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March 12, 2007

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Associate Director and Chief Counsel
Division of Investment Management
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-0504

Re: Classification of Foundations as Qualified Purchasers under Section 2(a)(51) of the Investment Company Act of 1940, as amended (the "1940 Act")

Gentlemen:

Goldman Sachs Asset Management, L.P. requests confirmation that the Division of Investment Management (the "Division") would not recommend that the Securities and Exchange Commission (the "Commission") take enforcement action under Section 7 of the 1940 Act against Goldman Sachs Asset Management, L.P. or any of its affiliates (collectively, "Goldman Sachs"), or against investment funds managed or distributed by Goldman Sachs that are excepted from the definition of "investment company" in reliance on Section 3(c)(7) ("Private Funds"), based on their treatment of certain foundations that are formed as non profit, non-stock corporations ("charitable corporations") as "qualified purchasers" for purposes of Section 2(a)(51) of the 1940 Act under the circumstances described below.[1]

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1 Section references are to the 1940 Act unless otherwise specified. Section 3(c)(7) excludes from the definition of investment company any issuer whose outstanding securities are owned exclusively by persons who, at the time of acquisition of the securities, are qualified purchasers, and which is not making and does not propose to make a public offering of its securities. Section 7(a) prohibits an investment company organized or otherwise created under the laws of the United States or of a state and having a board of directors from, among other things, offering or selling any security (or engaging in certain other activities) by use of the mails or any means or instrumentality of interstate commerce unless the company is registered under the 1940 Act. Section 7(d) prohibits investment companies organized outside of the United States from making a public offering. A fund organized outside of the United States in which U.S. persons invest will ordinarily be considered to be a Section 3(c)(7) issuer because it makes a private offering (if any) in the U.S., and requires all of its owners who are U.S. persons to be qualified purchasers. See Registration Under the Advisers Act of Certain Hedge Fund Advisers, Investment Advisers Act Rel. No. 2333 (Dec. 2, 2004) at note 226. Thus, in the case of a Private Fund organized outside of the United

Potential investors in Private Funds include foundations, some of which are formed as trusts and some of which are formed as corporations. As more fully described below, foundations formed as trusts can be treated as "qualified purchasers" under Section 2(a)(51) if they have $25 million of investments or if the trustees and grantors of the trusts are qualified purchasers. It is unclear from the text of the 1940 Act whether a foundation formed as a charitable corporation may be treated as a qualified purchaser if it has less than $25 million of investments.

We believe, however, that it would be appropriate and consistent with the policies underlying Section 3(c)(7) if Private Funds treat as a qualified purchaser:

(1) a charitable corporation (a) that was not formed for the specific purpose of acquiring an interest in a Private Fund, (b) all of the persons who have contributed assets to which are related in one or more of the ways enumerated in Section 2(a)(51)(A)(ii), and (c) which owns not less than $5 million in "investments" as defined in Rule 2a51-1(b) under the Investment Company Act; or

(2) a charitable corporation (a) that was not formed for the specific purpose of acquiring an interest in a Private Fund, and (b) each person authorized to make investment decisions with respect to the charitable corporation, and each person who has contributed assets to the charitable corporation, is a qualified purchaser within the meaning of subsections (i), (ii) or (iv) of Section 2(a)(51)(A) of the Investment Company Act.

Overview of Foundations

Generally speaking, a foundation is a fund established and maintained by contributions for charitable, educational, religious or other benevolent purposes. Foundations are typically formed as trusts or charitable corporations. Foundations must meet certain criteria to receive tax "exempt" status under Section 501(c)(3) of the Internal Revenue Code, as amended (the "Code").[2] The key elements of Section 501(c)(3) of the Code are that (1) the company is organized and operated for one of the specified benevolent purposes and (2) no part of the

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States, no-action relief is requested under Section 7(d).

2 See Section 501(c)(3) of the Code, which provides, in part, "[c]orporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office."

company's net earnings inure to the benefit of any private shareholder or individual.3 For purposes of determining whether an entity is exempt from federal income taxes under Section 501(c)(3) of the Code, the Internal Revenue Service does not make a distinction between whether the entity is a corporation or a trust under state law.[4] Therefore, a corporation and a trust may both qualify as a tax exempt entity as long as the other requirements under the Code or treasury regulations under the Code are met.

Due to the benevolent purpose of foundations as well as the Code restrictions, foundations formed as corporations are formed as non-stock corporations, in which no part of the company's earnings or assets inure to the benefit of any private shareholder or individual. For example, the New York Not-For-Profit Corporation Law (the "NY N-PCL") essentially prohibits a charitable corporation from issuing stock or shares and from paying dividends.[5]

The role of the directors of a charitable corporation is essentially the same as the role of the trustees of a charitable trust – they act as the governing body, with investment authority over the assets of the foundation, and they owe a fiduciary duty to the corporation. For example, in New York, the governing body of a charitable corporation has investment authority over the assets of the corporation[6] and has a fiduciary duty to act "in good faith and with that degree of diligence, care and skill which ordinarily prudent men would exercise under similar circumstances in like positions."[7] Duties of a trustee in New York are governed by the prudent investor standard pursuant to which the trustee "...shall exercise reasonable care, skill and caution to make and implement investment and management decisions as a prudent investor would for the entire portfolio, taking into account the purposes and terms and provisions of the governing instrument."[8] Although the standard of care applicable to directors and trustees under

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3 Charitable foundations are formed as charitable corporations so that they may meet the requirement in Section 501(c)(3) that none of their earnings or assets may inure to the benefit of any particular person.

4 See IRS Form 1023, Application for Recognition of Exemption under Section 501(c)(3) of the Internal Revenue Code, Part II.

5 See Sections 501 and 515 of the NY N-PCL. Rather, charitable corporations may issue membership certificates, "to evidence membership, *whether or not connected with any financial contribution to the corporation.*" Section 501 of the NY N-PCL (emphasis added). This suggests that membership may not equate to ownership. Certain types of not-for-profit corporations have the option of not having members. See Section 601 of the NY N-PCL.

6 See Section 512 of the N-PCL.

7 See Section 717 of the N-PCL.

8 See New York Estates, Powers and Trusts Law Section 11-2.3(b)(2).

New York state law is slightly different, the role of directors and trustees is essentially the same - that of a governing body charged with fiduciary duties.[9]

Not-for-profit organizations exempt under Section 501(c)(3) of the Code are often organized as corporations rather than charitable trusts because not-for-profit corporations are subject to well-delineated corporate governance provisions under state law. In New York State, the NY N-PCL is a well-developed and established body of law that controls the governance of not-for-profit entities in particular. Since the statute applies specifically to not-for-profit corporations, it addresses many issues unique to not-for-profit entities and is, therefore, a valuable tool in structuring the corporate governance of such entities. For instance, many of the powers of directors of a not for profit corporation are provided for in the NY N-PCL, including default voting powers and responsibilities. Reliance on the NY N-PCL simplifies corporate governance and helps ensure that it is maintained under a clear set of rules. These statutory provisions serve to eliminate drafting complexities and ease ambiguities for those responsible for their formation and management. Although trusts may have similar characteristics to not-for-profit corporations in practice (*e.g.*, limited liability for trustees that is similar to that of directors), trust documents must be carefully drafted in order to provide many such benefits that corporations enjoy as a matter of default through the NY N-PCL. It is this access to an established and developed set of default rules that often makes the corporate form more attractive to a not-for-profit entity than a trust.

Tax exempt organizations under Section 501(c)(3) of the Code may be public charities or private foundations. Private foundations generally receive their support from a single corporate or individual source, or a family group, and they may be formed by high net worth individuals as part of their overall estate planning. Public charities generally receive broad based public support, governmental funding or gross receipts from exempt activities.

Section 2(a)(51)

Generally, a "qualified purchaser" is:

(1) a natural person with $5,000,000 in investments;[10]
(2) a family company with $5,000,000 in investments;[11]

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9 A trustee is held to a slightly higher standard of care. See Stern v. Lucy Webb Hayes Nat. Training Sch. For Deaconesses and Missionaries, 381 F. Supp. 1003, 1013 (D.D.C. 1974). (The court noted that a trustee is held to a higher standard of care than a corporate director; the former is liable for simple negligence, while the latter is liable only for gross negligence.)

10 See Section 2(a)(51)(A)(i), "Any natural person (including any person who holds a joint, community property, or other similar shared ownership interest in an issuer that is excepted under Section 3(c)(7) with that person's qualified purchaser spouse) who owns not less than $5,000,000 in investments, as defined by the Commission."

11 See Section 2(a)(51)(A)(ii), "Any company that owns not less than $5,000,000 in investments and that is

(3) a trust whose grantor(s) and trustee(s) are qualified purchasers;[12]
(4) a company with $25,000,000 in investments;[13]
(5) or a company of which each beneficial owner is a qualified purchaser.[14]

A foundation with $25 million of investments is a qualified purchaser regardless of its organizational structure. In addition, a foundation formed as a trust is a qualified purchaser if its grantor(s) and trustee(s) are qualified purchasers. However, it is unclear how a foundation formed as a charitable corporation can qualify as a qualified purchaser if it has less than $25 million of investments. Such a foundation does not appear to qualify as (1) a family company under Section 2(a)(51)(A)(ii) because it is not "owned" by two or more related persons,[15] (2) a trust under Section 2(a)(51)(A)(iii) because it was formed as a corporation, or (3) a company all of the beneficial owners of the securities of which are qualified purchasers because it has not issued any securities. We have found no discussion in the legislative history of Section 2(a)(51) that mentions the trust provision or foundations. Accordingly, we are concerned that a charitable corporation would appear to be eligible to invest in a Private Fund only if it owns investments of at least $25 million in value, placing it within the scope of Section 2(a)(51)(A)(iv). We believe,

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owned directly or indirectly by or for two or more natural persons who are related as siblings or spouse (including former spouses), or direct lineal descendants by birth or adoption, spouses of such person, the estates of such persons, or foundations, charitable organizations, or trusts established by or for the benefit of such persons." In addition, under Rule 2a51-3(a), such a company "shall not be deemed to be a qualified purchaser if it was formed for the specific purpose of acquiring the securities offered by [the Private Fund] unless each beneficial owner of the [Private Fund's] securities is a qualified purchaser."

12 See Section 2(a)(51)(A)(iii), "Any trust that is not covered by clause (ii) and that was not formed for the specific purpose of acquiring the securities offered, as to which the trustee or other person authorized to make decisions with respect to the trust, and each settlor or other person who as contributed assets to the trust, is a person described in clause (i), (ii) or (iv)."

13 See Section 2(a)(51)(A)(iv), "Any person, acting for its own account or the accounts of other qualified purchasers, who in the aggregate owns and invests on a discretionary basis, not less than $25,000,000 in investments."

14 See Rule 2a51-3(b), "for purposes of Section 2(a)(51) of the [1940] Act, a company may be deemed to be a qualified purchaser if each beneficial owner of the company's securities is a qualified purchaser."

15 Although Section 2(a)(51)(A)(ii) (the family company provision) includes an explicit reference to foundations and charitable organizations, it is unclear how the ownership requirement would be satisfied by a charitable corporation or a charitable trust. Charitable corporations are typically organized as non-stock corporations and are not "owned" in the sense that they are prohibited from allowing any portion of their profits or assets to inure to the benefit of a particular person. In the case of a charitable trust seeking to qualify under Section 2(a)(51)(A)(ii), the Division has said that a trust is owned by its beneficiaries. See American Bar Association, 1999 SEC No-Action LEXIS 456 (April 22, 1999) at Section C, Question 4. The beneficiaries of a charitable trust are never related family members; moreover, there might not be any named beneficiaries. While a foundation may make an investment indirectly through a family company that is owned by a foundation and a member of the family that established the foundation, forming such a company would be cumbersome and may not always be practical.

however, that charitable corporations meeting certain criteria should be deemed to be qualified purchasers for purposes of determining the status of the Private Funds under Section 3(c)(7).

Request for No-Action Assurances

Based on the analysis set forth below, we request that the Division confirm that it would not recommend that the Commission take enforcement action under Section 7 of the 1940 Act if Goldman Sachs, or Private Funds managed or distributed by Goldman Sachs, treat charitable corporations as qualified purchasers for purposes of Section 2(a)(51) where the charitable corporation (a) was not formed for the specific purpose of acquiring an interest in a Private Fund, (b) all of the persons who have contributed assets to which are related in one or more of the ways enumerated in Section 2(a)(51)(A)(ii), and (c) the charitable corporation owns not less than $5 million in "investments" as defined in Rule 2a51-1(b) under the Investment Company Act.

We also request that the Division confirm that it would not recommend that Commission take enforcement action under Section 7 of the 1940 Act if Goldman Sachs, or Private Funds managed or distributed by Goldman Sachs, treat a charitable corporation as a qualified purchaser where the charitable corporation (a) was not formed for the specific purpose of acquiring an interest in a Private Fund, and (b) each person authorized to make investment decisions with respect to the charitable corporation, and each person who has contributed assets to the charitable corporation, is a qualified purchaser within the meaning of subsections (i), (ii) or (iv) of Section 2(a)(51)(A) of the Investment Company Act.[16]

1. Foundations Organized as Charitable Corporations

It does not appear that a charitable corporation can be a qualified purchaser unless it owns at least $25 million of investments. A charitable corporation may not be a qualified purchaser under Section 2(a)(51)(A)(iii) because it is not organized as a trust.[17] For reasons discussed below, it may not be a "family company" under Section 2(a)(51)(ii).

A charitable trust would be a qualified purchaser under Section 2(a)(51)(A)(iii) if it is not formed for the specific purpose of investing in a Private Fund, and each person authorized to make investment decisions for it, and each person who has contributed assets to it, is a person described in Section 2(a)(51)(A)(i), (ii) or (iv). There is no apparent policy reason for not

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16 Under this approach, if the foundation delegates investment decision-making authority to a third party fiduciary, such as an investment adviser, the investment adviser would need to be a "qualified purchaser" in order for the foundation to be a qualified purchaser. Similarly, if the foundation delegates authority to make investment decisions to a committee of the board of directors comprising a subset of the directors, all members of that investment committee (but not all of the directors) would need to be qualified purchasers. If the board itself made the decision, but not all of the directors were qualified purchasers, such directors could not vote on the decision to invest in the Private Fund.

17 We note that the term "trust" is not defined in the 1940 Act.

treating a charitable corporation that satisfies the requirements of Section 2(a)(51)(A)(iii) as a qualified purchaser but for the fact that it is a corporation and not a trust.

We believe that the definition of qualified purchaser contained in Section 2(a)(51)(A)(iii) provides an appropriate test of financial sophistication for a charitable foundation, whether organized as a charitable corporation or as a trust. If all persons who have contributed funds to a charitable corporation and all persons with authority to direct the corporation's investments are qualified purchasers, then the requisite level of financial sophistication should be imputed to the charitable foundation as it would be to a charitable trust under Section 2(a)(51)(A)(iii). Accordingly, a charitable corporation that meets these conditions and that is not formed for the purpose of investing in a Private Fund should be treated as a qualified purchaser, notwithstanding the fact that it has adopted a corporate, rather than a trust, organizational form.

The term "trust" generally includes "a fiduciary relationship regarding property and charging the person with title to the property with equitable duties to deal with it for another's benefit."[18] This is akin to the relationship created when a foundation is formed, including one formed as a charitable corporation overseen by directors with the duties described above.

In applying the federal securities laws and rules, the Commission Staff typically puts substance over form and, where appropriate, will disregard the type of entity used to conduct business. For example, the Commission Staff has treated charitable organizations formed as trusts and charitable organizations formed as corporations in exactly the same manner for purposes of Rule 144 under the Securities Act of 1933, as amended, (the "Securities Act") even though Rule 144 makes a distinction between the treatment of trusts and non-trusts.[19] In addition, in the context of Section 2(a)(51)(A)(iii), the Division has disregarded corporate form when it combined the "knowledgeable employee"[20] provision with the trust provision and concluded that "consistent with the intent of §2(a)(51)(A)(iii) and Rule 3c-5, a family company trust *or a similar estate planning vehicle* for which the knowledgeable employee is both responsible for investment decisions and the source of the funds invested, may be able to invest in securities issued by any . . . Section 3(c)(7) fund in which the knowledgeable employee is eligible to invest individually" (emphasis added).[21]

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18 See Black's Law Dictionary 1546 (8th ed. 2004).

19 See, e.g., The Gap, Inc. 1992 SEC No-Act LEXIS 928 (September 16, 1992); SEC Release No. 33-6099, 1979 LEXIS 968, Item 7 (August 2, 1979); The Coleman Charitable Foundation, Inc., 1994 SEC No-Act LEXIS 860 (December 29, 1994); The Turner Foundation, Inc. 1993 SEC No-Act LEXIS 489 (March 19, 1993); Moores Foundation, 1991 SEC No-Act LEXIS 1991 (August 14, 1991) (incoming letters assert that the distinction between Section 501(c)(3) charitable foundations organized as non profit corporations and Section 501(c)(3) foundations organized as charitable trusts is illogical and serves no useful purpose).

20 See Rule 3c-5.

21 See American Bar Association at Section A, Question 4.

Similarly, the Division has already interpreted the term "trust" as used in the context of Section 2(a)(51) differently in different circumstances in order to give effect to Congressional intent. For example, the Division determined that for purposes of Section 2(a)(51)(A)(ii) (the family company provision), the beneficial owners of a trust are its beneficiaries[22] but that under the "look through" provision in Rule 2a51-3(b) the beneficiaries of the trust are not its beneficial owners.[23]

We note that other provisions of the federal securities laws do not make a distinction based on the organizational form of a foundation. For example, Regulation D under the Securities Act defines accredited investor to include "any organization described in section 501(c)(3) of the Internal Revenue Code, corporation, Massachusetts or similar business trust, or partnership, not formed for the specific purpose of acquiring the securities offered, with total assets in excess of $5,000,000." This definition does not distinguish between foundations formed as trusts and those formed as corporations. Similarly, Section 3(c)(10) defines "charitable organization" as an "organization described in paragraphs (1) through (5) of section 170(c) or section 501(c)(3) of the Code" and makes no distinction between trusts and corporations.

We also believe that the donative intent of the persons who establish a charitable corporation and the lack of beneficial owners of a charitable corporation support our request. As noted above, due to the benevolent purpose of charitable foundations, as well as the restrictions of the Internal Revenue Code, charitable corporations are formed as non-profit, non-stock corporations in which no part of the company's earnings or assets inure to the benefit of any private shareholder or individual. Charitable corporations therefore typically do not have "owners" in the sense that no portion of their earnings or assets may inure to the benefit of any private shareholders or individuals.

Based on all of the foregoing, we believe it is appropriate to treat a foundation organized as a charitable corporation as a qualified purchaser under Section 2(a)(51) if the charitable corporation (a) was not formed for the specific purpose of acquiring an interest in a Private Fund, and (b) each person authorized to make investment decisions with respect to the charitable corporation, and each person who has contributed assets to the charitable corporation, is a qualified purchaser within the meaning of subsections (i), (ii) or (iv) of Section 2(a)(51)(A) of the Investment Company Act.

2. Family Foundations

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22 See American Bar Association at Section C, Question 4.

23 See American Bar Association at Section C, Question 3. The Division stated that interpreting Rule 2a51-3(b) to include a trust would be inconsistent with Congress's intent in enacting Section 2(a)(51)(A)(iii).

We also believe it is appropriate to treat a foundation organized as a charitable corporation as a qualified purchaser under Section 2(a)(51)(A)(ii) if (1) the foundation has at least $5,000,000 in investments and (2) all of the persons who have contributed assets to the foundations are family members enumerated in Section 2(a)(51)(A)(ii). Under these circumstances, the foundation has the level of financial sophistication contemplated by Section 2(a)(51)(A)(ii), (namely, $5 million in investments) and all the contributors to the foundation have the familial relationship contemplated by Section 2(a)(51)(A)(ii). However, when read literally, the family provision seems to require that a foundation be "owned by" two or more family members.

As discussed above, a foundation will often be organized as a charitable corporation that does not have any owners as such.[24] It is unclear whether Section 2(a)(51)(A)(ii) could apply to a charitable corporation because no part of the earnings or assets of a charitable corporation may inure to the benefit of any particular person, and the corporation may therefore not be considered to be "owned by" any person in the traditional sense of the word. Thus, a literal reading of the provision would appear to suggest that a family company that takes the form of a charitable foundation could not be a qualified purchaser under this provision. It appears to be unlikely that this result was intended. For example, as noted above, Section 2(a)(51)(ii) itself contemplates the possibility that a family company could be owned by "foundations, charitable organizations, or trusts established by or for the benefit of [the family members that organized the family company]."[25] This suggests that the key criteria at the core of Section 2(a)(51)(ii) is not the form of the organization but whether it was organized by a group of related persons and their estate planning vehicles who could contribute substantial investments to the family vehicle. It clearly provides that family foundations could be qualified purchasers through their participation in family companies.

There is no apparent policy reason to treat charitable corporations differently than other corporations under Section 2(a)(51)(A)(ii) simply because they do not have "owners" in the traditional sense of the word. A charitable corporation that is funded solely by two or more of the persons who are related in one or more of the ways enumerated in Section 2(a)(51)(A)(ii) should be treated as if it were "owned by" such persons for the purpose of determining its status as a qualified purchaser. The traditional concept of ownership is not pertinent to a charitable foundation formed as a charitable corporation; a more natural method of evaluating the foundation's status as a qualified purchaser would be to look to the relationships between the parties who have established the foundation by contributing assets to it. Accordingly, a

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24 See footnote 15.

25 Id. We note that, while it may be theoretically possible to have a family foundation own an interest in a family company that in turn might be a qualified purchase, such a layering of corporate entities is cumbersome, not always practical and may raise additional legal and fiduciary issues. Further, we believe that requiring families to establish both a charitable corporation and an investment vehicle through which the charitable corporation may invest its assets serves no additional purpose.

charitable foundation established as a charitable corporation should be treated as a qualified purchaser if it has been funded solely by two or more persons having the relationship(s) enumerated in Section 2(a)(51)(A)(ii) so long as it is not formed for the specific purpose of investing in a Private Fund and owns not less than $5 million in investments, as defined under Rule 2a51-1(b).

We request that the Division would not recommend that the Commission take enforcement action under Section 7 of the 1940 Act if Goldman Sachs, or Private Funds managed or distributed by Goldman Sachs, treat a foundation as a qualified purchaser a charitable corporation: (a) that was not formed for the specific purpose of acquiring an interest in a Private Fund; (b) all of the persons who have contributed assets to which are related in one or more of the ways enumerated in Section 2(a)(51)(A)(ii), and (c) which owns not less than $5 million in "investments" as defined in Rule 2a51-1(b) under the Investment Company Act.

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Please contact the undersigned or Jessica Forbes of Fried, Frank, Harris, Shriver & Jacobson LLP at 212 859-8558 or Kenneth J. Berman of Debevoise & Plimpton LLP at 202 383-8050 if you have any questions regarding this request.

Respectfully submitted,

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