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SECTION 3(c)(1); 3(c)(7); 7(d)
RULE _____
PUBLIC _____
AVAILABILITY 2-28-97

RESPONSE OF THE OFFICE OF CHIEF COUNSEL
DIVISION OF INVESTMENT MANAGEMENT

Our Ref. No. 96-434-CC
Goodwin, Procter & Hoar
File No. 132-3

Your letter dated October 24, 1996 requests our concurrence with your views on three issues concerning the application of Section 7(d) of the Investment Company Act of 1940 ("Investment Company Act"). First, you request confirmation that investment companies formed under the laws of a jurisdiction other than the United States and not registered under the Investment Company Act ("Foreign Funds") may offer and sell their shares to U.S. residents that are "qualified purchasers" in accordance with the terms of new Section 3(c)(7) of the Act.¹ Second, you request our concurrence that Foreign Funds may rely on the definition of "U.S. person" in Rule 902(o) of Regulation S ("Reg. S") under the Securities Act of 1933 ("Securities Act") in considering whether a potential investor in a Foreign Fund is a U.S. resident beneficial owner for purposes of determining whether the Fund is acting in accordance with Section 7(d) of the Investment Company Act.² Third, you seek our concurrence that a Foreign Fund would not be deemed to violate the provisions of Section 7(d) if it sells its securities in an offering in the United States that is not a public offering within the meaning of Section 7(d) ("private offering") at the same time that it conducts an offshore public offering of its securities that complies with the provisions of Reg. S.

I. Background

Section 7(d) of the Investment Company Act prohibits a Foreign Fund from using the U.S. mails or any means or instrumentality of interstate commerce to offer or sell its securities in connection with a public offering unless the Commission issues an order permitting the Foreign Fund to register under the Investment Company Act. Section 7(d) authorizes the Commission to issue such an order only if the Commission finds that it is both legally and practically feasible to enforce the provisions of the Investment Company Act

¹ Section 3(c)(7) was added to the Investment Company Act by the National Securities Markets Improvement Act of 1996 (the "1996 Amendments").

² Reg. S clarifies the extraterritorial application of the registration provisions under the Securities Act. Reg. S provides generally that Section 5 of the Securities Act does not apply to offers and sales of securities if both the offer and the sale occur outside the United States. Reg. S also includes two safe harbors for specified transactions: Rule 903 (the "issuer safe harbor") and Rule 904 (the "resale safe harbor"). Transactions that satisfy all the conditions of the applicable safe harbor are deemed to be made outside the United States and thus are not subject to the registration requirements of Section 5 of the Securities Act. See Securities Act Release No. 6863 (Apr. 24, 1990) (adopting Reg. S). Reg. S does not apply to offers and sales by open-end investment companies or unit investment trusts registered or required to be registered or closed-end investment companies required to be registered, but not registered, under the Investment Company Act. Preliminary note 8 to Reg. S.

against the Foreign Fund, and that the issuance of the order is consistent with the public interest and the protection of investors. Congress has indicated that Section 7(d) was intended to subject Foreign Funds that access the U.S. market to the same type and degree of regulation that applies to U.S. investment companies.³

By its terms, Section 7(d) does not address a private offering in the United States undertaken by a Foreign Fund. In light of the purpose of Section 7(d), however, the staff has interpreted and applied that section with reference to Section 3(c)(1) of the Investment Company Act. Section 3(c)(1) excepts from the definition of investment company any issuer whose securities are beneficially owned by not more than 100 persons and that is not making, and does not presently propose to make, a public offering of its securities (a "Section 3(c)(1) company").⁴ In *Touche Remnant & Co.* (pub. avail. Aug. 27, 1984) ("*Touche Remnant*"), the staff concluded that a Foreign Fund could make a private offering in the United States without violating Section 7(d) only if after the private offering the Fund's securities are held by no more than 100 beneficial owners resident in the United States.⁵

The staff's position in *Touche Remnant* is intended to treat private offerings by Foreign Funds comparably to offerings undertaken by Section 3(c)(1) companies. *Touche Remnant* also reflects the staff's conclusion that, in drafting Section 7(d), Congress could not have intended Foreign Funds to be able to conduct private offerings in the United States to a greater extent than those permitted to be conducted by Section 3(c)(1) companies.⁶

³ See S. Rep. No. 1775, 76th Cong., 3d Sess. 13 (1940); H.R. Rep. No. 2639, 76th Cong., 3d Sess. 13 (1940).

⁴ Section 3(c)(1) reflects a determination that public interest concerns arise when an investment company has more than 100 shareholders and that, as a result, the investment company should be required to register under the Investment Company Act. See Investment Trusts and Investment Companies: Hearings on S. 3580 Before a Subcomm. of the Senate Comm. on Banking and Currency, 76th Cong., 3d Sess. 179 (1940).

⁵ The Commission cited this position with approval in Securities Act Release No. 6862 (April 23, 1990) (adopting Rule 144A under the Securities Act).

⁶ While Section 7(d), by its terms, prohibits only a "public offering" of securities by a Foreign Fund in the United States, applying the limits of Section 3(c)(1) to private offerings under Section 7(d) is consistent with Congress' intent in enacting Section 7(d). At the time Congress used the words "public offering" in Section 7(d), a non-public offering generally involved a very limited number of participants, well below the 100 investor limit of Section 3(c)(1). The traditional view, as expressed by the Commission's Office of General Counsel, was that although the determination of whether an offering was public was one of fact that should be made on a case-by-case basis, ordinarily an offering to more than 25 persons would be viewed as a public

The staff clarified the Touche Remnant position in a letter to the Investment Funds Institute of Canada (pub. avail. Mar. 4, 1996) ("IFIC"). In that letter, the staff recognized that, as a general matter, a Foreign Fund should not be deemed to have violated Section 7(d) if the 100 U.S. beneficial owner limit under Touche Remnant is exceeded due to the independent actions of the Fund's securityholders. Consistent with this principle, the Division stated that it would not recommend enforcement action under Section 7(d) if a Foreign Fund that has offered its securities privately to U.S. investors has more than 100 securityholders resident in the United States solely as a result of (1) the relocation of foreign securityholders of the Fund to the United States; or (2) offshore secondary market transactions not involving the Foreign Fund or its agents, affiliates or intermediaries.

II. Section 3(c)(7) and Section 7(d)

Section 3(c)(7) of the Investment Company Act provides a new exclusion from the definition of investment company for issuers whose securities are owned exclusively by "qualified purchasers," provided that the issuer is not making, and does not presently propose to make, a public offering of its securities ("Section 3(c)(7) companies," and together with Section 3(c)(1) companies, "private investment companies").⁷ Section 3(c)(7) reflects the view that certain investors with a high degree of financial sophistication do not require the substantive protections of the Investment Company Act.⁸

offering. Securities Act Release No. 285 (Jan. 24, 1935). Twenty-five persons remained the generally accepted ceiling for private offers for a number of years. See L. Loss and J. Seligman, *The Fundamentals of Securities Regulation*, 308 (1995).

The concept of a "public offering" has evolved considerably since 1940. *E.g.*, Rules 505 and 506 of Regulation D under the Securities Act (permitting private offerings involving an unlimited number of accredited investors). We believe, however, that Section 7(d) should be interpreted in a manner consistent with both Congressional intent and the policies and purposes of the Investment Company Act as a whole. We believe it inconsistent with Congressional intent and the regulatory framework established by the Investment Company Act for a Foreign Fund to be able to offer its securities privately to more U.S. residents than could a Section 3(c)(1) company.

⁷ The term "qualified purchaser" is defined in new Section 2(a)(51) to include (1) individuals and certain family companies that have not less than \$5 million in "investments," (2) certain trusts if both the trustee or other person with investment discretion and all settlors or other contributors are qualified purchasers, and (3) other persons that own and invest on a discretionary basis not less than \$25 million in "investments." The Commission has proposed rules that would define "investments" for purposes of Section 2(a)(51). Investment Company Act Release No. 22405, (December 18, 1996).

⁸ See H.R. Rep. No. 622, 104th Cong., 2d Sess. 18 (1996).

As noted above, Section 7(d) reflects a Congressional determination that Foreign Funds that access the U.S. market should be subject to the same type and degree of regulation that applies to U.S. investment companies. Consistent with this principle, we believe that a Foreign Fund may privately offer and sell its securities to qualified purchasers in the United States in accordance with the provisions of Section 3(c)(7) (and any Commission rules promulgated under the section) without violating Section 7(d).⁹ A Foreign Fund that wishes to offer its securities privately in the United States, like a U.S. private investment company, may rely on either Section 3(c)(1) or Section 3(c)(7).¹⁰ In addition, a Foreign Fund that has sold its securities to 100 or fewer U.S. resident beneficial owners in the manner outlined in Touche Remnant may, like a U.S. private investment company, rely on the "grandfathering" provision of Section 3(c)(7)(B) to privately offer securities to qualified purchasers in accordance with Section 3(c)(7).¹¹ We also believe that it is consistent with the purpose of Section 7(d) for a Foreign Fund relying on Section 3(c)(1) or Section 3(c)(7) to comply with the "consent" provision in Section 2(a)(51)(B) of the Investment Company Act to the extent that it intends to be deemed a qualified purchaser of securities of Section 3(c)(7) companies.¹²

III. Section 7(d) and "U.S. Person"

A Foreign Fund seeking to make a private offering in the United States must determine whether existing or prospective shareholders should be considered beneficial

⁹ In our view, the non-U.S. resident shareholders of a Foreign Fund relying on Section 3(c)(7) to offer its securities in the United States need not be qualified purchasers.

¹⁰ As is the case with domestic private investment companies, a Foreign Fund may not simultaneously seek to rely on Section 3(c)(7) to offer securities to U.S. resident qualified purchasers and Section 3(c)(1) to offer securities to 100 U.S. residents who are not qualified purchasers.

¹¹ Section 3(c)(7)(B) allows certain existing Section 3(c)(1) companies to convert to Section 3(c)(7) companies and "grandfather" their existing investors that are not qualified purchasers, provided that those investors receive appropriate disclosure and adequate notice and opportunity to redeem their investments. In applying the grandfathering provision, a Foreign Fund must meet the requirements of that provision only with respect to those U.S. resident beneficial owners that should be counted under the principles set out in IFIC.

¹² Section 2(a)(51)(B) requires a private investment company that wishes to become a qualified purchaser to obtain the consent of all its beneficial owners that invested in it prior to April 30, 1996. We believe that a Foreign Fund need comply with this provision only with respect to U.S. resident beneficial owners that are to be counted under the principles set out in IFIC.

owners resident in the United States for purposes of Section 7(d).¹³ You suggest that it would be appropriate and consistent with previous staff positions¹⁴ for a Foreign Fund making a private offering in the United States within the meaning of Section 7(d) to rely on the definition of "U.S. person" in Rule 902(o) of Reg. S for purposes of determining whether an investor should be deemed a U.S. resident beneficial owner.

We believe that the definition of U.S. person in Rule 902(o) of Reg. S can be used generally in the context of Section 7(d) of the Investment Company Act. Reliance on certain provisions of Rule 902(o), however, may under certain circumstances raise issues under Section 48(a) of the Investment Company Act.¹⁵ Our views with respect to the relevant provisions of Rule 902(o) are set forth below.

a. *Natural Persons*

A natural person's residency, rather than citizenship, determines his or her status under Rule 902(o)(1)(i) of Reg. S. For example, a citizen of another country residing in the United States is a U.S. person under Reg. S, while a U.S. citizen residing abroad is not a U.S. person. We believe that residency should also determine whether an individual must be considered a U.S. resident beneficial owner for purposes of Section 7(d). Thus, we conclude that it would be appropriate for a Foreign Fund to count as U.S. resident beneficial owners those natural persons who would be considered to be U.S. persons under Rule 902(o)(1)(i).

In our view, a distinction should be made under Section 7(d), as under Reg. S, between persons permanently residing abroad, and U.S. residents who are temporarily abroad. U.S. citizens and other persons permanently residing abroad who purchase securities

¹³ Your letter does not contemplate the situation in which a Foreign Fund does not use U.S. jurisdictional means in connection with the offer or sale of any of its securities. The staff has taken the view that such a Foreign Fund is not subject to Section 7(d), even if U.S. residents purchase the Fund's securities in transactions that occur outside the United States. See Global Mutual Fund Survey (pub. avail. July 14, 1992).

¹⁴ See, e.g., Merrill, Lynch & Co., Inc. (pub. avail. May 12, 1986) ("Merrill"); Prudential-Bache Securities, Inc. (pub. avail. Aug. 17, 1987) ("Prudential"); G.T. Global Financial Services, Inc. (pub. avail. Aug. 2, 1988) ("G.T. Global"). In each of these letters, the requesting party defined the term "U.S. resident" to include: (1) a citizen or resident of the United States; (2) a partnership organized or existing in any state, territory or possession of the United States; (3) a corporation organized under the laws of the United States; and (4) any estate or trust, other than an estate or trust the income of which from sources without the United States is not includible in gross income for purposes of computing United States income tax payable on it.

¹⁵ Section 48(a) of the Investment Company Act prohibits any person from doing indirectly what he or she would be prohibited from doing directly under that Act.

may be deemed to have chosen foreign markets, and the laws and regulations applicable to those markets.¹⁶ U.S. residents who are temporarily abroad, however, should be treated differently because they continue to maintain a permanent presence in the United States that warrants full protection under the federal securities laws. Thus, a Foreign Fund that has made or proposes to make a private offering in the United States and that has sold its securities to a U.S. resident who is temporarily outside the United States should treat that person as a beneficial owner resident in the United States for purposes of Section 7(d).¹⁷

b. *Partnerships and Corporations*

(i) *General Rule*

Rule 902(o)(1)(ii) of Reg. S includes within the definition of U.S. person "any partnership or corporation organized or incorporated under the laws of the United States." Rule 902(o)(1)(v) of Reg. S includes within the definition of U.S. person "any agency or branch of a foreign entity located in the United States." We believe that entities that are deemed U.S. persons under these subsections should likewise be treated as U.S. resident beneficial owners for purposes of Section 7(d).¹⁸

¹⁶ See Securities Act Release No. 6863, supra note 2.

¹⁷ Whether a person is temporarily or permanently residing outside the United States is a factual question that depends on all of the circumstances surrounding that person's presence in a foreign country. See Securities Exchange Act Release No. 27017 (July 11, 1989) (adopting Rule 15a-6 under the Securities Exchange Act of 1934).

¹⁸ This conclusion is consistent with earlier positions taken by the staff. See, e.g., Merrill, Prudential, and G.T. Global, supra note 14. Each letter defined the term "U.S. resident" to include a partnership organized or existing in any state, territory or possession of the United States, and a corporation organized under the laws of the United States.

We note that in determining the number of beneficial owners for purposes of Section 3(c)(1), a "company" (e.g., a partnership or corporation) that invests in a Section 3(c)(1) company generally is presumed to be a single beneficial owner. Under the 1996 Amendments, however, if the acquiring company (1) owns more than 10% of the stock of the Section 3(c)(1) company and (2) is (or but for Section 3(c)(1) or Section 3(c)(7) would be) an investment company itself, the Section 3(c)(1) company is required to count the beneficial owners of the acquiring company towards the 100 beneficial owner limit. The staff has taken the position under Section 48(a) of the Investment Company Act that if a "company" that invests in a private investment company is simply a device for facilitating individual investment decisions of its securityholders, then the company's securityholders should be deemed to be the beneficial owners of the company's investment in the private investment company.

(ii) *Offshore Investment Vehicles for U.S. Persons*

Rule 902(o)(1)(viii) provides that the term U.S. person includes any partnership or corporation organized under foreign law by a U.S. person "principally for the purpose of investing" in unregistered securities, unless the partnership or corporation is organized and owned by accredited investors (as that term is defined in Regulation D under the Securities Act) that are not natural persons, estates or trusts.¹⁹ Subsection (1)(viii) is intended to prevent the circumvention of the registration provisions of the Securities Act through the use of an offshore entity formed for the purpose of purchasing securities in Reg. S offerings, unless the entity is formed by sophisticated non-natural persons that can invest directly in unregistered securities without the protections of the Securities Act.²⁰

We believe that offshore entities that are deemed U.S. persons under Subsection (1)(viii) should be treated as U.S. resident beneficial owners for purposes of Section 7(d). We also believe that the offshore entities formed by U.S. accredited investors that are excluded from the definition of U.S. person by Subsection (1)(viii) generally need not be treated as U.S. resident beneficial owners for purposes of Section 7(d). To the extent, however, that a Foreign Fund facilitates the use of an offshore entity by U.S. accredited investors as a means to evade the requirements of Section 7(d), we believe that the Foreign Fund would violate Section 48(a).²¹

See WR Investment Partners (pub. avail. Apr. 15, 1992) (limited partners deemed the beneficial owners of the partnership's interest in a Section 3(c)(1) company). In our view, these principles should similarly apply in the context of a private U.S. offering by a Foreign Fund relying on Touche Remnant.

¹⁹ Rule 501(a) of Regulation D defines the term "accredited investor" to include, among others, a bank as defined in Section 3(a)(2) of the Securities Act, a savings and loan association as defined in Section 3(a)(5)(A) of the Securities Act, a broker or dealer registered under Section 15 of the Securities Exchange Act of 1934, any business development company as defined in Section 2(a)(48) of the Investment Company Act, an investment company registered under the Investment Company Act, and certain employee benefit plans.

²⁰ See Securities Act Release No. 6863, supra note 2.

²¹ See supra note 15. We note that if a Foreign Fund deems an offshore entity covered by Rule 902(o)(1)(viii) to be a U.S. resident beneficial owner for purposes of Section 7(d), to the extent that the entity meets the definition of qualified purchaser under Section 2(a)(51) of the Investment Company Act, it may be treated as a qualified purchaser by a Fund seeking to comply with the requirements of Section 3(c)(7). As in the domestic context, however, the offshore entity may not be used as a vehicle for evading the qualified purchaser requirement of Section 3(c)(7). The sponsor of the

(iii) *Foreign Agencies or Branches*

Rule 902(o)(6) excludes from the definition of U.S. person any agency or branch of a U.S. bank or insurance company located outside the United States if it: (1) operates for valid business reasons; (2) is engaged in the banking or insurance business; and (3) is subject to substantive banking or insurance regulation in the jurisdiction in which it is located. We see no policy reason for treating these entities differently under Section 7(d). Therefore, for purposes of Section 7(d), a Foreign Fund need not count as U.S. resident beneficial owners any entity described in Rule 902(o)(6).²²

c. *Trusts, Estates, Discretionary and Non-Discretionary Accounts*

(i) *General Rule*

Under Rule 902(o)(1)(iv) and (o)(1)(iii) of Reg. S, respectively, a trust or estate is a U.S. person if any trustee, executor or administrator is a U.S. person. We believe that it is consistent with the purpose of Section 7(d) for a Foreign Fund to look to this provision of Reg. S in determining whether a trust or estate should be deemed a beneficial owner resident in the United States for purposes of Section 7(d).²³

Rule 902(o)(1)(vi) includes within the definition of U.S. person any non-discretionary account or similar account (other than an estate or trust) held by a dealer or other fiduciary for the benefit of a U.S. person. Rule 902(o)(vii) includes within the definition of U.S. person any discretionary account (other than an estate or trust) that is held by a dealer or other fiduciary organized, incorporated or resident in the United States. These provisions are based on the principle that the person or entity that has the power to direct the investment of an account's assets should be deemed to be the buyer for purposes of determining the locus

Foreign Fund could not, for example, establish the offshore company solely for the purpose of creating a qualified purchaser when the U.S. resident owners of the offshore company could not meet the qualified purchaser requirement individually. See H.R. Rep. 622, *supra* note 8 at 52 ("a promoter of a Section 3(c)(7) fund could not organize a 'sham' Section 3(c)(1) fund to facilitate investment by non-qualified purchasers in the Section 3(c)(7) fund").

²² Any branch or agency of a foreign entity that is located in the United States would, however, be a U.S. resident beneficial owner.

²³ This treatment of trusts and estates differs from that reflected in earlier staff letters relating to Section 7(d). See Merrill and G.T. Global, *supra* note 14 (requesters relied on the "sourcing of income" rules under the Internal Revenue Code in determining whether a foreign trust or estate was a "beneficial owner resident in the United States"). In issuing this letter, the staff is not rescinding those previous letters, which may continue to be relied upon.

of an offering.²⁴ The effect of these provisions is that an account managed by a U.S. person will be deemed a U.S. person. We believe that the treatment of accounts under these provisions is consistent with the requirements of Section 7(d), and the accounts covered by these provisions should be treated as U.S. resident beneficial owners for purposes of Section 7(d).²⁵

(ii) *Exceptions*

Rule 902(o)(2) provides an exception from the definition of U.S. person for discretionary accounts held for the benefit of a non-U.S. person by a dealer or other professional fiduciary organized, incorporated, or resident in the United States. Rule 902(o)(4) provides a similar exception for a trust having a U.S. person acting as a trustee if (1) a trustee who is not a U.S. person has sole or shared investment discretion and (2) no beneficiary of the trust (or settlor if the trust is revocable) is a U.S. person. Likewise, Rule 902(o)(3) provides that an estate having a U.S. professional fiduciary acting as administrator or executor is not a U.S. person if: (1) an administrator or executor of the estate who is not a U.S. person has sole or shared investment discretion with respect to the assets of the estate; and (2) foreign law governs the estate. In adopting Reg. S, the Commission noted the serious competitive disadvantages that U.S. professional fiduciaries, particularly smaller U.S. advisers, might face if these exceptions were not made.²⁶

We believe the treatment of accounts, trusts, or estates held for the benefit of non-U.S. persons in Subsections (o)(2), (o)(4) or (o)(3) of Rule 902 is consistent with the purpose of Section 7(d). Moreover, the staff has acknowledged that the same type of competitive harm to U.S. trustees and professional fiduciaries that could result if these trusts, estates and accounts are considered beneficial owners resident in the U.S. for purposes of Section

²⁴ See Securities Act Release No. 6779 (Jun. 10, 1988) (proposing Reg. S).

²⁵ The release adopting Reg. S also stated that when a foreign fiduciary or other entity has full investment discretion for the account of a U.S. person, that account is not treated as a U.S. person. Securities Act Release No. 6863, supra note 2. Because such an account is managed by a non-U.S. person, we generally agree with this treatment for purposes of determining who is a U.S. resident under Section 7(d). To the extent, however, that a Foreign Fund facilitates the use of foreign discretionary accounts by U.S. persons as a means to evade the requirements of Section 7(d), we believe that the Foreign Fund would violate Section 48(a). See supra note 15.

²⁶ See Securities Act Release No. 6863, supra note 2.

7(d).²⁷ We believe, therefore, that Foreign Funds need not treat the entities covered by these subsections as U.S. resident beneficial owners under Section 7(d).

d. *Employee Benefit Plans*

Under Rule 902(o)(5) of Reg. S, an employee benefit plan established and administered in accordance with the law of a country other than the United States is not deemed to be a U.S. person. We believe that an employee benefit plan that is established and administered under the law of a country other than the United States ordinarily should also not be deemed a U.S. resident beneficial owner under Section 7(d).²⁸

e. *International Organizations Operating in the United States*

Rule 902(o)(7) excludes certain international organizations, their agencies, affiliates, and pension plans from the definition of U.S. person. We believe that the entities covered by Rule 902(o)(7) also need not be considered U.S. resident beneficial owners for purposes of Section 7(d).

²⁷ See *Fiduciary Trust Global Fund* (pub. avail. Aug. 2, 1995) (excluding discretionary accounts held for the benefit of non-U.S. persons by brokers and other professional fiduciaries organized in the United States (as defined in Rule 902(o)(2) of Reg. S) from the 100 purchaser limit under Touche Remnant).

²⁸ These employee benefit plans may be treated as non-U.S. residents notwithstanding that there may be some U.S. residents who are participants. This represents a modification of the position taken in *Scimitar Global Pension Fund* (pub. avail. Aug. 9, 1990) and *Win Global Fund* (pub. avail. May 14, 1991), in which the staff granted no-action assurance to funds offering shares to pension plans of foreign subsidiaries of large U.S. multi-national corporations, if both the plans' administrators and any participating employees who were U.S. citizens were located outside the United States.

We note that Section 4(b)(4) of the Employee Retirement Income Security Act of 1974 ("ERISA") provides a similar exception for employee benefit plans "maintained outside the United States primarily for the benefit of persons substantially all of whom are nonresident aliens...." A foreign employee benefit plan that has significant participation by U.S. citizens or residents, however, likely will be subject to ERISA. See, e.g., Department of Labor - Pension and Welfare Benefits Administration - Advisory Opinions 80-5 (Jan. 28, 1980) (exemption not available when 1,900 participants (of a total of 25,277) were U.S. citizens); 78-26 (Nov. 27, 1978) (exemption not available when 60 participants (out of a total 110) were U.S. citizens).

IV. Integration of U.S. Private Offerings and Reg. S Offerings by Foreign Funds.

You maintain that a Foreign Fund should not be deemed to violate the provisions of Section 7(d) if it sells its securities in a private offering in the United States at the same time that it conducts an offshore public offering that complies with the provisions of Rule 903 of Reg. S. You note that offers and sales by a foreign issuer²⁹ (including a Foreign Fund) that does not have a "substantial U.S. market interest"³⁰ need only satisfy two conditions to comply with the Rule 903 safe harbor: (1) the offer and sale must be made in an "offshore transaction"³¹ and (2) there may be no "directed selling efforts"³² in the United States. These conditions focus on the location of the offering activity and the location of the prospective purchaser, but do not require an examination of the purchaser's residence. Such foreign issuers are not precluded by Reg. S from selling to U.S. persons in the offering,

²⁹ A foreign issuer is defined under Rule 902(f) to include, among other things, "a corporation or other organization incorporated or organized under the laws of any foreign country" unless the issuer has (1) more than 50% of its voting securities held by record holders with a U.S. address and (2) either (A) the majority of the executive officers or directors of the issuer are U.S. citizens or residents, (B) more than 50% of the assets of the issuer are located in the United States, or (C) the business of the issuer is administered principally in the United States.

³⁰ Substantial U.S. market interest for an equity security is defined under Rule 902(n) to exist when (1) U.S. securities exchanges or inter-dealer quotation systems constitute the largest market for the security, or (2) 20% or more of all trading of the security takes place on or through the facilities of securities exchanges or inter-dealer quotation systems in the United States and less than 55% of all trading of the security takes place in any one single country.

³¹ Under Rule 902(i), an offer or sale is made in an "offshore transaction" if (1) the offer is not made to a person in the United States, and (ii) either (A) at the time the buy order is originated, the buyer is outside the United States (or the seller reasonably believes the buyer is outside the United States) or (B) the sale is through the physical trading floor of an established foreign securities exchange.

³² "Directed selling efforts" are defined in Rule 902(b) as activities undertaken for the purpose of, or that could reasonably be expected to result in, conditioning of the market in the United States for securities being offered (e.g., marketing efforts in the United States designed to induce the purchase of the securities purportedly being distributed abroad). Activities such as mailing printed material to U.S. investors, conducting promotional seminars in the United States, or placing advertisements with radio or television stations broadcasting into the United States or in publications with a general circulation in the United States, which discuss the offering or could reasonably be expected to condition the market for the securities being offered abroad, would constitute directed selling efforts in the U.S.

provided that the two conditions are met. Rule 903, therefore, would permit a Foreign Fund with no substantial U.S. market interest, but that has made or proposes to make a private U.S. offering, to make an offshore sale to a U.S. resident, without violating the registration provisions of the Securities Act.

In Touche Remnant, the staff took the position that, generally, a Foreign Fund's private U.S. offering would be viewed as separate from the Fund's simultaneous offshore public offering. The staff took the position, therefore, that Section 7(d) does not prohibit a Foreign Fund from conducting a private U.S. offering simultaneously with an offshore public offering, provided that the Foreign Fund does not use U.S. jurisdictional means in connection with the offshore offering.³³ We believe that the same principle should apply in the case of a Foreign Fund seeking to make a private offering in the United States under Section 3(c)(7) at the same time that it is making a public offering outside the United States. We believe, therefore, that Section 7(d) does not prohibit a Foreign Fund from conducting a private U.S. offering in compliance with Section 3(c)(7) simultaneously with an offshore public offering.

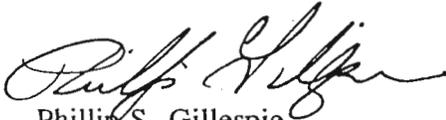
We note that, in our view, compliance of a Foreign Fund's offshore offering with the terms of Rule 903 does not necessarily mean that the offshore offering does not raise issues with respect to the Fund's private U.S. offering. As noted above, Rule 903 would permit a Foreign Fund to make a sale to a U.S. person in an offshore transaction without requiring the registration of the offering. Under the staff's interpretation of Section 7(d) in Touche Remnant and IFIC, a Foreign Fund must generally count as U.S. resident beneficial owners all U.S. residents who have purchased directly or indirectly from the Foreign Fund, its agents, affiliates, or intermediaries.³⁴ The staff also indicated in IFIC that when a Foreign Fund, its agents, affiliates, or intermediaries had sold shares to a U.S. resident beneficial owner in a transaction occurring outside the United States, it was appropriate to count that U.S. resident towards the 100 person limit. The requirement of counting sales to U.S. residents occurring outside the United States is intended to assure that the prohibitions of

³³ See also KBS International Ltd. (pub. avail. Mar. 18, 1985). The staff has recognized an offshore offering that involves only incidental U.S. jurisdictional contacts does not violate Section 7(d). See G.T. Global, supra note 14 (limited use of U.S. mails for the sale of foreign investment company securities to non-resident aliens through U.S. broker-dealers permitted under Section 7(d)).

³⁴ As noted above, the staff stated in IFIC that a Foreign Fund need not count toward the 100 purchaser limit U.S. resident beneficial owners who purchased shares (1) directly from the Fund while residing abroad, or (2) in secondary market transactions not involving the fund or its agents, affiliates, or intermediaries.

Section 7(d) are not circumvented by purposefully structuring offers and sales of shares of Foreign Funds to U.S. persons as offshore transactions.³⁵

In our view, therefore, it would be inconsistent with the requirements of Section 7(d) of the Investment Company Act to rely on Rule 903 to determine whether a Foreign Fund has complied with the limits on private offerings required by Section 7(d). Rather, to the extent that a Foreign Fund has sold securities to a U.S. person in an offshore transaction in reliance on Rule 903, that U.S. person would be deemed a U.S. resident beneficial owner for purposes of Section 7(d) and a Foreign Fund that makes a private offering in the United States in reliance on Touche Remnant would have to count that U.S. person toward the 100 investor limit of Section 3(c)(1). Similarly, a Foreign Fund that was making a private placement in the United States in reliance on Section 3(c)(7) would have to determine whether the U.S. person was a qualified purchaser.



Phillip S. Gillespie
Senior Counsel

³⁵ As noted above, supra note 13, a Foreign Fund that has never used U.S. jurisdictional means in connection with the offer or sale of any of its securities is not subject to Section 7(d), even if U.S. residents purchase the Fund's securities in transactions that occur outside the United States. If that Foreign Fund subsequently seeks to offer its securities in the United States, however, it must count those U.S. residents to whom it previously sold securities towards the U.S. beneficial owner limits imposed by Section 7(d).

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**Investment Company Act
of 1940--Section 7(d)**

October 24, 1996

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

Attention: John V. O'Hanlon, Assistant Chief Counsel

Ladies and Gentlemen:

We are seeking your interpretative advice on an issue of importance to investment companies organized outside of the United States ("offshore funds"), including many of our clients: the effect of the National Securities Markets Improvement Act of 1996 (the "1996 Improvement Act") upon the Touche Remnant doctrine under Section 7(d) of the Investment Company Act of 1940, as amended (the "1940 Act"). We are also asking that you clarify the interrelationship between the Touche Remnant doctrine and Regulation S under the Securities Act of 1933, as amended (the "1933 Act").

Specifically, we ask you to confirm that, upon the effectiveness of Section 3(c)(7) of the 1940 Act,¹ offshore funds may offer and sell their shares to U.S. residents in accordance with the limitations imposed by either Section 3(c)(1) or Section 3(c)(7). Secondly, we ask you to confirm that the definition of a U.S. person set forth in Rule 902(o) of Regulation S may be used for purposes of determining who is a resident in the United States under the Touche Remnant doctrine.² Finally, we ask you to confirm that a public offering outside of

¹ Pursuant to the 1996 Improvement Act, Section 3(c)(7) will take effect on the earlier of 180 days after its enactment or the date upon which rulemaking is completed to define the term "investments," which is a component of the term "qualified purchaser."

² The Staff has recently indicated that a U.S. investor who acquires shares in a secondary market transaction without the direct or indirect involvement of the offshore fund, its affiliates, agents or intermediaries and in compliance with certain other conditions will not be regarded as a U.S. resident for purposes of the Touche Remnant doctrine. See note 13 to Investment Funds Institute of Canada (March 4, 1996). Accordingly, we

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the United States by an offshore fund relying upon the Touche Remnant doctrine will not be integrated with a private placement inside the United States so long as the offshore offering is conducted in compliance with Regulation S.

I. THE TOUCHE REMNANT DOCTRINE.

In a series of no-action letters beginning with Touche, Remnant & Co. (August 27, 1984), the Staff has stated that it would not recommend that the Commission take any enforcement action against offshore funds for failing to register under the 1940 Act, provided that they do not publicly offer their securities in the United States and that they limit ownership of their securities to no more than 100 beneficial owners resident in the U.S. This position is sometimes referred to as the "Touche Remnant doctrine." While the Touche Remnant doctrine originated as a Staff no-action position, in 1990 it was endorsed by the Commission in its release adopting Rule 144A under the 1933 Act.³

The Touche Remnant doctrine involves an interpretation of Section 7(d) of the 1940 Act. Section 7(d) provides in relevant part that "[n]o 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 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." Thus, on its face Section 7(d) only prohibits an offshore fund from making a U.S. public offering; the statute contains no express limitation on the number of U.S. resident beneficial owners of an offshore fund. In *Touche Remnant*, the Staff rejected a literal reading of Section 7(d). Instead, the Staff essentially adopted a bifurcated approach to the regulation of offshore funds: as to any offering to U.S. residents, an offshore fund would be subject to the same restrictions as a domestic private investment company; however, the 1940 Act would not be deemed to restrict the scope of any offering to non-U.S. residents.

understand that, regardless of whether the Staff accepts the Regulation S definition, such secondary market investors would not constitute U.S. residents for purposes of the Touche Remnant doctrine.

³ See Resale of Restricted Securities; Changes to Method of Determining Holding Period of Restricted Securities under Rules 144 and 145, Securities Act Release 6862 (April 23, 1990), Fed. Sec. L. Rep. (CCH) ¶84,523 at p. 80,648. The Commission's formulation of the Touche Remnant doctrine referred to "100 beneficial owners who are U.S. residents."

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II. APPLYING TOUCHE REMNANT UNDER 3(c)(7).

To date, domestic private investment companies have been required to comply with the provisions of Section 3(c)(1) under the 1940 Act ("3(c)(1) funds"). As noted above, the 1996 Improvement Act contemplates a new type of private investment company under Section 3(c)(7) of the 1940 Act (a "3(c)(7) fund"). A 3(c)(7) fund will be able to have an unlimited number of security holders, provided that it does not make a public offering and that its outstanding securities are owned exclusively by persons who, at the time of acquisition, are "qualified purchasers," as defined in the new Section 2(a)(51) of the 1940 Act. Upon effectiveness of this portion of the 1996 Improvement Act, the 1940 Act will recognize two types of domestic private investment companies, 3(c)(1) funds and 3(c)(7) funds.⁴

As noted above, the premises of the Touche Remnant doctrine are that in conducting any offering to U.S. residents, an offshore fund should be subject to the same rules as a domestic private investment company, but that the 1940 Act should not be deemed to restrict the scope of any offering to non-U.S. residents. We respectfully submit that these premises support an extension of the Touche Remnant doctrine. Accordingly, we ask you to confirm that offshore funds will be permitted to offer and sell its shares without limitation to non-U.S. residents, provided that, as to U.S. residents, they conduct their activities in accordance with the limitations applicable to either 3(c)(1) funds or 3(c)(7) funds.

III. THE RELATIONSHIP BETWEEN TOUCHE REMNANT AND REGULATION S.

A. Regulation S. In 1990 the Commission adopted Regulation S to clarify the extraterritorial application of the registration provisions of the 1933 Act.⁵ Regulation S provides generally that any offer or sale that occurs within the United States is subject to Section 5 of the 1933 Act and any offer or sale that occurs outside the United States is not

⁴ The 1996 Improvement Act contemplates that Section 3(c)(1) will remain in effect, with some modification to the "look through" provisions used for computing the number of beneficial owners of a fund's outstanding voting securities and the provisions affecting the relationship between Section 3(c)(1) and Section 12(d)(1). Certain transition rules apply which enable existing 3(c)(1) funds to become 3(c)(7) funds.

⁵ See Offshore Offers and Sales, Securities Act Release 6863; Exchange Act Release 27942; Investment Company Act Release No. 17458 (April 24, 1990) Fed. Sec. L. Rep. (CCH) ¶84,524 at p. 80,661 (hereinafter, the "Adopting Release"). Regulation S was initially proposed in Securities Act Release No. 6779 (June 10, 1988), Fed. Sec. L. Rep. (CCH) ¶84,426 at p. 80,209 (hereinafter the "Proposing Release"). It was re-proposed in Offshore Offers and Sales, Securities Act Release No. 6838 (July 11, 1989), Fed. Sec. L. Rep. (CCH) ¶84,426, at p. 80,209 (hereinafter the "Re-Proposing Release").

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subject to Section 5. Additionally, Regulation S provides two "safe harbors" for specified transactions. Offers and sales meeting all of the conditions of the applicable safe harbor are deemed to be outside the United States and, therefore, not subject to Section 5 of the 1933 Act.

The underlying principles of these safe harbors and of Regulation S generally are comity⁶ and a territorial approach to the application of Section 5 of the Securities Act.⁷ This approach focuses on protection of U.S. capital markets and protection of all investors acquiring securities in such markets, without regard to the citizenship of such investors. The Commission stated:

Principles of comity and reasonable expectations of participants in the global markets justify reliance on laws applicable in jurisdictions outside the United States to define disclosure requirements for transactions effected offshore. The territorial approach recognizes the primacy of the laws in which a market is located. As investors choose their markets, they would choose the disclosure requirements applicable to such markets.⁸

Consistent with this approach, certain transactions (including offers and sales by foreign private issuers whose securities have no substantial U.S. market interest)⁹ need satisfy

⁶ "The doctrine of comity emphasizes restraint and tolerance to other nations in international affairs. . . . Among the values stressed by the doctrine of comity is 'the limited application of sovereign powers to extraterritorial events and persons.'" Proposing Release, note 61 at p. 89,128 (citations omitted).

⁷ Id.; see also Adopting Release at p. 80,662.

⁸ Proposing Release at p. 89,128. See also Adopting Release at p.80,665.

⁹ "Substantial U.S. market interest" is defined under Rule 902(n) of Regulation S to exist, with respect to a class of an issuer's equity securities when "(i) [t]he securities exchanges and inter-dealer quotation systems in the United States in the aggregate constituted the single largest market for such class of securities in the shorter of the issuer's prior fiscal year or the period since the issuer's incorporation; or (ii) 20 percent or more of all trading in such class of securities took place in, on or through the facilities of securities exchanges and inter-dealer quotation systems in the United States and less than 55 percent of such trading took place in, on other through the facilities of securities markets of a single foreign country in the shorter of the issuer's prior fiscal year or the period since the issuer's incorporation." The term "foreign issuer" is defined in Rule 902(f) of Regulation S to include a corporation or other organization incorporated or organized under the laws of any foreign country. In light of these definitions, it is virtually certain that any offshore fund would be a foreign issuer whose securities have no substantial U.S. market

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only two conditions to comply with the safe harbor: that (a) the offer or sale be made in an "offshore transaction"¹⁰ and (b) there be no "directed selling efforts"¹¹ in the United States.¹² These conditions focus on the location of the activity and of the prospective purchaser, but generally do not require an examination of the purchaser's nationality or permanent residence. Such issuers are not specifically precluded from offering securities to U.S. persons or obligated to bar resales to U.S. persons for any particular period of time.¹³

Certain other transactions (including offers and sales by U.S. issuers which file reports pursuant to the Securities Exchange Act of 1934) must satisfy additional requirements designed to restrict the "flow back" of unregistered securities into the hands of persons whom the United States has a strong regulatory interest in protecting.¹⁴ The definition of U.S. person in Rule 902(o) of Regulation S is used primarily for purposes of these "flow back" restrictions.

interest for purposes of Regulation S.

¹⁰ An "offshore transaction" is defined under Rule 902(i) of Regulation S. An offer or sale is made in an offshore transaction when, for example, the offer is not made to a person in the United States and at the time the buy order is originated, the buyer is outside the United States.

¹¹ "Directed selling efforts" are defined as "any activity undertaken for the purpose of, or that could reasonably be expected to have the effect of, conditioning the market in the United States for any of the securities being offered in reliance on this Regulation S. Such activity includes placement of an advertisement in a publication with a general circulation in the United States that refers to the offering of securities being made in reliance upon this Regulation S." Regulation S, Rule 902(b). In the *Investment Funds Institute of Canada* letter, the Staff stated that it would generally look to the definition of "directed selling efforts" under Regulation S for purposes of determining when an offshore fund was conditioning the U.S. market. Legitimate U.S. selling activities in connection with the sale of securities in a private placement exempt under Section 4(2) or Rule 506 generally will not result in directed selling efforts. See Adopting Release, note 64 at p. 80,670.

¹² See Regulation S, Rule 903.

¹³ Of course, Regulation S incorporates the general principle that the safe harbors are not available with respect to any transaction or series of transactions that, although in technical compliance with the relevant rules, "is part of a plan or scheme to evade the registration provisions of the [1933] Act." Preliminary Note 2 to Regulation S.

¹⁴ On June 27, 1995, the Commission published a release stating its views with respect to certain problematic practices in connection with offers and sales under Regulation S. Securities Act Release No. 7130. On October 10, 1996 the Commission adopted revisions to certain forms designed in part to address abusive practices in connection with the sale of equity securities by domestic companies in purported Regulation S offerings. Securities Exchange Act Release No. 37801. We do not believe that either of these developments has any bearing on the interpretative advice sought by this letter.

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The Commission clearly intended that Regulation S would be available to registered closed-end investment companies and investment companies that are not required to register under the 1940 Act.¹⁵ Although, Regulation S, by its terms, only provides relief under the 1933 Act, the Staff has traditionally looked to 1933 Act concepts in determining whether any offering to U.S. investors is a bona fide private placement for purposes of the Touche Remnant doctrine.¹⁶

B. The Definition of a "U.S. Resident" under Touche Remnant. As noted above, the Staff in *Touche Remnant* referred to "100 beneficial owners resident in the U.S." The Commission's formulation of the doctrine referred to "100 beneficial owners who are U.S. residents." Neither of these formulations provides guidance as to the status of investors that are not natural persons. At present, offshore funds seeking to comply with the

¹⁵ See Adopting Release at p. 80,664. Preliminary Note 8 to Regulation S provides, "[t]he provisions of this Regulation S shall not apply to offers and sales of securities issued by open-end investment companies or unit investment trusts registered or required to be registered or closed-end investment companies required to be registered, but not registered, under the Investment Company Act of 1940."

¹⁶ Neither the Adopting Release nor Regulation S itself addresses the Regulation's interrelationship with the Touche Remnant doctrine and existing no-action letters do not provide clear guidance.

In Alpha Finance Corporation Limited (July 27, 1990), the Staff granted no-action relief where the issuer contemplated offering a class of "U.S. Notes" and a class of "Euro-notes." U.S. Notes could not be held by more than 100 beneficial owners. Euro-notes were not subject to any such numerical limitation, but would be sold in compliance with Regulation S and could not be held by any U.S. person (as defined in Rule 902(o) of Regulation S). However, in Win Global Fund (May 14, 1991), *Alpha Finance* was cited for the proposition that the Staff has not expressed an opinion regarding the status of a foreign investment company under Section 7(d) making an offshore offering in reliance upon Regulation S, thus raising a question about the meaning of *Alpha Finance*.

MEC Finance USA, Inc. (Oct. 25, 1991), although not involving the Touche Remnant doctrine, is of some relevance. *MEC Finance* involved a proposal by a Delaware subsidiary of a Japanese corporation to sell medium term notes in Europe in accordance with Rule 903 under Regulation S without registering as an investment company under the 1940 Act in reliance upon Rule 3a-5 thereunder. The Staff stated, [B]ecause the Euro-Notes will be issued in a public offering to persons outside the United States in accordance with Regulation S, we believe that the Euro-Notes are not securities 'issued to or held by the public'"

Most recently, in Fiduciary Trust Global Fund (August 2, 1995), an Irish unit trust proposed to sell shares to accounts established by non-U.S. persons with certain U.S. fiduciaries without counting such accounts toward the 100 U.S. shareholder limit under the Touche Remnant doctrine. In granting no-action relief, the Staff noted that such accounts were excluded from the definition of U.S. person by Section 902(o)(2) of Regulation S.

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Touche Remnant doctrine have only two sources for guidance, the Regulation S definition of U.S. person and language set forth in letters from a handful of applicants seeking no-action relief in a period from 1984 through 1988.¹⁷

Given that offshore funds must limit their U.S. investors to avoid violating Section 7(d) of the 1940 Act, we believe that it is critical that the industry have an objective standard that provides detailed guidance for determining who is a U.S. investor. A subjective approach that would require a fund to weigh the U.S. contacts of each shareholder on an on-going basis in order to determine whether the fund is required to register under the 1940 Act would be unworkable.¹⁸ Accordingly, we ask that the Staff confirm that offshore funds may rely upon the Regulation S definition of U.S. person for this purpose.

C. **Integration of Onshore and Offshore Transactions.** An important predicate of the Touche Remnant doctrine is that a public offering by an offshore fund outside of the United States will not be integrated with a private placement of securities within the United States.¹⁹ When Regulation S was adopted, the Commission also amended Regulation D

¹⁷ See, e.g. *Touche Remnant*, Merrill Lynch & Co., Inc. (May 12, 1986), G.T. Global Financial Services, Inc. (August 2, 1988), and Prudential-Bache Securities Inc. (August 17, 1987). In these letters, the Staff appears to have implicitly accepted each applicant's definition of a U.S. resident, but did not expressly approve any such definition. These letters generally do not provide the same degree of precision as the Regulation S definition and do not recite a uniform standard. We believe that a substantial number of offshore funds use the Regulation S definition of U.S. person for purposes of establishing their restrictions upon U.S. investors.

¹⁸ In *Mercury Asset Management* (Apr. 16, 1993), the Staff stated that the Regulation S definition of U.S. person would generally, though not in all cases, be used in determining the extra-territorial reach of the Investment Advisers Act of 1940. This approach seems to require an investment adviser to undertake some analysis of the U.S. contacts of its clients. We note that an investment adviser is likely to have more information regarding the clients for whom it provides advisory services than an offshore fund will have regarding its shareholders.

¹⁹ In *Touche Remnant*, the Staff based its conclusions in part on the premise that the offering to be made in the United States was a private placement made in compliance with the provisions of Rule 506 under Regulation D. One aspect of compliance with Rule 506 is determining whether offerings must be integrated in accordance with Rule 502(a) under Regulation D.

While at least one early no-action letter under the Touche Remnant doctrine, *KBS International Ltd.* (March 18, 1985), stated that onshore and offshore offers would be integrated if U.S. jurisdictional means were used directly or indirectly in connection with the offshore offer, the Staff subsequently granted no-action relief in numerous letters involving limited use of U.S. jurisdictional means in connection with the foreign offering (e.g. *Merrill Lynch*). These letters typically contemplated that certain procedures designed to preclude redistribution of the offshore funds' shares in the United States would be used. The applicant's letter in *G.T. Global* provides a detailed description of such

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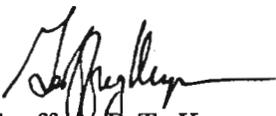
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to provide that, "[g]enerally, transactions otherwise meeting the requirements of an exemption will not be integrated with simultaneous offerings being made outside the United States in compliance with Regulation S."²⁰ We believe that there is no doubt that for 1933 Act purposes, offshore transactions complying with Regulation S will not be integrated with a U.S. private placement. However we believe that there is unnecessary ambiguity as to whether the same principles are available to offshore funds for purposes of the Touche Remnant doctrine and Section 7(d) of the 1940 Act.²¹

In light of the foregoing, we ask the Staff to confirm our view that, in the absence of a plan or scheme to evade applicable law, a public offering outside the United States by an offshore fund relying upon the Touche Remnant doctrine will not be integrated with a private placement inside the United States so long as the offshore offering is conducted in compliance with Regulation S.

If you should have any questions concerning the above, please feel free to call me at (617) 570-1167 or Elizabeth Shea Fries at (617) 570-1559.

Sincerely yours,



Geoffrey R.T. Kenyon

cc: Elizabeth Shea Fries, Esq.
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procedures. In a number of letters, the applicants have cited 1933 Act Release No. 4708 (July 9, 1964) for the proposition that the onshore and offshore offerings should not be integrated. See, e.g., *G.T. Global*. In the Regulation S Adopting Release, the Commission stated, "reliance upon Securities Act Release 4708 . . . and the no-action and interpretative letters relating thereto is not appropriate for offerings of securities commencing after the ninetieth day following publication of this release in the Federal Register." (Citation omitted.) This statement creates some question as to the continuing validity of letters such as *G.T. Global*.

²⁰ See Note to Rule 502(a).

²¹ This ambiguity arises primarily from *Win Global*, which stated that the Staff has not expressed an opinion regarding the status of a foreign investment company under Section 7(d) making an offshore offering in reliance upon Regulation S.