

INCOMING LETTER:

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

Re: SCP Private Equity Partners II, L.P.

Gentlemen:

We are writing on behalf of SCP Private Equity Partners II, L.P. (the "Fund"), requesting that the staff of the Division of Investment Management (the "Staff") concur with our view that, for purposes of Section 2(a)(51)(A)(iii) of the Investment Company Act of 1940, as amended (the "Act"), the Trust (as defined below) will not be deemed to have been formed or operated for the specific purpose of acquiring securities offered by an entity that is excepted from the definition of "investment company" by Section 3(c)(7) of the Act (a "3(c)(7) Fund").

FACTS AND ASSUMPTIONS

The Fund is organized as a limited partnership under the laws of the State of Delaware. The purpose of the Fund is to generate returns for its partners through long-term investments in equity and equity-related securities. It is not an investment company within the meaning of the Act because interests in the Fund are beneficially owned by fewer

than 100 persons as determined in accordance with Section 3(c)(1) of the Act and the rules promulgated thereunder. The Fund began operations in June 2000, raised approximately \$560 million through the sale of limited partnership interests to limited partners and has made numerous investments. Pursuant to the Fund's Limited Partnership Agreement (the "Partnership Agreement"), the Fund's term of existence will expire in June 2010 unless it is extended or terminated pursuant to the Partnership Agreement. The Fund is a Qualified Purchaser as defined in Section 2(a)(51)(A)(iv) of the Act because it acts for its own account and owns and invests on a discretionary basis not less than \$25,000,000 in investments and is not disqualified under Rule 2a51-3(a). Not all of the limited partners of the Fund are Qualified Purchasers as defined in Section 2(a)(51)(A)(i) – (iv) of the Act.

The Fund has made investments and is considering making additional investments in one or more 3(c)(7) Funds. The securities of the 3(c)(7) Funds acquired by the Fund are referred to in this letter as the "3(c)(7) Interests." The aggregate cost basis of all of the 3(c)(7) Interests does not represent a significant portion of the approximately \$560 million of capital raised by the Fund.

Each of the 3(c)(7) Funds has a fixed term of existence that is expected to expire after the expiration of the Fund's term of existence. Therefore, the Fund may be holding 3(c)(7) Interests in one or more 3(c)(7) Funds when the Fund is required to liquidate pursuant to the Partnership Agreement.

Prior to or at the time of its liquidation, the Fund typically would seek to sell its remaining assets and distribute the proceeds to its partners. However, as these assets, including 3(c)(7) Interests, usually represent investments in securities of private issuers that have not been registered under the Securities Act of 1933, and that may be subject to contractual restrictions on transfer, these assets are not readily transferable. Due to these restrictions on transfer, and other factors such as economic and market conditions at the time, the Fund may determine that it is not in the financial best interests of the limited partners in the Fund to seek to sell one or more of the 3(c)(7) Interests.

Ordinarily, the alternative to a sale of Fund assets would be to distribute the assets in kind to the Fund's partners. However, distributing 3(c)(7) Interests in-kind will not be possible in most situations because the 3(c)(7) Funds will only permit an in-kind distribution of their respective 3(c)(7) Interests if such distribution would not cause the 3(c)(7) Fund to be required to register as an investment company under the Act. Absent such a limitation on transfers, a distribution of a 3(c)(7) Interest by the Fund to a limited partner who is not a Qualified Purchaser, as defined in Section 2(a)(51)(A)(i) – (iv) of the Act, at the time of the transfer could cause the 3(c)(7) Fund to lose its ability to continue to rely on the exception from the definition of "investment company" under Section 3(c)(7) of the Act. Since it is highly likely that not all of the limited partners of the Fund will be Qualified Purchasers as defined in Section 2(a)(51)(A)(i) – (iv) of the Act at the expiration of the Fund's term of existence, the Fund will not be able to distribute 3(c)(7) Interests in-kind to the limited partners of the Fund.

In order to not be compelled to sell 3(c)(7) Interests at a time when such a sale is against the best interests of its limited partners, the Fund would propose to transfer one or more of the 3(c)(7) Interests to a liquidating trust (the "Trust") for liquidation some time after the Fund's liquidation date. The Trust will be formed contemporaneously with the liquidation and dissolution of the Fund. The sole beneficial owners of the Trust will be the partners in the Fund (in the same proportion as their partnership interests in the Fund as of its liquidation date). The Trust will meet the exception from the definition of "investment company" contained in Section 3(c)(1) of the Act. The limited partners of the Fund will not participate in the decision to organize the Trust. The Trust will hold each 3(c)(7) Interest until the 3(c)(7) Fund of that 3(c)(7) Interest itself is liquidated or until the 3(c)(7) Interest can be prudently sold. The trustee of the Trust will be an institution that is a Qualified Purchaser as defined in Section 2(a)(51)(A)(i) – (iv) of the Act and will not be an affiliate of any of the 3(c)(7) Funds.

The activities of the Trust will be limited to liquidating, in an orderly fashion, the 3(c)(7) Interests transferred to it by the Fund, and distributing the proceeds of the liquidation to the Trust's beneficial owners (as well as activities designed to assure that liquidation and distribution). The beneficial interests in the Trust will not be transferable, except by operation of law or upon the death of the beneficial owner. The Trust will terminate upon the complete liquidation of the 3(c)(7) Interests.

LEGAL ANALYSIS

In order for each 3(c)(7) Fund to continue to be able to rely on the exemption provided by Section 3(c)(7) of the Act following distribution of 3(c)(7) Interests to the Trust, the Trust, as the holder of the 3(c)(7) Interests, must be a "Qualified Purchaser" as defined in Section 2(a)(51)(A)(i) – (iv) of the Act.

As a trust, the Trust will be a Qualified Purchaser if it satisfies Section 2(a)(51)(A)(iii) of the Act, which states that a Qualified Purchaser includes "any trust that is not covered by clause (ii) and that was not formed for the specific purpose of acquiring the securities offered, as to which the trustee or other person authorized to make decisions with respect to the trust, and each settlor or other person who has contributed assets to the trust, is a person described in clause (i), (ii), or (iv)" of Section 2(a)(51)(A) of the Act.

As stated above, the trustee will be a Qualified Purchaser and will not be an affiliate of any of the 3(c)(7) Funds. For purposes of this letter, we assume that the Fund (as the settlor of the Trust) will be a Qualified Purchaser when the Trust is organized.

The Trust therefore will qualify as a Qualified Purchaser unless it has been "formed for the specific purpose of acquiring the securities offered." We believe that the Trust should be regarded as not being formed for that purpose.

In the American Bar Association Section of Business Law no-action letter (publicly available April 22, 1999), question D, the Staff of the Commission gave guidance as to when an entity is deemed to be formed for the specific purpose of acquiring securities in an investment company relying on Section 3(c)(7) of the Act to avoid registration under the Act. The Staff's response to question D states that Section 2(a)(51)(A)(iii) of the Act "limits the possibility that a company will form an entity for the specific purpose of making an investment in a Section 3(c)(7) Fund available to investors that themselves are not qualified purchasers. This conduct also may raise issues under Section 48(a) of the Investment Company Act, which prohibits an entity from doing indirectly what it is prohibited from doing directly, and gives the Commission the authority to "look-through" a transaction if it is a sham or conduit formed or operated for no purpose other than circumventing the requirements of the Act."

As we have described,

- the Fund has existed for over four years and will have existed for ten years when it is liquidated;
- the Fund has made and will make numerous investments;
- the aggregate cost basis of the 3(c)(7) Interests does not represent a significant portion of the capital of the Fund;
- the trustee of the Trust will be a Qualified Purchaser as defined in Section 2(a)(51)(A)(i) – (iv) of the Act and will not be an affiliate of the 3(c)(7) Funds;
- the Trust will be organized solely to avoid forcing the general partner of the Fund to sell the 3(c)(7) Interests at a time that may be detrimental to the limited partners of the Fund;
- upon the transfer of the 3(c)(7) Interests to the Trust, the same parties which held the 3(c)(7) Interests indirectly as partners of the Fund will continue to hold the 3(c)(7) Interests indirectly as beneficiaries of the Trust; and
- the 3(c)(7) Interests are expected to be held in the Trust for an extended period of time.

Therefore, we believe that the Trust is not the type of vehicle that Section 2(a)(51)(a)(iii) of the Act is designed to prohibit from being a Qualified Purchaser and believe that the Trust satisfies Section 2(a)(51)(a)(iii) of the Act.

CONCLUSION

Based on the forgoing, we respectfully request the advice of the Staff that it concur with our view that, for purposes of Section 2(a)(51)(A)(iii) of the Act, the Trust will not be deemed to have been formed or operated for the specific purpose of acquiring securities offered by a 3(c)(7) Fund and that, following transfers by the Fund of the 3(c)(7)

Interests to the Trust, the 3(c)(7) Funds may continue to rely upon the exemption set forth in Section 3(c)(7) of the Act following such transfers based upon the Trust's status as a Qualified Purchaser.

Furthermore, we respectfully request that the Staff inform the undersigned before the Staff responds in writing to this inquiry if the Staff disagrees with the views expressed herein or if any additional information is required.

Please acknowledge receipt of this letter by date stamping the enclosed copy and returning it to our offices in the enclosed self-addressed, stamped envelope.

Very truly yours,

Lawrence D. Rovin