States will not be deemed engaged in trade or business because of activity in an investment account or by granting a discretionary investment power to a U.S. banker, broker, or adviser; * * *."

In an effort to implement this recommendation H.R. 5916 would amend section 871(c) to read, in relevant part, as follows:

"(c) ENGAGED IN TRADE OR BUSINESS DEFINED.—* * * the term 'engaged in trade or business within the United States' * * * does no include—

*   *   *   *   *   *   *

"(2) TRADING IN SECURITIES OR COMMODITIES.—

"(A) SECURITIES.—Trading in stocks or securities for one's own account, whether transactions are effected directly, or by way of an agent, through a resident broker, commission agent, custodian, or other independent agent, and, except where the person so trading is a dealer in securities, whether or not any such agent has discretionary authority to make decisions in effecting such transactions."

In our opinion the proposed amendment easily can be interpreted as implying that a dealer in securities will be deemed to be engaged in trade or business in the United States if any discretion is granted by such dealer to a U.S. agent.

The usual forms of agreement among underwriters employed by U.S. investment banking firms contain provisions whereby the members of the underwriting group grant to the managing underwriter the power, in his discretion, to sell certain of the securities being underwritten to institutions and dealers on behalf of the members of the syndicate, to engage in stabilizing transactions, and to take certain other actions which may result in the realization of a profit by all members of the group. If foreign banks and securities firms believed that participating in a U.S.-managed underwriting syndicate might result in such foreign firms being deemed to be engaged in trade or business in the United States, the present trend of increasing distribution of underwritten securities to foreign investors probably would be reversed.

It is clear that it is not the intent of H.R. 5916 to create an obstacle to the sale of securities to foreign investors. Accordingly, we recommend that through regulation, published ruling, statement in the committee report, or such other manner as may be deemed appropriate, the above described inference that can be drawn from the proposed amendment to IRC section 871(c) be clearly eliminated.

Very truly yours.

ANDRE MEYER.
FREDERICK M. EATON.

JUNE 24, 1965.

Memorandum to: Hon. Wilbur D. Mills, Chairman, Committee on Ways and Means, U.S. House of Representatives, 1102 Longworth House Office Building, Washington, D.C.

Subject: H.R. 5916.

Review of H.R. 5916 has revealed certain situations in which the provisions of the bill would lead to results which appear inconsistent with the intent of the bill.

1. Discretionary authority given to a U.S. agent in connection with securities and commodities trading activity

H.R. 5916 is designed to increase foreign investment in the United States. One of the principal methods for achieving such an increase is the stimulation of a more widespread distribution of securities of U.S. issuers among foreign investors. In order to effect such distribution it is important that foreign banks and securities firms be included in underwriting groups having U.S. managers. As was recognized by the task force in its recommendation No. 6:

"U.S. investment bankers should include foreign banks and securities firms as underwriters, whenever possible, or as selling group members in new offerings and secondary distributions of either domestic or foreign securities."

One of the principal obstacles to the inclusion of foreign banks and firms in such underwriting groups was eliminated when the Securities and Exchange Commission adopted task force recommendation No. 5 that:

"The Securities and Exchange Commission should issue a release eliminating the requirement that foreign underwriters participating exclusively in distributions of securities to nonresidents of the U.S. register as broker-dealers." (See SEC Releases No. 33–4708 and No. 34–7366, July 9, 1964, 29 F.R. 9828.)