

INVESTMENT FUNDS MAINTAINED BY CHARITABLE ORGANIZATIONS

An investment fund maintained by a charitable organization for the collective investment of certain assets of charitable organizations (Charitable Investment Fund) that is organized and operated exclusively for religious, educational, benevolent, fraternal, charitable, or reformatory purposes (Permitted Purposes) generally is excluded from regulation under the Investment Company Act of 1940 (1940 Act) pursuant to Section 3(c)(10) of the 1940 Act. The staff recently was asked to clarify that the exclusion may be available to a Charitable Investment Fund that is a legal entity separate from the charitable organization that maintains it and that is organized and operated for the purpose of earning investment returns for the investing charitable organizations, to be used exclusively for Permitted Purposes. The staff believes that the exclusion may be available to such a Charitable Investment Fund, subject to the conditions of Section 3(c)(10) and the staff's existing no-action positions addressing Section 3(c)(10).

Background

A Charitable Investment Fund may meet the definition of investment company in Section 3(a)(1) of the 1940 Act. Charitable Investment Funds, however, typically rely on the conditional exclusion from regulation under the 1940 Act set forth in Section 3(c)(10)(A)(ii). That exclusion is available to a certain type of fund "organized and operated exclusively for [Permitted Purposes]" that is maintained by a charitable organization "exclusively for the collective investment and reinvestment of [assets set forth in Section 3(c)(10)(B) of the 1940 Act (Permitted Assets)]." The Permitted Assets include, among others, assets of the general endowment fund or other funds of one or more charitable organizations. A "charitable organization" is defined in Section 3(c)(10)(D)(iii) to include an organization described in Section 501(c)(3) of the Internal Revenue Code of 1986 (Code) (Section 501(c)(3) entity).



Charitable Investment Fund That Is a Separate Legal Entity Organized and Operated for Investment Purposes

A Charitable Investment Fund might be formed as a separate legal entity to protect it against any liabilities of the charitable organization that maintains it. Although the investing charitable organizations would use the proceeds from such a Charitable Investment Fund solely for Permitted Purposes, the Charitable Investment Fund technically might not be “organized and operated exclusively for [Permitted Purposes],” but for the purpose of producing investment returns for the investing charitable organizations. In all other respects, the Charitable Investment Fund will satisfy the requirements set forth in Section 3(c)(10)(A)(ii) as well as the relevant representations on which the staff has based a number of prior no-action letters addressing other Charitable Investment Funds under Section 3(c)(10).¹

The staff believes that such a Charitable Investment Fund is not the type of entity intended by Congress to be regulated under the 1940 Act. Rather, the staff believes that it is the type of entity that Congress intended to be excluded pursuant to Section 3(c)(10) because it will be used solely for the investment of Permitted Assets of charitable organizations that, in turn, will use the proceeds from the Charitable Investment Fund solely for Permitted Purposes.²

ENDNOTES

- 1 See, e.g., Sisters of Mercy of the Americas, Inc., SEC No-Action Letter (Oct. 1, 2009); Mercy Investment Program, Inc., SEC No-Action Letter (June 12, 2003); Daughters of Charity National Health System, Inc., SEC No-Action Letter (Apr. 3, 1998). Such representations include the following, among others: (i) no part of the Charitable Organization Fund’s net earnings will inure to the benefit of a private shareholder or individual; (ii) each investing charitable organization will be a Section 501(c)(3) entity; (iii) each investing charitable organization will invest only moneys over which it has immediate, unrestricted, and exclusive use, benefit and enjoyment, and will not invest assets that are attributable to a retirement plan providing for employee contributions or variable benefits; and (iv) on an annual basis, each investing charitable organization will receive a written report on the financial condition and results of operation of the Charitable Organization Fund, including audited financial statements, prepared by an independent certified public accountant. Although many of the staff no-action letters address Charitable Investment Funds that are Section 501(c)(3) entities, the staff on at least one occasion has addressed Charitable Investment Funds that held assets of multiple Section 501(c)(3) entities but which were not themselves Section 501(c)(3) entities. See American Heart Association, SEC No-Action Letter (Feb. 26, 1993).

- 2 Section 3(c)(10), enacted in 1940 as Section 3(c)(12) and renumbered pursuant to the 1970 Amendments to the 1940 Act, originally excluded from the definition of investment company “[a]ny company organized and operated exclusively for religious, educational, benevolent, fraternal, charitable or reformatory purposes, no part of the net earnings of which inures to the benefit of any private shareholder or individual.” The Section 3(c)(10) exclusion generally was premised on the social benefits provided by charitable organizations and Congress’s belief that the operations of non-profit charitable organizations are unlikely to raise investor protection concerns of the type addressed by the federal securities laws. See, e.g., The Philanthropy Protection Act of 1995: Hearings on H.R. 2519 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Commerce, 104th Cong. 1st Sess. 5, 7 (1995) (statement of Barry P. Barbash, Director of the Division of Investment Management, SEC). Congress amended Section 3(c)(10) as part of the Philanthropy Protection Act of 1995 to clarify that charities that are or maintain certain types of investment funds are also excluded from the definition of investment company under the 1940 Act. Pub. L. No. 104-62, 109 Stat. 682 (1995). The Philanthropy Protection Act added Sections 3(c)(10)(A)(ii), (B), (C) and (D) to the 1940 Act. The Philanthropy Protection Act similarly amended the Securities Act of 1933 and the Securities Exchange Act of 1934.

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