GARY R. HERBERT
Governor

GREG BELL
Lieutenant Governor

State of Utah
Department of Commerce
Division of Securities

FRANCINE A. GIANI
Executive Director

THAD LEVAR
Deputy Director

KEITH WOODWELL
Director, Division of Securities

May 2,2012

Alan W. Bell
DORSEY & WHITNEY LLP
136 South Main Street, Ste. 1000
Salt Lake City, UT 84101-1655

Re: AP Primus, LLC 110-Action Request Regarding Exemption from Licensing as Investment Adviser

Dear Mr. Bell:

The Utah Division of Securities ("Division") has reviewed your April 3, 2012 request for a no-action letter concerning AP Primus, LLC ("AP Primus") and AP Primus Loan Fund, LP (the "Fund"). Your request for a no-action letter from the Division is authorized by Section 61-1-25(5) of the Utah Uniform Securities Act ("Act") and Utah Administrative Code Rule R164-25-5.

Your letter requests that the Division take a no-action position with respect to AP Primus's anticipated role as manager of the Fund. Specifically, you request that the Division staff recommend no enforcement action if AP Primus acts as manager of the Fund without being licensed as an investment adviser.

Based upon the representations made in your letter and in discussions with Division staff, we will not recommend any enforcement or administrative disciplinary action, should the activities proceed in Utah as outlined in your request.

In making this determination, we note several points. First, AP Primus will not be in the business of advising others as to securities and will not otherwise hold itself out as an investment adviser. Second, while a Rule 506 offering will be made to accredited investors in order to raise funds for the secured lending business of the Fund, neither the issuer (the Fund) nor its manager (AP Primus) will have any discretion in using the funds, apart from the secured lending activities described in the accompanying offering materials and subject to the limitations set forth in your request letter. Third, each loan will be fully collateralized by real estate', and in some cases, in

'In this regard, each loan will be secured by the Fund holding a first position lien represented by a properly recorded and perfected deed on the real property serving as collateral.

addition to real estate, other assets of the borrower, beyond the amount of the loan. The Division renders no opinion as to whether the notes memorializing the loans are securities under the Act.

As this recommendation is based upon the representations made to the Division, any different facts or conditions of a material nature might require a different conclusion. Furthermore, this no-action letter relates only to the activities described above and will not apply to future similar factual circumstances. The relief granted herein is expressly limited to AP Primus and will have no precedential effect whatsoever for any other party. This response does not purport to express any legal conclusions regarding the applicability of statutory or regulatory provisions of federal or state securities laws to the questions presented. It merely expresses the position of the Division staff on enforcement or administrative actions. Finally, the issuance of a no-action letter does not absolve any party from complying with the anti-fraud provisions contained in Section 61-1-1 of the Act.

Very truly yours,

UTAH DIVISION OF SECURITIES

Chip Lyons

Charles M. Lyons
Securities Analyst

DORSEY

April 3,2012

Mr. Chip Lyons
Securities Analyst
Division of Securities
State of Utah
160 East 300 South, 2nd Floor
Salt Lake City, UT 84111

Re: No-Action Letter on Behalf of AP Primus, LLC Regarding Exemption from Licensing as an Investment Adviser.

Dear Mr. Lyons:

We represent AP Primus, LLC, a Utah limited liability company ("AP Primus"), an entity to be formed, and AP Primus Loan Fund, LP (the "Fund"), an entity to be formed.[1] On behalf of AP Primus, we respectfully request a no-action letter from the Utah Division of Securities (the "Division") under Section 61-1-25(5) of the Utah Uniform Securities Act, as amended (the "Act"), and Rule 164-25-5 of the Utah Administrative Code. Specifically, we request that the Division declare that it will take no action if AP Primus, as the general partner of the Fund, is not licensed with the Division as an investment adviser.

AP Primus desires a no-action letter in order to provide comfort that it can proceed with the proposed transaction without being registered as an investment adviser. The transactions in question have not yet been commenced.

I. Background

The Fund intends to raise up to $5 million for the Fund[2] through the offer and sale of limited partnership interests only to accredited investors in accordance with Rule 506 of the Securities Act of 1933, as amended (the "Securities Act"). The Fund would file a Form D with the Securities and Exchange Commission and the Division in accordance with the requirements of applicable law and the rules promulgated thereunder. The investors would include persons other than those identified in Section 61-1-3(3)(b) of the Act. The general partner of the Fund would be AP Primus, and AP Primus would control the business and affairs of the Fund, subject to the limitations set forth in the Fund's limited partnership agreement. AP Primus would be entitled to receive an annual management fee (calculated as a percentage of contributed capital) as well as a carried interest in the Fund's profits. Both the General Partner and the Fund would have their principal place of business in Utah.

[1] The principals may decide to use names other than AP Primus, LLC for the general partner entity and AP Primus Loan Fund, LP for the limited partnership entity.

[2] The Fund would impose minimum investment requirements.

The principals of AP Primus are in the business of making secured loans, for their own account, to companies or individuals in order to fund working capital, refinancings, general operations or other business objectives. In no case prior to the Fund have AP Primus or its principals made such loans for or on behalf of third parties, other than entities they own.

The Fund would make secured loans to companies or individuals in order to fund working capital, refinancings, general operations or other business objectives. Pending their use for secured loans, the funds raised by the Fund would be placed in CDs, money market and other similar FDIC-insured instruments. Neither the Fund nor AP Primus would have any discretion to use the funds other than for making secured loans and paying the costs and expenses (including AP Primus' management fee) associated with the management and operation of the Fund. The offering documents of the Fund and AP Primus would include restrictions to this effect.

AP Primus or its affiliates would contribute at least $500,000 to the capital of the Fund. it is anticipated that this contribution would be in the form of existing loans that are the same type of loans the Fund is permitted to make. This fact would be disclosed to potential investors in the Fund's offering documents.

While each loan made by the Fund would be a unique and distinct transaction, with varying terms for each loan (such as the maturity date, interest rate and payment terms), each loan would have the following characteristics in common:

- AP Primus would have full discretion in selecting borrowers and negotiating the terms of the loans. However, under the limited partnership agreement, AP Primus would only have the discretion to make loans of the nature described in this letter. Under the Fund's limited partnership agreement, AP Primus would not be permitted to make investments of any other nature.

- Each loan would be evidenced by customary loan documentation and would be fully collateralized by real estate. In addition to real estate collateral, the loan may be secured by other assets of the borrower.

- AP Primus would use commercially reasonable valuation methodologies to establish the value of the collateral far loans made by the Fund, including in some cases appraisals by an independent appraiser. In no event would the amount of a loan exceed 100% of the value of the real estate collateral at the time the loan is made based on AP Primus' analysis.

- Trust deeds (or similar instruments) would be signed and recorded and financing statements would be filed with the applicable county or state agency, and the security interest in the real estate or other assets would be properly perfected.

- The loans would contain customary covenants, the violation of which may accelerate the borrower's obligation to repay, or have other consequences.

- Some of the loans may be made for the purpose of refinancing outstanding indebtedness. In addition, some of the loans may be subordinate to senior debt, but even in such cases, the loans would be collateralized.

- In no case would the Fund make any equity investments in any borrower or any other person, whether through convertible promissory notes, warrants or other equity vehicles.

II. Analysis

Persons who fall within the definition of "investment advisers" under the Act are required to be licensed with the Division.[3] An investment adviser is any person or entity who:

- for compensation engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing or selling securities; or

- for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities.

Although AP Primus would not provide advice to the limited partners of the Fund based on their individual investment objectives, AP Primus would advise the Fund itself as to the advisability of making loans. Therefore, there are two critical questions in determining if AP Primus is an investment adviser under the Act. The first question is whether AP Primus is "engag[ed] in the business of advising others" with respect to securities. The second question is whether the secured promissory notes evidencing the loans would be treated as "securities" under the Act. If AP Primus is not engaged in the business of advising others with respect to securities, or if the secured promissory notes would not be treated as securities, then AP Primus should not be treated as an investment adviser and should not be required to be licensed with the Division.

We respectfully submit that AP Primus should not be treated as an investment adviser for the reasons set forth below.

A. Engaged in the Business of Advising Others

Through its activities, AP Primus would not be "engag[ed] in the business of advising others" as to the advisability of investing in certain securities and AP Primus would not hold itself out as an investment adviser. AP Primus' responsibility as the general partner of the Fund would be limited to arranging, negotiating and managing loans. AP Primus would not have the discretion to arrange loans for the Fund outside of the loan parameters described in this letter, nor would AP Primus have the discretion to pursue equity investments, such as convertible promissory notes, warrants or other equity investments. Outside of the Fund, the principals of AP Primus have not engaged in pursuing loans or investments for persons other than themselves or entities they own. In light of these facts, AP Primus's business would not be advising others as to securities.

[3] *See* Section 61-1-3 of the **Act.**

B. Application of *Reves* Test

The term "notes" is included within the definition of "security" under the Act. However, the term "note" is not interpreted literally to mean every note. Instead, notes are examined under the "family resemblance" test articulated by the United States Supreme Court in Reves v. Ernst & Young.[4]

The *Reves* test begins with the presumption that every note is a security. The test then considers a list of certain notes that have been categorically excluded from the definition of security, such as:

- consumer financing notes;
- notes secured by a mortgage on a home;
- short-term notes secured by a lien on a small business or some of its assets;
- notes evidencing "character" loans to bank customers;
- short-term notes secured by an assignment of accounts receivable; or
- notes which simply formalize an open-account debt incurred in the ordinary course of business.'

If the note in question does not fit into one of the categories above, the *Reves* test then examines four factors to determine whether it bears a strong resemblance to one of the foregoing types of notes. The four factors are utilized in an effort to explore the "economic realities" of the transaction.[6] The purpose of the *Reves* test is to avoid "subjecting routine commercial transactions to federal securities regulation."[7] The four factors of the *Reves* test are:

- the motivations of the buyer and seller;
- the plan of distribution;
- the public's reasonable expectations; and

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[4] 494 U.S. 56, 63 (1990); *see also,* State of Utah v. Burkinshaw, 2010 UT **App.** 245, n.3 (2010) (applying the *Reves* test in the context of determining whether a note is a security under the Utah Act, but noting that the court is not formally deciding whether Utah should adopt the *Reves* test).

[5] *See id.* at 65.

[6] *See id.* at 61.

[7] Singer v. Livoti, 741 F.Supp. 1040,1048 (S.D.N.Y. 1990).

- regulatory schemes or other features that significantly reduce the instrument's risk. [8]

We believe that, on balance, the application of the *Reves* test, and in particular the fourth factor, weighs strongly against treating the secured promissory notes as securities. The fourth factor asks whether some other feature of the instrument reduces its risk. The Court in *Reves* indicated that this fourth prong, standing alone, may be dispositive in certain cases since it considers whether some feature of the instrument "significantly reduces the risk of the instrument, thereby rendering application of the Securities Acts unnecessary."[9] The Court in *Reves* also indicated that in applying the fourth factor, the existence of collateral is a feature that can reduce an instrument's risk."[10] In the matter in question, the Fund's level of risk associated with the secured promissory notes would be greatly reduced since at the time the loan is made the value of the real estate collateral based on AP Primus' analysis will exceed the amount of the loan.

In summary, we believe that under the *Reves* test the secured promissory notes would not be treated as securities.

III. Conclusion

AP Primus should not be required to license with the Division as an investment adviser. First, AP Primus would not be engaged in the business of advising others with respect to securities and would not hold itself out as an investment adviser. Second, the secured promissory notes to be issued to the Fund in consideration for business loans should not be treated as securities under the Act.

As required by Rule 164-25-5 of the Utah Administrative Code, AP Primus and the Fund affirm that there is no legal action, judicial or administrative, which relates directly or indirectly to the facts set forth here, and that the actions described in this letter have not been commenced.

We ask that the Division contact Alan Bell at (801) 933-7261 with any comments or questions before issuing an official response. We also respectfully request that we have the right to withdraw our request in the event that the Division determines that it cannot issue the requested no-action letter.

Sincerely,

Alan W. Bell

Alan W. Bell

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[8] *Reeves,* 494 *U.S.* at 66—67.

[9] *Id.* at *67; see also,* Lebrun v. Kuswa, 24 F.Supp.2d 641,646 (E.D.La 1998).

[10] *Id.* at 69; *see also,* Resolution Trust Corp. v. Stone, 998 F.2d 1534, 1539 (10th Cir. 1993) ("We find that the existence of collateral is a risk-reducing factor that favors finding [the instruments] are not securities.").