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SECTION 7(d); 3(c)(1); 3(c)(7)
RULE 502(c)
PUBLIC
AVAILABILITY 10/5/98

RESPONSE OF THE OFFICE OF CHIEF COUNSEL
DIVISION OF INVESTMENT MANAGEMENT

October 5, 1998
Our Ref. No. 98-491-CC
Wilmer, Cutler & Pickering
and Davis Polk & Wardwell
File No. 132-3

Your letter dated August 13, 1998 requests our confirmation that an investment company formed under the laws of a jurisdiction other than the United States ("Foreign Fund") would not be deemed to be making a public offering for purposes of Section 7(d) of the Investment Company Act of 1940 (the "Act") if certain functions that, for U.S. tax purposes, previously have been performed offshore by the Foreign Fund are performed in the United States. You also request our confirmation that so long as a Foreign Fund is conducting only a global private offering, a foreign investor who is temporarily in the United States may meet with personnel associated with the sponsor or manager of the Foreign Fund to discuss the Foreign Fund or other potential advisory services, and possibly purchase an interest in the Foreign Fund, without causing the Foreign Fund to be deemed to be making a public offering for purposes of Section 7(d) of the Act or to have to count or qualify the foreign investor under Section 3(c)(1) or 3(c)(7) of the Act as applied to Section 7(d).

BACKGROUND

You state that a nonresident individual or foreign corporation engaged in a trade or business in the United States is subject to U.S. taxation on its net income that is effectively connected with the trade or business. Section 864(b)(2)(A)(ii) of the Internal Revenue Code of 1986, as amended, contains a specific safe harbor that generally provides that mere trading in securities by a company, other than as a dealer, for its own account, does not constitute a trade or business in the United States.¹ You state that prior to the passage of the Taxpayer Relief Act of 1997 ("Taxpayer Relief Act"), this safe harbor was available to a Foreign Fund so long as the fund did not maintain its "principal office" in the United States.

You state that the determination of whether a Foreign Fund's principal office was in the United States for U.S. tax purposes was made by comparing the activities (other than trading in securities) that the fund conducted from offices located in the United States to the activities that it conducted from offices located outside of the United States. If the Foreign Fund performed "all or a substantial portion" of ten specific activities, typically referred to as the "Ten Commandments," from offices located outside of the United States, the Internal Revenue Service considered the fund not to maintain its principal office in the United States.²

¹ 26 U.S.C. § 864 (1998).

² See Treas. Reg. § 1.864-2(c)(2)(iii). The Ten Commandments activities were as follows: (1) communicating with the fund's shareholders (including the furnishing of financial reports); (2) communicating with the general public; (3) soliciting sales of the fund's stock; (4) accepting

The Taxpayer Relief Act modified the securities trading safe harbor by eliminating the requirement that a foreign entity's principal office be located outside of the United States.³ This change, which is effective for tax years beginning after December 31, 1997, eliminates the need for a Foreign Fund to comply with the Ten Commandments.⁴ Because the performance of the Ten Commandments activities in the United States represents a departure from the historical operations of Foreign Funds, you request our guidance concerning the consequences under Section 7(d) of the Act from such a change in industry practice. In particular, you seek our concurrence that the Ten Commandments activities generally may be performed in the United States in connection with a Foreign Fund's global private offering of its securities, as long as those activities that amount to the offer or sale of securities are consistent with the regulatory restrictions on non-public offerings.

You state the provision of the Ten Commandments activities in the United States creates an increased likelihood that foreign investors⁵ may seek to meet with personnel associated with the sponsor or manager of the Foreign Fund to discuss the Foreign Fund or other potential advisory services while the foreign investors are temporarily in the United States. You state that such meetings may result in the offer and sale of the Foreign Fund's securities occurring in the United States. You request our concurrence that such activity, solely in the context of a global private offering, should not be deemed to be a public offering for purposes of Section 7(d) of the Act, or require the counting or qualification of the foreign investors as U.S. persons under Section 3(c)(1) or 3(c)(7) of the Act as applied to Section 7(d) of the Act.

ANALYSIS

Section 7(d) of the Act states:

No investment company, unless organized or otherwise created under the laws of the United States or of a State . . . shall make use of the mails or any means or

subscriptions of new shareholders; (5) maintaining the fund's principal corporate records and books of account; (6) auditing the fund's books of account; (7) disbursing payments of dividends, legal fees, accounting fees, and officers' and directors' salaries; (8) publishing or furnishing the offering and redemption price of the stock issued by the fund; (9) conducting meetings of the fund's shareholders and board of directors; and (10) making redemptions of the fund's stock (collectively, the "Ten Commandments activities"). Id.

³ Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 1162, 111 Stat. 788 (1997).

⁴ See H.R. Rep. No. 220, 105th Cong., 1st Sess. (1997).

⁵ For purposes of this letter, a foreign investor is a person who is not a "U.S. person," as such term is defined in Rule 902(k) of Regulation S under the Securities Act of 1933 ("Securities Act"). A natural person's residency, rather than citizenship, determines his or her status under Rule 902(k). Goodwin, Procter & Hoar (pub. avail. Feb. 28, 1997).

instrumentality of interstate commerce, directly or indirectly, to offer for sale, sell, or deliver after sale, in connection with a public offering, any security of which such company is the issuer.

The Commission has indicated that the prohibitions of Section 7(d) apply only to a public offering by a Foreign Fund in the United States or to U.S. persons.⁶ Several positions taken by the staff have applied a similar principle in permitting a Foreign Fund to simultaneously make an offshore public offering and a private U.S. offering of its securities. Under these positions, a Foreign Fund that is conducting an offshore offering also may make, under certain circumstances, a private U.S. offering in reliance on Section 3(c)(1)⁷ or 3(c)(7)⁸ of the Act consistent with the U.S. public offering prohibition in Section 7(d). A Foreign Fund generally may rely on the definition of "U.S. person" in Rule 902(k) of Regulation S under the Securities Act in determining whether a potential investor must be counted or qualified for purposes of complying with Section 3(c)(1) or 3(c)(7) of the Act, respectively.⁹

⁶ Investment Company Act Release No. 23071 (Mar. 23, 1998) at n. 12 and accompanying text. See also S. Rep. No. 1775, 76th Cong., 3d Sess. 13 (1940); H.R. Rep. No. 2639, 76th Cong., 3d Sess. 13 (1940) ("foreign investment companies may not register as investment companies or *publicly offer securities of which they are the issuer in the United States* unless the Commission finds that these foreign investment companies can be effectively subjected to the same type of regulation as domestic investment companies") (emphasis added).

We note that Section 7(d) of the Act is implicated only when a Foreign Fund uses U.S. jurisdictional means in connection with its public offering. As a result, we believe that an offshore public offering by a Foreign Fund to U.S. persons that does not make use of U.S. jurisdictional means would not constitute a public offering for purposes of Section 7(d) of the Act. Global Mutual Fund Survey (pub. avail. July 14, 1992).

⁷ Touche Remnant & Co. (pub. avail. Aug. 27, 1984). Section 3(c)(1) of the Act provides an exclusion from the definition of investment company for any fund that is not conducting, and does not presently propose to conduct, a public offering of its securities and that has 100 or fewer beneficial owners.

⁸ Goodwin, Procter & Hoar, *supra* note 5. Section 3(c)(7) of the Act provides an exclusion from the definition of investment company for any fund the securities of which are owned exclusively by persons who, at the time of acquisition, are "qualified purchasers," and that is not conducting, and does not at that time propose to conduct, a public offering of its securities. The term "qualified purchaser" is defined in Section 2(a)(51) of the Act to include certain investors with a high degree of financial sophistication.

⁹ Goodwin, Procter & Hoar, *supra* note 5. We note that if U.S. persons become shareholders of a Foreign Fund as a result of activities beyond the control of the fund or persons acting on its behalf, the fund would not be required to count those shareholders as U.S. persons for purposes of determining whether it may rely on Section 3(c)(1) or 3(c)(7) of the Act. See Investment Funds Institute of Canada (pub. avail. Mar. 4, 1996); Investment Company Act Release No. 23071, *supra* note 6, at n. 41.

Ten Commandments Activities

You request our confirmation that a Foreign Fund would not be deemed to be making a public offering for purposes of Section 7(d) of the Act if the Ten Commandments activities are performed by the Foreign Fund in the United States.¹⁰ We believe that the Ten Commandments activities generally may be performed in the United States in connection with a global private offering of a Foreign Fund's securities, as long as those activities that amount to an offer or sale of securities are consistent with the regulatory restrictions on non-public offerings.¹¹ Specifically, any unregistered securities offering in the United States by a Foreign Fund must be made in compliance with Section 4(2) of the Securities Act, or Regulation D or other exemption from registration under the Securities Act, as well as Section 3(c)(1) or 3(c)(7) of the Act.

Private Meetings

You state that the provision of the Ten Commandments activities in the United States following the repeal of the Ten Commandments creates an increased likelihood that foreign investors may seek to meet with U.S. entities retained by the Foreign Fund to provide administrative and advisory services while the foreign investors are temporarily in the United States. You state that such meetings may result in the offer and sale of the Foreign Fund's securities occurring in the United States. You request our confirmation that such activity, solely in the context of a global private offering, should not be deemed to be a public

¹⁰ We note that in several prior no-action letters, we have taken the position that we would not recommend enforcement action under Section 7(d) of the Act against a Foreign Fund that performed certain of its activities (e.g., receiving and effecting purchase and redemption orders for its shares) in the United States. See *G. T. Global Financial Services, Inc.* (pub. avail. Aug. 2, 1988); *Merrill Lynch* (pub. avail. May 12, 1986); and *Shearson International Dollar Reserves* (pub. avail. July 15, 1981). In each of those situations, counsel represented that the Foreign Fund was not doing business in the United States for federal tax purposes. This representation seems to indicate that those Foreign Funds were performing all or a substantial portion of the Ten Commandments activities outside of the United States. We believe that a Foreign Fund that structures its operations consistent in all material respects with these prior letters, and conducts its Ten Commandments activities in the United States consistent with the standards articulated in this response, should not be deemed to be making a public offering for purposes of Section 7(d) of the Act.

¹¹ In analyzing whether the performance of the Ten Commandments activities in the United States by a Foreign Fund implicates Section 7(d) of the Act, we recognize that many of the activities that make up the Ten Commandments (e.g., maintaining the fund's principal corporate records and books of account; auditing the fund's books of account; and disbursing payments of dividends, legal fees, accounting fees, and officers' and directors' salaries) typically are not part of the offer or sale of securities. The performance of those Ten Commandments activities that could be part of the offer or sale of securities (e.g., soliciting sales of the fund's stock) in the United States will only implicate Section 7(d) if such activities result in the Foreign Fund making a public offering of its securities in the United States or to U.S. persons.

offering for purposes of Section 7(d) of the Act or require the counting or qualification of the foreign investors as U.S. persons under Section 3(c)(1) or 3(c)(7) of the Act. You represent that in connection with these private meetings: (1) the Foreign Fund will employ procedures to identify, and count or qualify as applicable, all U.S. persons to whom it sells its securities on a worldwide basis for purposes of Section 7(d) of the Act in accordance with staff positions; (2) the relevant offering materials will disclose prominently and fully that the Foreign Fund is not registered under the Act and its securities are not registered under the Securities Act; and (3) the Foreign Fund will not sell its securities either domestically or abroad by means of any "general solicitation or general advertising," as those terms are defined in Rule 502(c) of Regulation D under the Securities Act,¹² and any offers and/or sales occurring in the United States will be effected in private offerings exempt from the registration requirements of the Securities Act.

We believe that, in the context of a global private offering, private meetings by a Foreign Fund with foreign investors who are temporarily in the United States generally will not result in the Foreign Fund being deemed to be making a public offering for purposes of Section 7(d) of the Act, as long as any offer or sale of securities is consistent with the regulatory restrictions on non-public offerings. In reaching this conclusion, we rely in particular on your representation that a Foreign Fund will not offer or sell its securities either domestically or abroad by means of any form of general solicitation or general advertising, and any offers and/or sales occurring in the United States will be effected in private offerings exempt from the registration requirements of the Securities Act. We also rely on your representation that a Foreign Fund's offering materials will disclose prominently and fully that the fund is not registered under the Act and its securities are not registered under the Securities Act.¹³

We also believe that a Foreign Fund generally may conduct a private meeting with a foreign investor who is temporarily in the United States in the context of a global private offering without counting or qualifying the foreign investor as a U.S. person under Section

¹² Rule 502(c) of Regulation D under the Securities Act defines general solicitation or general advertising to include any advertisement, article, notice, or other communication published in any newspaper, magazine, or similar media or broadcast over television or radio, and any seminar or meeting whose attendees have been invited by any general solicitation or general advertising.

¹³ While a Foreign Fund will not register under the Act or register its securities under the Securities Act, we believe that a Foreign Fund that uses U.S. jurisdictional means as part of the offer or sale of its securities may be subject to the antifraud provisions of the federal securities laws. The antifraud provisions have been applied broadly by the courts to protect U.S. investors and investors in U.S. markets where either significant conduct occurs in the United States (the "conduct test") or the conduct occurs outside of the United States but has a significant effect within the United States or on the interests of U.S. investors (the "effects test"). See, e.g., SEC v. Kasser, 548 F.2d 109, 114-16 (3d Cir. 1977) (discussing the conduct test); Consolidated Gold Fields PLC v. Minorco, S.A., 871 F.2d 252, 261-62 (2d Cir. 1989) (discussing the effects test).

3(c)(1) or 3(c)(7) of the Act as applied to Section 7(d) of the Act. We believe that a foreign investor's residency determines his or her status as a U.S. person for purposes of Section 7(d) of the Act.¹⁴ A meeting with a foreign investor who is physically but only temporarily present in the United States would not result in a change of the foreign investor's jurisdiction of residence. In reaching this conclusion, we rely in particular on your representation that a Foreign Fund will maintain and follow procedures designed to determine the U.S. person status of investors who meet with fund personnel in the United States prior to the sale of fund shares to ensure that all investors who are U.S. persons are counted or qualified under Section 3(c)(1) or 3(c)(7) of the Act as applied to Section 7(d) of the Act. Such procedures could include, for example, obtaining subscription or other documents in which the person certifies his or her U.S. person status.



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¹⁴ Goodwin Procter & Hoar, supra note 5.

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VIA: Messenger

Douglas J. Scheidt, Esq.
Chief Counsel
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United States Securities and
Exchange Commission
450 Fifth Street, N.W.
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Re: Section 7(d) of the Investment Company Act of 1940

Dear Mr. Scheidt:

This letter is being submitted by Wilmer, Cutler & Pickering and Davis Polk & Wardwell to request that the staff issue an interpretive position concerning section 7(d) of the Investment Company Act of 1940 (the "Investment Company Act") in light of recent changes to the Internal Revenue Code of 1986, as amended, (the "Code"). Until August of 1997, investment companies organized under the laws of a jurisdiction other than the United States ("Offshore Funds") performed a substantial portion of ten specified administrative functions outside of the United States to avoid federal income tax consequences. The so-called "Ten Commandments" in regulations under section 862 of the Code provided a safe harbor under which an Offshore Fund could avoid being treated as engaged in a "United States trade or business" for federal income tax purposes.

On August 5, 1997, the Taxpayer Relief Act of 1997 effectively repealed the Ten Commandments for tax years beginning on or after January 1, 1998. The repeal of the Ten Commandments reflected a Congressional determination that those provisions did not further an important policy and merely shifted administrative functions and jobs offshore.^{1/} Because Offshore Funds managed in the United States no longer must bear the expense of conducting their administrative activities from a foreign location many are likely to relocate such functions to the United States. Foreign investors who are interested in Offshore Funds may wish to speak

^{1/}

Taxpayer Relief Act of 1997, Pub. L. No. 105-34, 111 Stat. 788 (1997).

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with the Offshore Fund's management in the United States and to meet with Fund personnel when visiting the United States. Such meetings may result in an offer and sale of the Offshore Fund's securities occurring in the United States. For the reasons discussed below, we request that the staff confirm that so long as the Offshore Fund is only conducting a global private offering, a "Foreign Investor"^{2/} who is temporarily in the United States may meet with personnel associated with the sponsor or manager of an Offshore Fund to discuss the Offshore Fund or other potential advisory services, and possibly purchase an interest in the Fund, without causing the Fund to have to count or qualify the Foreign Investor under sections 3(c)(1) or 3(c)(7) of the Investment Company Act as applied to section 7(d) of that Act.

The requested interpretation would be subject to the requirements that the relevant offering materials disclose prominently and fully that the issuer is not registered under the Investment Company Act and its securities are not being registered under the Securities Act. The requested interpretation also would be subject to the requirement that the Offshore Fund not sell its securities either domestically or abroad by means of any "general solicitation" or advertisement and any offers and/or sales occurring in the United States be effected in private offerings exempt from the registration requirements of section 5 of the Securities Act of 1933 ("Securities Act").

As interpreted by the staff, section 7(d) has two primary requirements: an Offshore Fund cannot engage in conduct in the United States that would constitute a general solicitation or other "public offering," and an Offshore Fund making use of United States jurisdictional means to offer its securities must count (for quasi-3(c)(1) purposes) or qualify (for quasi-3(c)(7) purposes) *all* United States Persons to whom it sells securities (as well as certain transferees). We respectfully submit that, for the reasons discussed below, an Offshore Fund that does not make *any* public offering of its securities should be required to count or qualify only United States Persons.

We also respectfully request that the staff also directly address the consequences of the repeal of the Ten Commandments. We request that the staff confirm that Offshore Funds may perform the routine Ten Commandments administrative functions in the United States without being treated as making a public offering for purposes of section 7(d) of the Investment

^{2/} We want to emphasize that, for the purposes of this letter, "Foreign Investors" are persons who are not "United States Persons." For these purposes, a United States Person is defined as a United States Person under rule 902(o) of Regulation S, and an offshore investment vehicle whose use by United States accredited investors pursuant to rule 902(o)(1)(viii) is facilitated by an Offshore Fund as a means to evade the requirements of section 7(d). See *Goodwin, Proctor & Hoar*, SEC No-Action Letter (Feb. 28, 1997).

Company Act. The location from which these routine administrative functions are performed has no relevance to the question of whether an Offshore Fund is making a public offering of its securities in the United States for purposes of section 7(d).

I. BACKGROUND

A. Repeal of the Ten Commandments

A nonresident individual or foreign corporation engaged in a trade or business in the United States is subject to United States taxation on its net income that is effectively connected with the trade or business. Prior to passage of the Taxpayer Relief Act, section 864(b)(2)(A)(ii) of the Code provided a safe harbor for Offshore Funds clarifying that such a Fund would not be engaged in a United States trade or business so long as the Offshore Fund *did not maintain its principal office in the United States*. The determination of whether a principal office is in the United States was made by comparing the activities (other than trading in securities) a company conducted from an office in the United States to the activities it conducted from offices located outside the United States.^{3/}

The Ten Commandments were found in the regulations promulgated under section 864(b)(2)(A)(ii) and elaborated on the activities that indicate a foreign corporation has its principal office in the United States. Specifically, the regulations provided that a foreign company that carried on most or all of its investment activities in the United States would not be treated as having a principal office in the United States if it maintained a general business office or offices outside the United States at or from which the corporation carried on "all or a substantial portion" of ten designated administrative functions, commonly known as the Ten Commandments.^{4/} These functions included: communicating with shareholders; communicating with the general public; soliciting sales of stock; accepting the subscriptions of new stockholders; maintaining principal corporate books and records; auditing corporate books; disbursing payments of dividends, legal fees, accounting fees, and officers' and directors' salaries; publishing or furnishing the offering and redemption price of the corporation's stock; conducting shareholder and board meetings; and making redemptions of stock.^{5/} Pursuant to the same regulations, a foreign partner in a partnership organized under either domestic or foreign laws would not be treated as engaged in a United States trade or business so long as the partnership complied with the Ten Commandments.

^{3/} H.R. Rep. No. 1450, 89th Cong., 2d Sess., 1966-2 C.B. 965, 976.

^{4/} Treasury Regulation § 1.864-2(c)(2)(iii).

^{5/} *Id.*

The Taxpayer Relief Act simplified the section 864(b)(2)(A)(ii) safe harbor.^{6/} According to the legislative history, the foreign principal office requirement did not promote any important policy, and merely shifted administrative functions and their associated jobs offshore.^{7/} As a result, the section 864(b)(2)(A)(ii) safe harbor was modified by eliminating the requirement that an Offshore Fund's principal office not be in the United States, thereby eliminating the need to perform administrative functions offshore in accordance with the Ten Commandments.

Consistent with Congress' intent to facilitate operation of Offshore Funds in the United States and to increase the number of administrative jobs available in the United States, many Offshore Funds would like to perform in the United States the administrative functions identified by the Ten Commandments. Because the performance of these administrative functions in the United States represents a departure from the historical operations of Offshore Funds, we respectfully request that the staff provide express interpretive guidance concerning the consequences under section 7(d) of the Investment Company Act from such a change in industry practice.

B. Section 7(d)

Section 7(d) of the Investment Company Act provides that no foreign investment company may use a means or instrumentality of United States interstate commerce to offer, sell, or deliver its securities in connection with a public offering thereof, unless the Securities and Exchange Commission ("SEC") first issues an order permitting it to register under the Investment Company Act. The SEC may grant such permission only if it finds that "it is both legally and practically feasible effectively to enforce the provisions of [the Investment Company Act] against such company and that issuance of such an order is otherwise consistent with the public interest and protection of investors." Because section 7(d) does not offer any guidance for determining when an Offshore Fund has made a "public offering" for purposes of its provisions, the section has been the subject of numerous no-action and interpretive letters from the staff.

The most notable letter was issued in 1984 to *Touche, Remnant & Company*.^{8/} In *Touche, Remnant*, the SEC staff took the position that section 7(d) bars an Offshore Fund from using United States jurisdictional means to make a private offering of its securities in the United States if, as a result, the Offshore Fund would have more than 100 United States resident beneficial owners. When the staff adopted this position, domestic private investment companies

^{6/} Taxpayer Relief Act of 1997, Pub. L. No. 105-34, 111 Stat. 788, (1997).

^{7/} S. Rep. No. 105-33, at 216 (1997); H.R. Rep. No. 105-148, at 542 (1997).

^{8/} *Touche, Remnant & Company*, SEC No-Action Letter (Aug. 27, 1984).

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could avoid registration under the Investment Company Act only if they had no more than 100 "beneficial owners" as defined by section 3(c)(1) of the Investment Company Act. The staff reasoned that Congress could not have intended to permit an Offshore Fund to offer its securities to an unlimited number of United States persons without being required to register under the Investment Company Act when a domestic private investment company was limited to 100 beneficial owners.

The *Touche, Remnant* position has been the subject of several further interpretations. These letters have confirmed that United States jurisdictional interest in an Offshore Fund is based in large part on the identity of the Fund's beneficial owners. Under the staff's current approach, an Offshore Fund that uses United States jurisdictional means to offer, sell, or deliver its securities generally will not be treated as having made a "public offering" for purposes of section 7(d),^{2/} so long as:

(a) the Offshore Fund has no more than 100 beneficial owners of its voting securities who are United States Persons,^{10/} that either:

(i) purchased voting securities directly or indirectly from the Offshore Fund, its agents, affiliates, or intermediaries, regardless of whether the securities were purchased in an offshore transaction, or

(ii) are transferees of United States Persons that acquired the securities from the Offshore Fund;

unless each person described in (i) and (ii) above is a qualified purchaser for purposes of section 3(c)(7),^{11/} and

^{2/} Offers and sales made without the use of any United States jurisdictional means will not, of their own accord, trigger the application of the Investment Company Act regardless of whether the purchasers are United States Persons. *See, e.g., Global Mutual Fund Survey*, SEC No-Action Letter (July 14, 1992) ("sales by foreign funds made abroad that do not use the United States mails or any means or instrumentality of interstate commerce, whether the sales are made to United States or foreign investors, would not violate section 7(d)").

^{10/} *See* footnote 2, *supra*.

^{11/} *See id.* (confirming that Offshore Funds relying on section 7(d) could offer and sell their securities to United States Persons that are qualified purchasers in reliance on section 3(c)(7) and clarifying the ability of an Offshore Fund to rely on the definition of United States

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(b) the Offshore Fund sells its securities in the United States only in private offerings. In this regard, the staff appears to have accepted the view that an Offshore Fund making a concurrent public offering outside of the United States comporting to the safe harbor provided by rule 903 of Regulation S need not integrate the two offerings and will not be engaged in a public offering in the United States for purposes of section 7(d) if the Offshore Fund limits the beneficial ownership of its voting securities as described above.^{12/}

II. GLOBAL PRIVATE OFFERINGS AND PRIVATE MEETINGS IN THE UNITED STATES WITH FOREIGN INVESTORS

The provision of administrative services in the United States by an Offshore Fund following repeal of the Ten Commandments creates an increased likelihood that Foreign Investors may seek to speak with United States entities retained by the Offshore Fund to provide administrative and advisory services and to meet with them while the Foreign Investors are temporarily in the United States. We submit that such activity, solely in the context of a global *private* offering, should not be considered the equivalent of a "public offering" under section 7(d) or require the counting or qualification of the Foreign Investor, provided that: (i) the Offshore Fund employ procedures to identify, and count or qualify as applicable, all United States Persons to whom it sells its securities on a worldwide basis for purposes of section 7(d) in accordance with staff positions; (ii) the relevant offering materials disclose prominently and fully that the issuer is not registered under the Investment Company Act and its securities are not being

Person in rule 902(o) of Regulation S) and *Investment Funds Institute of Canada*, SEC No-Action Letter (Mar. 4, 1996) (clarifying that, subject to certain requirements, Offshore Funds must count all United States residents to whom they sell their securities, as well as any transferees of United States residents who purchase securities in private offerings in the United States, but generally need not count United States residents that purchase securities in *bona fide* secondary transactions outside of the United States or the transferees of such United States residents).

^{12/} Although the staff rejected the notion that rule 903 was determinative in the *Goodwin, Proctor & Hoar* no-action letter, the staff did so because it was unwilling to permit an Offshore Fund to sell its securities directly to United States Persons, even in "offshore transactions" as defined by rule 902(i), without counting or qualifying such persons under section 3(c)(1) or 3(c)(7), respectively. The staff clearly assumed, however, that a foreign offering that comported with the safe harbor provided by rule 903 and counted or qualified all United States Persons for purposes of sections 3(c)(1) or 3(c)(7), respectively, would not be deemed to be engaged in a "public offering" for purposes of the Investment Company Act. *See also Investment Funds Institute of Canada.*

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registered under the Securities Act; and (iii) the Offshore Fund not sell its securities either domestically or abroad by means of any "general solicitation" or advertisement and any offers and/or sales occurring in the United States be effected in private offerings exempt from the registration requirements of section 5 of the Securities Act.^{13/}

A. The Status of Investors as United States Persons

Under current staff interpretations, a private meeting held in the United States with a Foreign Investor in the context of a global private offering does not create a United States jurisdictional interest in applying the Investment Company Act to an Offshore Fund. The principle that applies is similar to the approach taken by the staff in the *Goodwin* and *Investment Funds* letters: the staff looks to the permanent residence of a natural person to determine status as a *United States Person* for purposes of section 7(d). The staff thus requires that an Offshore Fund using United States jurisdictional means treat all direct sales to United States Persons as subject to section 3(c)(1) or section 3(c)(7), regardless of the location of the investor during any offer or sale. A meeting with a Foreign Investor physically but only temporarily present in the United States would not result in a change in the Foreign Investor's jurisdiction of residence. The United States jurisdictional interest in an Offshore Fund derived from the ownership of interests in the Offshore Fund by its residents would not be implicated simply because a Foreign Investor purchased shares of an Offshore Fund at a meeting in the United States.^{14/}

To ensure that those persons who meet in the United States with Fund personnel are appropriately counted or qualified for purposes of section 3(c)(1) and/or 3(c)(7), the Offshore Fund will maintain and follow procedures designed to determine the United States Person status of all such persons prior to the sale of Fund shares. Such procedures will include obtaining subscription or other documents in which the Foreign Investor certifies his status. As a result,

^{13/} Assuming a fund has not otherwise made a public offering in the United States, the staff has indicated for purposes of section 7(d) that it is most concerned with the identity of any direct purchaser rather than the location of the purchaser at the time of offer or sale. In this regard, we note that a United States Person who is temporarily abroad must be counted or qualified for purposes of section 7(d) if he acquires securities from the Offshore Fund or its agents and affiliates. We respectfully submit that limited contact consisting, at most, of a private offer or sale in the United States by an Offshore Fund that is not making any public offering does not raise sufficient United States regulatory concerns under the Investment Company Act to require the counting or qualification of Foreign Investors.

^{14/} By contrast, Regulation S would permit the sale of securities of an Offshore Fund without registration under the Securities Act of 1933 based on the location of the buyer at the time of offer and sale.

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meetings in the United States with Foreign Investors will not impact the ability of an Offshore Fund to comport with staff interpretive statements concerning the United States' jurisdictional interest in an Offshore Fund based on the number of the Offshore Fund's shareholders who are United States Persons.

B. Disclosure that the Issuer and its Securities are Unregistered

Investors in Offshore Funds typically receive clear and abundant disclosure regarding the Offshore Fund's jurisdiction of incorporation and the applicable regulatory scheme. An Offshore Fund that meets with investors in the United States will include prominent and unmistakable disclosure in any offering material distributed to potential investors that the issuer is not registered under the Investment Company Act and its securities are not being registered under the Securities Act. As a result, potential investors will not suffer the misperception that, by meeting in the United States, they have invoked the application and protections of the Investment Company Act or the Securities Act in relation to an Offshore Fund.

C. Private Offerings

Under the express language of section 7(d), the operative event triggering United States jurisdiction over an Offshore Fund is a "public offering." Such a "public offering" might arise in connection with a global private offering only if the offering activities were not exempt from the registration requirements of the Securities Act, or if the number of United States resident beneficial owners exceeded the number permitted by the marriage of section 7(d) to sections 3(c)(1) and 3(c)(7). The meetings contemplated by our request, however, would not cause either result.^{15/}

^{15/} To ensure that any offering activities by an Offshore Fund performing administrative functions in the United States are sufficiently private for purposes of the United States, an Offshore Fund relying on this position could not make any offer or solicit sales of securities by any form of general solicitation or advertisement as defined in rule 502(c) of Regulation D under the Securities Act. The prohibition on the use of any general solicitation or general advertisement includes but is not limited to a general advertisement, article, notice, or other communication by the Offshore Fund or any person acting on its behalf that offers or solicits the sale of interests in the Offshore Fund, whether effected through any newspaper, magazine, or similar media or broadcast over television, radio, or the internet, and a prohibition on offers or sales to persons who have been invited to seminars or meetings by any general solicitation or general advertisement.

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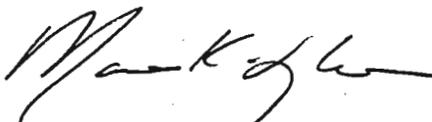
D. Performance of Administrative Functions in the United States

Finally, we respectfully request that the staff confirm that an Offshore Fund making a global private offering can perform administrative activities in the United States so long as such activities are consistent with the private nature of its offering. As noted previously, the United States' jurisdictional interest in an Offshore Fund making a private offering in the United States turns on two questions: whether offering activities in the United States are appropriately circumscribed so as not to constitute a public offering for the general purposes of the Securities Act and whether the Offshore Fund has more than 100 beneficial owners of its securities who are United States Persons (unless each United States Person is a qualified purchaser).

The private nature of United States directed offering activities is governed by the nature of such activities, rather than the location from which those activities are conducted. Thus, an Offshore Fund making a global private offering would not be effecting a "public offering" solely by virtue of the provision of additional administrative functions in the United States. For that reason, such an issuer may freely use United States jurisdictional means to effect its private offering activities, including through the performance of any Ten Commandments administrative functions, subject to the general requirements for private offerings and the specific requirement that it count or qualify all United States Persons.

For the foregoing reasons, we respectfully request that the staff confirm that a Foreign Investor who is temporarily in the United States may meet privately with the sponsor or manager of an Offshore Fund conducting a global private offering, and that such an Offshore Fund may perform routine Ten Commandments administrative functions in the United States without being treated as making a public offering for purposes of section 7(d). Thank you for your consideration of this request. If you have any questions, or you would like to meet to discuss our request, please contact Jeremy N. Rubenstein at (202) 663-6159 or Marianne K. Smythe at (202) 663-6663.

Sincerely,



Marianne K. Smythe