

**PUBLIC**

SEP 2 1993

Our Ref. No. 93-233-CC  
The South America  
Fund N.V.  
File No. 132-3

RESPONSE OF THE OFFICE OF CHIEF COUNSEL  
DIVISION OF INVESTMENT MANAGEMENT

Your letters dated July 16, and April 28, 1993 and October 26, 1992, request our assurance that we would not recommend that the Commission take any enforcement action under Sections 18(d) and 23(b) of the Investment Company Act of 1940 (the "1940 Act") if, after registering with the Commission under the 1940 Act, the South America Fund N.V. (the "Fund") maintains a capital structure that includes long-term warrants (the "Warrants") and, for a brief period, sells its common stock at a price below net asset value without first obtaining shareholder approval.

The Fund was formed on July 16, 1991 as a closed-end investment company, organized under the laws of the Netherlands Antilles. In August 1991, the Fund issued 6,400,000 units, each of which consisted of five shares of common stock and one Warrant. Each Warrant entitles the holder to purchase one share of common stock at a price of \$2.00 per share at any time through August 11, 1996. At the time the Fund issued the Warrants, it was neither registered nor required to be registered with the Commission under the 1940 Act. 1/ You state that, at the time the Fund issued the Warrants, it did not contemplate reorganizing in the U.S. The Fund now proposes to reorganize as a Delaware corporation and to register under the 1940 Act as a closed-end, management investment company. 2/ The Fund proposes to list its

1/ The Fund did not register its securities under the Securities Act of 1933 (the "Securities Act"). The Fund offered some of its units in the United States in transactions exempt from registration under the Securities Act by Section 4(2) of the Securities Act and Rule 144A thereunder. The Fund also offered units outside the United States in transactions not subject to registration under the Securities Act, in accordance with Regulation S. The Fund has taken steps to assure that no more than 100 U.S. investors own its securities. These steps included placing a restrictive legend on each stock and warrant certificate, requiring that shareholders document their nationality, and, if necessary, requiring ineligible U.S. investors to redeem their shares.

2/ The Fund currently uses two sub-advisers that are not registered with the Commission under the Investment Advisers Act of 1940 ("Advisers Act"). You state that, prior to registering under the 1940 Act, either the Fund's sub-advisers will register under the Advisers Act, or the Fund will terminate the subadvisers and replace them with registered advisers. Telephone conversation between Paula M. Gaccione and Amy R. Doberman, dated November 13, 1992.

common stock but not the Warrants on a U.S. exchange. The common stock and the Warrants currently are, and will continue to be, listed on the London Stock Exchange.

Section 18(d) of the 1940 Act prohibits a registered closed-end investment company from issuing warrants unless they expire within 120 days of issuance. You believe that, although Section 18(d) prohibits a registered investment company from issuing certain warrants, it does not require a company to modify its preregistration capital structure to comply with this statutory provision. Because you believe that the Fund's reorganization will not result in a new issuance of securities, 3/ you contend that the Fund should not be required to redeem the Warrants when it registers under the 1940 Act. 4/

The express terms of Section 18, and its legislative history, support your interpretation. Section 18(a) generally prohibits a registered, closed-end investment company from issuing senior securities, and Section 18(d) specifically prohibits a fund from issuing long-term warrants. Although Section 18 clearly reflects Congressional concern with the dilutive effect on a fund's common stock of senior securities in general, and long-term warrants in particular, the statute appears only to prohibit an investment company from issuing certain securities concurrent with or subsequent to its

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3/ You state that the Fund proposes to reorganize as a Delaware corporation in accordance with the procedures set forth in Section 388 of the Delaware General Corporation Law. You represent that a foreign corporation relying on Section 388 is assumed to have been organized at the time of its original formation under foreign law and therefore its reorganization as a Delaware corporation does not result in an issuance of securities. Accordingly, you believe that the Fund is not required to register its securities under the Securities Act. Telephone conversation between Amy R. Doberman and Paula M. Gaccione, dated July 1, 1993. You do not request, and we do not offer, any opinion with respect to whether the Fund's reorganization as a Delaware corporation will result in a new issuance of securities or require registration of the Fund's securities under the Securities Act.

4/ You state that it is impractical for the Fund to redeem the Warrants because, according to the Warrant Agreement, they are redeemable only by unanimous consent of the warrant holders.

registration. 5/ While the original Senate bill that became the 1940 Act included a provision that would have given the Commission authority to require an investment company to conform its capital structure with Section 18 upon registration, this provision was not enacted. 6/ A company whose capital structure does not comply with Section 18 may thus register with the Commission as an investment company without changing its capital structure. 7/

We note, however, that the Warrants create the potential for substantial dilution of common stockholder interests. Although you represent that the Fund will disclose the existence and terms of the Warrants in all shareholder reports and all public announcements regarding the commencement of common stock trading in the U.S., 8/ if, as you propose, the Warrants are not listed in the U.S., their existence may not be readily apparent to investors. Because this result would be especially unfair to uninformed investors, we believe that the Warrants should be listed on the same U.S. exchange as the Fund's common stock. Moreover, to prevent any further dilution of common stockholder interests, we believe that the Fund should not conduct any rights offering in which common stock is offered at a price less than net asset value as long as there are any outstanding Warrants.

If the outstanding Warrants are exercised after the Fund registers, the Fund may violate Section 23(b). At the time the

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5/ See Surfcastle (pub. avail. Mar. 14, 1988) (acknowledging this interpretation of Section 18 by way of contrast to Section 61(b) of the 1940 Act, which requires a business development company ("BDC") to conform its capital structure before electing to be treated as a BDC).

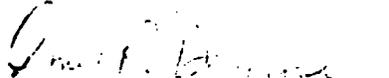
6/ S. 3580, 76th Cong., 3d Sess., §18 (1940).

7/ We note, however, that the capital structure requirements of Section 18 apply to all investment companies that are either registered or required to register with the Commission. In re Townsend Corp. of America, Investment Company Act Rel. No. 4045 (September 2, 1964) (once company in question decided to become an investment company, it could no longer issue warrants that did not comply with Section 18(d)). We also note that a fund that issued long-term warrants prior to registering with the Commission for the purpose of evading the 1940 Act's capital structure requirements would violate Section 48(a) of the 1940 Act.

8/ Telephone conversation between Amy R. Doberman and Paula M. Gaccione, dated July 28, 1993. In addition, the Fund is required to fully describe its capital structure in all shareholder reports and proxy statements.

Fund registers under the 1940 Act, the exercise price of the Warrants may be less than the Fund's net asset value per share. Section 23(b) prohibits a registered closed-end fund from selling its common stock at a price below net asset value, except under certain conditions. While Section 23(b)(2) permits this practice if the Fund obtains the consent of a majority of its common stockholders, the Fund may have to issue stock to exercising warrant holders immediately following registration but before a shareholder vote. You represent that, after registering under the 1940 Act, the Fund will obtain the requisite shareholder approval under Section 23(b)(2) as soon as reasonably practicable. 9/

On the basis of the facts and representations in your letters and the telephone conversations, we would not recommend that the Commission take any enforcement action under Sections 18(d) and 23(b) if, after registering under the 1940 Act, the Fund does not redeem the Warrants and, for a brief period, sells stock to exercising Warrant holders at a price below net asset value without first obtaining shareholder approval. Our conclusion is based particularly on your representations that (1) the Fund was not required to register under the 1940 Act at the time it issued the Warrants; (2) the Fund will disclose the existence of the Warrants and describe their terms in all public announcements regarding the commencement of its listing on a U.S. exchange, as well as in all shareholder reports; and (3) the Fund will obtain shareholder approval to issue common stock at less than net asset value as soon as reasonably practicable after registering under the 1940 Act. Our position is conditioned on the Fund (1) listing the Warrants on the same U.S. exchange on which the Fund's shares will trade; and (2) abstaining from conducting any rights offering at less than net asset value while the Warrants are outstanding. Moreover, with respect to the question presented under Section 23(b), this response expresses the Division's position on enforcement action only and does not express any legal conclusions on the question presented.

  
Amy R. Doberman  
Senior Counsel

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9/ You represent that the Fund also will seek shareholder approval to issue common stock at less than net asset value when it solicits shareholder approval for the Fund's reorganization as a Delaware corporation. This approval would not satisfy the requirements of Section 23(b), which requires that the Fund obtain shareholder consent while it is a registered investment company.

WILLKIE FARR & GALLAGHER

ACT 1940 Act  
SECTION 18(d) 23(b)  
RULE \_\_\_\_\_  
PUBLIC AVAILABILITY \_\_\_\_\_

9-2-93  
New York  
Washington, DC  
London  
Paris

1940 Act/§ 18(d) & 23(b) (2)

July 16, 1993

Office of the Chief Counsel  
Division of Investment Management  
Securities and Exchange Commission  
450 Fifth Street, N.W.  
Washington, D.C. 20549

RECD S.E.C.  
JUL 19 1993  
FEE 016

Re: The South America Fund N.V.

Ladies and Gentlemen:

This letter supplements our letter to you dated October 26, 1992 (the "Original Letter") and our letter to you dated April 28, 1993, in which, on behalf of The South America Fund N.V. (the "Fund"), a closed-end investment company organized under the laws of the Netherlands Antilles, we requested assurance that the Division of Investment Management (the "Division") would refrain from recommending enforcement action to the Securities and Exchange Commission (the "Commission") upon the reorganization of the Fund into an investment company incorporated in Delaware and registered under the Investment Company Act of 1940, as amended (the "1940 Act"). Unless otherwise defined herein, capitalized terms have the definition attributed to them in the Original Letter.

The purpose of this supplemental letter is to provide you with information regarding the mechanisms that the Fund has in place for monitoring the number of its U.S. shareholders. As you are aware, none of the Fund's Units were registered under the Securities Act of 1933, as amended (the "Securities Act"), at the time of their initial offering, nor is the Fund registered under the 1940 Act. At the time of the offering and thereafter, care has been taken to seek to assure that the Common Stock and the Warrants will not be owned beneficially by more than 100 Ineligible U.S. Persons.<sup>1</sup>

<sup>1</sup> The Fund's offering circular defined "Ineligible U.S. Person" as (1) a "U.S. Person" (as defined below), (2) any corporation that is not a U.S. Person in which U.S. Persons hold 10% or more of either voting power or value, (3) any partnership that is not a U.S. Person in which a U.S. Person is a partner, or (4) a trust

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The measures employed are the following:

1. The underwriters of the offering represented and warranted to the Fund that Units would be placed with no more than 40 Ineligible U.S. Persons and that no such investor would acquire in excess of 10% of the Units issued by the Fund.
2. The offering to Ineligible U.S. Persons was made in compliance with Regulation D under the Securities Act or Regulation S under the Securities Act.
3. On an ongoing basis, every shareholder or warrant holder of the Fund must, at the request of the managing director of the Fund, furnish the Fund with documentation demonstrating whether the investor is an Ineligible U.S. Person. If the documentation is not supplied by a shareholder or warrant holder, as the case may be, or if it comes to the attention of the Fund at any time that any of the shares of Common Stock or Warrants are owned directly or beneficially by an Ineligible U.S. Person whose ownership would cause the Fund to be required to register under the 1940 Act or to register any of its Common Stock or Warrants under the Securities Act, then the Fund may require the shareholder or warrant holder to transfer his Common Stock or Warrants or may compel a redemption of the Common Stock or Warrants.
4. Common Stock and Warrants are issued only in registered form. The Common Stock and Warrant certificates are endorsed with a prominent legend providing that (1) they have not been registered under the Securities Act, (2) the Fund has not been registered under the 1940 Act, (3) the securities evidenced by the certificate cannot be transferred or sold to an Ineligible U.S. Person except as permitted by the Fund's managing director and

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that is not a U.S. Person whose grantor or any of whose beneficiaries is a U.S. Person. The term "U.S. Person" means (1) any citizen or resident of the United States, (2) a corporation or partnership created or organized in the United States or under the laws of the United States, or (3) a trust or estate which is subject to U.S. tax on its worldwide income from all sources.

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- (4) if the securities are beneficially owned by an Ineligible U.S. Person in circumstances where the Fund determines that such person's ownership would be prejudicial to the Fund, the securities may be required to be transferred or, alternatively, compulsorily redeemed by the Fund.
5. Each purchaser of Common Stock or Warrants is required to represent, among other things, that he understands and agrees to the restrictions set forth in No. 4 and that (a) he will not transfer any of his Common Stock or Warrants to an Ineligible U.S. Person, (b) he did not acquire nor will he transfer any of his Common Stock or Warrants within the United States without the prior approval of the Fund and (c) he will notify the Fund immediately if he becomes an Ineligible U.S. Person.
6. An agreement with both Euro-Clear and CEDEL, on the one hand, and the Fund, on the other hand, provides that a dividend payment or other distribution with respect to any shares of the Fund's Common Stock will be withheld if the shareholder has not provided to Euro-Clear or CEDEL written certification that it is not an Ineligible U.S. Person and, in turn, if Euro-Clear or CEDEL has not, therefore, provided to the Fund's transfer or other paying agent a written certification that it has received such shareholder certifications. The Euro-Clear or CEDEL participant must promptly advise the Fund's transfer agent or other paying agent of any change in the status of a beneficial owner to that of an Ineligible U.S. Person.

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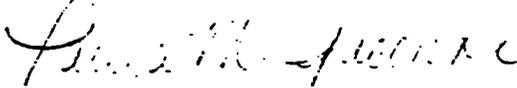
We trust that the above discussion is responsive to your request for additional information. Should you require additional assistance, please do not hesitate to contact me at (212) 935-8000.

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In accordance with Securities Act Release No. 6269 (Dec. 5, 1980), seven additional copies of this letter have been enclosed.

Very truly yours,



Paula M. Gaccione

PMG/rr  
Enclosures

cc: Amy Doberman, Esq.  
Mr. Piers Playfair  
Rose F. DiMartino, Esq.

# WILLKIE FARR & GALLAGHER

New York  
Washington, DC  
London  
Paris

1940 Act/§ 18(d) & § 23(b) (2)

April 28, 1993

Office of the Chief Counsel  
Division of Investment Management  
Securities and Exchange Commission  
450 Fifth Street, N.W.  
Washington, D.C. 20549



Re: The South America Fund N.V.

Ladies and Gentlemen:

This letter supplements our letter to you dated October 26, 1992 (the "Original Letter"), in which, on behalf of The South America Fund N.V. (the "Fund"), a closed-end investment company organized under the laws of the Netherlands Antilles, we requested that the Division of Investment Management (the "Division") of the Securities and Exchange Commission (the "Commission") concur in our view that upon the reorganization of the Fund into an investment company registered under the Investment Company Act of 1940, as amended (the "1940 Act"), the Fund's outstanding warrants (the "Warrants") would not be deemed to violate Section 18(d) of the 1940 Act. Unless otherwise defined herein, capitalized terms have the definition attributed to them in the Original Letter.

The purpose of this supplemental letter is two-fold. First, this supplemental letter broadens the relief requested in the Original Letter to encompass Section 23(b) (2) of the 1940 Act in order to permit, during the Interim Period (as such term is defined below), the Fund's Common Stock to be issued at a price below the Common Stock's current net asset value upon exercise of the Warrants. Second, this supplemental letter provides supporting information on the question of whether the reorganization of the Fund from a Netherlands Antilles limited liability company into a Delaware corporation and a closed-end, non-diversified management investment company registered under the 1940 Act and incorporated in Delaware (the "Transaction") results in a new issuance of the Fund's outstanding Warrants. As stated in the Original Letter, the chief purposes of the Transaction are to enhance the value of shareholders' investment in the Fund by permitting the development of a more liquid trading market for the Common Stock and to eliminate adverse tax consequences to U.S. investors associated with the Fund's being a PFIC.

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Discussion

I. Issuance of the Fund's Common Stock Below Net Asset Value

A. Background

The Original Letter explains that the Transaction involves: (1) the transfer of the Fund's corporate seat from the Netherlands Antilles to Delaware and (2) the registration of the Fund under the 1940 Act. The Original Letter stated that prior to the seat transfer, holders of the Fund's Common Stock would be asked to approve amendments to the Fund's Articles of Incorporation to change the Fund's name and to make such other changes as may be necessary to replace the Fund's existing Articles of Incorporation with a Delaware certificate of incorporation containing provisions more typical of a U.S. registered closed-end investment company. At the same time, holders of the Common Stock would be asked to approve the issuance of the Common Stock at a price below the Common Stock's current net asset value upon exercise of the Warrants, pursuant to Section 23(b)(2) of the 1940 Act.

The Warrants entitle the holders thereof, until August 26, 1996, to purchase one share of Common Stock at a price of U.S. \$2.00. Although such purchase price may be below the net asset value of the Fund's Common Stock on the exercise date of the Warrants, the Fund cannot unilaterally abrogate the rights of the warrant holders and, as set forth in the Original Letter, any amendment to the Warrant Agreement would require the unanimous consent of the warrant holders, a result that is impracticable, if not impossible, to achieve.

B. Statutory Language

Section 23(b)(2) of the 1940 Act prohibits the issuance of common stock by a registered closed-end investment company at a price below current net asset value unless such issuance is (1) in connection with an offering to the holders of one or more classes of the company's capital stock; (2) with the consent of a majority of the company's common stockholders; (3) upon conversion of a convertible security in accordance with its terms; (4) upon the exercise of any warrant outstanding on the date of enactment of the 1940 Act or issued in accordance with the provisions of Section 18(d); or (5) under such other circumstances as the Commission may permit by rules, regulations or orders for the protection of investors.

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The Staff has indicated that obtaining approval from holders of the Fund's Common Stock before the Fund becomes registered under the 1940 Act does not satisfy the requirements of Section 23(b)(2), which can be read to require that approval be obtained while the company is a regulated investment company. Thus, the Fund undertakes to call a special shareholders' meeting as soon as practicable after becoming registered under the 1940 Act to solicit shareholder approval of the issuance during the Interim Period (defined below) of the Common Stock below net asset value upon exercise of the Warrants. The Fund requests that the Staff refrain from recommending any action to the Commission if, during the period between the registration of the Fund as an investment company under the 1940 Act and the approval by the holders of its Common Stock of the issuance of the Common Stock at a price below net asset value (the "Interim Period"), the Fund issues shares at a discount from net asset value upon exercise of Warrants. Assuming this approval is obtained, the Fund's shareholders will have approved the issuance of the Common Stock at less than net asset value both immediately prior to the Transaction and again soon after the Transaction. The Fund will seek to minimize the length of the Interim Period by expeditiously filing proxy materials for review by the Staff following registration of the Fund as an investment company.

In view of the fact that the Warrants were validly issued when the Fund was a Netherlands Antilles limited liability company and at a time when a domestication in the United States was not contemplated, and in light of the short duration of the Interim Period, we believe the relief requested hereby is appropriate. The relief sought is necessary to facilitate the domestication of the Fund under U.S. law while preserving, as the Fund must, the contractual rights of the warrant holders.

## II. The Transaction Does Not Result in a New Issuance of Warrants

### A. Background

As discussed in our Original Letter, Section 18 prohibits the issuance of specified securities and the sale of those securities unless the issuer complies with the capital structure requirements of that section. Section 18(d) specifically prohibits the issuance of warrants expiring later than 120 days from their issuance. Nevertheless, precedent exists which indicates that a company subject to Section 18 does not have to change its capital structure as in effect before it

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becomes registered; however, any further sale or issuance of shares after the company is registered triggers the application of Section 18.<sup>1</sup>

With the exception of possible adjustments in the amount of Warrants outstanding pursuant to certain anti-dilution provisions, no additional Warrants are expected to be issued after the Fund becomes registered under the 1940 Act. Accordingly, the only basis upon which Section 18 would apply is if the Transaction itself resulted in an issuance (or reissuance) of the Warrants.

B. Discussion

Section 388 of the Delaware General Corporation Law provides, in pertinent part, that "upon filing with the Secretary of State a certificate of domestication ... the corporation shall be domesticated in this State and ... the existence of the corporation shall be deemed to have commenced on the date the corporation commenced its existence in the jurisdiction in which the corporation was first formed ..." Delaware counsel has informed us that there does not appear to be any judicial or administrative decision addressing the question of whether a security is deemed to be "reissued" upon the domestication of a corporation pursuant to Section 338. However, counsel's view is that the language and substance of Section 388 indicate that following its domestication in Delaware, the Fund is to be treated as a continuation of a foreign corporation and not as a new entity. Section 388 further provides that "the domestication of any corporation in this state shall not be deemed to affect any obligations or liabilities of the corporation incurred prior to its domestication." If Section 388 contemplated that a domestication in Delaware created a separate new entity, the foregoing provision would be unnecessary since there could be no previously existing obligations of a newly created entity. Thus, Delaware counsel believes that the Transaction should not be viewed as affecting the Warrants or in any way constituting an issuance or reissuance of the Warrants under Delaware law.

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<sup>1</sup> In re Surfcastle Inc., SEC No-Action Letter, [1988-1989 Transfer Binder] Fed. Sec. L. Rep (CCH) ¶ 78,847 at p. 3 (March 14, 1988) (emphasis added) (citations omitted).

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The Staff has granted no-action requests in connection with transactions involving various changes in the form of organization, investment policies and operating practices of a registrant.<sup>2</sup> In those cases, the relief is premised on the fact that the change in state of incorporation, for example, does not materially change the nature of the security held by the investor. While not directly applicable, some guidance as to federal policy on the issue of domestication can be obtained from studying Staff interpretations of Rule 145 under the Securities Act of 1933 ("Rule 145"), which indicate that the critical determinant of the applicability of the Rule 145 exemption is the effect which the change of domicile has upon the rights of shareholders. The Staff has granted no-action relief from registration for investment company reorganizations based on Rule 145(a)(2), which exempts from registration, securities issued in connection with a statutory merger or similar plan of acquisition where the sole purpose of the transaction is to change the issuer's domicile.<sup>3</sup> In general, a modification in the terms of a security that makes a fundamental change in the nature of the investment the security represents is a disposition of the modified security for value and a resultant sale of that security. In the situation at hand, there will be no significant change in the warrant holder's economic interests (that is, there will be no change in the terms of the Warrants or in the dividend, preference or liquidation rights of the underlying Common Stock). As indicated above, under Delaware law, the Fund continues as an entity with its outstanding obligations unimpaired. The Fund will have the same investment objectives

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<sup>2</sup> See Scudder Common Stock Fund, Inc. (avail. Oct 10, 1984) (a Massachusetts corporation reorganized as a Massachusetts business trust with a change in investment objective and fundamental investment restrictions); and Comstock Fund, Inc. (avail. Aug. 28, 1978) (a Delaware open-end investment company reincorporated in Maryland). Research has not disclosed any no-action positions taken by the Staff in connection with a domestication by a foreign corporation, as is contemplated here.

<sup>3</sup> See Lutheran Brotherhood Money Market Fund, Inc., CCH [1983-1984 Transfer Binder] Fed. Sec. L. Rep. 77,501. See also the Division of Corporation Finance's Interpretation of Rule 145, as expressed in Release No. 34-10,661 (Feb. 28, 1974).

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and policies after the Transaction as before the Transaction.  
Thus, no new issuance of Warrants should be deemed to result.

Conclusion

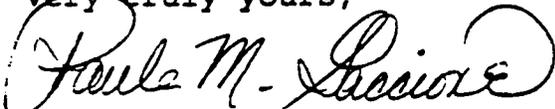
For the reasons set forth herein and in the Original Letter, we respectfully request that the Division advise us that it would not recommend any enforcement action to the Commission if (a) the Fund were to register as an investment company and maintain its capital structure as described in the Original Letter and as supplemented hereby and (b) the Fund were to issue shares of Common Stock at a discount to net asset value during the Interim Period upon exercise of the Warrants. The Fund hopes to effect the Transaction as soon as possible and, accordingly, solicits your prompt consideration of this matter.

We trust that the above discussion is responsive to your request for additional information. Should you require additional assistance, please do not hesitate to contact me at (212) 935-8000.

If you determine preliminarily that you are unable to concur in our view of the matters described herein and in the Original Letter, we specifically ask that you contact the undersigned or Rose F. DiMartino of this firm at (212) 935-8000 prior to transmittal of your response so that we may have an opportunity to address your concerns prior to the issuance of a negative response.

In accordance with Securities Act Release No. 6269 (Dec. 5, 1980), seven additional copies of this letter have been enclosed.

Very truly yours,



Paula M. Gaccione

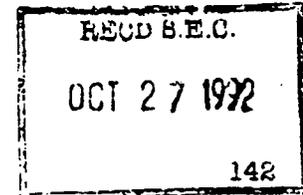
cc: Lawrence B. Stoller, Esq.  
Piers Playfair  
Rose F. DiMartino, Esq.

# WILLKIE FARR & GALLAGHER

1940 Act/§ 18(d)

October 26, 1992

Office of the Chief Counsel  
Division of Investment Management  
Securities and Exchange Commission  
450 Fifth Street, N.W.  
Washington, D.C. 20549



Re: The South America Fund N.V.

Ladies and Gentlemen:

On behalf of The South America Fund N.V. (the "Fund"), a closed-end investment company organized under the laws of the Netherlands Antilles, we respectfully request that the Division of Investment Management (the "Division") of the Securities and Exchange Commission (the "Commission") concur in our view that upon the reorganization of the Fund into an investment company registered under the Investment Company Act of 1940, as amended (the "1940 Act"), as described below, the Fund's outstanding warrants would not violate Section 18(d) of the 1940 Act.

The relief requested is supported by the specific language of Section 18(d) itself, which prohibits the issuance by a registered investment company of warrants expiring in more than 120 days. Since the Fund was not registered under the 1940 Act at the time it issued its warrants, nor was it required to register, Section 18(d) by its terms would not be violated if the Fund maintains its warrants outstanding after it registers as an investment company under the 1940 Act.

## Background

The Fund is a closed-end investment company, which was formed on July 16, 1991 under the laws of the Netherlands Antilles. The Fund was designed for investors desiring to participate in a diversified portfolio of South American securities.

On August 8, 1991, the Fund issued 6,400,000 units ("Units") at \$10 per Unit, each Unit consisting of five shares of the Fund's common stock, par value \$.01 per share (the "Common Stock"), and one warrant to subscribe for one share of Common Stock to be issued by the Fund (a "Warrant"). Each Warrant entitles the

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holder to subscribe for one share of Common Stock at a price of \$2.00 at any time until August 11, 1996, subject to certain adjustments. The Common Stock and the Warrants are listed separately on The International Stock Exchange of the United Kingdom and the Republic of Ireland, Ltd. (the "London Stock Exchange").

The issuance of the Common Stock and the Warrants was not registered under the Securities Act of 1933, as amended (the "1933 Act"), in reliance on the exemptions noted below, and the Fund is not registered under the 1940 Act in reliance on the exclusion in Section 3(c)(1) thereof and the terms of Section 7(d) thereof. A portion of the Units were offered in the United States in transactions exempt from the registration requirements of the 1933 Act pursuant to Rule 144A under the 1933 Act and Section 4(2) of that Act. A portion of the Units were also offered outside the United States in transactions not subject to the registration requirements of the 1933 Act in accordance with Regulation S thereunder. The Common Stock and Warrants are subject to certain restrictions on transfer in order to ensure compliance with U.S. securities and tax law and regulations, in particular, to seek to assure that the Fund can continue to avoid any requirement to register as an investment company under the 1940 Act.

The Fund is a "passive foreign investment company" ("PFIC") for U.S. federal income tax purposes, which results in certain adverse tax consequences to U.S. investors.<sup>1</sup>

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<sup>1</sup> Unless a shareholder subject to U.S. taxation makes the election, provided in Section 1295 of the Internal Revenue Code of 1986, as amended (the "Code"), the tax on the gain from the sale of shares of Common Stock will be determined by the excess distributions rule as follows: (1) the amount of the gain will be allocated ratably to each day of the holding period; (2) the tax will be computed at the highest effective rate for ordinary income for each year of the holding period on the amount of the gain allocated to such year; and (3) interest, at the prescribed Code rate, will be added to the amount of the tax, with interest commencing on the due date for the tax return for each year of the holding period prior to the year of sale. Thus, the entire gain will be treated as ordinary income whether such gain is attributable to undistributed income of the Fund or to unrealized appreciation in Fund investments.

If a shareholder makes the election described above, the shareholder will be required to include its pro rata share of the Fund's ordinary income (including short-term  
(Footnote Continued)

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The Fund's investment objective is long-term capital appreciation by investing primarily in South American equity securities (excluding Mexican equity securities). The Fund is managed by a managing director as required under Netherlands Antilles law, which also provides administrative and transfer agency services to the Fund. A supervisory board (the "Board") supervises the policies of the managing director and oversees the general business of the Fund. Currently, the Board consists of four persons, one of whom would be an "interested person" of the Fund if Section 2(a)(19) of the 1940 Act were applied. BEA Associates, an investment adviser registered under the Investment Advisers Act of 1940, as amended, is the investment adviser to the Fund. The Fund also has retained a sub-investment adviser in each of Argentina, Brazil, Chile and Venezuela.

#### The Warrants

Each Warrant entitles the holder thereof at any time during the period ending August 19, 1996 to purchase one share of Common Stock at a price (the "Exercise Price") of U.S. \$2.00, subject to adjustment in certain events.<sup>2</sup> The agreement governing the rights of warrant holders (the "Warrant Agreement") provides that, in lieu of adjusting the Exercise Price, the number of shares of Common Stock covered by each Warrant or the number of Warrants outstanding may be adjusted upon the occurrence of those events. The Warrants cannot, under the terms of the Warrant Agreement, be redeemed at the option of the Fund. Because any amendment to the Warrant Agreement to provide for

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1 (Footnote Continued)  
gains in excess of long-term losses) and long-term gains (i.e., the excess of net long-term gains over short-term losses) in the return of the shareholder for each taxable year. Actual distributions out of amounts so included will not be taxable to the shareholder.

2 The Exercise Price is subject to adjustment in certain events, including (i) the declaration of a dividend on the Common Stock payable in Common Stock; (ii) a stock split or consolidation of Common Stock; (iii) the issuance by reclassification of Common Stock; (iv) the issuance to all holders of Common Stock of rights or warrants entitling them to subscribe for or purchase Common Stock at less than the then market price; and (v) the distribution to all holders of Common Stock of evidences of indebtedness or assets of the Fund (other than cash dividends) or subscription rights (other than those referred to in clause (iv) above).

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such redemption would require the unanimous consent of the warrant holders, redemption of the Warrants is not practicable.

#### Proposed Transaction

The Fund proposes to reorganize itself from The South America Fund N.V., a Netherlands Antilles limited liability company, into The South America Fund, Inc., a Delaware corporation and a closed-end non-diversified management investment company registered under the 1940 Act (the "Transaction"). The chief purposes of the Transaction are to enhance the value of shareholders' investment in the Fund by permitting the development of a more liquid trading market for the Common Stock and to eliminate adverse tax consequences to U.S. investors associated with the Fund's being a PFIC.

The Transaction will involve the following steps:

1. Transfer of Corporate Seat

The Board has approved the transfer of the Fund's corporate seat from the Netherlands Antilles to Delaware, subject to receipt of a positive response to this letter and the satisfaction of certain other conditions. Under Netherlands Antilles law and pursuant to the Fund's Articles of Incorporation, the Fund is authorized to transfer its corporate seat by resolution of the Fund's managing director subject to the prior approval of the Board. Section 388 of the Delaware General Corporation Law provides that a foreign entity like the Fund can become a Delaware corporation by filing a certificate of domestication and a certificate of incorporation in Delaware. Upon the filing of these documents and upon the filing by the Fund's managing director of certain documents with the Commercial Register in Curacao, Netherlands Antilles, the Fund will be "domesticated" in Delaware, which means that the Fund would become a Delaware corporation subject to all the provisions and entitled to all the benefits of Delaware laws governing corporations.

Prior to the seat transfer, the holders of the Common Stock will be asked to approve amendments to the Fund's Articles of Incorporation (a) to change the Fund's name and (b) to make such other changes as may be necessary to replace the Fund's existing Articles of Incorporation with a Delaware certificate of incorporation containing provisions more typical of a U.S. registered closed-end investment company. At the same time, holders of Common Stock will be asked to approve the issuance of Common Stock at a price below the Common Stock's current net asset value upon exercise of the Warrants, pursuant to Section 23(b)(2) of the 1940 Act.

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2. Registration of the Fund under the 1940 Act

Upon transfer of the Fund's corporate seat to Delaware, the Fund will file a notification of registration on Form N-8A and a registration statement on Form N-2 under the 1940 Act.

3. Listing Matters

The Fund would apply to list the Common Stock on the New York Stock Exchange, the American Stock Exchange or the National Association of Securities Dealers Automated Quotation System. The listing of the Common Stock and the Warrants on the London Stock Exchange is currently expected to be maintained.

4. Shelf Registration

The Fund believes that certain persons that purchased Common Stock in the initial offering of Units pursuant to Rule 144A under the 1933 Act may be interested in filing a "shelf" registration statement pursuant to Rule 415 under the 1933 Act that would enable them to sell all or a portion of their shares from time to time during the two year period following the effectiveness of the registration statement. The Fund does not intend to issue any shares of Common Stock or Warrants at or about the time of the transaction individually or together with selling shareholders, except in connection with the exercise of Warrants in accordance with their terms.

Question Presented

Section 18 of the 1940 Act forbids the issuance of specified securities unless certain conditions are satisfied regarding the type, number, terms and asset coverage of the securities. Section 18(d) provides, in relevant part, that "it shall be unlawful for any registered management investment company to issue any warrant or right to subscribe to purchase a security of which such company is the issuer, except in the form of warrants or rights to subscribe expiring not later than one hundred and twenty days after their issuance ..."

As noted above, the Fund has outstanding Warrants that expire in approximately four years. At the time the Fund becomes registered as an investment company, the Warrants would not expire within 120 days. The question, therefore, arises as to whether the Fund's capital structure would violate Section 18(d) of the 1940 Act. For the reasons set forth below, we believe that it would not.

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## Discussion

### A. Statutory Language and Legislative History

The language of Section 18(d) itself is clear. It prohibits only the issuance by a registered investment company of warrants expiring in more than 120 days. The Fund, at the time it issued the Warrants, was not registered under the 1940 Act, nor was it required to register, having taken advantage of the exclusion from the definition of investment company provided by Section 3(c)(1) of the 1940 Act. Except for possible adjustments in the amount of Warrants outstanding pursuant to the anti-dilution provisions described above, no additional Warrants are expected to be issued after the Fund becomes registered under the 1940 Act.

Section 18(d) does not require an entity to conform its capital structure to the requirements of the Section once it becomes registered. This is fully supported by legislative history as well as the plain language of the Section.<sup>3</sup> Prior to enactment of Section 18(d), consideration was given to vesting the Commission with the power to cause an investment company to conform its capital structure to the requirements of that Section, but no such language was ever included in the enacted version.<sup>4</sup>

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<sup>3</sup> If Congress meant for the statute to have a broader reach, it would have included language similar to the language included in Section 61(b) of the 1940 Act, which explicitly requires an issuer's capital structure to meet the requirements of the 1940 Act when it files an election to be treated as a business development company "as if it were issuing a security of each class which it has outstanding at such time."

<sup>4</sup> See Comm. on Banking and Currency, Hearings before a subcomm. on S. 3580, 76th Cong., 3d Sess. 384-385 (1940). See also Alfred Jaretzki, Jr., The Investment Company Act of 1940, 26 Wash. L.Q. 303, 332 (1941) (certain persons demanded a time limit during which existing companies would have to conform to their capital structures to Section 18). See also Tamar Frankel, 3 The Regulation of Money Managers 125 (1980) ("[i]f a company sold or issued securities before it became an investment company without complying with section 18, and then became an investment company, there is no violation of the section.")

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## B. Precedents

The relief sought hereby is supported by language in an exemptive order and in a Division no-action letter -- In re Townsend Corporation of America and Townsend Management Company ("Townsend")<sup>5</sup> and In re Surfcastle Inc. ("Surfcastle").<sup>6</sup>

In Townsend, an unregistered, closed-end investment company had issued perpetual warrants. The company subsequently became registered. The company's capital structure was determined to have violated Section 18(d) of the 1940 Act because the company's warrants were found to have been issued at a time when the company, although not registered under the 1940 Act, was an investment company within the meaning of Section 3(a) of the 1940 Act and was required to be registered as such.<sup>7</sup> In reaching this result the Commission stated flatly that Section 18(d) is applicable only to registered investment companies or to companies required to be registered. Since the Fund has availed itself, and, until registered, will continue to avail itself, of the Section 3(c)(1) exclusion from the definition of investment company, Townsend supports the view that the Fund need not conform its capital structure to Section 18(d) after it registers.

Surfcastle involved the registration of a company as a business development company ("BDC") under the 1940 Act that prior to registration had issued warrants exercisable for a period longer than one year. The staff concluded that the warrants did not violate Section 18(d) of the 1940 Act because, measured from the date the company's registration as a BDC became effective, the warrants expired within 120 days, as required by Section 18(d). In a footnote, the staff of the Division took the opportunity to explain the difference between Section 61(b) of the 1940 Act, which governs BDCs, and Section 18(d) as applied to other registered investment companies:

...[S]ection 61(b) treats the capital structure of a company that becomes a BDC differently than a company that becomes a registered management investment company subject to the provisions of section 18.

<sup>5</sup> Townsend, Investment Company Act Release No. 4045, [1964-1966 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 77,120, at 82,063 (Sept. 2, 1964).

<sup>6</sup> Surfcastle, SEC No-Action Letter, [1988-1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 78,847, at 78,287 (March 14, 1988).

<sup>7</sup> Townsend at pp. 71-73.

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Section 18, contrary to section 61(b), prohibits the issuance of specified securities and the sale of those securities unless the company complies with the capital structure requirements of that section. *Thus, a company subject to section 18 does not have to change its capital structure before it becomes registered....* However, any further sale or issuance of shares after the company is registered triggers the application of section 18....<sup>8</sup>

Both Townsend and Surfcastle confirm the plain language of Section 18(d) of the 1940 Act that the registration of a fund as an investment company does not require previously outstanding warrants to be modified to conform to Section 18(d) except where the fund was required to register at the time the warrants were issued. Since the Fund was not required to register at the time it issued the Warrants, its subsequent registration does not result in a violation of Section 18(d) or require the terms of the Warrants to be modified to shorten the Exercise Period.

#### C. Benefits to the Fund and its Shareholders

The Fund was designed primarily as an investment vehicle for non-U.S. institutional investors. Shares were not publicly offered in the United States or listed on an U.S. exchange. The Warrants themselves were offered because investors in offshore funds listed on the London Stock Exchange have come to expect this structure. This contrasts sharply with the offering of country funds designed for U.S. retail markets. In addition, the investment policies reflect the institutional, rather than retail, nature of the Fund. In contrast to the three U.S. registered equity funds investing in the same geographic area as the Fund -- The Latin America Investment Fund, Inc., The Latin America Equity Fund, Inc. and The Latin America Discovery Fund, Inc. -- the Fund does not invest in Mexican equity securities. The reason for this is that institutional investors of the type to which the Fund was marketed have the sophistication to invest directly in Mexico without using a pooled vehicle, such as the Fund.

Since the offering of the Units, the premises on which the Fund was organized have been reevaluated in light of the greater-than-anticipated number of U.S. investors in the Fund and the less-than-anticipated liquidity of the Common Stock on

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the London Stock Exchange. The Board believes that the Transaction would provide several important benefits to the Fund and its shareholders.

First, the Transaction would result in the Common Stock being traded on a U.S. securities market that may reasonably be expected to provide increased liquidity for the Fund's shareholders. The proliferation of the number and variety of securities and trading strategies and the increase in market volatility over the past few years have made liquidity highly important to investors. While the London Stock Exchange provides a liquid market for the trading of many securities, it has not proven to be such for the Common Stock and Warrants. Set forth below is a table showing the average daily trading of the Common Stock and Warrants on the London Stock Exchange in comparison with the trading of three NYSE-listed U.S. investment companies investing in the same geographic area:

Name of Fund/Shares	Shares	Net Asset	Market	Average Daily
	Outstanding on Oct. 20, 1992 (millions)	Value Per Share on Oct. 20, 1992	Price Per Share on Oct. 20, 1992	Trading Volume of Shares in September 1992 <sup>9</sup>
The South America Fund N.V.				
Common Stock .....	32.0	\$2.11	\$1.45	15,000
Warrants .....	6.4	--	.45	2,000
The Latin America Investment Fund, Inc. ....	4.0	23.54	23.125	18,200
The Latin America Equity Fund, Inc. ....	6.0	14.56	13.25	19,300
The Latin America Discovery Fund, Inc. ....	5.9	12.72	11.375	8,200

Second, the Fund is considered a PFIC for U.S. federal income tax purposes. In order to comply with certain London Stock Exchange listing requirements, the Fund does not distribute net realized capital gains to its shareholders; instead, it reinvests them. Accordingly, Fund shareholders that are U.S. taxpayers are subject to the Code provisions described above, which may require them to pay U.S. taxes without having received a distribution to cover the payment due. As a U.S. registered fund, the Fund contemplates distributing

<sup>9</sup> The inception dates of the funds other than the Fund are as follows: The Latin America Investment Fund, Inc. -- July 25, 1990; The Latin America Equity Fund, Inc. October 22, 1991; and The Latin America Discovery Fund, Inc. -- June 16, 1992.

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substantially all of its net realized capital gains as well as net investment income annually. Although the consequences of the Fund's being a PFIC were recognized and disclosed to investors at the time the Units were offered, the number of U.S. investors and the amount of realized capital gains could not have been anticipated at that time. For the fiscal year ended December 31, 1991, the Fund had net realized capital gains of \$3,913,913, and for the semiannual period ended June 30, 1992, the Fund had net realized capital gains of \$8,248,497.

Lastly, once the Fund is registered, it becomes subject to the full spectrum of regulation afforded by the 1940 Act. This enhanced level of regulatory protection is beneficial to existing shareholders of the Fund as well as potential investors, for it provides them with specific safeguards against self-dealing, conflicts of interest, misappropriation of funds and overreaching in many areas.

#### Conclusion

In light of the statutory language, the legislative history and the above-referenced precedents and in view of the substantial benefits to shareholders that can be expected to result from the Transaction, it is our view that Section 18(d) of the 1940 Act does not prohibit the Fund, once registered as a U.S. investment company, from maintaining a capital structure that consists, in part, of outstanding Warrants with a maturity greater than 120 days.

For the reasons set forth herein, we respectfully request that the Division advise us that it would not recommend any enforcement action to the Commission if the Fund were to register as an investment company and maintain its capital structure as herein described. The Fund hopes to effect the Transaction as soon as possible and, accordingly, solicits your prompt consideration of this matter.

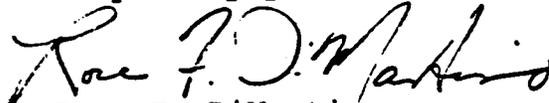
If you determine preliminarily that you are unable to concur in our view of these matters, we specifically ask that you contact the undersigned or Paula Gaccione of this firm at (212) 935-8000 prior to transmittal of your response so that we may have an opportunity to address your concerns prior to the issuance of a negative response.

0262B

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In accordance with Securities Act Release No. 6269 (Dec. 5, 1980), seven additional copies of this letter have been enclosed.

Very truly yours,

  
Rose F. DiMartino

cc: Piers Playfair  
Paula M. Gaccione, Esq.