February 10, 1998
Our Ref. No. 97-471-CC
Nebraska Higher Education Loan Program, Inc.
File No. 132-3

RESPONSE OF THE OFFICE OF CHIEF COUNSEL
DIVISION OF INVESTMENT MANAGEMENT

Your letter of December 16, 1997 requests assurance that the staff of the Division of Investment Management (the "Division") would not recommend enforcement action to the Commission if Nebraska Higher Education Loan Program, Inc. ("NEBHELP"), a Nebraska non-profit corporation, establishes a limited purpose subsidiary that would engage in student loan finance activities ("Newco") and does not register Newco under the Investment Company Act of 1940.

Facts

The Proposed Transaction

You represent that NEBHELP is a qualified scholarship funding corporation within the meaning of section 150(d) of the Internal Revenue Code of 1986, as amended (the "Code").[1] A qualified scholarship funding corporation is a non-profit corporation that is organized at the request of a state or political subdivision and is operated exclusively for the purpose of acquiring student loans made pursuant to the Higher Education Act of 1965. You represent that NEBHELP is authorized to issue bonds and notes as a means of financing the administration of a program to acquire student loans made pursuant to the Higher Education Act, and currently is the designated secondary market in Nebraska for these loans. You assert that NEBHELP's acquisition of loans from originating lenders increases the amount of funds available to the lenders to make additional student loans.

You represent that NEBHELP currently has aggregate outstanding debt securities worth approximately one billion dollars. You request relief with respect to three issues of tax-exempt bonds issued by NEBHELP in 1985 (the "1985 Bonds"), 1986 (the "1986 Bonds"), and 1988 (the "1988 Bonds") (collectively, the "Bonds"). You represent that the Bonds were issued in public offerings and are exempt securities under sections 3(a)(2) or 3(a)(4) of the Securities Act of 1933.

You state that NEBHELP is considering making an election, pursuant to section 150(d)(3) of the Code, to terminate its status as a qualified scholarship funding corporation and establish Newco as a taxable subsidiary to acquire NEBHELP's assets and liabilities. Section 150(d)(3), enacted as part of the Small Business Job Protection Act of 1996, permits a qualified scholarship funding corporation to elect to transfer its assets and liabilities to a taxable subsidiary in exchange for all of the senior stock of the taxable subsidiary, provided that certain conditions are met.

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[1] You also represent that NEBHELP is a tax-exempt charitable organization under section 501(c)(3) of the Code.

You represent that Congress adopted section 150(d)(3) in response to the anticipated effects of the Federal Direct Student Loan Program on qualified scholarship funding corporations. The Federal Direct Student Loan Program, enacted in 1993, permits the federal government to make student loans directly. You state that Congress was concerned that, as more student loans are made by the federal government, loan programs such as those conducted by NEBHELP and other qualified scholarship funding corporations would be reduced or eliminated. In enacting section 150(d)(3), Congress sought to provide qualified scholarship funding corporations with the opportunity to engage in other education-related charitable activities without jeopardizing the tax-exempt status of their outstanding bonds and notes.[2]

You represent that, in order to make the tax election permitted by section 150(d)(3), NEBHELP would transfer to Newco all of its rights, title and interest in the student loans and other assets that secure the Bonds as well as other NEBHELP bonds and notes. Newco would assume all of NEBHELP's liabilities with respect to the Bonds and all other NEBHELP bonds and notes.[3] As required by section 150(d)(3), Newco also would, to the extent permitted by law, assume the responsibilities, and succeed to the rights, of NEBHELP under NEBHELP's agreements with the U.S. Secretary of Education in respect of student loans. You represent that all of NEBHELP's tax-exempt bonds and notes, including the Bonds, would remain tax-exempt if Newco becomes the obligor on them. In exchange for NEBHELP's transfer of assets and liabilities to Newco, NEBHELP will receive all of Newco's senior stock, although NEBHELP will not be required to retain ownership of this stock.[4]

The Bonds

The Bonds are variable rate demand bonds that currently pay interest weekly. The Bonds were issued pursuant to certain trust indentures that permit holders to tender their Bonds to a co-paying agent for purchase upon seven days' notice.[5] The co-paying agent

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[2] Staff of Joint Comm. on Taxation, 104th Cong., 2d Sess., *General Explanation of Tax Legislation Enacted in the 104th Congress* 244 (Comm. Print 1996).

[3] Assuming that NEBHELP makes the tax election, as discussed above, all subsequent references in this letter to NEBHELP's obligations with respect to the Bonds should be read as applying to Newco.

[4] You believe that the senior stock to be issued by Newco will not constitute redeemable securities within the meaning of section 2(a)(32) of the Investment Company Act. You do not request relief, and we take no position, regarding the status of these securities under section 2(a)(32).

[5] You represent that the co-paying agent is not affiliated with NEBHELP. You also represent that a holder's right to tender Bonds to the co-paying agent would terminate if certain events occur, including certain changes to the interest rate calculation and interest payment schedule applicable to the 1985, 1986, or 1988 Bonds; specified events of default

obtains funds to pay tendering holders from either (i) a remarketing agent's remarketing of the tendered Bonds,[6] or, if remarketing is unsuccessful, (ii) the provider of one of the liquidity facilities (the "Liquidity Facilities"), described below. You represent that neither NEBHELP, the trustee under each Bond's trust indenture, nor the co-paying agent is obligated to make funds available for the repurchase of tendered Bonds.

Two Liquidity Facilities exist to support the co-paying agent's purchase obligation. The first Liquidity Facility applies only to the 1985 Bonds and consists of five standby bond purchase agreements between the trustee under each Bond's trust indenture and the Student Loan Marketing Association ("Sallie Mae"). Under each agreement, Sallie Mae is obligated to purchase tendered 1985 Bonds for face value plus accrued interest. Once Sallie Mae has purchased a 1985 Bond, the remarketing agent is obligated to continue attempting to remarket the Bond. If the remarketing effort is unsuccessful, the co-paying agent will hold the Bond for Sallie Mae's benefit for the remainder of the term of the standby bond purchase agreement. If the Bond is not remarketed, NEBHELP is obligated to redeem the Bond three years after termination of the standby bond purchase agreements.[7]

The second Liquidity Facility applies only to the 1986 and 1988 Bonds and consists of letters of credit issued by Sallie Mae. This Liquidity Facility operates like the standby bond purchase agreements that apply to the 1985 Bonds, except that if the remarketing agent is unable to remarket a 1986 or 1988 Bond after Sallie Mae has purchased it, NEBHELP is obligated to reimburse Sallie Mae within two weeks, in the case of a 1986 Bond, or thirty days, in the case of a 1988 Bond, of the date of the letter of credit draw. You represent that if NEBHELP does not have adequate funds available to reimburse Sallie Mae at the time that reimbursement of a 1986 or 1988 Bond is required, NEBHELP may either (i) transfer to Sallie Mae unencumbered assets; (ii) transfer to Sallie Mae those loans and other assets in the trust that serve as security for those Bonds held by Sallie Mae; or (iii) draw upon a separate financing facility provided by Sallie Mae. You further represent that, if reimbursement is made in accordance with either (ii) or (iii), the Bond will be redeemed by NEBHELP.

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under the Bonds' trust indentures; and the termination of the relevant liquidity facility, described below.

[6] You represent that the remarketing agent is not affiliated with NEBHELP.

[7] The termination of the standby bond purchase agreements is scheduled to occur on May 1, 2004.

Issues Presented

You represent that NEBHELP currently is not registered under the Investment Company Act in reliance on an exception from the definition of "investment company" that would not be available to Newco.[8] You assert that Newco should not be required to register under the Investment Company Act because it will be excepted from the definition of "investment company" by rule 3a-7. Rule 3a-7 excepts from the definition of "investment company" an issuer that "is engaged in the business of purchasing, or otherwise acquiring, and holding eligible assets and who does not issue redeemable securities (and in activities related or incidental thereto)," provided that certain conditions are met. You request the staff's concurrence with your view that the Bonds are not "redeemable securities" for purposes of rule 3a-7. You represent that Newco will comply in all other respects with rule 3a-7.[9] Alternatively, if the staff is not able to concur with your view, you assert that requiring Newco to register as an investment company would be inconsistent with Congress' intent in enacting section 150(d)(3) of the Code.

Analysis

Section 2(a)(32) of the Investment Company Act defines "redeemable security" as any security, other than short-term paper, under the terms of which the holder, upon its presentation to the issuer, is entitled to receive approximately his proportionate share of the issuer's current net assets, or the cash equivalent thereof. You assert that NEBHELP will not be issuing redeemable securities because the Bonds may be tendered only to the co-paying agent, who is unaffiliated with NEBHELP, and tendered Bonds may be purchased only with proceeds obtained from remarketing the Bonds or drawing on a Liquidity Facility. In addition, you assert that, because Newco will be the *obligor* on the Bonds but is not the *issuer*, the possibility that Newco may reimburse Sallie Mae for Bonds purchased under a Liquidity Facility does not make the Bonds redeemable.

If a security may be tendered only to a third party that is not designated by the issuer, and may not be redeemed by the issuer at any time, the security is not redeemable for purposes of rule 3a-7.[10] If, however, a tendered security ultimately may be redeemed by the issuer, whether the security is considered redeemable for purposes of rule 3a-7 will depend on whether there are substantial enough restrictions on an investor's ability to

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[8] *See* Section 3(c)(10) of the Investment Company Act. Telephone conversation among Richard C. Sammis, counsel to NEBHELP, and Barry A. Mendelson and Sarah A. Wagman of the Division on February 3, 1998.

[9] Telephone conversation among Richard C. Sammis, counsel to NEBHELP, and Barry A. Mendelson and Sarah A. Wagman of the Division on February 3, 1998.

[10] *See* Donaldson, Lufkin & Jenrette Securities Corporation (pub. avail. May 26, 1994); McDonald & Company Securities, Inc. (pub. avail. Dec. 14, 1983).

obtain from the issuer its proportionate share of the issuer's net assets.[11] The fact that ultimate redemption is by an obligor other than the issuer does not change this analysis if the obligor essentially stands in the issuer's place, as Newco will for NEBHELP.

In the case of the 1985 Bonds, if Sallie Mae acquires a Bond through the Liquidity Facility, the earliest that NEBHELP would be obligated to redeem the bond would be three years after Sallie Mae's acquisition.[12] We agree that this three-year "holding period" requirement is sufficiently restrictive so that the 1985 Bonds would not be considered redeemable securities for purposes of rule 3a-7.[13] We therefore would not recommend enforcement action to the Commission if Newco relies on rule 3a-7 with respect to the 1985 Bonds. If the remarketing agent is unable to remarket the 1986 and 1988 Bonds, however, NEBHELP might have to redeem the Bonds within two weeks, in the case of the 1986 Bonds, and thirty days, in the case of the 1988 Bonds, following Sallie Mae's acquisition. Based on these facts, we are unable to conclude that the 1986 and 1988 Bonds are not redeemable securities.

Alternatively, you assert that requiring Newco to register as an investment company under the Investment Company Act would be inconsistent with Congress' intent in enacting section 150(d)(3) of the Code. You state that Congress' intent in enacting section 150(d)(3) was to provide qualified scholarship funding corporations with an opportunity to diversify their activities while preserving the tax-exempt status of their existing debt securities. You represent that if NEBHELP makes an election under section 150(d)(3) and establishes Newco, however, Newco would not be able to rely on the

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[11] Brown & Wood (pub. avail. Feb. 24, 1994). In our view, the fact that the Bonds may be repurchased by the co-paying agent using only proceeds obtained from remarketing the Bonds or drawing on a Liquidity Facility does not function as a significant restriction on an investor's ability to redeem the Bonds because under the terms of the Liquidity Facilities, Sallie Mae is obligated to purchase any tendered bonds that are not successfully remarketed. By contrast, the staff of the Division has stated that it would not recommend enforcement action to the Commission if funds did not register as investment companies in reliance on section 3(c)(5)(C) of the Investment Company Act, where the funds imposed a number of restrictions on an investor's ability to withdraw its share of net assets from the funds, including permitting withdrawal only to the extent that a fund had cash available that was not invested in mortgage loans (California Dentists' Guild Real Estate Mortgage Fund II (pub. avail. Jan. 4, 1990) or funds were available from principal payments or prepayments on mortgage loans, or from the liquidation of mortgage loans for reasons other than the need to meet investor redemption requests (United States Property Investments, N.V. (pub. avail. May 1, 1989)).

[12] NEBHELP will not be obligated to redeem the Bond at all if the remarketing agent is able to remarket the Bond.

[13] *See* Brown & Wood, *supra* note 11; California Dentists' Guild Real Estate Mortgage Fund II, *supra* note 11; United States Property Investments, N.V., *supra* note 11.

exception from the definition of "investment company" that currently is available to NEBHELP,[14] and therefore would be subject to the Investment Company Act unless it could rely on another exception to the definition of "investment company." You believe that Newco could not operate as proposed if required to register as an investment company, and assert that rule 3a-7 provides the only feasible exception under which Newco could operate. You represent that if Newco is not able to rely on rule 3a-7 because of the demand feature of the 1986 and 1988 Bonds, NEBHELP would have to refinance all of the outstanding 1986 and 1988 Bonds to make them fixed-rate obligations and thereby eliminate the demand feature.[15] You state that refinancing the 1986 and 1988 Bonds in this manner would impose significant costs on NEBHELP.

We would not recommend enforcement action to the Commission under section 7 of the Investment Company Act if Newco does not register as an investment company under the Investment Company Act. Our position with respect to the 1986 and 1988 Bonds is based particularly on your representations that: (i) Newco will be established in accordance with federal legislation that encourages qualified scholarship funding corporations to terminate their loan programs and reorganize as a means to engage in new education-related charitable activities; (ii) Newco's predecessor, NEBHELP, currently is not subject to the Investment Company Act; (iii) to the extent permitted by law, Newco will assume all of NEBHELP's responsibilities and succeed to all of NEBHELP's rights under NEBHELP's agreements with the U.S. Secretary of Education in respect of student loans; (iv) Newco will assume all of NEBHELP's liabilities with respect to the Bonds and all other NEBHELP bonds and notes; (v) Newco will engage solely in student loan finance activities; (vi) before Newco is required to redeem any Bond that has been tendered to the co-paying agent, a remarketing agent will attempt to remarket the Bond; and (vii) with respect to the 1986 and 1988 Bonds, Newco will comply with the requirements of rule 3a-7 in all respects other than the redeemability of the Bonds[16]. Our position with respect to the 1986 and 1988 Bonds represents the position of the staff on enforcement action only, and does not purport to state any legal conclusion on the issues presented.[17]

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[14] *See supra* note 8.

[15] Telephone conversation among Richard C. Sammis, counsel to NEBHELP, and Barry A. Mendelson and Sarah A. Wagman of the Division on February 3, 1998.

[16] As discussed above, with respect to the 1985 Bonds, Newco will comply with rule 3a-7 in all respects.

[17] Our determination not to recommend enforcement action if Newco does not register as an investment company is based solely on our review of the information that you have provided to us concerning the Bonds, and does not extend to any other securities for which Newco currently is, or may in the future become, issuer or obligor. With respect to any securities other than the Bonds, Newco would have to comply with the requirements of rule 3a-7 in all respects, avail itself of some other applicable exception or exclusion from regulation under the Investment Company Act, or register as an investment company under the Investment Company Act.

Your request for confidential treatment under 17 C.F.R. § 200.81(b) has been granted until the earlier of: (i) the date that the proposed transaction is closed; (ii) the date of any public disclosure of facts sufficient to reveal the essence of the no-action request or this response; or (iii)120 days from the date of this letter. Please inform this office as soon as the proposed transaction is closed or this information is made public in any fashion prior to the expiration of the 120-day period.

Sarah A. Wagman
Special Counsel

WILLKIE FARR & GALLAGHER

Richard C. Sammis

New York
Washington, DC
London
Paris

1940 Act/2(a)(32)
Rule 3a-7

December 16, 1997

Douglas J. Scheidt, Esq.
Associate Director (Chief Counsel)
Division of Investment Management
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, DC 20549

Re: Nebraska Higher Education Loan Program, Inc.

Dear Mr. Scheidt:

We are writing on behalf of Nebraska Higher Education Loan Program, Inc., a Nebraska nonprofit corporation located in Lincoln, Nebraska ("NEBHELP") for which we serve as special counsel. We respectfully request that the Staff of the Division of Investment Management (the "Staff") concur with our opinion that, under the circumstances described below, none of the Securities (as defined below) would constitute a "redeemable security" for purposes of Rule 3a-7 under the Investment Company Act of 1940, as amended (the "Investment Company Act"). We further request, in the alternative, that the Staff assure NEBHELP and Newco (as defined below) that the Staff will not recommend any enforcement action to the Securities and Exchange Commission (the "Commission") if, following the Tax Election and the Transfer and Assumption (as defined below), none of Newco or any of the assets, funds or accounts pledged to secure the Securities is registered under the Investment Company Act as an investment company in reliance upon the view that none of the Securities constitutes a "redeemable security" for purposes of Rule 3a-7.

THE NEBHELP PROGRAM

NEBHELP is currently the designated secondary market in Nebraska for student loans originated under the Higher Education Act of 1965, as amended (the "Higher Education Act") and, as such, is a "qualified scholarship funding corporation" within the meaning of Section 150(d) of the Internal Revenue Code of 1986, as amended (the "Code"). Qualified scholarship funding corporations are nonprofit corporations that are organized at the request of a State or political

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subdivision thereof and are operated exclusively for the purpose of acquiring student loans incurred under the Higher Education Act. Interest on bonds and notes that are issued by qualified scholarship funding corporations to acquire student loans is exempt from federal income taxes provided that such bonds and notes meet the requirements of Section 144(b) of the Code or applicable provisions of prior tax law. NEBHELP has received a determination from the Internal Revenue Service that it is a tax-exempt charitable organization under Section 501(c)(3) of the Code. NEBHELP has authority under its Articles of Incorporation, Nebraska law, the Higher Education Act and the rules and regulations promulgated by the Secretary of the United States Department of Education to issue bonds and notes and to apply the proceeds of the sale thereof to the payment of the costs of conducting and administering a program of acquiring student loans made under the Higher Education Act (the "NEBHELP Program").

The purpose of the NEBHELP Program and the basis for NEBHELP's tax-exempt status under Section 501(c)(3) of the Code are that, by acquiring student loans from originating lenders, NEBHELP frees up funds of the lenders which may be applied to originate additional student loans, thereby increasing the amount that is made available to students to finance their education. As a result of the NEBHELP Program, NEBHELP now owns directly or beneficially approximately $1 billion in aggregate principal amount of student loans, substantially all of which are financed under outstanding issues of bonds or notes and are pledged to secure repayment of such indebtedness. NEBHELP regularly acquires student loans from lending institutions in the Midwest, and specifically from lenders in Nebraska, as part of the NEBHELP Program.

NEBHELP currently has aggregate outstanding debt of approximately $1 billion, all of which is rated not lower than A or its equivalent by nationally recognized statistical rating organizations. A majority of NEBHELP's debt is currently rated AAA by such organizations. Exhibit A hereto sets forth a summary of the outstanding indebtedness to which this letter relates, all of which is tax-exempt (collectively, the "Securities"). All of the Securities were originally issued in public offerings and were, and are currently, exempt securities under either Section 3(a)(2) or Section 3(a)(4) of the Securities Act of 1933, as amended (the "Securities Act").

THE PROPOSED TRANSACTION

The Tax Election. For the reasons set forth below, NEBHELP is currently contemplating an election pursuant to Section 150(d)(3) of the Code (the

"Tax Election") to terminate its status as a qualified scholarship funding corporation while continuing to qualify as a tax-exempt charitable organization under Section 501(c)(3) of the Code. Section 150(d)(3) of the Code was enacted as part of the Small Business Job Protection Act of 1996 (Pub L. No. 104-188) and became effective on August 20, 1996 (the "Federal Act").

In 1993, the Congress enacted the Federal Direct Student Loan Program under which student loans are made directly by the Federal Government. To the extent that student loans are made by the Federal Government, loan programs such as those conducted by NEBHELP and other qualified scholarship funding corporations will be reduced and possibly terminated. The Congress believed, however, that qualified scholarship funding corporations should be given the opportunity to engage in new education-related charitable activities without jeopardizing the tax-exempt character of their outstanding student loan bonds and notes. In addition, the Congress believed that the surplus, if any, that has been accumulated by qualified scholarship funding corporations should continue to be dedicated to charitable purposes. Staff of Joint Comm. on Taxation, 104th Cong., 2d Sess., General Explanation of Tax Legislation Enacted in the 104th Congress 244 (Comm. Print 1996).

Accordingly, in 1996 the Congress enacted Section 150(d)(3) of the Code so that the assets and liabilities of a qualified scholarship funding corporation may, at the election of such corporation, be transferred to a taxable subsidiary in exchange for all of the senior stock of the taxable subsidiary as long as the qualified scholarship funding corporation continues to qualify as a tax-exempt Section 501(c)(3) charitable organization and the terms of the subsidiary's senior stock to be issued to such charity protect the charity's interests. Since NEBHELP believes that direct lending by the Federal Government may, as a practical matter, reduce the demand for the NEBHELP Program, NEBHELP is considering whether or not to avail itself of the Federal Act. In connection with enactment of the Federal Act, Congress did not address any securities law issues, such as the issue resulting from the Transfer and Assumption described below which involves the transfer of securities by an "exempt" obligor to, and the assumption of all obligations on such securities by, a "non-exempt" obligor.

The Transfer and Assumption. In order to make the Tax Election, NEBHELP will be required to form a for-profit subsidiary ("Newco"). If NEBHELP makes the Tax Election, NEBHELP will form Newco as a limited purpose entity, its purpose being limited to student loan finance activities. As required by the Federal

Act, NEBHELP will transfer to or on behalf of Newco all of its rights, title and interest in and to the student loans and other assets that secure the Securities as well as other NEBHELP bonds and notes. In order to meet certain other federal income tax requirements, NEBHELP will also transfer substantially all of its remaining assets to or on behalf of Newco in exchange for cash and/or securities. Such assets consist of other student loans that are not subject to the liens imposed by indentures, cash and investments. NEBHELP will transfer to Newco, and Newco will assume, all of NEBHELP's liabilities with respect to the Securities and all other NEBHELP bonds and notes. Pursuant and subject to Section 150(d)(3) of the Code the Securities, and all other tax-exempt NEBHELP bonds and notes, will remain tax-exempt when Newco is the obligor on them. As further consideration for the transfer of assets from NEBHELP to Newco and to protect NEBHELP's net trust estate assets under the indentures governing the Securities and all the other NEBHELP bonds and notes, NEBHELP will receive all the senior stock of Newco. NEBHELP will not be required to retain ownership of the stock. To the extent permitted by law, Newco also will be required to assume all of the responsibilities and succeed to all of the rights of NEBHELP under NEBHELP's agreements with the Secretary of Education with respect to student loans. The transfers to and assumptions by Newco are referred to herein collectively as the "Transfer and Assumption."

Under Section 150(d)(3) of the Code, senior stock (the "Senior Stock") is defined as stock whose rights to dividends and liquidation or redemption rights are not inferior to those of any other class of stock of the taxable subsidiary and that (1) participates pro rata and fully in the equity value of the subsidiary with any other common stock of the subsidiary, (2) has the right to payments in liquidation prior to any other common stock in the subsidiary, (3) upon liquidation or redemption, has a fixed right to receive the greater of (a) the fair market value of the stock at the date of liquidation or redemption or (b) the fair market value of all assets transferred by the qualified scholarship funding corporation in exchange for such stock and reduced by the amount of all liabilities assumed by the subsidiary, and (4) affords its holder a right to require its redemption by a date which is not later than ten years after the date that the Tax Election is made[1]. The value in item (3)(b) would be established at the time of the Transfer and Assumption.

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[1] We believe that, based upon its anticipated structure, the Senior Stock will not constitute a "redeemable security" under existing interpretations of the Staff of

Variable Rate Demand Bonds. The Securities are what are known as variable rate demand bonds. They are the 1985 Bonds, 1986 Bonds and Series 1988 Bonds, as described on Exhibit A to this letter. All of the Securities are currently in a weekly interest rate mode. Each of the indentures of trust pursuant to which the Securities were issued (an "Indenture") provides the holders of the Securities with the option to put them to the Co-Paying Agent under the Indenture (a non-affiliate of NEBHELP) for purchase upon seven days' notice. Under various circumstances the interest rate mode for any of the 1985 Bonds, 1986 Bonds or 1988 Bonds can be changed to another variable rate mode, under which the interest rate will be set at different intervals and the timing of the related put options will change accordingly, in the case of the 1988 Bonds to an auction mode, in which case the interest rate is set by auction and there are no put options but only opportunities to seek to sell the 1988 Bonds to other investors through auctions, or to a fixed rate in which case the interest rate will not again change and there will be no further put options after the conversion to a fixed rate.

Holders of Securities exercising their put option must tender the Securities to the Co-Paying Agent. Tendered Securities are to be purchased solely from (i) proceeds of a remarketing of the tendered Securities by the Remarketing Agent (a non-affiliate of NEBHELP) and (ii) proceeds received by the Co-Paying Agent from the provider of one of the liquidity facilities described below (the "Liquidity Facilities"). None of NEBHELP, the Trustee under the related Indenture (the "Trustee") or the Co-Paying agent is obligated to make any funds available for the purchase of tendered Securities. The right of a holder of the Securities to demand purchase terminates upon the occurrence of certain events of default under the Indentures or upon termination of the applicable Liquidity Facility. A failure in the payment of the purchase price of tendered Securities is an event of default under the applicable Indenture.

The Co-Paying Agent receives funds for the purchase of tendered Securities from the Remarketing Agent or, upon failure to remarket, the provider of the Liquidity Facility and delivers those funds to the owners of the tendered Securities. Securities sold by the Remarketing Agent are delivered by the Co-Paying Agent to the Remarketing Agent or its designee. Securities purchased with money

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the Commission. Consequently we are not soliciting any assurance from the Staff with respect to the Senior Stock.

provided by the provider of the Liquidity Facility are held by the Co-Paying Agent on behalf of the Liquidity Facility provider.

Liquidity support of the 1985 Bonds consists of five Standby Bond Purchase Agreements between the Trustee and Student Loan Marketing Association ("Sallie Mae") under each of which Sallie Mae is obligated to purchase 1985 Bonds that have been tendered for purchase but not remarketed at the purchase price of par (face value) plus accrued interest. Under the terms of the Indenture governing the 1985 Bonds, the Remarketing Agent is obligated to continue to remarket Securities purchased by Sallie Mae. If that remarketing effort is not successful, the Co-Paying Agent will continue to hold the Securities for the benefit of Sallie Mae during the term of the Standby Bond Purchase Agreements. Under recent amendments to the Standby Bond Purchase Agreements, if the Securities purchased by Sallie Mae are not successfully remarketed by the Remarketing Agent, they are to be redeemed by NEBHELP on a date which is three years after termination of the Standby Bond Purchase Agreements (either by stated expiration or termination of Sallie Mae's purchase obligations). The Standby Bond Purchase Agreements are currently scheduled to terminate on May 1, 2004.

Liquidity support for the 1986 Bonds and 1988 Bonds is provided by letters of credit issued by Sallie Mae. Under the terms of the Reimbursement Agreements between NEBHELP and Sallie Mae with respect to the 1986 Bonds and the 1988 Bonds, NEBHELP is obligated to reimburse Sallie Mae for any letter of credit draw made to purchase tendered Securities within two weeks, in the case of the Series 1986 Bonds, or thirty days, in the case of the Series 1988 Bonds, of the date of the draw. If NEBHELP does not have funds on hand sufficient to make the reimbursement, or such Sallie Mae owned Securities are not remarketed, NEBHELP may transfer loans and other assets from the trust estate securing repayment of the Sallie Mae owned Securities, transfer other unencumbered assets or draw upon a separate financing facility made available by Sallie Mae in order to effect the reimbursement. In the case of reimbursement from a financing facility draw or certain amounts on deposit in funds and accounts held under the related Indenture, the Securities will be redeemed. In other cases, the Securities are to be delivered by or on behalf of Sallie Mae to or upon the order of NEBHELP.

LEGAL ISSUE AND ANALYSIS

Issue. A question has arisen as to whether, when their obligor is Newco, the Securities constitute "redeemable securities" under Rule 3a-7 of the Investment Company Act.

Rule 3a-7 was adopted by the Commission to exempt issuers of asset-backed securities from regulation under the Investment Company Act. Issuers of redeemable securities do not qualify for exemption under Rule 3a-7. The Investment Company Act defines the term "redeemable security" in Section 2(a)(32) to mean:

> . . . any security other than short term paper, under the terms of which the holder, upon its presentation to the issuer or to a person designated by the issuer, is entitled (whether absolutely or only out of surplus) to receive approximately his proportionate share of the issuer's current net assets, or the cash equivalent thereof.

As initially proposed, issuers of debt securities entitling holders to receive payment of principal and accrued interest within fourteen days of demand would also have been excluded from relying upon Rule 3a-7. In response to comments that such an exclusion would be inconsistent with industry practice, the Commission deleted the reference to debt securities payable upon fourteen days demand from the final rule. The issuing release directs counsel concerned about whether a security is a redeemable security under Rule 3a-7 to examine no-action positions taken with respect to the definition of a redeemable security in the context of Section 3(c)(5) of the Investment Company Act.

Analysis. There is sufficient basis for the Staff to conclude that the Securities are not "redeemable" securities when they are measured against the previously expressed views of the Staff and the intent of Congress in enacting the Federal Act.

Several no-action letters have considered the specific question of whether securities subject to a put option are redeemable securities within the meaning of the Investment Company Act. *See, e.g.*, Donaldson, Lufkin & Jenrette Securities Corporation (pub. avail. Sep. 23, 1994) ("*DLJ*"); La Quinta Motor Inns, Inc. (pub. avail. Jan. 4, 1989) ("*La Quinta*"); McDonald & Company Securities, Inc. (pub. avail. Dec. 14, 1983) ("*McDonald*"). These no-action letters are based on facts

that are, in pertinent part, substantially similar. Each transaction contemplated the issuance of securities by entities holding other securities. The securities in question afforded holders the right to tender the securities periodically to third party liquidity providers (e.g., a bank providing a letter of credit) for purchase at their face value plus accrued interest or other accrued distributions. In each case a remarketing agent was obligated to attempt to remarket any tendered securities but, failing successful remarketing, the liquidity provider was obligated to purchase the tendered securities. In each case the amounts advanced by the liquidity provider to fund such purchases were required to be reimbursed by the sponsor of the issuing entity or the obligor on, or the former owner of, the securities held by the issuing entity. Finally, in each case the securities apparently remained outstanding after purchase by the liquidity provider and reimbursement of the liquidity provider. In each of the letters, the Staff either agreed with counsel's view that the securities were not "redeemable securities" under the Investment Company Act or expressed a "no action" position in respect of enforcement and the applicant's proceeding on the basis of that view.

We believe that the Securities and the related put options are substantially similar to the securities and the related put options present in *DLJ, La Quinta* and *McDonald*. The put option available to holders of the Securities does not permit the Securities to be presented to NEBHELP (or Newco) at the demand or request of the holders of the Securities. The Securities may only be tendered to the Co-Paying Agent (a non-affiliate of NEBHELP), which is to purchase tendered Securities only with the proceeds of a remarketing or a draw on the applicable liquidity facility. Thus, the tendered Securities are not redeemed at the demand or request of the holder of the Securities by their issuer under the terms of the Indentures, but rather are purchased by third parties who become holders of the Securities. We acknowledge that the exercise of the put option for the Securities can set in motion a chain of events that results in repayment of the Securities. However, the Securities are not redeemed upon exercise of the put option but rather remain outstanding and are transferred by the Co-Paying Agent to the Remarketing Agent (a non-affiliate of NEBHELP) or its designees or are held by the Co-Paying Agent for the benefit of Sallie Mae if the remarketing is unsuccessful. Moreover, in the case of the 1986 Bonds and the 1988 Bonds, while Sallie Mae must be reimbursed for its purchase of the Securities that were not remarketed reasonably quickly, it is not mandated under the governing documents that such Securities be redeemed unless the reimbursement is funded by a draw under the Sallie Mae financing facility or certain amounts on deposit in funds and accounts held under the Indentures. In the case of the 1985 Bonds, Sallie Mae must eventually be reimbursed for its purchase of

Securities by means of redemption of such Securities, but such redemption is scheduled to be on the date that is three years after the termination of the Standby Bond Purchase Agreements. The current scheduled termination date is May 1, 2004. We believe that this lengthy period is such a substantial restriction on Sallie Mae's right of redemption that, for this reason alone, the 1985 Bonds should not be considered redeemable securities. See California Dentists' Guild Real Estate Mortgage Fund II (pub. avail. Jan. 4, 1990) and Brown & Wood (pub. avail. February 24, 1994). Regarding all of the Securities, we note that, while Sallie Mae has a right of reimbursement, it does not have the right at its discretion to present the Securities to NEBHELP for payment at any time or from time to time after their purchase by Sallie Mae.

We think it is particularly important that, insofar as the question of redeemability is concerned, the Securities are substantially similar to the securities at issue in *DLJ*. The Securities may not be tendered to NEBHELP but only to the Co-Paying Agent for remarketing or purchase by Sallie Mae; in fact NEBHELP is precluded from purchasing tendered Securities in a remarketing. On this point, which the Staff clearly considered the central issue when considering redeemability, the Staff stated in *DLJ*:

> You assert that the Certificates are not redeemable securities because the Certificates may not be tendered to the Trust, but only to the Bank, which is not a person designated by the issuer within the meaning of Section 2(a)(32). We agree.

We also believe that several other important distinctions exist between the circumstances addressed in the three no-action letters discussed above and those extant here. First, the proposing release for Rule 3a-7 indicated that the proposed rule was "intended to exclude only structured financings from the Investment Company Act and to preclude excluded issuers from acting in a manner similar to registered investment companies." Newco will not conduct business in a manner similar to a registered investment company. Second, the three no-action letters involved programs and securities that were to be offered only prospectively. In contrast, the Securities are presently outstanding and can be refinanced only through the issuance of new securities which, depending upon a variety of circumstances, may be disadvantageous to the obligor. Third, any concern about the Securities under the Investment Company Act arises only in the context of Newco as the obligor on the Securities and under the plain language of the Investment Company Act Newco is not

the "Issuer" of the Securities, quite literally not having issued them. In Section 2(a)(22) of the Investment Company Act "Issuer" is defined as follows:

> 'Issuer' means every person who issues or proposes to issue any security, or has outstanding any security which it has issued.

THE PUBLIC POLICY OF THE FEDERAL ACT

Earlier in this letter under the heading "PROPOSED TRANSACTION—The Tax Election" we summarized the reasons for the Federal Act as they have been expressed by the Staff of the Joint Committee on Taxation. From this expression it is clear that Congress recognized that the Federal Direct Student Loan Program, which competes directly with the NEBHELP Program, will have an adverse impact on qualified scholarship funding corporations such as NEBHELP and that they should be given an opportunity to diversify their activities while preserving the tax-exemption of interest on their tax-exempt bonds.

A non-municipal entity such as NEBHELP must be a qualified scholarship funding corporation in order to issue tax-exempt debt. The permitted activities of such corporations are very tightly restricted by Section 150(d) of the Code; as described above under the heading "THE NEBHELP PROGRAM," their activities are limited to acquiring student loans incurred under the Higher Education Act. These restrictions were conceived and imposed, however, when the Federal Government was not an active competitor of qualified scholarship funding corporations such as NEBHELP. If NEBHELP were to engage in currently unauthorized activities, even though they might be education related, the tax-exemption of interest on its outstanding tax-exempt bonds (which include all of the Securities) would be jeopardized. Under the Federal Act, however, NEBHELP may engage in activities that are currently outside the scope of its authorized activities without jeopardizing the tax-exemption of interest on its tax-exempt bonds. To accomplish this otherwise unattainable result NEBHELP must make the Tax Election, undertake the Transfer and Assumption and, as required by the Federal Act, remain a corporation described under Section 501(c)(3) that is exempt from tax under Section 501(a) of the Code. In effect, therefore, the Federal Act offers relief to a limited

number of special corporations[2] that were put into a very restricted business by one federal law and materially adversely affected by another federal law.

In addition to providing relief for qualified scholarship funding corporations and protection to the holders of the tax-exempt bonds previously issued by such corporations, the Federal Act achieves two other noteworthy federal policy goals. Most importantly, by virtue of the Senior Stock mechanism described above under "THE PROPOSED TRANSACTION - the Transfer and Assumption," the Federal Act assures that the net equity value of a student loan portfolio which has been acquired by a qualified scholarship funding corporation that makes a Tax Election will continue to be dedicated to charitable purposes. Moreover, because qualified scholarship funding corporations which make a Tax Election will not be able to issue additional tax-exempt bonds and because upon transfer to corporations such as Newco the related student loan portfolios will for the first time become subject to federal income taxation (since they will be owned by taxable corporations instead of by Section 501(c)(3) tax-exempt charitable organizations), the Joint Committee on Taxation has estimated that the income tax receipts realized by the Federal Government will increase by up to $10,000,000 annually as a result of the Federal Act. Staff of Joint Comm. on Taxation, 104th Cong., 2d Sess., General Explanation of Tax Legislation Enacted in the 104th Congress 246 (Comm. Print 1996).

We believe that the Congress meant for the Federal Act to work for the benefit and protection of qualified scholarship funding corporations such as NEBHELP, the holders of their tax-exempt bonds and the U.S. Treasury. For the reasons discussed below, in NEBHELP's case the Federal Act will not work very well unless NEBHELP (and Newco) can proceed on the basis that the Securities are not "redeemable securities" for purposes of Rule 3a-7. To explain this fact, we draw your attention to the interplay between the Investment Company Act and the Federal Act. Unlike NEBHELP, Newco will not enjoy a "status" exemption from the Investment Company Act and, therefore, Newco must qualify for an exemption from the Investment Company Act under one of Section 3(c)(1), Section 3(c)(7) or Rule

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[2] NEBHELP estimates that approximately 23 qualified scholarship funding corporations exist at this time, thus defining the approximate number of entities that could possibly undertake a transaction of the type contemplated by the Tax Election and the Transfer and Assumption.

3a-7.[3] Section 3(c)(1) would require, among other things, that the number of holders of NEBHELP securities be limited to 100 while Section 3(c)(7) would require, among other things, that all holders of NEBHELP securities be qualified purchasers. In either case, NEBHELP would be required to refinance all NEBHELP securities then outstanding (approximately $1 billion in aggregate principal amount) to achieve the necessary results. Obviously such a refinancing would be extremely difficult, expensive and inefficient. The issue of whether the Securities are "redeemable securities" for purposes of Rule 3a-7 would be eliminated if NEBHELP were to refinance the Securities ($286,535,000 aggregate principal amount) with fixed rate financings. NEBHELP's management is of the view that fixed rate refinancings of the Securities would be expensive to undertake and, over time, would prove to be more expensive and thus less efficient than the Securities outstanding as variable rate demand bonds. NEBHELP's management believes that the result of this increased expense and lack of efficiency would be a loss of value to NEBHELP as a charity, greater tax-exempt interest income in the market place and diminished taxable revenue at Newco. If, and only if, NEBHELP (and Newco) are able to proceed on the basis that the Securities are not "redeemable securities" for purposes of Rule 3a-7 can fixed rate refinancing of the Securities be avoided.[4] We believe that, at least as regards the very limited circumstances in which existing securities are to be transferred by a qualified scholarship funding corporation like NEBHELP to a transferee corporation like Newco, and in light of the limited nature and scope of the "redeemability" issue presented by the Securities, the assurance requested in this letter would be entirely consistent with the public policy and Congressional intent behind the Federal Act.

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[3] We believe that Newco could not operate as a registered investment company under the Investment Company Act.

[4] If it receives the assurance requested in this letter with respect to redeemability and elects to make the Tax Election and undertake the Transfer and Assumption, NEBHELP will structure Newco so that it will comply in all other respects with Rule 3a-7 in respect of the Securities.

REQUESTED STAFF ACTION UNDER THE INVESTMENT COMPANY ACT

We respectfully request that the Staff concur with our opinion that, under the circumstances described above, none of the Securities would constitute a "redeemable security" for purposes of Rule 3a-7 under the Investment Company Act. We further request, in the alternative, that the Staff assure NEBHELP and Newco that the Staff will not recommend any enforcement action to the Commission if, following the Tax Election and the Transfer and Assumption, none of Newco or any of the assets, funds or accounts pledged to secure the Securities is registered under the Investment Company Act as an investment company in reliance upon the view that none of the Securities constitutes a "redeemable security" for purposes of Rule 3a-7. Please feel free to direct any questions or responses to the undersigned at (212) 821-8263.

Very truly yours,

Richard C. Sammis

cc: Jon S. Rand, Esq.

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Exhibit A

Issue	Final Maturity	Principal Amount Issued or Authorized (000's)	Principal Amount Outstanding as of June 30, 1997 (000's)
Multiple-Mode Student Loan Program Revenue Bonds, Series 1985 A, B, C, D and E (the "1985 Bonds")	December 1, 2015	$ 143,035	$ 143,035
Multiple-Mode Student Loan Program Revenue Bonds, Series 1986 A, B, C and D (the "1986 Bonds")	December 1, 2016	$ 103,500	$ 103,500
Multiple-Mode Student Loan Program Revenue Bonds, Series 1988C (the "1988 Bonds")	August 1, 2018	$ 40,000	$ 40,000
		$ 286,535	$ 286,535