

BEFORE THE ARKANSAS SECURITIES COMMISSIONER

RECEIVED

09 DEC 15 PM 2: 58

CASE NO. C-09-081

ARKANSAS SECURITIES DEPT.

IN THE MATTER OF:

ORDER NO. C-09-081-09-OR01

SISTERS OF MERCY OF THE AMERICAS, INC.

RESPONDENT

ORDER

This Order is entered pursuant to the Arkansas Securities Act ("Act"), Ark. Code Ann. §§ 23-42-101 through 23-42-509, the Rules of the Arkansas Securities Commissioner ("Rules"), and the Arkansas Administrative Procedures Act, codified at Ark. Code Ann. §§ 25-15-101 through 25-15-219.

FINDINGS OF FACT

1. On November 4, 2009, the Arkansas Securities Commissioner ("Commissioner") received a letter ("Request") from legal counsel for Sisters of Mercy of the Americas, Inc. ("Sisters of Mercy") requesting that the proposed asset management program and certain pooled investment vehicles ("Interests") of Sisters of Mercy and Mercy Investment Services, Inc. ("Issuer"), be determined to be exempt from the registration requirements of Ark. Code Ann. §23-42-501 and 23-42-502, pursuant to Ark. Code Ann. § 23-42-503(a)(9) as not being necessary or appropriate in the public interest or for the protection of investors.

2. Sisters of Mercy submitted the Request pursuant to Ark. Code Ann. § 23-42-503(a)(9) for the interests involved in the proposed asset management program as further described in the Request, attached as "Exhibit A."

3. The definition of "Agent" in Ark. Code Ann. § 23-42-102(1)(B)(i)(a) does not include an individual who represents an issuer in effecting transactions of interests that are

exempted by Ark. Code Ann. § 23-42-503 which the Securities Commissioner may by rule or order prescribe.

CONCLUSIONS OF LAW

4. Based upon the facts as presented in the Request, it is not necessary or appropriate in the public interest or for the protection of investors for Sisters of Mercy to be required to register the Interests under the Act for the purposes of the proposed asset management program. This Order does not exempt Sisters of Mercy from the other provisions of the Act, including the antifraud provisions.

ORDER

IT IS THEREFORE ORDERED that any Interests of Sisters of Mercy offered or sold in Arkansas, if offered and sold in compliance with the representations made in the Request, and in accordance with the Findings of Fact stated herein, shall be exempt from Ark. Code Ann. §§ 23-42-501 and 23-42-502.



A. HEATH ABSHURE
Arkansas Securities Commissioner

December 15, 2009
DATE

ROSE LAW FIRM

A PROFESSIONAL ASSOCIATION

ATTORNEYS

120 East Fourth Street
Little Rock, Arkansas
72201-2893

501-375-9131
501-375-1309 FAX

November 4, 2009

RECEIVED

09 NOV -4 PM 3:20

ARKANSAS SECURITIES DEPT.

VIA HAND DELIVERY

A. Heath Abshure, Commissioner
Arkansas Securities Department
Heritage West Building
201 E. Markham, Suite 300
Little Rock, Arkansas 72201

Re: Sisters of Mercy of the Americas Request for No-Action Letter
Mercy Investment Services, Inc.

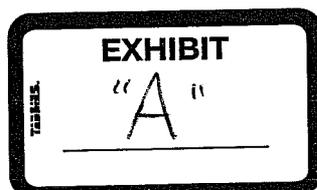
Dear Commissioner Abshure:

The Sisters of Mercy of the Americas, Inc., a Maryland nonstock corporation, has authorized us to request on behalf of the Sisters of Mercy of America (the "Sisters of Mercy") that the Arkansas Securities Department (the "Department") not commence an enforcement action under the Arkansas Securities Act, as amended, codified at Ark. Code Ann. § 23-42-101 *et seq.* (the "Act"), against certain pooled investment vehicles (consisting of "Program Funds" as described in further detail and defined below) established as part of an asset management program operated by the Sisters of Mercy if the Sisters of Mercy operates the asset management program in the manner described below without registering:

(a) the interests in the Program Funds under Ark. Code Ann. § 23-42-501 in reliance on the exemptions in Ark. Code Ann. §§ 23-42-503(a)(7), 23-42-503(a)(9), 23-42-504(a)(9), and 23-42-504(a)(12);

(b) Mercy Investment Services, Inc., a nonprofit public benefit corporation organized under the Missouri Nonprofit Corporation Act (the "Program Manager"), as a broker-dealer under Ark. Code Ann. § 23-42-301(a) on the basis that the Program Manager (i) is not "in the business of effecting transactions in securities" and therefore does not come within the definition of "broker-dealer" in Ark. Code Ann. § 23-42-102(2) or, in the alternative, (ii) is excluded from the definition of broker-dealer as being an "issuer" under Ark. Code Ann. § 23-42-102(2)(B);

(c) the officers, directors, and employees of the Program Manager as agents under Ark. Code Ann. § 23-42-301(a) on the basis that these individuals are not "effecting or attempting to effect purchases or sales of securities" and therefore do not come within the definition of "agent" in Ark. Code Ann. § 23-42-102(1)(A);



(d) the Program Manager as an investment adviser under Ark. Code Ann. § 23-42-301(c) on the basis that (i) the scope of business of the Program Manager does not include being a person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation, issues or promulgates analyses or reports concerning securities and therefore does not come within the definition of “investment adviser” in Ark. Code Ann. § 23-42-102(8) or, in the alternative, (ii) it is not required to be registered with the Department as an investment adviser in reliance on Ark. Code Ann. § 23-42-102(8)(E); and

(e) the officers, directors, and employees of the Program Manager as investment adviser representatives under Ark. Code Ann. § 23-42-301(c) as these individuals (i) do not come within the meaning of “representative” of an investment adviser, as defined in Ark. Code Ann. § 23-42-102(12) or, in the alternative, (ii) are not required to be registered with the Department in reliance on Ark. Code Ann. § 23-42-102(8)(E).

Bryan Cave LLP, as national counsel for the Sisters of Mercy, submitted a request for a no-action letter (the “SEC Letter”) from the staff of the U.S. Securities and Exchange Commission (“SEC”) regarding exemptions from registration under the Investment Company Act of 1940, the Investment Advisers Act of 1940, the Securities Exchange Act of 1934 and the Securities Act of 1933 with respect to the facts described below. A copy of the SEC Letter and the response of the SEC staff granting the request are enclosed

We have relied upon and assumed the accuracy of the facts set forth in the SEC Letter, which are also set forth below.

The Sisters of Mercy would like to implement the Program as soon as possible, and therefore, expedited review of this matter is requested. In addition, the Sisters of Mercy request confidential treatment of this letter based on the proprietary nature of the investment strategy, structure, and objectives of the Program and also the desire for privacy of the Sisters of Mercy.

Facts

The Sisters of Mercy is an order of vowed religious women affiliated with the Roman Catholic Church, which is in the process of completing the consolidation and reconfiguration of its 26 religious communities into seven surviving corporations and related entities. The order is planning to create an asset management program (the “Program”) for the collective investment and professional management of its endowment and other funds and the funds of its related entities and sponsored ministries (each, a “Participant”).

In addition to the seven surviving community corporations and their related entities, Participants would include entities which the Sisters of Mercy refers to as “sponsored ministries” and which carry on charitable activities that the Sisters of Mercy sponsors. For purposes of this letter, a “Sponsored Ministry” is a separately incorporated organization described in Section 501(c)(3) of the Internal Revenue Code of 1986, as amended (the “Internal Revenue Code”), with respect to which the Sisters of Mercy (or its delegatee(s)) has the corporate power, through

participation on the governing body of such Sponsored Ministry, to approve or veto one of the following corporate governance matters: (i) an amendment to the articles of incorporation or bylaws of the Sponsored Ministry; (ii) any corporate merger, consolidation, creation of a subsidiary, liquidation or dissolution of the Sponsored Ministry; or (iii) selection of the distributee of the assets of the Sponsored Ministry upon termination thereof. Sponsored Ministries in some states may participate in the Program by depositing their endowment and other assets with one or more newly-formed fund entities (each, individually, a "Sponsored Ministry Vehicle" and collectively, the "Sponsored Ministry Vehicles") for which the Program Manager would be the administrator and manager. The sole purpose and activity of each Sponsored Ministry Vehicle would be to receive deposits from Sponsored Ministries and invest such assets in certain specific Program Funds as described later herein.

Each of the seven surviving corporations and their related entities is organized as a nonprofit public benefit corporation whose exempt purpose is to carry on charitable activities with a primary emphasis on the needs of the poor, sick, and uneducated.

Each Participant, including each Sponsored Ministry, will be a charitable organization described in Section 501(c)(3) of the Internal Revenue Code that has been recognized as tax exempt by the Internal Revenue Service either by the issuance of a favorable determination letter or pursuant to the Group Exemption Letter issued by the Internal Revenue Service to the United States Conference of Catholic Bishops currently dated July 28, 2009 (the "Group Exemption Letter"), which states:

. . . the agencies and instrumentalities and educational, charitable, and religious institutions operated, supervised, or controlled by or in connection with the Roman Catholic Church in the United States, its territories or possessions appearing in *The Official Catholic Directory* for 2009 are exempt from federal income tax under Section 501(c)(3) of the Code.

Each Participant will be primarily engaged in religious and charitable activities in direct service to a broad class of charitable beneficiaries including the sick, poor, or uneducated.

Two Sponsored Ministries which will likely be Participants include Mount St. Mary Academy Corporation and Mercy Crest Housing, Inc., each of which is an Arkansas non-profit corporation, with the principal place of its exempt activities in Arkansas.

The Program is intended to provide Participants with economies of scale and the possibility of access to better performing investment managers. The Program will be managed by the Program Manager, which itself is a charitable organization described in Section 501(c)(3) of the Internal Revenue Code that has been recognized as tax exempt by the Internal Revenue Service pursuant to the Group Exemption Letter. The Program Manager will be located in St. Louis, Missouri and will not have a place of business in Arkansas. The Program Manager has submitted appropriate documentation to the Roman Catholic Archdiocese of St. Louis, Missouri regarding its relationship to the Roman Catholic Church, and has been advised that it is eligible and will be listed in *The Official Catholic Directory*.

Management and governance of the Program Manager will be vested in a two-tiered governing body consisting of members and a Board of Directors. The members of the Program Manager will consist of members of the Sisters of Mercy (the "Members"). The reserved powers of the Members will include the power to (i) elect the Board of Directors of the Program Manager (the "Board"), (ii) amend the articles of incorporation and bylaws of the Program Manager, and (iii) in the event of liquidation, designate the charitable organizations to which any net assets of the Program Manager remaining after the return of the Participant's invested funds will be distributed. The Board will include members of the Sisters of Mercy, chief financial officers of several of the surviving corporations, and others with backgrounds in such areas as ethics, social justice, audit, legal, finance, investments, strategic planning, and/or communication. The Board will approve the principal investment policies of the Program based on the recommendations of its investment committee (the "Investment Committee") and its social responsibility committee (the "Social Responsibility Committee"), and will oversee the activities of its committees and review the performance and compensation of the Program Manager's chief investment officer.

The Investment Committee will include members of the Sisters of Mercy, chief financial officers of several of the surviving corporations, and others with backgrounds in such areas as ethics, social justice and/or institutional investing. The Investment Committee will set the investment objectives and strategies of the Program and the Program Funds to be established (e.g., a Cash Fund, Balanced Funds, Equity Funds, Fixed Income Funds, and a Community Investment Fund) (each, a "Program Fund") and the criteria for the selection and termination of the investment advisers for the Program Funds (except the Community Investment Fund), and will monitor the performance of the investment advisers. The Social Responsibility Committee will include members of the Sisters of Mercy, chief financial officers of several of the surviving corporations, and others with backgrounds in ethics, social justice, corporate responsibility, and/or community investing. The Social Responsibility Committee will set the Program criteria for socially responsible investing and shareholder advocacy.

The staff of the Program Manager will include a chief investment officer with experience in nonprofit asset management, several social responsibility investment officers, and a finance officer. While the Investment Committee initially will be responsible for the selection and termination of the investment advisers for the Program Funds in accordance with established criteria and policies, over time the chief investment officer of the Program Manager may assume greater responsibility for the selection and termination of investment advisers in accordance with such criteria and policies.

Except as provided herein, all investment decisions with respect to the portfolio securities of the Program Funds will be made by independent investment advisers who are registered under federal or state securities laws, or who are excluded from the definition of investment adviser or are exempt from such registration requirements, and all transactions in the portfolio securities will be effected by registered broker-dealers. Neither the Program Manager nor any of its officers, directors, employees, or volunteers will solicit donations to any Program Fund. Several of the Balanced Funds will invest in certain other Program Funds in percentages pre-determined by the Program Manager without the involvement of independent investment advisers. Due to

the social responsibility investing orientation of the Community Investment Fund, investment decisions for that fund will be made by the Program Manager without the involvement of independent registered investment advisers.

It is anticipated that the Community Investment Fund will provide low interest rate loans to other non-profit organizations and community development finance institutions, which directly use the proceeds thereof to carry on socially responsible activities and make loans to underserved businesses and individuals in need of capital; make deposits at below market interest rates in credit unions and other financial institutions, which directly use the proceeds thereof to make loans to underserved businesses and individuals in need of capital to stimulate economic development in the communities; and make equity investments in community development financial institutions that promote socially responsible activities and make loans to the underserved or in companies which provide technical assistance to those in need of educational, advisory, or consulting services for community development.

Each Participant will deposit its funds in a custodial account with an institutional custodian and will be solely responsible for determining the allocation of funds it has deposited among the various Program Funds. Subject to certain administrative limitations, the Participants will be free to withdraw their funds from the Program Funds at any time. The custodian will provide monthly written reports to the Participants. A Participant's sole ownership interest in the Program will consist of its interest in the portfolio securities of the Program Funds. The sole ownership interest of a Sponsored Ministry Vehicle will consist of its invested assets under management in one or more Balanced Funds. In the event the Program Manager is liquidated, its articles of incorporation require that any net assets remaining after the return of the Participants' invested funds will be distributable to one or more charitable organizations that are exempt from taxation under Section 501(c)(3) of the Internal Revenue Code.

The members of the Board will not be compensated for their services as directors but will be reimbursed for approved out-of-pocket expenses incurred in performing their duties. The Program Manager's expenses, including the compensation of its officers and staff, and the fees and commissions of the independent investment advisers and broker-dealers, will be borne by the Participants on a pro rata basis according to the amounts each has under management in the Program Funds, except that certain Sponsored Ministries may bear a lesser share of the Program Manager's expenses and, in each such case, the balance will be borne entirely by the surviving community corporation that sponsors such Sponsored Ministry. The Program Manager's chief investment officer and staff will not receive compensation that is transaction-based, performance-based, or based upon amounts invested by the Participants in the Program Funds or the return on the investment of the Participants' funds. The compensation of the Program Manager's chief investment officer and staff will consist of salaries and may include bonuses in amounts determined by the Board based on subjective criteria reflecting their respective contributions to the achievement of the Program's objectives in areas such as the development and implementation of investment and asset allocation strategies, the selection of investment advisers, the creation of social responsibility investment initiatives, and communications and relationships with Participants.

A Participant may invest in the Program Funds only those assets to which it has immediate, unrestricted, and exclusive use, benefit, and enjoyment, and none of the assets invested may be attributable to a retirement plan providing for employee contributions or variable benefits. No Participant may assign, encumber, or transfer its interest in the Program Funds, except that a Participant would be permitted from time to time to pledge its interests in the Program Funds to third party lenders as collateral for loans to fund its charitable and tax-exempt activities. From time to time, the Participants have need of funds to further their charitable and tax-exempt activities. The Program proposes to permit the Participants each to pledge their respective interests in the Program Funds to third-party lenders as collateral for loans for such activities. The Participants' ability to offer their interests as collateral for such loans would provide the Participants with the opportunity to obtain competitive financing for these activities and the full financial benefit of these assets. The proceeds of such loans would be used exclusively for "charitable" and "religious" purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code.

No Participant would be permitted to pledge its interest in the Program Funds to a third party lender unless: (1) in the case of a loan default, the pledged interest would, under the terms of the pledge and Program's governing instruments, automatically liquidate into cash to the extent necessary to pay off the loan; (2) under the terms of the pledge and Program's governing instruments, the investment risk would remain with the Participant; (3) under the terms of the pledge and Program's governing instruments, the lender would at no time have anything other than a security interest in a Participant's interest in the Program Funds; and (4) under the terms of the pledge, the lender would have no right to convert any amount of the loan into an interest in the Program Funds, but rather, would only have the right to the cash proceeds from the automatic liquidation of the pledged interest in Program Funds. If, in the case of a loan default, the value of the pledged interest is less than the remaining amount of the loan, the Participant would remain liable for the deficit. Any excess liquidated amount would be returned to the Participant.

The Participants will be informed that the Program Manager is not registered as an investment adviser under the Investment Advisers Act of 1940 or any state securities law or as a broker-dealer under the Securities Exchange Act of 1934 or any state securities law, and that neither the Program Manager nor the Program Funds are registered as an investment company under the Investment Company Act of 1940. Independent certified public accountants will prepare a written report on the financial condition and performance of each of the Program Funds, including audited financial statements. Each Participant will receive a copy of the reports with respect to the Program Funds in which the Participant's assets have been invested at any time during the year.

The Program Manager will comply with Section 7(e) of the Investment Company Act of 1940 with regard to providing Participants with a written description of the material terms of the operation of the Program Funds.

As indicated on page two of this letter, which is consistent with the submission to the SEC staff, Sponsored Ministries in some states may participate in the Program through Sponsored Ministry Vehicles. The Program Manager has advised, however, that such is not currently contemplated to be the case in Arkansas, and therefore, further discussion of Sponsored

Ministry Vehicles is not relevant to the issues to be discussed and analysis presented under the Act. If the use of Sponsored Ministry Vehicles did become relevant, we would apply for further guidance on the matter at that time.

Securities Registration

We request the Department to find that the interests in the Program Funds are exempt from registration under Ark. Code Ann. § 23-42-501 pursuant to the exemption in Ark. Code Ann. § 23-42-503(a)(7) for “any security issued by any person organized and operated not for private profit but exclusively for religious, educational, benevolent, charitable, fraternal, social, athletic, or reformatory purposes.”

Although neither the Program nor the Program Funds will constitute a separate legal entity for which tax exempt status may be sought under Internal Revenue Code Section 501(c)(3), the Program Manager, which controls the Program and the Program Funds, is organized exclusively for charitable purposes, and the Program Manager is a tax exempt entity described in Internal Revenue Code Section 501(c)(3). The Program Manager and the Participants have organized the Program and the Program Funds exclusively for the purposes expressed in Ark. Code Ann. § 23-42-503(a)(7), and each Participant will use the proceeds from its investment in the Program Funds to further its charitable purposes.

We recognize that the Department’s Rule 503.01(7) contains additional requirements in order to claim the exemption in 23-42-503(a)(7); however, because in this case, the Program and the Program Funds are not separate legal entities and the interests are not certificated, some of the requirements are not applicable to this situation. In addition, Rule 503.01(7) requires that the security meet the requirements as set forth in the appropriate NASAA Statement of Policies on Church Bonds, Health Care Facility Offerings, or Guidelines for General Obligation Financing by Religious Denominations. None of these Statements of Policy are applicable to this situation. Therefore, we request the Department waive the requirements of Rule 503.01(7) and find that the interests in the Program Funds are exempt under Ark. Code Ann. § 23-42-503(a)(7).

In addition, we believe that to the extent the interests in the Program Funds are securities, the offer and sale of the interests also would be exempt under the limited offering exemption in Ark. Code Ann. § 23-42-504(a)(9) for offers and sales to not more than 35 purchasers (other than those set forth in subsection 504(a)(8)). As set forth above, there are currently two Sponsored Ministries engaged in exempt activities in Arkansas that are likely to become Participants. It is not currently contemplated that there will be more than six Sponsored Ministries engaged in exempt activities in Arkansas during any twelve-month period, but we would apply for further guidance if such were to be the case. The offer and sale of all interests to Participants in other states will comply with such state’s applicable securities laws. All Participants are participating for the purpose of investment and not with a view to distribution, and there will be no solicitation of investors in Arkansas, other than the Sponsored Ministries. We recognize that Rule 504.01(9) contains other requirements to claim the exemption in Ark. Code Ann. § 23-42-504(a)(9); however, because the Program and Program Funds are not separate legal entities and the interests will not be certificated, certain of the requirements are inapplicable. Furthermore, the Arkansas Participants, which are not accredited, would not be able to represent that their investments do

not exceed twenty percent (20%) of their net worth. Therefore, we request the Department waive the requirements of Rule 504.01(9) and find that the offer and sale of the interests in the Program Funds are exempt under Ark. Code Ann. § 23-42-504(a)(9).

In addition to the foregoing exemptions, we request the Department to find that the interests in the Program Funds and the offer and sale thereof are exempt pursuant to the Department's discretionary authority in Ark. Code Ann. § 23-42-503(a)(9) and Ark. Code Ann. § 23-5-42-504(a)(12) for any security or transaction as to which the Department by rule or order finds that registration is not necessary or appropriate in the public interest or for the protection of investors. As described herein, all of the Participants in the Program are related to the Sisters of Mercy, and we request the Department to concur that registration of the Program Fund interests and the offer and sale thereof is not necessary or appropriate in the public interest or for the protection of the Participant investors.

Broker-Dealer Registration

Program Manager does not come within the definition of Broker-Dealer. For the reasons set forth below, we do not believe that the activities of the Program Manager come within the definition of broker-dealer in Ark. Code Ann. § 23-402-102(2) of being "engaged in the business of effecting transactions in securities for the account of others or for his own account." The Program Manager will provide the following services:

- (1) Set the investment objectives of the Program and the funds to be maintained (e.g., a Cash Fund, Balanced Funds, Equity Funds, Fixed Income Funds, and a Community Investment Fund that will make socially responsible investments, including investments in securities of, and loans to, organizations that make low cost capital available to the underserved) (each, a "Program Fund");
- (2) Except for certain of the Balanced Funds and the Community Investment Fund, choose the independent investment advisers for the Program Funds (which could include advisers that are registered under federal or state securities laws, or are exempt from such registration requirements or excluded from the definition of investment adviser);
- (3) Monitor the performance of these investment advisers; and
- (4) Replace an investment adviser if its performance is determined to be unsatisfactory by the Program Manager.

The scope of business of the Program Manager will not (i) involve effecting any transactions in portfolio securities on behalf of, or for the account of, the Program Funds, (ii) involve buying, selling, or otherwise making a market in interests in the Program Funds except that it may be deemed to sell and purchase such interests in the Program Funds to and from Participants in its capacity as issuer of those interests and in accordance with the purchase and redemption provisions applicable to each Program Fund, (iii) involve effecting any transaction in securities on behalf of any other person, except that it will make investment decisions for, and

purchase securities for investment purposes on behalf of, the Community Investment Fund, or (iv) include the receipt of any transaction-based, performance-based, or any other compensation, directly or indirectly, with respect to services it provides to the Program or Program Funds.

We are unaware of any Department interpretation of “in the business.” However, Black’s Law Dictionary defines “business” as “a commercial enterprise carried on for profit.”¹ In the present case, the Program Manager is organized as a nonprofit public benefit corporation under Missouri law and is not organized to generate a profit.

The Program Manager is excluded from the definition of Broker-Dealer. We believe that the Program Manager should not be required to register as a broker-dealer under Ark. Code Ann. § 23-42-301(a) because it is excluded from the definition of broker-dealer as an “issuer” under Ark. Code Ann. § 23-42-102(2)(B). Ark. Code Ann. § 23-42-102(9)(A) provides, in part, the following definition of “issuer”:

[w]ith respect to certificates of deposit, voting-trust certificates, or collateral-trust certificates, or with respect to certificates of interest or shares in an unincorporated investment trust not having a board of directors or persons performing similar functions or of the fixed, restricted management, or unit type, the term “issuer” means the person performing the acts and assuming the duties of depositor or manager under the provisions of the trust or other agreement or instrument under which the securities are issued.

The only commentator that we are aware of who discusses the application of a provision similar to Ark. Code Ann. § 23-42-102(9)(A) agrees that the manager of an unincorporated fund under similar circumstances would be considered the issuer. In commenting on the comparable provision of the Uniform Securities Act of 1956 (upon which the Act is based), this author has stated:

Probably the best example of this is the unincorporated mutual fund. If the mutual fund has no independent manager, but has this function performed for it by the fund manager who also happens to be the sponsor of the fund, the fund manager would be considered the issuer of the mutual fund interests. As such, it would not have to maintain a separate registration as owner-dealer in the share [sic] of the mutual fund.

Long, Vol. 12A, *Blue Sky Law, Securities Law Series*, § 8:64, p.8-89.

In addition, the agencies of several states have recognized under provisions similar to Ark. Code Ann. § 23-42-102(9)(A) that the manager of an unincorporated fund under similar circumstances would be considered the issuer.²

¹ 8th ed., Bryan A. Garner.

² See *Re: Wells Fargo Investment Trust for Retirement Programs*, 1987 WL 274856 (Wash. 1987) (where securities were held in a trust, the trust did not have a body performing the functions of a board of directors, and Wells Fargo was the trustee and conducted the day-to-day trust operations, a no-action letter was issued in response to Wells

In the present case, the Program Manager is responsible for the day-to-day operations of the Program, as neither the Program itself nor any of the Program Funds have any directors, officers, or employees. As in the example in the quote from Professor Long, the Program Manager is the fund manager of the Program Funds. Hence, we believe the Program Manager should be deemed the “issuer” of the participation interests in the Program Funds. Based on the foregoing, it is our view that the Program Manager is excluded from the definition of broker-dealer under Ark. Code Ann. § 23-42-102(9)(A).

Agent Registration

The definition of an “agent” in Ark. Code Ann. § 23-42-102(1)(A) includes “any individual, other than a broker-dealer, who represents a broker-dealer or issuer in effecting or attempting to effect purchases or sales of securities.” As previously indicated, neither the Program Manager nor any of its officers, directors, or employees are involved in (i) effecting any transactions in portfolio securities on behalf of, or for the account of, the Program Funds, (ii) buying, selling, or otherwise making a market in interests in the Program Funds except that the Program Manager may be deemed to sell and purchase such interests in the Program Funds to and from Participants in its capacity as issuer of those interests and in accordance with the purchase and redemption provisions applicable to each Program Fund, (iii) effecting any transaction in securities on behalf of any other person, except that the Program Manager will make investment decisions for, and purchase securities for investment purposes on behalf of, the Community Investment Fund, or (iv) the receipt of any transaction-based, performance-based, or any other compensation, directly or indirectly, with respect to services the Program Manager provides to the Program and Program Funds. Furthermore, neither the Program Manager nor any of its directors, officers, or employees will solicit donations to any Program Fund. Based on the foregoing, we request that the Department concur that, under the foregoing circumstances, registration of the officers, directors, and employees of the Program Manager as agents under Ark. Code Ann. § 23-42-301(a) or, to the extent this transaction is exempt under Ark. Code Ann. § 23-42-503(a)(7), as agents of the issuer under Rule 503.02(A)(2), is not required.

Investment Adviser Registration

Program Manager not “in the business.” We believe that the Program Manager should not be required to register as an investment adviser under Ark. Code Ann. § 23-42-301(c) because its activities do not meet all the elements of the investment adviser definition. Ark. Code Ann. § 23-42-102(8) provides the following definition of “investment adviser”:

“Investment adviser” means any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as

Fargo’s claim that Wells Fargo was the issuer); *Re: Wells Fargo Investment Trust For Retirement Programs; Sections 2(9) and 401(A)(3)*, 1987 WL 348922 (Okl. 1987); *Re: Wells Fargo Investment trust For Retirement Programs*, 1987 WL 2732306 (Md. 1987); *Re: Southland Royalty Company Opinion Request*, 1980 WL 127956, 1 (Okl. 1980) (where a corporation transferred certain funds to two trusts and the trustees were two banks, it was determined that the banks were the issuers since they were “performing the acts and assuming the duties of depositor or manager”).

to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation, issues or promulgates analyses or reports concerning securities.

As discussed above, we believe that the meaning of “in the business” in Arkansas is an activity carried on for profit. In addition, with respect to the SEC’s very similar definition of investment adviser, the SEC has interpreted the phrase “in the business” to include a person “holding itself out” as an investment adviser.³

The SEC further sets forth several ways in which a person may hold itself out, including (1) “advertising its investment advisory services,” (2) “referring to itself as an investment adviser,” (3) “maintaining a listing as an investment adviser,” such as in a telephone directory, (4) using “letterhead indicating any investment advisory activity” or (5) otherwise letting it be known, “through word of mouth or otherwise,” that it is willing to provide investment advisory services.

We believe that the Program Manager should not be deemed to be “in the business” of providing investment advisory services because (i) it will only be reimbursed for its expenses and will not realize any profit or pecuniary gain from its Program-related activities, such as transaction-based or performance-based compensation; and (ii) it does not engage in any activity which would be deemed to be holding itself out as an investment adviser, nor does it make its services generally known or available except to Participants, all of which are related to the Sisters of Mercy. Hence, for all of these reasons, we believe the Program Manager does not come within the definition of “investment adviser” under the Act.

Program Manager may rely upon an exemption from registration. Without conceding that the Program Manager comes within the definition of investment adviser in the Act or is providing investment advice in Arkansas,⁴ Ark. Code Ann. § 23-42-102(8)(E) provides an exemption for a person who does not have a place of business in Arkansas and during the preceding twelve-month period has had fewer than six (6) clients who are residents of Arkansas, exclusive of persons described in Ark. Code Ann. § 23-42-102(8)(E)(i).

The Program Manager is organized under the laws of the State of Missouri and has its principal place of business in St. Louis, Missouri. It does not, and will not, have a place of business in Arkansas as that term is defined in Rule 102.01(21). Even assuming that both Arkansas Participants are not persons described in Ark. Code Ann. § 23-42-108(E)(i) and thus should be counted towards the number of clients in Arkansas, as discussed above, we contemplate at all times there will be six or fewer Arkansas Participants who would be clients of the Program Manager. Pursuant to Rule 102.01(7)(B), corporations, such as the Participants, are counted as a single client when they receive investment advice based on the corporation’s

³ *Applicability of the Investment Advisors Act to Financial Planners, Pension Consultants, and Other Persons Who Provide Investment Advisory Services as a Component of Other Financial Services*, Investment Advisers Act Release No. 1092 (Oct. 8, 1987).

⁴ Even if the Program Manager was deemed to come within the definition of an investment adviser under the Act, its only client is the Program which is not located in Arkansas, but rather in Missouri.

investment objectives, rather than the individual investment objectives of its corporate members or its directors.

Based on the foregoing, it is our view that the Program Manager would be exempt from registration as an investment adviser under the Act in reliance on Ark. Code Ann. § 23-42-102(8)(E).

Investment Adviser Representative Registration

Officers, directors, and employees of Program Manager do not come within the definition of Investment Adviser Representative. We are of the view that these individuals would not come within the definition of a representative of an investment adviser under Ark. Code Ann. § 23-42-102(12) since the Program Manager itself does not come within the definition of an investment adviser under the Act.

Officers, directors, and employees of the Program Manager are exempt from registration as Representatives of an Investment Adviser. Without conceding that the officers, directors, and employees of the Program Manager come within the definition of a representative of an investment adviser in the Act or are providing any service described in Ark. Code Ann. § 23-42-102(12) in the State of Arkansas, it is our view that the officers, directors, and employees of the Program Manager are exempt from registration as representatives of an investment adviser in reliance upon Ark. Code Ann. § 23-42-102(8)(E) inasmuch as the Program Manager meets all of the conditions to rely upon the exemption from registration as an investment adviser under Ark. Code Ann. § 23-42-102(8)(E).

We respectfully request that, in reliance upon the representations set forth herein, the Commissioner issue a no action letter advising that the Department will not commence enforcement action under the Act if (a) interests in the Program Funds are offered and sold in Arkansas without registration under the Act; (b) the Program Manager does not register as a broker-dealer under the Act; (c) the officers, directors, and employees of the Program Manager do not register as agents under the Act; (d) the Program Manager does not register as an investment adviser under the Act; and (e) the officers, directors, and employees of the Program Manager do not register as a representative of an investment adviser under the Act.

We request that a file-marked copy of this letter be returned to our office in the postage prepaid envelope which we have provided.

Securities Commissioner

November 4, 2009

Page 13

Please do not hesitate to contact us if you have any questions or require additional information.

Very truly yours,

A handwritten signature in black ink that reads "Robyn P. Allmendinger". The signature is written in a cursive style with a large, prominent "R" at the beginning.

Robyn P. Allmendinger

RPA:nr

[Home](#) | [Previous Page](#)**U.S. Securities and Exchange Commission****Investment Company Act of 1940 — Section 7
Investment Advisers Act of 1940 — Section 203(a)****Sisters of Mercy of the Americas, Inc.
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 is in Acrobat format.

<http://www.sec.gov/divisions/investment/noaction/2009/sistersofmercy100109.htm>

[Home](#) | [Previous Page](#)

Modified: 10/02/2009