ''central switching sites'' that control the flow of signals among cell sites.

9. Active developmental assistance also includes assistance with purchasing goods and services (including hardware and software) necessary in building an LMDS network. FII is currently negotiating bulk purchasing arrangements with a variety of vendors that it believes provide quality equipment, software, or services. In Formus' experience, most foreign telecommunications ventures do not have contacts or knowledge of the vendors of the necessary goods and services. These arrangements will make goods and services readily available, on prenegotiated terms and at discounted prices, to any foreign telecommunications venture in which a Covered Entity holds a substantial interest′.

10. Covered Entities also provide assistance with recruiting and training qualified senior personnel to operate a foreign telecommunications venture. To date, senior personnel of the applicants' foreign telecommunications ventures in Poland and New Zealand have been recruited from among former employees or consultants of the applicants. FII is currently establishing a training program which will permit it to bring key personnel of a foreign telecommunications venture to the United States for training in various aspects of the business, including engineering, installation, field maintenance, sales, and marketing and customer service.

11. Covered Entities also will provide assistance in deploying and operating the networks of foreign telecommunications ventures. This will include matters such as operating an in-country or regional net fault center (i.e., a computer system to monitor and identify faults in an operating network), oversight of administration, including field operations and the supervision of customer service personnel, maintenance of operating networks, provisioning of signal (i.e., developing computer programs to tell a network what facilities and capabilities are available to best provide a particular service requested by a particular customer), and the development and deployment of billing and financial systems and training personnel to operate them.

12. Applicants' participation in foreign telecommunications ventures with local or strategic partnerships is a result of both restrictions on ownership of foreign telecommunications ventures under the laws of many countries, as well as various benefits, both tangible and intangible, that an applicant may obtain from joining with strategic partners to create, develop and operate such ventures. Applicants' structure was not established for the purpose of creating an investment company within the contemplation of the Act. While applicants believe that today they are not required to register under the Act, they are seeking the requested relief as they are increasingly constrained in structuring their foreign telecommunications ventures by the requirements of the Act.

Applicants' Legal Analysis

1. Section 3(a)(1)(C) of the Act defines an ''investment company'' to include any issuer that is engaged in the business of investing, reinvesting, owning, holding, or trading in securities, and owns investment securities having a value exceeding 40% of the value of the issuer's total assets (exclusive of Government securities and cash items). Section 3(a)(2) of the Act defines ''investment securities'' to include, in pertinent part, all securities except securities issued by majority-owned subsidiaries of the owner which are not investment companies and which are not excepted from the definition of investment company by section 3(c)(1) or section 3(c)(7). Section 2(a)(24) defines a ''majority-owned subsidiary'' of a person as a company 50% or more of the outstanding voting securities of which are owned by the person, or by a company which, with the meaning of section 2(a)(24), is a majority-owned subsidiary of the person.

2. Rule 3a–1 under the Act deems certain issuers that meet the statutory definition of investment company in section 3(a)(1)(C) of the Act not to be investment companies, provided the issuer meets certain criteria. An issuer can qualify for this exemption only if no more then 45% of its total assets consist of, and no more than 45% of its net income is derived from, securities other than, among others, securities of certain companies controlled primarily by the issuer.[2]

3. Applicants represent that they seek to acquire a majority voting interest in their foreign telecommunications ventures or, where such an interest is not permitted under applicable foreign investment laws or is inadvisable for business reasons, seek to acquire interests that grant them primary control. Applicants assert that these ownership thresholds are prohibitively large, as the applicants often seek to join with two or three strategic partners in a foreign telecommunications venture. Applicants represent that each partner typically desires an interest in, and rights over, the venture that is equal to that of the other partners. Hence, applicants state that the acquisition of a

[2] ''Primary control'' under rule 3a–1 means a degree of control that is greater than that of any other person. *See* Health Communications Services, Inc. (pub. avail. Apr. 26, 1985).

majority interest, or the largest interest, in a foreign telecommunications venture is often impossible.

4. Applicants state that they may participate in a foreign telecommunications venture through a ''joint venture,'' in which an applicant's interest may not be a ''security'' for purposes of the Act. However, applicants state that whether an arrangement is a joint venture is sometimes difficult to determine.

5. Applicants assert that the need to structure their participation in foreign telecommunications ventures in a manner that complies with the Act has resulted in severe constraints on their ability to operate effectively and efficiently and grow their business. Applicants state that if a Covered Entity is unable to obtain either a majority interest or primary control for purposes of section 3(a)(1)(C) or rule 3a–1, or a degree of control that will allow it to obtain an opinion of counsel that it can classify its participation as a joint venture interest, then the Covered Entity most likely will abstain from participating in that foreign telecommunications venture.

6. Applicants also state that as a venture grows out of the development stage, it will often seek to expand its businesses through acquisitions, or will seek public financing. Applicants note that these goals are often in direct conflict with the Covered Entity's need to maintain its ownership interest at a level that permits the interest to be classified as a non-investment security. Applicants submit that this can result in serious delays in the development of their foreign telecommunications ventures, as they seek to structure transactions around the requirements of the Act. Applicants state that at times, especially when the Covered Entity's interest would fall below the level of presumptive control as set forth in section 2(a)(9) of the Act, the Covered Entity may have to deny the foreign telecommunications venture permission to undertake a transaction that would have been in the best interest of the Covered Entity and that venture.

7. Section 6(c) provides that the SEC may exempt any person, security, or transaction from any provision of the Act or any rule or regulation under 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. Applicants request an order under section 6(c) to permit applicants and the other Covered Entities to engage, directly or through subsidiaries, in foreign telecommunications ventures without being subject to the Act.

8. Applicants believe that the requested exemption is necessary and appropriate in the public interest. Applicants assert that their interests in the foreign telecommunications ventures, unlike the assets of investment companies, are not liquid, mobile or otherwise readily negotiable because Formus, directly or indirectly, will be actively and materially involved in the business activities of the foreign telecommunications ventures. Applicants also state that they are not a so-called ''special situation'' investment company that takes a controlling position in other issuers primarily for the purpose of making a profit in the sale of the controlled company's securities. Instead, applicants state that the Covered Entities will provide active developmental assistance for the purpose of participating in the profits from the foreign telecommunications ventures. Applicants maintain that their active developmental assistance, which requires personnel with expertise in planning, operating, managing, and providing services to a foreign telecommunications venture, requires resources far beyond those available to the manager of an investment company. Accordingly, applicants assert that the Covered Entities engage in business activities that do not entail the types of abuses that the Act was designed to address.

9. Applicants believe that the requested relief is consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Applicants believe that the requirements of their business, their strategy that each Covered Entity own or hold directly or indirectly a substantial interest in a foreign telecommunications company or partnership, and their representation that each Covered Entity will provide active developmental assistance to a foreign telecommunications ventures demonstrate that none of the applicants is of the type that engages in the activities which the Act was designed to address.

Applicants' Conditions

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

1. No covered Entity that proposes to rely on the requested relief will hold itself out as being engaged in the business of investing, reinvesting, or trading in securities.

2. A Covered Entity may rely on the order granting the requested relief only if the manner in which it is involved in foreign telecommunications ventures does not differ materially from that described in the application.

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

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 98–28168 Filed 10–20–98; 8:45 am]

BILLING CODE 8010–91–M

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 23488; 812–11312]

The Victory Portfolios and Key Asset Management, Inc.; Notice of Application

October 15, 1998.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice of an application under section 12(d)(1)(J) of the Investment Company Act of 19940 (the ''Act'') for an exemption from section 12(d)(1) of the Act, and under sections 6(c) and 17(b) of the Act for an exemption from section 17(a) of the Act.

SUMMARY OF APPLICATION: Applicants request an order that would supersede a prior order and permit applicants to implement a ''fund of funds'' arrangement. In addition to the fund and funds investing in other funds in the same group of investment companies, the order would permit the fund of funds to invest a portion of its assets in funds that are not part of the same group of investment companies in reliance on section 12(d)(1)(F) of the Act. The order would also allow the funds of funds to offer its shares to the public with a sales load that exceeds the 1.5% limit of section 12(d)(1)(F)(ii).

APPLICANTS: The Victory Portfolios (''VP'') and Key Asset Management, Inc. (''KAM'').

FLING DATE: The application was filed on September 18, 1998.

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 November 9, 1998 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