

ACT ICA of 1940  
SECTION 2(a)(22); 3(a)(1)  
RULE \_\_\_\_\_  
PUBLIC  
AVAILABILITY Oct. 25, 2000

October 25, 2000  
Our Ref. No. 99-746  
Comdisco, Inc.  
File No. 1-7725

RESPONSE OF THE OFFICE OF CHIEF COUNSEL  
DIVISION OF INVESTMENT MANAGEMENT

Your letter dated October 2, 2000 requests our concurrence with your view that the issuance of two series of stock that are intended to track the economic performance of two groups of businesses within Comdisco, Inc. (each, a "tracking stock") would not render either business group a separate "issuer," as defined in Section 2(a)(22) of the Investment Company Act of 1940 (the "Act"). If one of the business groups were a separate "issuer," that business group might be subject to regulation under the Act as an investment company. In general, we believe that an operating company's issuance of tracking stock would not render a tracked business group a separate issuer, except in the limited circumstances discussed below.

Facts

You state that Comdisco, Inc. ("Comdisco") is a technology services company that helps its customers maximize the business benefits of technology. You state that Comdisco reported total assets in excess of \$8.6 billion as of June 30, 2000, and total revenues of \$2.8 billion during the first three quarters of its fiscal year ending on that date.

You state that a business group within Comdisco engages in venture financing activities relating to Comdisco's technology services business. As part of its venture financing activities, the business group provides financing to customers of Comdisco that are start-up companies to help them lease or purchase equipment or services. In exchange for providing this financing, the business group receives warrants to purchase equity stakes in the start-up companies. The business group also makes direct equity investments in some customers to help them raise capital. You state that assets attributable to Comdisco's venture financing activities amounted to \$1.7 billion as of June 30, 2000, and that revenues of \$451 million were attributable to these activities during the first three quarters of its fiscal year ending on that date.

You state that Comdisco has amended and restated its certificate of incorporation to authorize it to issue common stock in multiple series. Initially, Comdisco proposes to issue two series designated as Comdisco Group Stock and Comdisco Ventures Stock, respectively. You state that both series will be tracking stock.

You state that Comdisco Ventures Stock is intended to track the economic performance of the business group within Comdisco that engages in the venture financing

activities described above (“Comdisco Ventures”), and that Comdisco Group Stock is intended to track the economic performance of the other businesses of Comdisco (“Comdisco Group”) and the retained interest in Comdisco Ventures.<sup>1</sup> Comdisco will, for accounting purposes, separately identify and allocate to Comdisco Ventures or Comdisco Group, respectively, the assets, liabilities, revenues, expenses, and cash flows of the businesses making up each group.<sup>2</sup> You state that Comdisco will prepare and make available to its shareholders separate financial statements for Comdisco Ventures, as well as consolidating and consolidated financial statements for Comdisco as a whole.

You state that Comdisco proposes to establish and issue the tracking stock to, among other things, offer investors securities that are intended to track the economic performance of each of Comdisco Ventures and Comdisco Group, while permitting Comdisco to retain control of each group’s assets and businesses.<sup>3</sup> You state that Comdisco Ventures and Comdisco Group will not be organized as separately incorporated subsidiaries of Comdisco.<sup>4</sup>

You state that Comdisco’s existing common stock will be reclassified as Comdisco Group Stock. Comdisco initially expects to sell to the public shares of Comdisco Ventures Stock representing approximately 12% of the initial equity value of the assets allocated for accounting purposes to Comdisco Ventures.<sup>5</sup> You state that the

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<sup>1</sup> See *infra* notes 5 and 6 (describing the retained interest).

<sup>2</sup> You state that despite these accounting allocations, Comdisco as a whole, rather than any business group within Comdisco, will continue to hold legal title to all of the assets of all of Comdisco’s businesses.

<sup>3</sup> You state that Comdisco’s other reasons for issuing the tracking stock include broadening market interest in Comdisco, providing more focused incentives to the management and employees of each business group through stock options tied to a particular series of tracking stock, raising capital for Comdisco, and preserving the financial, tax, operational, and strategic benefits of being a single consolidated entity.

<sup>4</sup> You state that Comdisco Ventures and Comdisco Group will not have their own boards of directors. Instead, Comdisco’s board of directors will oversee the operations of both Comdisco Ventures and Comdisco Group, and will be accountable to the shareholders of Comdisco as a whole. Comdisco’s board of directors will appoint certain of its members to serve on the Comdisco Capital Stock Committee, which will serve as a committee of the whole board to interpret and implement board policies with respect to the relationships between the groups. You state that the Committee will not owe a separate fiduciary duty to the holders of Comdisco Ventures Stock or the holders of Comdisco Group Stock.

<sup>5</sup> You state that the remaining 88% of the initial equity value of the assets allocated for accounting purposes to Comdisco Ventures initially will be allocated to Comdisco Group as its retained interest. Thereafter, Comdisco may distribute additional shares of Comdisco Ventures Stock to the holders of Comdisco Group Stock.

[footnote continued]

proceeds of any sales of Comdisco Ventures Stock will not necessarily be used for Comdisco Ventures, but may be used by Comdisco for any business purpose, including to benefit Comdisco Group.<sup>6</sup>

You state that holders of Comdisco Ventures Stock (“Comdisco Ventures shareholders”) and holders of Comdisco Group Stock (“Comdisco Group shareholders”) will be investors in Comdisco as a whole. Each shareholder will own an undivided interest in all of the assets of Comdisco, and be subject to the same risks arising from all of Comdisco’s businesses, including any associated liabilities.<sup>7</sup> You state that the assets allocated for accounting purposes to each of Comdisco Ventures and Comdisco Group will be subject to the liabilities of the other group, and that if Comdisco were unable to satisfy one group’s liabilities out of the assets allocated to that group, Comdisco would be required to satisfy the liabilities out of the assets allocated to the other group.

You state that Comdisco Ventures shareholders and Comdisco Group shareholders will vote together as a single class on all matters requiring shareholder approval, including the election of directors, except as required by state law, applicable rules of the New York Stock Exchange, or the qualification requirements for Nasdaq Stock Market securities. Comdisco Group shareholders will have one vote per share. You state that the relative weight assigned to the votes of Comdisco Ventures shareholders will not reflect the relative value of the assets previously allocated to each group for accounting purposes, but will be determined by a formula based on the relative, per-share average market value of each series over a specified period.<sup>8</sup>

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You state that Comdisco also may sell additional shares of Comdisco Ventures Stock to investors in private or public offerings, and the proceeds of those offerings may be allocated to either Comdisco Ventures or Comdisco Group.

<sup>6</sup> You state that if the proceeds of a sale of Comdisco Ventures Stock are used to benefit Comdisco Group, Comdisco may reduce the number of shares of Comdisco Ventures Stock that represent Comdisco Group’s retained interest in Comdisco Ventures by a corresponding amount. In the alternative, Comdisco’s board of directors may make a comparable equitable adjustment in accordance with the Comdisco board’s Policy Statement relating to Comdisco Ventures, a copy of which is appended to Comdisco’s registration statement for Comdisco Ventures Stock. *See infra* note 15.

<sup>7</sup> You state that Comdisco disclosed these facts to the holders of Comdisco’s existing common stock in a proxy statement seeking shareholder approval of the proposal to amend Comdisco’s restated certificate of incorporation to issue the tracking stock (the “proxy statement”).

<sup>8</sup> You state, however, that during the first thirty trading days following the effective date of the amended and restated certificate of incorporation, shares of Comdisco Ventures Stock will each have one vote. You also state that under the amended and restated certificate of incorporation, the voting weight assigned to

[footnote continued]

You state that any shareholder of Comdisco, whether a Comdisco Ventures shareholder or a Comdisco Group shareholder, will not have any claim to specific assets of Comdisco or the assets of any particular group of businesses within Comdisco, and that each shareholder's interest will be subject to the claims of the creditors of Comdisco as a whole. If Comdisco were liquidated, shareholders would possess only general claims to the assets of Comdisco that remained after the payment of liabilities, and the payment of preferences due to Comdisco's preferred shareholders (if any). In any liquidation, Comdisco Group shareholders would be entitled to one liquidation unit per share. You state that the relative amount of liquidation units allocated to Comdisco Ventures shareholders would not reflect the relative value of the assets previously allocated to each group for accounting purposes, but generally would reflect the relative, per-share average market value of each series over a specified period.<sup>9</sup>

You state that Comdisco could dispose of some or all of the assets allocated for accounting purposes to Comdisco Ventures or Comdisco Group without the approval of Comdisco Ventures shareholders or Comdisco Group shareholders, respectively.<sup>10</sup> If Comdisco disposes of substantially all of the assets that are allocated to Comdisco Ventures, it would have several options in addressing the interests of Comdisco Ventures shareholders. Under one option, Comdisco could exchange each share of Comdisco Ventures Stock for shares of Comdisco Group Stock having a value equal to the average market value of one share of Comdisco Ventures Stock over a specified period, plus a predetermined premium that would not necessarily reflect the sale price for the assets previously allocated to Comdisco Ventures.<sup>11</sup> You state that Comdisco is unlikely to

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Comdisco Ventures Stock cannot exceed 35% of the total voting power of all of the outstanding shares of the common stock of Comdisco.

<sup>9</sup> You state that after February 21, 2001, the number of liquidation units per share allocated to Comdisco Ventures Stock will remain fixed relative to the one unit per share allocated to Comdisco Group Stock. The ratio between the number of units per share allocated to each series will correspond to the relative per-share average market value of each series during the period of twenty-one trading days prior to February 21, 2001. You state that neither a merger of Comdisco with another corporation nor any sale or other disposition of all or any part of its assets would, by itself, be deemed a liquidation for purposes of these provisions.

<sup>10</sup> You state that a shareholder vote generally would be required by state law, the rules of the New York Stock Exchange, or the qualification requirements for Nasdaq Stock Market securities only if the transaction involved the disposition of substantially all of the assets of Comdisco.

<sup>11</sup> You state that certain other options would allow Comdisco to pay a dividend to Comdisco Ventures shareholders, or to redeem shareholders' shares for cash or other property. The dividend or redemption payment generally would have a value equal to shareholders' proportionate interest in the net proceeds from the disposition of assets.

[footnote continued]

dispose of substantially all of the assets allocated to Comdisco Group without also disposing of the assets allocated to Comdisco Ventures.<sup>12</sup>

You state that the economic performance of the Comdisco Ventures Stock and Comdisco Group Stock will be affected by the operations and profitability of Comdisco as a whole, rather than only by the performance of Comdisco Ventures or Comdisco Group.<sup>13</sup> Comdisco does not expect to pay dividends on Comdisco Ventures Stock for the foreseeable future, but has paid and expects to continue to pay dividends on Comdisco Group Stock. Nevertheless, Comdisco's board of directors can pay dividends on both series, either series, or neither series in its sole discretion, subject to certain limitations imposed under state law and under the amended and restated certificate of

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You state that shareholders' proportionate interest would equal the net proceeds multiplied by a fraction. The numerator of the fraction would be the total number of shares of Comdisco Ventures Stock that are outstanding, and the denominator would be the sum of (a) the total number of shares of Comdisco Ventures Stock that are outstanding, plus (b) the total number of shares of Comdisco Ventures Stock that are reserved for issuance for the benefit of Comdisco Group or to the Comdisco Group shareholders.

<sup>12</sup> You state that the terms and conditions of any disposition of substantially all of the assets of Comdisco, merger of Comdisco, or any similar transaction, and the corresponding treatment of Comdisco Group shareholders and Comdisco Ventures shareholders, would be determined at the time of the transaction based on negotiations with the acquirer and applicable law.

<sup>13</sup> You state that the performance of one business group could adversely affect the other group, and that if one business group encounters financial difficulties, the market value of the other business group's stock may suffer for reasons unrelated to the actual value or economic prospects of that group's assets.

incorporation.<sup>14</sup> You state that dividends may be paid using any source of funds within Comdisco that is legally available for the payment of dividends under state law.<sup>15</sup>

You state that Comdisco's board of directors could reconstitute the two series of tracking stock into a single series of common stock at any time. In particular, you state that, under the amended and restated certificate of incorporation, Comdisco could exchange all of the shares of Comdisco Ventures Stock for shares of Comdisco Group Stock having an equivalent average market value per share, if it also pays a predetermined premium that would not necessarily reflect the relative value of the assets previously allocated to each group for accounting purposes.

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<sup>14</sup> You state that state law would generally limit the amount of dividends that could be paid to both series together by limiting the total amount of funds of the entire company that are legally available to pay any dividends. The "available dividend amount" set by the amended and restated certificate of incorporation would separately limit the amount of dividends that could be paid to either series. The "available dividend amount" for Comdisco Ventures at any time, for example, would be the amount of retained earnings per share that Delaware law would deem legally available to be paid as dividends in hypothetical circumstances in which: (1) Comdisco Ventures was an independent Delaware corporation, and (2) Comdisco Ventures had issued a hypothetical number of shares of common stock, par value \$.10 per share, equal to the sum of (a) the number of shares that are actually outstanding, plus (b) the number of unissued shares that would correspond to the value of Comdisco Group's retained interest in Comdisco Ventures.

<sup>15</sup> For example, you state that, subject to the limitations imposed under state law and under the amended and restated certificate of incorporation, Comdisco could reallocate profits or surplus previously allocated to Comdisco Ventures to fund dividends to be paid to Comdisco Group shareholders. This type of reallocation would be treated as a transfer of assets of one group to the other group under the Comdisco board's Policy Statement relating to Comdisco Ventures, a copy of which is appended to Comdisco's registration statement for Comdisco Ventures Stock. You state that the Policy Statement provides that if Comdisco transfers cash or other property allocated to one group to another group, it may account for that transfer as: (1) an adjustment to allocated pooled debt, a short-term or long-term loan between groups, or a repayment of previous borrowing; (2) a sale of assets between groups; or (3) a reduction or increase in Comdisco Group's retained interest in Comdisco Ventures. You state that Comdisco's board of directors and management may exercise their business judgment in determining how to account for a transfer in specific instances or through generally applicable policies.

## Analysis

Your letter requests our concurrence with your view that the issuance of tracking stocks that are intended to track the economic performance of Comdisco Ventures and Comdisco Group would not render either business group a separate “issuer,” as defined in Section 2(a)(22) of the Act. In particular, you are concerned that if the Commission or the staff views Comdisco Ventures instead of Comdisco as the “issuer” of Comdisco Ventures Stock, Comdisco Ventures could be subject to regulation as an “investment company,” depending on the nature of Comdisco Ventures’s activities and assets.<sup>16</sup>

An “issuer” under the Act may be, among other things, a natural person, a company, a partnership, a trust, a fund, or any organized group of persons whether incorporated or not.<sup>17</sup> Congress drafted the definition of issuer to encompass investment enterprises broadly, regardless of their legal form or structure.<sup>18</sup> Thus, an issuer may exist even though it is not formally organized as a separate legal entity.

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<sup>16</sup> Section 3(a)(1) of the Act defines an “investment company,” in part, as “*any issuer*” (emphasis added) that:

(A) is or holds itself out as being engaged primarily, or proposes to engage primarily, in the business of investing, reinvesting, or trading in securities . . . or (C) is engaged or proposes to engage in the business of investing, reinvesting, owning, holding, or trading in securities, and owns or proposes to acquire investment securities having a value exceeding 40 per centum of the value of such issuer’s total assets.

You state that if Comdisco Ventures were deemed to be an “issuer,” it would likely be an investment company because “investment securities” would constitute more than 40% of its total assets.

<sup>17</sup> Section 2(a)(22) of the Act defines the term “issuer” to mean “every *person* who issues or proposes to issue any security, or has outstanding any security which it has issued” (emphasis added). Section 2(a)(28) of the Act defines the term “person” to mean “a natural person or a *company*” (emphasis added). Section 2(a)(8) of the Act, in turn, defines the term “company” to mean “a corporation, a partnership, an association . . . a trust, a fund, or *any organized group of persons whether incorporated or not*” (emphasis added).

<sup>18</sup> See *Prudential Insurance Company of America v. SEC*, 326 F.2d 383, 387 (3d Cir. 1964), *cert. denied*, 377 U.S. 953 (1964) (hereinafter “*Prudential*”) (“Congress intentionally drafted the statutory definitions in general terms in order to control [an investment enterprise] regardless of the legal form or structure of the investment enterprise”). The Commission’s report on its investment trust study noted that one form of organization of investment companies involves a “group of individual investors [that] is not a legal entity but rather constitutes in essence a combination of distinct individual interests.” SEC REPORT, INVESTMENT TRUSTS AND INVESTMENT COMPANIES, H.R. Doc. No. 707, 75th Cong., 3d Sess., pt. 1 at 24 (1939). See *Prudential*, 326

[footnote continued]

We believe that it is appropriate to assess the existence of a separate issuer within an operating company based on elements articulated by the United States Court of Appeals for the Third Circuit in *Prudential Insurance Company of America v. SEC*.<sup>19</sup> In that case, the court upheld a finding by the Commission that a variable annuity “investment fund” operated by an insurance company was an issuer separate from the insurance company itself.<sup>20</sup> The court based its conclusion on several elements that together establish a test for evaluating the existence of a separate issuer within an operating company. Under this test, a separate issuer may exist within an operating company<sup>21</sup> if: (i) the operating company causes interests to be issued in a pool of assets

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F.2d at 387 (the Act and Congressional reports emphasize the importance of the study and the Commission’s reports on the study in shaping the Act). A committee report of the House of Representatives, in describing the investment enterprises that Congress sought to address, quoted Senate testimony in which SEC Commissioner Robert E. Healy stated that “[e]ssentially these organizations are large liquid pools of the public’s savings entrusted to managements to be invested.” H.R. Rep. No. 2639, 76th Cong., 3d Sess., at 6 (1940).

<sup>19</sup> See *Prudential*, *supra* note 18, 326 F.2d at 387-88. See also Status of Investment Advisory Programs under the Investment Company Act of 1940, Investment Company Act Release No. 21260 at nn.11-15 and accompanying text (July 27, 1995) (the Commission cited *Prudential* in concluding that an investment advisory program could be deemed to be an “issuer,” and therefore an “investment company,” as an organized group of persons who purchase securities in the form of investment contracts). Rule 3a-4 under the Act provides a non-exclusive safe harbor from the definition of investment company for certain investment advisory programs.

<sup>20</sup> See *Prudential*, 326 F.2d at 387-88 (*affirming* In re Prudential Insurance Company of America, 41 SEC 335 (1963)). As a result, the investment fund was unable to rely on the “insurance company” exclusion from the definition of “investment company.” See Section 3(c)(3) of the Act.

<sup>21</sup> We note that the *Prudential* test, which focuses on whether a particular pool of assets within an operating company constitutes a separate “issuer,” does not preclude a finding that a “company” or “issuer” could exist in other types of arrangements that lack a single identifiable pool. A company or issuer might sometimes exist, for example, when an organized group of persons maintains multiple pools or multiple accounts, or coordinates its investments without using any identifiable pool. See Investment Company Act Release No. 21260, *supra* note 19, at n.14 and accompanying text; *Bancroft Convertible Fund, Inc. v. Zico Investment Holdings Inc.*, 825 F.2d 731, 736-37 (3d. Cir. 1987); *Clemente Global Growth Fund, Inc. v. T. Boone Pickens, III*, 705 F. Supp. 958, 964-68 (S.D.N.Y. 1989).



that is legally segregated from the company's other assets;<sup>22</sup> (ii) the assets in the pool are held primarily for the benefit of the interest holders as the sole measure of their investment participation;<sup>23</sup> and (iii) the interests in the pool do not confer significant rights in other assets of the operating company.<sup>24</sup>

#### Factors Relevant In Applying the *Prudential* Test to Tracking Stock

We have considered how the *Prudential* test may apply to corporate structures involving tracking stock. Based on our analysis of a variety of tracking stock structures in addition to Comdisco's structure, we believe that the presence of certain factors may tend to show that an operating company has established a tracked business group as a separate issuer under the *Prudential* test. These factors include, without limitation:

(a) The tracked group is a separate corporation that is legally distinct from the operating company.

(b) A board of directors that is separate from the board of directors of the operating company governs the tracked group.

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<sup>22</sup> In *Prudential*, the court emphasized that the investment fund was a "completely segregated account" devoted to investing in securities. 326 F.2d at 384-85, 387. See *In re Prudential Insurance Company of America*, *supra* note 20, 41 SEC at 342, 345 (the Commission noted that some state laws required that investment funds under variable annuity contracts be maintained in an account that was "legally separate from" the other assets and liabilities of the insurance company). In our view, a pool of assets may be "legally segregated" from an operating company's other assets if the pool of assets is insulated by legal means (rather than merely by accounting or other conventions), such as through articles of incorporation, a trust document, or contracts that shield the pool of assets from liabilities affecting the company's other assets, including claims by the company's general creditors. See, e.g., Rule 0-1(e)(2) under the Act (a separate account must be "legally segregated" from insurance company's other assets; account must contain assets having a value equal to the reserves and other contract liabilities of the separate account, and those assets may not be chargeable with liabilities arising out of any other business that the insurance company may conduct).

<sup>23</sup> The court stated that "[p]roceeds of the fund [were] held for the sole benefit of" the variable annuity contract holders who acquired interests in the fund. 326 F.2d at 387. The fund was "not . . . subject to claims of any other contract or policyholder." *Id.* at 384-85. The contract holders' "investment participation [was] measured solely by the" fund. *Id.* at 388 n.6.

<sup>24</sup> The court stated that contract holders possessed interests only in the fund, and in "no other entity," apart from a *de minimis* interest in the insurance company's general assets. 326 F.2d at 387 & n.5.

(c) The operating company is restricted from eliminating the tracking stock or disposing of the assets of the tracked group.

(d) The tracked group and the operating company are restricted from encumbering each other's assets.

(e) General creditors of the operating company are unable to seek repayment from the assets of the tracked group.

(f) The tracking stock does not expose tracking stock investors to the risks and rewards of the businesses and assets of the operating company as a whole.

(g) The proceeds of a tracking stock offering are required to be used exclusively for the tracked group, and the proceeds of an offering of any other series of common stock of the operating company may not be used for the tracked group.

(h) The source of any dividends paid to tracking stock investors is required to be limited to the assets allocated to the tracked group; or the ratio between any dividends paid to tracking stock investors and any dividends paid to other investors must correspond to the ratio between the profitability of the tracked assets and the profitability of the other assets of the operating company.

(i) The relative rights of tracking stock investors and other investors with respect to voting, asset dispositions, and liquidations fluctuate with the actual values of the assets allocated to the tracked group and the other assets of the operating company.

(j) Offering or marketing documents encourage tracking stock investors to look primarily to the assets of the tracked group for a return on their investment.

(k) The market performance of the tracking stock differs greatly from the market performance of other series of common stock issued by the operating company.

Each of these factors relates to one or more of the three elements of the *Prudential* test. Although each element of the *Prudential* test must be present in order to conclude that an operating company has established a tracked business group as a separate issuer, not all of the listed factors need be present. Conversely, the presence of one or more of the factors is not necessarily a ground for concluding that a separate issuer exists. We believe that other analogous factors not listed here also may be relevant.

We observed relatively few of the listed factors in reviewing a variety of corporate structures involving tracking stock. We recognize that tracking stock structures differ substantially. We believe that the particular characteristics of each tracking stock structure should be evaluated under the factors listed above and other analogous factors to determine whether the three elements of the *Prudential* test are present.

Application of the *Prudential* Test and Relevant Factors to Comdisco

We have considered the applicability to Comdisco's tracking stock structure of the three elements of the *Prudential* test and the relevant factors listed above. You assert that under *Prudential*, the issuance by Comdisco itself<sup>25</sup> of the Comdisco Ventures Stock and the Comdisco Group Stock will not render either Comdisco Ventures or Comdisco Group a separate issuer that could be an investment company.<sup>26</sup> We agree that many of the factors listed above that are relevant to the *Prudential* test are not present in Comdisco's tracking stock structure.<sup>27</sup> We also believe, however, that one or more of the listed factors may be present to some degree, as discussed further below.

We note that factors (g) and (h) may be at issue in Comdisco's tracking stock structure. You state that (1) the proceeds of an offering of one group's stock could be used to benefit the other group, and (2) a dividend could be paid to the shareholders of one group from assets allocated to the other group, or could be paid without regard to the former group's relative profitability.<sup>28</sup> You acknowledge, however, that an event of either type would be treated as a transfer of cash or other property from the latter group to the former group, and would be counterbalanced to a degree by a compensating reallocation of assets and liabilities between the groups for accounting purposes.<sup>29</sup> You assert, however, that reallocations of assets for accounting purposes would not substantively affect the rights of shareholders and may not affect the market values of their shares.

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<sup>25</sup> You assert that Comdisco is an operating company rather than an investment company. You assert that Comdisco holds itself out as an operating company that is engaged primarily in the business of providing technology services to its customers, and that the value of the investment securities held by Comdisco is a small percentage of its total assets. See Sections 3(a)(1)(A) and (C) of the Act, *supra* note 16.

<sup>26</sup> In addition to reaching this conclusion under the *Prudential* case, you assert that tax law and general corporate law ordinarily would not characterize a tracking stock structure as creating an entity separate from the issuing corporation. See generally *Solomon v. Armstrong*, 747 A.2d 1098 (Del. Ch. 1999), *aff'd*, 746 A.2d 277 (Del. 2000); *In re General Motors Class H Shareholders Litigation*, 734 A.2d 611 (Del. Ch. 1999).

<sup>27</sup> You have stated facts that show that factors (a) through (f) listed above are not present in Comdisco's tracking stock structure.

<sup>28</sup> Telephone conference on October 2, 2000 between James T. Barrett and Joshua M. Thayer of Palmer & Dodge LLP and Thomas M.J. Kerwin of the staff; see also *supra* notes 6 and 15. You state that the amount of any dividend would be subject to maximum limits based on state law and on the "available dividend amount" restriction outlined above. See *supra* note 14.

<sup>29</sup> See *supra* notes 6 and 15.

Factor (i) may be present because, as you acknowledge, the rights of shareholders relating to asset dispositions may fluctuate with their proportionate interest in the net proceeds from a disposition of assets or with the market value of each group's stock,<sup>30</sup> and voting rights will generally fluctuate with the market value of each group's stock.<sup>31</sup> Under certain market conditions, fluctuation with stock market value may be equivalent to fluctuation with the actual value of the assets. You assert, however, that the market value of the tracking stock will not necessarily reflect the actual value or economic prospects of the tracked group's assets.<sup>32</sup>

Factor (j) may be present because, as you acknowledge, Comdisco's proxy statement and other offering documents might encourage Comdisco Ventures shareholders and Comdisco Group shareholders to look primarily to the performance of the assets of Comdisco Ventures or Comdisco Group, respectively, for a return on their investments.<sup>33</sup> You assert, however, that the registration statement and other offering documents for Comdisco Ventures Stock disclose that Comdisco cannot assure investors that the market value of tracking stock will always reflect the performance of the tracked group, and that the registration statement and the proxy statement disclose that tracking stock does not represent ownership interests in the tracked group's assets.<sup>34</sup>

Factor (k) may be present because, as you acknowledge, the market performance of Comdisco Ventures Stock could differ greatly from the market performance of Comdisco Group Stock, and different market performance by the two series of stock might imply that they reflect different pools of assets.<sup>35</sup> You assert, however, that the

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<sup>30</sup> See *supra* note 11 and accompanying text. In some circumstances, the net proceeds from a disposition of assets may reflect the actual value of the assets.

<sup>31</sup> You state that voting rights will be fixed for a short time, and will be subject to a maximum limit. See *supra* note 8.

<sup>32</sup> See *infra* notes 34 and 36 and accompanying text.

<sup>33</sup> For example, you acknowledge that the proxy statement discloses that Comdisco Ventures Stock is intended to reflect the economic performance of Comdisco Ventures, and that, from an accounting standpoint, Comdisco has separated Comdisco Ventures from its other businesses.

<sup>34</sup> Telephone conference on October 2, 2000 between James T. Barrett and Joshua M. Thayer of Palmer & Dodge LLP and Thomas M.J. Kerwin of the staff; see also *supra* text accompanying note 7.

<sup>35</sup> We note that whether substantial differences will exist between the market performance of tracking stock and the market performance of other series of common stock issued by an operating company generally cannot be predicted before the issuance of the tracking stock. In addition, we believe that differences in market performance may more likely be temporary, depending on market conditions, when no separate issuer exists under a tracking stock structure. See *infra* note 36 and accompanying text.

[footnote continued]

financial performance of one group could adversely affect the other group, and that if Comdisco encounters financial difficulties, the value of a group's stock may suffer for reasons unrelated to the economic prospects of that group.<sup>36</sup>

Accordingly, based on our consideration of the listed factors, we believe that the three elements of the *Prudential* test are not present in Comdisco's tracking stock structure. In particular, we believe that: (i) Comdisco will not cause interests to be issued in a pool of assets that is legally segregated from Comdisco's other assets; (ii) the assets allocated to Comdisco Ventures and Comdisco Group will not be held primarily for the benefit of Comdisco Ventures shareholders and Comdisco Group shareholders, respectively, as the sole measure of their investment participation; and (iii) Comdisco Ventures shareholders and Comdisco Group shareholders will have rights under each tracking stock to participate in assets allocated to the other group, and will participate generally in the risks and returns of the assets of Comdisco as a whole.

On the basis of the facts and representations set forth in your letter, therefore, we believe that Comdisco's issuance of tracking stocks that are intended to track the economic performance of Comdisco Ventures and Comdisco Group would not render either business group a separate issuer under Section 2(a)(22) of the Act.<sup>37</sup> Because this

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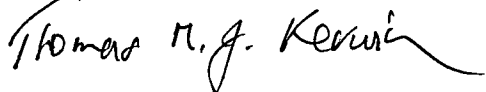
In contrast, market performance differences may be more likely to persist over the long term when a separate issuer exists. Thus, any performance differences under factor (k) may be of limited significance in the absence of other indications of whether a separate issuer exists.

<sup>36</sup> See N. Deogun, *Pittston Plans to Sell Coal Business and Scuttle Its Tracking-Stock Effort*, THE WALL STREET JOURNAL at B16 (Dec. 6, 1999) (Pittston Company's board of directors intends to sell Pittston's coal operations and abandon its tracking stock structure because liabilities associated with the coal business "cast a shadow on" the market value of Pittston's tracking stocks for other businesses).

<sup>37</sup> See also The Equitable Life Assurance Society of the United States (pub. avail. Dec. 22, 1995) (staff agreed not to recommend enforcement action against insurance company that would establish a legally insulated, non-unitized separate account that would not register as an investment company under the Act; contract holders would not share in investment experience of account, and would have no direct claim to assets of account; account assets would remain legal property of insurance company; contract holders would retain claim against general assets of insurance company); First Boston Risk Capital Units Plan (pub. avail. Feb. 16, 1988) (staff agreed not to recommend enforcement action against employer that would establish an unfunded employee benefit plan that would not register as an investment company under the Act; the plan would allow key employees to invest their own capital and receive a return measured by employer's return from certain risk capital investments; employees' investments could be used for general corporate purposes and need not be invested in risk capital investments; plan would not grant employees a property interest in any particular assets, but only the rights of an unsecured creditor of employer).

position is based on the facts and representations set forth in your letter, you should note that different facts or representations may require a different result. Further, you have not asked us about, and we take no position regarding, the appropriate level of disclosure in the prospectus offering the tracking stock.

We have stated here our views on when the issuance of tracking stock may indicate the existence of a separate issuer under Section 2(a)(22) of the Act. Having stated our views, we will not respond to inquiries about whether particular tracking stock structures establish separate issuers unless the inquiries present novel or unusual issues.

A handwritten signature in black ink, reading "Thomas M.J. Kerwin". The signature is written in a cursive style with a long, sweeping tail on the final letter.

Thomas M.J. Kerwin  
Senior Counsel

**PALMER & DODGE LLP**  
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October 2, 2000

**Via Facsimile and Overnight Mail**

Office of the Chief Counsel  
Division of Investment Management  
Mail Stop 5-6  
Securities and Exchange Commission  
450 Fifth Street, NW  
Washington, DC 20549

Re: Tracking Stock Proposal

1940 Act/3(a)

Ladies and Gentlemen:

On behalf of our client Comdisco, Inc. ("Comdisco"), we request confirmation from the staff (the "Staff") of the Securities and Exchange Commission (the "Commission") that the Staff would not recommend enforcement action under the Investment Company Act of 1940, as amended (the "1940 Act"), if Comdisco issues two series of common stock with the terms and in the manner described in this letter, and thereafter continues to operate without registration under the 1940 Act. Comdisco's two new series of common stock would have the characteristics of tracking stock; each would be intended to track, to the extent described herein, the performance of a specified business Group of Comdisco. Comdisco's proposal to create and issue its "Comdisco Group Stock" and "Comdisco Ventures Stock" as tracking stocks, with those terms and in the manner described in this letter, is not intended to, nor does it, create any "company," "person" or "issuer" separate from Comdisco that is an investment company under the 1940 Act.

We believe that Comdisco's proposal does not implicate the 1940 Act or its registration requirements for reasons that include:

- (1) Comdisco is not an "investment company" as defined under the 1940 Act;
- (2) the issuance of the tracking stocks does not create a "fund" or any other "person" that is an "issuer" separate from Comdisco that could properly be identified as an "investment company" under the 1940 Act; and
- (3) holders of each series of common stock will have legal and economic interests in Comdisco as a whole, and not in any separate business or assets.

## BACKGROUND

### **I. Comdisco.**

A. Comdisco. Comdisco provides global technology infrastructure solutions to help its customers maximize their technology's reliability, efficiency and flexibility while reducing technology cost and risk.

Comdisco, Inc.'s businesses include:

- its technology services businesses, including: continuity services, managed network services, desktop management solutions and web hosting and availability services;
- its global leasing and remarketing businesses in areas such as electronics, communications, laboratory and scientific and industrial automation equipment;
- Prism Communication Services, Inc., a majority-owned subsidiary through which Comdisco provides integrated communications services; and
- its venture financing division, through which Comdisco provides equipment leasing and other financing to venture capital-backed companies.

Comdisco was founded in 1969 and incorporated in Delaware in 1971. Its executive offices are located in the Chicago area. Comdisco has more than 100 additional locations around the world, and serves more than 4,000 customers in North and South America, Europe, the Pacific Rim and Australia.

At September 30, 1999, the end of Comdisco's last completed fiscal year, Comdisco had total assets in excess of \$7.8 billion and total stockholders' equity in excess of \$1 billion. As of June 30, 2000, Comdisco had total assets of \$8.6 billion and total stockholders' equity in excess of \$1.2 billion.

For the year ended September 30, 1999, Comdisco reported total revenues of \$4.2 billion and earnings from normal operations of \$167 million. Including the operational losses from its communication services subsidiary, and the previously announced \$150 million charge due to the sale of Comdisco's non-strategic assets during the second quarter of its fiscal year ended September 30, 1999, Comdisco reported net earnings of \$48 million for the year ended September 30, 1999. For the nine months ended June 30, 2000, Comdisco reported total revenues of \$2.8 billion and earnings from normal operations of \$186 million. Including the operational losses from its communication services subsidiary, Comdisco reported net earnings of \$101 million for the nine months ended June 30, 2000.



The Comdisco Group Stock is listed on the New York Stock Exchange, and upon its issuance the Comdisco Ventures Stock will be quoted on the Nasdaq Stock Market. On June 30, 2000, Comdisco had 224,906,304 shares of common stock outstanding.

B. Comdisco's Venture Financing Activities. Beginning in 1987, Comdisco identified start-up companies as a potential market for its equipment leasing services. Through its ventures financing division, Comdisco made equipment lease financing available to these companies on economic terms that, given their start-up status, was generally not available from other financing sources. As part of its equipment lease financing package, Comdisco historically has obtained warrants to purchase equity in its customer at a predetermined price.

Since 1987, Comdisco has developed and marketed additional innovative equity-linked financing products, primarily loans and leases combined with warrants, in response to the evolving needs of customers, who today are primarily emerging technology companies in high growth industries. More recently, Comdisco also has made direct equity investments in its customers as a way of providing them additional needed capital. Comdisco's financing products are designed to complement equity from venture capital firms and debt from commercial banks and traditional leasing companies.

Comdisco has also been able to provide customers of its venture finance products with a variety of value added services including discount purchasing of new equipment and access to reconditioned equipment. Also, because customers of its venture finance products are primarily in high technology emerging industries, Comdisco has been able to provide those customers with other of its technology services, such as business continuity, network management and design services, and access to its proprietary, high-speed nationwide ATM data communications network. Also, as these customers mature as businesses, Comdisco has been able to establish more traditional leasing arrangements with them.

As described more fully below, the assets, liabilities, revenues, expenses and cash flow attributable to Comdisco's venture financing activities will be separately identified for accounting purposes as a business group, Comdisco Ventures, which relates to one of Comdisco's new series of common stock, Comdisco Ventures Stock. At least 40% of the value of these assets would constitute "investment securities" for purposes of the 1940 Act.

Comdisco's venture financing activities constitute a small portion of the assets and revenues of the company as a whole. At September 30, 1999, assets attributable to Comdisco's venture financing activities represented \$872 million, or approximately 11% of the company's total \$7.8 billion dollars in assets. For the year ended September 30, 1999, revenues attributable to Comdisco's venture financing activities were \$229 million, or less than 6% of the company's total \$4.2 billion in revenues reported for that period. At June 30, 2000, assets attributable to Comdisco's venture financing activities represented \$1.7 billion or approximately 20% of the company's total \$8.6 billion dollars in assets. For the nine months ended June 30, 2000,

revenues attributable to the company's venture financing activities were \$451 million, or approximately 16% of the company's total \$2.8 billion in revenues for that period.

**II. Summary of Comdisco's proposal and the proposed terms of its two new series of common stock.**

**A. The proposal.**

Comdisco has filed an amended and restated certificate of incorporation to authorize the company to issue common stock in multiple series, and following the lead of a number of public companies like General Motors, AT&T, Circuit City Stores, Inc., J. C. Penney & Co., Inc., Donaldson Lufkin & Jenrette, Inc., The Walt Disney Company and others, proposes initially to designate and issue two series of common stock, each of a type that is generally referred to as "tracking stock." Comdisco's amended and restated certificate of incorporation:

- authorizes Comdisco to, consistent with Delaware law, issue its common stock in multiple series, with the terms of such series to be designated from time to time by Comdisco's board of directors;
- initially designates two series of common stock as Comdisco Group Stock and Comdisco Venture Stock, with the terms summarized below; and
- reclassifies Comdisco's existing common stock into Comdisco Group Stock.

Comdisco proposes initially to sell to the public Comdisco Ventures Stock representing approximately 12% of the initial equity value of the assets to be allocated for accounting purposes (as described in Section II.B.1 below) to Comdisco Ventures. The remaining 88% of such initial equity value will be allocated to Comdisco Group. Until Comdisco sells or otherwise distributes Comdisco Ventures Stock representing all of the equity value allocated by Comdisco to Comdisco Ventures, Comdisco's retained interest in Comdisco Ventures will be allocated to Comdisco Group. Such retained interest will be represented by a designated number of authorized but unissued shares of Comdisco Ventures Stock that are reserved for issuance for the benefit of Comdisco Group or to the holders of the Comdisco Group Stock.

**B. The terms of Comdisco Group Stock and Comdisco Ventures Stock.**

Set forth below is a summary of the terms presently contemplated for Comdisco's proposed Comdisco Group Stock and Comdisco Ventures Stock.

**1. Allocation of Comdisco's business groups among the series of common stock.**

One series of Comdisco's common stock, Comdisco Group Stock, is intended to track the economic performance of Comdisco Group, that is, Comdisco's businesses other than Comdisco Ventures, as well as Comdisco Group's retained interest in Comdisco Ventures. Comdisco will,

for accounting purposes, separately identify and allocate to Comdisco Group the assets, liabilities, revenue, expenses and cash flow of the businesses making up Comdisco Group.

The other series of Comdisco's common stock, Comdisco Ventures Stock, is intended to track the economic performance of Comdisco Ventures, that is, Comdisco's venture financing activities. Comdisco will, for accounting purposes, separately identify and allocate to Comdisco Ventures the assets, liabilities, revenue, expenses and cash flow of the businesses making up Comdisco Ventures.

Comdisco will prepare and make available to its stockholders separate financial statements for Comdisco Ventures, as well as the consolidated and consolidating financial statements of Comdisco.<sup>1</sup>

2. Option to Reconstitute Shares. At any time, Comdisco may reconstitute its two series into a single series of common stock by exchanging each share of Comdisco Ventures stock for shares (or a fraction of a share) of Comdisco Group Stock having a value equal to the ratio of an average market value of one share of Comdisco Ventures Stock to an average market value of one share of Comdisco Group Stock over a specified period, plus a predetermined premium. The predetermined premium is fixed in Comdisco's amended and restated certificate of incorporation; the premium is not designed to reflect the relative value of the assets previously allocated to each group for accounting purposes. As a result, holders of Comdisco Ventures Stock and Comdisco Group Stock will be subject at all times to the authority of the board of directors to reconstitute Comdisco's common stock into one series.

3. Voting Rights. The holders of the two series of common stock will vote together as a single class on all matters requiring stockholder approval. Neither series will have special class voting or approval rights other than as provided by Delaware law, applicable rules of the New York Stock Exchange or the qualification requirements for Nasdaq Stock Market securities.

4. Voting Power. The holders of Comdisco Group Stock will have one vote per share. At the time of any vote, the holders of Comdisco Ventures Stock will have a number of votes determined by a formula based on the relative per-share average market values of Comdisco Group Stock and Comdisco Ventures Stock over a specified period.<sup>2</sup> The

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<sup>1</sup> Comdisco disclosed these facts to the holders of Comdisco's existing common stock in a proxy statement seeking shareholder approval of the proposal to amend Comdisco's restated certificate of incorporation to designate the tracking stock (the "proxy statement"). Comdisco also disclosed these facts in a registration statement for the company's proposed initial public offering of shares of Comdisco Ventures Stock. This disclosure may have the effect of encouraging Comdisco Ventures shareholders and Comdisco Group shareholders to look primarily to the performance of the assets of the respective groups for a return on their investments.

<sup>2</sup> During the first thirty trading days following the effective date of the amended and restated certificate of incorporation, shares of Comdisco Ventures Stock will each have one vote. Under the amended and restated

predetermined formula and period are fixed in Comdisco's amended and restated certificate of incorporation; the formula and period are not designed to reflect the relative value of the assets previously allocated to each group for accounting purposes.

5. Liquidation. The net assets available for distribution to Comdisco's stockholders upon a liquidation of the company will be determined after payment of, or provision for, all liabilities, including contingent liabilities, of Comdisco and payment of the liquidation preference payable to any holders of Comdisco's preferred stock. After such payments, the available net assets will be divided among the holders of Comdisco Group Stock and Comdisco Ventures Stock pro rata in accordance with the liquidation units per share of each series. Each share of Comdisco Group Stock will have one liquidation unit. Each share of Comdisco Ventures Stock will have a number of liquidation units (including a fraction of a liquidation unit) determined by a formula based on the relative per-share average market values of Comdisco Group Stock and Comdisco Ventures Stock over a specified period. The predetermined formula and period are fixed in Comdisco's amended and restated certificate or incorporation; the formula and period are not designed to reflect the relative value of the assets previously allocated to each group for accounting purposes.<sup>3</sup>

6. Dividends. Dividends on both series of common stock may be paid in the sole discretion of Comdisco's board of directors and may be paid on neither, either<sup>4</sup> or both of the series of common stock.<sup>5</sup> Dividends on either series may be payable out of all funds of

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(continued...)

certificate of incorporation, the voting weight assigned to Comdisco Ventures Stock cannot exceed 35% of the total voting power of all of the outstanding shares of common stock of Comdisco.

<sup>3</sup> After February 21, 2001, the number of liquidation units per share allocated to Comdisco Ventures Stock will remain fixed relative to the one unit per share allocated to Comdisco Group Stock. The ratio between the number of units per share allocated to each series will correspond to the relative per-share average market value of each series during the period of twenty-one trading days prior to February 21, 2001. Neither a merger of Comdisco with another corporation nor any sale or other disposition of all or any part of its assets would, by itself, be deemed a liquidation for purposes of these provisions.

<sup>4</sup> For example, Comdisco could distribute shares of Comdisco Ventures Stock allocated as a retained interest to Comdisco Group as a dividend to the holders of Comdisco Group Stock, but not distribute any dividend to the holders of Comdisco Ventures Stock.

<sup>5</sup> Comdisco has paid, and currently expects to continue to pay, dividends on Comdisco Group Stock. Comdisco does not expect to pay dividends on Comdisco Ventures Stock for the foreseeable future.

Comdisco legally available for the payment of dividends under Delaware law<sup>6</sup>, and Comdisco may pay dividends on one series without paying dividends on the other. Comdisco's amended and restated certificate of incorporation limits the total amounts that can be paid as dividends on each series of common stock to an amount that would be legally available for the payment of dividends under Delaware law if the group were a separate Delaware corporation and certain other assumptions were applied.<sup>7</sup>

7. Dividend, Exchange or Redemption Upon a Disposition. If Comdisco disposes of all or substantially all of the properties and assets that are allocated to Comdisco Ventures<sup>8</sup>, it will have the option of (i) paying a dividend to the holders of Comdisco Ventures Stock having a

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<sup>6</sup> Delaware law would generally limit the amount of dividends that could be paid to both series together by limiting the total amount of funds of the entire company that are legally available to pay any dividends. Subject to this limitation, and the limitations in Comdisco's amended and restated certificate of incorporation, the Comdisco board's Policy Statement Regarding Comdisco Ventures Stock (described in Section II.B.8 below) allows Comdisco to reallocate profits and surplus previously allocated to Comdisco Ventures to fund dividends to be paid to Comdisco Group shareholders. This type of reallocation would be treated as a transfer of assets of one group to the other group under the board's Policy Statement. The board's Policy Statement provides that if Comdisco transfers cash or other property allocated to one group to another group, Comdisco would make a compensating reallocation by accounting for that transfer as (1) an adjustment to allocated pooled debt, a short-term or long-term loan between groups, or a repayment of previous borrowing; (2) a sale of assets between groups; or (3) a reduction or increase in Comdisco Group's retained interest in Comdisco Ventures. Comdisco's board of directors and management may exercise their business judgment in determining how to account for a transfer in specific instances or through generally applicable policies. Such reallocations for accounting purposes would not substantively affect the rights of shareholders and may not affect the market value of their shares.

<sup>7</sup> The "available dividend amount" set by the amended and restated certificate of incorporation would separately limit the amount of dividends that could be paid to either series. The "available dividend amount" for Comdisco Ventures at any time, for example, would be the amount of retained earnings per share that Delaware law would deem legally available to be paid as dividends in hypothetical circumstances in which: (1) Comdisco Ventures was an independent Delaware corporation, and (2) Comdisco Ventures had issued a hypothetical number of shares of common stock, par value \$.10 per share, equal to the sum of (a) the number of shares that are actually outstanding, plus (b) the number of unissued shares that would correspond to the value of Comdisco Group's retained interest in Comdisco Ventures.

<sup>8</sup> Comdisco could dispose of some or all of the assets allocated for accounting purposes to Comdisco Ventures or Comdisco Group without the approval of Comdisco Ventures shareholders or Comdisco Group shareholders, respectively. A shareholder vote generally would be required by Delaware law, applicable rules of the New York Stock Exchange, or the qualification requirements for Nasdaq Stock Market securities only if the transaction involved the disposition of substantially all of the assets of Comdisco. Comdisco is unlikely to dispose of substantially all of the assets allocated to Comdisco Group without also disposing of the assets allocated to Comdisco Ventures. The terms and conditions of any disposition of substantially all of the assets of Comdisco, a merger of Comdisco, or any similar transaction, and the corresponding treatment of Comdisco Group shareholders and Comdisco Ventures shareholders, would be determined at the time of the transaction based on negotiations with the acquirer and applicable law.

value equal to their proportionate interest<sup>9</sup> in the net proceeds from the disposition, (ii) redeeming all outstanding shares of Comdisco Ventures Stock for cash and/or securities or other property having a value equal to the proportionate interest of the holders of Comdisco Ventures Stock in the net proceeds from the disposition, if the disposition involves all of the properties and assets allocated to Comdisco Ventures, (iii) redeeming a number of whole shares of Comdisco Ventures Stock having an aggregate average market value over a specified period equal to the value of the proportionate interest of the holders of Comdisco Ventures Stock in the net proceeds from the disposition, if the disposition involves substantially all, but not all, of the properties and assets of Comdisco Ventures, or (iv) exchanging each share of Comdisco Ventures Stock for shares (or a fraction of a share) of Comdisco Group Stock having a value equal to the average market value of one share of Comdisco Ventures Stock over a specified period, plus a predetermined premium. The predetermined premium in the event of such an exchange is fixed in Comdisco's amended and restated certificate or incorporation, and is not designed to reflect the relative value of the assets previously allocated to each group for accounting purposes. Consequently, in any such exchange, the holders of Comdisco Ventures Stock could receive an amount for their shares that would not reflect what a third party buyer would pay for the assets allocated to Comdisco Ventures if the group were an independent company.

8. Management and Allocation Policies. Comdisco will prepare and make available to its stockholders separate financial statements for Comdisco Ventures as well as consolidated and consolidating financial statements of Comdisco. Comdisco will establish certain policies governing the allocation of company resources, costs and revenues among Comdisco Group and Comdisco Ventures, interdivisional transfers and other transactions<sup>10</sup>. These policies serve as guidelines for the preparation of each group's financial statements and for the internal management of each group. These policies are substantially similar to policies that exist among business groups and divisions in corporations without a tracking stock structure. These policies are generally subject to change at any time by Comdisco's board of directors.

These policies permit Comdisco to use the proceeds of any sales<sup>11</sup> of Comdisco Ventures Stock for any valid business purpose. These policies do not require that such proceeds be

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<sup>9</sup> The proportionate interest of the holders of Comdisco Ventures Stock in the net proceeds of a disposition will equal the net proceeds times a fraction, the numerator of which is the total number of shares of Comdisco Ventures Stock outstanding and the denominator of which is the total number of shares of Comdisco Ventures Stock outstanding plus the number of shares of Comdisco Ventures Stock reserved for issuance for the benefit of Comdisco Group or to the holders of Comdisco Group Stock.

<sup>10</sup> A copy of the Comdisco board's Policy Statement Regarding Comdisco Ventures Stock Matters is appended to Comdisco's registration statement for the Company's proposed initial public offering of shares of Comdisco Ventures Stock.

<sup>11</sup> Any sales includes Comdisco's proposed initial public offering of Comdisco Ventures Stock and any subsequent sales, whether public or private.

allocated to Comdisco Ventures; they may instead be used to benefit Comdisco Group. If the proceeds of a sale of Comdisco Ventures Stock are used to benefit Comdisco Group, Comdisco may reduce the number of shares of Comdisco Ventures Stock that represent Comdisco Group's retained interest in Comdisco Ventures by a corresponding amount. In the alternative, Comdisco's board of directors may make a comparable equitable adjustment in accordance with these policies.

While the series of Comdisco's common stock will have the individual characteristics summarized above, we think it is important to again emphasize that each of the stockholders will continue to:

- have the same undivided interest in all of the assets of the company,
- have no claim to specific assets of the company,
- be represented by one board of directors, and
- be subject to the same risks as all other holders of common stock of the company.<sup>12</sup>

C. If Comdisco implements its proposal, no legal entity or issuer separate from the company will be created for corporate or tax purposes.

For corporate and tax law purposes there will be no issuer of Comdisco Group Stock and Comdisco Ventures Stock other than Comdisco.

The members of the board of directors of Comdisco exercised their business judgment under Delaware law on behalf of the stockholders of Comdisco to approve the amended and restated certificate of incorporation and recommended its adoption by the stockholders of Comdisco. The stockholders of Comdisco in turn exercised their rights under Delaware law to vote on the approval of the amended and restated certificate of incorporation. As a result of these actions, Comdisco, and not a particular group, will be authorized to issue Comdisco Group Stock and Comdisco Ventures Stock as so approved and in accordance with the amended and restated certificate of incorporation and Delaware law.

Comdisco Group and Comdisco Ventures will not be organized as separately incorporated subsidiaries of Comdisco. Accordingly, under established principles of Delaware

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<sup>12</sup> Accordingly, the performance of one business group could adversely affect the other group. If one business group encounters financial difficulties, the market value of the other business group's stock may suffer for reasons unrelated to the actual value or economic prospects of the group's assets.

corporate law, once authorized, as a series of common stock of the company, each of Comdisco Group Stock and Comdisco Ventures Stock will simply represent an undivided interest in all of the assets of Comdisco.<sup>13</sup> As stockholders of the company, the holders of Comdisco Group Stock and Comdisco Ventures Stock will vote together as a single class on all matters requiring common stockholder approval, including the election of directors. Moreover, Comdisco will have only one board of directors who will represent the interests of all of its stockholders and who will owe an equal fiduciary duty to all stockholders regardless of class or series. Control of each group will remain with Comdisco's board of directors. Comdisco's board of directors will continue to be accountable to all stockholders of the company, regardless of the series they hold.<sup>14</sup>

Comdisco Group Stock and Comdisco Ventures Stock will be issued by Comdisco, and the holders of both Comdisco Group Stock and Comdisco Ventures Stock will be stockholders of Comdisco, owning together the entire equity interest in Comdisco. The holders of each of Comdisco Group Stock and Comdisco Ventures Stock would not own, or have any specific rights with respect to, the separate assets of either Comdisco Group or Comdisco Ventures. Rather, as stockholders of Comdisco, the holders of both Comdisco Group Stock and Comdisco Ventures Stock would be subject to all of Comdisco's risks and liabilities.<sup>15</sup>

Additionally, recent decisions of the Delaware Chancery court are consistent with Comdisco's position that authorizing and issuing series of its common stock as "tracking stock" does not create a separate legal issuer for corporate law purposes. In *Solomon v. Armstrong*, 1999 WL 182569 (Del. Ch. Mar. 1999), the plaintiffs were stockholders of GM Class E stock, a tracking stock issued as a class of General Motors common stock to track the performance of General Motors' wholly-owned subsidiary EDS. The litigation arose from GM's split-off of EDS. One of plaintiffs' claims was that GM's tracking-stock capital structure caused GM's board to have irreconcilably conflicting duties to the various shareholder classes. In furtherance of their claim, the plaintiffs took the position that Class E stockholders were in effect minority stockholders in EDS, not GM stockholders. The Court rejected this position, emphasizing that "the Class E stockholders were stockholders of the GM corporation." *Id.* at \*12.

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<sup>13</sup> This result relies in part on the fact that, despite the accounting allocations described in Section II.B.1 above, Comdisco will continue to hold legal title to all of the assets of all of Comdisco's business.

<sup>14</sup> Although neither Comdisco Group nor Comdisco Ventures will have (nor, under Delaware law, could have) its own board of directors, Comdisco's board of directors will appoint certain of its members to serve on the Comdisco Capital Stock Committee. The Committee will serve as a committee of the whole board to interpret and implement board policies with respect to the relationships between the groups. The Committee will not owe a separate fiduciary duty to the holders of Comdisco Ventures Stock or to the holders of Comdisco Group Stock.

<sup>15</sup> Comdisco disclosed these facts to the holders of Comdisco's existing common stock in the proxy statement.



*In Re General Motors Class H Shareholders Litigation*, 734 A.2d 611 (Del. Ch. Mar. 1999), provides further support for the argument outlined above. In that case, the GM Class H (another General Motors tracking stock) stockholders brought an action against GM and its directors challenging the fairness of transactions that split-up GM's wholly-owned subsidiary, Hughes Electronics. As in *Solomon*, the court noted that "[h]olders of GMH shares had no direct rights in the equity or assets of Hughes Electronics, but rather had those rights in the equity and assets of GM, Hughes Electronics' sole owner." *Id.* at 613.

Finally, tax practitioners are in agreement that, under general principles of tax law, so long as a series of common stock, thought of as tracking stock, falls within certain parameters, it will constitute capital stock of the issuing corporation rather than of a separate entity. Consistent with this position, while the Internal Revenue Service (the "IRS") does not issue rulings relating to the classification of tracking stock, it has accepted representations made by issuers that tracking stock is capital stock of such issuers (i.e. as opposed to capital stock of a different entity) in connection with favorable rulings regarding the tax-free nature of transactions involving tracking stock. Comdisco believes that the proposed terms of Comdisco Group Stock and Comdisco Ventures Stock, which are substantially the same as the terms of already outstanding tracking stock of other issuers, fall within the parameters accepted by the tax community for treatment of Comdisco Group Stock and Comdisco Ventures Stock as capital stock of Comdisco. The company will receive an opinion of tax counsel to that effect.

D. Comdisco's reasons for issuing Comdisco Group Stock and Comdisco Ventures Stock as tracking stocks.

By establishing the two new series of common stock as tracking stocks, Comdisco hopes to offer investors securities that are intended to track the economic performance of each of Comdisco Ventures and Comdisco Group, thereby broadening market interest in Comdisco and improving Comdisco's ability to raise capital. Additionally, by establishing the new series of common stock as tracking stocks, Comdisco hopes to issue stock options tied to Comdisco Group Stock and Comdisco Ventures Stock, thereby providing more focused incentives to management and employees of each business group. Finally, by establishing the new series of common stock as tracking stocks, Comdisco hopes to accomplish these goals while preserving the financial, tax, operational, strategic and other benefits of being a single consolidated entity, including the ability to retain control of each group's assets and businesses.

By authorizing and issuing its Comdisco Group Stock and Comdisco Ventures Stock as tracking stocks as described in this letter, the company does not intend to create, or transform either Group into, a separate legal entity for any legal purpose. We believe that it has not done so.

**LEGAL ANALYSIS UNDER THE 1940 ACT**

**III. Comdisco is not an “investment company” and is not required to register under the 1940 Act.**

Comdisco is not an “investment company” as defined under Section 3(a) of the 1940 Act.

The 1940 Act states in relevant part that an “investment company” means any “issuer” which –

(A) Is or holds itself out as being engaged primarily, or proposes to engage primarily, in the business of investing, reinvesting, or trading in securities; . . . or

(C) Is engaged or proposes to engage in the business of investing, reinvesting, owning, holding, or trading in securities, and owns or proposes to acquire investment securities having a value exceeding 40 per centum of the value of such issuer’s total assets (exclusive of Government securities and cash items) on an unconsolidated basis.

First, as can be seen from the description of Comdisco’s business in Section IA above, Comdisco is an operating company that primarily provides technology services to its customers. It is not engaged, does not hold itself out as engaged, nor does it propose to engage, primarily in the “business of investing, reinvesting, or trading in securities.” Consequently, Comdisco does not meet the definition of subsection (A).

Second, while certain of Comdisco’s activities, including some of the venture financing it proposes to conduct through Comdisco Ventures, do involve “investing, reinvesting, owning, holding, or trading in securities,” as of September 30, 1999, the value of all investment securities held by Comdisco represented less than 8% of Comdisco’s \$7.8 billion in total assets on that date and, as of June 30, 2000, such value represented less than approximately 16% of Comdisco’s \$8.6 billion in total assets on that date. Consequently, Comdisco does not meet the definition of subsection (C).

**IV. By authorizing and issuing its Comdisco Group Stock and Comdisco Ventures Stock as tracking stocks in the manner described in this letter, Comdisco does not intend to create, and has not created, a “person” that is an “issuer” separate from the company that could properly be identified as an “investment company” for purposes of the 1940 Act.**

A. Overview.

To be an “investment company” under the 1940 Act by the definition discussed above in Section III, one must first be an *issuer*. An “issuer” is defined in Section 2(a)(22) of the 1940 Act as “every person who issues or proposes to issue any security, or has outstanding any

security which it has issued." As analyzed above, Comdisco, which is the issuer of Comdisco Group Stock and Comdisco Ventures Stock for all corporate, tax and accounting purposes, clearly is not an "investment company" under the 1940 Act.

Notwithstanding these facts, to conclude that registration under the 1940 Act is necessary, the Commission would be required to find that by authorizing and issuing its new series of common stocks as tracking stocks with the terms and in the manner described in this letter, Comdisco has created an issuer *separate from the company* that is an investment company. We do not believe the facts, Delaware corporate law or the Commission's prior application of the 1940 Act can support this finding. By designating and issuing its Comdisco Group Stock and Comdisco Ventures Stock as tracking stocks with the terms and in the manner described in this letter, Comdisco will not create a fund, a trust, or an organized Group of persons, or any other person that is an issuer separate from Comdisco and that could properly be identified as an "investment company" under the 1940 Act.

- B. Comdisco's proposal does not create any "person," or "issuer," separate from Comdisco itself, whose activities can be subject to application of the 1940 Act.

Although the Commission (and at least one federal court) has taken the position that an issuer for purposes of the 1940 Act need not be a recognizable legal entity such as a corporation, an issuer must be a "person" — defined in Section 2(a)(28) as "a natural person or a company." A "company" in turn is defined under Section 2(a)(8) to include "a corporation, a partnership, an association, a joint-stock company, a trust, a fund, or any organized group of persons whether incorporated or not." In each case where a non-legal entity has been found to be an issuer, the Commission or the court, as applicable, has determined that such issuer is in fact a "person" as defined by the 1940 Act as a result of meeting the definition of "company" by being one of "a trust, a fund, or any organized Group of persons whether incorporated or not." *See, e.g., In the Matter of The Prudential Insurance Company of America*, Investment Company Act Release No. 3620, 41 SEC 335 (1963), *aff'd*, *Prudential Ins. Co. v. Securities & Exchange Comm.*, 326 F.2d 383 (3rd Cir. 1964), *cert. denied*, 377 U.S. 953 (1964) (variable annuity contracts sold by insurance company constitute a separate fund for purposes of the 1940 Act); *First State Bank of Dodge City*, SEC No-Action Letter (November 21, 1975) (participation interests in a pool of loans sold by bank constitute a separate fund for the purposes of the 1940 Act); *Lubbock National Bank of Lubbock*, SEC No-Action Letter (June 13, 1975) (participation interests in a pool of mortgages sold by bank constitute a separate fund for purposes of the 1940 Act); *Equitable Communications Co.*, SEC No-Action Letter (February 26, 1975) (pooled investments established for individual investors for a fee constitute a company for purposes of the 1940 Act); *Urban Land Investment, Inc.*, SEC No-Action Letter (November 4, 1971) (participation interests in limited partner constitute a company for purposes of the 1940 Act). None of the aforementioned cases involved a corporation issuing its own securities; rather each involved the creation of a separate fund, or a separate relationship among third parties, and the sale of participation interests in such separate fund or relationship.

In *Prudential*, for example, the Third Circuit affirmed the Commission's ruling that where an insurance company issued variable annuity contracts to its customers, it created and managed a separate investment company subject to registration under the 1940 Act. The variable annuity contracts provided for the purchasers to pay certain fixed amounts over a period of years (the "pay-in period"), a substantial portion of which were placed in an "Investment Fund." The assets of the Investment Fund were invested primarily in common stock. Each purchaser was credited with "units" in the Investment Fund, which represented his or her proportionate interest in the fund, not in the insurance company issuer. After the pay-in period, the contracts provided for the payment to the purchaser, over a number of years, of the value of the number of units allocated to such purchaser, as determined at the end of the pay-in period. The Third Circuit agreed with the Commission that the Investment Fund, and not the insurance company itself, constituted the issuer for purposes of the 1940 Act, and was consequently an investment company under Section 3(a).

In *Prudential*, the court stated that "... the legislative history compels the conclusion that Prudential's Investment Fund is a 'fund' as that term is used in the statute." The court explained its holding as follows:

... the Investment Fund is a *completely segregated account*, devoted to investing in securities. The cash for these investments is derived from payments made by the purchaser of the variable annuity contract. Though the proceeds of the fund are held for the sole benefit of the annuitant, *it is this fund, and no other entity, in which he has an interest*. Thus, the fund is *separate from the insurance company* which, as the Supreme Court noted in VALIC, "guarantee[s] nothing to the annuitant except an interest in a portfolio of common stocks or other equities—an interest that has a ceiling but no floor" (emphasis added).<sup>16</sup>

In *Urban Land Investment*, an individual limited partner of a partnership that owned and managed real estate proposed to sell participation interests representing undivided economic interests in his limited partnership interest without registration under the 1940 Act. In refusing to issue a no-action letter, the Staff stated: "The Limited Partner would be the creator of a "company" within the meaning of Section 2(a)(8) of the Act consisting of a fund or an

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<sup>16</sup> The court did not address the Commission's position that the investment fund also constituted an organized group of persons. However, it did note that an investment company could be created by "an agency relationship between the individual contributors to the fund and the management upon whom they confer substantially a power of attorney to act as agent in the investment of the monies contributed. The group of individual investors is not a legal entity but rather constitutes in essence a combination of distinct individual interests." (citing H.R.Doc.No.707, 75<sup>th</sup> Cong., 3<sup>rd</sup> Sess. 24 (1939)). However, the mere allocation of assets, liabilities, and revenues for accounting purposes to Comdisco's groups would not create an organized group of persons separate from Comdisco under this interpretation any more than it would create a fund or trust separate from Comdisco.

*unincorporated organized Group of persons* ('Fund'), whose only investment would be the security of a single issuer, the Limited Partner." (emphasis added).

Similarly, the Staff declined to issue a no-action letter in *Equitable Communications*, where an individual proposed to buy and sell securities for individual investors through the use of separate accounts or limited partnership interests in the name of the individuals. In concluding that such activities may have involved the creation of an investment company, the Staff emphasized that the definition of "company" includes a fund, a trust, or an organized Group of persons.

In *Lubbock National Bank*, and in *First State Bank*, the Staff refused to issue no action letters where banks proposed to offer and sell to their customers certificates of participation representing undivided interests in a pool of mortgages and other loans without registration under the 1940 Act. The Staff found that the pools of loans were issuers of securities *separate* from the banks, because such pools did not represent an ownership interest in the banks themselves, but rather were discrete identifiable *funds* that met the definition of a person under the 1940 Act.

In every one of the aforementioned cases where the Commission deemed there to be an "issuer" for purposes of the 1940 Act that was not a recognizable legal entity, the Commission could identify a fund, a trust or an organized group of persons that was created by, but distinct from, a legal entity. The investments were made in such distinct fund, trust or organized group of persons, and not in securities representing an ownership interest in the legal entity. Comdisco's allocation, for accounting purposes, of its assets, liabilities, revenue, expenses and cash flow to each of its identified Groups in order to authorize and issue its Comdisco Group Stock and Comdisco Ventures Stock as tracking stocks does not result in the establishment of "a fund, trust or organized group of persons" as does the pooling of annuity contracts, loan participations and other investment instruments in the above decisions. To the contrary, Comdisco Group Stock and Comdisco Ventures Stock each represent an undivided ownership interest in Comdisco and its assets *and not* in any specific assets that have been allocated to the Groups for accounting purposes. Thus, only Comdisco as a whole meets the definition of a "company," or "person" or "issuer" under the 1940 Act, and, as stated above, Comdisco is not an investment company subject to registration under the 1940 Act.

Unlike Comdisco's Comdisco Group Stock and Comdisco Ventures Stock, in each of the aforementioned decisions and no action positions, the performance or investment attributes of the identified investment pools or participation interests were solely a function of the separate fund or relationship. For example, unlike those investment pools and participation interests, the assets to be allocated for accounting purposes to each group of Comdisco will be subject to the liabilities of the other group, and if Comdisco is unable to satisfy one group's liabilities out of the assets allocated to such group, it would be required to satisfy the liabilities out of the assets allocated to the other group. As a result, the economic performance of Comdisco Group Stock and Comdisco Ventures Stock will be affected by the operations and profitability of Comdisco as

a whole rather than simply the performance of Comdisco Group or Comdisco Ventures.<sup>17</sup> Also, Comdisco may at its option exchange Comdisco Ventures Stock for Comdisco Group Stock at a fixed premium to the market value of Comdisco Ventures Stock. In such a case, the holders of Comdisco Ventures Stock could receive an amount for their shares that would not reflect what a third party buyer would pay for the assets allocated to Comdisco Ventures if the business group were an independent company. Consequently, the value of Comdisco Ventures Stock will not necessarily approximate the value of the assets allocated to Comdisco Ventures.

We believe that our position is also supported by a line of no-action letters in which the Staff granted relief to corporations that established trusts in connection with certain non-qualified employee benefit plans without registration under the 1940 Act. *See, e.g., St. Paul Cos., Inc.*, SEC No-Action Letter (February 25, 1988); *Wells Fargo & Co. Supplemental Benefits Plan*, SEC No-Action Letter (May 5, 1986); *Monsanto Co.*, SEC No-Action Letter (April 10, 1985). In each of these cases, the participants in the plan were general, unsecured creditors of the corporation to the extent of their respective interests in the fund or trust created pursuant to such plan, but did not have any direct claim to the assets contained in such fund. Similarly, under Comdisco's proposal, a stockholder of Comdisco, regardless of whether the stockholder holds Comdisco Group Stock or Comdisco Ventures Stock, has no claim to the specific assets of Comdisco, or any particular division of Comdisco, and is subject to the claims of the creditors of Comdisco as a whole.

In the present case, even if a "person" other than Comdisco exists, in order to find that some person other than Comdisco is the issuer of Comdisco Group Stock and Comdisco Ventures Stock, the Commission would have to ignore basic Delaware corporate law principles that Comdisco Group Stock and Comdisco Ventures Stock are capital stock of Comdisco, not any other person, and that Comdisco, and not any other person, is the issuer of those securities.

### CONCLUSION

Comdisco is not an investment company under the 1940 Act. Comdisco's proposal to issue its Comdisco Group Stock and Comdisco Ventures Stock as tracking stocks, with those terms and in the manner described in this letter, is not intended to, nor does it, create any "company," "person" or "issuer" separate from Comdisco that is an investment company under the 1940 Act. Comdisco will continue to hold legal title to all of the assets of all of its businesses. Comdisco's board of directors will continue to represent the interests of all

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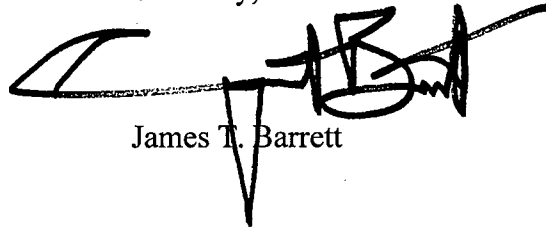
<sup>17</sup> Even though the economic performance of Comdisco Group Stock and Comdisco Ventures Stock will be affected by the operations and profitability of Comdisco as a whole rather than simply the performance of Comdisco Group or Comdisco Ventures, we acknowledge that the market performances of Comdisco Group Stock and Comdisco Ventures Stock could differ greatly from each other, thereby implying that they reflect different pools of assets. We urge the Staff not to view this possibility, standing alone, as dispositive.

stockholders of Comdisco without distinction among the series of common stock owned. Persons who hold Comdisco Group Stock or Comdisco Ventures Stock will be investors in Comdisco as a whole and will own an undivided interest in all of the assets of Comdisco. Comdisco's stockholders will have no claim to specific assets of Comdisco. Each stockholder's investment in Comdisco will be subject to the same risks as all other holders of common stock of Comdisco. Other than the accounting allocations required in connection with the creation of Comdisco Group Stock and Comdisco Ventures Stock, Comdisco intends to operate in substantially the same manner after the implementation of its proposed issuance of tracking stock as it has prior to that implementation.

For the foregoing reasons, we respectfully request that the Staff confirm that it will not recommend any enforcement action be taken in connection with Comdisco's creation and issuance of the Comdisco Group Stock and Comdisco Ventures Stock as tracking stocks with the terms and in the manner described in this letter, and thereafter continues to operate its businesses without registration under the 1940 Act.

If you have any questions, please call me at (617) 573-0385 or Joshua M. Thayer of this firm at (617) 573-0518.

Sincerely,

A handwritten signature in black ink, appearing to read 'JTB', is written over a horizontal line. The signature is stylized and somewhat illegible.

James T. Barrett

cc: Jeremiah M. Fitzgerald, Esq.  
Joshua M. Thayer, Esq.  
John W. Pickett, Esq.