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July 17, 1996

ACT IOA of 1940  
SECTION \_\_\_\_\_  
RULE 3a-5  
PUBLIC  
AVAILABILITY 7-17-96

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Office of Chief Counsel  
Division of Investment Management  
Mail Stop 10-6  
U.S. Securities and Exchange Commission  
450 Fifth Street, N.W.  
Washington, D.C. 20549

Re: Reliance on Rule 3a-5 for an Exemption from the Registration  
Requirements of the Investment Company Act of 1940

Ladies and Gentlemen:

We are writing on behalf of Hewlett-Packard Finance Company ("HPFC"), a wholly-owned finance subsidiary of Hewlett-Packard Company (the "Parent"), regarding the proposed short-term investment by HPFC in shares of money market mutual funds. Because an investment in money market mutual fund shares is substantially similar to the types of investment that the Securities and Exchange Commission (the "Commission") allows under Rule 3a-5, promulgated under the Investment Company Act of 1940 (the "Act"), we request the assurance of the Division of Investment Management (the "Staff") that it would not recommend any enforcement action to the Commission if HPFC invests in money market mutual funds while continuing to rely upon the exemption from registration as an investment company contained in Rule 3a-5.

BACKGROUND

The primary purpose of HPFC is to finance the business operations of the Parent and the Parent's subsidiaries other than HPFC. HPFC has not registered as an

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investment company under the Act in reliance on Rule 3a-5. HPFC believes that its activities comply with subparagraphs (a)(1) through (a)(5) of Rule 3a-5,<sup>1</sup> and HPFC does not ask the staff to address any issue under these individual subparagraphs.

With respect to paragraph (a)(6) of the Rule, HPFC currently invests all or part of its funds available for short-term investment (funds not lent to the Parent company or to companies controlled by the Parent) in either time or demand deposits of foreign banks or repurchase agreements, or both, or other forms of short-term cash-equivalent investments permissible under Rule 3a-5, depending on the yields available in the markets for these investments at the time of investment.<sup>2</sup> HPFC now proposes to invest portions of its short-term funds in shares of money market mutual funds. If the Staff provides the requested no-action relief, HPFC intends to invest only in those money market mutual funds that are specifically intended to be used for short-term investments. HPFC believes that the yield it

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<sup>1</sup> It should be noted that HPFC has, to date, issued securities only in transactions exempted from registrations under the Securities Act of 1933 (the "Securities Act") pursuant to Section 4(2) of that Act or Regulation S. Securities issued by HPFC outside the United States in reliance on Regulation S have not been guaranteed by the Parent, in reliance on the no-action position the Staff took in *MEC Finance USA, Inc.* (pub. avail. Oct. 25, 1991) (stating that the requirement that any debt securities held by the public be guaranteed by the parent company is not applicable to securities sold in any offshore offering).

<sup>2</sup> HPFC previously requested and received no-action assurance from the Staff with respect to HPFC's investments in foreign deposits and repurchase agreements. See *Hewlett-Packard Finance Company*, (pub. avail. October 7, 1992) (hereinafter "HPFC"). As discussed in that letter, during most of any given month, HPFC will have a balance of less than \$10,000,000 invested in cash equivalents (including deposits or repurchase agreements). However, at the peak of its cash balances in any month, HPFC may have as much as \$250,000,000 available for short-term investment due to repayments by the Parent on Parent securities held by HPFC. After HPFC receives and invests such funds, the amount of investments is reduced as the funds are re-lent to the Parent or its other subsidiaries. This reduction in cash balances normally takes no longer than seven days. If looked at on average over one year's time, the average daily balance of funds actually invested in deposits or repurchase agreements in any year normally will not exceed 5% of HPFC's total assets.

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can obtain from this kind of investment will frequently exceed the yield that can be obtained from direct investments in time deposits, repurchase agreements, or commercial paper.

### DISCUSSION

Rule 3a-5(a)(6) does not specifically address the eligibility of shares of money market mutual funds for short-term investments by finance subsidiaries, and to our knowledge the Staff has never issued a no-action letter concerning this subject. We believe, however, that the language of Rule 3a-5(a)(6), the Commission release adopting the Rule, and related Staff no-action letters support permitting finance subsidiaries to invest in money market mutual fund shares. They are the type of short-term money market investments that the Commission intended the Rule to allow.

Rule 3a-5(a)(6) provides that a finance subsidiary may not:

invest in, reinvest in, own, hold or trade in securities other than Government securities, securities of its parent company or a company controlled by its parent company (or in the case of a partnership or joint venture, the securities of the partners or participants in the joint venture) or debt securities (including repurchase agreements) which are exempted from the provisions of the Securities Act of 1933 by Section 3(a)(3) of that act.

Section 3(a)(3) in turn exempts:

Any note, draft, bill of exchange, or banker's acceptance which arises out of a current transaction or the proceeds of which have been or are to be used for current transactions, and which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited.

In the release adopting Rule 3a-5, the Commission stated that this part of the rule was intended to give a finance subsidiary flexibility to manage cash received from its offerings by allowing it to temporarily invest in short-term money market instruments.<sup>3</sup> In accordance with that purpose, the Staff has issued no-action letters under Rule 3a-5 permitting investments that, while not specifically enumerated in the rule, are the types of

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<sup>3</sup> See Investment Company Release Act No. 14275 (Dec. 14, 1984).

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investments the Commission intended Rule 3a-5(a)(6) to allow. For example, in *HPFC*, the Staff stated it would not recommend enforcement under the Act against a finance company that invested its funds in foreign time deposits, even though the finance company could not state with certainty that any given issuer used the time deposits for current transactions. The Staff agreed that the time deposits in question were very similar to Section 3(a)(3) commercial paper, a permitted investment, and thus were the type of investments the Commission intended Rule 3a-5(a)(6) to allow. Similarly, in another no-action letter issued to Merrill Lynch Capital Markets, the Staff decided it would not recommend enforcement against a finance company whose assets could potentially include notes issued by its parent's employees.<sup>4</sup> The Staff agreed that, because the notes in question were collateralized by the parent's debentures, the notes were similar enough to securities issued by the parent (a permitted investment under Rule 3a-5(a)(6)) so as to satisfy the major policy consideration underlying Rule 3a-5(a)(6), which is to circumscribe a finance subsidiary's investment authority in order to prevent certain potential risks and abuses.

We believe that shares of money market mutual funds are the type of short-term money market investments that the Commission intended Rule 3a-5(a)(6) to allow for two reasons. First, the overwhelming majority of money market mutual fund assets squarely meet the requirements of Rule 3a-5(a)(6). Second, to the extent that some assets may not meet the literal requirements of Rule 3a-5(a)(6), they are, due to Rule 2a-7's requirements governing money market mutual fund portfolios described below, overwhelmingly similar to Section 3(a)(3) commercial paper, a permitted investment under Rule 3a-5. Because the assets of money market mutual funds are either the same as or the type of investments the Staff intended Rule 3a-5(a)(6) to allow, *HPFC*'s proposed investment in shares of money market mutual funds warrants no-action relief from the Staff.

**1. The Overwhelming Majority of Money Market Mutual Fund Assets Squarely Meet the Requirements of Rule 3a-5(a)(6).**

The Investment Company Institute ("ICI") tracks and reports monthly on the composition of the money market mutual fund sector as a whole. In the ICI's most recently

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<sup>4</sup> *Performance Investment Plan* (pub. avail. March 29, 1990).

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published information, the aggregate assets of 670 surveyed money market mutual funds consisted, in January 1996, of the following:<sup>5</sup>

	<u>Jan. 96</u>	<u>Dec. 95</u>	<u>Jan. 95</u>
TOTAL NET ASSETS (AT MONTH END)	\$ 650,002.0	\$ 629,729.2R	\$ 523,951.2
<u>DISTRIBUTION OF ASSETS (AT MONTH END)</u>			
U.S. TREASURY BILLS	\$ 39,736.1	\$ 42,280.8R	\$ 40,968.8
OTHER TREASURY SECURITIES	\$ 34,903.2	\$ 29,174.7R	\$ 19,813.9R
OTHER U.S. SECURITIES	\$ 96,102.0	\$ 92,689.8R	\$ 80,789.5R
REPURCHASE AGREEMENTS	\$ 88,945.1	\$ 89,316.2R	\$ 79,563.8R
COMMERCIAL BANK CD (1)	\$ 9,393.7	\$ 8,144.8R	\$ 5,210.3
OTHER DOMESTIC CD (2)	\$ 31,115.6	\$ 31,753.8R	\$ 22,778.7R
EURODOLLAR CD (3)	\$ 17,756.6	\$ 20,066.1R	\$ 15,677.5R
COMMERCIAL PAPER	\$ 243,526.9	\$ 237,121.9R	\$ 199,711.9R
BANKER'S ACCEPTANCES	\$ 2,962.8	\$ 3,059.6R	\$ 4,150.2
CASH RESERVES	\$ -3,847.7	\$ -3,596.9R	\$ -1,143.7
OTHER	\$ 87,407.2	\$ 79,718.2R	\$ 56,430.3
<u>AVERAGE MATURITY OF PORTFOLIO (4)</u>			
NUMBER OF DAYS	51	52	32

- (1) COMMERCIAL BANK CDS ARE THOSE ISSUED BY AMERICAN BANKS LOCATED IN THE U.S.
- (2) OTHER DOMESTIC CDS INCLUDE THOSE ISSUED BY S&L'S AND AMERICAN BRANCHES OF FOREIGN BANKS.
- (3) EURODOLLAR CDS ARE THOSE ISSUED BY FOREIGN BRANCHES OF DOMESTIC BANKS AND SOME ISSUED BY CANADIAN BANKS; THIS CATEGROY INCLUDES SOME ONE DAY PAPER.
- (4) MATURITY OF EACH INDIVIDUAL SECURITY IN THE PORTFOLIO AT END OF MONTH WEIGHTED BY ITS VALUE.

As the chart, in relevant part, indicates, in January 1996, over 86% of the assets of money market mutual funds consisted of government securities, repurchase agreements, commercial bank, domestic and eurodollar certificates of deposit, commercial paper, and banker's acceptances. As of January 1995, this number was over 89%. All of these types of investments are permitted investments for finance subsidiaries under Rule 3a-5(a)(6). First, government securities and repurchase agreements are specifically permitted

<sup>5</sup> All dollar amounts are in millions. "R" indicates that a number has been revised from earlier figures.

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under Rule 3a-5(a)(6). Second, commercial paper and banker's acceptances fall within the exemption under 3(a)(3) of the Securities Act. Finally, the Staff has stated that certificates of deposit are considered the type of short-term investments Rule 3a-5(a)(6) was intended to allow.<sup>6</sup>

**2. The Remaining Money Market Assets That Rule 3a-5 Does Not Squarely Address Are the Type of Short-term Money Market Investments That the Commission Intended the Rule to Allow.**

Any remaining money market assets that Rule 3a-5 does not specifically address are also themselves the type of short-term money market investment activity that the Commission intended Rule 3a-5 to allow, due to the requirements governing money market mutual fund assets set out in Rule 2a-7.

Rule 2a-7 requires that money market mutual funds invest only in certain eligible securities that present minimal credit risks, specifically securities: (1) of issuers with a class of short-term securities that is rated by a nationally recognized statistical rating organization in the top two classes of short-term debt obligations; and (2) that possess a maturity date of less than 397 days. While such a security would not technically be commercial paper (because it would not meet the requirements of Section 3(a)(3) that the security have a maturity date at issue of nine months or less or that it be used for current transactions), it would be fungible in the market with commercial paper of the same issuer with the same maturity. Moreover, the average remaining maturity date of a fund's entire portfolio may not exceed ninety days.<sup>7</sup> These strict requirements concerning high portfolio quality and short average maturity cause shares of money market mutual funds to have the same characteristics as commercial paper. As such, money market mutual fund shares are the type of short-term money market investments that the Commission intended the Rule to allow. In addition, the intended effect of Rule of 2a-7 is to require money market mutual funds to maintain a stable net asset value per share. By requiring money market mutual funds

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<sup>6</sup> See *HPFC*. In this no-action letter, the Staff stated that foreign time deposits were permissible under Rule 3a-5(a)(6). Presumably, domestic time deposits are equally permissible.

<sup>7</sup> According to the ICI data, the average maturity of money market portfolios as of January 1996 was 51 days.

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to maintain stable share values, investments in shares of money market mutual funds address the major concern of Rule 3a-5, which is to prevent exempted finance subsidiaries from engaging in the risks and abuses the Act was intended to address. Therefore, HPFC's potential investments in money market mutual fund shares warrant no-action relief even though a relatively small amount of money market mutual fund assets may not meet the literal requirements of Rule 3a-5(a)(6).

Indeed, the Staff has issued no-action letters under Rule 3a-5 permitting investments that, while not literally fulfilling the requirements of the Rule, are the type of short-term money market investments that the Commission intended the Rule to allow. For example, as discussed above, in *HPFC* the Staff decided it would not recommend enforcement under the Act against a finance company that invested its funds in foreign time deposits, even though the finance company could not state with certainty that any given issuer used the time deposits for current transactions, the literal requirement of Section 3(a)(3) of the Securities Act. The Staff agreed that these deposits were the type of short-term money market investments that the Commission intended the Rule to allow, and thus permitted the investments under Rule 3a-5(a)(6).

### CONCLUSION

Based on the foregoing, we believe that investments by HPFC in shares of money market mutual funds should be deemed to come within the requirements of Rule 3a-5(a)(6) under the Act. Accordingly, we request that you provide assurance that the Staff will not recommend that the Commission take any enforcement action if HPFC continues to rely on Rule 3a-5 while investing in shares of money market mutual funds.<sup>8</sup> We request that you advise us by telephone if you reach a preliminary conclusion that you will be unable to take a

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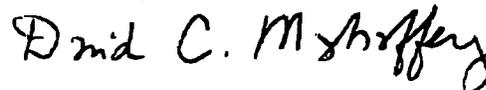
<sup>8</sup> As noted above, HPFC, in its earlier no-action request, represented that the average daily balance of funds invested in deposits or repurchase agreements in any year normally will not exceed 5% of its total assets. If the Staff provides the no-action assurance requested in this letter, HPFC proposes that its investments in money market mutual funds not be subject to this limitation.

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no-action position on the issues set forth herein and allow us an opportunity to discuss the matter further with you. If you have any questions or need any further information please telephone the undersigned at (202) 887-3625 or Todd Kantorczyk at (202) 887-3608.

Very truly yours,



David C. Mahaffey

DCM/dcm  
WA960460.166/0\*

**PUBLIC**

JUL 17 1996

Our Ref. No. 96-162-CC  
Hewlett-Packard Finance  
Company  
File No. 132-3

RESPONSE OF THE OFFICE OF CHIEF COUNSEL  
DIVISION OF INVESTMENT MANAGEMENT

Your letter dated July 17, 1996 requests our assurance that we would not recommend enforcement action to the Commission if Hewlett-Packard Finance Company ("HPFC"), which currently is not registered under the Investment Company Act of 1940 ("1940 Act") in reliance on Rule 3a-5 thereunder, invests in the shares of money market mutual funds.

You state that the primary purpose of HPFC is to finance the business operations of its parent, Hewlett-Packard Company, and its parent's subsidiaries other than HPFC. You state that HPFC currently invests funds that are available for short-term investment in time or demand deposits of foreign banks, repurchase agreements, or other short-term cash-equivalent investments permissible under paragraph (a)(6) of Rule 3a-5. HPFC now proposes to invest a portion of its funds available for short-term investment in shares of money market mutual funds. 1/

Rule 3a-5 exempts from the definition of an investment company a subsidiary of a parent company that has been formed primarily to finance the business operations of the parent or other companies controlled by the parent (a "finance subsidiary"). Paragraph (a)(6) of Rule 3a-5 provides that a finance subsidiary may not invest in, reinvest in, own, hold, or trade in securities other than (1) Government securities, (2) securities of its parent company or a company controlled by its parent company, or (3) debt securities (including repurchase agreements) that are exempted from registration under the Securities Act of 1933 ("1933 Act") by Section 3(a)(3) of that Act. 2/ In the release adopting Rule 3a-5, the Commission stated that paragraph (a)(6) was intended to make clear that a finance subsidiary may temporarily hold short-term money market investments. 3/ The Commission further stated that the provision

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- 1/ You state that HPFC complies with all of the other applicable conditions of Rule 3a-5. The staff expresses no view on whether HPFC meets these conditions.
  - 2/ Section 3(a)(3) of the 1933 Act exempts "[a]ny note, draft, bill of exchange, or banker's acceptance which arises out of a current transaction or the proceeds of which have been or are to be used for current transactions, and which has a maturity at the time of issuance of not exceeding nine months."
  - 3/ Investment Company Act Rel. No. 14275 (Dec. 14, 1984).

was intended to give a finance subsidiary the flexibility to manage the cash it receives from an offering until its parent is in a position to receive the offering proceeds. 4/

You believe that a finance subsidiary's investment in money market mutual fund shares is consistent with the objectives of paragraph (a)(6) to permit a finance subsidiary to invest in short-term money market instruments. You maintain that a substantial majority of money market fund assets consist of the types of investments permissible under paragraph (a)(6) of Rule 3a-5. 5/ You further note that, because of the requirements of Rule 2a-7 under the 1940 Act relating to credit risk and maturity of fund assets, money market fund assets that are not investments specifically permitted under Rule 3a-5 nevertheless would be instruments similar to the type expressly permitted by the Rule. Finally, you maintain that these requirements cause money market fund shares to have characteristics similar to commercial paper, a permissible investment under Rule 3a-5.

The staff has granted no-action relief to finance subsidiaries that proposed to invest in instruments not specifically listed in paragraph (a)(6) of the Rule when the investments would be consistent with the purposes of the Rule. For example, the staff granted relief to HPFC to permit investments in demand and time deposits of foreign banks. 6/

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4/ Id. Paragraph (a)(5) of Rule 3a-5 provides that the finance subsidiary has no more than six months to remit to its parent or companies controlled by its parent at least 85% of any funds it raises in an offering.

5/ The Investment Company Institute's January, 1996 survey of money market mutual funds indicated that over 86% of money market fund assets consisted of Government securities, repurchase agreements, commercial bank, domestic and eurodollar certificates of deposit, commercial paper, and banker's acceptances.

6/ Hewlett-Packard Finance Company (pub. avail. Oct. 7, 1992) ("HPFC 1"). Similarly, the staff has granted relief to finance subsidiaries that proposed to hold notes issued by employees of their parent companies or the parents' subsidiaries as payment for debentures of the parents and secured by those debentures. These letters were based, at least in part, on the theory that the notes were the functional equivalent of the debentures issued by the parents. Performance Investment Plan (pub. avail. March 29, 1990); National Medical Enterprises Inc. (pub. avail. Jan. 8, 1990).

We agree that a finance subsidiary's investments in money market funds would be consistent with the Rule's intent to permit finance subsidiaries to invest in short-term instruments and manage their cash in a flexible manner. Accordingly, we would not recommend enforcement action to the Commission if HPFC invests in money market fund shares and continues to rely on Rule 3a-5 under the 1940 Act. 7/ Because this position is based on the facts and representations made in your letter, you should note that any different facts or circumstances might require a different conclusion.

*Jana M. Cayne*

Jana M. Cayne  
Attorney

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7/ HPFC represented in connection with HPFC 1 that the average daily balance in any year of its investments in certain foreign bank deposits and repurchase agreements generally would not exceed 5% of its total assets. When a particular instrument is of a type consistent with paragraph (a)(6) of Rule 3a-5, the staff is of the view that no percentage limitation is necessary. The response issued in HPFC 1 therefore is modified to eliminate any percentage limitation on investments in the foreign bank deposits and repurchase agreements described in that letter.