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SECTION § 3(c)(5)(A) & (B)  
RULE \_\_\_\_\_  
PUBLIC  
AVAILABILITY 5-22-98



May 22, 1998  
Our Ref. No. 98-80-CC  
New England Education Loan  
Marketing Corporation  
File No. 132-3

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

Your letter of March 12, 1998 requests assurance that the staff would not recommend enforcement action to the Commission if NEWCO, a subsidiary of The New England Education Loan Marketing Corporation ("Nellie Mae"), does not register under the Investment Company Act of 1940 in reliance on the exception from the definition of an investment company contained in Sections 3(c)(5)(A) and (B), as more fully described in your letter.

**Facts**

You represent that Nellie Mae is a private, non-profit corporation created by an act of the legislature of the State of Massachusetts for the sole purpose of acquiring student loans ("federal student loans") made pursuant to the Federal Family Education Loan Program ("FFELP") under the Higher Education Act of 1965 ("HEA"). As such, you represent that Nellie Mae is a qualified scholarship funding corporation within the meaning of section 150(d) of the Internal Revenue Code of 1954, as amended (the "Code"). Under the Code, qualified scholarship funding corporations are prohibited from engaging in any business activity other than acquiring federal student loans. As a qualified scholarship funding corporation, Nellie Mae is authorized to issue, and has issued, tax-exempt debt securities to finance its activities.

Under the FFELP program, a federal student loan may be made only to a qualified borrower. You represent that a qualified borrower is a student or parent of a student who, among other things, (i) has been accepted or is enrolled in a qualified institution, (ii) is carrying at least one-half of the normal full-time academic workload, and (iii) meets applicable "need" requirements of the particular loan program. You represent that a student's need is determined by subtracting the family's estimated contribution from the cost of attending a particular institution for the applicable period. You represent that federal student loans are made in amounts which, subject to certain limitations, cover the student's estimated cost of attending a particular eligible institution, including tuition and fees, books, supplies, room and board and transportation.<sup>1</sup> Federal student loans are disbursed directly to the student's eligible institution which applies it to the student's unpaid costs of attendance, and then disburses any

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<sup>1</sup>Depending on the particular loan program, a qualified borrower may be permitted to borrow only the amount of estimated need or may be permitted to borrow all or a portion of the student's estimated family contribution. Regardless of the program, however, you represent that the maximum amount of a federal student loan is limited by the cost of attendance at a particular institution.

remaining funds to the student or parent to cover other permitted costs of attendance. Each federal student loan is represented by a note.<sup>2</sup>

Nellie Mae, Inc. ("NMI"), an affiliate of Nellie Mae, originates and purchases student loans that are not made under the HEA and that are not federally-reinsured ("private student loans"). You represent, however, that private student loan programs are administered in substantially the same manner as federal student loan programs, including calculating the amount of a student loan based upon a student's estimated "need" to attend a particular eligible institution, and in the manner in which funds are disbursed only to eligible borrowers. You state that private student loans differ from federal student loans in the manner in which they are guaranteed and that they are not federally-reinsured.<sup>3</sup> Each private student loan also is represented by a note.

You represent that Nellie Mae is considering making an election, under Section 150(d)(3) of the Code, to terminate its status as a qualified scholarship funding corporation, and establish NEWCO as a taxable subsidiary to acquire Nellie Mae's assets and liabilities. Although not required by the Code, NMI will transfer its assets and liabilities to Nellie Mae, and Nellie Mae will then transfer a portion of those assets and liabilities to NEWCO, including all of the private student loan business currently conducted by NMI. Section 150(d)(3), added as part of the Small Business Job Protection Act of 1996,<sup>4</sup> permits a qualified scholarship funding corporation to make a one-time election to transfer its assets and liabilities to a taxable subsidiary in exchange for all of the senior stock of the taxable subsidiary, provided that certain conditions are met.<sup>5</sup> If a qualified scholarship funding corporation complies with all of the conditions of the Code, any tax-exempt debt that it issued in the past will retain this status after all assets and liabilities are transferred to a taxable subsidiary.

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<sup>2</sup>You state that federal student loans are guaranteed by state or private guarantee agencies in different amounts depending on when the loan was made. You also represent that the guarantee agencies are reinsured by the United States Department of Education.

<sup>3</sup>While several letters requesting no-action relief have represented that the notes in question were guaranteed, we believe that the presence of a guarantee is not relevant to the legal analysis under Sections 3(c)(5)(A) and (B). Thus, the fact that private student loans are guaranteed in a different manner than federal student loans also is not relevant to the legal issue of whether notes representing student loans are qualifying receivables under Section 3(c)(5). As used in this letter, the term "student loan" means federal or private student loans calculated and dispersed to eligible borrowers as you describe in your letter.

<sup>4</sup>Pub. Law No. 104-188.

<sup>5</sup>You represent that Nellie Mae will comply with all of the conditions in the Code to terminate its status as a qualified scholarship funding corporation.

Congress adopted Section 150(d)(3) of the Code in response to changes that it made in 1993 to the federal student loan program that now requires the United States government to make some student loans directly. As more student loans are made by the federal government, loan programs such as those provided by qualified scholarship funding corporations may be reduced or terminated. You state that Congress' purpose in adopting Section 150(d)(3) of the Code was to permit qualified scholarship funding corporations, such as Nellie Mae, to engage in other educational activities (other than acquiring student loans) without jeopardizing the status of any previously issued tax-exempt debt.<sup>6</sup> After the election, you represent that NEWCO's primary business will be to originate and purchase student loans.<sup>7</sup>

### Analysis

NEWCO could fall within the definition of an investment company because its primary assets will consist of notes representing student loans.<sup>8</sup> You represent that Nellie Mae currently is exempt from regulation under the Investment Company Act pursuant to Section 3(c)(10).<sup>9</sup> You state that NEWCO cannot rely upon Section 3(c)(10) because it will be a for-profit company. You contend that NEWCO should not be required to register under the Investment Company Act, however, because it will be excepted under Sections 3(c)(5)(A) and (B) of the Act.

Section 3(c)(5)(A), in pertinent part, excepts from the definition of investment company any person who is primarily engaged in "[p]urchasing or otherwise acquiring notes . . . . representing part or all of the sales price of merchandise, insurance, and services." Section 3(c)(5)(B) excepts persons primarily engaged in the business of making loans to

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<sup>6</sup>See Staff of Joint Comm. on Taxation, 104th Cong., 2d Sess., *General Explanation of Tax Legislation Enacted in the 104th Congress* 244 (Comm. Print 1996).

<sup>7</sup>Telephone conversation on May 15, 1998 between Daniel M. Rossner, counsel for Nellie Mae, and Eileen Smiley of the staff.

<sup>8</sup>Section 3(a)(1)(C) of the Investment Company Act, in pertinent part, defines an investment company to include issuers who own investment securities having a value exceeding 40% of the value of the issuer's total assets. The staff has taken the position that notes representing student loans are investment securities for purposes of Section 3(a). See Education Loan Marketing Association (pub. avail. Mar. 6, 1986) ("Ellie Mae").

<sup>9</sup>Section 3(c)(10) excepts from the definition of investment company any company "organized and operated exclusively for religious, educational, benevolent, fraternal, charitable or reformatory purposes . . . ." You do not seek, and we are not providing, the staff's views regarding Nellie Mae's status under Section 3(c)(10).

“prospective purchasers of, specified merchandise, insurance, and services.”<sup>10</sup> In the staff’s view, a note must relate to the sale of specific merchandise, insurance or services to be a qualifying receivable under Sections 3(c)(5)(A) or (B).<sup>11</sup> The staff has refused to grant no-action assurance to issuers that proposed to include as qualifying receivables under Sections 3(c)(5)(A) and (B) notes representing general loans for unspecified goods or services, even if the loans were secured by collateral typically associated with sales financing.<sup>12</sup>

You contend that NEWCO can rely upon Sections 3(c)(5)(A) and (B) because its primary business will consist of originating, and purchasing notes representing, student loans, and that student loans underlying the notes represent all or a part of the sales price of educational services. Although the express language of Sections 3(c)(5)(A) and (B) appears to except NEWCO from the definition of an investment company, you note that the staff previously took the position that student loans were not qualifying receivables for purposes of Section 3(c)(5)(A).<sup>13</sup> In Ellie Mae, the staff stated that it had “traditionally interpreted [Section 3(c)(5)(A)] as being available to various sales financing activities,” and that “lending money for educational purposes is not such an activity.” The staff, however, did not define the term “sales financing.”<sup>14</sup> You contend that the student loans underlying the notes are not general purpose loans. Rather, you state that student loans that are made to eligible borrowers and calculated in the manner that you describe represent all or a part of the sales price to a student (or the student’s parent) of specific educational services to be provided to the student by a specific eligible institution.

<sup>10</sup>To qualify for Sections 3(c)(5)(A) or (B), an entity also must not issue redeemable securities, face-amount certificates of the installment type or periodic payment plan certificates. You represent that NEWCO will comply with these limitations.

<sup>11</sup>See Alleco, Inc. (pub. avail. July 14, 1988) (“Alleco”) (Section 3(c)(5)(B) refers to the “extension of credit to a borrower representing the purchase price of specific goods or services.”). See also Protecting Investors: A Half Century of Investment Company Act Regulation, 70-71 (May 1992) (the “1992 Report”) (“When the assets the entity acquires are not related to the purchase or sale of specific merchandise, insurance, or services, the no-action request [under Sections 3(c)(5)(A) or (B)] has been refused.”).

<sup>12</sup>See generally World Evangelical Development, Ltd. (pub. avail. Apr. 5, 1979) (staff refused to grant assurance that it would not recommend enforcement action if an issuer treated notes representing general purpose commercial loans as qualifying receivables under Section 3(c)(5)(B), even if such loans were secured by collateral typically associated with sales financing). See also 1992 Report, supra n.11.

<sup>13</sup>See Ellie Mae, supra n.7. See also 1992 Report, supra n.11.

<sup>14</sup>The requesting party in Ellie Mae did not explain how student loans were calculated and made. It is unclear whether the staff refused to grant the request on the basis that the student loans did not relate to the sale of specified services, or on some other basis.

We agree. Sections 3(c)(5)(A) and (B), by their terms, are not limited solely to issuers who make or acquire notes representing the purchase price of specified merchandise. Rather, both sections also apply to issuers who make or acquire notes representing loans made to a prospective purchaser of specified services.<sup>15</sup> In attempting to describe the limitations of Section 3(c)(5)(A) and (B), the staff has sometimes stated that those sections are limited to issuers engaged in "sales financing activity." The term "sales financing activity," however, is not contained in Section 3(c)(5), and appears to be a term used by the staff to describe the requirement in Sections 3(c)(5)(A) and (B) that a note must relate to a sale of specified merchandise, insurance or services.<sup>16</sup> Because student loans are made to students or their parents in amounts limited by the student's unmet cost of attending a particular institution for a specified period of time, we believe that the student loans underlying the notes relate to the sale of specific educational services.

For the reasons set forth above, we concur with your view that student loans made to eligible borrowers and calculated in the manner you describe, represent all or part of the sales price of specified educational services, and thus notes representing student loans may be treated as qualifying receivables under Sections 3(c)(5)(A) and (B).<sup>17</sup> Accordingly, we would not recommend enforcement action to the Commission under Section 7 of the Investment Company Act if NEWCO relies upon Sections 3(c)(5)(A) and (B), provided that NEWCO's primary business will be to originate, or purchase notes representing, student loans as described in your letter, and that NEWCO will not issue redeemable securities, face-amount certificates of the installment type or periodic payment plan certificates.<sup>18</sup> The staff's position

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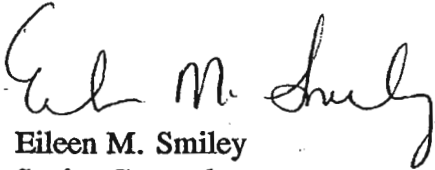
<sup>15</sup>See generally Econo Lodges of America, Inc. (pub. avail. Dec. 22, 1989) (staff would not recommend enforcement action if an entity relied upon Section 3(c)(5)(A), provided that at least 55% of its assets consisted of notes representing franchise fees owed by franchisees for an integrated package of services provided by parent company, and the entity loaned a specified percentage of the proceeds to the parent company within six months of the completion of financings secured by the receivables.). See also State of Israel (pub. avail. Aug. 12, 1988) (staff would not recommend enforcement action to the Commission if entities whose sole assets consisted of loans to the State of Israel to prepay existing foreign military sales loans for the purchase of "defense articles, defense services, design and construction services and related expenses" did not register as investment companies in reliance on Section 3(c)(5)(A).).

<sup>16</sup>See n.11, *supra*.

<sup>17</sup>The positions taken by the staff in Ellie Mae and the 1992 Report are superseded to the extent that they suggest that student loans made to qualified borrowers and calculated in the manner that you describe are not qualifying receivables under Sections 3(c)(5)(A) and (B).

<sup>18</sup>You also contend, but reserve the argument, that NEWCO also qualifies for the exception contained in Section 3(c)(4) of the Investment Company Act. Section 3(c)(4) excepts from the definition of an investment company those entities "substantially all of whose business is confined to

is based upon all of the facts and representations contained in your letter. Any different facts or representation might require a different conclusion.



Eileen M. Smiley  
Senior Counsel

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making small loans, industrial banking, or similar businesses.” You do not seek our views, and we provide none, regarding whether NEWCO’s business of originating and *purchasing* student loans originated by others would satisfy the requirement in Section 3(c)(4) that “substantially all” of its business consist of “making small loans.”

**B R O W N & W O O D L L P**

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March 12, 1998

U.S. Securities and Exchange Commission  
450 Fifth Street, N.W.  
Washington, D.C. 20549

Attention: Office of Chief Counsel  
Division of Investment Management

Ladies and Gentlemen:

On behalf of The New England Education Loan Marketing Corporation ("Nellie Mae") we are writing to request advice to the effect that the staff of the Division of Investment Management (the "Division") of the Securities and Exchange Commission (the "Commission") would not take action if a newly organized subsidiary of Nellie Mae ("Newco"), organized pursuant to the Transition Provisions described below, does not register under the Investment Company Act of 1940, as amended (the "1940 Act"), after Nellie Mae's reorganization pursuant to such Transition Provisions.

**History of Nellie Mae**

Nellie Mae is a private non-profit corporation with a principal place of business in Braintree, Massachusetts. Its business is originating and purchasing student loans ("federal student loans") under the Federal Family Education Loan Program ("FFELP") under the Higher Education Act of 1965, as amended (the "HEA"). Nellie Mae was created by an act of the Massachusetts legislature (Chapter 356 of the Acts of 1982) for the sole purpose of acquiring student loan notes under the HEA.

The Internal Revenue Service has issued a determination letter concluding that Nellie Mae is exempt from federal income taxation under Section 501(c)(3) of the Internal Revenue Code of 1954, as amended (the "Code").

Based on its limited purposes and activities, Nellie Mae is, and since inception has been, a "qualified scholarship funding corporation" as defined in Section 150(d) of the Code. Companies

qualifying as such (*i.e.*, engaging in no activities other than acquiring student loans) are permitted to raise funds through the direct issuance of tax-exempt debt securities. For many years Nellie Mae's status as a Section 150(d) qualified scholarship funding corporation was advantageous, given its ability to issue tax-exempt debt at attractive rates.

In recent years, however, the advantages of Nellie Mae's Section 150(d) status have waned due to tax code changes affecting tax-exempt issuers as well as changes in the student loan market place. Since 1994, Nellie Mae has raised funds for its activities exclusively in the taxable debt markets.

#### **Tax Code Amendments**

On August 20, 1996, President Clinton signed the Small Business Job Protection Act of 1996 (Pub. L. No. 104-188). This legislation contains provisions (the "Transition Provisions") which amend Section 150(d) of the Code to allow a qualified scholarship funding corporation, such as Nellie Mae, to make a one-time election to transfer its assets and liabilities (including its tax-exempt debt obligations) for fair market value to a successor for-profit taxable corporation, such as Newco, organized by such a corporation.

#### **Nellie Mae's Plans**

Nellie Mae is currently in the process of planning to make the permitted election pursuant to Section 150(d)(3) of the Code. It has received required approvals for the transfer of its assets as contemplated by the Transition Provisions from the Attorney General of the Commonwealth of Massachusetts and the Supreme Judicial Court of Massachusetts. When the plans are finalized, Nellie Mae's Board will vote to approve the election and the transfer of assets and liabilities from Nellie Mae to Newco.

Immediately following the transition as required by the Transition Provisions (the "Transition"), Newco will have issued a senior class of stock to Nellie Mae (in return for assets transferred to Newco). In addition, Newco will have assumed Nellie Mae's obligations under its outstanding debt securities. After the transition, all of Nellie Mae's federal student loan business will be conducted through Newco.

Although not required by the Transition Provisions, the reorganization also contemplates the merger of Nellie Mae, Inc. ("NMI"), an affiliate of Nellie Mae, into Nellie Mae immediately following the transfer of Nellie Mae's assets and liabilities to Newco. NMI was incorporated as a non-profit corporation pursuant to Chapter 180 of the Massachusetts General Laws and qualifies as



a 501(c)(3) corporation under the Code. It is engaged in originating and purchasing private student loans (i.e., student loans not originated under the HEA or federally-reinsured) ("private student loans"). Immediately following the transfer of NMI's assets and liabilities to Nellie Mae, Nellie Mae will transfer a portion of such assets and liabilities to Newco and all of the private student loan business currently conducted by NMI will be conducted through Newco. As of December 31, 1997, federal student loans and private student loans would constitute approximately 96% of Newco's assets, on a pro forma basis, after giving effect to the reorganization, consisting of \$2.1 billion of federal student loans (93.4% of Newco's pro forma assets) and \$59.2 million of private student loans (2.7% of Newco's pro forma assets).

### **Federal Student Loans**

As indicated above, Nellie Mae's primary business is making and purchasing federal student loans. The HEA provides for several programs of federal student loans to students and parents of students attending eligible institutions, including Stafford Loans and Unsubsidized Stafford Loans, Parent Loans (PLUS) Loans and Consolidation Loans.

Under the FFELP program, a federal student loan may be made only to a qualified borrower. In general, a qualified borrower is an individual or a parent of an individual who (i) has been accepted for enrollment or is enrolled and is maintaining satisfactory progress at an eligible institution, (ii) is carrying at least one-half of the normal full-time academic workload for the course of study the student is pursuing, as determined by such institution, and (iii) meets the applicable "need" requirements for the particular loan program. "Eligible institutions" are post-secondary schools which meet the requirements of the HEA; requirements include state licensure and/or periodic accreditation by independent accrediting agencies acceptable to the United States Department of Education (the "Department").

Federal loans are made in amounts which, subject to certain limitations, cover the student's estimated cost of attendance (as defined in the HEA), including tuition and fees, books, supplies, room and board and transportation. Each Stafford Loan applicant is required to undergo a "need" analysis, which requires the applicant to submit a need analysis form to a multiple data processor which forwards the data to a federal central processor. The federal processor evaluates the student's need by subtracting the family's expected contribution from the cost of attending the eligible institution for the applicable period. The amount of such need is then certified to the school by the federal

processor. The amount of a subsidized Stafford Loan may not exceed the amount of such need, as certified by the federal central processor less other financial aid the student may have been awarded. For PLUS and Unsubsidized Stafford loans the student or parent may borrow the amount of "need" and may also borrow to pay all or a portion of the estimated family contribution up to the cost of attendance and subject to annual and cumulative borrowing limits. If the student or parent is determined to qualify for a federal student loan, the amount of the loan is disbursed in installments based on the academic period directly to the eligible institution. The eligible institution then applies the loan proceeds against unpaid costs of attendance, including tuition and fees and room and board, and pays any remaining amount to the student or parent to cover other permitted costs of attendance, including books, supplies and transportation. Each federal student loan is represented by a note ("Note").

Federal student loans originated prior to October 1, 1993 are guaranteed by either a state or private non-profit guarantee agency as to 100% of principal and accrued interest against default, death, disability or bankruptcy. Federal student loans originated on or after October 1, 1993 are guaranteed by such a guarantee agency as to 100% of principal and accrued interest against death, disability or bankruptcy and up to 98% of principal and accrued interest against default. The guarantee agencies are reinsured by the Department 80% to 100% with respect to federal student loans made prior to October 1, 1993, and 78% to 98% with respect to federal student loans originated thereafter, depending upon their default claim experience. The HEA provides that, subject to compliance with the HEA, the full faith and credit of the United States is pledged to the payment of federal reinsurance claims. It further provides that if the Department determines that the guarantee agency is unable to meet its insurance obligations, holders of federal student loans may submit claims directly to the Department until such time as the obligations are transferred to a new guarantee agency capable of meeting such obligations, or until a successor guarantee agency assumes such obligations.

As lenders under the HEA, Nellie Mae is, and Newco will be, subject to extensive regulation by the Department and the guarantee agencies with respect to originating, processing, disbursing, selling, servicing and collecting federal student loans. Both the Department and the individual guarantee agencies have established stringent servicing requirements, along with mandatory reporting and audit criteria, which must be complied with in order to receive guarantee benefits.

The HEA and regulations promulgated by the Department thereunder (the "Regulations") require that lenders exercise "due

diligence" in the making, disbursing and servicing federal student loans. Substantial compliance with these Regulations is a condition of the guarantee agency's and the federal government's guarantee on a federal student loan. The due diligence requirements for making loans include required procedures for processing forms, approval of borrowers, determination of loan amounts and requirements for promissory notes. The due diligence requirements for disbursing loans address arrangements with escrow agents, methods of loan disbursement, number of permitted disbursements and related record keeping. Whether a lender services or contracts with a third party to provide servicing for its loans, the HEA and Regulations specifically address permissible reporting to credit bureaus, responding to borrower inquiries and establishing terms for repayment. The HEA also sets forth specifically the permitted terms under which a lender may grant a borrower deferments and forbearance.

Pursuant to broad authority granted to it under the HEA, the Department monitors compliance by lenders, the guarantee agencies and eligible institutions with the HEA. Each year, lenders and their loan servicers are required to submit a report by an independent audit firm demonstrating compliance with the due diligence requirements under the HEA. In addition, the Department conducts its own audits of lenders and their servicers to determine compliance with the HEA. The HEA grants the Department the authority to limit, suspend or terminate a lender's participation in the federal loan program in the event the Department determines that the lender has failed to exercise reasonable care and diligence in making and collecting loans under the HEA or Regulations. In certain instances, the Department may impose civil penalties on a lender. The Department may also suspend interest subsidies and guarantees with respect to loans and call for refunds of amounts previously paid to a lender with respect to a nonconforming loan.

### **Private Student Loans**

As indicated above, after the Transition is consummated, it is expected that Newco will also carry on the privately insured education loan programs previously administered by NMI. As of the transfer date (on a pro forma basis as of December 31, 1997), Newco will hold approximately \$59.2 million in private student loans, which will represent approximately 2.7% of its total assets.

Like federal student loans, private student loans are made in amounts which, subject to certain limitations, cover the student's estimated cost of attendance, including tuition and fees, books, supplies, room and board and transportation. And

like federal student loans, each private student loan is based on a student's unmet need in funding such costs. Prior to disbursing any private student loan, the applicable educational institution is required to certify the student's unmet need in funding such costs. As in the case of federal student loans, funds on private student loans are disbursed directly to the applicable educational institution, which applies such funds against unpaid costs of attendance, including tuition and fees and room and board, and pays any remaining amounts to the student to cover other permitted costs of attendance, including books, supplies and transportation. Like federal student loans, each private student loan is represented by a promissory note.

In connection with each private student loan, the borrower is charged a guarantee fee which is transferred to a guarantee reserve held by the lender. If the private student loan goes into default, any uncollected amount is charged off against the reserve. Following the consummation of the Transition, it is anticipated that Newco will enter into a guarantee agreement with Nellie Mae.

#### **Investment Company Act of 1940 Issues**

Because Nellie Mae is primarily engaged in the business of originating and purchasing student loans, Nellie Mae believes, based on past pronouncements of the Commission staff, that absent an exemption its activities could possibly be viewed by the Commission staff as requiring it to register under the 1940 Act. See Education Loan Marketing Association (pub. avail. Mar. 6, 1986) ("Ellie Mae"). In that letter, which was written prior to the enactment of the Transition Provisions, the staff expressed the view that student loan notes are securities under the 1940 Act. The staff also took the view that, under the facts as presented therein, the exemption contained in Section 3(c)(5)(A) of the 1940 Act would not be available.

Currently, even if the Commission were to take the position that Nellie Mae was engaged in activities which would otherwise require it to register as an investment company under the 1940 Act, Nellie Mae would, as a non-profit 501(c)(3) corporation, be exempt from the provisions of the 1940 Act pursuant to Section 3(c)(10) thereof. That section exempts from the 1940 Act any "company organized and operated exclusively for religious, educational, benevolent, fraternal, charitable, or reformatory purposes ... no part of the net earnings of which inures to the benefit of any private shareholder or individual." However, as a for-profit enterprise, Newco, the successor to Nellie Mae's business, will be unable to take advantage of the exemption in Section 3(c)(10).

Congress' intent in enacting the Transition Provisions was to facilitate the ability of qualified scholarship funding corporations, such as Nellie Mae, to continue their businesses as for-profit enterprises. See Joint Committee on Taxation, General Explanation of Tax Legislation Enacted in the 104th Congress (JCS-12-96), Dec. 18, 1996 at 244. Subjecting Nellie Mae's business to the 1940 Act simply because it will be conducted by a for-profit entity following Nellie Mae's reorganization pursuant to the Transition Provisions would completely defeat the intent of Congress in enacting such provisions, since registration of Newco under the 1940 Act is not a viable alternative.

Moreover, we believe that there is a statutory basis for the Commission staff to be able to view Newco as exempt from the provisions of the 1940 Act pursuant to Section 3(c)(5) thereof. That section exempts from the definition of "investment company," and therefore from the registration requirements of the 1940 Act "any person who is not engaged in the business of issuing redeemable securities, face amount certificates of the installment type or periodic payment plan certificates, and who is primarily engaged in one or more of the following businesses: (A) purchasing or otherwise acquiring notes, drafts, acceptances, open accounts receivable, and other obligations representing part or all of the sales price of merchandise, insurance, and services [and] (B) making loans to manufacturers, wholesalers, and retailers of, and to prospective purchasers of, specified merchandise, insurance and services."

Newco will not engage in the business of issuing redeemable securities, face amount certificates of the installment type or periodic plan certificates.

As indicated above, Newco's assets will consist primarily of Notes. The Notes represent the payment obligations with respect to specific services, viz. tuition and fees, books, supplies, room and board, transportation and related costs for attendance at eligible institutions. See, e.g., Econo Lodges of America (pub. avail. Dec. 22, 1989); Days Inn of America, Inc. (pub. avail. Dec 30, 1988) (receivables representing the payment by franchisees of the sales price of services produced by franchisor, representing a package of services produced by franchisor and made available to franchisees, including training courses, advertising, reservation, consulting and other services, considered Section 3(c)(5)(A) receivables). Accordingly, the Notes will represent all or part of the sales price of services.

The conclusion that the Notes represent the sales price of services is supported by the fact that the amount of each loan represented by a Note cannot exceed the amount determined, after a needs analysis, to be required to fund such services and by the fact that the proceeds of such loan are disbursed directly to the

eligible educational institution. The above procedures ensure that the loans will be used to fund the specific educational services being provided.<sup>1</sup> Accordingly, the Notes cannot be said to represent generalized lending activity that does not qualify for the Section 3(c)(5) exclusion.

In addition, as a matter of securities regulation policy, there is no reason for Newco to be regulated as an investment company under the 1940 Act. The assets of Newco will consist primarily of federal student loans which are guaranteed by the guarantee agencies, to the extent described above. The guarantees of the guarantee agencies are, in turn, reinsured by the Department, to the extent described above. The HEA provides that, subject to compliance with the HEA, the full faith and credit of the United States is pledged to the payment of federal reinsurance claims. It further provides that if the Department determines that the guarantee agency is unable to meet its insurance obligations, holders of loans may submit claims directly to the Department until such time as the obligations are transferred to a new guarantee agency capable of meeting such obligations, or until a successor guarantee agency assumes such obligations. See generally State of Israel Foreign Military Sales (pub. avail. Aug. 17, 1988) (loans to refinance loans, a portion of which were used to purchase military services, including engineering, research and development, and testing associated with military and defense items, 90% guaranteed by the United States government, considered Section 3(c)(5)(A) receivables). These guarantees minimize the risk of credit losses on Newco's assets.

Further, as discussed above, Newco will be subject to extensive regulation by the Department and the guarantee agencies with respect to originating, processing, disbursing, selling and servicing federal student loans.<sup>2</sup>

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<sup>1</sup> Under the facts presented in Ellie Mae, it was possible for staff to conclude that the loans did not relate to services, since a direct nexus between the loan and the specific services provided was not demonstrated.

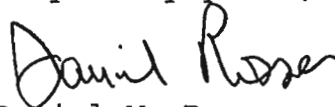
<sup>2</sup> While we also believe that Newco would also be subject to exemption from registration under the exemption contained in Section 3(c)(4) of the 1940 Act for entities in the business of making small loans, we are reserving that argument. We note, however, that to the extent that Newco originates or purchases private student loans in Massachusetts it will be required to be licensed and regulated by the Massachusetts Division of Banks as a small loan business under Massachusetts's small loan law (Chapter 140, Section 96 of the Massachusetts General Laws). In  
(continued...)

As a result of such regulation, and the guarantee accorded to the federal student loan assets of Newco, holders of Newco's securities will not be in need of safeguards of the sort that the 1940 Act imposes on the operations and investment policies of investment companies.

On the basis of the foregoing, we are of the opinion that Newco will be excluded from the definition of "investment company" under the 1940 Act by virtue of Section 3(c)(5). We hereby request your advice that the Division would not recommend that the Commission take any action under the 1940 Act if Newco does not register as an investment companies under the 1940 Act.

Please call the undersigned at (212) 839-5533 if you have any questions.

Very truly yours,



Daniel M. Rossner

cc: Mr. Barry Mendelson  
Ms. Eileen Smiley

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<sup>2</sup>(...continued)

granting no-action relief under Section 3(c)(4) of the 1940 Act, the Commission staff has taken notice of the fact that Congress did not intend entities subject to regulation under small loan laws to be subject to the registration requirements of the 1940 Act. See The Commonwealth Fund (pub. avail. Jul. 15, 1971); Robert D. Brody (pub. avail. Nov. 22, 1979). - 3 -