Dechert

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March 30, 2001

VIA HAND DELIVERY

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Douglas J. Scheidt
Associate Director
Office of Associate Director (Chief Counsel)
Division of Investment Management
Securities and Exchange Commission
450 Fifth Street, N W. -- Mail Stop 5-6
Washington, D C 20549

Re Longleaf Partners Funds, Section 17(a), Investment Company Act of 1940, and Rule 17a-6 thereunder.

Dear Mr Scheidt.

On behalf of the Longleaf Partners Realty Fund ("Realty") and Longleaf Partners Small-Cap Fund ("Small-Cap") (collectively, the "Funds"), we request that the Staff of the Division of Investment Management of the Securities and Exchange Commission (the "Commission") advise us that it would not recommend that the Commission take any enforcement action for violations of Section 17(a) of the Investment Company Act of 1940, as amended (the "Act") if Realty and Bay View Capital Corporation ("Bay View"), as described below, participate in the transactions described below.[1]

In short, we believe that, under the circumstances described below, those transactions do not involve any of the abuses to which Section 17(a) was directed, that the administrative history of Rule 17a-6 provides a sound basis for the relief requested, and that your granting of that relief would be in the best interests of the shareholders of the Funds and the other parties to the transactions.

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[1] This letter sets forth facts furnished to you prior to the events described below, and therefore speaks prospectively about transactions that have already occurred. The parties proceeded with those transactions in reliance on oral advice that your office provided to us prior to the consummation of those transactions

I. Facts

A. The Funds and the Investment Adviser.

The Funds are two of the four series of Longleaf Partners Funds Trust, a Massachusetts business trust registered under the Act (File No. 811-4923). The Funds' investment adviser is Southeastern Asset Management, Inc., a Tennessee corporation registered under the Investment Advisers Act of 1940 ("Advisers Act") (File No 801-11123) ("Southeastern"), which also manages a large number of private or separate accounts. These private accounts are primarily institutional accounts and are comprised of portions of the assets of corporate and governmental retirement plans, endowment funds of universities, hospitals, and religious organizations, and portions of the investment portfolios of a few wealthy individuals. There are no proprietary private accounts such as limited partnerships or retirement plans in which the investment adviser or its employees are participants.

Southeastern uses the value concept of investing for the Funds and its private accounts Its objective is to acquire equity securities of companies which are deemed to be significantly undervalued at the time of purchase. Positions are generally held until they reach the expected or "appraised" value, a period which may take two to five years. It has not been unusual for positions held by the Funds and the private or managed accounts to be acquired through tender offers or mergers by other companies not previously held in any of the Funds' or managed accounts' portfolios

The Funds are non-diversified and accordingly have relatively concentrated portfolios Currently, Small-Cap, with assets of approximately $1.5 billion, has 32 equity positions, while Realty, with approximately $750 million in assets, has 23 equity positions. Because of the asset size of these Funds and their relatively concentrated portfolios, it is not uncommon for one or more of the Funds to own more than 5% of the outstanding equity securities of a particular company held in the portfolios. On occasion, the equity securities of a particular company may be held by more than one of the Funds and also by a number of the private accounts. For example, a realty oriented company which is also a small cap stock may be held both by Realty and Small-Cap, and could also be held by one or more private accounts It is therefore not uncommon for the entire group of accounts to hold, in the aggregate, 20% to 25% of the shares of a particular company for investment purposes

Southeastern files ownership reports on Schedule 13G, and classifies itself as a "passive" investor As a matter of practice, therefore, Southeastern, the Funds and the managed accounts are never represented on the board of directors of any of

the portfolio holdings, and do not attempt to manage or control the daily operations of any of the portfolio holdings.

B. The Merging Portfolio Companies

The transaction at issue involves a proposed merger (the "Merger" or "Transaction") between Bay View and Franchise Mortgage Acceptance Company ("FMAC"), under which Bay View will acquire all of the outstanding common stock of FMAC in exchange, at the election of shareholders, for 0.5444 shares of common stock of Bay View or $9.80 in cash for each share of common stock of FMAC. These elections will be adjusted to assure that at least 85% of the FMAC shares are acquired with Bay View common stock and that not more than 15% of the FMAC shares will be acquired with cash.

Bay View's common stock is listed on the New York Stock Exchange, while FMAC common stock is traded on NASDAQ. The joint proxy statement seeking shareholder approval for the proposed Merger was mailed to shareholders on September 14, 1999 and, if shareholders approve the Merger, the closing is now expected to take place on or about November 1, 1999.[2]

Bay View is a bank holding company owning all of the capital stock of Bay View Bank, N.A , national bank, and Bay View Securitization Corp., which issues asset-backed securities through a trust. FMAC is a commercial finance company originating and servicing loans to small businesses. The stated purpose of the Merger is to create a financially stronger and more diversified company able to compete more effectively.

The business of Bay View is subject to regulation by the Federal Reserve Board and the Comptroller of the Currency. Prior to becoming a bank holding company, Bay View was a savings and loan holding company and was regulated by the Office of Thrift Supervision. Its present regulatory agencies, the Federal Reserve Board and the Comptroller of the Currency, have both approved the necessary aspects of the proposed Merger, subject to shareholder approval. The business of FMAC is not subject to regulation by a particular regulatory agency. With respect to the Merger, Lehman Brothers has rendered a favorable fairness opinion to Bay View, and Credit Suisse First Boston Corporation has rendered a favorable fairness opinion to FMAC.

The Board of Trustees of Realty, including a majority of independent trustees, have found that the terms of the Bay View/Realty transaction were reasonable and fair and would not involve overreaching of Realty, and that

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[2] *See, supra*, note 1.

participation in the transaction would be in the best interests of Realty and would be consistent with Realty's investment policies.

C. Ownership of Bay View and FMAC Common Stock By Southeastern Accounts

The following table shows the levels of ownership of the merging corporations:

Account	Bay View	FMAC
Small-Cap	12 3%	None
Realty	4.9%	8.6%
One Private Account	0.3%	3.4%
Three Private Accounts	2.9%	None
TOTAL	20.4%	12.0%

D. Facts With Respect To Control of Bay View

The Southeastern accounts listed above began acquiring Bay View common stock during the period when it was subject to regulation by the Office of Thrift Supervision ("OTS"). In order to acquire more than 10% of the outstanding common stock of Bay View, Southeastern filed a "Rebuttal of Rebuttable Control Determination" with the regional office of OTS having jurisdiction over Bay View. In connection with this application, Southeastern represented that it was not seeking to acquire the additional shares of Bay View for the purpose or effect of changing control of Bay View and further agreed with OTS that, among other things, it would not seek or accept representation on the board of directors, would not propose a director in opposition to management's nominees, would not solicit proxies in opposition to management, would not attempt to influence in any respect loan or credit decisions or policies, pricing of services, any personnel decisions, location of offices, dividend policies, seek or accept non-public information, and, most significantly, would not exercise or attempt to exercise, directly or indirectly,

control or a controlling influence over the management, policies, or business operations of Bay View or any of its subsidiaries. OTS thereupon granted Southeastern authority to acquire on behalf of the Funds and its private accounts up to 25% of the outstanding capital stock of Bay View. Southeastern was required to re-affirm these representations and agreements to the Federal Reserve Board and the Comptroller of the Currency at the time Bay View became a national bank.

Southeastern has filed ownership reports on Schedule 13G with the Commission with respect to the holdings of the Funds and the managed accounts for both Bay View and FMAC, in which it has certified that the holdings were acquired for investment purposes only, in the ordinary course of business and were not acquired for the purpose of and do not have the effect of changing or influencing the control of either company, and were not acquired in connection with or as a participant in any transaction having such purposes and effect.

As a result of the filings with the banking regulatory authorities listed above and compliance with the agreements therein, the fact that no Fund or other account, or all accounts together, own as much as 25% of the shares of Bay View or FMAC, and the filing of ownership reports by Southeastern and the Funds with the SEC on Schedule 13G, neither Southeastern, nor the Small-Cap nor Realty Funds are controlling persons of either Bay View or FMAC as "control" is defined in Section 2(a)(9) of the Act. And, as a matter of fact, neither Southeastern, nor the Small Cap, nor Realty Funds control either Bay View nor FMAC[3] .

Moreover, Southeastern and the Funds had no part in originating the proposed Merger, or in subsequent negotiations between the two companies with respect to pricing the shares of FMAC, the number of shares of Bay View to be exchanged per share of FMAC, or any other provisions of the proposed Merger. Instead, the proposed Merger was originated independently of Southeastern and the Funds by management of the respective Merger participants for valid business reasons. Southeastern expects to vote all common stock of Bay View and FMAC over which it has discretionary voting authority, including the shares held by the Funds, in favor of the proposed Merger, and will elect to receive shares of common stock of Bay View in exchange for all shares of FMAC which are so held.

II. Legal Analysis

A. Section 17(a)

As a preliminary matter, it bears emphasis that completion of the Merger would not involve any violation of Section 17(a) of the Act by the Funds, Southeastern, or any other party under the *direct* regulatory jurisdiction of the

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[3] *See infra*, note 4.

Commission. Rather, the Merger may result in a transaction between Bay View and Realty pursuant to which Bay View will purchase the FMAC shares held by Realty in exchange for shares of Bay View (the "Transaction"). The Transaction may result in violation of that Section by Bay View as a possible affiliated person of an affiliated person of Realty.

As relevant here, Section 17(a) of the Act provides that:

> It shall be unlawful for any affiliated person . . . of a registered investment company . . . or any affiliated person of such a person . . . acting as principal--
>
> (1) knowingly to sell any security or other property to such registered company . . . unless such sale involves solely (A) securities of which the buyer is the issuer, [or] (B) securities of which the seller is the issuer and which are part of a general offering to the holders of a class of its securities. . . .
>
> (2) knowingly to purchase from such registered company . . . any security . . . (except securities of which the seller is the issuer) . . . [4]

These prohibitions arguably do not apply to the Transaction, because Bay View is an affiliated person of Small-Cap, but it is not an affiliated person of Realty.

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[4] Sections 2(a)(3)(B) and 2(a)(3)(C) of the Act define "affiliated person" to include any person 5 % or more of whose voting securities are owned by another person, and any person under common control with another person. Section 2(a)(9) defines "control" to mean "the power to exercise a controlling influence over the management or policies of the company, unless such power is solely the result of an official position with such company" That Section also provides that: (a) any person who owns beneficially more than 25 percent of the voting securities of a company shall be presumed to control that company; (b) a person who does not own more than 25 % of the voting securities of a company is presumed not to control the company; and (c) a natural person is presumed not to be a controlled person All of these presumptions may be rebutted by evidence, but generally continue until a determination to the contrary is made by the Commission by order.

But, because the Commission has stated that an investment adviser nearly always controls a fund for which it is the adviser,[5] you might treat Small-Cap and Realty as

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[5] *In the Matter of Steadman Security Corp.*, Fed. Sec. L. Rep.[1977-1978 Transfer Binder] (CCH) Par. 81,243, aff'd in part and vacated and remanded on other grounds sub nom. *Steadman v. SEC*, 603 F2d 1126 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981). The Funds are both affiliated persons of Southeastern, but despite the statement in *Steadman*, Southeastern is presumed not to control either of the Funds under Section 2(a)(9), in the absence of Commission order to the contrary, because Southeastern does not own more than 25% of the outstanding voting securities of either of the Funds Moreover, since the *Steadman* case, the Commission has more than once addressed the issue of whether an investment adviser controls an investment company by virtue of its advisory position. In each instance, the Commission did not take the position, articulated in *Steadman*, that Funds with a common investment adviser are affiliated persons. For example, in Investment Company Act Release No. 11136 (April 21, 1980), the Commission proposed amendments to Rule 17a-7 to expand the existing exemption for purchase and sale transactions between investment companies that are affiliated persons "solely by reason of having a common investment adviser or investment advisers which are affiliated persons of each other, common directors, and/or common officers . . . ." In proposing the amendment to Rule 17a-7, the Commission cited the *Steadman* case for the proposition that if the foreign fund in that case were registered, it could have relied on the Rule as it then was written. But, when the Commission adopted the amendments, it did not cite the *Steadman* case. Rather, it stated: "The rule does not represent a Commission finding that investment companies having common officers, directors or investment advisers are always affiliated persons or affiliated persons of an affiliated person. *They may or may not be, depending on the facts.* The rule enables the parties to go forward without resolving that question if the requirements of the rule are met. Release No. IC-11676 at n.5 (emphasis supplied). See also Release No. IC-11053 (Feb. 19, 1980) using identical language in adopting Rule 17a-8); *Fundtrust*, (*pub. avail.* May 26, 1987) ("Investment companies with a common investment adviser are not necessarily under 'common control' and, therefore, are not necessarily affiliated persons solely for this reason"). The Funds also have common directors and officers, but this fact is not a deciding one because, in the words of Section 2(a)(9), their "power to exercise a controlling influence" over the Funds arises " solely [as] the result of [their] official position[s] with [the Funds]." Based on this analysis, we respectfully suggest that it would be reasonable to conclude that the Funds are not controlled by Southeastern or under common control unless and until the Commission issues an order finding that they are.

direct affiliates of each other because they are under the common control of Southeastern as investment adviser of both of the Funds. We do not believe this treatment is required, or supported by the facts, but will present our case assuming this treatment for the sake of argument.

In this connection, as just noted, Bay View is not an affiliated person of Realty, because Realty owns less than 5% of the outstanding voting securities of Bay View. But, Bay View is an affiliated person of Small-Cap by virtue of Small-Cap's ownership of 12.3 % of the shares of Bay View. Assuming that Realty Fund is a direct affiliate of Small-Cap because it is under common control with Realty, Bay View is an affiliated person of an affiliated person of Realty.[6]

As discussed above, the Transaction could be regarded as involving the sale by Bay View of additional Bay View shares to Realty, which may implicate Section 17(a)(1).

Also the Transaction may result in a violation by Bay View of the prohibition of Section 17(a)(2), if the relinquishment of the FMAC shares held by Realty for additional shares of Bay View is regarded as a "purchase by Bay View from Realty of a security" of which Bay View is not the issuer.[7] The Transaction

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[6] In addition, Bay View may be deemed to be a second-tier affiliate of Realty because Bay View may be a first-tier affiliate of Southeastern, which is a first-tier affiliate of Realty. In particular, Bay View may be a first-tier affiliate of Southeastern pursuant to Section 2(a)(3)(B) because Southeastern, on behalf of the Funds and the Southeastern Accounts, directly or indirectly controls, or holds with power to vote more than 5% of the outstanding voting securities of Bay View. Southeastern is a first-tier affiliate of Realty pursuant to Section 2(a)(3)(E) because Southeastern is Realty's investment adviser.

[7] Nonetheless, the relinquishment by Realty of its shares in FMAC would not necessarily constitute a "purchase" of those shares by Bayview. In *SEC v. Sterling Precision Corp.*, 393 F.2d 214 (1968), Judge Friendly, writing for the Court of Appeals for the Second Circuit, held that the redemption by an affiliated person of a registered investment company of bonds and preferred stock issued by the company was not a "purchase" within the meaning of Section 17(a)(2). Our case involves the functional equivalent of the redemption by Realty of its shares in FMAC; arguably, not a "purchase" under the reasoning of *Sterling Precision*. Under the provisions of the Merger Agreement, the FMAC shares would be converted to a right to receive either Bay View shares or cash. However, we assume for purposes

may also expose Southeastern and Realty to liability for aiding and abetting of, or being a cause of by contributing to, a violation by Bay View of Section 17(a)(2).[8]

B. Rule 17a-6 (the "Rule")

As relevant here, the Rule provides that "a transaction to which a registered investment company . . . is a party, and to which a company affiliated with such a registered investment company *or a person affiliated with such affiliated company* is also a party, shall be exempt from the provisions of Section 17 (a) of the Act," unless any one of certain persons and entities listed in the Rule ("disqualified persons") is also a party to the transaction or has a direct or indirect financial interest in a party (except the registered investment company) to the transaction.[9]

Among the disqualified persons, are persons directly or indirectly under common control with the registered investment company (paragraph (a)(4)), persons affiliated with such persons (paragraphs (a)(5) and (a)(4) taken together) and persons affiliated with the investment adviser (paragraphs (a) (5) and (a)(1) taken together).

Small-Cap may be a disqualified person because it may be deemed to be an affiliated person of Southeastern.[10] Small-Cap also may be a disqualified person because it may be deemed to be under common control with Realty. And, Small-Cap has a direct financial interest in Bay View, a party to the Transaction.[11]

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of this discussion, that you would treat the relinquishment of the Realty's ownership of FMAC shares in exchange for the issuance of additional Bay View shares as a "purchase" by Bay View of the FMAC shares. But, as discussed below, we believe that the involuntary nature of the transaction on the part of Bay View in relation to Section 17(a)(2) in our case supports our request for relief.

8 *See, e.g.*, the Act, Sections 9 (b)(3), 9(d)(1)(A), and 9(f); Advisers Act, Sections 203(e)(5) and 203(i)(1)(B); *and cf., In the Matter of Parnassus Investments, et al*, Initial Decision Release No. 131 (Sept. 3, 1998).

9 Emphasis supplied.

10 Small-Cap may be deemed to be an affiliated person of Southeastern pursuant to Section 2(a)(3)(C) of the Act because it may be deemed to be controlled by Southeastern.

11 See Rule 17a-6(a)(5) (ii), and 17a-6(b).We believe that the private accounts are not disqualified from participating in the Merger because they are not

Bay View may be a disqualified person because, assuming that Small-Cap is under common control with Realty, Bay View is an affiliated person of Small-Cap[12] and Bay View is a participant in the Transaction. Accordingly, Realty and Bay View may not be able to rely on the exemption provided by the Rule. As discussed below, however, Southeastern does not have a direct or indirect financial interest in any party to the Transaction. As a result, Southeastern did not have the incentive to, and, in fact, did not overreach Realty. Therefore , the Transaction does not involve any of the abuses to which Section 17(a) was directed.

III. Reasons for No-Action Relief

(A) The Transaction Does Not Involve Any of the Abuses to Which Section 17(a) was Directed

Section 1(b) of the Act states that

> [It] is hereby declared that the national public interest and the interest of investors are adversely affected -- . . .(2) [w]hen investment companies are . . operated, [or] managed . . . in the interest of . . . investment advisers . . .or other affiliated persons thereof . . . or in the interest of other investment companies . . . rather than in the interest of all classes of such companies' security holders. . . .

The last unnumbered paragraph of Section 1(b) states that:

> It is hereby declared that the policy and purposes of this title, in accordance with which the provisions of this title shall be interpreted, are to mitigate and, so far as is feasible, to eliminate the conditions enumerated in this section which adversely affect the national public interest and the interest of investors.

"persons" within the meaning of the Act. Also, the owners of the private accounts are not disqualified persons because Southeastern does not control them. See Section 2(a)(2) defining "person" and Section 2(a)(9) *supra*, note 4

12 As stated above, Bay View is an affiliated person of Small-Cap by virtue of Small-Cap's ownership of 12.3% of the shares of Bay View.

Of course, Section 17(a) is one of the provisions designed to ensure that investment companies are operated in the interest of the companies' securities holders rather than in the interest of investment advisers and their affiliated persons. Section 17(b) provides the Commission with the needed flexibility to mitigate the draconian provisions of Section 17(a) by authorizing the Commission to exempt proposed transactions from the restrictions of Section 17(b) if certain conditions are met.[13] We have no doubt that the Transaction meets, and would meet these standards if we were to file an application under Section 17 (b), but it appears that the scheduled closing of the Merger, which is not under the control of Southeastern or the Funds, would make this impractical.

The Commission has also exercised its authority under Section 6(c) of the Act to adopt exemptive rules, including the Rule.

In any event, we submit that it would be appropriate for you to grant the relief requested in this letter, because it would meet the standards of Section 17(b) and be consistent with the mandate of the last unnumbered paragraph of Section 1(b). In this regard, none of the negative factors enumerated in Section 1(b) are present in our case That is:

> (1) the terms of the proposed transaction are reasonable and fair because they have been set at arms length by Bay View and FMAC without the influence of Southeastern or the Funds
>
> (2) the transactions do not involve overreaching on the part of any person concerned;
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> (3) the transactions are consistent with the policies of Realty and Small Cap as recited in their registration statements and reports filed under [the Act]; and

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13 Those conditions are: (1) the terms of the proposed transaction, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching on the part of any person concerned; (2) the proposed transaction is consistent with the policy of each registered investment company concerned, as recited in its registration statement and reports filed under [the Act]; and (3) the proposed transaction is consistent with the general purposes of [the Act].

> (4) the transactions are consistent with the general purposes of [the Act] as set forth in Section 1(b). Specifically, the Merger and the transactions necessary to carry it out would be in the interest of the shareholders of Realty and would not be effectuated to serve any special interests of Southeastern or Small Cap.

Indeed, preventing Bay View from issuing additional shares to Realty, in return for the shares of FMAC relinquished in the Transaction would be substantiality deleterious to the interests of the Realty shareholders.

(B) <u>The Administrative History of the Rule Provides a Sound Basis for the Relief Requested</u>

We believe that the administrative history of the Rule shows that the Transaction is consistent with the basis purposes of Rule 17a-6 and provides a sound basis for the issuance of a no-action letter under the circumstances of this case The Rule was originally adopted in 1961 to provide a limited exemption from the provisions of Section 17(a) for registered investment companies that were Small Business Investment Companies licensed by the Small Business Administration, and certain venture capital companies defined in the Rule.[14] The Rule was amended in 1964 to expand its coverage to all registered investment companies, but the amendment restricted that coverage with respect to affiliated persons of companies that were portfolio affiliates of registered investment companies to "non-public" companies, whose outstanding securities were beneficially owned by not more than one hundred persons.[15]

The Rule was further amended in 1979 to apply equally to transactions of any investment company, regardless of whether the company was a venture capital company or was licensed as a Small Business Investment Company. In doing so, the Commission removed the restriction relating to non-public companies.[16]

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14 Release No. IC-3324 (Sept. 12, 1961) (Proposing Release); Release No. IC-3361 (Nov. 17, 1961). (Adopting Release).

15 Release No. IC-3776 (September 27, 1963) (Proposing Release); Release No. IC-3968 (April 29, 1964) (Adopting Release).

16 Release No. IC-10698 (May 17, 1979) (Proposing Release); Release No. IC-10828 (August 13, 1979) (Adopting Release).

In proposing and adopting the 1979 amendments, the Commission explained.

> The basic purpose of the [1964] amendment, like the original Rule was "to eliminate filing and processing applications in circumstances in which there appears to be no likelihood that the statutory finding for a specific exemption under Section 17(b) could not be made."[17]

As originally proposed, in addition to making the Rule applicable to all investment companies, the 1979 amendments would have added a new provision to the Rule to exempt from the prohibitions of Section 17(a) certain transactions between an investment company and a non -controlled portfolio affiliates of that company.[18] The Commission explained:

> As in existing paragraphs (a) and (b) of Rule 17a-6, the exemption would not be available in instances in which certain prescribed persons -- *who, by virtue of their relation to the investment company, would be in a position to influence the terms of the transaction* -- are parties to the transaction or have a financial interest therein. *This limitation would make it unlikely that a transaction effected under the proposed exemption would involve overreaching against an investment company, because persons with the potential ability to overreach the company could not be included in the transaction.*[19]

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17 Release No. IC- 10698, supra, note 16, text at n. 10.

18 "Noncontrolled portfolio affiliate" was defined in the proposed amendments, in effect, as a company affiliated with the investment company solely by virtue of the investment company's ownership of 5 % or more of the outstanding voting securities of the portfolio company. *Id.* 1979 WL 22325 *4 (S E.C.) Despite its initial intention, in proposing the 1979 amendments, to limit the expanded relief to situations involving noncontrolled portfolio affiliates, as adopted, and as currently in effect, the Rule provides exemptive relief to transactions involving both noncontrolled and controlled portfolio affiliates. Release No. IC-10828, *supra,* note 13.

19 *Id.*, at 1979 WL 22325 *2-*3)(S.E.C.). Emphasis supplied. At a previous page of the Release, the Commission also explained that the statutory

We believe that this statement is highly significant, especially as it applies to the circumstances set forth in this letter. The statement demonstrates that the Commission's primary concern in designating disqualified persons in the Rule was to deal with situations in which persons affiliated with the investment adviser "would be in a position to influence the terms of the transaction" to overreach an investment company. [20]

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requirement for exempting particular proposed transactions under Section 17(b) "has been read to mean that the Commission -- in addition to finding that the proposed transaction is fair and reasonable and involves no overreaching of the investment company -- must find that there is no overreaching of the portfolio affiliate by the investment company or by any other person involved in the proposed transaction. However, the legislative history of Section 17 (a) regarding the persons intended to be protected by that provision may not be free from doubt with respect to Congressional intent Additionally, Congress' fundamental findings and declaration of policy upon which the Act was legislated does not referred explicitly to any legislative concern regarding investors of portfolio affiliates." *Id.* at *2 (citations omitted.)

[20] See also, letter dated December 10, 1998 to Paul F. Roye, Director Division of Investment Management, from Craig S. Tyle, General Counsel of the Investment Company, (recommending, among other things, that the Rule be amended to exempt transactions in which a registered investment company or separate series of a registered investment company is an affiliated person, or affiliated person of an affiliated person, of another investment company solely by reason of having a common investment adviser or investment advisers that are affiliated persons of each other, common directors, or common officers , or common directors or officers.). *Id.* at 40. In his letter, Mr. Tyle pointed out that that Rule 17a-7 permits the purchase and sale of portfolio securities between funds affiliated solely as result of having a common investment adviser, affiliated investment advisers, or common directors or officers. He said that, in adopting that rule, the Commission concluded that, under these circumstances, "there is no likelihood of overreaching of the investment company participating in the transaction." He added that Rules 17a-8 and 17d-1(d)(8) permit mergers and reorganizations involving funds affiliated solely as result of having a common investment adviser, common directors or common officers. He concluded that, "[w]hen it proposed these rules, the Commission stated that '[w]hen a merger involves investment companies which are affiliated persons exclusively by virtue of having a common investment adviser, directors, and/or officers, no person who is responsible for evaluating and

Indeed, it is arguable that it was not the intention of the Commission in adopting and amending the Rule to prohibit transactions involving the type of relationships involved in this case. That is, the words of the Rule may be read to prevent Bay View from relying on the Rule if Realty is an affiliated person of an affiliated person of Bay View, and because Small-Cap is under common control with Realty. But, Bay View is a "downstream" affiliated person of an affiliated person of Southeastern, the Funds' investment adviser, and has no potential ability to overreach Realty or Small-Cap. Similarly, Small-Cap as an entity that may be deemed to be under common control with Realty, has no potential ability to overreach Realty.

IV. Conclusion

For the reasons set forth above, we request that you advise us that you would not recommend that the Commission take any enforcement action for violations of Section 17(a) of the Act if the Funds, Southeastern and Bay View participate in the transactions described in this letter

Sincerely,

Alan Rosenblat

Alan Rosenblat

Charles D. Reaves
Executive Vice President
General Counsel
Longleaf Partners Funds

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approving the terms of the transactions on behalf of the various participating investment companies would have a significant financial interest in a transaction improperly influencing these terms." *Id.* at 39 (citations omitted). We support Mr. Tyle's recommendations, but we do not believe amendments are necessary to permit the parties to proceed with the Merger. In any event, we believe that the Commission's statements quoted by Mr. Tyle enunciate principles that support our request.