Dechert

Direct Tel: (202) 261-3332

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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

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.

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