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An Alternative Retail Offering: "Conglomerate Vehicles" and Their Regulatory Considerations

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Retail investors are increasingly demanding access to the private markets, which has historically been limited to investors that meet the "qualified purchaser" standard[1] required by most private equity funds. There are limited avenues for funds registered under the Investment Company Act of 1940 (the 1940 Act), which are the vehicles many retail investors have traditionally used to invest, to access the private markets. Additional regulatory flexibility is not expected in the near future; therefore, in recent years, there has been a high level of interest in alternative retail products that provide exposure to private markets under the existing regulatory regime. One such product is structured as an operating company or "conglomerate" that is not considered an "investment company" within the meaning of the 1940 Act.[2] This article primarily discusses how conglomerates are structured to avoid the 1940 Act's definition of investment company and also discusses certain other federal securities laws that may apply to these structures.

Conglomerates are structured in a variety of forms, each with their own features and treatment under the federal securities laws. Conglomerates that are listed on a national securities exchange in many respects look like traditional public operating companies. Among other things, listed conglomerates provide shareholders daily liquidity at a market price, can conduct public offerings from time to time and are subject to the rules of the exchange on which they list their shares. Non-listed conglomerates, on the other hand, may offer their shares continuously and are, from a liquidity standpoint, structured much like closed-end tender offer funds. Non-listed conglomerates may register offerings of their shares under the Securities Act of 1933 (1933 Act) or they may offer their shares in a private placement in reliance on Regulation D under the 1933 Act.[3] Additionally, non-listed conglomerates may offer multiple classes of shares in order to access different sales channels. Non-listed conglomerates typically offer to repurchase a limited percentage of their outstanding shares (for example, 5 percent) at periodic intervals at net asset value and may have certain other features, such as lockups, designed to preserve the asset base while permitting some liquidity.

Definition of "Investment Company"

At a high level, the 1940 Act is intended to impose shareholder-protective restrictions on pooled investment vehicles accessible to retail investors.[4] The 1940 Act regulatory regime is not intended to regulate operating companies or holding companies that engage in operating businesses through

subsidiaries (that is, conglomerates). In fact, in the congressional hearings leading to the passage of the 1940 Act, David Schenker, Chief Counsel to the Investment Trust Study conducted by the Securities and Exchange Commission (SEC), explained the 1940 Act's intended reach:

> We are not even remotely interested in holding companies . . . if you can prove that even though you do not do your business through wholly owned subsidiaries but through majority-owned subsidiaries, if you make out a case that you are engaged in a business other than investing and reinvesting in securities, you will be exempt.[5]

The 1940 Act contains numerous operational restrictions and limitations that would leave many operating businesses hamstrung and unable to effectively operate.[6] Conglomerates, which own and control companies ultimately engaged in operating businesses, are therefore structured in a manner designed to avoid being investment companies.

Section 3(a)(1) of the 1940 Act contains three non-exclusive definitions of "investment company" which, absent an available exemption or exclusion, would require an issuer to register under the 1940 Act. The two definitions most relevant to conglomerates are:[7]

1. Section 3(a)(1)(A). An issuer that "is or holds itself out as being engaged primarily, or proposes to engage primarily, in the business of investing, reinvesting, or trading in securities;"[8]
2. Section 3(a)(1)(C). An issuer that "is engaged or proposes to engage in the business of investing, reinvesting, owning, holding, or trading in securities, and owns or proposes to acquire investment securities having a value exceeding 40 per centum of the value of such issuer's total assets (exclusive of government securities and cash items) on an unconsolidated basis."

Section 3(a)(1)(A)—Orthodox Investment Companies

Section 3(a)(1)(A) picks up clearly recognizable and self-labeled investment companies that hold themselves out as engaging in an investment company business. Though, on its face, the analysis of whether a company would meet this definition seems obvious, the meanings of "holding out" and "primarily engaged" have both been subject to judicial and SEC interpretation.

"Holding out" has been interpreted as implying intent on the part of the issuer.[9] Courts generally look to the issuer's public statements and a reasonable person's interpretation of those statements to determine if an issuer holds itself out as being engaged in an investment company business. In evaluating an issuer's public statements, the SEC has focused on the issuer's description of its current and contemplated activities.[10]

An analysis of whether an issuer *is engaged primarily* in an investment company business is based on the specific facts and circumstances of the issuer. Courts and industry practitioners generally look to the five factors enumerated in *In re Tonopah Mining Co. of Nevada*,[11] and the additional public perception layer of review recognized in *SEC v. National Presto Industries, Inc.*,[12] to determine whether an issuer is "engaged primarily" in an investment company business.[13] The *Tonopah* factors are (1) the issuer's history; (2) the way the issuer holds itself out to the public; (3) the activities of the issuer's officers and directors; (4) the nature of the issuer's assets; and (5) the sources of the issuer's income.[14] The *Tonopah* test balances both qualitative and quantitative factors in analyzing whether an issuer is primarily engaged in a non-investment-company business. Additionally, in *Presto*, the court emphasized how a reasonable investor would view an issuer when considering the totality of the *Tonopah* factors. The court in *Presto* stated that when analyzing an issuer under *Tonopah,* "[W]hat principally matters is the beliefs the company is likely to induce in investors. Will its portfolio

and activities lead investors to treat a firm as an investment vehicle or as an operating enterprise?"[15]

Section 3(a)(1)(C)—Inadvertent Investment Companies

Section 3(a)(1)(C) is intended to reach issuers that, while not necessarily conforming to the popular perception of an investment company, nonetheless hold such a substantial portion of their assets in investment securities that Congress believed their shareholders might need the protections of the 1940 Act. Issuers described in Section 3(a)(1)(C) but not in Section 3(a)(1)(A) (that is, issuers that do not meet the "holding out" and "engaged primarily" requirements) are sometimes referred to as "inadvertent investment companies." Section 3(a)(1)(C) differs from Section 3(a)(1)(A) in three key respects:

1. It requires only that an issuer be or propose to be "engaged" in an investment company business, whereas Section 3(a)(1)(A) requires that an issuer be "engaged primarily" in such business;
2. It applies a 40 percent test relating to an issuer's investments in "investment securities" (defined below); and
3. It applies to an issuer that merely "owns" or "holds" securities, whereas Section 3(a)(1)(A) requires the more involved action of "investing, reinvesting, or trading in" securities.

By its terms, Section 3(a)(1)(C) excludes from the definition of investment company many operating companies but may pick up companies that operate through non-majority-owned subsidiaries (because, as discussed below, unlike majority-owned subsidiaries, interests in these entities are considered investment securities) or other companies that meet the 40 percent test (sometimes referred to as *prima facie* investment companies) but have a different primary business (for example, reinsurance, and tech companies engaged in research and development).[16]

The SEC Staff has taken an expansive view of what constitutes being "in the business" of holding investment securities for purposes of Section 3(a)(1)(C), although it typically requires some ongoing investment company activity.[17] An issuer's continued holding of, or investment in, investment securities could be considered activity that may constitute being "in the business."[18]

Section 3(a)(1)(C) applies its 40 percent test to investment in "investment securities." For these purposes, "investment securities" are all securities excluding government securities, interests in employees' securities companies and securities issued by majority-owned subsidiaries of the owner that (1) are not investment companies, and (2) are not relying on the exception from the definition of investment company in Sections 3(c)(1) or 3(c)(7). The SEC considers investment in the securities of a majority-owned subsidiary as being "more akin to activities of a holding company than an investment company."[19] Section 2(a)(24) of the 1940 Act defines a majority-owned subsidiary of a parent as a company in which the parent owns 50 percent or more of the outstanding voting securities,[20] either directly or through one or more majority-owned subsidiaries of the parent.

The 40 percent test is calculated on an unconsolidated basis, meaning that assets held through subsidiaries are not included in the calculation of the issuer's investment securities. Rather, the value of securities issued by non-qualifying subsidiaries is included in the issuer's total assets as investment securities for purposes of the 40 percent test whereas majority-owned subsidiaries are included as "good assets" under the test as discussed above.[21]

Rule 3a-1—Exclusion for *Prima Facie* Investment Companies

Rule 3a-1 provides a safe harbor for an issuer that is an investment company under Section 3(a)(1)(C), provided that such issuer meets the specific requirements described generally below.[22]

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1. No more than 45 percent of the value of its total assets (exclusive of government securities and cash items) consists of and no more than 45 percent of its income is derived from, securities other than government securities, securities of employees' securities companies, securities of majority-owned subsidiaries (other than subsidiaries relying on the exclusion in Section 3(b)(3) or Section 3(c)(1) of the 1940 Act), or securities of companies "controlled primarily" by the issuer through which the issuer engages in a non-investment company business;
2. It is not an investment company as defined in Sections 3(a)(1)(A) or 3(a)(1)(B); and
3. It is not a "special situation investment company."[23]

The Rule 3a-1 safe harbor is similar to the quantitative test in Section 3(a)(1)(C) but adds companies "controlled primarily"[24] by the issuer to the list of "good assets" for purposes of the calculation and allows for a higher percentage (45 percent instead of 40 percent) of "bad assets." The total assets and net income tests in Rule 3a-1 are determined on an unconsolidated basis, except that the issuer consolidates the holdings of its wholly owned subsidiaries with its own holdings.

Application of the 1940 Act

Conglomerate vehicles take the position that they are not engaged in an investment company business and do not otherwise satisfy the quantitative definition of an investment company. This position is premised on the argument that interests representing portfolio companies and other intermediate entities in the conglomerate structure[25] are neither securities (in some instances) nor investment securities under the tests discussed above because such interests represent (1) majority-owned subsidiaries, (2) "primarily controlled" entities, or (3) interests in joint ventures (JVs) that are not securities (and therefore by definition are not investment securities).

Some issuers have used Rule 3a-1's concept of a "primarily controlled" subsidiary to argue that even where the conglomerate holds less than 50 percent of an operating company subsidiary's voting securities, because the conglomerate's holding is over 25 percent of the voting securities and the conglomerate holds more than any other shareholder's voting power, the conglomerate's interests in the subsidiary are not counted as "securities" for purposes of Rule 3a-1's 45 percent tests.

Other issuers take the position that they are not investment companies under Section 3(a)(1)(C) because more than 60 percent of their assets are invested in majority-owned subsidiaries, that is, operating companies in which the conglomerate owns 50 percent or more of the company's voting securities (even though they may own less than 50 percent of the economics). Given the monetary sums necessary to take such large stakes in portfolio companies, certain conglomerates have deployed their assets in a relatively limited number of issuers. Under both Section 3(a)(1)(C) and Rule 3a-1, a conglomerate may also invest in non-majority owned subsidiaries or non-primarily controlled companies, as applicable, so long as they meet the applicable numerical tests.

Newer conglomerates seek the ability to make a larger number of investments (and therefore have a more diversified portfolio) by co-investing alongside affiliated private equity funds managed by the same, or a related, sponsor. In these arrangements the co-investments are made through JVs that are typically structured as limited partnerships. The conglomerates hold interests in a general partner of the JV. The aggregation of the conglomerate's and private funds' investments allows the conglomerate to access more and larger investment opportunities.

Importantly, the conglomerate effectively holds governance power in the JV that may be disproportionate (that is, greater than) to its economic interest.[26] Because the 1940 Act's definition of a majority-owned subsidiary is tied to voting power rather than economic interest, these conglomerates

have several potential arguments that their JV holdings are not investment securities, including (1) that the JV interests are not securities at all; and (2) that if they are securities, they represent interests in the conglomerate's majority-owned subsidiary and therefore are not "investment securities." Under either theory, the conglomerate's interests in the JV would not be counted for purposes of Section 3(a)(1)(C)'s 40 percent test.

Joint Ventures

The argument that the conglomerate's interests in the JVs are not securities is premised on the factors first put forth in *SEC v. W.J. Howey Co.*[27] and then specifically applied to joint ventures in *Williamson v. Tucker*.[28]

In *Williamson*, the court applied the seminal "*Howey* test"[29] to address whether interests in a JV were investment contracts (and therefore securities). The court determined that the JV interests at issue were not investment contracts because the interests were structured such that the investor had the right to participate in the control of the enterprise. The court determined, however, that there are certain circumstances in which a JV interest would be deemed to be a security because the presumed right to control does not, in fact, exist. The court therefore developed an exception to the general rule, stating that "the mere fact that an investment takes the form of a general partnership or joint venture does not inevitably insulate it from the reach of the federal securities laws,"[30] and set forth three examples in which a joint venturer would be so dependent upon a promoter or other third party that the joint venturer's investment would constitute an investment contract:

1. An agreement among the parties leaves so little power in the hands of the venturer that the arrangement in fact distributes power as would a limited partnership;
2. The venturer is so inexperienced and unknowledgeable in business affairs that the venturer is incapable of intelligently exercising its venture powers; or
3. The venturer is so dependent on some unique entrepreneurial or managerial ability of the promoter or manager that the venturer cannot replace the manager of the enterprise or otherwise exercise meaningful venture powers.[31]

Conglomerates operating with this JV structure take the position that certain features of the JV agreements support the position that the JV interests are not of the passive variety that the *Williamson* court noted would suggest that the interest is a security. Arguments put forth supporting this point are that the JV agreements provide, among other things, that the conglomerate has the same or more authority over the JV as the other party to the agreement (a vehicle owned by the affiliated private funds); that the conglomerate is liable for losses of the JV; and that the JV agreements restrict the transfer of the JV general partnership interests. Because the conglomerate and the private funds are managed by the same or related managers, and therefore the two entities have the same knowledge and experience with respect to the management of the JV, the second and third factors from *Williamson*, each relating to the venturer's inexperience and dependency on another party, are not applicable. The foundation of these arguments is that the conglomerate intends to take an active role in the management of the JV and that, in fact, the conglomerate's management is able to do so.

Majority-Owned Subsidiaries

Even if the JV interests are considered securities, conglomerates may be able to take the position that they are interests in a "majority-owned subsidiary" of the conglomerate. At the risk of oversimplifying, the argument is that because the conglomerate has at least 50 percent of the voting power, and the majority-owned subsidiary definition is based on voting power, the JV is a majority-owned subsidiary of the conglomerate. Similar arguments may be made

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under Rule 3a-1 where the conglomerate's governance rights are at least equal to the other investing entity.

Application of the 1933 Act

Although interests in more recent conglomerates are offered via private placements in reliance on Regulation D, Regulation S or another exemption from the 1933 Act, conglomerates have registered their shares under the 1933 Act. Registration under the 1933 Act requires, among other things, initial and ongoing review of the conglomerate's registration statement and the conglomerate's registration statement must be declared effective by SEC Staff.[32] Shares of conglomerates that register under the Securities Act may also be listed on a national securities exchange or non-listed.

Application of the Exchange Act

Conglomerates that seek to be widely held generally will be required to register their shares under the Securities Exchange Act of 1934 (Exchange Act),[33] regardless of whether their shares are registered under the 1933 Act. Conglomerates that list their shares on a securities exchange are also subject to additional exchange-specific rules. The repurchase program of a non-listed conglomerate introduces unique considerations under Regulation M (Reg M)[34] and the tender offer rules.[35] These considerations are beyond the scope of this article.

Tax

The treatment of conglomerates for US federal income tax purposes depends on a variety of factors, including the application of the "publicly traded partnership rules" and the type of the conglomerate's expected income. Some conglomerates are taxed as corporations, meaning that the conglomerates themselves are subject to tax but their shareholders are only subject to taxation upon disposition of shares and receipt of taxable dividends. More recent conglomerates are taxed as partnerships which, at a high-level, permits a tax structure that is broadly similar to that of many private equity funds. In addition, because these conglomerates are pass-through for tax purposes, the character of the income from the conglomerates will generally pass through to their investors. For example, if a conglomerate recognizes ordinary income, the ordinary character of that income will be passed through to its investors as well.

Conclusion

Conglomerate vehicles are an innovative alternative investment vehicle that private equity sponsors may be able to use to offer products to a broader investor base. The range of conglomerate structures offers diversity in approach to target investment strategies and target shareholders, each with its own unique set of considerations under the federal securities laws. Given the nuance of many of the arguments under the federal securities laws, careful consideration is required in structuring and offering these vehicles, and sponsors should be prepared for significant SEC Staff engagement as part of the launch process.

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NOTES

1 Section 2(a)(51) of the Investment Company Act of 1940, as amended (1940 Act), defines "qualified purchaser," which is generally an individual with at least $5 million in investments or a company with at least $25 million in investments.

2 Since conglomerates are not investment companies as defined in Section 3(a) of the 1940 Act, they need not rely on the exclusion from 1940 Act regulation provided by Section 3(c)(7), which is the typical exclusion relied on by private funds and requires investors to be qualified purchasers.

3 17 CFR § 230.500, et seq. (1982).

[4] *See* Section 1 of the 1940 Act.

[5] Hearings on S. 3580, A Bill to Provide for the Registration and Regulation of Investment Companies and Investment Advisers, and for Other Purposes, Before the Subcomm. on Secs. & Exch. of the S. Comm. on Banking & Currency, 76th Cong. 177 (3d Sess.) (1940) (statement of David Schenker, Chief Counsel to the Investment Trust Study). Several provisions of the 1940 Act exclude bona fide holding companies from regulation under the 1940 Act though they are not relied on frequently. *See, e.g.*, Section 3(b)(1) and Section 3(b)(2). Section 3(b)(2) requires an order from the SEC, and issuers generally prefer Section 3(a)(1)(C)'s quantitative test, discussed herein, over the more subjective Section 3(b)(1).

[6] Some examples of obligations imposed on 1940 Act-registered companies include: (1) registration and ongoing public reporting and disclosure requirements; (2) mandatory compliance programs; (3) a board of directors comprising at least 40% directors that are not "interested persons" (as defined in the 1940 Act) of the investment company or its adviser, with certain actions required to be approved by a majority of such directors; (4) restrictions on transactions with affiliates of the investment company and affiliates of those affiliates; and (5) limits regarding the use of leverage and issuance of senior securities.

[7] The third definition, not discussed here, is Section 3(a)(1)(B)—an issuer that "is engaged or proposes to engage in the business of issuing face-amount certificates of the installment type, or has been engaged in such business and has any such certificate outstanding."

[8] Referred to in this article as an investment company business. Section 2(a)(36) of the 1940 Act defines "security" broadly as: "any note, stock, treasury stock, security future, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security (including a certificate of deposit) or on any group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a 'security,' or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing."

[9] *See* SEC v. Fifth Ave. Coach Lines, Inc., 289 F. Supp. 3, 27-28 (S.D.N.Y. 1968) (discussing Section 3(a)(1)(A)).

[10] *See, e.g.*, *id.* at 28 (examining the issuer's annual reports and statements at its annual stockholders' meeting).

[11] 26 S.E.C. 426, 1947 WL 26116 (July 21, 1947).

[12] SEC v. National Presto Industries, Inc., 486 F.3d 305 (7th Cir. 2007).

[13] *See e.g.*, Dan River, Inc. v. Icahn, 701 F.2d 278, 291 (4th Cir. 1983).

[14] *Tonopah*, 26 S.E.C. 426 at *1.

[15] *Presto*, 486 F.3d at 315.

[16] Some types of *prima facie* investment companies have statutory provisions or regulations intended specifically to exempt them from being investment companies. *See*, *e.g.*, Rule 3a-8 (exempting certain research and development companies).

[17] *See, e.g.*, *Fifth Ave. Coach Lines*, 289 F. Supp. at 31 (finding that a company that received a substantial amount of money and began investing such money in securities was "entitled to a reasonable time within which to turn around" and decide the business in which it would engage and therefore such company was not engaged in ongoing investment company activity).

[18] *Id.*

[19] *See* Rule 3a-1 Proposing Release, Certain Prima Facie Investment Companies, Release No. 10,937, 44 Fed. Reg. 66,608, 66,609 n.6 (Nov. 20, 1979).

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[20] Section 2(a)(42) defines a voting security as "any security presently entitling the owner or holder thereof to vote for the election of directors of a company."

[21] The SEC has explained that Section 3(a)(1)(C) "requires unconsolidated financial statements presumably because consolidation of an issuer with a subsidiary which is majority owned, but not wholly owned, would distort the relative value of the issuer's investment securities to its other assets. This distortion would occur since consolidation requires all the subsidiary's assets to be included on the issuer's balance sheet." *See* Rule 3a-1 Adopting Release, *supra* n.19, at n.5.

[22] Rule 3a-1 provides a safe harbor from Section 3(a)(1)(C). It does not provide a safe harbor from Section 3(a)(1)(A). Therefore, even if an issuer meets the Rule's enumerated requirements, if the issuer otherwise meets the definition of Section 3(a)(1)(A) above, then it will be considered an investment company.

[23] Although this term is not defined in the rule itself, in the release proposing Rule 3a-l, the SEC stated that "[s]pecial situation investment companies are companies which secure control of other companies primarily for the purpose of making a profit in the sale of the controlled company's securities." *See* Rule 3a-1 Adopting Release, *supra* n.19, at 66, 610. Factors that may indicate an issuer is a "special situation investment company" include (1) a pattern of activities of acquiring a diversified portfolio of securities for investment with a view to increasing their value and disposing of them within a short period of time for capital gains; and (2) a policy of shifting from one investment to another. *See, e.g.*, *In re Frobisher Ltd.*, 27 S.E.C. 944, 950 (1948); In re Bankers Sec. Corp., 15 S.E.C. 695, 704 (1944), *aff'd,* Bankers Sec. Corp. v. SEC, 146 F.2d 88 (3d Cir. 1944). Issuers that have sought to be excluded from the definition generally place emphasis on operational involvement, focus on a particular investment strategy/line of business and not having rigid goals around disposition or an emphasis on turning a quick profit. *See, e.g.*, *Bankers Sec. Corp.*, 146 F.2d 88; *In re Frobisher Ltd.*, 27 SEC at 944; In re Ne. Cap. Corp., 37 S.E.C. 715, (Apr. 15, 1957); Entrepreneurial Assistance Grp., Inc., SEC Staff No-Action Letter (Dec. 5, 1974). *See also Citizens Growth Props., I.C.* Release No. 812-5854 (Nov. 5, 1984)—Application filed pursuant to Section 6(c) of the Act); *Bankers Sec. Corp. v. SEC*, 146 F.2d at 88; and In re United Stores Corp., 10 S.E.C. 1145 (Feb. 12, 1942).

[24] A company "controlled primarily" by the issuer is a company which the issuer owns more than 25 percent of the voting power and controls more than any other shareholder's voting power. Health Commc'ns Servs. Inc., SEC Staff No-Action Letter (Apr. 26, 1985) ("In our view, a company is not 'controlled primarily' by an issuer within the meaning of the rule unless (1) the issuer has control over the company within the meaning of Section 2(a)(9) of the 1940 Act, and (2) the degree of the issuer's control is greater than that of any other person.").

[25] Although conglomerate structures typically include multiple entities interposed between the conglomerate and operating company, often as liability blockers, this article does not address the various intermediate entities. Information in this article regarding the conglomerate structures and their arguments as to why they do not meet the definition of investment company or are eligible for an exception or exemption from the definition has been derived from public SEC filings. These filings do not specifically discuss all the 1940 Act-related arguments and, although this article simplifies its description of the structures, the actual organizational structure of conglomerate vehicles may be quite complicated.

[26] Sponsors interested in taking this position should consider whether their private funds' governing documents and disclosure permit them to have governance power disproportionate to their economic interest.

[27] SEC v. W.J. Howey Co., 328 U.S. 293 (1946).

[28] Williamson v. Tucker, 645 F.2d 404 (5th Cir.), *cert. denied* 454 U.S. 897 (1981).

[29] *Howey* held that the three elements of an "investment contract" are (1) an investment of money, (2) in a common enterprise, (3) on an expectation of profits

to be derived solely from the efforts of individuals other than the investor. While *Howey* was not interpreting the definition of security found in Section 2(a)(36) of the 1940 Act, courts have held that the *Howey* test is applicable to similar definitions found under other federal statutes, and the Staff of the SEC has provided guidance that the *Howey* test can appropriately be applied to similar definitions found under the 1940 Act. *See, e.g.*, Oxford Fin. Cos. v. Harvey, 385 F. Supp. 431 (E.D. Pa. 1974) and Albert M. Zlotnick, SEC Staff No-Action Letter (June 9, 1986) (Zlotnick).

30 *Williamson*, 645 F.2d at 423.

31 The SEC Staff has recognized *Williamson*'s application to the 1940 Act definition of "security" through no-action relief. *See, e.g.*, Pacesetter I L.P., SEC Staff No-Action Letter (July 18, 1986). *See also*, Colony Realty Partners 1986, L.P., SEC Staff No-Action Letter (April 27, 1988) (Colony); Oppenheimer Capital, SEC Staff No-Action Letter (July 29, 1987) (Oppenheimer); FCA Realty Fund, SEC No-Action Letter (Nov. 13, 1984) (FCA Realty) and Zlotnick.

32 Conglomerates need to consider the treatment of their shares under state "blue sky" laws and, if applicable, non-US laws.

33 Under Section 12(g)(1) of the Exchange Act, an issuer that is not a bank, bank holding company or savings and loan holding company is required to register a class of equity securities under the Exchange Act if both (a) it has more than $10 million of total assets; and (2) the securities are "held of record" by either 2,000 or more persons, or 500 or more persons who are not accredited investors.

34 17 C.F.R. pt. 242 (1997, unless otherwise noted).

35 Rule 13e-4 under the Exchange Act.

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