

**PUBLIC**

JAN 22 1993

RESPONSE OF THE OFFICE OF CHIEF COUNSEL  
DIVISION OF INVESTMENT MANAGEMENT

Our Ref. No. 92-569-CC  
Pasadena Investment  
Trust  
File No. 811-4506

By letter dated September 25, 1992, you seek our assurance that we would not recommend any enforcement action to the Commission under Section 7(d) of the Investment Company Act of 1940 ("1940 Act") if, as more fully described in your letter, a non-United States investment company (the "Offshore Fund") offers and sells its securities outside the United States and invests substantially all of its assets in a single series (the "Fund") of the Pasadena Investment Trust, a registered investment company whose shares are registered under the Securities Act of 1933. 1/

You state that you will organize the Offshore Fund under the laws of a foreign jurisdiction, which will enable foreign investors to invest indirectly in the Fund while also enabling the Offshore Fund to comply with certain foreign tax and regulatory requirements. 2/ Individual and institutional United States investors also may invest in the Fund. The proposed arrangement will comply with the requirements of Section 12(d)(1)(E) of the 1940 Act. 3/ You also represent that the Fund

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- 1/ The Pasadena Investment Trust is an open-end management investment company currently consisting of three series.
  - 2/ Foreign investors will receive full disclosure regarding the nature of their investment in the Offshore Fund, including that the Offshore Fund is not registered with the Commission under the 1940 Act, and thus not subject to United States regulation and oversight. Telephone conversation between Mitchell E. Nichter and Amy R. Doberman, dated November 9, 1992.
  - 3/ Section 12(d)(1)(E) provides a safe harbor from Section 12(d)(1), which generally limits the pyramiding of investment companies. To qualify for the Section 12(d)(1)(E) safe harbor, you represent that: (1) the principal underwriter for the Offshore Fund will be a registered broker or dealer, or a person controlled by a registered broker or dealer; (2) the shares issued by the Fund will be the only investment security held by the Offshore Fund; and (3) the Offshore Fund will enter into an arrangement with the Fund, or its principal underwriter, whereby the Offshore Fund will be required (a) either to seek instructions from its shareholders with regard to voting proxies received from the Fund and to vote the proxies only in accordance with these instructions, or to vote Fund shares held by the Offshore Fund in the same proportion as the vote of all other holders of Fund shares, and (b) to refrain from substituting the Fund shares it

will disclose in its prospectus the Offshore Fund's investment in the Fund, and the risks, if any, to other Fund shareholders this arrangement poses. 4/

Section 7(d) of the 1940 Act prohibits a non-United States investment company from using the means and instrumentalities of United States interstate commerce to publicly offer its securities unless the Commission issues an order permitting the investment company to register and offer its securities. The Commission has interpreted Section 7(d) to prohibit a foreign investment company from using the means and instrumentalities of United States interstate commerce to make a private offering of its securities if the offering causes its shares to be beneficially owned by more than 100 United States residents. 5/ You represent that the Offshore Fund will not, at any time, have more than 100 beneficial owners who are United States residents, and that the Offshore Fund will not offer its securities publicly or privately to any United States residents.

Although the Offshore Fund's offering of securities to non-United States residents falls outside the scope of Section 7(d), you raise the question of whether this offering should be "integrated" with the Fund's public offering of securities within the United States, thus subjecting the Offshore Fund's offering

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holds for other securities unless the Commission approves the substitution in advance pursuant to Section 26(b) of the 1940 Act.

4/ Telephone conversations between Mitchell E. Nichter and Amy R. Doberman, dated October 14, and October 28, 1992. In addition, Item 6(b) of Form N-1A requires the Fund to disclose in its prospectus if the Offshore Fund, or any other person, acquires a controlling interest in the Fund. For purposes of this requirement, "control" is defined in Item 15(b) of Form N-1A as the beneficial ownership of more than 25% of the voting securities of a company, the acknowledgment or assertion by either the controlled or the controlling party of the existence of control, or a final adjudication under Section 2(a)(9) of the 1940 Act that control exists. Item 15(b) of Form N-1A also requires the Fund to disclose in its statement of additional information if the Offshore Fund, or any other person, acquires 5% or more of any class of the Fund's outstanding equity securities.

5/ Securities Act Rel. No. 6862 (Apr. 23, 1990) (adopting Rule 144A under the Securities Act of 1933). See also Touche Remnant & Co. (pub. avail. Aug. 27, 1984).

to regulation under the 1940 Act. The staff considers several factors in determining whether integration is appropriate, and generally will require integration if a reasonable purchaser qualified to invest in both offerings would view an interest in one offering as not materially different from another. 6/ In making this determination, the staff will consider whether the entities share the same investment objectives, investment portfolios, and portfolio risk/return characteristics. 7/ The staff also may consider whether two funds are intended for two distinct groups of investors. 8/

With respect to the Offshore Fund and the Fund, differing tax laws, among other regulatory disparities, create materially different investment opportunities for foreign and United States investors. For example, United States funds generally must distribute substantially all of their income and capital gains to shareholders each year to avoid taxation at the fund level. In contrast, many foreign jurisdictions do not require investment companies to make such distributions, permitting shareholders to enjoy a tax-free buildup of earnings. Moreover, United States tax law generally requires United States funds to withhold a substantial percentage of certain foreign investors' distributions. United States tax law also contains significant disincentives for United States residents to invest in offshore investment companies. 9/ Therefore, although the Fund and the Offshore Fund share the same investment objectives and risk/return characteristics, we believe that a reasonable

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6/ See, e.g., Equitable Capital Management Corp. (pub. avail. Jan. 6, 1992); PBT Covered Option Fund (pub. avail. Feb. 17, 1979) ("PBT").

7/ Id.

8/ See, e.g., Rogers, Casey & Associates, Inc. (pub. avail. June 16, 1989). In examining this factor, however, we will not consider two offerings to be separate where investor distinctions are artificial, arbitrary or immaterial. See PBT, supra ("The legislative history of Section 3(c)(1) evidences a serious concern with technical avoidance of the 1940 Act's jurisdiction."). See also Section 48(a) of the 1940 Act (prohibiting a person from doing indirectly any activity that could not be done directly).

9/ In certain circumstances, for example, United States investors must pay taxes annually on their proportionate share of a foreign investment company's realized and unrealized capital gains.

investor would view these investments as materially different. Accordingly, we would not integrate the offerings of the two investment companies and thus the Offshore Fund would not violate Section 7(d) under the circumstances you describe.

Although we concur in your view that the Offshore Fund would not violate Section 7(d) if it offered its securities to non-United States investors, the Offshore Fund's investment in the Fund raises concerns regarding the risks to United States investors that may occur if the Offshore Fund redeems a significant percentage of Fund securities. A request for a substantial redemption may force the Fund to liquidate portfolio securities quickly to meet the redemption request, and thus obtain a less favorable price than the Fund might otherwise receive in an orderly liquidation. Such action, if necessary, may decrease the net asset value of Fund shares to the detriment of remaining shareholders. 10/ We are satisfied that these concerns are addressed by (1) the Offshore Fund's agreement to comply with Section 12(d)(1)(E), including Section 26(b) with respect to the substitution of the Fund's securities 11/, and (2) the Fund's ability to redeem its shares in kind. 12/

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10/ Moreover, a request for a substantial redemption may disrupt the portfolio manager's investment strategy. See generally, SEC Report on the Public Policy Implications of Investment Company Growth, H.R. Rep. No. 2337, 89th Cong., 2d Sess. 314-18 (1966).

11/ Section 12(d)(1)(E)(iii)(bb) permits an unregistered investment company to rely on the Section 12(d)(1)(E) safe harbor only if, among other things, it complies with Section 26(b). Section 26(b) generally prohibits the trustee of a unit investment trust holding the security of a single issuer to substitute another security for that security without prior Commission approval. The Commission is required to issue an order granting approval of the substitution if the evidence establishes that it is consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the 1940 Act.

12/ Section 2(a)(32) of the 1940 Act defines a redeemable security in relevant part as "any security . . . under the terms of which the holder is entitled . . . to receive approximately his proportionate share of the issuer's current net assets, or the cash equivalent thereof." The Fund's ability to redeem its shares in kind is limited only by its election under Rule 18f-1 under the 1940 Act, which requires the Fund to redeem in cash requests by any shareholder during any 90-day period in an amount that is the lesser of \$250,000, or 1% of the net asset value of the

Accordingly, we would not recommend any enforcement action to the Commission under Section 7(d) if the Offshore Fund offers and sells its securities outside the United States and invests substantially all of its assets in the Fund. Our position is based on all the facts and representations in your letter and the telephone conversations, particularly that the Offshore Fund will comply with Section 12(d)(1)(E). You should note that any different facts or representations might require a different conclusion.

  
Amy R. Doberman  
Senior Counsel

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Fund at the beginning of that period. The Fund may not enter into any arrangement with the Offshore Fund to increase these limits without violating, among other provisions, Section 18(f) of the 1940 Act. Accordingly, the Fund would have the option of meeting a substantial redemption request by the Offshore Fund in kind, if appropriate.

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ACT Investment Co. Act  
7(d)  
PUBLIC AVAILABILITY  
1/22/93

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September 25, 1992

1940 Act/57(d)

VIA FEDERAL EXPRESS

Office of the Chief Counsel  
Division of Investment Management  
Securities and Exchange Commission  
450 Fifth Street, N.W.  
Stop 10-6  
Washington, D.C. 20549-1004

Attention: Thomas S. Harman, Esq.

Re: **Pasadena Investment Trust - Investment Company Act of 1940,  
Section 7(d)**

Dear Mr. Harman:

On behalf of our client, Pasadena Investment Trust (the "Trust"), we request your concurrence that the staff (the "Staff") of the Securities and Exchange Commission (the "Commission") will not recommend any enforcement action to the Commission under Section 7(d) of the Investment Company Act of 1940, as amended (the "1940 Act"), under the circumstances described below.

Background

The Trust is a Massachusetts business trust registered with the Commission under the 1940 Act as an open-end management investment company. The Trust is a series company currently

consisting of three series (each a "Fund").<sup>1</sup> Units of beneficial interest ("shares") of the Trust are registered under the 1940 Act and under the Securities Act of 1933, as amended (the "1933 Act").

The following arrangement is currently under consideration. An offshore investment fund (referred to herein as the "Offshore Fund") will be organized or otherwise created under the laws of a foreign jurisdiction (e.g., the Cayman Islands). It has not yet been determined whether the Offshore Fund will be a trust, partnership, corporation or other entity. The Offshore Fund will be formed for the purpose of gathering offshore assets from individual and institutional investors who are not United States residents, and will invest substantially all of its assets in a single Fund. The Offshore Fund will have the same investment objective as the Fund in which it will invest. The proposed arrangement will be set up as a feeder fund-master fund structure, and will comply with the requirements

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<sup>1</sup> The three Funds are: The Pasadena Growth Fund (which seeks to achieve long-term capital appreciation by emphasizing investments in companies with rapidly growing earnings per share, some of which may be smaller emerging growth companies), The Pasadena Nifty Fifty Fund (which seeks to achieve long-term capital appreciation by investing in approximately 50 different securities which are believed to offer the best potential for long-term growth of capital), and The Pasadena Balanced Return Fund (which seeks to maximize a total investment return consistent with reasonable risk through a balanced approach using moderate asset allocation). The Funds invest primarily in securities issued by United States entities, and no more than 15% of each Fund's total assets will be invested in foreign securities. Although this letter specifically discusses the proposed arrangements with respect to a single Offshore Fund investing in a single Fund, it is possible that one or more additional offshore funds may be formed in the future for the purpose of investing substantially all of their assets in a single series of the Trust, including additional series of the Trust which may be formed in the future. Accordingly, this request is intended to cover such additional arrangements if and when they are implemented.

set forth in 1940 Act Section 12(d)(1)(E).<sup>2</sup> The purpose of this structure is to enable the Offshore Fund to comply with certain foreign tax and regulatory requirements while allowing it effectively to invest, through the Fund, in a portfolio of assets managed in the United States. Shares of the Offshore Fund will be offered and sold outside of the United States to persons who are not United States residents. At no time will more than 100 United States residents beneficially own shares of the Offshore Fund, and it is not contemplated that the Offshore Fund will offer its shares to any United States residents.

**Discussion**

Section 7(d) of the 1940 Act provides, in relevant part, as follows:

No investment company, unless organized or otherwise created under the laws of the United States or of a state, and no depositor or trustee of or underwriter for such a company not so organized or created, shall make use of the mails or any means or

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<sup>2</sup> Section 12(d)(1)(E) of the 1940 Act provides a safe harbor from certain restrictions set forth in Section 12(d)(1) of the 1940 Act. To qualify for the Section 12(d)(1)(E) safe harbor, the proposed arrangement would satisfy the following requirements: (1) the depositor of, or principal underwriter for, the Offshore Fund will be a broker or dealer registered as such with the Commission, or will be a person controlled by such a registered broker or dealer, (2) the shares issued by the Fund will be the only investment securities held by the Offshore Fund, and (3) the Offshore Fund will enter into an arrangement with the Fund, or its principal underwriter, whereby the Offshore Fund will be required (a) either to seek instructions from its security holders with regard to the voting of all proxies with respect to the Fund shares it holds and to vote such proxies only in accordance with such instructions, or to vote the Fund shares held by it in the same proportion as the vote of all other holders of such shares, and (b) to refrain from substituting the Fund shares held by it unless the Commission approves the substitution in advance pursuant to Section 26 of the 1940 Act.

instrumentality of interstate commerce, directly or indirectly, to offer for sale, sell, or deliver after sale, in connection with a public offering, any security of which such company is the issuer.

Congress enacted Section 7(d) to enable the Commission to enforce the investor protections of the 1940 Act against foreign funds operating in the United States. See Protecting Investors: A Half Century of Investment Company Regulation, 189 (SEC Div. Inv. Mgmt. May 1992) ("Protecting Investors").

The issue presented by the proposed arrangement that is the subject of this request is whether the concurrent offering of shares of the Offshore Fund outside of the United States to non-United States residents would be integrated with the public offering of shares of the Fund in the United States such that the Offshore Fund would be deemed to be engaged in a public offering in violation of Section 7(d) of the 1940 Act.

The concept of integration under the 1940 Act allows the Commission to look through apparently separate issuers to determine if they really constitute the same issuer. See Joseph H. Moss (January 27, 1984). Under this concept, for example, two or more similar funds, one or more of which seeks to be excluded from the definition of an investment company pursuant to 1940 Act Section 3(c)(1), could be combined into one fund for purposes of determining whether the 100 beneficial owner limitation of that exclusion has been exceeded. See Underwood, Neuhaus & Co. (September 6, 1974). If such integration were to occur, then the Offshore Fund could be viewed as conducting a public offering in the United States in violation of Section 7(d). We are seeking hereby the Staff's confirmation that it will not recommend any enforcement action to the Commission under Section 7(d) of the 1940 Act if the Offshore Fund (1) invests substantially all of its assets in a Fund, (2) concurrently conducts a public offering of its shares offshore to non-United States residents, and (3) is at no time beneficially owned by more than 100 United States residents.

Definitive guidelines on integration under the 1940 Act do not exist. See Lemke, Private Investment Companies Under Section 3(c)(1), 44 Bus. Law. 401, 424 (February 1989). The Staff has, however, issued a series of no-action letters addressing the issue of 1940 Act integration in various contexts,

none of which directly addresses the proposed arrangement that is the subject of this request. See, e.g., Monument Capital Management, Inc. (July 12, 1990); Rogers, Casey and Associates, Incorporated (June 16, 1989); Frontier Capital Management Company Incorporated (May 6, 1988). Under this line of authority, the Staff may require the integration of two funds if a reasonable purchaser qualified to invest in both would view an interest in one as not materially different from an interest in the other. See, e.g., Monument Capital Management, Inc. (July 12, 1990). Among the factors that the Staff has considered in determining whether integration is appropriate are the following: (1) similarity of investment objective, (2) similarity of investment portfolios, and (3) similarity of risk/return characteristics.<sup>3</sup> In view of this line of no-action responses, use of the proposed structure may entail a risk that the offshore offering by the Offshore Fund might be integrated with the public offering in the United States by the Fund, and thereby could cause the offering by the Offshore Fund to violate 1940 Act Section 7(d).

In our opinion, the proposed offer and sale of shares of the Offshore Fund and the operation of the Offshore Fund in the manner described above should not be deemed violative of Section 7(d) of the 1940 Act because the primary conduct and effects of such offer, sale and operation will occur outside of the United States and will not affect a sufficient number of United States residents to warrant application of Section 7(d). Furthermore, the primary conduct and effect of the proposed arrangement in the United States (i.e., the operation of the

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<sup>3</sup> If those criteria were to be applied inflexibly to the proposed arrangement, the Staff could conclude that integration may be appropriate because (a) the investment objectives of the Offshore Fund and the Fund will be identical, (b) the underlying investment portfolios of both funds will be, at least indirectly, identical, and (c) the investment risk/return characteristics of the two funds are expected to be substantially identical. However, the two funds will hold different securities (the Offshore Fund will own shares of the Fund; the Fund owns individual portfolio securities), and each will be offered to a different investor group (the Offshore Fund will be offered to non-United States residents; the Fund is offered primarily to United States residents).

Fund) would be regulated by the 1940 and 1933 Acts through the registration of the Fund and its shares thereunder. See Protecting Investors at pp. 221-236 (discussing conduct and effects approach in context of investment adviser regulation); Unibanco-Uniao de Bancos de Brasileiros S.A. (July 28, 1992) (adopting conduct and effects approach in context of investment adviser regulation).

The Staff has acknowledged that Section 7(d) is intended to protect United States investors. See Protecting Investors at p. 202. The Commission, through interpretations of the 1940 Act, has "married" Section 7(d) to the Section 3(c)(1) private investment company exclusion, Protecting Investors at p. 200, and takes the position that Congress has determined that the point at which an investment company has more than 100 beneficial owners reasonably reflects when public interest concerns arise, and therefore when Section 7(d) should be implicated. See Protecting Investors at p. 200. See also, Fonlyser, S.A. de C.V. (August 14, 1991); Win Global Fund (May 14, 1991); G.T. Global Financial Services, Inc. (August 2, 1988); Touche Remnant & Co. (August 27, 1984); SEC Rel. 33-6862 (April 24, 1990) (adopting release for 1933 Act Rule 144A in which the Commission interpreted Touche Remnant & Co. as standing for the proposition that the term "public offering" in Section 7(d) includes an offer by United States jurisdictional means that causes the shares of a foreign investment company to be beneficially owned by more than 100 United States residents); Protecting Investors at p. 201 (states that Commission in Rule 144A adopting release "endorsed" the Staff's position in Touche Remnant & Co.).

Clearly, the focus of the Touche Remnant & Co. line of authority is on whether a foreign investment company has a sufficient nexus with the United States to trigger application of Section 7(d). The sufficiency of the nexus is tested by the number of United States residents who beneficially own the foreign investment company's shares. See, e.g., Fonlyser, S.A. de C.V. (August 14, 1991); Touche Remnant & Co. (August 27, 1984). In our view, the proposed arrangement is entirely consistent with that precedent because at no time will shares of the Offshore Fund be beneficially owned by more than 100 United States residents (in fact, we anticipate no such ownership because shares of the Offshore Fund will not be offered to any United States residents), and therefore its operations should not have a sufficient nexus with the United States to trigger the

application of the 1940 Act through Section 7(d) thereof. Conversely, the operation of the Fund, which offers and sells its shares to the public primarily in the United States, directly and primarily affects United States residents, but such shares and the Fund are registered under the 1940 Act and the 1933 Act, and therefore the safeguards imposed by those regimes fully apply to the operation of the Fund.

Furthermore, there is no intent in the proposed arrangement to use multiple entities to take advantage of an exception from the 1940 Act definitions of investment company (and thereby circumvent the protections afforded by 1940 Act registration to United States residents), as is the case in most 1940 Act integration situations. See, e.g., Frontier Capital (July 13, 1988) (involving three 1940 Act Section 3(c)(1) funds); Protecting Investors at p. 202 (notes that the Commission's position set forth in Touche Remnant & Co. and its progeny prevents foreign funds from circumventing the point at which a valid United States regulatory interest arises). The Fund and its shares are already registered under the 1940 Act and 1933 Act, and such shares are available for purchase by United States residents and non-residents alike. The proposed structure is simply intended to make available to foreign investors a vehicle that is designed to comply with certain foreign tax and regulatory requirements (which the Fund is not able to do directly) and that invests in a portfolio of assets managed in the United States. The Staff has indicated that this is a legitimate objective. See Hub-and-Spoke Funds: A Report Prepared By The Division of Investment Management 2 (April 1992) ("IM Report").

Finally, the Staff has not applied the doctrine of integration generally to the operation of master and feeder funds. In fact, the IM Report, at pages 2 and 8, and Exhibit B, appears to contemplate a feeder fund-master fund structure in which the feeder fund is not registered under the 1940 Act and is offered and sold to foreign investors.<sup>4</sup>

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<sup>4</sup> The proposed arrangements are also similar to the foreign fund-mirror fund structure suggested by the Commission in its 1983 "mirror funds" release. See SEC Rel. No. IC-13691 (December 23, 1983) ("Mirror Funds Release"). In that release, the Commission advised prospective foreign

(continued...)

**Position Requested**

In view of the foregoing, we would appreciate confirmation that the Staff will concur in our opinion and will not recommend any enforcement action to the Commission under Section 7(d) of the 1940 Act if the Offshore Fund (1) invests substantially all of its assets in a Fund engaged in a registered public offering in the United States, (2) concurrently conducts a public offering of its shares offshore to non-United States residents, and (3) is at no time beneficially owned by more than 100 United States residents.

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In the event that you reach a preliminary conclusion that you will be unable to take the no-action position we are requesting, we would appreciate you so advising us so that we may discuss this matter with you further. Please confirm your receipt of this request by returning a file-stamped copy in the self-addressed, stamped envelope enclosed for your convenience.

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<sup>4</sup>(...continued)

investment company applicants to consider forming a mirror fund registered under the 1940 Act to offer its securities in the United States rather than attempting to obtain an order from the Commission under Section 7(d). By organizing a United States registered investment company that would "mirror" the investments of a foreign fund, a foreign money manager would be able to offer its services to United States investors without needing to register the foreign investment company under Section 7(d). See Protecting Investors at pp. 196-97. In proposing this method of legitimately avoiding the application of Section 7(d) in the Mirror Funds Release, the Commission apparently concluded that under those circumstances integration of the foreign fund with the registered United States mirror fund would not be appropriate. The primary difference between our proposed arrangement and the mirror fund structure appears to be that the Offshore Fund will invest substantially all of its assets in the Fund, whereas under the mirror fund structure the foreign fund would not so invest in the domestic mirror fund. As discussed above, however, this difference should not trigger the application of Section 7(d).

Office of the Chief Counsel  
Division of Investment Management  
Securities and Exchange Commission  
September 25, 1992

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In accordance with Securities Act Release No. 6269, we have submitted one original and seven copies of this letter to your attention.

Should you have any questions regarding the matters referred to in this letter, please telephone the undersigned at 415-772-6082, or Julie Allecta of this office at 415-772-6980.

Very truly yours, ^

A handwritten signature in black ink, appearing to read "Mitchell E. Nichter". The signature is stylized with a large, sweeping flourish at the end.

Mitchell E. Nichter

Enclosures