PUBLIC

5 AUG 1994

Our Ref. No. 94-479-CC
Integrated Resources, Inc.
File No. 132-3

RESPONSE OF THE OFFICE OF CHIEF COUNSEL
DIVISION OF INVESTMENT MANAGEMENT

On the basis of the facts and representations in your letter of August 4, 1994, we would not recommend enforcement action to the Commission if Presidio Capital Corp. ("Holding Company") and certain other entities directly or indirectly owned by Holding Company (together with Holding Company, the "Liquidating Entities") do not register under the Investment Company Act of 1940 in reliance on the exceptions in Sections 7(a) and 7(b) for "transactions which are merely incidental to the dissolution of an investment company."[1] The Liquidating Entities were created to liquidate certain non-cash assets of Integrated Resources, Inc. (the "Acquired Assets") and distribute the proceeds thereof.

Our position is based on your representations that the Liquidating Entities:

(1) exist solely to liquidate the Acquired Assets and distribute the proceeds to holders of Holding Company common stock;

(2) will be prohibited from conducting a trade or business (other than maintaining going concern businesses acquired from Integrated Resources, Inc. pending sale or liquidation thereof), and from making any investments, except for temporary investments in money market instruments, government short-term securities, or other investment grade short-term debt securities pending the distribution of liquidation proceeds to beneficiaries; and

(3) will not hold themselves out as investment companies, but rather as liquidating entities.

You also represent that the Liquidating Entities will dissolve on or before the fifth anniversary of the effective date of the plan of liquidation unless additional no-action assurance is obtained from the staff. You state that Holding Company and its manager believe the Acquired Assets can be liquidated within three to five years. Liquidation of the Acquired Assets, however, is subject to significant uncertainties due to general business and economic conditions and the illiquidity of certain Acquired Assets. The Acquired Assets include, among other things, rights to various deferred payment obligations ("Contract Rights"), interests in partnerships that invest in various operating businesses, interests in real estate partnerships and fee interests in certain parcels of land. Holding Company and its manager believe that given the complex, highly illiquid, and varied nature of the Acquired Assets,

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[1] We express no opinion on whether the principal assets of the Liquidating Entities would constitute "securities" for purposes of Section 2(a)(36), or "investment securities" for purposes of Section 3(a)(3).

as well as the amount and large value of such assets, these assets will require up to five years for an orderly liquidation. For example, you represent that the Contract Rights could produce significantly different values depending on whether they are sold immediately at a deep discount, over time, or held until maturity. You believe that in time the Contract Rights could be sold in bulk for a reasonable value.

Our position is also based on your representations that, although Holding Company's common stock will be transferable for the benefit of the creditors of Integrated Resources:

(1) Holding Company and its manager, CD Co., will not:

(a) cause the stock to be listed on any national securities exchange or NASDAQ,

(b) engage the services of any market maker, facilitate the development of an active trading market or encourage others to do so,

(c) place any advertisements in the media promoting investments in Holding Company common stock, or

(d) except as required under Item 201(a) of Regulation S-K promulgated under the Securities Exchange Act of 1934 (the "1934 Act"), collect or publish information about prices at which Holding Company's common stock may be transferred;

(2) an active trading market in the common stock of Holding Company is unlikely to develop; and

(3) Holding Company will comply with the registration and reporting requirements of the 1934 Act.

Our position is based on the facts and representations in your letter. Any different facts or representations may require a different conclusion. Moreover, this response expresses the Division's position on enforcement action only and does not express any legal conclusions on the issues presented.

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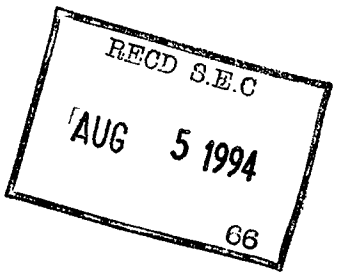
ACT ICA-40
SECTION 7(a)
RULE
PUBLIC AVAILABILITY 8/5/94

Sections 3(a), 7(a) and 7(b) of the Investment Company Act of 1940

August 4, 1994



VIA FEDERAL EXPRESS

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

Re: **Integrated Resources, Inc.**

Dear Ms. Stam:

On behalf of Steinhardt Management Company, Inc. and certain of its affiliates (the "Steinhardt Group"), CD Co. (the "Manager") and Presidio Capital Corp. ("HoldingCo"), we respectfully request your confirmation that HoldingCo and certain other liquidating entities which are being formed by the Steinhardt Group, the Manager and existing creditors (the "Creditors") of Integrated Resources, Inc. (the "Debtor") for the purpose of acquiring and liquidating substantially all of the assets of the Debtor pursuant to a plan of reorganization currently proposed in the Debtor's pending bankruptcy proceeding will not be required to register under the Investment Company Act of 1940, as amended (the "Company Act"), in reliance on Sections 7(a) and 7(b) thereof.

I. Summary of Proposed Transaction.

The Debtor filed for bankruptcy under Chapter 11 of the Bankruptcy Code in February, 1990, and has been unsuccessful in confirming a plan of reorganization for over four years. The Creditors have made claims against the Debtor exceeding $1.9 billion.[1] The Debtor has approximately $500 million in cash and various other assets, many of which are highly illiquid.

The Steinhardt Group initially proposed a cash offer for the Debtor's assets in March of 1992 which was subsequently rejected by the Creditors. The Creditors have indicated that they wish to participate in the equity of any entity formed for the purpose of liquidating the Debtor's assets in the expectation that they would thereby realize greater value on their original investment. In response, and after extensive negotiations with the Debtor and Creditors, the Manager and the Steinhardt Group developed a plan of reorganization (the "Plan"), described in a disclosure statement which has been approved by the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court"), which provides for (i) substantially all of the non-cash assets of the Debtor (the "Acquired Assets") to be transferred to HoldingCo and certain other entities directly or indirectly owned by HoldingCo for the purpose of liquidation (collectively, the "Liquidating Entities") and (ii) the Creditors to receive common shares of HoldingCo for all or a part of their claims against the Debtor. HoldingCo and the Manager anticipate that the Liquidating Entities will liquidate the Acquired Assets within five years. The Creditors have insisted that the common shares they acquire be transferable as a condition to their supporting the Plan.

The Plan has received the endorsement of each of the three official committees of Creditors appointed in the Debtor's bankruptcy case (the "Bankruptcy Case"), and the necessary votes of Creditors for confirmation.

We seek your concurrence that the Liquidating Entities will not be deemed to be investment companies in reliance on Sections 7(a) and 7(b) of the Company Act.

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[1] Shareholder's equity and certain other claims would be discharged pursuant to the bankruptcy.

II. Background.

A. *The Debtor and its Bankruptcy Case.*

The Debtor's Bankruptcy Case is currently pending in the Bankruptcy Court before the Honorable Cornelius Blackshear. Prior to filing the Bankruptcy Case in 1990, the Debtor was a financial services company engaged primarily in the organization, management and sale of direct participation investment programs, generally taking the form of limited partnerships organized to own, develop and manage real estate; operating businesses, including the manufacturing of private jet aircraft, residential fireplaces and musical instruments; the ownership and operation of cable television franchises, network television affiliates and soft drink bottling companies; and the operation of life insurance companies and independent general agencies. The Debtor continues to be in possession of its remaining properties and is managing its business as a debtor-in-possession. Since the commencement of its Chapter 11 case, the Debtor has disposed of certain assets.

Initially, the Steinhardt Group submitted a proposal to the Debtor and the Creditors to acquire the assets of the Debtor pursuant to a plan of reorganization of the Debtor to be funded by the Steinhardt Group which would have provided solely for cash distributions to all Creditors which held allowed claims in the bankruptcy proceedings. This proposal was rejected by the Creditors who have made it clear that in order to obtain approval of the Creditors any plan of reorganization must (i) offer the Creditors the option to have a participation in the Debtor and any entity to which assets of the Debtor are transferred for purposes of liquidation rather than an up-front cash payment, (ii) provide that the non-cash assets of the Debtor be liquidated in a prudent and expeditious manner but not in haste at "deep discount" and (iii) provide that the securities held by the Creditors constituting their indirect interest in the non-cash assets of the Debtor not be subject to transfer restrictions. The Plan has been structured so as to satisfy these conditions. A qualifying vote of Creditors (generally a majority by number and two-thirds by value of each class) is required to approve the Plan.

The receipt of a no action position as to the issues raised in this request is a condition to both confirmation and consummation of the Plan.

Pursuant to various orders of the Bankruptcy Court, the Plan and a "backup" plan proposed by the Debtor have been presented to the Creditors in a joint disclosure

statement (the "Disclosure Statement").[2] On May 5, 1994, the Bankruptcy Court entered an order approving the Disclosure Statement, which was mailed to Creditors together with copies of the Plan and the backup plan on May 31, 1994. A majority by number and more than two-thirds by value of each class of Creditors entitled to receive distributions under the Plan have now voted in favor of the Plan, and the hearing on the confirmation of the Plan is scheduled for August 8, 1994. Assuming the Plan is confirmed and the conditions to closing are satisfied, it is anticipated that the consummation of the Plan will occur during 1994 (the "Consummation Date").

B. ***The Plan.***

The Plan provides that the Acquired Assets will be acquired by the Liquidating Entities, which will consist of (i) a newly formed Delaware Limited Partnership (the "Acquisition Partnership") of which the sole partners will be two newly formed British Virgin Islands corporations owned by HoldingCo, (ii) one or more newly-formed Delaware corporations (collectively, "DomesticCo") and (iii) HoldingCo, which is a newly formed holding company under the laws of the British Virgin Islands that will hold directly or indirectly all of the interests in the Acquisition Partnership and DomesticCo. Directors of HoldingCo will be designated by the Creditors and by a Steinhardt Group affiliate. The Liquidating Entities will acquire the Acquired Assets on the Consummation Date pursuant to an Asset Purchase Agreement with the Debtor (the "Asset Purchase Agreement").[3] The

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[2] The Debtor's "back-up" plan (which involves no third party funding) will only be considered by the Bankruptcy Court if the Plan is unable to be confirmed or to consummate within certain deadlines. The Official Committee of Holders of Bank Debt and the Official Committee of Senior Public Debt and Commercial Paper Holders, together with the Penguin Group, L.P., previously jointly proposed a third, competing plan, which was later withdrawn, in approximately November of 1993.

[3] Under the proposed liquidating structure, assets of the Debtor which do not consist of operating companies, such as the Contract Rights assets described below, will be transferred to the Acquisition Partnership, non-U.S. partners of which generally would not be subject to a corporate level of U.S. income taxation because they will not engage in a U.S. trade or business. All operating U.S. businesses of the Debtor will be held in the one or more U.S. companies comprising DomesticCo, and certain assets will be transferred to HoldingCo. The acquisition of assets by separate affiliated corporations will maximize the liquidation proceeds available for distribution by insulating a group of assets from potential liabilities which may be incurred with

(continued...)

Contract Right assets, described below, will be acquired by the Acquisition Partnership. DomesticCo and HoldingCo will acquire all of the remaining Acquired Assets. Substantially all of the approximately $500 million in cash held by the Debtor will be distributed to the Creditors directly by the Debtor on the Consummation Date.[4]

The Plan provides that the Creditors may elect to receive up to 88% of the common stock in HoldingCo (the "HoldingCo Common Stock") in lieu of all or a portion of the cash distributions to which they otherwise would have been entitled, and that an affiliate of the Steinhardt Group will acquire for cash the remaining 12% of the shares of HoldingCo Common Stock. The 12% of the shares of HoldingCo Common Stock acquired by the Steinhardt Group affiliate will be designated Class B and will be entitled to elect two "Class B" directors, and all other shares of HoldingCo Common Stock will be designated Class A and will be entitled to elect three "Class A" directors. The Plan does not provide for any concurrent offering of HoldingCo Common Stock to the public at large or any concurrent offering of preferred stock or debt securities. To the extent that Creditors elect to receive HoldingCo Common Stock in excess of the aggregate amount available, the number of shares of HoldingCo Common Stock to be received by each electing Creditor will be subject to reduction on a pro rata basis. If Creditors initially elect to receive less than 88% of the HoldingCo Common Stock, the Steinhardt Group affiliate is required to purchase additional shares so that it receives up to 25% of the HoldingCo Common Stock. Any remaining shares shall be eligible for acquisition for cash by those electing Creditors which had

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[3](...continued)
respect to an activity or asset unrelated to that asset group and will allow for the resulting proceeds to be distributed by the corporation as a liquidating distribution, rather than as a fully taxable dividend.

[4] The Plan also provides that a limited number of non-cash assets of the Debtor, which are not included in the Acquired Assets, will be transferred to ERC Corp. ("ERC"). These assets principally include equipment leasing interests (or, at the election of the Steinhardt Group or in the event such interests are sold prior to the Consummation Date, real estate leasing interests) and the Debtor's interest in various litigations and claims. You may assume for purposes of this no action request that ERC will not be an investment company for purposes of Section 3(a) of the Company Act. Upon the Consummation Date, 88% of ERC's common stock (the "ERC Common Stock") will be transferred to the Debtor's disbursing agent for distribution to the Creditors pursuant to the Plan. The remaining 12% of ERC's outstanding stock will be transferred to Steinhardt Management Company, Inc. in consideration of its agreement to oversee the management of the affairs of ERC.

previously elected to receive HoldingCo Common Stock in lieu of 100% of the cash distribution they would have otherwise received, and, thereafter, by the Steinhardt Group affiliate. If any shares remain, they will be distributed to Creditors on account of their claims. In addition, certain shares of HoldingCo Common Stock may be reserved in respect of disputed claims, which if ultimately disallowed, would be available for purchase by holders of Class A HoldingCo Common Stock. The HoldingCo Common Stock will not be the subject of any secondary distribution, but will not otherwise be subject to restrictions on transfer.

HoldingCo will enter into a management agreement with the Manager pursuant to which the Manager will have discretion to direct the "disposition, liquidation, sale, securitization or other realization of the value" of such assets. In consideration of such services, the Manager will receive a fee (the "Management Fee") of $1.25 million per year and reimbursement of all reasonable out-of-pocket expenses. The Management Fee compensates the Manager for its services in managing the liquidation of the Acquired Assets. Steinhardt Management Company, Inc. will provide certain consulting services to the Manager and will also receive a fee of $1.25 million per year. The Manager and Steinhardt Management Company, Inc. will not receive any other compensation for their services to HoldingCo.

The Liquidating Entities will exist solely for the purpose of liquidating the Acquired Assets and dissolving, which will be reflected in the constitutional documents of HoldingCo. The Liquidating Entities (1) will exist solely for purposes of liquidating the Acquired Assets and distributing the proceeds thereof to the holders of HoldingCo Common Stock; (2) will be prohibited from conducting a trade or business (other than maintaining going concern businesses acquired from the Debtor pending sale or liquidation thereof) and will not make any investments, except for temporary investments in cash equivalents and government securities, pending the distribution of liquidation proceeds to beneficiaries; (3) will not hold themselves out as investment companies, but rather as liquidating entities; and (4) will dissolve on or before the fifth anniversary[5] of the Consummation Date unless prior

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[5] In *MPC Liquidating Trust* (Avail. March 10, 1994), the trust was represented to liquidate its assets and dissolve within three years. As discussed below, in light of greater amount and highly illiquid nature of the Acquired Assets, it is anticipated that the Acquired Assets will require between three to five years to liquidate.

thereto additional no action assurance is received from the staff of the Division of Investment Management (the "IM Staff").[6]

HoldingCo Common Stock will be transferrable. HoldingCo will comply with the registration and reporting requirements under the Securities Exchange Act of 1934 (the "1934 Act"). From and after the Consummation Date, the Manager and HoldingCo will not cause HoldingCo Common Stock to be listed on any national securities exchange or NASDAQ, will not engage the services of any market maker, will not facilitate the development of an active trading market or encourage others to do so and will not place any advertisement in the media promoting investments in HoldingCo Common Stock or, except as required under Item 201(a) of Regulation S-K promulgated under the 1934 Act, collect or publish information about prices at which HoldingCo Common Stock may be transferred.

It is likely that following the Consummation Date some trading will occur in HoldingCo Common Stock. However, HoldingCo and the Manager believe that it is unlikely that such trading will be active or that a significant market will develop of holders far beyond the initial holders who are familiar with the Debtor and the Acquired Assets. Such trading is unlikely in light of the lack of a listing in HoldingCo Common Stock, the fact that HoldingCo and the Manager will not engage any market maker or collect or publish information about prices at which HoldingCo Common Stock may be transferred as set forth above, the limited term of HoldingCo and the complexity of the Acquired Assets.

The Acquired Assets are expected to be fully liquidated within five years. Liquidation of the Acquired Assets is subject to significant uncertainties, such as general business and economic conditions and the illiquidity of certain Acquired Assets. It is possible that the actual period which may be required to effect the liquidation of some of the Acquired Assets may exceed the expected five year period. As noted above, however, under its constitutional documents HoldingCo must liquidate the Acquired Assets and dissolve

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[6] In *MPC Liquidating Trust, supra*, the Bankruptcy Court retained jurisdiction over the liquidating trust and the term of the trust could only be extended beyond three years with the approval of the Bankruptcy Court for cause. Here, the Bankruptcy Court will only retain jurisdiction after the Consummation Date over issues relating to the implementation of the Plan, the treatment, allowance and payment of claims and other similar matters specified in the Plan. It is unlikely that the Bankruptcy Court would exercise jurisdiction over the Liquidating Entities in a manner that would enable it to consider whether the term of the Liquidating Entities should be extended, because their assets will no longer be property of the Debtor's estate and their affairs will not be directly related to the Debtor's bankruptcy case.

within five years of the Consummation Date unless prior thereto additional no action assurance is received from the IM Staff. Certain of the Acquired Assets will be subject to (i) a lien to secure an indemnity to certain directors and officers of the Debtor, which in certain circumstances might affect the amount and timing of distribution of proceeds from the liquidation of such Acquired Assets, or (ii) a lien to secure one-year notes issued under the Plan to certain subsidiaries of the Debtor[7], and cash reserves may be established to cover such potential obligations.

In general, HoldingCo and the Manager expect that the Acquired Assets of each Liquidating Entity and the expected liquidation period of the Acquired Assets will be as follows:

1. *Acquisition Partnership.* The Debtor and its subsidiaries hold various deferred payment obligations (the "Contract Rights") issued in consideration for the Debtor's or a subsidiary's performance of services in originating a sale-leaseback transaction entered into by various privately-offered limited partnerships or in consideration for the Debtor's or the subsidiary's assignment to such partnership of a contractual right to purchase the real property currently owned by the partnership. The Contract Rights are generally unsecured obligations and provide for payments during both the primary and renewal terms of the underlying lease. The Contract Rights are highly illiquid and could produce significantly different values depending on whether they are (i) sold immediately at deep discount; (ii) sold over time on a contract by contract basis, (iii) sold in due course in "bulk" or (iv) held to maturity.

HoldingCo and the Manager believe that in time the Contract Rights could be sold in "bulk" for a reasonable value. However, in order to realize immediate cash available for distribution, HoldingCo and the Manager are considering a securitized financing based on a significant portion of the value of the Contract Rights, which may be accomplished directly

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[7] Certain subsidiaries of the Debtor have filed claims against the Debtor in its bankruptcy case. In lieu of making cash distributions on account of such claims (or offering such subsidiaries the opportunity to elect to receive HoldingCo Common Stock on account thereof) the Plan provides for the issuance to the subsidiaries of secured one-year notes in a principal amount equal to the cash distribution the subsidiaries would otherwise have received. It is anticipated that the subsidiary notes will be forgiven, paid, or contributed to capital within one year of the Consummation Date.

by the Acquisition Partnership or by a special purpose vehicle established for that purpose.[8] HoldingCo and the Manager would expect to sell any residual interests in the securitized assets within the five year liquidation period.

2. *DomesticCo*. The Debtor and its subsidiaries own interests in numerous private partnerships which have invested in various operating businesses (the "Operating Businesses"), public and private real estate partnerships and fee interests in certain parcels of land (the "Real Estate Interests"). These interests are generally illiquid. HoldingCo and the Manager will pursue various realization strategies for the Operating Businesses including sales to third parties. Such alternatives also may include taking such companies public followed by a distribution of the stock to HoldingCo shareholders. HoldingCo and the Manager will seek to sell or dispose of the Real Estate Interests.

3. *HoldingCo*. Various other miscellaneous assets, which are also generally illiquid, may be acquired directly by HoldingCo, which HoldingCo and the Manager will seek to liquidate within the five year liquidation period. The most significant of these assets consist of the right to receive various payments for the sale of the Debtor's annuity business and approximately 278,000 shares of a New York Stock Exchange listed company (which shares are subject to an escrow agreement).

During the five year liquidation period, HoldingCo will provide its stockholders of record with year-end audited financial statements and unaudited quarterly financial statements, in each case together with management's discussion and analysis thereof, and will comply with the reporting requirements under the 1934 Act. HoldingCo will be dissolved promptly following the date on which all of the Acquired Assets have been liquidated and distributed.

III. No Action Request.

A. *Issues and Applicable Legal Standards*.

Section 3(a) of the Company Act defines as an "investment company" any issuer that either (i) "is or holds itself out as being engaged primarily, or proposes to engage primarily, in the business of investing, reinvesting, or trading in securities . . ." or (ii) is "engaged or proposes to engage in the business of investing, reinvesting, owning, holding, or

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[8] We are not requesting the IM Staff to address at this time whether a securitized offering of a portion of the value of the Contract Rights would comply with the requirements of Rule 3a-7 under the Company Act.

trading in securities, and [that] owns or proposes to acquire investment securities having a value exceeding 40 per centum of the value of such issuer's total assets (exclusive of Government securities and cash items) on an unconsolidated basis."[9]

The Liquidating Entities will own and hold the Acquired Assets solely for the purpose of liquidation, and will not engage in investing, reinvesting or trading securities. As noted earlier, the Liquidating Entities will not hold themselves out as investment companies and will not conduct a trade or business (other than maintaining going concern businesses acquired from the Debtor pending sale or liquidation thereof). Without reaching the question of whether each of the Acquired Assets constitutes an "investment security" under the Company Act, each of the Liquidating Entities might constitute an "investment company" under Section 3(a)(1) of the Company Act if such entity is deemed to engage or propose to engage primarily, or to hold itself out as being engaged primarily, in the business of investing, reinvesting or trading in securities. Each of the Liquidating Entities might also constitute an "investment company" under Section 3(a)(3) of the Company Act if they each are deemed to "engage" or "propose to engage" in the business of "investing, reinvesting, owning, holding, or trading" "investment securities" having a value exceeding 40 percent of the value of such issuer's "total assets".[10]

Sections 7(a) and 7(b) of the Company Act exempt from the provisions of the Company Act an investment company, the transactions of which "are merely incidental to its

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9 "Investment securities" are defined in Section 3(a)(3) to include "all securities except (A) Government securities, (B) securities issued by employees' securities companies, and (C) securities issued by majority-owned subsidiaries of the owner which are not investment companies." Section 2(a)(36) of the 1940 Act, in relevant part, defines a "security" as "any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, . . . transferable share, investment contract, . . . or, in general, any interest or instrument commonly known as a "security". . . ."

10 We are not requesting that you consider whether the Liquidating Entities in fact constitute investment companies under Section 3(a) or whether they would meet the terms of the exception under Rule 3a-1 under the Company Act for a company of which no more than 45 percent of such company's total assets consist of, and no more than 45 percent of each such company's net income after taxes (for the last four fiscal quarters combined) is derived from, securities other than those listed in sub-sections (a)(1), (2), (3) and (4) under Rule 3a-1 or which is not an investment company under Section 3(a)(1) under the Company Act or a "special situation investment company".

dissolution" (the "Liquidating Entity Exclusion").[11] Each of the Liquidating Entities is organized and operates for the exclusive purpose of holding and liquidating Acquired Assets and distributing the proceeds therefrom to the holders of HoldingCo Common Stock. Accordingly, so long as each of such Liquidating Entities, even if otherwise meeting the definition of an investment company within the meaning of Section 3(a), is deemed only to be taking actions and effecting transactions which "are merely incidental to its dissolution," such Liquidating Entity would not constitute an investment company under the Company Act.

The Liquidating Entity Exclusion, applicable to liquidating entities organized as corporations (Section 7(a)) and those liquidating entities organized as trusts or other non-corporate entities (Section 7(b)), was adopted by Congress in recognition that the comprehensive scheme established under the Company Act for the protection of investors in investment companies is inappropriate to and not needed for entities which are merely in the process of liquidation, even if they otherwise meet the definition of an "investment company" by reason of their purpose or composition of assets.[12] As Professor Tamar Frankel stated in her treatise *The Regulation of Money Managers*,[13], Sections 7(a) and 7(b) "were designed to meet situations which the [Company] Act should not cover." Since liquidation of an entity otherwise constituting an "investment company" invariably would involve sale of a pool of "investment securities," it follows that the mere fact that an entity holds and is involved in selling a pool of "investment securities" does not require it to be registered and regulated under the Company Act. Rather, the adoption of the Liquidating Entity Exclusion by Congress apparently reflects a determination that an entity must take actions to attract investors and/or actively manage investment assets before the protections of the Company

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11 There have been no regulations proposed or adopted by the Commission under Sections 7(a) or 7(b).

12 Similarly, Congress has determined, and reflected in thirteen separate definitional exclusions contained in Section 3(c) under the Company Act, that an entity which otherwise meets the definition of an "investment company" under Section 3(a) of the Company Act should not be subject to the burden of compliance with the registration and regulatory requirements under the Company Act if it is already subject to regulations which protect holders of interests in such entities or there is no strong interest on the part of the public in imposing the projections under the Company Act. *See, e.g., Protection of Investors: A Half Century of Investment Company Regulation*, p. 105, "Section 3(c)(1) reflects Congress's belief that federal regulation of private investment companies is not warranted."

13 3 T. Frankel, *The Regulation of Money Mangers*, 429.

Act are required. *See, e.g.*, Frankel, *supra*, Sections 7(a) and 7(b) does "not apply to the *company* . . . but to the *activity*."

The IM Staff has identified in various no action letters four principal factors in determining whether a liquidating entity such as each of the Liquidating Entities may rely on the Liquidating Entity Exclusion[14]. These letters indicate that the Liquidating Entity Exclusion is available to an entity if:

(i) the sole objective and purpose of the entity is to liquidate and the entity holds itself out and presents information to holders of interests in the entity and the public in a manner compatible with such objective and purpose;

(ii) the entity issues periodic financial reports to holders of interests in the entity during the period of liquidation to ensure that the interests of such holders are protected;

(iii) the entity will liquidate its assets and dissolve within a reasonable period of time in light of the entity's assets and any other relevant factors; and

(iv) interests in the entity are not offered to the public and are not transferable or tradeable in a manner that would suggest that the entity is syndicating interests or creating a market in an ongoing investment pool.

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14 *E.g., MPC Liquidating Trust* (Avail. March 10, 1994); *Marbella Founders Trust* (Avail. Dec. 1, 1993); Oppenheimer Landmark Properties (Avail. March 9, 1993); *Celina Financial Corp.* (Avail. February 19, 1993); *VHA Enterprises, Inc.* (Avail. January 7, 1993); *Dean Witter Principal Guaranteed Fund III L.P.* (Avail. July 23, 1992); *Grubb & Ellis Realty Income Trust* (Avail. May 26, 1992); *Damson Oil Corp.* (Avail. February 21, 1992); *Western Air Lines Inc.* (Avail. January 28, 1992); *Graphic Scanning Corp.* (Avail. August 21, 1991); *JMB Realty Trust* (Avail. November 19, 1990); *The Fund American Companies, Inc.* (Avail. November 16, 1990); *Hutton/Energy Assets Insured Oil and Gas* (Avail. May 17, 1990); *LDX Group, Inc. (Avail. May 4, 1990); Federated National Resources Corp.* (Avail. July 13, 1989); *Newhall Investment Properties* (Avail. September 21, 1988).

The IM Staff recently clarified in *MPC Liquidating Trust* (Avail. March 10, 1994) the circumstances under which it would grant favorable no action relief under Sections 7(a) and 7(b) under the foregoing general criteria. As discussed below, we believe that the instant no-action request complies with the material requirements identified by the IM Staff in *MPC Liquidating Trust*, as well as the four general criteria set forth in the IM Staff's prior letters relating to the Liquidating Entity Exclusion.[15]

B. *Analysis.*

1. *Purpose.*

The objective and purpose of each of the Liquidating Entities to liquidate the Acquired Assets and dissolve is clearly stated in the Disclosure Statement approved by the Bankruptcy Court in the Bankruptcy Case, which has been distributed to the Creditors. This objective and purpose is also reflected in the Plan, the Asset Purchase Agreement, the organizational documents of HoldingCo, and all documentation relating to the issuance to and purchase by Creditors of HoldingCo Common Stock, and will be reflected in all filings any of the Liquidating Entities may in the future make with the Bankruptcy Court, with the Commission in accordance with the 1934 Act or as may otherwise be required by applicable

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[15] We do not believe that the form of organization of each of the Liquidating Entities is material to whether each such entity meets these four criteria. It is clear that Congress intended the Liquidating Entity Exclusion to apply equally to all entities in the process of liquidation regardless of the form of their organization, because the Liquidating Entity Exclusion was inserted in nearly identical terms in Section 7(a), dealing with entities which are organized in corporate form with boards of directors, and Section 7(b), dealing with entities which are organized in non-corporate form without a board of directors such as trusts or partnerships. It should not be material whether an existing entity takes steps to liquidate assets and dissolve or, as here, the assets of the entity are transferred to a special purpose entity which takes steps to liquidate such assets and dissolve. *See, e.g., MPC Liquidating Trust, supra* (assets transferred to a liquidating trust); *Oppenheimer Landmark Properties, supra* (assets transferred to a liquidating trust); *Dean Witter Principal Guaranteed Fund III L.P., supra* (limited partnership to liquidate and distribute proceeds to its limited partners); *Western Air Lines Inc., supra* (assets transferred to a liquidating trust); *The Fund American Companies, supra* (the company to liquidate and distribute proceeds to its stockholders); *Hutton/Energy Assets Insured Oil and Gas Completion Program A, Ltd., supra,* (assets transferred to a liquidating trust); *Gearhart Industries, Inc.* (Avail. April 6, 1987) (assets transferred to an "investment trust").

law. As noted previously, the Liquidating Entities will not conduct a trade or business (other than maintaining going concern businesses acquired from the Debtor pending sale or liquidation thereof). The Liquidating Entities will not hold themselves out as investment companies, and HoldingCo and the Manager each represent that it will not cause any materials to be distributed to Creditors or the public which are inconsistent with the objective and purpose of the Liquidating Entities as set forth above. The Liquidating Entities thus meet the requirement that they will hold themselves out and will present information about themselves to holders of interests in such entities and to the public in a manner compatible with an objective and purpose to liquidate and dissolve, as clearly and prominently set forth in numerous regulatory and legally binding documents.[16]

In addition, none of the Liquidating Entities will reinvest proceeds from liquidation of the Acquired Assets in new investments, and instead will hold such proceeds in cash, money market instruments, government short-term securities or other investment grade short-term debt securities pending distribution to holders of HoldingCo Common Stock. This

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[16] *See MPC Liquidating Trust, supra* (objective to liquidate and would not hold trust out as investment company); *Oppenheimer Landmark Properties, supra* (the managing general partner adopted a policy of liquidating the assets of the partnership by disposing of its existing real estate portfolio); *Celina Financial Corp., supra* (the objective was to permit shareholders of Celina to participate in any recovery under certain legal claims); *Grubb & Ellis Realty Income Trust, supra* (the board determined that it was in the REIT's "best interests" to liquidate and both the board and the shareholders approved the plan of liquidation); *Graphic Scanning Corp., supra* (the objective was to hold a promissory note to maturity and distribute other assets); *Lockwood Banc Group, Inc.* (Avail. December 19, 1990) (the objective was to collect accounts payable on promissory notes and distribute the proceeds); *Quanex Corp.* (Avail. July 28, 1989) (the objective was to establish an escrow fund to wind up the interests of the stockholders of the company subsequent to a merger); *Sinclair Venezuelan Oil Company* (Avail. November 8, 1979) (the objective was to liquidate, although the company neither filed a formal plan of liquidation and dissolution nor had obtained stockholder approval for any dissolution plan); *Atlanta/LaSalle Corp.* (Avail. May 18, 1979) (both the board and shareholders approved Atlanta/LaSalle's dissolution). *Cf. Terrapet Energy Corp.* (Avail. January 10, 1985) (no action position denied for partnership whose objective was to sell all its assets for notes and to dissolve but which intended to amend its partnership agreements to provide that the sale would not cause its dissolution).

approach is consistent with that of other entities relying on the Liquidating Entity Exclusion.[17]

2. *Reports.*

Throughout its liquidation period, HoldingCo will issue audited year-end financial statements and unaudited quarterly financial statements to all shareholders of record of HoldingCo Common Stock, in each case together with management's discussion and analysis thereof, and will comply with the reporting requirements under the 1934 Act. These reports will reflect the assets, income and liabilities and other relevant financial information of HoldingCo, Acquisition Partnership and DomesticCo on a consolidated basis. Holders of HoldingCo Common Stock will thus be in a position to monitor their interest in the Liquidating Entities and protect their interest as they deem appropriate as provided in previous IM Staff letters.[18]

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17 *See, e.g., MPC Liquidating Trust, supra* (proceeds held in cash and government securities); *Oppenheimer Landmark Properties, supra* (proceeds were invested in short-term cash equivalent mutual funds, certificates of deposit and/or money market accounts); *Dean Witter Principal Guaranteed Fund III L.P., supra* (proceeds held in U.S. government securities or time deposits); *Western Air Lines Inc., supra* (proceeds held in U.S. government securities); *The Fund American Companies, Inc., supra* (proceeds were invested to a limited extent in short-term investment-grade debt securities); *Sinclair Venezuelan Oil Company, supra* (proceeds invested in short-term money market instruments).

18 *Cf. MPC Liquidating Trust, supra* (annual and quarterly reports); *VHA Enterprises, Inc., supra* (annual and interim reports); *Grubb & Ellis Realty Income Trust, supra* (annual and interim reports); *Western Air Lines Inc., supra* (semi-annual reports); *Lockwood Banc Group, Inc., supra* (annual reports); *Hutton/Energy Assets Insured Oil & Gas Completion Program A, Ltd., supra* (annual reports and additional reports regarding material events or changes affecting the Trust or beneficiaries' rights); *RRP-DGT GP Corp.* (Avail. September 25, 1989) (annual reports and interim reports on a discretionary basis); *Crime Control, Inc.* (Avail. August 3, 1987) (annual reports); *ASI Communications, Inc.* (Avail. March 12, 1987) (annual reports); *Glenborough Limited* (Avail. June 17, 1986) (annual reports and "other information"); *Energy Development Partners Ltd.* (Avail. September 12, 1985) (annual reports).

3. *Term.*

The Liquidating Entities will liquidate their Acquired Assets and dissolve as quickly as practicable in accordance with the Plan approved by the Bankruptcy Court, subject to the duty of the Manager on behalf of the Creditors to liquidate the Acquired Assets in a reasonable and orderly manner rather than in haste at "deep discount". HoldingCo and the Manager believe that the Acquired Assets can be liquidated within three to five years, and the organizational documents of HoldingCo provide that it must liquidate the Acquired Assets and dissolve within five years (unless prior thereto additional no action assurance is received from the IM Staff). If HoldingCo and the Manager determine that it may take longer to liquidate certain highly illiquid assets they would seek additional no action assurances from the IM Staff as a condition to extending such term.

The liquidation period permitted in previous IM Staff letters has varied considerably, from under a year to up to longer than 10 years or even an indefinite period.[19] In general, however, we understand from previous conversations with members of the IM Staff that it currently views a liquidation period of three years as appropriate,[20] absent special circumstances.

In previous letters the IM Staff has consistently recognized that special circumstances, generally involving illiquid assets, support a longer liquidation period than three years. For example, in *Western Air Lines Inc.*, the IM Staff suggested that a liquidating trust with a duration of 12 years could rely on the Liquidating Entity Exclusion

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19 *See MPC Liquidating Trust, supra, (three years); Oppenheimer Landmark Properties, supra* (3 years); *Western Air Lines Inc., supra* (12 years); *Lawyers Title of Dallas, Inc.*, (Avail. April 2, 1991) (3 years); *The Fund American Companies, supra* (5 years); *Hutton Energy Assets, supra* (less than 7 years); *LDX Group, Inc.* (Avail. May 4, 1990) (1 year); *RRP-DGT GP Corp., supra* (6 years); *Quanex Corp., supra* (4 years); *Newhall Investment Properties, supra* ("restricted term of existence"); *Timber Realization Co.* (Avail. June 15, 1987) (15 years); *Gearhart Industries, Inc., supra* ("restricted term of existence"); *United Western Corp.* (Avail. October 29, 1984) ("restricted term of existence"); *Heizer Corp.* (Avail. April 25, 1984) ("reasonable period of time"); *Merit Clothing Co.* (Avail. March 29, 1982) (up to 10 years); *Sinclair Venezuelan Oil Co., supra* (indefinite).

20 *See, e.g., MPC Liquidating Trust, supra; Marbella Founders Trust, supra; Oppenheimer Landmark Properties, supra*; *Celina Financial Corp., supra*; *Damson Oil Co., supra*; *Federated National Resources Corp., supra.*

due to the fact that the illiquid assets held by the liquidating trust could only be sold at very deep discounts. (*See also The Fund American Companies, Inc.* (extended period of time due to illiquid nature of assets held by the Company); *Gearhart Industries, Inc.* (extended period of time due to extremely depressed prices of real property); *Merit Clothing Company* (extended period of time required to ascertain the exact amount of Merit's liabilities); *Atlanta/LaSalle Corp.* (no unequivocal time for liquidation stated because the manner and timing of the sale of Atlanta/LaSalle Corporation had not yet been determined)).

It is in the best interest of the Creditors that the Acquired Assets be liquidated in an orderly and reasonable manner. In light of the complex and highly illiquid and varied nature of the Acquired Assets, as well as the amount and large value of such assets, HoldingCo and the Manager believe that these assets will require up to five years for an orderly liquidation, and accordingly the liquidation term has been established at five years in order to permit, to the extent possible, the greatest potential for realization of value. Immediate and complete liquidation or a cash sale of the Acquired Assets would needlessly decrease the return available to the Creditors, which would not promote the public policy objective of permitting creditors to obtain a reasonable value in bankruptcy proceedings.

4. *Transferability.*

The Plan provides that no member of the general public other than Creditors and the Steinhardt Group affiliate will acquire HoldingCo Common Stock pursuant to the Plan. However, the Creditors have required for their own business objectives that they receive in exchange for their claims against the Debtor a security which will be freely transferable. Imposition of an absolute restriction on transferability of HoldingCo Common Stock would preclude confirmation of the Plan, a result which would be inconsistent with the public policy interest under the Bankruptcy Code in achieving liquidation of the Debtor after over four years of bankruptcy proceedings. Transferability of HoldingCo Common Stock would simply afford liquidity to Creditors currently holding illiquid claims against the Debtor in accordance with the Plan approved by the Bankruptcy Court.

A liquidating entity may rely on the Liquidating Entity Exclusion even if its securities are transferrable or tradeable, if, as here, there are circumstances which warrant transferability of interests. In *LDX Group, Inc.*, the IM Staff permitted the LDX Group to register shares owned by minority stockholders under the 1933 Act pursuant to a pre-existing agreement between the minority and the majority shareholders that afforded the former the right to have their shares purchased or registered by the latter. The IM Staff in the *Western Air Lines Inc.* and *Dean Witter Principal Guaranteed Fund III, L.P.* letters similarly did not insist on non-transferability, accepting instead representations that an active trading market in the interests was unlikely to develop, that the trustee would not facilitate the development of

a trading market in the interests, would not make a market in the interests or encourage others to do so. (*See also Lawyers Title of Dallas, Inc.*, *supra*, (interests were transferable pursuant to a qualified tax-free rollover); and *Laguna Hills Utility Co.* (Avail. August 15, 1983) (interests were transferable to the majority shareholder)). The IM Staff has also granted favorable responses where the requesting parties represented that their shares were either already publicly traded or at least widely held. *(See, e.g., Keyes Offshore Limited Partnership*; *Merit Clothing Co.*; *Atlanta/LaSalle Corp.*; *American Recreation Group, Inc.)* No representation was made in the letters, and the IM Staff did not require, that such trading would be terminated or that action would be taken to restrict the transfer of the interests.

In *MPC Liquidating Trust* the interests were transferable and some trading was likely, although an active trading market was unlikely to develop. In granting a favorable no action response, the IM Staff clarified that interests of a liquidating entity can be transferable, and be subject to some trading, so long as an active trading market is unlikely to develop, the interests are not listed on a national securities exchange or NASDAQ, the entity will not facilitate the development of an active trading market or encourage others to do so, place any advertisement in the media promoting investments in such interests or collect or publish information about prices at which such interests may be traded, and such interests will be registered under the 1934 Act.

HoldingCo and the Manager will comply with these requirements of *MPC Liquidating Trust*. It is likely that following the Consummation Date some trading will occur in HoldingCo Common Stock. However, HoldingCo and the Manager believe that it is unlikely that such trading will be active or that a significant market will develop of holders far beyond the initial holders who are familiar with the Debtor and the Acquired Assets. Such trading is unlikely in light of the lack of a listing in HoldingCo Common Stock, the fact that HoldingCo and the Manager will not engage any market maker or collect or publish information about prices at which HoldingCo Common Stock may be transferred as set forth above, the limited term of HoldingCo and the complexity of the Acquired Assets. Further, HoldingCo and the Manager represent that they will not, and the Manager will not cause HoldingCo to, engage the services of any market maker, facilitate the development of a trading market in HoldingCo Common Stock or encourage others to do so, cause HoldingCo Common Stock to be listed on any national securities exchange or NASDAQ, place any advertisement in the media promoting investments in HoldingCo Common Stock or, other than as required under Item 201(a) of Regulation S-K, collect or publish information about prices at which HoldingCo Common Stock may be transferred. In addition, HoldingCo Common Stock will be registered under the 1934 Act and HoldingCo will comply with the reporting requirements under the 1934 Act.

IV. Conclusions and Requests for Relief.

Based on all of the foregoing, it is our opinion that the Liquidating Entities will not be investment companies and accordingly will not be subject to registration or regulation under the Company Act since they will be engaged solely in "transactions . . . which are merely incidental to [their] dissolution" within the meaning of Sections 7(a) and 7(b) of the Company Act. We respectfully request that the IM Staff (i) concur with the opinion of counsel set forth above, or alternatively, (ii) confirm that it will not recommend that the Commission take any enforcement action against the Liquidating Entities, the Manager or the Steinhardt Group if they proceed in the manner outlined above.

* * * * *

In accordance with Release No. 3306269 (December 5, 1980) we have enclosed an original and seven (7) copies of this no-action letter request.

Please do not hesitate to contact the undersigned (Jeffrey S. Sabin, 212-756-2290 or Stephen R. Nelson at 212-756-2470), or Peter Nussbaum (212-756-2565) who is also familiar with this matter, with any comments, questions or requests for additional information regarding the foregoing.

Very truly yours,

Jeffrey S. Sabin by SRN

Stephen R. Nelson

cc: Felice Foundos, Esq.
Division of Investment Management

Peter Nussbaum, Esq.