

PUBLIC

JUN 21 1996

RESPONSE OF THE OFFICE OF CHIEF COUNSEL
DIVISION OF INVESTMENT MANAGEMENT

Our Ref No. 96-105-CC
Cornish & Carey
Commercial, Inc.
File No. 132-3

Your letter of February 26, 1996 requests the staff's concurrence that each employee investment limited partnership or limited liability company ("Fund") established by Cornish & Carey Commercial, Inc. ("Cornish & Carey") may be considered a single beneficial owner of the securities of an issuer relying on Section 3(c)(1) ("3(c)(1) Entity") of the Investment Company Act of 1940 ("the Act"), under the circumstances described below.

You state that Cornish & Carey, a commercial real estate broker, periodically is presented with opportunities to invest in 3(c)(1) Entities, primarily venture capital funds operated in the Northern California area. You state that Cornish & Carey wants to share these investment opportunities with management employees as a way to encourage and reward long-term employment. To that end, Cornish & Carey proposes to establish a Fund each year for the participation of its then-eligible employees.¹ The Investment Committee of Cornish & Carey's Board of Directors will make all investment decisions for each Fund. Employee participants will have no discretion over the selection or disposition of investments by the Funds. Each participant in a Fund will share, pro rata, in proportion to the participant's capital contribution, in all investments made by the Fund. You state that each Fund will limit its investment to less than 10% of the outstanding voting securities of each 3(c)(1) Entity. Depending on the level of capitalization, a Fund may invest in one or more 3(c)(1) Entities.²

Section 3(c)(1) excludes from the definition of 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 securities. Under Section 3(c)(1)(A), ownership by a company³ is deemed to be beneficial ownership by one person, unless the company owns 10% or more of the outstanding voting securities of the issuer, and the value of the company's investments in all 3(c)(1) Entities exceeds 10% of its

1/ You state that all offers and sales of interests in each Fund will be made pursuant to Rule 506 of Regulation D or otherwise pursuant to Section 4(2) of the Securities Act of 1933.

2/ It is anticipated that these Funds also will rely on Section 3(c)(1).

3/ The term "company" includes, in pertinent part, a partnership and any organized group of persons whether incorporated or not. See Section 2(a)(8) of the Act.

assets (the "attribution rule").⁴

Despite compliance with the express provisions of Section 3(c)(1), however, Section 48(a) of the Act gives the Commission the authority to "look through" a transaction or a multi-tiered structure if it is a sham or conduit formed or operated for no purpose other than circumventing the requirements of Section 3(c)(1) or any other provision of the Act.⁵ For example, for purposes of counting beneficial owners, the staff will require "integration" of ostensibly separate 3(c)(1) Entities if it appears that the separate offerings do not present investors with materially different investment opportunities.⁶ Similarly, when an entity is managed as a device for facilitating individual investment decisions instead of as a collective investment vehicle, the staff will "look through" the entity and attribute ownership directly to the underlying securityholders.⁷

Although you state that the Funds will be collective investment vehicles formed for the purpose of rewarding long-term employees and not for the purpose of circumventing any provision of the Act, you seek the views of the staff because of a representation recited in a number of the prior staff no-action letters addressing the application of the attribution rule to a company investing in a 3(c)(1) Entity. In several of these

4/ Specifically, the second 10% test of Section 3(c)(1)(A) provides that a company shall be considered a single beneficial owner unless more than 10 percent of its assets are invested in issuers that are, or, but for Section 3(c)(1)(A) would be, excluded under Section 3(c)(1).

5/ The staff has taken the position that Section 3(c)(1) must be read in conjunction with Section 48(a). See generally Tyler Capital Fund, L.P./South Market Capital ("Tyler Capital") (pub. avail. Sept. 28, 1987); see also Railbox Company (pub. avail. Oct. 29, 1984). Section 48(a) generally makes it unlawful for any person to do indirectly through another person or entity what would be unlawful for the person to do directly.

6/ See, e.g., Shoreline Fund, L.P. (pub. avail. Apr. 11, 1994); Monument Capital Management, Inc. (pub. avail. July 12, 1990); PBT Covered Option Fund (pub. avail. Feb. 17, 1979); see also In the Matter of Kenneth von Kohorn & VK Partnership Management, Inc., Investment Company Act Release No. 20907 (Admin. Proc. File No. 3-8624) (Feb. 22, 1995).

7/ See PanAgora Group Trust (pub. avail. Apr. 29, 1994); WR Investment Partners Diversified Strategies Fund, L.P. (Apr. 15, 1992); Tyler Capital, supra n.2; Six Pack (pub. avail. Nov. 13, 1989).

letters, the requesting party represented, and in some cases the staff conditioned relief on the representation, that the company would not invest more than 40% of its committed capital in any one 3(c)(1) Entity.⁸ You are unable to make this representation because the Funds may not have sufficient capital to diversify their investments to this extent.

You maintain that this 40% of capital limit is not a statutory requirement and should not be determinative of when to "look through" a collective investment vehicle to which the attribution rules of Section 3(c)(1)(A) otherwise would not apply, and that is neither structured nor operated for the purpose of circumventing the 100-securityholder limit of Section 3(c)(1). The staff agrees. When an issuer can make the 40% representation, the staff generally has been able to conclude with a degree of certainty that the structure was not created to evade the Act and the staff thus has granted no-action relief.⁹ Because the 40% test is not a statutory requirement, however, failure to comply with it would not automatically place a private investment company in violation of the Act. Rather, whether a company that meets the express conditions of Section 3(c)(1) will be considered to have violated Section 48(a) will depend on an analysis of all of the surrounding facts and circumstances. While the percentage of an issuer's assets invested in another 3(c)(1) company is relevant to this analysis, exceeding a specified percentage level, by itself, is not determinative.¹⁰

We concur, therefore, that each Fund may be considered a single beneficial owner of a 3(c)(1) Entity, provided that: 1) no Fund will invest in any 3(c)(1) Entity to the extent that the attribution provisions of Section 3(c)(1)(A) are triggered; and

8/ See Handy Place Investment Partnership (pub. avail. July 19, 1989); see also Merrill Lynch & Co., Inc. (pub. avail. Apr. 23, 1992); Knightsbridge Integrated Fund (pub. avail. May 20, 1988); CMS Communications Fund (pub. avail. Apr. 17, 1987).

9/ The staff continues to adhere to the positions taken in the prior no-action letters, and issuers may continue to rely on them.

10/ Compare Six Pack, supra n.5; WR Investment Partners, supra n.3 (staff looked through collective entities even though the entities represented that they would abide by 40% capital limit, when the collective entities facilitated individual investment decisions); with McKinsey & Co. (pub. avail. Feb. 23, 1989) (staff granted no-action relief assuring that it would consider a limited partnership established for employees as one beneficial owner of 3(c)(1) Entities even though the limited partnership did not represent that it would abide by the 40% capital limit).

2) no Fund or 3(c)(1) Entity will be structured or operated for the purpose of circumventing the provisions of the Act.


Eileen M. Smiley
Senior Counsel

WILSON SONSINI GOODRICH & ROSATI
PROFESSIONAL CORPORATION

650 PAGE MILL ROAD
PALO ALTO, CALIFORNIA 94304-1050
TELEPHONE 415-493-9300 FACSIMILE 415-493-6811

JOHN ARNOT WILSON
OF COUNSEL

February 26, 1996

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

ACT ICA - 40
SECTION 3(c)(1)
RULE _____
PUBLIC AVAILABILITY 6/21/96

Re: **Cornish & Carey Commercial, Inc.**
Investment Company Act of 1940, as amended - Section 3(c)(1)

Ladies and Gentlemen:

On behalf of our client, Cornish & Carey Commercial, Inc. ("Cornish & Carey"), we seek assurance that the staff (the "Staff") of the Division of Investment Management of the Securities and Exchange Commission (the "Commission") will not recommend enforcement under the Investment Company Act of 1940, as amended (the "Act"), if Cornish & Carey causes one or more employee investment vehicles (the "Employee Funds") to purchase securities in investment funds which rely on the exemption from the definition of "investment company" set forth in Section 3(c)(1) of the Act ("3(c)(1) Entities"), as described below. In particular, we request that the Staff concur in our view that each Employee Fund should be considered a single beneficial owner of the securities of any 3(c)(1) Entity in which it invests, provided that it beneficially owns less than ten percent (10%) of the outstanding voting securities of such 3(c)(1) Entity.

FACTS

Cornish & Carey is the largest commercial real estate broker operating in Northern California and has gross annual revenues in excess of \$25 million. Cornish & Carey currently has over 150 employees operating out of five offices in the area. From time to time, Cornish & Carey is presented with the opportunity to subscribe for interests in 3(c)(1) Entities, primarily venture capital funds operating in the region. Cornish & Carey desires to share such investment opportunities with members of its management team as a way to encourage and reward long-term service to Cornish & Carey. Therefore, Cornish & Carey proposes to establish Employee Funds for the participation of its management personnel, as described below.

Only individuals who are "accredited investors" within the meaning of Rule 501(a) of Regulation D of the Securities Act of 1933, as amended (the "Securities Act"), will be allowed to

Office of Chief Counsel
Division of Investment Management
Securities and Exchange Commission
February 26, 1996
Page 2

participate in the Employee Funds. The opportunity to participate in an Employee Fund will be further restricted to management employees of Cornish & Carey, whom Cornish & Carey believes are sophisticated in business and financial matters and capable of protecting their own interests with respect to investments in the Employee Funds.¹ Almost all of the Cornish & Carey management employees hold college degrees, and many hold graduate degrees as well. Such management employees typically have 10 to 30 years of experience in the commercial real estate business or related real estate and finance activities. Such management employees typically are experienced in making investment decisions, including decisions with respect to stock in public and private corporations, limited partnership interests, real estate, and other investments.

It is expected that approximately 20 to 30 employees will initially be eligible to participate in the Employee Funds, although such number may increase as the Cornish & Carey organization grows. Capital contributions from participants in an Employee Fund are expected to be in the range of \$50,000 to \$100,000, although larger or smaller contributions may be allowed in the discretion of the Executive Investment Committee of Cornish & Carey's Board of Directors (the "Investment Committee"), which will manage the Employee Funds.

The Employee Funds will be structured as a series of limited partnerships or limited liability companies, with a new fund formed annually for the participation of Cornish & Carey's then-current eligible employees. Alternatively, to minimize administrative inconvenience and costs, the Employee Funds may be structured as a series of sub-accounts within a single limited partnership or limited liability company. For purposes of this letter, any such sub-account is considered to be a separate Employee Fund.

The Investment Committee will make all investment decisions for the Employee Funds. Employee participants in the Employee Funds, in their capacities as such, will have no discretion over the selection or disposition of investments by the Employee Funds. Each participant in an Employee Fund will share pro rata, in proportion to such participant's capital contribution to the fund, in all investments made by that fund. Transfers of interests in the Employee Funds may be permitted under limited circumstances in the sole discretion of the Investment Committee, and

¹ References in this letter to management employees are intended to include senior consultants who may be deemed independent contractors rather than employees for tax purposes (i.e., their income is reported on Form 1099 rather than Form W-2), but who meet the same eligibility criteria for participating in Employee Funds as the other management employees referred to herein.

Office of Chief Counsel
Division of Investment Management
Securities and Exchange Commission
February 26, 1996
Page 3

will be prohibited if not in compliance with the requirements of the Securities Act. Employee participants will have no right to demand early withdrawal or distribution of their interests in the Employee Funds.

Depending on the amount of capital contributed to a particular Employee Fund and the size and number of investment opportunities that become available to that Employee Fund, such Employee Fund may be limited in its ability to diversify and may invest in many, or as few as one, 3(c)(1) Entities. However, the Employee Funds are not designed to facilitate individual investment decisions of their participants with respect to the underlying investments in 3(c)(1) Entities. With the exception of the first Employee Fund's initial investment, which Cornish & Carey has already identified, eligible participants generally will not have knowledge, prior to making their commitments to an Employee Fund, of the identity of the particular 3(c)(1) Entities in which such Employee Fund intends to invest. In fact, in most cases, not all investments for an Employee Fund will have been identified by the Investment Committee at the time of the fund's formation. In no event will an Employee Fund's investment in a 3(c)(1) Entity represent ten percent (10%) or more of the outstanding voting securities of such 3(c)(1) Entity.

In order to assure partnership tax classification of the Employee Funds, Cornish & Carey will contribute at least 1% of the total capitalization of each Employee Fund. To increase the likelihood that each Employee Fund will be capitalized sufficiently to meet the minimum investment requirements of the 3(c)(1) Entities in which it may be invited to participate, Cornish & Carey may contribute up to 5% of the total capitalization of each Employee Fund. For purposes of this letter, it should be assumed that the value of all securities owned by Cornish & Carey in the Employee Funds and other issuers described in Section 3(c)(1)(A) of the Act will be less than ten percent (10%) of the value of Cornish & Carey's total assets.

Like all other participants in an Employee Fund, Cornish & Carey will share pro rata in the investments of the fund in proportion to its capital contribution. Cornish & Carey will not receive a "carried interest" for managing an Employee Fund, nor will it be paid a management fee. Cornish & Carey may be reimbursed for direct expenses incurred on behalf of an Employee Fund, such as accounting and legal expenses.

Offers and sales of interests in the Employee Funds will be made pursuant to Rule 506 of Regulation D or otherwise pursuant to Section 4(2) of the Securities Act. Prospective participants in the Employee Funds will be advised by means of a detailed written offering memorandum of the ownership and management structure of the Employee Funds, the expected

Office of Chief Counsel
Division of Investment Management
Securities and Exchange Commission
February 26, 1996
Page 4

costs to be incurred by the Employee Funds, the fact that the investments made by the Employee Funds in the 3(c)(1) Entities, as well as the underlying investments made by the 3(c)(1) Entities, are expected to be risky and highly speculative, and other relevant information necessary for an eligible participant to make an informed investment decision. Because the Employee Funds will have 100 or fewer beneficial owners of their respective outstanding securities within the meaning of Section 3(c)(1) of the Act, it is expected that the Employee Funds will operate without registration under the Act.

Cornish & Carey believes that the Employee Funds will be a valuable benefit to the members of its management team. While all of the eligible participants will be accredited, most of such individuals ordinarily would not have access to investment opportunities in the 3(c)(1) Entities in which the Employee Funds plan to invest due to the large minimum commitments typically required to participate in such 3(c)(1) Entities, often in the range of \$250,000 to \$1,000,000. By allowing eligible employees to pool their resources, the Employee Funds will provide eligible employees access to these investment opportunities while minimizing the amount that any individual must put at risk in order to participate.

The 3(c)(1) Entities in which the Employee Funds are expected to invest, including venture capital funds, carefully monitor the number of beneficial owners of their securities in order to come within the exemption from the registration requirements of the Act provided by Section 3(c)(1). Therefore, an Employee Fund generally will not be permitted to invest in a 3(c)(1) Entity unless it can assure the 3(c)(1) Entity that it will be deemed to be a single beneficial owner of the 3(c)(1) Entity's securities. As a result, the value of the Employee Funds as a means to reward and retain key personnel is dependent upon a positive response to this no-action request.

ANALYSIS

Section 3(c)(1) of the Act excludes from the definition of investment company "[a]ny 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." Section 3(c)(1)(A) provides that beneficial ownership by a "company" generally is deemed to be beneficial ownership by one person. However, where the company owns ten percent (10%) or more of the outstanding voting securities of an issuer and the value of all securities owned by such company of all issuers which are or would, but for the exception set forth in Section 3(c)(1)(A), be excluded from the definition of investment company solely by reason of Section 3(c)(1) exceeds ten percent (10%) of the value of the company's total

Office of Chief Counsel
Division of Investment Management
Securities and Exchange Commission
February 26, 1996
Page 5

assets at the time of its most recent acquisition of securities of the issuer, the company is deemed to be a "look through" entity and beneficial ownership of the issuer's securities is attributed to the holders of such company's outstanding securities (other than short-term paper).

The purpose of Section 3(c)(1) is to exempt from investment company regulation those entities in which there is no significant public interest making such regulation appropriate. The 100-person limit is the bright line that has been established to demarcate public investment companies within the purview of the Act from private investment companies not within the purview of the Act. See "Protecting Investors: A Half-Century of Investment Company Regulation," SEC Staff Report 1504, Chapter 2, Section II (1992). The attribution rule of Section 3(c)(1)(A) is designed to ensure "that an investment company issuer cannot evade the requirements of the Act simply by using one or more other companies to purchase blocks of its securities and, in turn, sell those companies' securities to investors, i.e., to act a conduits for the distribution of the investment company's securities." H.R. Rep. No. 1341, 96th Cong., 2d Sess. 35 (1980).

Because an Employee Fund is a "company" as such term is used in Section 3(c)(1)(A) of the Act² and because no Employee Fund will be permitted to acquire ten percent (10%) or more of the outstanding voting securities of any 3(c)(1) Entity, the language of Section 3(c)(1)(A) of the Act would require that beneficial ownership by an Employee Fund of securities of a 3(c)(1) Entity be deemed to be beneficial ownership by one person, and not by each of the participants in the Employee Fund. However, we are aware of several instances in which the Staff has examined the particular structure and operation of an investment vehicle to determine whether a "look through" to its beneficial owners should be required, notwithstanding literal satisfaction of the conditions of Section 3(c)(1)(A) for treating the investment vehicle as a single beneficial owner. Section 48(a) of the Act provides that "[i]t shall be unlawful for any person, directly or indirectly, to cause to be done any act or thing through or by means of any other person which it would be unlawful for such person to do under the provisions of this title or any rule, regulation, or order thereunder." The concern of the Staff articulated in those cases where a "look through" was required, despite literal compliance with Section 3(c)(1)(A), was whether or not the use of a multi-tier structure was simply a sham or conduit being used in violation of Section 48(a) to facilitate the individual investment decisions of a number of investors exceeding the 100-person

² Section 2(a)(8) of the Act defines "company" as "a corporation, a partnership, an association, a joint-stock company, a trust, a fund, or any organized group of persons whether incorporated or not; or any receiver, trustee in a case under Title 11 of the United States Code or similar official or any liquidating agent for any of the foregoing, in his capacity as such."

Office of Chief Counsel
Division of Investment Management
Securities and Exchange Commission
February 26, 1996
Page 6

limit.

For example, in Six Pack (pub. avail. Nov. 13, 1989), each partner of an investment partnership had the ability to vary his percentage participation on an investment-by-investment basis, subject to the unanimous approval of the other partners. The Staff took the position that under these circumstances, the investment partnership was not a common investment vehicle, but rather was a device for facilitating individual investment decisions. Therefore, notwithstanding the fact that the Six Pack partnership at all times owned less than ten percent (10%) of the outstanding interests of any 3(c)(1) Entity, the Staff concluded that each partner should be counted as a separate beneficial owner under Section 3(c)(1). Similarly, in Tyler Capital Fund, L.P./South Market Capital (pub. avail. Sept. 28, 1987), a separate sub-account was established for each new investment to be made by an investment partnership, and each participant in the investment partnership was allowed to determine his level of participation in the sub-account after being informed of the new investment opportunity. Again, the Staff took the position that, notwithstanding literal compliance with the requirements of Section 3(c)(1)(A), each participant in a sub-account should be treated as a separate beneficial owner of the 3(c)(1) Entity in which the sub-account invested. See also WR Investment Partners Diversified Strategies Fund, L.P. (pub. avail. Apr. 15, 1992), where it was proposed that the general partner of an investment partnership vary each limited partner's percentage participation in investments made by the partnership after consulting with the limited partners regarding their individual investment objectives. Again, the staff declined to take a no-action position. In each of these cases, the investment vehicle in question was used to facilitate the individual investment decisions of its participants. Such abuse is not present in the case of the Cornish & Carey Employee Funds. Each participant in an Employee Fund will share in all investments made by the Employee Fund pro rata in proportion to the participant's total capital contribution, and no employee participant, in his capacity as such, will have discretion over the investment decisions made by the Cornish & Carey Board of Directors.

In contrast to the no-action letters cited above, the Staff has consistently taken the position that a "look through" to the beneficial owners of an investment vehicle is not necessary or appropriate where the investment vehicle in question meets the requirements of Section 3(c)(1)(A) for being treated as a single beneficial owner and is operated strictly as a common investment vehicle. For example, in Handy Place Investment Partnership (pub. avail. July 19, 1989), the Staff agreed that a partnership organized to allow members of a law firm to pool their investment resources should not be treated as a "look through" entity under Section 3(c)(1) where the single-owner attribution test of Section 3(c)(1)(A) was satisfied, where each participant's contribution with respect to each underlying investment of the partnership was simply

Office of Chief Counsel
Division of Investment Management
Securities and Exchange Commission
February 26, 1996
Page 7

proportionate to the participant's relative capital commitment to the partnership, where investment decisions were made by the managing partners of the partnership, and where the partnership's investment in any one 3(c)(1) Entity did not constitute more than forty percent (40%) of the committed capital of the partnership. See also Merrill Lynch & Co., Inc. (pub. avail. Apr. 23, 1992); Knightsbridge Integrated Fund (pub. avail. May 20, 1988); and CMS Communications Fund, L.P. (pub. avail. Apr. 17, 1987).

Depending on the amount of capital contributed to a particular Employee Fund and the size and number of investment opportunities that become available to that Employee Fund, such Employee Fund may invest in several, or as few as one, 3(c)(1) Entities. Therefore, we cannot assure the Staff that each Employee Fund will limit its investment in any 3(c)(1) Entity to forty percent (40%) of the Employee Fund's total capital commitments, as was the case in certain of the no-action letters cited above. However, the forty percent (40%) limit, which has evolved out of the fact patterns of prior no-action requests, is simply one factor that the Staff has used to determine whether an investment vehicle has been formed solely for the purpose of investing in a particular 3(c)(1) Entity. It is not a statutory requirement, nor should it be determinative of whether a "look through" of an investment vehicle is required where there are other strong indicia that the investment vehicle is not being used to facilitate individual investment decisions. The fact that a bona fide common investment vehicle for employees was non-diversified did not prevent the Staff from granting no-action relief in McKinsey and Company Incorporated (pub. avail. Feb. 23, 1989). Like Cornish & Carey, McKinsey created a series of investment partnerships designed to allow key, accredited employees to pool their resources to gain access to investments in 3(c)(1) Entities which usually would not be offered to them as individual investors and which might be beyond their individual means. Although the McKinsey no-action request disclosed that one or more of the McKinsey partnerships might invest exclusively in one 3(c)(1) Entity, the Staff agreed that each such partnership should be treated as a single beneficial owner for purposes of Section 3(c)(1) of the Act. We note that the McKinsey partnerships, which had approximately 300 eligible participants, were the subject of an exemptive order as employees' securities companies, while the Cornish & Carey Employee Funds, which are expected to have 100 or fewer participants, will rely on the exemption from registration under the Act provided by Section 3(c)(1). So long as a fund is not designed to circumvent the Act's provisions, whether the fund is deemed to be a single beneficial owner of the securities of an entity in which it invests is a separate issue from the method by which the fund itself is exempt from registration under the Act. Therefore, based on the manner in which the Cornish & Carey Employee Funds will be operated as collective investment vehicles, and notwithstanding the distinction between the McKinsey and Cornish & Carey methods of avoiding registration under the Act, we believe that the Cornish & Carey Employee Funds, like the McKinsey partnerships, should be treated as single beneficial

Office of Chief Counsel
Division of Investment Management
Securities and Exchange Commission
February 26, 1996
Page 8

owners of the securities of 3(c)(1) Entities in which they invest.

CONCLUSION

Because each Employee Fund will be operated as a collective investment vehicle for eligible Cornish & Carey employees as described above, and will not be operated to facilitate individual investment decisions, we believe that the treatment of an Employee Fund as a single beneficial owner of the securities of any 3(c)(1) Entity in which it acquires less than ten percent (10%) of the outstanding voting securities is not only allowed by the language of Section 3(c)(1)(A) of the Act, but is also consistent with the no-action positions previously taken by the Staff. Many of the 3(c)(1) Entities in which the Employee Funds may be invited to invest will be unwilling to admit an Employee Fund as an investor unless the Employee Fund can assure the 3(c)(1) Entity that the Employee Fund is appropriately deemed to be a single beneficial owner of the 3(c)(1) Entity's securities for purposes of Section 3(c)(1) of the Act. We therefore respectfully request that the Staff concur in our view that, under the circumstances described in this letter, an Employee Fund will be deemed to be the beneficial owner of the securities of any 3(c)(1) Entity in which it acquires less than ten percent (10%) of the outstanding voting securities, and that a "look through" to the Employee Fund's participants will not be required.

Thank you for your consideration of this request. Please direct any comments or questions on this matter to Larry Sonsini, Gail Husick or Brett Byers of this office at (415) 493-9300.

Sincerely,

WILSON SONSINI GOODRICH & ROSATI
Professional Corporation

WILSON SONSINI GOODRICH & ROSATI
PROFESSIONAL CORPORATION

650 PAGE MILL ROAD
PALO ALTO, CALIFORNIA 94304-1050
TELEPHONE 415-493-9300 FACSIMILE 415-493-6811

JOHN ARNOT WILSON
OF COUNSEL

February 26, 1996

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

**Re: Cornish & Carey Commercial, Inc.
Investment Company Act of 1940, as amended - Section 3(c)(1)**

Ladies and Gentlemen:

Enclosed please find one original and seven copies of a no-action request on behalf of Cornish & Carey Commercial, Inc. If you have any questions concerning this matter, please contact the undersigned, Larry Sonsini or Brett Byers of this office at (415) 493-9300. In the event you are unable to grant a positive response to this request, we would be most appreciative if you would contact one of us to discuss such matter before issuing your response.

Please date stamp and return the enclosed copy of this cover letter in the self-addressed stamped envelope provided.

Sincerely,

WILSON SONSINI GOODRICH & ROSATI
Professional Corporation



Gail Clayton Husick

PUBLIC

JUN 21 1996

RESPONSE OF THE OFFICE OF CHIEF COUNSEL
DIVISION OF INVESTMENT MANAGEMENT

Our Ref No. 96-105-CC
Cornish & Carey
Commercial, Inc.
File No. 132-3

Your letter of February 26, 1996 requests the staff's concurrence that each employee investment limited partnership or limited liability company ("Fund") established by Cornish & Carey Commercial, Inc. ("Cornish & Carey") may be considered a single beneficial owner of the securities of an issuer relying on Section 3(c)(1) ("3(c)(1) Entity") of the Investment Company Act of 1940 ("the Act"), under the circumstances described below.

You state that Cornish & Carey, a commercial real estate broker, periodically is presented with opportunities to invest in 3(c)(1) Entities, primarily venture capital funds operated in the Northern California area. You state that Cornish & Carey wants to share these investment opportunities with management employees as a way to encourage and reward long-term employment. To that end, Cornish & Carey proposes to establish a Fund each year for the participation of its then-eligible employees.¹ The Investment Committee of Cornish & Carey's Board of Directors will make all investment decisions for each Fund. Employee participants will have no discretion over the selection or disposition of investments by the Funds. Each participant in a Fund will share, pro rata, in proportion to the participant's capital contribution, in all investments made by the Fund. You state that each Fund will limit its investment to less than 10% of the outstanding voting securities of each 3(c)(1) Entity. Depending on the level of capitalization, a Fund may invest in one or more 3(c)(1) Entities.²

Section 3(c)(1) excludes from the definition of 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 securities. Under Section 3(c)(1)(A), ownership by a company³ is deemed to be beneficial ownership by one person, unless the company owns 10% or more of the outstanding voting securities of the issuer, and the value of the company's investments in all 3(c)(1) Entities exceeds 10% of its

1/ You state that all offers and sales of interests in each Fund will be made pursuant to Rule 506 of Regulation D or otherwise pursuant to Section 4(2) of the Securities Act of 1933.

2/ It is anticipated that these Funds also will rely on Section 3(c)(1).

3/ The term "company" includes, in pertinent part, a partnership and any organized group of persons whether incorporated or not. See Section 2(a)(8) of the Act.

assets (the "attribution rule").⁴

Despite compliance with the express provisions of Section 3(c)(1), however, Section 48(a) of the Act gives the Commission the authority to "look through" a transaction or a multi-tiered structure if it is a sham or conduit formed or operated for no purpose other than circumventing the requirements of Section 3(c)(1) or any other provision of the Act.⁵ For example, for purposes of counting beneficial owners, the staff will require "integration" of ostensibly separate 3(c)(1) Entities if it appears that the separate offerings do not present investors with materially different investment opportunities.⁶ Similarly, when an entity is managed as a device for facilitating individual investment decisions instead of as a collective investment vehicle, the staff will "look through" the entity and attribute ownership directly to the underlying securityholders.⁷

Although you state that the Funds will be collective investment vehicles formed for the purpose of rewarding long-term employees and not for the purpose of circumventing any provision of the Act, you seek the views of the staff because of a representation recited in a number of the prior staff no-action letters addressing the application of the attribution rule to a company investing in a 3(c)(1) Entity. In several of these

4/ Specifically, the second 10% test of Section 3(c)(1)(A) provides that a company shall be considered a single beneficial owner unless more than 10 percent of its assets are invested in issuers that are, or, but for Section 3(c)(1)(A) would be, excluded under Section 3(c)(1).

5/ The staff has taken the position that Section 3(c)(1) must be read in conjunction with Section 48(a). See generally Tyler Capital Fund, L.P./South Market Capital ("Tyler Capital") (pub. avail. Sept. 28, 1987); see also Railbox Company (pub. avail. Oct. 29, 1984). Section 48(a) generally makes it unlawful for any person to do indirectly through another person or entity what would be unlawful for the person to do directly.

6/ See, e.g., Shoreline Fund, L.P. (pub. avail. Apr. 11, 1994); Monument Capital Management, Inc. (pub. avail. July 12, 1990); PBT Covered Option Fund (pub. avail. Feb. 17, 1979); see also In the Matter of Kenneth von Kohorn & VK Partnership Management, Inc., Investment Company Act Release No. 20907 (Admin. Proc. File No. 3-8624) (Feb. 22, 1995).

7/ See PanAgora Group Trust (pub. avail. Apr. 29, 1994); WR Investment Partners Diversified Strategies Fund, L.P. (Apr. 15, 1992); Tyler Capital, supra n.2; Six Pack (pub. avail. Nov. 13, 1989).

letters, the requesting party represented, and in some cases the staff conditioned relief on the representation, that the company would not invest more than 40% of its committed capital in any one 3(c)(1) Entity.⁸ You are unable to make this representation because the Funds may not have sufficient capital to diversify their investments to this extent.

You maintain that this 40% of capital limit is not a statutory requirement and should not be determinative of when to "look through" a collective investment vehicle to which the attribution rules of Section 3(c)(1)(A) otherwise would not apply, and that is neither structured nor operated for the purpose of circumventing the 100-securityholder limit of Section 3(c)(1). The staff agrees. When an issuer can make the 40% representation, the staff generally has been able to conclude with a degree of certainty that the structure was not created to evade the Act and the staff thus has granted no-action relief.⁹ Because the 40% test is not a statutory requirement, however, failure to comply with it would not automatically place a private investment company in violation of the Act. Rather, whether a company that meets the express conditions of Section 3(c)(1) will be considered to have violated Section 48(a) will depend on an analysis of all of the surrounding facts and circumstances. While the percentage of an issuer's assets invested in another 3(c)(1) company is relevant to this analysis, exceeding a specified percentage level, by itself, is not determinative.¹⁰

We concur, therefore, that each Fund may be considered a single beneficial owner of a 3(c)(1) Entity, provided that: 1) no Fund will invest in any 3(c)(1) Entity to the extent that the attribution provisions of Section 3(c)(1)(A) are triggered; and

8/ See Handy Place Investment Partnership (pub. avail. July 19, 1989); see also Merrill Lynch & Co., Inc. (pub. avail. Apr. 23, 1992); Knightsbridge Integrated Fund (pub. avail. May 20, 1988); CMS Communications Fund (pub. avail. Apr. 17, 1987).

9/ The staff continues to adhere to the positions taken in the prior no-action letters, and issuers may continue to rely on them.

10/ Compare Six Pack, supra n.5; WR Investment Partners, supra n.3 (staff looked through collective entities even though the entities represented that they would abide by 40% capital limit, when the collective entities facilitated individual investment decisions); with McKinsey & Co. (pub. avail. Feb. 23, 1989) (staff granted no-action relief assuring that it would consider a limited partnership established for employees as one beneficial owner of 3(c)(1) Entities even though the limited partnership did not represent that it would abide by the 40% capital limit).

2) no Fund or 3(c)(1) Entity will be structured or operated for the purpose of circumventing the provisions of the Act.


Eileen M. Smiley
Senior Counsel