

ACT ICA/1AA

SECTION 2(a)(4); 2(a)(9); 15(a)(4) / 205(a)(2)

RULE _____

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AVAILABILITY 12/23/97

Our Ref. No. 97-543
American Century
Companies, Inc./J.P.
Morgan & Co.
Incorporated
File No. 801-08174

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

Your letter dated December 2, 1997 requests that the staff of the Division of Investment Management not recommend enforcement action to the Commission under Section 15(a)(4) of the Investment Company Act of 1940 (the "1940 Act") or Section 205(a)(2) of the Investment Advisers Act of 1940 (the "Advisers Act"), if American Century Companies, Inc. ("ACC") proceeds with the transaction described below, and its advisory subsidiary continues to provide services and receive compensation under the existing advisory contracts between that subsidiary and its investment company clients or, without obtaining their consent, other advisory clients.

FACTS

JPM and ACC

In your letter, you state that J.P. Morgan & Co. Incorporated ("JPM") is a bank holding company incorporated under Delaware law and registered under the Bank Holding Company Act of 1956. JPM's shares are listed on the New York, Amsterdam, London, Paris, Swiss and Tokyo stock exchanges.

You state that ACC, a Delaware corporation, is the holding company of a registered investment adviser and various other operating subsidiaries that support ACC's business. ACC's stock is not publicly traded. You represent that ACC is controlled by the Stowers Family, which comprises ACC's founder and principal stockholder, James E. Stowers, Jr., his children, grandchildren and their spouses. You state that the ACC organization offers a variety of asset management and investment advisory services and serves as investment adviser to open-end investment companies registered under the 1940 Act (the "ACC Funds").

ACC's Capital Stock and Voting Rights

You state that ACC's Certificate of Incorporation provides for two classes of common stock, Class A and Class B. Shares of each class are entitled to equal pro rata interests in all dividends of ACC and equal pro rata interests in ACC upon

liquidation of ACC. Class A shares have one vote per share, whereas Class B shares have 10,000 votes per share. The Certificate of Incorporation provides that the Class B shares are entitled to elect 75% of ACC's board of directors, with the number of directors entitled to be so elected being rounded up to the next whole number, if necessary. The remainder of the directors are elected by the holders of the Class A shares. You state that, as of October 9, 1997, the members of the Stowers Family collectively held approximately 48.28% of the outstanding equity interest in ACC and 69.75% of the combined voting power of both classes of shares of common stock of ACC.

You represent that Class B shares can be converted at any time at the request of the holder into an equal number of Class A shares. Class B shares can be transferred only within a limited group of persons -- essentially among the members of the Stowers Family and certain charitable trusts established by them. Ownership of a Class B share can be transferred outside that group only by converting the share into a single Class A share and, upon conversion, each Class A share will have only one vote per share rather than 10,000 votes per share.

The Proposed Transaction

JPM, ACC and ACC's principal stockholders have agreed to a transaction whereby ACC will sell, and JPM will purchase, shares of ACC common stock representing 45% of all of the outstanding shares of ACC's common stock.¹ You state that the Stowers Family will not be obliged to sell any shares in the proposed transaction, and does not intend to sell any. You represent that under ACC's dual class voting stock structure, the 45% equity interest will entitle JPM to a maximum of only 10.83% of the voting power in ACC. JPM also will receive certain minority stockholder contractual protections (described below) and an option, exercisable three years after JPM's initial investment, to increase JPM's economic interest to 50%. You represent that exercise of this option would increase JPM's voting power in ACC to a maximum of 12.04%.

¹ You state that on October 9, 1997, ACC and JPM entered into an agreement providing for the creation of a strategic alliance, of which JPM's equity investment in ACC is an important component. You represent that the strategic alliance is structured so as to give JPM a substantial economic stake as a stockholder of ACC in the future development of ACC's business, and to satisfy other objectives of critical importance to the parties, including that Mr. Stowers and his family retain control of ACC and continue to actively participate in and be the principal public representatives of ACC's business.

You represent that upon consummation of the proposed transaction, and until such time as the option is exercised, the Stowers Family will continue to own the largest block of shares of common stock in ACC. The voting power of the shares owned by the Stowers Family will remain at not less than 69.75%, and conceivably could increase to as much as 87.55%, of the total voting power.² If JPM exercises the option, the shares owned by the Stowers Family would represent between 68.79% and 86.3% of ACC's total voting power.

Upon completion of JPM's purchase, JPM, ACC, and ACC's principal stockholders will enter into a stockholders agreement (the "Stockholders Agreement") pursuant to which, among other things, the parties will agree that:

(i) JPM will have the right to designate two members of ACC's board, which would consist of ten persons; the other eight members would be designated by the holders of the Class B shares, provided that at least six of the eight would be members of ACC's management (and of such six, two will be James E. Stowers, Jr., and James E. Stowers, III);

(ii) ACC will not take any of the actions listed on Annex A attached to your letter without JPM's prior consent ("Special Approval Rights")³; and

(iii) JPM will have the right, but only upon the occurrence of certain extraordinary events, to replace certain members of ACC's management ("Management Replacement Rights"). These extraordinary events consist of (1) ACC's total assets under management declining by 25% or more in any calendar year following closing (net of any change in the market value of assets under management) or (2) events, described in your letter, agreed to constitute extraordinary turnover in ACC's senior management.

The Stockholders Agreement also will provide for a "steering

² You state that an increase in the Stowers Family's voting power would occur if non-Stowers Family stockholders elected to sell their Class B shares to JPM. Class B shares so sold would be converted to Class A shares, thus reducing the total number of votes attributable to all shares of common stock of ACC then outstanding. That, in turn, would increase the percentage voting power of the remaining Class B shares held by the Stowers Family.

³ You represent that the Special Approval Rights listed on Annex A generally relate to transactions that could significantly alter ACC's structure or business as currently conducted. Telephone conversation between Alison M. Fuller and Leonard B. Mackey on December 18, 1997.

committee" composed of equal numbers of representatives of ACC and JPM. You represent that the steering committee will not be a committee of ACC's board of directors, will have no legal authority to direct the management or operations of ACC, and, in fact, will not direct the management or operations of ACC.⁴

ANALYSIS

Section 15(a)(4) of the 1940 Act

Section 15(a)(4) of the 1940 Act makes it unlawful for any person to serve or act as investment adviser of a registered investment company, except pursuant to a written contract that has been approved by a majority of the outstanding voting securities of the investment company and that provides, in substance, for its automatic termination in the event of its assignment. If the proposed transaction results in an assignment of the advisory contracts between ACC's advisory subsidiary and the ACC Funds, the contracts would terminate and the advisory subsidiary could not lawfully act or serve as investment adviser to the ACC Funds unless and until shareholders of those funds had approved new advisory contracts with the advisory subsidiary.

An "assignment" is defined in Section 2(a)(4) of the 1940 Act to include any direct or indirect transfer or hypothecation of an investment advisory contract by the assignor, or of a controlling block of the assignor's outstanding voting securities by a security holder of the assignor. Because the proposed transaction does not entail the direct or indirect transfer of an advisory contract, our analysis is limited to consideration of whether the proposed transaction entails the transfer of a controlling block of voting securities of ACC.

Although "controlling block of voting securities" is not defined in the 1940 Act, "control" is defined in Section 2(a)(9) of the 1940 Act as "the power to exercise a controlling influence over the management or policies of a company." In addition, the section provides a rebuttable presumption of control when a person beneficially owns more than 25% of the voting securities of a company. Conversely, the section provides that "any person who does not so own more than 25 per centum of the voting securities of any company shall be presumed not to control such company." Section 2(a)(9) provides that any presumption established under the section may be rebutted by evidence, but will continue until a determination to the contrary is made by

⁴ Telephone conversation between Alison M. Fuller and Leonard B. Mackey on December 23, 1997.

the Commission by order either on its own motion or on application by an interested person.⁵

You state that the total amount of voting securities to be acquired by JPM is less than 25% of the outstanding voting securities of ACC and, therefore, is presumed not to be a controlling block. Specifically, you state that although JPM will acquire 45% of ACC's outstanding common stock and all of those shares have voting rights, JPM will possess a maximum of 10.83%, and possibly as little as 8.63%, of the combined voting power of ACC's two classes of common stock after the completion of the proposed transaction.

You argue that the granting of the Special Approval Rights and Management Replacement Rights to JPM in the proposed transaction does not justify rebutting the presumption that no transfer of a controlling block of voting securities will occur. You state that the Special Approval Rights and Management Replacement Rights are not intended to, and will not, give JPM the right to direct the day-to-day management of ACC. You represent that the rights will apply only in extraordinary situations and that they merely will provide JPM with limited consent rights, as opposed to the right to direct affirmatively

⁵ The Commission has issued a number of orders under Section 2(a)(9) of the 1940 Act rebutting the presumption of control by the beneficial owner of more than 25% of the outstanding voting securities of an investment adviser for purposes of Section 2(a)(4) of the 1940 Act. See, e.g., Paine Webber Group Inc., et al., Investment Company Act Release No. 21261 (July 27, 1995); Dimensional Fund Advisers Inc., Investment Company Act Release No. 16911 (Apr. 12, 1989); and Hartwell & Campbell Fund, Inc., et al., Investment Company Act Release No. 8453 (Aug. 9, 1974). The Commission also has issued at least one order under Section 2(a)(9) rebutting the presumption of non-control by the beneficial owner of less than 25% of the outstanding voting securities of an investment adviser for purposes of Section 2(a)(4). See Dimensional Fund Advisers Inc., Investment Company Act Release No. 21527 (Nov. 21, 1995). In addition, the Commission has issued an order under Section 2(a)(9) finding that the evidence presented did not rebut the presumption of non-control by the beneficial owner of less than 25% of the outstanding voting securities of an investment adviser. See Investors Mutual, Inc., Investment Company Act Release No. 4595 (May 11, 1966) ("Investors Mutual"), aff'd Phillips v. Securities and Exchange Commission, 388 F.2d 964 (2nd Cir. 1968) ("Phillips v. SEC").

the activities of ACC.⁶

You state that after the proposed transaction, ACC's current stockholders will retain approximately 90% of the voting power in ACC and the right to appoint 80% of ACC's directors. Members of the Stowers Family will continue to hold key management positions in ACC. The Stowers Family will have the right to designate or elect eight directors to the Board and will own 48.28% of the equity interest of ACC. You represent that none of JPM's equity investment in ACC, the Special Approval Rights, the Management Replacement Rights, or the ability to select two members of the ACC board of directors will give JPM a controlling influence over the management and policies of ACC as contemplated by the 1940 Act.⁷ You represent that upon completion of the proposed transaction, the Stowers Family will continue to control ACC.

We agree that the Class A common stock to be acquired by JPM, representing 10.83% of the voting power of ACC, is presumptively not a controlling block of voting securities of ACC. That presumption continues unless and until the Commission makes a determination to the contrary in a formal rebuttal proceeding under Section 2(a)(9) of the 1940 Act. Furthermore, based on the facts and representations described above, we agree that the proposed transaction would not result in an assignment of the advisory contracts of the ACC Funds within the meaning of Section 2(a)(4) of the 1940 Act. In reaching this conclusion, we considered, among other things, your representations that (i) the Stowers Family controls ACC and would continue to control ACC after the proposed transaction, (ii) the proposed transaction has been structured so as to preserve that control, and (iii) none of the Management Replacement Rights, Special Approval Rights, or the ability to select two members of the ACC board of directors would give JPM a controlling influence over the management or policies of ACC.

You should note that any different facts or representations

⁶ You represent that, had these provisions been in effect during the past three years, the only transaction that would have triggered the need for JPM's approval would have been the acquisition by ACC of Benham Management International, Inc. ("Benham"), and certain amendments to ACC's Certificate of Incorporation made in anticipation of that acquisition. You also represent that neither the acquisition of Benham nor the amendments to ACC's Certificate of Incorporation required the approval of the shareholders of the ACC Funds. Telephone conversation between Alison M. Fuller and Leonard B. Mackey on December 23, 1997.

⁷ Telephone conversation between Alison M. Fuller and Leonard B. Mackey on December 23, 1997.

may require a different conclusion. In addition, if the staff becomes aware in the future that JPM is in fact exercising a controlling influence over the management or policies of ACC, the staff would not be precluded by the position taken in this letter from recommending to the Commission the institution of a proceeding by the Commission under Section 2(a)(9) of the 1940 Act designed to rebut the presumption that JPM does not control ACC.⁸

Having stated our views here and in another recent letter⁹ regarding the definition of assignment contained in Section 2(a)(4) of the 1940 Act and the operation of Sections 2(a)(9) and 15(a)(4) of the Act, we will no longer respond to letters relating to the effect of proposed corporate transactions on existing investment advisory agreements of investment companies registered under the 1940 Act unless they present novel or unusual issues.

Section 205(a)(2) of the Advisers Act

Section 205(a)(2) of the Advisers Act generally makes it unlawful for a registered investment adviser to enter into or perform any investment advisory contract unless the contract provides, in substance, that no assignment of such contract may be made by the investment adviser without the consent of the client. This section does not, however, prohibit an adviser's assignment of an investment advisory contract without client consent. The section merely provides that the contract must contain the specified provision. Thus, the assignment of a non-investment company advisory contract, without obtaining client consent, could constitute a breach of the advisory contract, but not a violation of Section 205(a)(2).

⁸ In such a proceeding, the Commission would undertake a broad inquiry, examining all of the facts and circumstances to determine who controls the investment adviser. See, e.g., Investors Mutual, supra note 5 ("[C]ontrol determinations involve issues of fact which . . . require a careful appraisal of the over-all effect of the various relationships and other circumstances present in the particular case, some of which may point to one inference while others to an opposite one" (footnote omitted)); and Phillips v. SEC, supra note 5, at 972 ("[I]n assessing an individual's potential influence, the Commission is obliged to consider not merely legal power but 'the special circumstances of each case'" (citation omitted)).

⁹ See, e.g., Dean Witter, Discover & Co; Morgan Stanley Group Inc. (pub. avail. Apr. 18, 1997).

Because you represent that the advisory contracts between ACC's advisory subsidiary and its advisory clients contain the required provision,¹⁰ we believe that we need not respond to your second inquiry.¹¹



Alison M. Fuller
Attorney
December 23, 1997

¹⁰ Telephone conversation between Alison M. Fuller and Leonard B. Mackey on December 18, 1997.

¹¹ In previous no-action letters, the staff agreed not to recommend enforcement action under Section 205(a)(2) of the Advisers Act. See, e.g., Templeton Investment Counsel Limited, et al. (pub. avail. Dec. 23, 1985); Jennison Associates Capital Corp. (pub. avail. Oct. 31, 1985); Scudder, Stevens & Clark, et al. (pub. avail. Feb. 15, 1985); Wellington Financial Corp. (pub. avail. Nov. 29, 1984); Investors Research Corporation (pub. avail. Aug. 10, 1984), Fiduciary Management Associates, Inc. (pub. avail. Feb. 23, 1984); and Equitable Life Assurance Society of the United States (pub. avail. Dec. 12, 1983). We believe that the inquiries raised in those letters did not need to be answered in light of the express wording of Section 205(a)(2) of the Advisers Act.

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December 2, 1997

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Associate Director and Chief Counsel
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Securities and Exchange Commission
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Re: American Century Companies, Inc./J.P. Morgan & Co. Incorporated

Dear Mr. Scheidt:

We are writing on behalf of American Century Companies, Inc., a Delaware corporation ("ACC"), and its subsidiary that serves as a registered investment adviser to request that the staff of the Division of Investment Management of the Securities and Exchange Commission not recommend enforcement action to the Commission under Section 15(a)(4) of the Investment Company Act of 1940, as amended (the "Investment Company Act"), and Section 205(a)(2) of the Investment Advisers Act of 1940, as amended (the "Advisers Act" and collectively with the Investment Company Act, the "Acts"), if J.P. Morgan & Co. Incorporated, a Delaware corporation ("JPM"), acquires 45% of the issued and outstanding shares of Class A common stock of ACC in the transaction described in this letter.

I. Background

On October 9, 1997, ACC and JPM entered into an agreement that provides for creation of a strategic alliance through which the two organizations will seek to leverage their distinctly different yet complementary capabilities in the asset management industry. As an important component of the strategic alliance, JPM will make a substantial equity investment in ACC by purchasing shares of ACC's Class A common stock representing approximately 45% of all shares of common stock outstanding. As explained in greater detail in Part IV below, because of ACC's dual class voting stock structure, JPM's 45% equity interest in ACC will entitle it to

a maximum of only 10.83% of the voting power in ACC. JPM also will receive certain minority stockholder contractual protections and an option, exercisable three years after its initial investment, to increase its economic interest to 50%. Exercise of this option, however, would only increase its voting power in ACC to a maximum of 12.04%. The Stowers Family, which for purposes of this letter comprises ACC's founder and principal stockholder, James E. Stowers, Jr., his children, grandchildren and their spouses, currently own approximately 48.28% of the outstanding equity interest and 69.75% of the voting power of ACC. Upon consummation of the strategic alliance and until such time as the option is exercised, the Stowers Family will continue to own the largest block of shares of common stock in ACC (representing 48.28% of the outstanding equity interest and at least 69.75% of the voting power of ACC). If and when JPM's option is exercised, the Stowers Family's equity interest in ACC will remain at 43.28% and the Stowers Family will continue to control at least 68.79% of the voting power of ACC. Pursuant to a stockholders agreement to be entered into among JPM, ACC and ACC's principal stockholders (the "Stockholders Agreement"), JPM will be entitled to designate two of ACC's ten directors; the balance will be comprised of representatives designated by the Stowers Family, of whom at least six will be drawn from a group comprised of Mr. Stowers, James E. Stowers, III and members of the Stowers Family and members of ACC's management.

As more fully discussed below, for purposes of the Acts, we believe the arrangements contemplated by the strategic alliance will not constitute a change of control of ACC (or the transfer of a controlling block of ACC's stock) because (i) JPM will not acquire a controlling block of voting securities of ACC; (ii) the Stowers Family will not dispose of a controlling block of voting securities of ACC (indeed, as discussed below, under certain circumstances the transaction may cause an increase in the Stowers Family's voting power), and both before and after the transaction the Stowers Family will continue to control ACC; and (iii) at all relevant times the Stowers Family will have the right to appoint eight of ACC's ten directors.

II. The Parties

JPM is a bank holding company incorporated under the laws of the State of Delaware and registered under the Bank Holding Company Act of 1956, as amended. JPM is the fifth largest bank holding company in the United States with its shares listed on the New York, Amsterdam, London, Paris, Swiss and Tokyo stock exchanges. Its principal wholly owned subsidiaries are Morgan Guaranty Trust Company of New York and J.P. Morgan Securities Inc. As of June 30, 1997, JPM on a consolidated basis had total assets of approximately \$250 billion, loans net of the reserve for credit losses of approximately \$29 billion, and total shareholders' equity of approximately \$11 billion. Asset management and servicing is one of the firm's five global business sectors, and it offers such services principally to institutional clients. Assets under management were approximately \$234 billion at June 30, 1997.

ACC, a Delaware corporation, is the holding company of one active registered investment adviser and various other operating subsidiaries that support ACC's business. Its stock is not publicly traded. ACC was founded by James E. Stowers, Jr. and is controlled by the Stowers Family. While the ACC organization offers a variety of asset management and investment advisory services, its principal focus is to serve as investment adviser to mutual funds, all of which are open-end investment companies registered under the Investment Company Act (the "ACC Funds"), and to fiduciaries of plans under the Employee Retirement Income Security Act of 1974. A subsidiary of ACC serves as distributor of the ACC Funds, and the shares of the ACC Funds are sold through that distributor and through mutual fund marketplaces and other distribution channels, on a no-load or a low-load basis. The ACC Funds generally impose account minimums ranging from \$1,000 to \$100,000, although in most cases the minimum required is \$2,500.¹ The ACC organization had approximately \$64.5 billion under management at October 10, 1997, substantially all of which was attributable to registered investment companies. The average shareholder balance of retail investors in the ACC Funds is approximately \$20,000. At October 10, 1997, the ACC Funds had approximately 1.7 million retail shareholders, who have approximately 2.5 million accounts.

III. The Strategic Alliance

JPM and ACC propose to create a long-term strategic alliance designed to leverage their respective strengths while preserving their distinct brands, market reputations and cultures. The strategic alliance structure will give JPM a substantial economic stake as a stockholder of ACC in the future development of ACC's business, while at the same time satisfying other objectives of critical importance to the parties: (i) Mr. Stowers and his family will retain control of ACC, and will continue to actively participate in and be the principal public representatives of ACC's business; (ii) ACC will continue to operate in its own distinctive corporate culture, thereby helping to preserve its highly productive relationships with its funds' shareholders and employees; and (iii) JPM's "high-end" image and brand will be preserved separate from ACC's broad-based, small investor, retail-oriented brand. Indeed, the crucial concept of brand separateness would be destroyed if, notwithstanding the realities of the continuity in voting control and management of ACC, a change in control were deemed to have occurred and ACC were required to seek approval of the investors in the ACC Funds of new investment advisory contracts.

¹ Minimums for most of ACC's equity funds are waived if the shareholder agrees to invest the equivalent of \$50 per month in such account. Approximately one-third of the ACC Funds offer an institutional class of shares with a substantially higher (\$5 million) investment minimum.

IV. ACC's Capital Stock and Voting Rights

ACC's Certificate of Incorporation provides (and following the implementation of the strategic alliance will continue to provide) for two classes of common stock, Class A and Class B. Although shares in each class are entitled to equal *pro rata* interests in all dividends and upon liquidation of ACC, Class A shares have one vote per share while Class B shares have 10,000 votes per share. Class B shares can be converted at any time at the request of the holder into equal numbers of Class A shares. With limited exceptions, the Class A shares and the Class B shares vote together as a single class. The Certificate of Incorporation provides that the Class B shares are entitled to elect 75% of ACC's board of directors, with the number of directors entitled to be so elected being rounded up to the next whole number, if necessary. The remainder of the directors are elected by the holders of the Class A shares. Accordingly, if the board consisted of ten members, as contemplated by the terms of the proposed strategic alliance, the Class B shares would elect eight of those ten members. Class B shares can be transferred only within a limited group of persons — essentially among members of the Stowers Family and certain charitable trusts established by them. Ownership of a Class B share can be transferred outside that group only by converting the share into a single Class A share (and upon any such conversion, each such share will have only one vote per share rather than 10,000 votes per share). At October 9, 1997, there were 13,368,717 Class A shares and 5,635.8603 Class B shares outstanding, and the members of the Stowers Family collectively held 48.28% of the outstanding equity interest in ACC and 69.75% of the combined voting power of both classes of shares of common stock.

V. JPM's Investment in ACC

JPM, ACC and ACC's principal stockholders have agreed to a transaction whereby ACC will sell, and JPM will purchase, shares of ACC common stock which will represent 45% of all outstanding shares of ACC's common stock (*i.e.*, 45% of the outstanding equity interest in ACC). The members of the Stowers Family will not be obligated to sell any shares in the proposed transaction, and do not intend to sell any. As described below, the 45% of the outstanding shares of ACC's common stock to be acquired by JPM would represent no more than 10.83% of the combined voting power of all outstanding shares of common stock.

Upon completion of JPM's purchase, JPM, ACC and ACC's principal stockholders will enter into the Stockholders Agreement pursuant to which, among other things, the parties will agree that:

(i) JPM will have the right to designate two members of ACC's board, which would consist of ten persons; the other eight members would be designated by the holders of the

Class B shares,² provided that at least six of the eight would be members of ACC's management (and of such six, two will be James E. Stowers, Jr. and James E. Stowers, III);

(ii) ACC will not take any of the actions listed on Annex A attached to this letter without JPM's prior consent (JPM's rights to approve those actions are sometimes referred to in this letter as the "Special Approval Rights"); and

(iii) JPM will have the right, but only upon the occurrence of certain extraordinary events, to replace certain members of ACC's management. These extraordinary events consist of (x) ACC's total assets under management declining by 25% or more in any calendar year following closing (net of any change in the market value of assets under management) or (y) events agreed to constitute extraordinary turnover in ACC's senior management³ (JPM's rights described in this clause (iii) are sometimes referred to in this letter as the "Management Replacement Rights").

The Stockholders Agreement also will provide for a "steering committee" comprised of equal numbers of representatives of ACC and JPM. That committee will perform a liaison function between the parties to the strategic alliance and coordinate the product, marketing, defined contribution and other activities of the alliance. It will not be a committee of ACC's board of directors and will have no legal authority to direct the management or operations of ACC.

VI. Investment Company Act and Investment Advisers Act

Section 15(a)(4) of the Investment Company Act requires that an advisory contract with an investment company provide for the contract's automatic termination in the event of its assignment. Similarly, Section 205(a)(2) of the Advisers Act provides that no assignment of an advisory contract can be made without the client's consent.

² At least 74.84% of the Class B shares would be owned by the Stowers Family after consummation of the strategic alliance.

³ If any three of ACC's Chief Executive Officer, Chief Operating Officer, Chief Investment Officer and Chief Marketing Officer cease to be employed by ACC in any 12-month period (other than by death, disability or normal retirement) or if any five of the individuals holding specified senior management positions (including those individuals holding the foregoing positions) cease to be employed by ACC in any 12-month period (other than as aforesaid), JPM can veto any replacement named by ACC's Board of Directors, and if no agreement with respect to the replacement is reached within three months of the event causing the replacement, JPM has the right to fill such position. In addition, if the Chief Operating Officer of ACC is one of those who has ceased to be employed, then JPM can either replace his successor or name his successor, as well as veto any selection of his replacement made by ACC's Board of Directors.

"Assignment" is defined under each Act to include "any direct or indirect *transfer* or hypothecation of a contract. . . , or of a controlling block of the assignor's outstanding *voting securities* by a security holder of the assignor."⁴ Although "controlling block" is not defined under either Act, "control" is defined under both Acts as "the power to exercise a controlling influence over the management or policies of a company, unless such power is solely the result of an official position with such company."⁵ In addition, the Investment Company Act provides for a rebuttable presumption of control where "any person . . . owns beneficially, either directly or indirectly through one or more controlled companies, more than 25% of the voting securities of a company." Conversely, a person who owns less than 25% of the *voting securities* of a company is presumed not to control the company.⁶ The staff has accepted the concept that a "controlling block" of stock means more than 25% of the outstanding voting securities of a company.⁷

Section 2(a)(42) of the Investment Company Act provides in relevant part:

⁴ See Investment Company Act §2(a)(4); Advisers Act §202(a)(1). The staff has interpreted the term "assignment" consistently under both Acts. See, e.g., Dean Witter, Discover & Co.; Morgan Stanley Group Inc., SEC No-Action Letter (avail. Apr. 18, 1997); Templeton Investment Counsel Ltd., SEC No-Action Letter (avail. Jan. 22, 1986).

In addition, rules enacted under both Acts create a safe harbor for transactions that do not result in a change of *actual control or management* of the investment adviser by providing that such transactions should not be deemed an assignment. See Rule 2a-6; Rule 202(a)(1)-1. The proposing releases for these rules suggest that they were enacted to exclude transactions that technically constitute an assignment under the Acts' definition of the term, but which, in fact, do not alter the actual control or management of the adviser and thus do not raise concerns about "trafficking" in investment advisory contracts, against which the prohibitions on assignment were meant to protect.

Since it is our view that the proposed investment does not give rise to an assignment within the language of the definitions under the Acts, we do not believe that it is necessary to analyze the proposed investment under the safe harbor provisions. However, it should be noted that the proposed transaction is consistent with the spirit of the safe harbor rules, as it does not involve an actual change in control or management of ACC.

⁵ Investment Company Act §2(a)(9); Advisers Act §202(a)(12).

⁶ See Investment Company Act §2(a)(9). The Advisers Act has no similar presumption; however, the staff has applied consistent principles in interpreting "assignment" under both Acts. See Dean Witter, Discover & Co.; Morgan Stanley Group Inc., SEC No-Action Letter (avail. Apr. 18, 1997); Templeton Investment Counsel Ltd., SEC No-Action Letter (avail. Jan. 22, 1986).

⁷ See, e.g., Wellington Management Company, SEC No-Action Letter (avail. November 29, 1979); Finomic Investment Fund Inc., SEC No-Action Letter (avail. June 18, 1973).

"Voting Security" means any security presently entitling the holder thereof to vote for the election of directors of a company. A specified percentage of the outstanding voting securities of a company means such amount of its outstanding voting securities as entitles the holder or holders thereof to cast said specified percentage of the *aggregate votes* which the holders of all the outstanding voting securities of such company are entitled to cast. (Emphasis supplied).

Thus, for these purposes, the relevant test in determining whether a block of voting securities is a controlling block is the number of votes represented by those securities as a percentage of total voting power.

VII. Analysis

A. Voting Securities

Neither the number of shares of common stock to be acquired by JPM nor its contractual rights to board representation will vest in it control of ACC. While JPM will acquire 45% of ACC's outstanding common stock and all those shares have voting rights, after its acquisition JPM will possess a maximum of 10.83%, and possibly as little as 8.63%, of the combined voting power of ACC's two classes of common stock. Under the Investment Company Act's definition of "voting security", for purposes of that Act, JPM will be deemed to hold between 8.63% and 10.83% of ACC's voting securities. The transfer of that amount of voting securities is presumed under the Investment Company Act not to involve a controlling block of ACC's voting securities because the level is below 25%. It is true that JPM also will have the contractual right to designate two out of ten (*i.e.*, 20%) of ACC's board of directors; however, even if, for purposes of the Investment Company Act, JPM's ability to designate 20% of the ACC's board means that it would be deemed to acquire 20% of the "voting securities" of ACC, that level of ownership nonetheless also is below 25%, with the result that JPM would be presumed under the Investment Company Act not to control ACC.

Similarly, the other terms of the strategic alliance do not involve a change in voting rights that could be deemed a transfer of a controlling block of ACC's voting securities. Under prior staff interpretations, if ACC's current stockholders, as a group, or its largest single stockholder were to lose 25% of their voting power as a result of the proposed transaction, a change of control could be deemed to occur.⁸ That, however, will not happen in this case. The

⁸ See note 14 of Dean Witter, Discover & Co.; Morgan Stanley Group Inc., SEC No-Action Letter (avail. April 18, 1997).

shares owned by the Stowers Family currently represent 69.75% of ACC's total voting power. Following the first phase of the transaction, the voting power of the shares owned by the Stowers Family will remain at not less than 69.75%, and conceivably could increase to as much as 87.55%, of total voting power.⁹ If and when JPM elected to exercise its option after three years, the shares owned by the Stowers Family will represent between 68.79% and 86.3% of ACC's total voting power. The Stowers Family currently owns 74.84% of the Class B shares (which elect at least 75% of ACC's board) and a majority of the Class A shares.¹⁰ After implementation of the strategic alliance, the Stowers Family, through its continued control of the Class B shares,¹¹ will have the right to elect eight of ten directors, subject only to the stipulation that six of the eight must be members of management. Since the Stowers Family has been instrumental in selecting members of management, this stipulation is not a material limitation on the Stowers Family's governance rights. All four of ACC's existing directors are members of management and were appointed by the Stowers Family. Even after implementation of the strategic alliance, all future members of management will be appointed by a Stowers-elected board. The continued control rights of the Stowers Family clearly rebut any inference that the proposed transaction could constitute a change in control. Indeed, the staff in the past has concurred that, even if the 25%-of-voting-securities test is satisfied (which is not the case here), the resulting presumption of a change of control may be rebutted when another party retains dominant control rights.¹² Based on that analysis, we believe that the Stowers Family's continued control of ACC would rebut a presumption of change of control even if JPM were acquiring more than 25% of voting power (which is not the case here). In the present case, the continued control by the Stowers Family refutes any possible inference that a transfer of a controlling block of ACC's stock to JPM will occur when the strategic alliance is consummated.

⁹ An increase in the Stowers Family's voting power would happen if non-Stowers Family stockholders elected to sell their Class B shares to JPM. Any Class B share so sold would be converted to a Class A share, thus reducing the total number of votes attributable to all shares of common stock of ACC then outstanding. That in turn would increase the percentage voting power of the remaining Class B shares held by the Stowers Family.

¹⁰ Currently, a representative of another block of minority shareholders is required to be elected to the board pursuant to the terms of an unrelated shareholders agreement. It is expected that the shareholders agreement will be eliminated as part of the proposed strategic alliance.

¹¹ The Stowers Family would own at least 74.84%, and quite possibly all, of the Class B shares following consummation of the transaction.

¹² See, e.g., Templeton Investment Counsel Ltd., SEC No-Action Letter (avail. Jan. 22, 1986) (internal restructuring resulting in transfer of approximately 36% of outstanding capital stock not a change of control as dominant shareholder continues to control company), and the no-action letters cited therein.

B. Power to Exercise a Controlling Influence

Under the terms of the proposed transaction, JPM will have the Special Approval Rights and, under certain extraordinary circumstances, the Management Replacement Rights. The existence of these consent and replacement rights does not justify rebutting the presumption that, because less than 25% of the voting rights in ACC will be transferred, no transfer of a controlling block of voting securities will occur. The Special Approval Rights and Management Replacement Rights are not intended to, and will not, give JPM the right to direct day-to-day management of ACC. Rather, they will apply only in extraordinary situations. Furthermore, they merely provide JPM with limited consent rights, as opposed to the right to affirmatively direct the activities of ACC. Had these provisions been in effect during the past three years, the only transaction that would have triggered the need for JPM's approval would have been the acquisition by ACC of Benham Management International, Inc. and certain amendments to ACC's Certificate of Incorporation made in anticipation of that acquisition. None of the investor protection or other policy considerations underlying the Acts would be advanced by treating ACC's need to obtain a minority stockholder's consent for these types of extraordinary transactions as involving a transfer of a controlling block of ACC's voting securities (and hence leading to automatic termination of investment advisory contracts with clients). Indeed, if that interpretation were correct, many loan agreements, which customarily include "negative covenants" against extraordinary transactions without the lender's consent, similarly could be deemed to involve changes of control.

After the proposed transaction, ACC's current stockholders will retain approximately 90% of the voting power in ACC and the right to appoint 80% of ACC's directors. It is expected that members of current management will continue to manage ACC's daily operations. Members of the Stowers Family will continue to hold key management positions (James E. Stowers, Jr. will be the Chairman and James E. Stowers, III, his son, will be the Chief Executive Officer), and the Stowers Family would have the right to designate or elect eight directors to the board and will own 48.28% of the equity interest of ACC (43.28% if JPM's option were exercised after three years). Members of management who, absent extraordinary circumstances, will be appointed by the Stowers Family, will constitute at least 60% of ACC's board of directors.

There will be no change in the personnel or operations of ACC (other than (i) in the areas of marketing and distribution, which will change only to the extent of the joint marketing efforts described in Part II of this letter and (ii) to the extent of applicable regulatory requirements). ACC and JPM each will continue to operate independently, and JPM will not have control of the daily operations of ACC. Accordingly, neither JPM's equity investment in ACC, nor the Special Approval Rights or the Management Replacement Rights, will give JPM a controlling influence over the management and policies of ACC as contemplated by the Acts. Certainly, nothing in any of these arrangements involves the "trafficking" in investment advisory

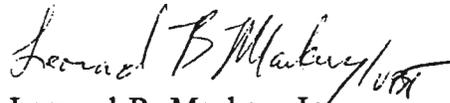
contracts against which the prohibitions on assignment are intended to protect.¹³ For these reasons, it is our opinion the proposed transaction would not effect an "assignment" of the advisory contracts of ACC's advisory subsidiary as that term is defined in Section 2(a)(4) of the Investment Company Act and Section 202(a)(1) of the Advisers Act.

* * *

For the reasons set forth above, we are of the opinion that the acquisition of 45% of the shares of Class A common stock of ACC by JPM will not result in a "change of control" or a transfer of a controlling block of the voting securities of ACC, within the meaning of the Acts. We respectfully request that the Division, based on our opinion that the shares to be acquired by JPM, including giving effect to the rights associated with those shares that JPM will have under the terms of the acquisition, do not constitute a controlling block of voting securities of ACC, not recommend enforcement action to the Commission under Section 15(a)(4) of the Investment Company Act or Section 205(a)(2) of the Advisers Act if ACC proceeds with the proposed transaction and its advisory subsidiary continues to provide services and receive compensation under the existing advisory contracts between that subsidiary and its investment company clients or, without obtaining their consent, other advisory clients.

Should you require additional factual information or further analysis, please contact either me at (212) 878-8489 or John Healy at (212) 878-8281. We thank you for your prompt consideration of this matter.

Sincerely,


Leonard B. Mackey, Jr.

cc: William M. Lyons, Esq.
Edward J. Kelly, III, Esq.
Nora Jordan, Esq.

¹³ See Investment Trusts and Investment Companies: Hearings on S. 3580, 76th Cong., 3d Sess. 253 (1939) (statement of David Schenker, Chief Counsel, Securities and Exchange Commission Investment Trust Study); Investment Company Act Release No. 10809 (Aug. 6, 1979) (proposing Rule 2a-6).

The approval of majority of the Board of Directors of ACC, and a majority of the JPM Directors on the Board, shall be necessary for ACC to effect any of the following actions:

(a) Any merger, consolidation, acquisition or joint venture, partnership, or business combination of ACC or any of its controlled subsidiaries with or into any other person other than an acquisition (including an acquisition structured as a merger, consolidation or other business combination) that the Board determines in good faith is incidental to the business and operations of ACC and in which the aggregate purchase price payable by ACC in such transaction or series of related transactions does not exceed an amount equal to (i) in the case of any such transaction or series of related transactions for which the relevant date is on or prior to December 31, 1998, the greater of (x) 20% of ACC's tangible stockholders' equity at the relevant date or (y) \$60 million, or (ii) in the case of any transaction for which the relevant date is later than December 31, 1998, 20% of tangible stockholders' equity at the relevant date;

(b) Any sale, lease, assignment or other disposition by ACC or any of its controlled subsidiaries, in any single transaction or series of related transactions, of any tangible or intangible assets with an aggregate value in excess of (i) in the case of any such transaction or series of related transactions for which the relevant date is on or prior to December 31, 1998, the greater of (x) 20% of ACC's tangible stockholders' equity at the relevant date or (y) \$50 million, or (ii) in the case of any transaction or series of related transactions for which the relevant date is later than December 31, 1998, 20% of ACC's tangible stockholders' equity at the relevant date;

(c) Any transaction involving or consisting of a voluntary, consensual pledge of, mortgage of, grant of a security interest in, or other encumbrance in the nature of a pledge or mortgage of, any tangible or intangible assets of ACC or any of its controlled subsidiaries other than such pledges, mortgages, security interests and encumbrances in existence on the date of the Stockholders Agreement (including any extensions thereof), that, together with all other such pledges, mortgages, security interests and encumbrances made, granted or created after the date of the Stockholders Agreement and in existence, secures indebtedness in an aggregate amount in excess of an amount equal to (i) in the case of any such transaction for which the relevant date is on or prior to December 31, 1998, the greater of (x) 20% of ACC's tangible stockholders' equity at the relevant date or (y) \$50 million, or (ii) in the case of any transaction for which the relevant date is later than December 31, 1998, 20% of tangible stockholders' equity at the relevant date;

(d) Any transaction pursuant to which ACC or any of its controlled subsidiary incurs, assumes or otherwise becomes liable for any indebtedness other than (i) indebtedness in existence on the date of the Stockholders Agreement and any replacements or refinancings thereof or (ii) indebtedness incurred for working capital purposes and under letter of credit facilities and finance leases that, together with all other such indebtedness described in this clause (ii) that remains outstanding at the relevant date of the transaction represents in the aggregate indebtedness having an aggregate principal amount not in excess of (1) in the case of

any such transaction for which the relevant date is on or prior to December 31, 1998, the greater of (x) 20% of ACC's tangible stockholders' equity at the relevant date or (y) \$50 million, or (2) in the case of any transaction for which the relevant date is later than December 31, 1998, 20% of ACC's tangible stockholders' equity at the relevant date;

(e) Any issuance of equity securities of ACC (including preferred stock, options to acquire equity securities and securities convertible into equity securities) or any of its controlled subsidiaries other than, in the case of equity securities of ACC only, those pursuant to any incentive arrangement authorized by the Board;

(f) Any increase in budgeted total operating expenses for any calendar year by more than 20% of the prior year's actual total operating expenses unless the percentage increase in budgeted total operating expenses for that year is less than 20 percentage points greater than the increase in budgeted total operating revenues for that year over the prior year's actual total operating revenues;

(g) Commencement of any voluntary proceeding in respect of ACC or any of its controlled subsidiaries seeking liquidation, reorganization, dissolution or bankruptcy;

(h) Except as provided in the Stockholders Agreement, entry by ACC or any of its controlled subsidiaries into any contract or transaction with, or for the benefit of, any affiliate or corporate affiliate of ACC other than a controlled subsidiary of ACC;

(i) Entry by ACC or any of its controlled subsidiaries into any material agreement, or related series of agreements that in the aggregate are material, including agreements comprising commitments to make capital expenditures, under which the aggregate amount of payments expected to be made by ACC, divided by the number of years over which the payments are expected to be made is greater than (i) in the case of agreements for which the relevant date is on or prior to December 31, 1998, the greater of (x) 20% of ACC's tangible stockholders' equity at the relevant date or (y) \$50 million, or (ii) in the case of agreements for which the relevant date is later than December 31, 1998, 20% of ACC's tangible stockholders' equity at the relevant date;

(j) Payment of dividends (or other distributions) by ACC to its stockholders in any calendar year that would represent a higher percentage increase over the previous calendar year than the percentage increase in ACC's net income over the same period or adoption of any dividend (or distribution) policy that is not consistent with the ACC's past practices and policies;

(k) After the three-year period following the date of the Stockholders Agreement, any *pro rata* redemption, *pro rata* repurchase or other *pro rata* acquisition of outstanding equity securities of ACC by ACC or any of its controlled subsidiaries, other than any such transaction in connection with incentive arrangements;

(l) Termination of, or material alteration of the responsibilities of, any senior officer of ACC;

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(m) Adoption of any material changes in ACC's compensation policies as in effect from time to time;

(n) Any amendment of the charter or by-laws of ACC other than amendments that effect only immaterial changes not adverse to JPM;

(o) Any change in the number of members of the Board except pursuant to other provisions of the Stockholders Agreement;

(p) The selection of any replacement for ACC's independent auditors;

(q) Any material change in any accounting, tax or legal compliance policy of ACC or any of its controlled subsidiaries unless required in the good faith opinion of the Board by changes in law, regulation or accounting conventions or principles;

(r) Entry into, or conduct of, any business or line of business other than those described as ACC's lines of business in the Vision Statement, or discontinuation of any material line of business in which ACC is engaged at the date of the Stockholders Agreement;

(s) Engaging in any activity that is inconsistent with applicable banking laws or regulations or with any of the undertakings given prior to the date of the Stockholders Agreement to bank regulatory authorities and listed in a schedule to the Stockholders Agreement, or engaging in any new activity requiring consent or approval from any bank regulatory agency without such consent or approval first having been obtained (it being understood and agreed that, if requested by the Board, JPM will use its best efforts to obtain any such consent or approval); provided, that under no circumstance shall ACC be required following the date of the Stockholders Agreement to terminate or modify any activity if to do so would materially impact the manner in which ACC or its subsidiaries provides services directly to or interacts with existing and prospective shareholders of the registered investment companies advised by ACC or its subsidiaries; or

(t) Except as contemplated by the Vision Statement, usage of the J.P. Morgan and related brand names.