

PUBLIC

JUN 24 1994

RESPONSE OF THE OFFICE OF CHIEF COUNSEL
DIVISION OF INVESTMENT MANAGEMENT

Our Ref. No. 93-723-CC
Owens-Illinois, Inc.
File No. 132-3

Your letter of November 4, 1993 requests our assurance that we would not recommend that the Commission take enforcement action if Owens-Illinois ("O-I") establishes two Group Trusts as described in your letter without registering the Trusts under the Investment Company Act of 1940 ("1940 Act"), in reliance on either section 3(c)(11) or section 3(c)(1) of the 1940 Act.

O-I operates two "Master Trusts" that are funding and investment vehicles for employee benefit plans sponsored by O-I and its subsidiaries: the Owens-Illinois Master Retirement Trust (the "Retirement Trust") for involuntary, noncontributory defined benefit plans, and the Owens-Illinois Master Stock Purchase and Savings Program Trust (the "SPASP Trust") for participant-directed defined contribution pension plans. 1/ All plans participating in the Master Trusts are "qualified" plans within the meaning of section 401(a) of the Internal Revenue Code.

In 1993, O-I spun off as an independent operating company one of its subsidiaries, Libbey, Inc. O-I retained no equity interest in Libbey. You state that O-I also may spin off one or more of its other subsidiaries and that, while it might retain some equity interest in these companies (collectively with Libbey, the "Former Subsidiaries"), it does not expect to retain control. O-I proposes to reorganize the two Master Trusts as group trusts (the "Retirement Group Trust" and the "SPASP Group Trust," and collectively, the "Group Trusts") that would serve as investment vehicles not only for employee plans sponsored by O-I, but also for plans sponsored by the Former Subsidiaries.

The first clause of section 3(c)(11) excepts from the definition of investment company any employee's stock bonus, pension, or profit-sharing trust qualified under section 401 of the Internal Revenue Code. This "single trust" exception is available to a trust established by a single company or by a group of "related" companies. 2/ You state that the Master Trusts currently qualify for the single trust exception because

1/ In a telephone conversation on May 10, 1994, Regina Joseph, counsel to O-I, represented that the defined benefit plans investing in the Retirement Trust are involuntary and noncontributory; and that the plans investing in the SPASP Trust are voluntary, contributory, participant-directed plans.

2/ See, e.g., Sunkist Master Trust (pub. avail. June 5, 1992); Eli Lilly and Company (pub. avail. Dec. 31, 1991) ("Eli Lilly").

participating plans are sponsored by related companies, i.e., O-I and its controlled subsidiaries.

You contend that if the Master Trusts are reorganized into the Group Trusts, they could continue to rely on the single trust exception because O-I and the Former Subsidiaries still would be related companies for purposes of section 3(c)(11). In support of your contention, you note the past relationship between O-I and its Former Subsidiaries and that the plans would cover many of the same employees and share the same investment objectives. You also state that the plan sponsors may remain operationally related through a variety of contractual undertakings. In our view, these facts do not cause O-I and the Former Subsidiaries to be related companies for purposes of section 3(c)(11).

Generally, two companies are related for purposes of the single trust exception when the companies are under common control or one company has a majority equity interest in the other. 3/ When a trust includes pension plan assets of a parent company and its minority-owned subsidiaries, the applicability of the single trust exception depends on all the facts and circumstances, particularly whether the degree of the relationship among them supports treating the arrangements as a single trust. 4/ You state that O-I in all likelihood would not retain a controlling interest in the Former Subsidiaries. Moreover, you do not indicate that any individuals would be officers or directors of both O-I and any of the Former Subsidiaries, that O-I and the Former Subsidiaries would be operationally integrated to any significant degree, or present other facts that would support treating the arrangement as a single trust. 5/ Accordingly, we do not concur with your opinion

3/ See, e.g., Eli Lilly; The E.W. Scripps Company (pub. avail. Jan. 5, 1983).

4/ Eli Lilly. See, e.g., New England Electric System Companies Pension Plan (pub. avail. May 7, 1979) (staff applied the single trust exception to two companies that were part of the same utility holding company system because several employees of one company were officers or directors of the other, and one company provided the other with support services, including legal, financial, tax, office space, and administration); Bell System Group Trust Fund (pub. avail. Dec. 7, 1978) (staff applied the single trust exception to a parent company and its minority (26.6% and 18.2%) subsidiaries that "operate[d] together as parts of a unified system" and had strong operational and contractual ties).

5/ Although you represent that O-I provides Libbey with certain management, administrative, and technical assistance services, you do not indicate that the operations of the two

that O-I and the Former Subsidiaries would be sufficiently related so as to permit the Group Trusts to rely on the single trust exception of section 3(c)(11).

You also are of the opinion that each Group Trust can rely on section 3(c)(1). Section 3(c)(1) excludes from the definition of investment company, and thus from regulation under the 1940 Act, an issuer that is not making and does not propose to make a public offering of its securities and whose outstanding securities are beneficially owned by not more than 100 persons. The attribution provisions of section 3(c)(1)(A) state that, with certain exceptions, beneficial ownership of an issuer's securities by a company shall be deemed to be beneficial ownership by one person unless the company owns 10% or more of the outstanding voting securities of the issuer. You assert that the Group Trusts can rely on the section 3(c)(1) exclusion because (a) the Group Trusts will not make public offerings of their securities, and no more than 100 plans will participate in each Group Trust, and (b) the attribution provisions of section 3(c)(1)(A) do not require us to "look through" the plans to their beneficiaries for purposes of calculating the 100-investor limit because the participating plans' interests in the Group Trusts are not "voting securities." Irrespective of whether the Group Trusts issue voting securities, we conclude that the Retirement Group Trust may rely, but the SPASP Group Trust may not rely, on section 3(c)(1).

The pension plans investing in the Retirement Group Trust are involuntary and noncontributory, and thus do not issue securities. 6/ Beneficiaries of these plans, therefore, are not security holders and do not count towards the 100-investor limit in section 3(c)(1), regardless of each plan's percentage ownership in the Retirement Group Trust. 7/ If no more than 100 plans participate in the Retirement Group Trust, we would not recommend enforcement action to the Commission if the Trust does not register under the 1940 Act in reliance on section 3(c)(1).

We reach a different conclusion with respect to the SPASP Group Trust. For purposes of section 3(c)(1), and independently of the attribution provisions, we consider a defined contribution plan beneficiary who decides whether or how much to invest in an issuer (such as the SPASP Group Trust) to be a beneficial owner

companies are significantly integrated.

6/ See International Brotherhood of Teamsters v. Daniel, 439 U.S. 551, 559 (1979); Securities Act Release No. 6188 (Feb. 1, 1980) (Part II.A).

7/ Kodak Retirement Income Plan (pub. avail. Feb. 29, 1988).

of the issuer's securities. 8/ We thus believe that, for purposes of section 3(c)(1), the SPASP Group Trust must count as beneficial owners all beneficiaries of participant-directed plans investing in the SPASP Group Trust. Consequently, with respect to the SPASP Group Trust's status under the 1940 Act, we are unable to assure you that we would not recommend enforcement action if you proceed as described in your letter.



Barry A. Mendelson
Senior Counsel

8/ The PanAgora Group Trust (pub. avail. Apr. 29, 1994).

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November 4, 1993

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ACT ICA
SECTION 3(c)(1)
RULE —
PUBLIC
AVAILABILITY June 24, 1994

Re: Owens-Illinois, Inc. Master Retirement Trust/
Owens-Illinois Stock Purchase and Savings Program Trust

Dear Mr. Harman:

This is a request submitted on behalf of the Owens-Illinois Master Retirement Trust (the "Retirement Trust") and the Owens-Illinois Master Stock Purchase and Savings Program Trust (the "SPASP Trust" and, together with the Retirement Trust, the "Master Trusts"), whose corporate sponsor is Owens-Illinois, Inc., a Delaware corporation ("O-I"). On behalf of the Master Trusts, we request that the staff of the Division of Investment Management take a no-action position as to the applicability of the attribution provision of § 3(c)(1) of the Investment Company Act of 1940 (the "Act") to participating plans in the Master Trusts if the Master Trusts are restated, as described below, to permit certain employee benefit plans sponsored by subsidiaries that were formerly controlled by O-I to remain a part of the Master Trusts and, further, as to whether any such former subsidiary would be a "related company" for purposes of § 3(c)(11) of the Act.

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I. Background

The Retirement Trust is at present organized and operated as a commingled funding and investment vehicle for several defined benefit pension plans ("Retirement Plans") sponsored by O-I and/or certain subsidiaries in which O-I owns a 50% or more equity interest ("Subsidiaries"). Bankers Trust Company is the master trustee. The SPASP Trust is at present organized and operated as a combined funding and investment vehicle for several defined contribution plans ("Savings Plans" and, together with the Retirement Plans, the "Plans"), including so-called 401(k) plans, sponsored by O-I and/or certain of its Subsidiaries. The master trustee is State Street Bank and Trust Company.

Both Master Trusts and their participating Plans are subject, inter alia, to the reporting and disclosure provisions and fiduciary responsibility provisions of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). The participating Plans are all "qualified" plans, within the meaning of § 401(a) of the Internal Revenue Code, and have as their stated objective the provision of benefits to employees (and their beneficiaries) at retirement. The master trustee of each Master Trust acts as the custodian of trust assets, but is without investment management discretion (unless separately appointed as an investment manager).

In the case of the Retirement Trust, the trust fund is subdivided into several investment accounts, each of which is managed by a registered investment advisor (or other qualified "investment manager" within the meaning of ERISA) appointed (and subject to replacement) by O-I. Each investment account is subject to investment policy guidelines which include the designation of the asset category (e.g., international equities, domestic bonds, real estate, venture capital, etc.) in which funds of the account are to be invested and a benchmark against which the investment performance of the account will be evaluated. Consistent with ERISA's requirement that plans establish and implement a "funding policy", O-I also undertakes strategic planning on behalf of the Retirement Plans whereby, based on actuarial studies and investment risk/return analyses, investment objectives and an optimum asset mix for the Retirement Plans are established, reviewed, and periodically adjusted. In the aggregate, the investment accounts of the Retirement Trust cover a wide array of investment categories and a very large portion of the investment risk/return spectrum.

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Historically, O-I has been responsible for the subdivision of the Retirement Trust into separate investment accounts, the appointment and removal of its investment managers, the establishment of investment policies (including benchmarks), and strategic planning for the Retirement Plans. Such services have been performed by certain individuals who are officers or employees of O-I and/or of O-I's wholly-owned subsidiary Harbor Capital Advisors, Inc. ("HCA"), a registered investment advisor. It is anticipated that in the future all such personnel will be officers or employees of HCA and that all such services will be provided for the Retirement Plans by HCA.

In the case of the SPASP Trust, each participating Savings Plan specifies that its assets may be invested in one or more of seven investment portfolios of the Harbor Fund, a diversified no-load, open-end registered investment company sponsored by HCA.¹ HCA is also the investment advisor to the Harbor Fund, although each of Harbor Fund's investment portfolios is directly managed by a subadvisor appointed by HCA. Each of the Harbor Fund portfolios has a counterpart investment account in the Retirement Trust with which it shares common investment objectives. The subadvisor for each Harbor Fund portfolio is also the investment manager of its counterpart investment account in the Retirement Trust. O-I and HCA believe that this commonality of investment objectives and management between the Retirement Trust and Harbor Fund -- and thus indirectly with the SPASP Trust -- provides Savings Plan participants with the benefits of the active planning, monitoring, and evaluation undertaken with respect to the Retirement Trust and that it affords such participants the opportunity to establish and implement an asset mix strategy consistent with the Savings Plans' stated objective of providing benefits at the conclusion of the participants' working careers.

The Master Trusts have enjoyed favorable investment performance relative to the assumed actuarial rate of return used in the funding policies of the Retirement Plans. Additionally, due to the substantial assets held in the Master Trusts, competitive fees with trustees, investment managers, and others have been negotiated, and the Plans have achieved certain other economies of scale. For example, the Retirement Trust as a whole has had sufficient assets to meet the minimum participation requirements of a number of private placement investments which by their nature contributed to the optimum asset mix

¹The Savings Plans participating in the SPASP Trust also include as additional investment options company stock funds and a qualified group trust invested in guaranteed income contracts issued by insurance companies.

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as determined for the Retirement Plans. An individual Retirement Plan of a Subsidiary might not be capable of participating in such private placements on its own, but as part of a Master Trust it can be allocated a share of such investment appropriate for its asset mix strategy.

O-I and HCA believe that the favorable investment performance of the Master Trusts is in significant part attributable to their monitoring and evaluation - and occasional replacement - of investment managers and that this strategy, in turn, depends for its success on access to virtually the entire market for investment management expertise and on the development and use of focused benchmarks for each manager. Given the large minimum account requirements of many investment managers, as well as the need for sophisticated systems and consulting techniques to establish and implement meaningful benchmarks, individual Plans would find it expensive and difficult, if not impossible, to pursue a comparable strategy.

In June 1993, one of O-I's wholly-owned Subsidiaries, Libbey Inc., was spun off from O-I in a public offering whereby O-I sold all of its equity interest in Libbey. In connection with that transaction, the employees of Libbey ceased their coverage under O-I's Retirement and Savings Plans, and separate Retirement and Savings Plans were established by Libbey to cover its employees. An appropriate portion of the assets of the Master Trusts has been earmarked for allocation to the new Libbey Plans. O-I, HCA, and Libbey have agreed that if possible these assets should remain invested through the Master Trusts so that the new Libbey Plans can continue to benefit from the investment performance and other advantages, described above, associated with the Master Trusts. In addition, O-I and Libbey have entered into a management services agreement under which, if the Libbey Plans' assets remain in the Master Trusts, O-I or HCA will continue to perform strategic planning and investment performance monitoring and evaluation for Libbey.

O-I anticipates that if other Subsidiaries and/or divisions ("Former Subsidiaries") are sold in the future, they may desire to make similar arrangements with respect to their Retirement and Savings Plans. While O-I might retain some equity interest in one or more of such Former Subsidiaries, it is not anticipated that O-I would retain control. In such future arrangements, Plan assets and liabilities may or may not be transferred to newly-formed Plans sponsored by the Former Subsidiaries, but it is expected that at a minimum such newly-formed Plans would assume responsibility for benefits accruing after the sale and

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that the Former Subsidiaries would assume responsibility for funding such after-accrued benefits.

Based on the foregoing, it has been proposed that each of the Master Trusts be reorganized to form a group trust in which the Libbey Plans and the Plans of other Former Subsidiaries could participate. As a part of such reorganization, HCA would replace O-I as the sponsor of the reorganized trusts and would undertake the strategic planning and investment management oversight activities heretofore performed by O-I. The reorganized Retirement Trust would be renamed the Harbor Capital Group Trust for Defined Benefit Plans, and the reorganized SPASP Trust would be renamed the Harbor Capital Group Trust for Defined Contribution Plans (the "Group Trusts"). The only Plans that would be eligible to participate in the Group Trusts would be those sponsored by O-I and its Subsidiaries and Former Subsidiaries.

II. Issues Presented

Presently, each Master Trust is exempt from the Act pursuant to § 3(c)(11), as a qualified employee benefit trust of a single employer. We are of the opinion that each Group Trust will be exempt from the Act pursuant to § 3(c)(1) and/or § 3(c)(11) of the Act. Each Group Trust should continue to be exempt under the first clause of § 3(c)(11) because all participating Plans will be sponsored by "related companies." Additionally, the exemption under § 3(c)(1) should be available because there will be far fewer than 100 Plans participating in each Group Trust. Although one or more of the participating Plans will each own more than 10% of a Group Trust's assets, and while each participating Plan will have more than 10% of its assets invested in a Group Trust, we are nevertheless of the opinion that the attribution rules will not be applicable because participation interests in each Group Trust will not constitute "voting securities." We request that the staff issue a no-action letter concurring in either or both of the foregoing opinions.

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III. Law

Section 3(c)(11)

The first clause of § 3(c)(11) of the Act exempts "[a]ny employee's stock bonus, pension, or profit-sharing trust which meets the requirements for qualification under section 401 of the Internal Revenue Code of 1986" In many no-action letters, commencing primarily with *Bank-Trusteed Pension and Profit-Sharing Plans*, (avail. Apr. 18, 1974)(CCH [1973-1974 Transfer Binder] Fed.Sec.L.Rptr. ¶ 79,768), the staff has taken the position that the initial clause of § 3(c)(11) applies only to a "single trust" or a group trust involving pension plans for the employees of "related companies." Further, the staff indicated that whether or not companies are "related" would be determined on a case-by-case basis, in light of all the relevant facts and circumstances. The relationship between a parent corporation and its controlled subsidiaries, as is the present case under each Master Trust, has been viewed as a single employer relationship exempt under the first clause of § 3(c)(1). (*E.g., Lanchart Industries, Inc.* (avail. Mar. 2, 1977) and *McDonald's Corporation* (avail. Feb. 2, 1977).) Here, while the continuity of the corporate control relationship may be severed, there nevertheless remains a continuing relationship between and among the Plans grounded in their shared objectives and, in certain instances, shared coverage of the same employees with respect to pre- and post-sale accrued benefits. In addition, the Plans' objective of participating together in a shared investment fund is commensurate with their shared investment risk/return tolerance and asset mix strategy.

Furthermore, relationships other than those established within an existing controlled group of corporations have also served as the basis for a finding that companies were sufficiently related. (*E.g., Harvard College* (avail. July 20, 1977); *American Telephone & Telegraph Co.* (avail. Dec. 7, 1978); and *Eli Lilly and Company* (avail. Dec. 31, 1991).) The circumstances here are analogous to those presented to the staff in the letters just cited, and are clearly distinguishable from situations in which an investment advisor has sought to market a pooled investment arrangement to plans sponsored by wholly-unrelated employers who had never been affiliated. (*Narragansett Capital Corporation* (avail. May 3, 1978)(1978 WL 13289)(S.E.C.)) Here, in fact, the initial investment decisions to invest Plan assets through the Master Trusts occurred when the corporate sponsor of a participating Plan was either O-I itself or a Subsidiary of O-I and the Master Trusts were, therefore, unquestionably exempt from the Act pursuant to § 3(c)(11). To our knowledge, this fact situation has never been presented to the staff.

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Finally, the Plan sponsors here may, in large part, also remain operationally "related" through a variety of contractual undertakings. In the case of Libbey, for example, O-I has agreed to provide for an indefinite period certain management, administrative, and technical assistance services to Libbey, in addition to the Plan services, referred to above, to be provided by HCA.

Section 3(c)(1)

Section 3(c)(1) of the Act exempts any issuer whose outstanding voting securities are beneficially owned by not more than 100 persons. In calculating the number of such owners, ownership by a company or trust is deemed to be ownership by one person unless such company or trust owns 10% or more of the outstanding voting securities of the issuer. In such event, the owners are deemed to be all the holders of such company's or trust's voting securities, unless, as to such company or trust, an investment in the issuer, in combination with all of the entity's other investments in investment companies which are exempt from the Act solely under § 3(c)(1), constitute less than 10% of such entity's assets.

Each Plan participating in a Group Trust will do so through its own individual trust, and there will not be more than 100 Plans (and related individual trusts) participating in either Group Trust. However, each Plan is expected to invest all or a substantial portion (expected, in any event, to exceed 10%) of its assets through a Group Trust, and some Plans' holdings will constitute more than 10% of the Group Trust's assets. Consequently, the exemption afforded by Section 3(c)(1) would be applicable here only if the participating Plans' interests in a Group Trust are not regarded as "voting securities" of the Group Trust. The term "voting securities" is defined in § 2(a)(42) of the Act to mean "any security presently entitling the owner or holder thereof to vote for the election of directors of a company." In applying this definition to a trust, an "owner or holder" would be equivalent to a beneficiary of the trust and the "directors of a company" would be equivalent to the trustees and/or investment managers of the trust.

It is axiomatic under the common law of trusts, and statutorily explicit under ERISA (§ 404(a)(1)(D)), that the written terms of a trust govern the rights and duties of the trustee and the beneficiaries unless such terms contravene applicable law. (See, e.g., Scott, The Law of Trusts, §§ 107.3, 164 (3d ed. 1967 and Supp. 1984).) Here, under the governing documents of the Group Trusts, the participating Plans will have no right to vote on any

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matters whatsoever; no right to select, remove or replace the trustee or any investment manager; no right to amend or revise the trust agreement; and no right to participate or interfere in the administrative or investment management decisions of the Group Trust. Consequently, whatever interests in the Group Trusts the participating Plans may "own" or "hold", they will not be "voting securities".

Based on the above analysis, the SEC staff has given advice that it would not take any enforcement action if a trust did not register under the Act. (*Morgan Grenfell Investment Services International Trust*, April 10, 1985; *Global Investment Trust*, July 16, 1984; *Sirach, Inc.*, October 17, 1984; *Krehbiel & Hubbard, Inc.*, (November 18, 1981); *FMR Investment Management Service, Inc.*, (November 28, 1979) 1979 WL 13178 (S.E.C.); *YMCA of Metropolitan Chicago*, (September 15, 1979) 1979 WL 13210 (S.E.C.); and *Wall, Patterson, McGrew & Richards, Inc.*, (November 10, 1980) 1980 WL 17546 (S.E.C.).² The facts set forth in the *Krehbiel* letter are identical to the Group Trust with respect to whether the trust beneficiaries hold "voting securities."

In sum, based upon the language of each Group Trust agreement and the applicable law, we are of the opinion that the participating Plans will not have any rights substantially similar to the voting rights of common stock so that their interests would not be considered to be "voting securities" as defined by § 2(a)(42) of the Act.

Additionally, we are of the opinion that there is no issue of "de facto control" of the Group Trusts, and that the Group Trusts will be, therefore, distinguishable from the situations addressed in such no-action letters as *The M.A. Hanna Co.*, 42 S.E.C. 477 (1964); *Hawkeye Bancorporation Government Securities Pool No. 1*; *Hawkeye Bancorporation Tax Exempt Securities Pool No. 2*, (CCH) [1971-1972 Transfer Binder] Fed. Sec. L. Rptr. ¶ 78,409 (avail. June 16, 1971); *Pierce Lewis & Dolan*, (March 17, 1972)(1972 WL 12248 (S.E.C.)); *Hudgins, Hurley Capital Management Corp.*, (CCH) [1972-1973 Transfer Binder] Fed. Sec. L. Rptr. ¶ 79,176; *Roberts, Scot and Company Incorporated*, (Feb. 22, 1973)(1974 WL 7137

²The rights of trust beneficiaries are governed by state law. (*Burke v. Lasker*, 441 U.S. 471 (1979).) The cited no-action letters thoroughly analyze the trust law of the Commonwealth of Massachusetts, which governs the SPASP Trust, and need not be repeated here. The applicable trust law of the State of New York, which governs the Retirement Trust, is the same as the law of Massachusetts in all material respects. (See e.g., *Gilbert v. Gilbert*, 385 N.Y.S.2d 278 (1976); *Re Balsam's Trust*, 296 N.Y.S.2d 969 (1968).)

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(S.E.C.)); *L. Marvin Moorehead*, (Jan. 30, 1975) (1975 WL 10946 (S.E.C.)); and *Devonshire Capital Corp.*, (Feb. 15, 1976).

The Plans participating in the Group Trusts will have no ability to replace the trustee or the investment managers; these duties are exclusively within the power of HCA. In this respect, the circumstances here would be similar to those in *Cigna Corporation* (avail. 1984) and *Kohlberg Kravis Roberts & Co.* (avail. Sept. 9, 1985). In *Cigna* and *Kohlberg Kravis, Roberts & Co.*, the staff recommended that the beneficial owners of a limited partner which owned 10% or more of the total interest in the limited partnership not be counted as beneficial owners of the limited partnership itself, so long as the limited partners had no right to remove or replace the general partner of the limited partnership. (Similarly, *Gordon & Herzfeld* (avail. Nov. 30, 1987) and *Horsley Keough Venture Fund* (avail. Apr. 27, 1988)(1988 WL 234249)(S.E.C.)). In *Horsley*, it was represented that, if the general partner withdrew, became bankrupt, or similar events occurred, the limited partners would only have a right to elect a liquidator, but they would have no right to elect to replace the general partner.

The participating Plans do not have the right to seek to amend or renew the Group Trust agreements at regular intervals. (*Rogers, Casey & Associates, (CCH) [1989-1990 Transfer Binder] Fed. Sec. L. Rptr. ¶ 79,320*). The Plans' only decision is whether or not to participate in each Group Trust. Nor is there "economic power" outside of the Group Trust agreements which will be controlling on HCA in discharging its duties with respect to each Group Trust. The Plans' corporate sponsors will not be legally capable of exercising economic power outside the governing Plan and Group Trust documents. Although, as a matter of corporate structure, HCA is a wholly-owned subsidiary of O-I, under ERISA each Plan is a distinct legal entity whose sponsor, administrators, and other fiduciaries are each bound to act in accordance with the strict principles of fiduciary duty embodied in ERISA and applicable trust law. Each fiduciary must act solely in the interests of the Plan and its participants and strictly in accordance with governing Plan documents and must avoid self-dealing and conflicts of interest. (See §§ 404(a)(1) and 406(b) of ERISA.)

The applicability of ERISA's fiduciary responsibility provisions here makes the Group Trusts distinguishable from the limited partnership at issue in *Clemente Global Growth Fund, Inc. v. T. Boone Pickens, III, et al*, 705 F. Supp. 958 (S.D.N.Y. 1989), *appeal withdrawn on consent*, in which the protections of the Act were being avoided by the layering of control.

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The Group Trusts, on the other hand, do not seek to circumvent the Act but seek only to afford a mechanism whereby the Plans and/or Plan assets of a Subsidiary will not need to be divested in the event of a sale. As noted above, such divestiture of Plan assets can produce an unfavorable result to the Plan through the loss of participation in favorable private placements, the unavailability of favorable fees, and the other reasons set forth above.

If the SEC staff issues a favorable no-action letter in response to this request, O-I and HCA will proceed with the reorganization of the Master Trusts and seek a determination from the Internal Revenue Service that each resulting Group Trust is qualified pursuant to § 401(a) of the Internal Revenue Code.

Accordingly, we respectfully request that the staff advise us that it would not recommend any enforcement action to the Commission if the Group Trusts do not register under the Act, provided that each Group Trust receives a favorable determination letter from the Internal Revenue Service that it remains qualified under § 401(a) of the Internal Revenue Code.

If you have any questions, please call the undersigned at the direct dial number shown above. Thank you for your cooperation on this important matter.

Very truly yours,

FULLER & HENRY



Regina M. Joseph