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**Chuck Mierzwa,**  
Clearance Officer.

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## SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 26047; 812-12770]

### The MainStay Funds, et al.; Notice of Application

May 15, 2003.

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

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

*Summary of the Application:* The requested order would permit certain registered management investment companies to invest uninvested cash and cash collateral in affiliated money market funds in excess of the limits in sections 12(d)(1)(A) and (B) of the Act.

*Applicants:* The MainStay Funds ("MainStay"), Mainstay VP Series Fund, Inc. ("VP"), Eclipse Funds, Eclipse Funds, Inc., New York Life Investment Management Institutional Funds ("NYLIM Institutional") and McMorgan Funds (together the "Funds"), all existing and future series of the Funds (together the "Portfolios"), New York Life Investment Management LLC ("NYLIM"), MacKay Shields LLC ("MacKay") and McMorgan & Company LLC ("McMorgan," together with NYLIM and Mackay, the "Adviser"), and any other registered management investment company and series thereof currently or in the future advised by the Adviser or any entity controlling, controlled by, or under common control with the Adviser (included in the term "Adviser")(each such investment company included in the term "Funds" and its series included in the term "Portfolios").

*Filing Dates:* The application was filed on February 12, 2002 and amended on May 9, 2003.

*Hearing or Notification of Hearing:* An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may

request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on June 9, 2003, 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 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, c/o Paul Schott Stevens, Esq., Dechert, 1775 Eye Street NW., Washington, DC, 20006.

**FOR FURTHER INFORMATION CONTACT:** Emerson S. Davis, Sr., Senior Counsel, at (202) 942-0714, 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. Each Fund is registered under the Act as an open management investment company. MainStay and Eclipse Funds are Massachusetts business trusts and consist of twenty-four and four Portfolios, respectively. VP and Eclipse Funds, Inc., are Maryland corporations and are comprised of nineteen and fourteen Portfolios, respectively. McMorgan Funds and NYLIM Institutional are Delaware business trusts and consist of five and one Portfolios, respectively. The Portfolio of NYLIM Institutional holds itself out as a money market fund that complies with rule 2a-7 under the Act (together with any future Portfolios that comply with rule 2a-7 under the Act, the "Money Market Funds").<sup>1</sup>

2. NYLIM, an investment adviser registered under the Investment Advisers Act of 1940 ("Advisers Act"),

<sup>1</sup> All existing Funds that currently intend to rely on the requested relief are named as applicants. The term "Adviser" shall include successor(s) in interests, which are entities that result from a reorganization of the entity into another jurisdiction or a change in the type of business organization of the entity. Any other existing and future entity that may rely on the relief in the future will do so only in accordance with the terms and conditions of the application.

serves as investment adviser to the Portfolios. MacKay and McMorgan, investment advisers registered under the Advisers Act, are subadvisers to certain Portfolios. The Adviser serves or may serve as investment adviser to privately managed accounts which are entities that are not pooled investment vehicles ("Managed Accounts"). NYLIM, MacKay and McMorgan are indirect wholly-owned subsidiaries of New York Life Insurance Company.

3. Portfolios that are not Money Market Funds (the "Investing Funds") and Managed Accounts have, or are expected to have, cash reserves ("Uninvested Cash"). Such Uninvested Cash may result from a variety of sources, including dividends or interest received on portfolio securities, unsettled securities transactions, strategic reserves, matured investments, liquidated proceeds from investment securities, or new investor monies. Certain Investing Funds and Managed Accounts also may participate in a securities lending program under which an Investing Fund may lend its portfolio securities to registered broker-dealers or other institutional investors ("Securities Lending Program"). The loans will be continuously secured by collateral, equal at all times to at least the market value of the securities loaned (such collateral, when in the form of cash, "Cash Collateral" and together with Uninvested Cash, "Cash Balances"). The Managed Accounts also may have Cash Collateral.

4. Applicants request an order to permit the Investing Funds and Managed Accounts to invest their Cash Balances in shares of one or more Money Market Funds and the Money Market Funds to sell their shares to, and redeem their shares from, the Investing Funds and Managed Accounts and the Adviser to effect the proposed transactions. Investment of Cash Balances in shares of the Money Market Funds will be made consistent with each Investing Fund's investment restrictions and policies as set forth in its prospectus and statement of additional information. Applicants believe that the proposed transactions may reduce transaction costs, create more liquidity, increase returns, and further diversify holdings.

5. Applicants state that the Managed Accounts and Money Market Funds engage in the purchase and sale transactions with each other in reliance of rule 17a-7 under the Act. Applicants seek relief to permit these interfund transactions to continue in the event that the Managed Accounts become 5% or more owners of the Money Market Funds ("Interfund Transactions").

## Applicants' Legal Analysis

### *I. Investment of Cash Balances in the Money Market Funds*

#### A. Section 12(d)(1) of the Act

1. Section 12(d)(1)(A) of the Act provides, in pertinent part, 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, in pertinent part, 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 from any provision of section 12(d)(1) if, and to the extent that, such exemption is consistent with the public interest and the protection of investors. Applicants request relief under section 12(d)(1)(f) from the percentage limitations of sections 12(d)(1)(A) and (B) to permit the Investing Funds to invest Cash Balances in the Money Market Funds.

3. Applicants state that the proposed arrangement would not result in the abuses that sections 12(d)(1)(A) and (B) were intended to prevent. Applicants state that because each Money Market Fund will maintain a highly liquid portfolio, an Investing Fund will not be in a position to gain undue influence over a Money Market Fund through threat of redemption. Applicants represent that the proposed arrangement will not result in an inappropriate layering of fees because shares of the Money Market Funds sold to and redeemed from 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 under the Act, or service fee (as defined in rule 2830(b)(9) of the National Association of Securities Dealers' ("NASD") Conduct Rules). If a Money Market Fund offers more than one class of securities, each Investing Fund will invest Cash Balances only in the class with the lowest expense ratio at the time of the investment. Before

approving any advisory contract with the Adviser for an Investing Fund, its board of directors (the "Board"), including a majority of the trustees who are not "interested persons," as defined in section 2(a)(19) of the Act ("Independent Trustees"), will 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 Funds by the Adviser as a result of the investment of Uninvested Cash in a Money Market Fund. Applicants represent that no Money Market Fund will acquire securities of any other investment company in excess of the limitations contained in section 12(d)(1)(A) of the Act.

#### B. Section 17(a) of the Act

4. Section 17(a) of the Act makes it unlawful for any affiliated person of a registered investment company, or an affiliated person of such person, 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, among others, any person directly or indirectly controlling, controlled by, or under common control with the other person and any person owning, controlling, or holding with power to vote, 5% or more of the other person. Applicants state that, because the Portfolios and Managed Accounts share a common investment adviser, a Portfolio may be deemed to be under common control with each of the other Portfolios, and thus an affiliated person of each of the other Portfolios. In addition, if the relief is granted, an Investing Fund and Managed Account may own more than 5% of certain Money Market Funds and such Investing Funds and Managed Accounts may be deemed affiliated persons of each other. As a result, section 17(a) would prohibit the sale of the shares of a Money Market Fund to the Investing Funds and Managed Accounts, and the redemption of such shares by the Investing Funds and the Managed Accounts.

5. Section 17(b) of the Act authorizes the Commission to exempt a transaction from section 17(a) if the terms of the proposed 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 proposed transaction is consistent with the policy of each investment company concerned, and the proposed transaction is consistent with the general purposes of the Act. Section 6(c) of the Act permits the Commission to exempt persons or transactions from

any provision of the Act if the 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.

6. Applicants submit that their request for relief to permit the purchase and redemption of shares of a Money Market Fund by the Investing Funds and Managed Accounts satisfies the standards in sections 6(c) and 17(b) of the Act. Applicants note that shares of the Money Market Funds will be purchased and redeemed at their net asset value, the same consideration paid and received for these shares by any other shareholder. Applicants state that the Investing Funds will retain their ability to invest Cash Balances directly in money market 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 Money Market Fund may discontinue selling shares to any of the Investing Funds if the Board of the Money Market Fund or the Adviser determines that such sale would adversely affect the Money Market Fund's portfolio management and operations.

#### C. Section 17(d) of the Act and Rule 17d-1 under the Act

7. Section 17(d) of the Act and rule 17d-1 under the Act 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. Applicants state that each Investing Fund and Managed Account, by purchasing shares of the Money Market Funds, each Money Market Fund, by selling shares to and redeeming shares from, the Investing Funds and Managed Accounts, and the Adviser, by effecting the proposed transactions, could be deemed to be participants in a joint enterprise or arrangement within the meaning of section 17(d) of the Act and rule 17d-1 under the Act.

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 participation by the investment company is on a basis different from or less advantageous than that of other participants. Applicants submit that the

investment by the Investing Funds and Managed Accounts in shares of a Money Market Fund would be made on the same basis and indistinguishable from those of any other shareholders. Applicants state that, for the reasons discussed above, the proposed transactions meet the standards for an order under rule 17d-1.

## II. Interfund Transactions

9. Applicants state that Money Market Funds and Managed Accounts may rely on rule 17a-7 under the Act to conduct Interfund Transactions. Rule 17a-7 under the Act provides an exemption from section 17(a) for purchase and sale transactions between a registered investment company and an affiliated person of such company (or an affiliated person of an affiliated person), provided certain conditions are met, including that the affiliation between the registered investment company and the affiliated person (or an affiliated person of the affiliated person) must exist solely by reason of having a common investment adviser, common officers and/or common directors. Applicants state that by virtue of the Managed Accounts owning 5% or more of the outstanding voting securities of a Money Market Fund, the Managed Accounts and the Money Market Funds would no longer be affiliated solely by reason of having a common investment adviser, common officers and/or common directors.

10. Applicants request relief under sections 6(c) and 17(b) of the Act to permit the Interfund Transactions. Applicants state that to engage in Interfund Transactions, the Managed Accounts and Money Market Funds will comply with rule 17a-7 under the Act in all respects other than the requirement that the parties to the transaction be affiliated persons (or affiliated person of affiliated persons) of each other solely by reason of having a common investment adviser or investment advisers that are affiliated persons of each other, common officer and/or common directors, solely because the Managed Accounts and the Money Market Funds might become affiliated persons within the meaning of sections 2(a)(3)(A) and (B) of the Act.

### Applicants' Conditions

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

1. Shares of the Money Market Funds sold to and redeemed by 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 under the Act or service fee (as

defined in rule 2830(b)(9) of the NASD's Conduct Rules).

2. No Money Market Fund will acquire securities of any other investment company in excess of the limits contained in section 12(d)(1)(A) of the Act.

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

4. Each Investing Fund, Managed Account and Money Market Fund relying on the order will be advised by the Adviser. An Investing Fund that is subadvised, but not advised, by a NYLIM Adviser may rely on the order provided that the NYLIM Adviser managers the Cash Balances and the Investing Fund is in the same group of investment companies (as defined in section 12(d)(1)(G) of the Act) as the Money Market Fund in which the Investing Fund invests its Cash Balances.

5. Investment of Cash Balances by an Investing Fund in shares of the Money Market Funds will be in accordance with each Investing Fund's respective investment restrictions and will be consistent with each Investing Fund's policies as set forth in its prospectus and statement of additional information.

6. Before the next meeting of the Board is held for the purpose of voting on an advisory contract under section 15 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 under the existing advisory contract, attributable to managing the Uninvested Cash of the Investing Fund that can be expected to be invested in the Money Market Funds. In connection with approving any advisory contract for an Investing Fund, the Board, including a majority of the Independent Trustees, 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 the Uninvested Cash being invested in the Money Market Funds. The minute books of the Investing Fund will record fully the Board's consideration in approving the advisory contract, including the considerations referred to above.

7. Before any Investing Fund may participate in a Securities Lending Program, a majority of the Board, including a majority of the Independent Trustees of the Investing Fund, will approve the Investing Fund's participation in the Securities Lending Program. Such trustees 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 Money Market Funds is in the best interest of the shareholders of such Investing Fund.

8. To engage in Interfund Transactions, the Managed Accounts and Money Market Funds will comply with rule 17a-7 under the Act in all respects other than the requirement that the parties to the transactions be affiliated persons (or affiliated persons of affiliated persons) of each other solely by reason of having a common investment adviser or investment advisers that are affiliated persons of each other, common officers and/or common directors, solely because the Managed Accounts and the Money Market Funds might become affiliated persons within the meaning of sections 2(a)(3)(A) and (B) of the Act.

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

**J. Lynn Taylor,**

*Assistant Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-4781; File No. S7-966]

### Program for Allocation of Regulatory Responsibilities Pursuant to Rule 17d-2; Notice of Filing of the Plan for Allocation of Regulatory Responsibilities Between the National Association of Securities Dealers, Inc. and the International Securities Exchange, Inc.

May 14, 2003.

Pursuant to section 17(d) of the Securities Exchange of 1934 ("Act")<sup>1</sup> and Rule 17d-2 thereunder,<sup>2</sup> notice is hereby given that on January 7, 2003, the National Association of Securities Dealers, Inc. ("NASD" or "Association") and the International Securities Exchange, Inc. ("ISE") filed with the Securities and Exchange Commission ("SEC" or "Commission") a plan for

<sup>1</sup> 15 U.S.C. 78q(d).

<sup>2</sup> 17 CFR 240.17d-2.