UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

DIVISION OF
INVESTMENT MANAGEMENT

ACT INVESTMENT COMPANY ACT
SECTION 3(c)(1)
RULE
PUBLIC
AVAILABILITY JANUARY 5, 1993

January 5, 1993

Mr. Michael Tannenbaum
Newman Tannenbaum Helpern Syracuse & Hirschtritt
900 Third Avenue
New York, NY 10022-4775

Re: Laifer Inc.

Dear Mr. Tannenbaum:

Your letter of November 6, 1992 requests that the staff of the Division of Investment Management state that it would not recommend enforcement action to the Commission if Hilltop Partners, L.P. (the "Partnership") did not attribute ownership of the Partnership to the owners of the two limited partners that each hold more than 10% of the interests in the Partnership, as generally required by Section 3(c)(1) of the Investment Company Act. You argue that the limited partnership interests are not "voting securities," and, therefore, that the attribution provisions of Section 3(c)(1) should not apply.

We decline to grant your request. In a telephone conversation with the undersigned on December 14, you stated that if one were to count the beneficial owners of the limited partnerships that own more than 10% of the interests in the Partnership as owners of the Partnership, it would be safe to assume that there would now be more than one hundred beneficial owners of the Partnership. As a matter of policy, the staff does not grant retroactive no-action relief. See Pajolo AG (pub. avail. Oct. 14, 1988). Because you are seeking relief with respect to a Partnership that arguably now has more than the one hundred shareholders permitted by Section 3(c)(1), a no-action position would involve granting retroactive relief.

We further note that under the terms of the Partnership agreement, the limited partners have the right to vote on the election or removal of the general partner in the event of the general partner's death, insanity or retirement. The staff has taken the position in the past that an interest that gives the right to name a new general partner is a voting security. See Weiss, Peck & Greer Venture Associates II, L.P. (pub. avail. Apr. 10, 1990); Horsley Keogh Venture Fund, Limited Partnership (pub.

avail. April 27, 1988); Kohlberg, Kravis, Roberts & Co. (pub. avail. Sept. 9, 1985); CIGNA Corporation (pub. avail. Oct. 1, 1984).

Sincerely,

Eli Nathans
Special Counsel

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November 6, 1992

Mr. Thomas S. Harmon
Chief Counsel
Division of Investment Management
Securities and Exchange Commission
450 5th Street, N.W.
Mail Stop 10-6
Washington, D.C. 20549

Dear Mr. Harmon:

On behalf of our client, Laifer Inc., we request that the Staff of the Division of Investment Management ("Staff") of the Securities and Exchange Commission take a no-action position with respect to the applicability of the attribution rule of Section 3(c)(1) of the Investment Company Act of 1940 ("Act") to holders of limited partnership interests in Hilltop Partners, L.P. ("Hilltop" or the "Partnership"), a collective investment Delaware limited partnership organized by Laifer Inc.

In light of the Staff's recent Investment Company Study ("Study"), and its proposed amendments to Section 3(c)(1), we

would like the opportunity to discuss this letter in light of the proposed amendments.

Facts

Laifer Inc. is a newly formed Delaware corporation, and the general partner (the "General Partner") of Hilltop. Laifer Inc., through its President and principal stockholder, Lance Laifer, solely manages the Partnership, and is solely responsible for all investment and distribution decisions, and communications with the limited partners of Hilltop. Laifer Inc. is a recently registered Investment Advisor.

Hilltop was established as a Delaware limited partnership on April 7, 1992. The General Partner's investment objective for the Partnership is to achieve significant total investment return, comprised of capital appreciation and income, consistent with preserving the nominal capital of the Partnership and its purchasing power primarily through the purchase and sale of various debt and equity interests. The General Partner primarily plans on making both long and short investments in distressed securities, highly leveraged companies and special situations through corporate and high yield bonds, equities, bank debt, trade debt, convertible securities and options. In

addition, the General Partner also manages individual client accounts in excess of $15.5 million.

On May 22, 1992, the Partnership closed its initial offering (hereinafter the "Initial Closing") with the sale of approximately $6,200,000 of Limited Partnership Interests. Since the Initial Closing, an additional $3,100,000 of Limited Partnership Interests have been sold and $110,000 of Limited Partnership Interests has been redeemed. The Partnership currently has an aggregate of $9,120,000 of Limited Partnership Interests outstanding. The General Partner along with family members of its President currently hold approximately $1.32 million (14.5%) of Limited Partnership Interests sold. Two unaffiliated investors, a limited partnership and a general partnership, subscribed for $2 million and $1.9 million of Limited Partnership Interests (the "Investors")[1], respectively, in the Initial Closing and currently hold approximately 22% and 21% of the outstanding Limited Partnership Interests, respectively. The Partnership intends to accept subscriptions and hold additional closings on a quarterly basis.

[1] Investors have one common principal who is a co-general partner of the general partnership and a controlling holder of the general partner of the limited partnership. However, Investors have represented to the General Partner that the two entities are not commonly controlled or affiliated in any other manner. In addition, Investors have also represented to the General Partner that as of January 1, 1993, there will be no common principals.

Under the Limited Partnership Agreement entered into by the General Partner on behalf of the Partnership and the Limited Partners (hereinafter the "Partnership Agreement"), the Partnership is managed, and the business of the Partnership is controlled, by the General Partner, who makes all policy and investment decisions relating to the conduct of the Partnership's business. Such decisions are made by the General Partner in its sole discretion. Furthermore, under the Partnership Agreement the limited partners are not given the right to vote on the election or removal of the General Partner, except in the event of death, insanity or retirement and will have no right or authority to act for or bind the Limited Partnership. Under certain circumstances limited partners will have a right to transfer their Limited Partnership Interests, however, such right may be arbitrarily withheld by the General Partner. Unless otherwise allowed in the sole discretion of the General Partner, the limited partners, pursuant to the Partnership Agreement, may only redeem their interest commencing on December 31, 1993 upon ninety (90) days prior notice, and, subsequently, only annually thereafter.

Limited Partnership Interests were offered pursuant to Rule 506 under the Securities Act of 1933, as amended (the "Securities Act"), and not in such other manner as would have

involved a "public offering" within the meaning of Section 3(c)(1) of the Act and Section 4(2) of the Securities Act. Although under the terms of the Partnership Agreement a limited partner may, under certain limited circumstances, sell or otherwise dispose of its Limited Partnership Interests, each limited partner acknowledges under the Partnership Agreement that such interests have not been registered under the Securities Act, as amended and that such interests cannot be sold or otherwise disposed of unless they are registered thereunder or unless an exemption therefrom is available, as evidenced by an opinion of counsel for the transferor. The General Partner may withhold its consent to any sale or other disposition by a limited partner of a Limited Partnership Interest.

For purposes of this request, the Staff should assume that (1) there will be no public offering of Limited Partnership Interests; (2) the total number of limited partners holding interests in the Partnership, will always be less than 100; (3) each limited partner including Investor has substantial business activities outside of its investment in Hilltop; (4) no limited partner including Investor is an investment company registered under the 1940 Act; and (5) no limited partner was formed for the purpose of investing in Hilltop.

Discussion

Section 3(c)(1) of the Act provides in pertinent part, that the term "investment company" shall not include:

> Any issuer whose outstanding securities (other than short-term paper) are beneficially owned by not more than one hundred persons and which is not making and does not presently propose to make a public offering of its securities. For purposes of this paragraph: (A) Beneficial ownership by a company shall be deemed to be beneficial ownership by one person, except that, if the company owns 10 percent or more of the outstanding voting securities of the issuer, the beneficial ownership shall be deemed to be that of the holders of such company's outstanding securities (other than short-term paper)....

Given the above-stated facts and assumptions, the Section 3(c)(1) exemption will be applicable to each Hilltop Limited Partnership Interest if such ownership is not attributed to "the holders of ... outstanding securities" of any company

owning 10% or more of the limited partnership's "voting securities". It is our opinion that the Section 3(c)(1) attribution rule does not apply because the interests in the limited partnerships do not constitute "voting securities" within the meaning of Section 3(c)(1).

"Voting security" is defined by Section 2(a)(42) of the Act to mean "any security presently entitling the owner or holder thereof to vote for the election of directors of a company." As the staff has noted in numerous no-action letters, a limited partner's interests in a partnership is not a voting security if the limited partner has no right to influence the limited partnership's management or remove or replace its general partner. (See, e.g., CMS Communications Fund, SEC No-Action Letter [1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶78,427 (Mar. 18, 1987); Kohlberg Kravis & Roberts & Co., SEC No-Action Letter [1985-1986 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶78,143 (Aug. 9, 1985)("KKR"); Cigna Corp. ("Cigna"), SEC No-Action Letter (Sept. 1, 1984) (LEXIS, Fedsec Library, No Act file); Sarofim Trust Co., SEC No-Action Letter [1982-1983 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶77,305 (Aug. 26. 1982); Krehbiel & Hubbard, SEC No-Action Letter (Oct. 19, 1981) (LEXIS, Fedsec Library, No Act file); Maine Mut. Sav. Bank, SEC No-Action Letter (Oct. 9, 1979) (LEXIS, Fedsec Library, No Act file). This

standard has also been adopted by the courts as the dispositive standard in determining what constitutes a voting security under Section 2(a)(42) of the Act. See Bancroft Convertible Fund, Inc. v. Zico Investment Holding, Inc., Civ. Act. No. 87-870, Slip. Op. April 16, 1987 (Dist. Ct.). In Bancroft, the Court noted that "[w]hatever rights and interests Zico's Class B non-voting stock may have, it does not have the power under Zico's articles of association to vote for the election of Zico's directors. Accordingly, the Court found that Zico's Class B voting shares were not voting securities.

As noted above, under the Partnership Agreement, the limited partners have no right to "influence" the management of the Partnership, whether by voting, removing or replacing the General Partner or otherwise. In fact, the only act of governance in which a limited partner may participate is in the event of death, insanity, or retirement of the General Partner. In that event, all limited partners must agree to a successor general partner or else the Partnership dissolves. We believe that this factor distinguishes Hilltop from the limited partnership agreement in Horsley Keogh Venture Fund ("Horsley") (publicly available April 27, 1988).

In Horsley, the limited partnership agreement provided that certain action by the general partner require the consent of the limited partners. A two-thirds majority of the limited partnership interests was required to extend the term of the partnership to dissolve the partnership, or to amend the limited partnership agreement. In addition, the limited partnership agreement provided that without the prior written consent or ratification of all the limited partners, the general partner shall have no authority to do any act in contravention of the partnership agreement or which would make it impossible to carry on the ordinary business of the partnership, to confess a judgment against the partnership, to possess partnership property or assign its rights in specific partnership property for other than a partnership purpose, to admit a person as a general partner of the Partnership, or to exceed certain investment limitations set forth in the partnership agreement. The partnership agreement also provides that the general partner has no authority to transfer its general partnership interest or withdraw as the general partner without the consent of the limited partners.

Under the Partnership Agreement, the limited partners of Hilltop have none of the rights Horsley limited partners were granted. Significantly, Hilltop limited partners cannot vote to

dissolve the Partnership nor can they vote to extend the term of the Partnership. Only in the death, insanity or retirement of the General Partner can the Limited Partners vote to replace the vacated General Partner. In such a case, all limited partners must approve the new general partner. This further distinguishes Hilltop from Horsley. This unanimous requirement further attenuates or dilutes any control or influence of individual Hilltop limited partners, particularly in light of the fact that the General Partner and family members of its President own approximately 14.5% of the Limited Partnership Interests sold.

We also recognize that in Pierce, Lewis & Dolan (available April 21, 1972) and in several subsequent no-action requests, the Staff took the position that although limited partnership interests are generally not voting securities, such interests may be deemed functionally equivalent to voting securities if the limited partner has the power to exercise a controlling influence because of economic power. (See e.g., Nautilus Trust, SEC No-Action Letter (Feb. 1, 1982) (LEXIS, Fedsec library, NoAct file); Engelberger Partnership, SEC no-Action Letter (Dec. 7, 1981) (LEXIS, Fedsec library, NoAct file). See also M.A. Hanna Co., 42 S.E.C. 477 (1964); C&S Inv. Funds, SEC No-Action Letter (June 13, 1977) LEXIS, Fedsec library, No Act file); Hudgins, Hurley Capital Management Corp., SEC No-

Action Letter, Mar. 17, 1972) (LEXIS, Fedsec library, No Act file); L. Marvin Moorehead, SEC No-Action Letter (Jan. 30, 1975) (LEXIS, Fedsec library, NoAct file).

The concern that economic interest created a de facto voting security because of the control element, stated by the staff in such letters as Pierce, Lewis & Dolan and L. Marvin Moorehead, while valid under Section 3(c)(1) generally, does not apply in the present case. Under the Partnership Agreement withdrawal, redemption and transfer rights are severely restricted, and in certain cases may be arbitrarily denied by the general partner. Accordingly, any influence that a limited partner may exert over the Partnership with a threatened withdrawal or request for redemptions is not evident in the instant case, since the earliest date for redemption of Limited Partnership Interests is December 31, 1993. At that time, it is anticipated that Investors will hold a significantly lower percentage of outstanding Limited Partnership Interests. Although Investors each currently own approximately 22% of the Limited Partnership Interests of Hilltop, that number will diminish as subsequent closings occur and the General Partner accepts additional subscriptions. In addition, any economic "control" Investor, or an other limited partner may exercise will likely be diluted or mitigated by the approximately 14.5% Limited

Partnership Interests held by the General Partner and family members of its President.

Finally, the concern noted in the Staff's Rogers, Casey & Associates, Inc. ("Rogers") no-action letter ([1989-1990 Transfer Binder] (CCH) ¶79,320, at 79,191 (June 16, 1989)) is also not at issue in the present case. Not only is a limited partner's right to withdrawal severely limited, but he cannot seek to amend or renew the Partnership Agreement at regular intervals. Relatedly, the state law backdrop in Rogers is similar to Hilltop. Hilltop, like the limited partnerships in Rogers is a Delaware limited partnership.

The Partnership Agreement insures that all limited partnership interests including Investors remain truly passive. As noted in former Staffers Lemke and Lins' dispositive article on Section 3(c)(1) "... a significant but passive economic interest should not be viewed as the equivalent of a voting security." (See Lemke and Lins, Private Investment Companies under Section 3(c)(1) of the Investment Company Act of 1940, The Business Lawyer, Vol. 44 (Feb. 1989) at p. 418.)

Accordingly, we believe that since Hilltop Limited Partnership Interests are not voting securities, the attribution

provisions of Section 3(c)(1) do not apply. This conclusion is consistent with the line of no-action letters including KKR where the Staff has held that entities which owned more than 10% of the outstanding non-voting securities of a company would be deemed to be a single holder of that company's securities under Section 3(c)(1). In the present situation, the limited partners, like those in the above-referenced letters, lack the ability to control or influence the Limited Partnership.

We also recognize that the Staff is concerned that the exemption under Section 3(c)(1) might be manipulated to permit sham, multi-tiered transactions under which a new company exempt from the definition of an investment company by virtue of Section 3(c)(1) would be formed to invest in a company which is also exempt from the definition of an investment company under the Act by virtue of Section 3(c)(1). This concern apparently prompted the Staff to require, as a condition to the no-action position taken in such letters as KKR, Robert N. Gordon, Thomas J. Herzfeld ([1987-1988 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶78,539 (Nov. 30, 1987) ("Gordon")) and Cigna, that no limited partner in the limited partnerships at issue would rely on Section 3(c)(1) to exempt itself from the definition of investment company". To alleviate this concern, we would be prepared to represent as noted above, that (i) no limited partner

including Investors have been formed for the purpose of making investments in Hilltop; and (ii) that each limited partner, including Investors, have substantial business activities in addition to the investments in Hilltop.

We are unable to represent that no limited partner itself relies on Section 3(c)(1) to exempt itself from the definition of "investment company". It is the General Partners' understanding that Investors rely on that exemption. Many prior no-action letters in this area did not expressly require the representations that no limited partner itself could not rely on Section 3(c)(1). In addition, the anti-pyramiding concerns of Section 12(d)(1) of the Act are not implicated here as Hilltop is not a registered investment company. As the Court noted in Clemente Global Growth Fund, Inc. v. Pickens [1988-1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶94,183 (S.D.N.Y. 1989), the purpose of Section 12(d)(1) is "to prevent control of registered investment companies by other investment companies." Id. at 91,655. Given Hilltop's recent formation, it is clear Investors were not formed for the purpose of investing in Hilltop. In addition, Investors have substantial business activities in addition to their investment in Hilltop. In fact, as discussed below, Investors are each a Qualified Institutional Buyer ("QIB") as defined in Rule 144A. We have been informed that Investors'

interest in Hilltop represents an insignificant percentage of their total assets. Given these facts, we believe that the abuses to which that Section 3(c)(1) representation protects are not at issue in Hilltop.

Accordingly, we believe that the present facts are similar to those set forth in the KKR and Gordon letters where the staff stated it would not recommend enforcement action under Section 3(c)(1) with regard to institutional investors who may purchase over 10 percent of a partnerships limited partnership interest. As noted above, we have made similar representations regarding limited partner status and their lack of control of the Limited Partnership. These representations as well as the present facts indicate that Hilltop Limited Partnership Interests are not de facto voting securities. In addition, Hilltop goes further to establish the lack of economic control of its limited partnership interests. As mentioned previously, the General Partner and family members of its President hold approximately 14.5% of Hilltop Limited Partnership Interests. Since under the Partnership Agreement, the Limited Partners' one act of governance (i.e., in the event of death, insanity or bankruptcy) requires unanimous consent, it is quite remote that any limited partner will have the voting power to influence Hilltop. Finally, as in KKR and Gordon, the composition of the Hilltop Limited Partners

does not raise the "sham multi-tiered transactions" concerns, inherent in Section 3(c)(1) and 12(d)(1) of the Act.

Request for No-Action Position

For the reasons set forth above, we respectfully request that the staff concur in our view that (1) even if a limited partner acquires a 10 percent (10%) or greater interest in Hilltop such limited partner will be treated as a single security holder of purposes of Section 3(c)(1) of the Act because the limited partner will not be subject to the attribution provisions of Section 3(c)(1) because the interests held by limited partner do not constitute voting securities, and (2) that in such case, provided that there is no public offering of interests in Hilltop, the Partnership will not be deemed an "investment company" within the meaning of the Act by reason of the applicability of Section 3(c)(1) because the securities issued by Hilltop will not be beneficially owned by more than 100 persons.

Sincerely,

Newman Tannenbaum Helpern Syracuse & Hirschtritt

NEWMAN TANNENBAUM HELPERN
SYRACUSE & HIRSCHTRITT