

SISTERS OF MERCY OF THE AMERICAS, INC.

**Investment Company Act of 1940 — Section 7
Investment Advisers Act of 1940 — Section 203(a)**

October 1, 2009

**RESPONSE OF THE OFFICE OF CHIEF COUNSEL
DIVISION OF INVESTMENT MANAGEMENT
Our Ref. No. 20094281042**

Your letter dated October 1, 2009 requests our assurance that we would not recommend enforcement action to the Securities and Exchange Commission (the "Commission"): (i) under Section 7 of the Investment Company Act of 1940 (the "Investment Company Act") against certain pooled investment vehicles (consisting of "Program Funds" and "Sponsored Ministry Vehicles," each as described in further detail and defined below) as part of an asset management program (the "Program") operated by the Sisters of Mercy of the Americas, Inc. ("Sisters of Mercy"), if Sisters of Mercy operates such Program in the manner described in your letter without registering any of the Program Funds or Sponsored Ministry Vehicles with the Commission as investment companies under the Investment Company Act; or (ii) under Section 203(a) of the Investment Advisers Act of 1940 (the "Advisers Act") against Mercy Investment Services, Inc., a non-profit public benefit corporation organized under the Missouri Nonprofit Corporation Act (the "Program Manager"), or any of the Program Manager's directors, officers, employees or volunteers acting within the scope of their employment or duties, if the Program Manager and the afore-mentioned individuals engage in the activities described in your letter without registering with the Commission as investment advisers under the Advisers Act.

You also request assurance that the Division of Trading and Markets would not recommend enforcement action to the Commission: (i) under Section 15(a) of the Securities Exchange Act of 1934 (the "Exchange Act") against the Program Manager or any of its directors, officers, employees, or volunteers acting within the scope of their employment or duties, if the Program Manager and the aforementioned individuals engage in the activities described in your letter without registering with the Commission as broker-dealers in accordance with Section 15(b) of the Exchange Act in reliance on the exemption provided in Section 3(e) of the Exchange Act; or (ii) under Section 17A(b) of the Exchange Act against the Program Manager if the Program Manager engages in the activities described in your letter without registering with the Commission as a transfer agent in accordance with Section 17A(c) of the Exchange Act.

Finally, you request assurance that the Division of Corporation Finance, in reliance on your opinion as counsel that the exemption afforded by Section 3(a)(4) of the Securities Act of 1933 ("Securities Act") is available, will not recommend enforcement action to the Commission if the Sisters of Mercy implements the Program in the manner described in your letter without registration under the Securities Act.

Investment Company Act

You contend that none of the Program Funds or Sponsored Ministry Vehicles should be deemed to be investment companies within the meaning of the Investment Company Act. Section 3(c)(10)(A) of the Investment Company Act excludes from the definition of investment company, among others, "[a]ny company organized and operated exclusively for religious, educational, benevolent, fraternal, charitable or reformatory purposes — (i) no part of the net earnings of which inures to the benefit of any private shareholder or individual; or (ii) which is or maintains a fund described in subparagraph (B)." Such a fund is defined in Section 3(c)(10)(B) of the Investment Company Act as including, among others, "a pooled income fund, collective trust fund, collective investment fund, or similar fund maintained by a charitable organization exclusively for the collective investment and reinvestment of ... (i) assets of the general endowment fund or other funds of one or more charitable organizations . . ." You note that on previous occasions, the staff of the Division of Investment Management has agreed not to recommend enforcement action to the Commission under the Investment Company Act if charitable entities pool

their assets in common investment pools without registering the pools under the Investment Company Act, provided that such charitable investment pools make the following representations: 1

1. the participants in such common investment pools will not assign, encumber, or otherwise transfer any part of their interests in the common investment pools, except that a participant may pledge its interest in the pooled fund to third party lenders as collateral for loans to fund its charitable and tax-exempt activities subject to specified limitations; 2
2. the common investment pool will be organized and operated at all times exclusively for religious, educational, benevolent, fraternal, charitable, or reformatory purposes;
3. no part of the common investment pool's net earnings will inure to the benefit of a private shareholder or individual;
4. the common investment pool and each participant is exempt from taxation under Section 501(c)(3) of the Internal Revenue Code;
5. each participant will invest only funds over which it has immediate, unrestricted, and exclusive use, benefit and enjoyment;
6. participants will not invest assets that are attributable to a retirement plan providing for employee contributions or variable benefits;
7. certified public accountants annually will prepare a written report on the common investment pool, and will send the report to participants; and
8. each participant will be informed that the common investment pool is not an investment company registered under the Company Act.

Collectively, these representations are referred to herein as the "Standard Charitable Pool Representations."

You represent that the Program, the Program Funds and the Sponsored Ministry Vehicles will be operated in accordance with each of the Standard Charitable Pool Representations, except that in the interest of preserving the confidentiality of the financial information of each Participant, a Participant will only receive reports prepared by certified public accountants relating to those Program Funds in which such Participant's assets have been invested at any time during the relevant year.³ You indicate that you believe that this approach is consistent with representation (7) referenced above (the "Audited Report Representation"), but you concede that it is possible to interpret the Audited Report Representation, as stated by the staff in previous no-action letters, to mean that a given participant must receive a single report covering all participating funds, including funds in which such participant is not invested. You contend that the concerns giving rise to the Audited Report Representation are adequately addressed where each Participant receives an annual report audited by a certified public accountant with respect to all Program Funds in which such Participant has invested during the relevant year. We agree.

Based on the facts and representations provided in your letter, we would not recommend enforcement action to the Commission under Section 7 of the Investment Company Act against any of the Program Funds or the Sponsored Ministry Vehicles if Sisters of Mercy operates the Program in the manner described in your letter without causing the Program Funds or Sponsored Ministry Vehicles to register with the Commission as investment companies under the Investment Company Act. Our position is based particularly on your representations that: (i) the Program will be operated in accordance with the Standard Charitable Pool Representations, except that a Participant will only receive reports prepared by certified public accountants relating to Program Funds in which such Participant's assets have been invested at any time during the relevant year; and (ii) the proceeds of any loan collateralized by a Participant's interest in the Program Funds will be used only for charitable purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code.

Our response expresses our views on enforcement action only, and does not express any conclusions with respect to the interpretive or other legal issues presented. You should note that any different facts or representations may require different conclusions.

Advisers Act

You contend that the Program Manager and its directors, officers, employees, and volunteers acting within the scope of their employment or duties should not be required to register with the Commission as investment advisers under the Advisers Act. Section 203(b)(4) of the Advisers Act provides that the registration requirements of the Advisers Act are not applicable to "any investment adviser that is a charitable organization, as defined in Section 3(c)(10)(D) of the Investment Company Act of 1940, or is a trustee, director, officer, employee, or volunteer of such a charitable organization acting within the scope of such person's employment or duties with such organization whose advice, analyses, or reports are provided only to one or more of the following: (A) any such charitable organization; or (B) a fund that is excluded from the definition of an investment company under Section 3(c)(10)(B) of the Investment Company Act of 1940."

You note that, under circumstances substantially similar to those detailed in your letter, the staff of the Division of Investment Management has agreed not to recommend enforcement action to the Commission under section 203 of the Advisers Act based upon representations that: (1) the subject organization is a charitable organization exempt from taxation under Section 501(c)(3) of the Internal Revenue Code; and (2) the subject organization will provide investment advice only to participants who are charitable organizations exempt from taxation under Section 501(c)(3) of the Internal Revenue Code.⁴ You represent that the Program will be operated in accordance with these representations, and that the facts and circumstances with regard to the Program Manager and its officers, directors, employees and volunteers acting within the scope of their employment or duties are substantially similar to those described in the staff's previous guidance with respect to this issue. You therefore may rely on the staff's previous guidance with respect to this issue.⁵

Exchange Act

The Office of Chief Counsel of the Division of Trading and Markets has asked us to inform you that it would not recommend enforcement action to the Commission under Section 15(a) of the Exchange Act against the Program Manager and its directors, officers, employees, and volunteers acting within the scope of their employment or duties, if the Program Manager and such individuals engage in the activities described in your letter without registering with the Commission as broker-dealers in accordance with 15(b) of the Exchange Act, in reliance on the exemption provided in Section 3(e) of the Exchange Act. In granting this request, we note in particular your representation that neither the Program Manager nor any of its directors, officers, employees or volunteers will solicit donations to any fund that is excluded from the definition of an investment company under Section 3(c)(10)(B) of the Investment Company Act of 1940.⁶

The Office of Clearance and Settlement of the Division of Trading and Markets has asked us to inform you that it would not recommend enforcement action to the Commission under Section 17A(b) of the Exchange Act if the Program Manager engages in the activities described in your letter without registering with the Commission as a transfer agent in accordance with Section 17A(c) of the Exchange Act.

Any different facts or representations may require a different conclusion. This is a staff position regarding enforcement action under Sections 15(a) and 17A only, and does not express any legal conclusions regarding these provisions or any other federal or state laws.

Securities Act

The Division of Corporation Finance has asked us to inform you that, in reliance on your opinion as counsel that the exemption afforded by Section 3(a)(4) of the Securities Act is available, it will not recommend enforcement action to the Commission if Sisters of Mercy implements the Program in the manner described without registration under the Securities Act.

Kyle R. Ahlgren
Attorney-Adviser

Endnotes

1 See American Bible Society, SEC Staff No-Action Letter (Jun. 1, 2004) ("American Bible Society letter"); Mercy Investment Program, Inc., SEC Staff No-Action Letter (Jun. 12, 2003) ("2003 Mercy letter"); Daughters of Charity National Health System, Inc., SEC Staff No-Action Letter (Apr. 3, 1998) ("Daughters letter"); National Association of Congregational Christian Churches, SEC Staff No-Action Letter (Aug. 11, 1995); American Heart Association, SEC Staff No-Action Letter (Feb. 26, 1993); Northeastern Pennsylvania Synod of the Evangelical Lutheran Church in America, SEC Staff No-Action Letter (May 3, 1988); Catholic Foundation Investment Trust, SEC Staff No-Action Letter (Feb. 17, 1983).

2 For a specific discussion of this representation in the context of the Program, see 2003 Mercy letter, *supra* n. 1.

3 You represent that the purpose of this limitation is to avoid disclosure of the amounts under management in the Program. You note that each Participant will have the option to invest in a distinct combination of Program Funds, and it is therefore likely that a given Participant will invest in a Program Fund in which other Participants are not invested, and vice versa.

4 See, e.g., American Bible Society and Daughters letters, *supra* n. 1.

5 The Division of Investment Management generally permits third parties to rely on no-action letters to the extent that such third party's facts and circumstances are substantially similar to those described in the prior request for a no-action letter. Informal Guidance Program for Small Entities, Investment Advisers Act Release No. 1624 (March 27, 1997), at n. 20 and accompanying text.

6 The Office of Chief Counsel of the Division of Trading and Markets will no longer respond to questions in this area regarding the availability of relief from broker-dealer registration in reliance on the exemption provided in Section 3(e) of the Exchange Act unless such questions present novel or unusual issues.

Incoming Letter

The Incoming Letter, in Acrobat format, is available on the SEC's website at:
<http://www.sec.gov/divisions/investment/noaction/2009/sistersofmercy100109-incoming.pdf>