

**PUBLIC**

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|           | ICA                           |
| Section   | 3(c)(7)                       |
| Rule      | Rule 2a51-1(g)(3)             |
| Date      | October 6, 1998               |
| Reference | Our Ref. No. 98-98-CC 10/6/98 |
|           | Service Corporation           |
|           | International                 |
|           | File No. 132-3                |

**RESPONSE OF THE OFFICE OF CHIEF COUNSEL  
DIVISION OF INVESTMENT MANAGEMENT**

Your letter dated October 1, 1998 requests our concurrence that Service Corporation International ("SCI") may pool the assets of certain trusts controlled by its majority-owned domestic subsidiaries into two limited liability companies without registering those companies with the Commission in reliance on Section 3(c)(7) of the Investment Company Act of 1940 ("Act").

Facts

SCI, a Texas corporation, is engaged in the business of providing death care services in the United States and abroad. SCI conducts its business through subsidiaries which, in turn, use affiliates to provide funeral and cemetery products and services at the local level. As of December 31, 1997, SCI and its subsidiaries operated 3,127 funeral service locations, 392 cemeteries and 166 crematoria worldwide. In connection with its business operations in the United States, SCI is required by various state laws to place certain funds in trust in order to secure the future performance of its obligations. You state that these arrangements can be divided into two general categories: pre-need trusts created in connection with the sale of pre-need contracts, and perpetual care trusts created in connection with the sale of burial plots.

Pre-need contracts allow purchasers to pay in advance for specific goods and services to be provided at the time of death. You state that SCI currently offers two types of pre-need contracts: (1) funeral contracts, which allow purchasers to pay in advance for a funeral to be performed in the future (e.g., preparation of the corpse, cremation, flowers, casket), and (2) cemetery merchandise contracts, which allow purchasers to pay in advance for cemetery merchandise (e.g., vaults, monuments, but not including burial plots) and, in some cases, services (e.g., interment fees). State law generally requires that all or a percentage of funds received from the sale of pre-need contracts be held in trust to ensure that the seller of the contract has sufficient funds to meet its obligations as they become due.

Certain states also impose investment restrictions on pre-need trusts, including that trust assets be invested in accordance with a prudent investor standard. To satisfy these requirements, SCI subsidiaries enter into trust agreements with third-party trustees and place the required amounts in the trust.<sup>1</sup> Under the trust agreement, the trustee reimburses the SCI subsidiary for incurred expenses only upon presentation of the death certificate and a certification that the subsidiary has fulfilled its obligations under the pre-need contract. If trust assets are insufficient to cover the SCI subsidiary's expenses, the subsidiary will not be reimbursed for additional expenses incurred in carrying out its contractual obligations. State law generally permits the SCI subsidiary to retain trust earnings that exceed its expenses, although in a minority of states the purchaser's estate is entitled to receive the excess. In general, purchasers of pre-need contracts may cancel

<sup>1</sup> Instead of placing the funds in trust, funeral home operators have, in certain states, the option of placing the proceeds from the sale of pre-need contracts in a depository account. You do not request our position, and we take no position, with respect to those accounts.

those contracts and the SCI subsidiary must refund all or a percentage of any amounts paid under the contract, in some cases less a penalty. Pre-need purchasers receive no reports on the investment performance of the trust and have no direct access to trust assets.<sup>2</sup>

Perpetual care trusts, which provide for the continued maintenance, repair and embellishment of cemetery property, also are regulated under state law. Upon the creation of a cemetery, state law requires the cemetery owner to establish a perpetual care trust. Those trusts are often funded through the sale of burial plots. In most states, perpetual care trusts, like pre-need trusts, are subject to certain investment restrictions. The SCI subsidiaries, as owners of the cemetery and settlors of the respective trusts, place a portion of the proceeds from the sale of each burial plot into the trusts. You state that the trusts are maintained in perpetuity and that trust income is distributed to the SCI subsidiary on a regular basis and must be used exclusively for the maintenance of cemetery property. You also state that, in the event that trust income exceeds the maintenance costs of the property, the excess either is used for maintenance in subsequent years or is rolled over into the corpus of the trust. Finally, you state that, unlike purchasers of pre-need contracts, purchasers of burial plots have no right of cancellation and have no other rights to have access to the funds held in trust.

In connection with selling pre-need contracts and burial plots, you state that SCI has established over 2,400 trust accounts with 295 different third-party trustees. You further state that the SCI subsidiaries are the settlors of the trusts. You also state that, although the SCI subsidiaries often provide the trustees with input regarding investment strategy (subject to applicable state law investment restrictions), the trustees maintain investment discretion with respect to the assets held in the trusts. Finally, you add that the trustees are appointed, and may be removed or replaced, by the respective SCI subsidiaries in their sole discretion.

SCI has established two Nevada limited liability companies, the Millennium Income Fund, L.L.C., and the Millennium Growth Fund, L.L.C. ("Fund," or collectively, the "Funds"). You state that the Funds are excluded from the definition of an investment company under Section 3(c)(1) of the Act.<sup>3</sup> SCI intends to invest the assets of more than one hundred trusts in each Fund, which SCI believes would make the exclusion provided by Section 3(c)(1) unavailable. SCI believes that the Funds will be excluded from the definition of an investment company under

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<sup>2</sup> According to your letter, sales of pre-need contracts will be made by sales personnel of SCI and its subsidiaries, who will receive a commission based on actual sales. You represent that the pre-need contracts will not be advertised as investment vehicles. You further represent that the sales and marketing materials used in connection with the pre-need contracts will not contain performance or any other information about the investment funds described below, nor will SCI or its subsidiaries provide the sales personnel with access to such information.

<sup>3</sup> Section 3(c)(1) of the Act excludes from the definition of an investment company any issuer whose outstanding securities (other than short-term paper) are beneficially owned by not more than 100 persons and which is not making and does not presently propose to make a public offering of its securities. You maintain that the staff has held in a series of no-action letters that a trust (as opposed to the trustee or beneficiary) will generally be considered the beneficial owner of the Section 3(c)(1) entity's securities for purposes of determining the number of beneficial owners. You do not request our position, and we take no position, regarding whether the Funds satisfy the requirements of Section 3(c)(1).

Section 3(c)(7) of the Act, however, as discussed further below. For purposes of this letter, you propose that the only purchasers of the Funds' securities will be trusts ("Trusts"), (1) the trustees of which have investment authority over at least \$25 million in investments ("Trustees"), and (2) the settlors of which are domestic majority-owned subsidiaries of SCI ("SCI Subsidiaries"). Finally, you state that SCI and its majority-owned subsidiaries, in the aggregate, hold over \$25 million in investments.

### Analysis

Section 3(c)(7) of the Act excludes from the definition of "investment company" any issuer whose outstanding securities are owned exclusively by persons who, at the time of acquisition of the securities, are qualified purchasers, and which is not making and does not propose to make a public offering of its securities ("Section 3(c)(7) Fund"). Section 2(a)(51)(A)(iii) generally defines "qualified purchaser" to include any trust (1) that does not meet the definition of family-owned company in clause (ii) of Section 2(a)(51)(A); (2) that was not formed for the specific purpose of acquiring the securities offered by the Section 3(c)(7) fund;<sup>4</sup> and (3) the trustee and settlor of which are qualified purchasers under clause (i), (ii), or (iv) of Section 2(a)(51)(A). Section 2(a)(51)(A)(iv) defines qualified purchaser to include "any person, acting for its own account or the accounts of other qualified purchasers, who in the aggregate owns and invests on a discretionary basis, not less than \$25,000,000 in investments."<sup>5</sup>

You believe that the Trustees are qualified purchasers under Section 2(a)(51)(A)(iv). You represent that each Trustee invests at least \$25 million on a discretionary basis, and that the only issue regarding the Trustees' status as qualified purchasers under clause (iv) is whether they also must own not less than \$25 million in investments.<sup>6</sup> We believe that Section 2(a)(51)(A)(iv) permits a person to satisfy the \$25 million threshold by aggregating investments that the person owns with investments in accounts that the person invests on a discretionary basis. We therefore agree that the Trustees are qualified purchasers under clause (iv).<sup>7</sup>

<sup>4</sup> You represent that the Trusts do not meet the definition of a family-owned company in clause (ii) and that the Trusts were formed for the purpose of complying with state law, and not in order to invest in the Funds' securities.

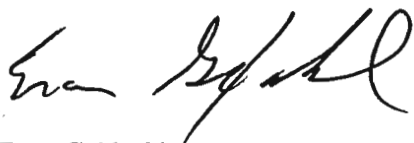
<sup>5</sup> Section 2(a)(51)(A) of the Act generally defines "qualified purchaser" also to include (i) any natural person who owns not less than \$5 million in investments and (ii) any family-owned company that owns not less than \$5 million in investments.

<sup>6</sup> For purposes of determining whether the \$25 million threshold in Section 2(a)(51)(A)(iv) is met, a person may include in his calculation assets owned by non-qualified purchasers that he invests on a discretionary basis. That person may invest in a Section 3(c)(7) Fund, however, only for his own account and for the accounts of other qualified purchasers. *Privately Offered Investment Companies*, Investment Company Act Release No. 22597 ("Adopting Release"), 62 Fed. Reg. 17512, 17513 & n.9 (Apr. 9, 1997).

<sup>7</sup> We note that this interpretation is consistent with the definition of a "qualified institutional buyer" under Rule 144A(a)(1)(i), which includes an entity that satisfies certain requirements and "that in the aggregate owns and invests on a discretionary basis at least \$100 million" in certain securities. *See Adoption of Rules on Resale of Restricted Securities*, Securities Act Release No. 6862, 55 Fed. Reg. 17933 (April 23, 1990) (release adopting Rule 144A interpreting language

You also believe that the SCI Subsidiaries, which are the settlors of the trusts, are qualified purchasers, notwithstanding the fact that each SCI Subsidiary holds less than \$25 million in investments. Rule 2a51-1(g)(3) under the Act provides that, in determining the amount of investments owned by a company for purposes of Section 2(a)(51)(A)(iv), “there may be included Investments owned by majority-owned subsidiaries of the company and Investments owned by a company (“Parent Company”) of which the company is a majority-owned subsidiary, *or* by a majority-owned subsidiary of the company and other majority-owned subsidiaries of the Parent Company” (emphasis added). You believe that Rule 2a51-1(g)(3) should be interpreted to allow a subsidiary to aggregate its own investments both with those of its majority-owned subsidiaries and its parent, as well as with those of any other majority-owned subsidiaries of its parent. Under this interpretation, the SCI Subsidiaries would be qualified purchasers under the rule because SCI and its majority-owned subsidiaries hold, in the aggregate, more than \$25 million in investments. We agree with your interpretation of Rule 2a51-1(g)(3).<sup>8</sup>

These positions are based on the representations made in your letter. Any different facts or circumstances may require different conclusions.



Evan Geldzahler  
Senior Counsel

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materially similar to Section 2(a)(51)(A)(iv) to allow eligible entities to aggregate proprietary securities holdings with holdings under management).

<sup>8</sup> See Adopting Release, at 17518 (stating that Rule 2a51-1(g)(3), as adopted, “permits the investments of a parent company and its majority-owned subsidiaries to be aggregated....”).

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October 1, 1998

Office of Chief Counsel  
Division of Investment Management  
Securities and Exchange Commission  
450 Fifth Street, N.W.  
Washington, D.C. 20549

Ladies and Gentlemen:

Our client, Service Corporation International, a Texas corporation ("SCI"), proposes to pool the funds of certain of the trusts controlled by its majority-owned domestic subsidiaries into two limited liability companies established for the purpose of making such investments on a collective basis. On behalf of SCI, we respectfully request that the staff of the Division of Investment Management (the "Staff") take a no-action position with regard to the applicability of Section 3(c)(7) of the Investment Company Act of 1940, as amended (the "Act") and confirm that, based on the facts outlined below, the Staff would agree with our interpretation of the availability of the exemption from registration requirements under the Act pursuant to Section 3(c)(7) thereof.

**BACKGROUND**

SCI is the largest provider of death care services in the world. SCI has over 300 subsidiaries in the United States and over 100 subsidiaries in Europe and the Pacific Rim. These subsidiaries manage numerous affiliates which provide funeral and cemetery products and services at the local level. As of December 31, 1997, SCI and its subsidiaries operated 3,127 funeral service locations, 392 cemeteries and 166 crematoria worldwide. In addition, SCI provides capital financing to independent funeral home and cemetery operators.

SCI's operations are organized into five North American divisions covering the United States and Canada, a European division which includes SCI's French and United Kingdom operations, and a Pacific Rim division. Local funeral service location and cemetery affiliates, under the direction of divisional executive management, receive support and resources from SCI's headquarters in Houston, Texas and have substantial consistency with respect to the manner in which services are conducted.

**1. *Pre-Need Contracts and Perpetual Care Trusts***

In connection with the provision of certain goods and services in the United States, SCI is required by various state laws to place funds in trust in order to secure future performance. These arrangements can be divided into two general categories: (1) pre-need contracts, and (2) perpetual care trusts.

**(a) *Pre-Need Contracts.***

A pre-need contract is a device under which a customer prepays for specific goods and services to be provided at the time of death, and SCI becomes contractually obligated to provide such goods and services regardless of the actual cost thereof. SCI currently offers its customers two types of pre-need contracts: (1) pre-need funeral contracts, and (2) cemetery merchandise contracts. Pre-need funeral contracts allow customers to contractually agree to the terms of a funeral to be performed in the future, including both funeral services (preparation of the corpse, cremation, etc.) and funeral merchandise (flowers, casket, etc.). Cemetery merchandise contracts allow customers to prepay for cemetery merchandise (including vaults, monuments and other markers, but not including burial lots) and, in some states, cemetery services (including interment fees).

Pre-need contracts are regulated by the laws of the various states. These state laws typically require that an amount equal to all or a percentage of the funds collected from pre-need contracts be held in trust, and in certain states the funeral home operator has the option of placing the funds in a depository account<sup>1</sup>. Most state laws impose certain investment restrictions on pre-need trusts, such as requiring that trust assets be invested in accordance with a prudent investor standard. The policy behind these trust requirements is to assure that the seller of prepaid goods and services has sufficient funds to support such contractual obligations as they become due. The result is a two-tiered system comprised of (1) the *pre-need contract* between the contract holder and an SCI subsidiary, under which the contract holder agrees to prepay for goods and services to be provided at the time of death, and (2) the *trust contract* between an SCI subsidiary and a third-party trustee, whereby the SCI subsidiary places money into a trust account to secure its obligations under the related pre-need contract. Under this arrangement, the respective SCI subsidiary places the requisite

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<sup>1</sup> This no-action letter only seeks relief with respect to funds from pre-need contracts which are held in trust, and does not seek relief with respect to funds placed in a depository account.

portion of funds from the pre-need contract into the pre-need trust, and is listed as the settlor in the applicable trust documents. These two levels of contract are related but are very distinct. Although the customer may be aware that all or a percentage of the funds paid under the pre-need contract will be placed in trust, the customer will not have direct access to the assets held in trust and will not receive any reports regarding investment performance with respect to such funds.

Under the laws of the various states, the contract holder typically has a right to cancel the pre-need contract, in which case the contract holder commonly receives a return of all or a percentage of any amounts paid under the pre-need contract (less a possible cancellation penalty) and the SCI subsidiary usually retains any earnings on the assets placed in trust.

If the pre-need contract has not been canceled, the assets continue to be held in trust until the contract holder dies. Upon the death of the contract holder, the SCI subsidiary presents the death certificate to the trustee of the respective trust together with certification that the contractual obligations under the pre-need contract have been performed. Only at that time are the trust assets released by the trustee to the SCI subsidiary as reimbursement for the expenses incurred on the respective pre-need contract. If the assets allocated to the pre-need contract (including any accrued earnings) are insufficient to cover the cost of the SCI subsidiary's obligations under such contract, the SCI subsidiary will not be reimbursed for any expenses above the amount allocated to the pre-need contract at issue. If, however, the assets allocated to the pre-need contract (including any accrued earnings) exceed the cost of the SCI subsidiary's obligations under such contract as adjusted for inflation, the SCI subsidiary typically retains the excess. However, in a minority of the states, the estate of the contract holder is entitled to all or a portion of such excess.

Sales of pre-need contracts are made by sales personnel of SCI and its subsidiaries, who receive a commission based on actual sales made. The pre-need contracts will not be advertised as investment vehicles. The sales and marketing materials used in connection with pre-need contracts will not contain information regarding the Funds (as hereinafter defined) or the performance thereof, and neither SCI nor its subsidiaries provide their sales personnel with access to such information.

**(b) *Perpetual Care Trusts.***

State laws typically establish certain standards for the continued maintenance, repair and embellishment of cemeteries. In order to ensure that such standards are satisfied, most states require that perpetual care trusts be established upon the creation of a cemetery, which trusts are then funded with a percentage of the revenues from the sale of burial plots. Under this system, the respective SCI

subsidiary, as owner of the cemetery, places the requisite portion of funds from the sale of burial plots into the perpetual care trust, and is listed as the settlor in the applicable trust documents. The policy behind these trust requirements is to ensure that there are always sufficient funds to provide for the continued maintenance, repair and embellishment of cemetery properties. In furtherance of such policy, most state laws impose certain investment restrictions on perpetual care trusts, such as requiring that trust assets be invested in accordance with a prudent investor standard.

The principal of a perpetual care trust is maintained in perpetuity, and any income from the trust is distributed to the SCI subsidiary for the upkeep and repair of the grounds it is obligated to maintain. This trust income is typically distributed to the SCI subsidiary on a regular basis, and must be used exclusively for maintenance of the respective cemetery. If income from the perpetual care trust is insufficient to fully cover the maintenance costs for a cemetery, the SCI subsidiary will still be required to maintain such property up to state standards, and will use its own funds to pay the difference. Although income from the perpetual care trust rarely exceeds the maintenance costs for a cemetery, any such excess is either used exclusively for maintenance in subsequent years or rolled-over into the corpus of the trust on an annual basis. In a few states, a portion of the principal held in a perpetual care trust can be distributed for use in connection with certain capital improvements to cemetery property.

Unlike the purchaser of a pre-need contract, the purchaser of cemetery property does not have any right of cancellation with respect to perpetual care trusts, and has no other rights to access the funds held in such trusts. Once funds are placed into a perpetual care trust, distributions in connection therewith can only be made for the maintenance of the respective cemetery.

## **2. *SCI's Current Structure***

As stated, assets securing performance under pre-need contracts or maintenance of cemetery property must be held partially or entirely in trust under the laws of many states. Accordingly, several of SCI's domestic subsidiaries have entered into trust agreements with various third-party trustees for investment of the funds acquired from the sale of pre-need contracts and cemetery property. Under such trust arrangements, the SCI subsidiaries place funds into the respective trusts and are listed as the settlors thereof pursuant to the applicable trust documents. The trustees are designated as the record owners of the trust funds. Although the SCI subsidiaries often provide trustees with input regarding investment strategy for trust funds (subject to applicable state law investment restrictions for such trusts), the trustees maintain ultimate investment discretion with respect to the investments held in such trusts in accordance with their fiduciary duties. Trustees are appointed, and may be removed or replaced, by the respective SCI subsidiaries in their sole



discretion. In the case of pre-need contracts, neither state law nor SCI's standard trust agreement requires that the SCI subsidiary notify the contract holder of the removal or replacement of the trustee.

As of December 31, 1997, there were 2,424 of these trust accounts, with 295 different third party trustees across the United States investing the funds of the various trusts. This structure not only creates complicated administrative and record keeping problems but also impedes coordinated investment management and proper diversification of investments. Consequently, SCI has established two Nevada limited liability companies, the Millennium Income Fund, L.L.C., and the Millennium Growth Fund, L.L.C. (referred to herein individually as a "Fund" and collectively as the "Funds") to provide common investment vehicles for several of the various trusts. The primary purpose of the Funds is to invest in non-publicly traded limited partnership interests and in cash and cash equivalents. Each Fund is currently investing the assets of less than 100 trusts, and each Fund is being operated in a manner to ensure that the trusts comply with applicable state law.

For purposes of this no-action letter, it will be assumed that only those trusts (1) which are managed by trustees with investment authority over at least \$25 million in investments (the "Trustees"), and (2) which are funded by those subsidiaries which are majority-owned by SCI (the "SCI Subsidiaries") may be invested in the Funds (with the trusts satisfying both of these requirements being referred to herein as the "Trusts").

### 3. *SCI's Proposed Structure*

In order to streamline the investment management of the Trusts, it is the intent of SCI for more than 100 Trusts to invest their assets in each of the Funds. Such consolidation will not only ease administrative burdens by allowing coordinated management of the Trusts but will also expand investment opportunities by allowing the assets of the various Trusts to be invested on a consolidated basis.

#### ISSUE PRESENTED AND OPINION OF COUNSEL

Pursuant to Section 3(a) of the Act, an investment company is defined to include any issuer which is "engaged primarily . . . in the business of investing, reinvesting or trading in securities." By investing the assets contributed to the Trusts, the Funds will be engaged primarily in investing, reinvesting and trading in securities and would therefore be required to register as investment companies under the Act unless otherwise excluded or exempted. The newly-added Section 3(c)(7) of the Act provides an exclusion from regulation under the Act for certain investment

companies whose investors consist solely of "qualified purchasers." As discussed below, because each of the Trusts investing in the Funds are "qualified purchasers" as defined under the Act, it is our belief that the Funds are excluded from the definition of an investment company under Section 3(c)(7) of the Act regardless of the number of Trusts investing in each Fund.

## DISCUSSION

### 1. *Current Exemption - Section 3(c)(1)*

As stated, each Fund is currently investing the investments of less than 100 Trusts. In doing so, the Funds are acting in reliance upon the exclusion provided by Section 3(c)(1) of the Act, which states that an issuer will not be considered an investment company for purposes of the Act if, among other things, its outstanding securities (other than short term paper) are beneficially owned by no more than 100 persons. In counting beneficial ownership, the Staff has held in a series of no-action letters that a trust (as opposed to its trustee or beneficiary) will generally be considered the beneficial owner of an investment company's securities for purposes of Section 3(c)(1). See *Rosenberg Capital Management* (pub. avail. February 18, 1979); *OSIRIS Management, Inc.* (pub. avail. February 17, 1984) ("[w]here a limited partnership interest is held by a trust, we would ordinarily deem the trust as the beneficial owner"). Since interests in the Funds are not being issued pursuant to a public offering, the exclusion provided by Section 3(c)(1) is clearly available to the extent that there are less than 100 Trusts investing in each Fund.

### 2. *Proposed Exemption - Section 3(c)(7)*

In 1992, the Securities and Exchange Commission ("SEC") suggested to Congress that the 100 investor limit of Section 3(c)(1), while reasonably reflecting the point beyond which federal regulatory concerns incorporated in the Act are raised, may place unnecessary constraints on private investment pools that sell their securities exclusively to sophisticated investors. Congress implemented this recommendation in the National Securities Markets Improvement Act of 1996 (the "1996 Act"), which, among other things, added Section 3(c)(7) to the Act to create a new exclusion from the definition of "investment company" for companies whose investors consist solely of "qualified purchasers."

Section 3(c)(7) of the Act excludes "[a]ny issuer, the outstanding securities of which are owned exclusively by persons who, at the time of acquisition of such securities, are qualified purchasers, and which is not making and does not at that time propose to make a public offering of such securities." The Funds are not and do not intend to publicly offer any of their respective

outstanding securities. Thus, the key issue in determining the availability of the Section 3(c)(7) exclusion is the definition of a "qualified purchaser."

**(a) Definition of "Qualified Purchaser"**

Section 2(a)(51)(A) defines the term "Qualified Purchaser" to include the following:

- (i) Any natural person who owns not less than \$5,000,000 in investments as defined by the SEC;
- (ii) Any company that owns not less than \$5,000,000 in investments and that is owned directly or indirectly by 2 or more natural persons who are related as siblings or spouse (including former spouses), or direct lineal descendants by birth or adoption, spouses of such persons, the estates of such persons, or trusts established by or for the benefit of such persons;
- (iii) Any trust that is not covered by clause (ii) above and that was not formed for the specific purpose of acquiring the securities offered, as to which the trustee or other person authorized to make decisions with respect to the trust, and each settlor or other person who has contributed assets to the trust is a qualified purchaser described in clause (i), (ii) or (iv); or
- (iv) Any person, acting for its own account or the accounts of other qualified purchasers, who in the aggregate owns and invests on a discretionary basis, not less than \$25,000,000 in investments.

The Trusts clearly cannot be regarded as Qualified Purchasers under the first or second definition set forth above, since the Trusts are neither natural persons nor family-owned companies with at least \$5 million in investments. Furthermore, the Trusts cannot be regarded as Qualified Purchasers under the fourth definition set forth above, since none of the Trusts own and invest on a discretionary basis more than \$25 million in investments. It is our position, however, that the Trusts fall within the third definition of a Qualified Purchaser set forth above.

To summarize Section 2(a)(51)(A)(iii) of the Act, a trust will be considered a Qualified Purchaser if (i) the trust is not covered by the Section 2(a)(51)(A)(ii) definition of a Qualified Purchaser, (ii) the trust was not formed for the specific purpose of acquiring the securities offered, and (iii) the trustee and the settlor of the trust are both Qualified Purchasers. As stated above,

since the Trusts are neither natural persons nor family owned companies, the Trusts do not fall within the 2(a)(51)(A)(ii) definition of a Qualified Purchaser. Furthermore, the Trusts were formed to comply with state law rather than for the specific purpose of acquiring securities in the Funds. Therefore, the Trusts meet the first two requirements of the Section 2(a)(51)(A)(iii) definition of a Qualified Purchaser, and the sole issue is whether both the Trustees and the settlors of the respective Trusts are Qualified Purchasers.

***(b) The Trustees as Qualified Purchasers***

Because the Trustees are companies which are not family-owned, they must be examined under the requirements of Section 2(a)(51)(A)(iv), which defines a Qualified Purchaser as a natural person or company, acting for its own account or the account of other Qualified Purchasers, who in the aggregate owns and invests on a discretionary basis not less than \$25 million in investments. It is our position that the Trustees satisfy this definition of Qualified Purchaser.

As institutional investors, the Trustees invest for the account of other Qualified Purchasers, including the settlors of the Trusts (as discussed below). Furthermore, as stated above, investment in the Funds will be limited to those Trusts which are managed by Trustees that invest on a discretionary basis at least \$25 million in investments. The only open issue is whether, in addition to investing on a discretionary basis not less than \$25 million in investments, Section 2(a)(51)(A)(iv) of the Act requires that the Trustees own not less than \$25 million in investments.

The definition set forth under Section 2(a)(51)(A)(iv) of the Act clearly contemplates the scenario of a Qualified Purchaser acting for the account of other persons. Such investment activities would typically arise in the trust context, in which the trustee has investment authority with respect to investments but does not have actual beneficial ownership thereof. It is our position that Section 2(a)(51)(A)(iv) should logically be interpreted to require only that a person acting on behalf of other Qualified Purchasers have investment discretion with respect to not less than \$25,000,000 in investments. A contrary interpretation would render a portion of this definition meaningless, and it would conflict with the policy underlying the Section 3(c)(7) exemption.

***(c) The Settlers as Qualified Purchasers***

The settlors of the respective Trusts are the SCI Subsidiaries, which also must be examined under the Section 2(a)(51)(A)(iv) definition of a Qualified Purchaser. Although each SCI Subsidiary individually holds less than \$25 million in investments, the rules recently enacted under

Section 3(c)(7) appear to allow a majority-owned subsidiary (*i.e.*, a subsidiary whose voting securities are more than 50% owned by a parent company) to include the investments of its parent company, as well as the investments of other majority-owned subsidiaries of its parent company, in determining whether such subsidiary is a Qualified Purchaser. This consolidation appears to be allowed under Rule 2a51-1(g)(3) under the Act, which states that “[f]or purposes of determining the amount of investments owned by a Company under Section 2(a)(51)(A)(iv) of the Act, there may be included Investments owned by majority-owned subsidiaries of the company and Investments owned by a company (“Parent Company”) of which the company is a majority-owned subsidiary, or by a majority-owned subsidiary of the company and other majority-owned subsidiaries of the Parent Company.”

The only interpretive issue arising under Rule 2a51-1(g)(3) is whether it (i) provides for the consolidation of either investments held by a company’s majority-owned subsidiaries and its Parent Company “or” the consolidation of investments held by the majority-owned subsidiaries of the company and other majority-owned subsidiaries of the Parent, or (ii) provides for the inclusion of investments held by the company, all majority-owned subsidiaries of the company, the Parent Company and all majority-owned subsidiaries of the Parent Company. As set forth below, it is our position that the latter interpretation is correct.

Because investment in the Funds will be limited to those Trusts funded by majority-owned subsidiaries of SCI, and because SCI and its majority-owned subsidiaries hold well over \$25 million in investments in the aggregate, it is our position that each SCI Subsidiary which is a settlor of a Trust should be permitted to combine its own investments with the investments of SCI and the other majority-owned SCI subsidiaries to fall within the Section 2(a)(51)(A)(iv) definition of a Qualified Purchaser. A contrary interpretation would appear to ignore the practicalities of the situation, and it would conflict with the policy underlying the Section 3(c)(7) exemption.

#### REQUESTED NO-ACTION POSITION

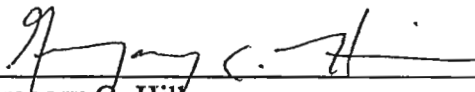
Because both the Trustee and settlor of each of the Trusts are Qualified Purchasers under Section 2(a)(51)(A)(iv) of the Act, we believe that the Trusts themselves are properly designated as Qualified Purchasers under Section 2(a)(51)(A)(iii) of the Act. This conclusion is consistent with the policy behind the enactment of Section 3(c)(7), which was to eliminate unnecessary protections for sophisticated investors. Therefore, we respectfully request that the Staff concur in our view that each of the Funds can manage the investments of more than 100 Trusts within the exclusion provided by Section 3(c)(7) of the Act.

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October 1, 1998  
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If for any reason the Staff does not agree with our position, we respectfully request an opportunity to discuss the matter with the Staff prior to any written response to this letter. If you have any questions or require additional information, please call the undersigned at (713) 226-1397.

Respectfully submitted,

LIDDELL, SAPP, ZIVLEY,  
HILL & LaBOON, L.L.P.

By:   
Gregory C. Hill