K&L|GATES

K&L Gates LLP
1601 K Street NW
Washington, DC 20006-1600

T 202.778.9000 www.klgates.com

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By Hand and Email Delivery

Douglas J. Scheidt, Esq.
Associate Director and Chief Counsel
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Re: ASA Limited

Dear Mr. Scheidt:

We are writing on behalf of ASA Limited ("**ASA**"), an internally-managed, registered, closed-end management investment company, to request that the staff of the Division of Investment Management (the "**Staff**") concur with our view that ASA may organize and acquire the securities issued by a wholly-owned investment adviser subsidiary ("**Adviser Sub**") to provide advisory services to clients that may include registered investment companies, U.S. and non-U.S. unregistered investment companies, and non-investment company clients, such as institutional investors and separate account clients (together, "**Clients**"), without violating Section 12(d)(3) of the Investment Company Act of 1940, as amended (the "**Act**"). In the alternative, we request your assurance that, if ASA organizes and acquires the securities issued by Adviser Sub, the Staff will not recommend enforcement action to the Securities and Exchange Commission (the "**Commission**" or "**SEC**") against ASA under Section 12(d)(3) of the Act.

As more fully set forth below, we think it would be appropriate to interpret Section 12(d)(3)(B) to exclude from the general prohibitions of Section 12(d)(3), ASA's ownership of Adviser Sub. We think this interpretation is supported by the legislative history of Section 12(d)(3) and the policies underlying the Act and specifically Section 12(d)(3). In addition, ASA believes that organizing and acquiring the securities issued by a wholly-owned investment adviser subsidiary would be beneficial to ASA's shareholders, would not disadvantage Adviser Sub's prospective clients, is consistent with its ability to engage directly in the investment advisory business, and is consistent with the policies underlying the Act and Section 12(d)(3).

BACKGROUND

ASA is a Bermuda closed-end management investment company whose shares trade on the New York Stock Exchange. ASA has been registered as an investment company with the Commission pursuant to an exemptive order under Section 7(d) of the Act since 1958 (as amended, the "**Section 7(d) Order**").[1] ASA invests primarily in the stocks of companies engaged in the exploration, mining, or processing of gold, silver, platinum, diamonds or other precious minerals. It may also invest in gold, silver, and platinum bullion or securities that seek to replicate the price movement of gold, silver, or platinum bullion. Since 1978, ASA has been internally managed by its directors, officers, and employees.[2]

ASA's board of directors ("**Board**") and officers desire to expand the scope of their advisory activities beyond the management of ASA to, among other things, allow them to offer investors additional investment options in the precious minerals and natural resources sectors. However, unlike most investment advisers that are legally separate from the investment companies that they manage and therefore are able to provide advisory services to multiple funds and other clients, ASA is internally-managed, making it significantly more difficult to expand and diversify advisory services. As a result, the ability of ASA to grow an

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[1] ASA originally registered when it was organized as a South African company. *See* Investment Company Act Release Nos. 2739 (July 3, 1958) (notice) and 2756 (Aug. 13, 1958) (order) (the "**Original Order**"). Since 1958, the Original Order has been amended on a number of occasions, including certain amendments necessary to permit ASA to reorganize as a Bermuda company in 2004. *See, e.g.,* Investment Company Act Release Nos. 26582 (Aug. 27, 2004) (notice) and 26602 (Sept. 20, 2004) (order); Investment Company Act Release Nos. 24321 (Feb. 29, 2000) (notice) and 24367 (Mar. 27, 2000) (order); Investment Company Act Release Nos. 21161 (June 23, 1995) (notice) and 21220 (July 20, 1995) (order); Investment Company Act Release Nos. 17904 (Dec. 17, 1990) (notice) and 17945 (Jan. 15, 1991) (order); Investment Company Act Release Nos. 14826 (Dec. 4, 1985) (notice) and 14878 (Dec. 31, 1985) (order); Investment Company Act Release Nos. 11669 (Mar. 6, 1981) (notice) and 11722 (Apr. 7, 1981) (order); Investment Company Act Release Nos. 10319 (July 11, 1978) (notice) and 10355 (Aug. 7, 1978) (order); Investment Company Act Release Nos. 8278 (Mar. 20, 1974) (notice) and 8312 (Apr. 17, 1974) (order); Investment Company Act Release Nos. 7860 (June 12, 1973) (notice) and 7894 (July 10, 1973) (order); Investment Company Act Release Nos. 2944 (Dec. 14, 1959) (notice) and 2957 (Dec. 29, 1959) (order); Investment Company Act Release Nos. 2883 (May 22, 1959) (notice) and 2886 (June 9, 1959) (order); and Investment Company Act Release Nos. 2817 (Jan. 5, 1959) (notice) and 2821 (Jan 20, 1959) (order).

[2] *See* Investment Company Act Release Nos. 10319 (July 11, 1978) (notice) and 10355 (Aug. 7, 1978) (order).

advisory business is limited to the following two options: (1) ASA's Board could approve the direct provision of advisory services by ASA itself; or (2) ASA's Board could approve the provision of advisory services through one or more new investment adviser entities, each wholly-owned by ASA.[3]

The first option, having ASA directly provide advisory services, would permit the expansion of advisory activities and requires no regulatory relief or approval under Section 12(d)(3). However, there are several drawbacks to this approach. Although a registered investment company is permitted under the Act to engage directly in the investment advisory business, by so doing, such a company may subject itself to inconsistent regulation under the Act and the Investment Advisers Act of 1940, as amended (the "**Advisers Act**"). For example, a registered investment company that itself acts as an investment adviser must accept its role as a fiduciary to its advisory clients, a duty that could directly conflict with its duties to its own shareholders. In addition, acting as an investment adviser could open an investment company up to claims of fiduciary breach from its advisory clients and other potential liabilities arising from its advisory activities. For all of these reasons, in considering the options that potentially are available, ASA's Board and officers preliminarily have determined that providing advisory services directly is not in the best interest of ASA's shareholders.

Instead, ASA's Board and officers have determined that the second option, providing advisory services through an investment adviser entity that is wholly-owned by ASA, would be the most beneficial to ASA's shareholders. ASA's Board and officers believe that establishing one or more wholly-owned investment adviser subsidiaries is the best option for ASA's shareholders because it would allow ASA to use its current resources – *i.e.*, its investment professionals – to increase ASA's gross revenue and income, while at the same time allow an expansion of advisory personnel and advisory activities. It also would allow ASA to shield itself from potential conflicts and liabilities associated with such advisory activities that ASA would be exposed to if it directly engaged in such activities. In addition, ASA's Board and officers believe that, from a practical standpoint, the new investment options that ASA would like to offer may be less marketable to potential new investors if those investments are directly managed by a registered, closed-end investment company.

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[3] We note that, in addition to these two options, the advisory activities of ASA could be expanded – without the need for any regulatory relief or approval – through the organization of a new investment adviser entity in which ASA had no ownership interest. Although permissible under the Act, ASA's Board is not considering this approach, because it would not benefit ASA's shareholders, who would not be able to share in any success of the new adviser entity.

ASA will capitalize Adviser Sub with an amount of money and assets reasonably necessary to cover Adviser Sub's organizational expenses and Adviser Sub will utilize certain employees and facilities of ASA to meet the investment advisory requirements of Clients. It is expected that, initially, all of the officers and employees of ASA will hold similar positions as officers and employees of Adviser Sub.

ASA sought and received, on March 11, 2010, shareholder approval of its proposal to enter into the business of providing advisory services to Clients either directly or through Adviser Sub. In addition to shareholder approval, ASA proposes to organize and operate Adviser Sub in accordance with the following representations (the "**Proposed Representations**"), which are designed to ensure that ASA's ownership and operation of Adviser Sub involve no conflicts of interest that would disadvantage ASA's shareholders or Adviser Sub's Clients:

1. Prior to ASA's entry into the advisory business, ASA's Board, in making a final determination with respect to whether ASA should enter into the advisory business through Adviser Sub, will base its decision on whether doing so is in the best interests of ASA and its shareholders, and any determination to enter into the advisory business through Adviser Sub will be made by a vote of at least a majority of ASA's directors who are not "interested persons" as defined in the Act. In making its decision, ASA's Board will discuss and consider the risks and liabilities of entering into the advisory business that are relevant to ASA in the context of the proposed business plan of Adviser Sub.

2. ASA will, consistent with its normal shareholder communications practices, which include the preparation and mailing of annual and semi-annual reports and proxy statements, advise its shareholders of the creation of Adviser Sub, the implementation through Adviser Sub of outside advisory services and an assessment of whatever risks, if any, are associated with the creation of Adviser Sub and its provision of advisory services.

3. ASA expects to own beneficially and of record 100 percent of the outstanding voting securities of Adviser Sub and, unless ASA disposes of all of its holdings of Adviser Sub's outstanding voting securities, will own beneficially and of record at least 95% of the outstanding voting securities of Adviser Sub.

4. ASA will continue to operate as an internally-managed, closed-end management investment company and will not use the advisory services of Adviser Sub.

5. ASA will adopt and implement policies and procedures with respect to the purchases and sales of securities that it makes for its own account and the purchases and sales of securities that Adviser Sub makes for Adviser Sub's Clients in order to ensure fair dealing[4] and compliance with the Act and the Advisers Act (to the extent applicable). In particular, such policies and procedures will be reasonably designed to prevent violation of Section 17 of the Act and the rules thereunder, as well as Staff guidance thereunder.[5] If Adviser Sub registers as an investment adviser with the Commission, Adviser Sub's policies and procedures also will be reasonably designed to prevent violation of the Advisers Act and the rules thereunder.

6. To the extent that Adviser Sub is not registered as an investment adviser with the Commission, Adviser Sub will comply with Rules 31a-1(e) and 31a-2(d) under the Act with respect to the maintenance and preservation of its books and records, and ASA will provide the Commission and Staff with access to such books and records.

7. ASA's Board will review at least annually the investment advisory business of Adviser Sub in order to determine whether or not such business should be continued and whether or not the benefits derived by ASA from Adviser Sub's business warrant the continued ownership of Adviser Sub and, if appropriate, approve (by a vote of at least a majority of its directors who are not "interested persons" as defined in the Act) at least annually such continuation. In determining whether or not the investment advisory business of Adviser Sub should be continued and whether or not the benefits derived by ASA from Adviser Sub's business warrant the continued ownership of Adviser Sub, the Board will take into consideration, among other things, the following:

   a. the compensation of the officers of ASA and of Adviser Sub;

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[4] In order to ensure fair dealing, the policies and procedures will, for example, address unfair practices such as Adviser Sub trading in advance of ASA in order to take advantage of changes in the market price of a security that will be caused by ASA's trade.

[5] For example, order aggregation and investment allocation policies and procedures generally will conform to Staff guidance in SMC Capital, Inc., SEC No-Action Letter (pub. avail. Sept. 5, 1995) and Massachusetts Mutual Life Insurance Co., SEC No-Action Letter (pub. avail. June 7, 2000), unless such guidance is amended. In addition, ASA will not purchase interests in Adviser Sub's Clients and will not purchase securities from or sell securities to Adviser Sub's Clients unless such purchases and sales are permitted under Section 17 of the Act or the rules or other Staff guidance thereunder.

b. all investment decisions of ASA that relate to any Client of Adviser Sub; and

c. the allocation of expenses associated with the provision of advisory services between ASA and Adviser Sub.[6]

8. ASA's establishment and operation of Adviser Sub will not cause ASA to violate any of the terms or conditions of its Section 7(d) Order,[7] as amended, will be consistent with ASA's organizational documents, and will not require any amendments to any provision in those documents that ASA's Section 7(d) Order requires to be in ASA's organizational documents, except as permitted under the Section 7(d) Order (as that order may have been amended or as it may be amended in the future).

In light of the benefits the wholly-owned investment adviser subsidiary option offers to ASA's shareholders and given the conflict of interest precautions outlined above in the Proposed Representations, the only apparent drawback of this approach is that it requires regulatory relief under Section 12(d)(3) of the Act. As we explain in greater detail below, we think it is appropriate for the Staff to permit ASA to organize a wholly-owned investment adviser subsidiary, particularly in light of the fact that ASA is pursuing this option because its Board (including its independent directors) and its officers preliminarily have determined that the wholly-owned subsidiary option offers ASA's shareholders the greatest benefits with the fewest risks as compared to the other expansion options available, notwithstanding the fact that ASA could pursue other expansion options without the need for any Section 12(d)(3) relief.[8]

ANALYSIS

I. Section 12(d)(3)(B) Should Be Interpreted to Exclude Wholly-Owned Investment Adviser Subsidiaries from the Prohibitions of Section 12(d)(3) Under the Circumstances

Section 12(d)(3) of the 1940 Act generally provides that it is unlawful for any registered investment company to purchase or otherwise acquire any security issued by any person who is a broker, dealer, underwriter, or investment adviser to an investment company

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6 Such expenses may include administration and operating expenses; investment research expenses; sales and marketing expenses; office space and general expenses; and direct expenses, including legal and audit fees, directors' fees, and taxes.

7 *See* Investment Company Act Release No. 26602 (Sept. 20, 2004) (order).

or investment adviser registered under the Advisers Act. Section 12(d)(3)(A) and (B) carve out of this prohibition the ownership by a registered investment company of any such person provided that: (A) such person is a corporation wholly-owned by the investment company, and (B) "such person is primarily engaged in the business of underwriting and distributing securities issued by other persons, selling securities to customers, or any one or more of such or related activities, and the gross income of such person normally is derived principally from such business or related activities."

Absent the carve-out provided in Section 12(d)(3)(B), ASA's ownership of Adviser Sub, a wholly-owned subsidiary, would be prohibited by Section 12(d)(3) if Adviser Sub provides advisory services to one or more investment companies or if Adviser Sub registers as an investment adviser under the Advisers Act.

We think that, under the circumstances described in this letter, it would be appropriate to interpret Section 12(d)(3)(B) to exclude from the general prohibitions of Section 12(d)(3), ASA's ownership of Adviser Sub, because we think the phrase "related activities" in Section 12(d)(3)(B) includes the provision of investment advisory services. We think that this interpretation is supported by both the legislative history of Section 12(d)(3) and the policies underlying the Act and the provision.

A. "Related Activities" Include Advisory Services

The legislative history of Section 12(d)(3) supports interpreting the phrase "related activities" to include advisory services. The legislative history shows that the language in the original version of Section 12(d)(3)(B) (originally Section 12(c)(2)(B)) clearly indicated that a registered investment company could own interests in a wholly-owned investment adviser. This is clear because the original language provided that a registered investment company could purchase interests in a wholly-owned subsidiary, if "the business of such person is confined to activities in which such registered company itself may lawfully engage,"[9] and a

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[8] As noted, ASA could provide the same advisory services directly without Section 12(d)(3) relief, but at far greater risk to its shareholders. Advisory activities also could be expanded by setting up a stand-alone investment adviser entity without Section 12(d)(3) relief, but without offering ASA's shareholders the ability to share in the income earned from the new advisory business. (As previously noted, because the stand-alone approach does not offer any benefits to ASA's shareholders, it is not being considered by ASA's Board.)

[9] *See* H.R. 8935, 76th Cong. (3d Sess. 1940); S.3580, 76th Cong. (3d Sess. 1940); *Investment Trusts and Investment Companies: Hearings on S.3580 before the Subcomm. on Securities and Exch. Of the Senate Comm. on Banking and Currency*, 76th Cong. (3d Sess. 1940) (hearings taking place in April 1940) ("**Senate Hearings**").

registered investment company itself was itself lawfully permitted to act as an investment adviser.

In subsequent drafts of the provision, the language in the carve-out was changed to its current form, carving out persons "primarily engaged in the business of underwriting and distributing securities issued by other persons, selling securities to customers, or any one or more of such or related activities." There is no testimony or explanation in the legislative history of Section 12(d)(3) to explain the changes to the carve-out language. Nevertheless, we think the revised language in the Section 12(d)(3) carve-out was intended to exclude all activities that a registered investment company could itself engage in, and that the phrase "related activities" in the revised language was intended to maintain an exclusion for wholly-owned subsidiaries that engaged solely in investment advisory activities.

This reading is supported by the increased focus in the revised language on brokerage and underwriting activities – a focus that is entirely consistent with all of the references to Section 12(d)(3) in the legislative history of the Act, which relate exclusively to a registered investment company's ownership of brokerage and underwriting businesses. For example, during the Senate hearings, David Schenker, the principal draftsman of the bill, stated that the section prohibits an investment company from buying interests in "a brokerage firm, a distributing company, or an investment banking house. It goes further and says that if it is engaged in the underwriting business itself – if engaged in that business through a wholly-owned subsidiary – it is permissible to do so."[10] The focus on brokerage and underwriting was also the focus in the House Report which stated, in connection with Section 12(d)(3), that "Paragraph (3) of this subsection prohibits investment companies from acquiring securities of persons engaged in the brokerage business or in the business of underwriting and dealing in securities unless the investment company will, after such acquisition, own all outstanding securities of such person and the principal business of such company is that of underwriting securities."[11]

Given this focus on brokerage and underwriting activities, it makes sense that the drafters of the provision wanted to clarify in the revised Section 12(d)(3)(B) language that registered investment companies could themselves engage in brokerage and underwriting and therefore also could do so through a wholly-owned subsidiary. Within this context, it also makes sense that the drafters would include in the revised language a new catch-all phrase,

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[10] Senate Hearings.

[11] The focus on brokerage and underwriting was also the focus on the Senate Report dated August 8, 1940, accompanying a subsequent version of the bill. *See also* S. Rep. No. 76-1775, 1940 CR 10075 (Aug. 8, 1940) ("**Senate Report**") (referring only to brokerage and underwriting activities in connection with Section 12).

"related activities," to maintain the scope of the original language which, as noted, was intended to cover any activities performed by brokers, dealers, underwriters, or investment advisers in which a registered investment company could itself engage. For these reasons, the legislative history supports an interpretation of "related activities" in Section 12(d)(3)(B) that includes advisory activities and that therefore would permit a registered investment company to own a wholly-owned investment adviser subsidiary.

B. Interpreting "Related Activities" to Include Advisory Services Is Consistent with the Policies Underlying the Act and Section 12(d)(3)

In addition to the support found in the legislative history, we think that interpreting "related activities" in Section 12(d)(3)(B) to include advisory activities is consistent with the policies underlying the Act, as well as consistent with the policies underlying Section 12(d)(3), particularly where, as here, the ownership of the adviser subsidiary does not create any affiliated transaction concerns.

The Commission has stated that Section 12(d)(3) was intended "principally to prevent investment companies from exposing their assets to the entrepreneurial risks of securities related businesses" and, together with other provisions of the Act, "to prevent investment companies from being organized, operated, managed, or their portfolio securities selected in the interests of brokers, dealers, underwriters, and investment advisers, whether or not those entities are affiliated persons of the companies."[12]

ASA's proposed ownership of Adviser Sub does not present the concerns against which Section 12(d)(3) was intended to safeguard, namely the entrepreneurial risks of owning securities related businesses and certain conflicts of interest and reciprocal practices.

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[12] *See Exemption for acquisition by registered investment companies of securities issued by persons engaged directly or indirectly in securities related businesses*, Investment Company Act Rel. No. 13725 (Jan. 17, 1984) ("**1984 Proposing Release**"); *see also* Section 1(b)(2) of the Act ("it is hereby declared that the national public interest and the interest of investors are adversely affected-- ... when investment companies are organized, operated, managed, or their portfolio securities are selected, in the interest of directors, officers, investment advisers, depositors, or other affiliated persons thereof, in the interest of underwriters, brokers, or dealers, in the interest of special classes of their security holders, or in the interest of other investment companies or persons engaged in other lines of business, rather than in the interest of all classes of such companies' security holders").

1. Conducting Advisory Activities Through a Wholly-Owned Subsidiary Provides ASA with Greater Protection from Entrepreneurial Risks

The Commission has stated that the limitations imposed by Section 12(d)(3) were intended, at least in part, to limit the risk of a registered investment company's exposure to the "'entrepreneurial risks,' or general liabilities, that are peculiar to securities related businesses."[13] Much of this concern stemmed from the fact that, in 1940, when Section 12(d)(3) was adopted, most securities-related businesses were organized as privately-held general partnerships.[14] If such a business failed, the investment company as a general partner could have been held accountable for the general partnership's liabilities. This same concern is reflected in Rule 12d3-1, adopted by the Commission in 1984. Rule 12d3-1 provides relief from the prohibitions of Section 12(d)(3) by permitting limited ownership of securities-related businesses, but maintains the Section 12(d)(3) prohibitions if such ownership is in the form of general partnership interests.[15]

ASA's shareholders will not be exposed to the risks of unlimited liability associated with ASA's ownership of Adviser Sub, because establishing Adviser Sub as a wholly-owned, limited liability company subsidiary would insulate ASA's shareholders by injecting a layer of liability protection between ASA and Adviser Sub. Because Adviser Sub will be organized as a separate entity and will be structured as a limited liability company, rather than as a partnership, if Adviser Sub were to experience a total loss of capital, ASA would lose only the capital invested in Adviser Sub just as ASA would in the case of losses incurred by any other portfolio investment.

Under these circumstances, it is actually the case that establishing a wholly-owned subsidiary to engage in advisory activities would provide greater protection to ASA's shareholders from the entrepreneurial risks of the advisory business than would be the case if ASA engaged in such advisory activities directly, as it is permitted to do under the Act. Given this reality, an interpretation of Section 12(d)(3) that permits a registered investment company to organize a wholly-owned, limited liability company, investment adviser

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13 *See Exemption of Acquisitions of Securities Issued by Persons Engaged in Securities-Related Businesses*, Investment Company Act Release No. 19716 at 6 (Sept. 16, 1993). *See also Exemption of Acquisitions of Securities Issued by Persons Engaged in Securities Related Businesses*, Investment Company Act Release No. 19204 (Jan. 4, 1993).

14 *See Exemption of Acquisitions of Securities Issued by Persons Engaged in Securities Related Businesses*, Investment Company Act Release No. 19204 (Jan. 4, 1993).

15 *See* Rule 12d3-1(c)(1).

subsidiary appears to be more consistent with the policies underlying Section 12(d)(3) than an interpretation that potentially restricts a registered investment company to engaging in such potentially risky activities directly.

2. Conducting Advisory Activities Through a Wholly-Owned, Controlled Subsidiary Does Not Raise Conflict of Interest Concerns

Section 12(d)(3) was also intended to prevent potential conflicts of interest and reciprocal practices between investment companies and securities-related businesses.[16] As with the Act in general, Section 12(d)(3) was an attempt to prevent situations in which brokers, securities dealers and other financial intermediaries were in a position to dominate investment companies. The *Report on the Study of Investment Trusts and Investment Companies* (the "**Study**"), prepared by the Commission prior to the passage of the Act, described several concerns involving the overreaching of investment companies by their securities-related business affiliates.[17] For example, the Study described concerns that investment company sponsors, such as investment banks, were using affiliated investment companies as a receptacle for illiquid and distressed securities,[18] that investment banks were using the investment companies to acquire securities that were subject to the investment banks' underwriting endeavors in an effort to increase the banks' underwriting capacity,[19] and that an affiliated securities-related business could take advantage of its control and influence over an investment company by forcing the investment company to purchase or otherwise acquire the outstanding securities of the affiliated securities-related business, regardless of its value, in an effort to prop up the value of the affiliate's stock, a practice known as "propping."[20] Section 12(d)(3) deals with these potential conflicts of interest by absolutely barring any ownership interests in the listed securities-related businesses.

We do not think that any of the dangers described in the Study apply to ASA's proposed ownership of Adviser Sub, because, as explained in greater detail above, most of the specific concerns identified by Congress, the Commission, and/or the Staff in this area

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16 *See* 1984 Proposing Release; Section 1(b)(2).

17 *See Report on the Study of Investment Trusts and Investment Companies*, H.R. Doc. No. 707, 75th Cong., 3d Sess. (1938).

18 *See id.*, part I, at 76-77.

19 *See id.*

20 See i*d.*, part III, at 131.

relate to an investment company's ownership of a brokerage or underwriting business, rather than ownership of an advisory business. Of the dangers identified above, the only one that appears to be relevant to an investment company's ownership of an advisory business – as opposed to a brokerage or underwriting business – is the concern with respect to propping and other forms of overreaching. Importantly, however, Adviser Sub will be under ASA's control rather than vice versa. The concern with respect to propping and more general overreaching comes into play only in the case of an adviser that exercises control over a registered investment company, such as the adviser to the registered investment company.[21] Propping and overreaching should not be a concern in the case of an adviser that is a downstream affiliate of a registered investment company, because such an adviser does not exercise control or influence over the investment company.

Such lack of control or influence over an investment company is apparent in ASA's proposed organization of Adviser Sub. As noted, after ASA organizes Adviser Sub, ASA will continue to operate as an internally-managed, closed-end management investment company and, therefore, will not be dependent on Adviser Sub for the provision of investment advice or other services to ASA. Indeed, as proposed, ASA will own 100 percent of the outstanding voting securities in Adviser Sub and will oversee Adviser Sub and its activities.

Moreover, the policies and procedures that ASA intends to adopt with respect to Adviser Sub will ensure that ASA will be operated and managed in the interests of its shareholders and that its ownership of Adviser Sub will not permit Adviser Sub to exercise any control or influence over ASA. In light of the Proposed Representations, in particular those involving initial and annual Board review and approval and the policies and procedures that ASA will adopt and implement, ASA will not be subject to the potential conflicts of interest or reciprocal practices against which Section 12(d)(3) is intended to guard by virtue of its ownership of Adviser Sub.

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[21] This concern is evident in Rule 12d3-1, which permits limited investment by a registered investment company in securities-related businesses, but specifically prohibits a registered investment company from acquiring securities of its investment adviser, or an affiliated person of its investment adviser. *See* Rule 12d3-1(c)(3). The Commission stated that the purpose of this prohibition was to prevent potential conflicts of interest, but recognized that such potential conflicts are also addressed under Sections 17(a) and 17(d). *See* 1984 Proposing Release, fn 27 ("an investment company would be required to apply for exemptive relief from section 17, as well as section 12(d)(3) of the Act, when contemplating the purchase of such securities directly from, or as a joint participant with, the company's investment adviser, promoter, principal underwriter or their affiliated persons).

C. "Related Activities" Should Be Interpreted to Include Advisory Activities For Purposes of ASA's Proposed Ownership of Adviser Sub Because the Proposal Does Not Involve Potential Affiliated Transactions

The question of whether the phrase "related activities" includes the provision of advisory services by a wholly-owned investment adviser subsidiary has not previously been addressed by the Staff or the Commission in a situation that did not raise affiliated transaction concerns. We note, however, that the Staff has previously declined to interpret the phrase "related activities" to include the provision of advisory services when presented with facts which *did* raise affiliated transaction concerns. In *Klukwan Inc.*, in considering a proposal by an Alaska native village corporation that intended to voluntarily register as an investment company to form a wholly-owned adviser subsidiary that would provide advice both to the village corporation and other entities – a situation involving Section 17(d) issues – the Staff stated that Section 12(d)(3)(B) "permits investment companies to acquire securities issued by persons primarily engaged in the business of underwriting or distributing securities, or 'related activities,' which does not include [an adviser subsidiary] solely rendering investment advice."[22]

We think the Staff's decision in *Klukwan*, declining to provide the requested Section 12(d)(3) relief, must be viewed in the context of the Section 17(d) issues involved in that letter. Importantly, although the incoming letter in Klukwan did not raise the Section 17(d) issue, the Staff's reply letter clearly states that the limited exemption from Section 12(d)(3) provided by Rule 12d3-1 does not extend to an investment company that wishes to acquire "any security issued by *its* investment adviser" (emphasis added), and quotes the Commission's statement in the Rule 12d3-1 proposing release that "'an investment company would be required to apply for exemptive relief from section 17, as well as section 12(d)(3) of the Act, when contemplating the purchase of such securities directly from. . . the company's investment adviser. . . .'"[23] Because of the Section 17(d) issues involved in *Klukwan*, we do not think the Staff's position in that letter should apply to ASA's proposal.

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22 *Klukwan Inc.*, SEC No-Action Letter (pub. avail. Mar. 19, 1991).

23 *See Klukwan* (quoting from the 1984 Proposing Release). We note that the quoted Commission statement seems to indicate that the Commission interprets Section 12(d)(3) to prohibit a registered investment company from owning the securities of a wholly-owned investment adviser subsidiary that is its own investment adviser. Although we think such an interpretation may be unnecessary in light of the prohibitions of Section 17, we nevertheless think that such an interpretation makes sense given the policies underlying the Act and Section 12(d)(3), as discussed above.

We note, however, that the Staff appears to support its conclusion in *Klukwan* by pointing to the exemptive order issued by the Commission to General American Investors Company, Inc. in 1980 (the "**General American Order**").[24] In the General American Order – under facts similar to those proposed by ASA – the Commission provided relief from Section 12(d)(3) to permit a registered, internally-managed, closed-end investment company to organize a wholly-owned adviser subsidiary that intended to provide advisory services to entities other than the parent investment company. In citing the General American Order, the Staff stated that the Commission's provision of such relief "would have been unnecessary if 'related activities' included solely rendering investment advice."

We disagree with the conclusion that a request for exemptive relief or the Commission's decision to grant such relief necessarily means that such relief is needed. There are many reasons a request for exemptive relief may be filed with the Commission and many reasons the Commission may choose to grant the requested relief. Indeed, many requests for exemptive relief are motivated by a desire for legal certainty, and the Commission may decide to provide such certainty when asked and when consistent with the protection of investors and the policies underlying the Act. As discussed above, the scope of the phrase "related activities" in Section 12(d)(3)(B) is not clear on its face and therefore it is not surprising that General American Investors Company sought an exemptive order with respect to the provision. We do not think that the Commission's decision to provide exemptive relief to General American Investors Company should preclude the Staff now from interpreting the phrase "related activities" to include advisory activities in a situation that does not involve affiliated transaction concerns.[25]

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[24] *General American Investors Company, Inc.*, Investment Company Act Release Nos. 11345 (Sept. 10, 1980) (notice) and 11396 (Oct. 10, 1980) (order).

[25] We note that other Section 12(d)(3) exemptions involving ownership by a registered investment company of a wholly-owned adviser subsidiary generally also have required relief from Section 17(a) and/or 17(d). *See, e.g., Broad Street Investing Corporation*, Investment Company Release Nos. 7071 (Mar. 16, 1972) (notice) and 7117 (Apr. 4, 1972) (order) (involving the complete or partial externalization of internal management functions of internally managed funds to the newly formed investment adviser subsidiaries of the funds in question and requiring Section 17 relief in addition to Section 12(d)(3) relief); *General American Investors Company, Inc. and General American Advisers, Inc.*, Investment Company Act Rel. Nos. 18277 (Aug. 19, 1991) (notice) and 18322 (Sept. 17, 1991) (order) (permitting externalization of adviser to majority-owned adviser subsidiary); *PMC Capital, Inc.*, Investment Company Act Release Nos. 19823 (Oct. 29, 1993) (notice) and 19895 (Nov. 23, 1993) (order) (PMC Capital, Inc. and a real estate investment trust advised by PMC Capital, Inc.'s newly-formed investment adviser subsidiary were permitted to enter into a

II. The Staff Should Provide No-Action Relief to Permit ASA's Proposed Creation and Ownership of Adviser Sub Even If "Related Activities" Is Not Interpreted to Include Advisory Activities

To the extent the Staff disagrees with our interpretation of Section 12(d)(3)(B), we nevertheless think that the Staff should provide no-action relief to ASA to permit ASA to organize a wholly-owned subsidiary to provide advisory services to clients other than ASA in situations that do not raise affiliated transaction concerns. Specifically, we think ownership by ASA of Adviser Sub should be permitted for the following reasons:

A. ASA's proposal to enter into the advisory business through a wholly-owned subsidiary will benefit ASA's shareholders by allowing them to share in the profits from the new advisory business, by allowing that advisory business to be more marketable than if provided directly by ASA, by allowing ASA to add advisory personnel, and by limiting any potential liabilities arising from Adviser Sub's provision of advisory services.

B. ASA's ownership of a wholly-owned adviser subsidiary will not disadvantage any of Adviser Sub's Clients because, whether or not Adviser Sub registers as an investment adviser with the Commission, Adviser Sub will be a fiduciary of its clients and will be subject to the anti-fraud provisions of the Advisers Act and the other federal securities laws. Furthermore, to the extent that Adviser Sub registers as an investment adviser with the Commission, Adviser Sub will be subject to and will comply with all of the duties and responsibilities required of a registered investment adviser under the Advisers Act. Finally, Adviser Sub's Clients that are investment companies – whether registered or not – will be represented by a board of directors or similar entity or person that will be responsible for protecting the Client's interests vis-à-vis Adviser Sub. For all of these reasons, ASA will not be able to overreach Adviser Sub's Clients.

C. As we have noted, the Act permits ASA to provide advisory services directly, and therefore, it should be able to provide advisory services indirectly through a wholly-owned subsidiary, particularly since the indirect provision of advisory services through Adviser Sub provides greater liability protection to ASA's shareholders.

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loan origination agreement, requiring Section 17(d) relief in addition to Section 12(d)(3) relief).

D. As discussed in detail above, the ownership of a wholly-owned and controlled adviser subsidiary is consistent with the policies underlying the Act and Section 12(d)(3) because:

1. Ownership of the adviser subsidiary does not increase the exposure of ASA's shareholders to the entrepreneurial risk of the advisory business. Rather, by setting up its advisory business in a wholly-owned limited liability company, ASA's shareholders will be shielded from any such risk to a far greater extent than would be the case if ASA provided such services directly; and

2. The conflicts of interest Section 12(d)(3) was intended to guard against are not applicable to ASA's ownership of a wholly-owned and controlled adviser subsidiary, and, to the extent conflicts of interest may exist, they will be addressed through ASA's conflict of interest policies and procedures and the oversight of Adviser Sub by ASA's directors, particularly its disinterested directors. Importantly, any such conflicts that may exist with respect to ASA's ownership of a wholly-owned adviser subsidiary would also exist if ASA provided the proposed advisory services directly, which, as noted above, is permitted by the Act.

Finally, as noted, the Commission has previously granted similar Section 12(d)(3) relief to permit registered, closed-end investment companies to establish wholly-owned investment adviser subsidiaries,[26] and has provided such relief even in situations – unlike the one proposed by ASA – that involved potential affiliated transactions.[27]

Because we have already discussed items (C) and (D) above, we will focus below only on items (A) and (B), the benefits of ASA's proposed ownership of Adviser Sub for ASA's shareholders and the reasons the proposed ownership of Adviser Sub will not disadvantage Adviser Sub's Clients.

A. ASA's Ownership of Adviser Sub Is Expected to Benefit ASA's Shareholders

As we have discussed, the underlying reason for the formation and ownership of Adviser Sub is to permit ASA's shareholders to benefit from the expansion of ASA's

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[26] *See* General American Order.

[27] *See supra,* note 25.

advisory activities. ASA's Board and officers believe that establishing Adviser Sub will benefit ASA's shareholders in several ways. It is expected that ASA will be more successful in expanding its advisory business – and therefore generate a greater return to ASA's shareholders – through the formation of a wholly-owned investment adviser subsidiary (as opposed to through ASA itself (which would not require Section 12(d)(3) relief)), because, as a practical matter, new investment options offered by the expanded advisory business likely would be less marketable if advised directly by a registered, closed-end investment company. This arrangement likely would be less marketable to new investors due to potential concerns arising from the uniqueness of the arrangement. Such potential concerns may include, for example, conflict of interest concerns as well as concerns regarding the stability of the advisory relationship given the fact that a registered, closed-end investment company acting as investment adviser may be more susceptible to hostile shareholder action than a typical investment adviser. In addition to better marketability, expanding ASA's advisory business through the formation of Adviser Sub also is expected to benefit ASA's shareholders by bringing in additional portfolio managers and investment analysts who will be available to provide advisory services both to ASA and to the Clients of Adviser Sub. Finally, the formation and ownership of Adviser Sub as a wholly-owned subsidiary – as opposed to using ASA itself to provide advisory services – also is intended to benefit ASA's shareholders by limiting ASA's exposure to potential liability in connection with Adviser Sub's provision of advisory services. Section 12(d)(3) should not prevent ASA's shareholders from realizing the substantial benefits to be obtained through ASA's ownership of Adviser Sub.

ASA's shareholders' regulatory protections would in no way be compromised by ASA's ownership of Adviser Sub. In this regard, as noted above, ASA has sought and received, on March 11, 2010, shareholder approval of its proposal to enter into the business of providing advisory services to Clients either directly or through Adviser Sub. In addition, ASA would continue to be subject to the Act and to oversight by the Commission as a registered investment company. Furthermore, ASA proposes to organize and operate Adviser Sub in accordance with the Proposed Representations, which are designed to ensure that ASA's ownership and operation of Adviser Sub involve no conflicts of interest that would disadvantage ASA's shareholders or Adviser Sub's Clients.

Given the potential benefits and the steps that will be taken to limit any risks related to ASA's proposed ownership of Adviser Sub, ASA believes that ownership of Adviser Sub is in the best interest of its shareholders and should be permitted.

B. Adviser Sub's Clients Will Not Be Disadvantaged by ASA's Ownership of Adviser Sub Because ASA Will Not Be Able to Overreach Adviser Sub's Clients

ASA's ownership of a wholly-owned adviser subsidiary will not disadvantage any of Adviser Sub's Clients for several reasons, including the following. First, whether or not

Adviser Sub registers as an investment adviser with the Commission, Adviser Sub will be a fiduciary of its Clients, and therefore must act in the best interests of its Clients, and will be subject to the anti-fraud provisions of the Advisers Act and the other federal securities laws. Adviser Sub's fiduciary duties and obligations and the anti-fraud provisions of the securities laws apply (and apply in the same way) to Adviser Sub's interactions with its Clients regardless of the identity of Adviser Sub's owner, whether that owner is ASA, another registered investment company, a registered adviser, an operating company, or some other entity. In addition, even if not registered, Adviser Sub, as a matter of best practices, intends to formulate and maintain compliance policies and procedures similar to those required of registered investment advisers to ensure the fair treatment of its Clients.

If required, Adviser Sub will register with the Commission under the Advisers Act as an investment adviser, and, if registered, will be subject to and will comply with all of the duties and responsibilities required of a registered investment adviser under the Advisers Act. As a result, as required by the Advisers Act, Adviser Sub will formulate and maintain formal policies and procedures related to its operations, including among other things, trading, allocation, conflicts of interest, personal investing by supervised persons, and policies relating to gifts and entertainment. All such policies will be designed to ensure that management of Adviser Sub is conducted in the best interests of its clients. Adviser Sub also, as required by the Advisers Act, will appoint a chief compliance officer who will oversee Adviser Sub's compliance with its policies and procedures, including its conflict of interest policies and procedures. Furthermore, as a registered investment adviser, Adviser Sub will be subject to periodic examinations by the staff of the Commission, further ensuring that the interests of Adviser Sub's Clients are protected.

In addition to the duties and obligations of Adviser Sub to ensure the fair treatment of its Clients, it is expected that the interests of most of Adviser Sub's Clients, particularly Clients that are investment companies (whether registered or not), will be represented by a board of directors or similar entity or person responsible for protecting the Client's interests vis-à-vis Adviser Sub.

Finally, in addition to the duties and obligations of Adviser Sub vis-à-vis its Clients and the additional protection of Clients' interests by the relevant Client board of directors or similar entity or person, Adviser Sub's Clients will also be protected from any overreaching by ASA by virtue of certain policies adopted by ASA, including policies and procedures with respect to the purchases and sales of securities that ASA makes for its own account and the purchases and sales of securities that Adviser Sub makes for Adviser Sub's Clients, and by virtue of the Commission's oversight of ASA.

CONCLUSION

For the reasons discussed above, we request that the Staff concur with our view that ASA may organize and acquire the securities issued by Adviser Sub, a wholly-owned subsidiary, under the circumstances described in this letter without violating Section 12(d)(3) of the Act. In the alternative, we request the Staff's assurance that, if ASA organizes and acquires the securities issued by Adviser Sub, the Staff will not recommend enforcement action to the Commission against ASA under Section 12(d)(3) of the Act.

Please call Darrell Mounts at (202) 778-9298, Robert Rosenblum at (202) 778-9464, or Susan Gault-Brown at (202) 778-9083 if you have any questions regarding the relief requested herein. We look forward to hearing from you or from a member of the Staff.

Sincerely,

Susan I. Gault-Brown