OCT 20 1995

Our Ref. No. 95-CC-480
Colonial Trust I et al.
File No. 801-2019

RESPONSE OF THE OFFICE OF CHIEF COUNSEL
DIVISION OF INVESTMENT MANAGEMENT

Your letter of September 21, 1995 requests that the staff confirm your view that Ms. Lora Collins, a trustee of several registered investment companies advised by Colonial Management Associates, Inc., ("Colonial Management"),[1] will not be considered an "interested person" within the meaning of section 2(a)(19) of the Investment Company Act of 1940 (the "Act") of those investment companies, Colonial Management, Colonial Investment Services, Inc. ("CISI"), or any other investment company of which she may serve as trustee in the future that has Colonial Management as its investment adviser or CISI as its principal underwriter[2] (together "the Colonial Companies") if Ms. Collins rejoins as an employee the law firm of Kramer, Levin, Naftalis, Nessen, Kamin & Frankel ("Kramer Levin"). You also request our assurance that we would not recommend to the Commission enforcement action against the Colonial Companies based on Ms. Collins' status under section 2(a)(19).

Ms. Collins joined Kramer Levin as an associate in September 1986, five years after she first became a trustee of some of the investment companies in the Colonial Companies. She resigned her employment with Kramer Levin in March 1995, and currently works as an independent contractor. While employed with Kramer Levin, she practiced, and if reinstated will continue to practice, in the employee benefits section of the firm's New York office.

Mr. Meyer Eisenberg joined Kramer Levin as counsel to the financial services group in the firm's Washington, D.C., office in September 1994. Prior to joining Kramer Levin, Mr. Eisenberg provided legal services to Colonial Management within the last two fiscal years of investment companies in the Colonial Companies.[3] Since joining Kramer Levin, however, Mr. Eisenberg

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[1]You state these investment companies are Colonial Trust I, Colonial Trust II, Colonial Trust III, Colonial Trust IV, Colonial Trust V, Colonial Trust VI, Colonial Trust VII, Colonial High Income Municipal Trust, Colonial InterMarket Income Trust I, Colonial Intermediate High Income Fund, Colonial Investment Grade Municipal Trust, and Colonial Municipal Income Trust. Ms. Collins does not serve as a trustee or director of any other registered investment company or business development company in the Colonial Companies.

[2]You state that CISI currently serves as the principal underwriter for each investment company that is an open-end management investment company.

[3]At the time Mr. Eisenberg provided legal services to the Colonial Management, it also served as the principal underwriter for the investment companies that were open-end management

has not provided any legal services to Colonial Management or any other member of the Colonial Companies. In addition, other than Mr. Eisenberg, no attorney at Kramer Levin has ever provided legal services to the Colonial Companies. The Colonial Companies will not retain Mr. Eisenberg or any other attorney at Kramer Levin to provide legal services while Ms. Collins remains a trustee of any of the investment companies.

Section 2(a)(19)(A)(iii) of the Act provides that "interested person" of an investment company means "any interested person of any investment adviser of or principal underwriter for such company." Section 2(a)(19)(B)(iv) in turn defines "interested person" of an investment adviser of or principal underwriter for any investment company, to include "any person or partner or employee of any person who at any time since the beginning of the last two completed fiscal years of such investment company has acted as legal counsel for such investment adviser or principal underwriter." Because Mr. Eisenberg has acted as legal counsel to Colonial Management within the last two completed fiscal years, you are concerned that Ms. Collins could be deemed to be an "interested person" of the Colonial Companies if she were deemed to be an "employee" of Mr. Eisenberg. This concern led to Ms. Collins' resignation from the firm.

The term "employee" is not defined in the Act. The staff, however, has issued no-action letters relating to the definition of employee (as that term is used in section 2(a)(3)(D) of the Act) in determining whether a director of an investment company is an affiliated person of any registered broker-dealer and thus an interested person within the meaning of sections 2(a)(19)(A)(v) and 2(a)(19)(B)(v) of the Act.[4] The parties requesting no-action relief maintained that a director was not an employee of a broker-dealer because the director's relationship with the broker-dealer did not meet the four elements generally considered when determining whether an employer/employee

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investment companies. These services were subsequently transferred to CISI. Although Mr. Eisenberg has never performed legal services for CISI, you have requested relief with respect to CISI to address any possibility that Mr. Eisenberg may be deemed to have performed such services for CISI as a result of CISI's succeeding Colonial Management as principal underwriter.

[4]Section 2(a)(3)(D) defines "affiliated person" of another person to mean "any officer, director, partner, copartner, or employee of such other person." Sections 2(a)(19)(A)(v) and 2(a)(19)(B)(v) define "interested person" of another person, when used with respect to an investment company, an investment adviser, or a principal underwriter, to include any affiliated person of a registered broker or dealer.

relationship exists at common law.[5] These elements include the selection and engagement of the employee; the payment of wages; the power of dismissal; and the power of control of the employee's conduct.[6]

Using this analysis, you maintain that Ms. Collins should not be considered to be an employee of Mr. Eisenberg. In particular, you represent that Mr. Eisenberg has not had, and will not have in the future, any decision making authority relating to (1) the terms of Ms. Collins' employment, including her hiring, compensation, retention and promotion, (2) the assignment and evaluation of Ms. Collins' work, and (3) the manner in which Ms. Collins' work is to be performed.[7] Therefore you conclude that, if reinstated, Ms. Collins would not be an employee of Mr. Eisenberg and thus would not be an interested person of the Colonial Companies.

We agree. Accordingly, if Ms. Collins rejoins Kramer Levis as an employee, we would not recommend to the Commission enforcement action against the Colonial Companies based on her status thereafter under section 2(a)(19) by virtue of Mr. Eisenberg's prior legal representation of Colonial Management. This response is based on the representations made to the Division in your letter and subsequent phone conversations. Any different facts or circumstances might require a different conclusion.

Rochelle Kauffman Plesset
Senior Counsel

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[5]Loomis-Sayles Mutual Fund, Inc. (pub. avail. Oct. 27, 1971); Merrill Lynch (pub. avail. July 20, 1981).

[6]*See* 53 Am. Jur. 2d, Master and Servant, § 2.

[7]*See also* telephone conversation of October 6, 1995 between Rochelle Kauffman Plesset and David C. Sullivan.

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September 21, 1995

ACT Investment Company Act
SECTION 2(a)(19)
RULE
PUBLIC AVAILABILITY Oct. 20, 1995

Jack Murphy, Chief Counsel
Office of Chief Counsel
Division of Investment Management
Securities and Exchange Commission
Washington, D.C. 20549

Re: Request for No-Action Relief from the Provisions of Section 2(a)(19) of the Investment Company Act of 1940 (the "Act")

Dear Mr. Murphy:

On behalf of Colonial Trust I ("CT1"), Colonial Trust II ("CT2"), Colonial Trust III ("CT3"), Colonial Trust IV ("CT4"), Colonial Trust V ("CT5"), Colonial Trust VI ("CT6"), Colonial Trust VII ("CT7") (together the "Open-End Trusts"); Colonial High Income Municipal Trust, Colonial InterMarket Income Trust I, Colonial Intermediate High Income Fund, Colonial Investment Grade Municipal Trust, Colonial Municipal Income Trust (together the "Closed-End Trusts" and together with the Open-End Trusts, the "Trusts") and any now or future created series of the Trusts; Colonial Management Associates, Inc. (the "Manager"); and Colonial Investment Services, Inc. ("CISI")(all of the foregoing being referred to as the "Applicants"), we request (i) the advice of the staff of the Division of Investment Management (the "Staff") that Ms. Lora Collins, a trustee of each of the Trusts, will not, under the circumstances described below, constitute an "interested person" of the Applicants within the meaning of Section 2(a)(19) of the Act if she rejoins as an employee the law firm of Kramer, Levin, Naftalis, Nessen, Kamin & Frankel ("Kramer Levin") and (ii) your confirmation that the Staff will not recommend that the Securities and Exchange Commission (the

"Commission") take any enforcement action against the Applicants based on Ms. Collins' status under Section 2(a)(19).

THE APPLICANTS

Each Open-End Trust is an open-end management investment company organized as a business trust under the laws of The Commonwealth of Massachusetts. Currently, CT1 and CT2 each consist of three series of shares; CT3 consists of eight series of shares; CT4 consists of seven series of shares; CT5 consists of nine series of shares; CT6 consists of two series of shares; and CT7 consists of a single series of shares. Each Closed-End Trust is a closed-end management investment company organized as a business trust under the laws of The Commonwealth of Massachusetts and each consists of a single series of shares.[1]

The Manager, a registered investment adviser, serves as investment adviser for each existing Fund with the exception of the Colonial Global Utilities Fund ("CGUF") and the Colonial Newport Tiger Fund ("CNTF"). The Manager serves as administrator for CGUF and CNTF. CISI, a registered broker-dealer, serves as the principal underwriter of each of the Funds in the Open-End Trusts.

STATUS OF MS. COLLINS WITH RESPECT TO THE APPLICANTS

Ms. Collins is a trustee of each of the Trusts. She joined Kramer Levin as an associate in September of 1986, more than five years after she first became a trustee of certain of the Trusts. She resigned her employment with Kramer Levin in March of 1995, and currently does work for the firm as an independent contractor.

On September 1, 1994, Meyer Eisenberg joined Kramer Levin, taking "counsel" status at the firm. Prior to his employment with Kramer Levin, and since the beginning of the last two completed fiscal years of each Fund, Mr. Eisenberg provided legal services to the Manager (which at the time also served as the

[1] As used herein, "Fund" refers to each series of the Trusts that consist of more than one series of shares, and to each Trust that consists of a single series of shares.

principal underwriter of the Open-end Trusts) while a partner successively at two other law firms.

Upon learning of Mr. Eisenberg's affiliation with Kramer Levin, the Applicants became concerned that such affiliation might bring Ms. Collins within the definition of "interested person" in Section 2(a)(19) of the Act with respect to certain of the Applicants. Ms. Collins resigned her employment with Kramer Levin prior to the acquisition of The Colonial Group, Inc., the Manager's parent, by Liberty Financial Companies, Inc., to help ensure that the Applicants could rely on the safe harbor provided by Section 15(f) of the Act.[2]

Based on the following discussion, and notwithstanding Mr. Eisenberg's prior representation of the Manager, the Applicants believe that Ms. Collins will not be an interested person of any Applicant if she rejoins Kramer Levin as an employee. We request your concurrence with this position and your confirmation that the Staff will not recommend enforcement action against the Applicants based on Ms. Collins' status under Section 2(a)(19) if she rejoins Kramer Levin as an employee.

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[2] Section 15(f) of the Act permits an investment adviser to realize a profit upon the sale or transfer of its advisory business without incurring liability to an investment company client or its shareholders provided certain conditions are met. Section 15(f)(1)(A) requires, in part, that for three years following the sale of securities or other interest in an investment adviser which results in an assignment of its advisory contract with a registered investment company, at least 75% of the board of directors (or trustees) of the investment company be persons who are not "interested persons" of the investment adviser. If Ms. Collins rejoins Kramer Levin and is deemed to be an "interested person," the Applicants will remain in compliance with the board composition requirements of Section 15(f)(1)(A) of the Act in that at least 75% of the Boards will consist of trustees who are not "interested persons." However, if certain of the trustees who are disinterested become interested, or leave the Boards and are not immediately replaced, the Applicants' ability to rely on the Section 15(f) safe harbor may depend on Ms. Collins' status.

DISCUSSION

Section 2(a)(19) of the Act provides in relevant part that:

> "Interested Person" of another person means . . . . (B) when used with respect to an investment adviser of or principal underwriter for any investment company . . . (iv) any person or partner or employee of any person who at any time since the beginning of the last two completed fiscal years of such investment company has acted as legal counsel for such investment adviser or principal underwriter . . . . (Emphasis added).

With the exception of Mr. Eisenberg, neither Kramer Levin nor any attorney at the firm (including Ms. Collins) has provided legal services of any kind to the Applicants or any affiliate of the Applicants.[3] The Applicants will not retain Mr. Eisenberg, Ms. Collins or Kramer Levin to participate in any legal matters relating to the Trusts, the Manager or CISI.

Accordingly, if Ms. Collins rejoins Kramer Levin, she would be an "interested person" of the Manager and the Funds[4] only if she were deemed to be an "employee of" Mr. Eisenberg, a person who acted as legal counsel to the Manager within the last two completed fiscal years of the Funds.[5]

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[3] In addition, neither Ms. Collins nor Kramer Levin has at any time had a "material business or professional relationship" with the Applicants or with the principal executive officer or any controlling person of the Applicants or with any other investment company for which the Manager acts as investment adviser or CISI acts as principal underwriter within the meaning of Sections 2(a)(19)(A)(vi) and 2(a)(19)(B)(vi) of the Act.

[4] If Ms. Collins were deemed interested with respect to the Manager she would also be interested with respect to the Funds pursuant to Section 2(a)(19)(A)(iii) of the Act which provides, in part, that "interested person" of another, when used with respect to an investment company, means "any interested person of any investment adviser of . . . such company."

[5] For the sake of clarity, if Ms. Collins rejoins Kramer Levin the threshold issue would not be whether Ms. Collins is an employee of Kramer Levin (clearly she would be) or of the Funds or the Manager (clearly she is

Neither the federal courts nor the Commission has defined the term "employee" in the context of Sections 2(a)(19)(A)(iv) or 2(a)(19)(B)(iv) of the Act. Further, the Commission has not addressed whether, and under what circumstances, an associate at a law firm will be considered an "employee of" an attorney with "counsel" status at the firm.

The Commission has issued several no-action letters relating to the definition of "employee" in Sections 2(a)(19)(A)(v) and 2(a)(19)(B)(v) of the Act (relating to broker-dealers). These letters considered whether a director of a fund is an "employee" of a broker-dealer for purposes of the Act. See Loomis-Sayles Mutual Fund, Inc., 1971 SEC No-Act. LEXIS 3642 (October 27, 1971)("Loomis-Sayles"); Merrill-Lynch Accumulation Programs, 1977 SEC No-Act. LEXIS 2841 (November 11, 1977).

In Loomis-Sayles, the party requesting no-action relief argued that the legislative history of Section 2(a)(19) indicates that the term "employee" should be given its common law meaning for purposes of the Section. The Commission staff did not disagree with this interpretation and granted no-action relief, suggesting that the common law meaning of "employee" may apply for purposes of Section 2(a)(19).

At common law, four elements are generally considered in determining whether an employer/employee relationship exists. These are:

1. The selection and engagement of the employee;
2. The payment of wages;
3. The power of dismissal; and,
4. The power of control of the employee's conduct.

See 53 Am. Jur. 2d, Master and Servant, § 2.

Having "counsel" status at Kramer Levin, Mr. Eisenberg does not share in the equity of the firm. He lacks the direct

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not), but whether she might be considered an "employee of" Mr. Eisenberg, a person who acted as legal counsel to the Manager within the last two completed fiscal years of the Funds.

authority to hire or dismiss employees, and neither sets nor distributes compensation at the firm. As such, the relationship between Mr. Eisenberg and Ms. Collins (if she were to rejoin Kramer Levin as an employee) would clearly fail to satisfy the first three common law elements.

The essential and conclusive element of the employer/employee relationship at common law is the employer's right of control over the employee's conduct, or: "the right of one person, the [employer], to order and control another, the [employee], in the performance of work by the latter, and the right to direct the manner in which work shall be done." Id. This so-called "control test" has been considered by the Commission in distinguishing employees of a company from independent contractors for purposes of Section 2(a)(19). The test requires that control extend to the "details and method of performing the work." See Merrill Lynch, 1981 No-Act. LEXIS 3783 (July 20, 1981).

The circumstances surrounding the prior relationship (and any future relationship) between Mr. Eisenberg and Ms. Collins at Kramer Levin strongly suggest that no employer/employee relationship existed or will exist between the two.

Mr. Eisenberg serves as "counsel" to the financial services group in the Washington offices of Kramer Levin. Ms. Collins served (and if she rejoins the firm will serve) as an associate in the employee benefits section of the firm's New York office. Aside from their brief discussions concerning the subject of this letter, Ms. Collins has had no contact with Mr. Eisenberg. They have not worked on common client matters at Kramer Levin and would not do so in the future. Ms. Collins has never assisted Mr. Eisenberg in any capacity. Accordingly, Mr. Eisenberg exercised no direct or indirect control over the details and method of Ms. Collins' work at Kramer Levin and will not do so in the future.

Therefore, if the Commission applies the common law definition of employee for purposes of Section 2(a)(19), the Applicants maintain that Ms. Collins was not and will not be an "employee of" Mr. Eisenberg and therefore, will not be an "interested person" of the Funds, the Manager or CISI within the

meaning of Section 2(a)(19) if she rejoins Kramer Levin as an employee.

In relation to Section 10(a) of the Act[6], the General Counsel of the Commission chose not to accept the common law definition of the term "employee" and instead construed the term as used in Section 2(a)(3)(D) of the Act to include an attorney on a general retainer from a registered investment company, or an associate or partner at a law firm which acts in that capacity. See SEC Investment Company Act Release 214, 1941 SEC Lexis 1829 (September 15, 1941)(the "1941 Release").

The 1941 Release states, in part, that: "[c]ases involving the construction of the term 'employees' indicate that the term has no fixed meaning, but must be construed in the context and connection in which it is used. . . . The settled rules of statutory construction require that the term, as used in a particular Section of a statute, must be interpreted in the light of the purpose of the particular Section and the evil sought to be remedied thereby." Id.

The Investment Company Amendments Act of 1970 (the "1970 Amendments"), which superseded the 1941 Release, were predicated upon the Congressional determination that the Act did not adequately regulate the conduct of investment company directors with "strong ties" to the managers of an investment company or "substantial business or professional relationships with the investment company or its adviser-underwriter . . . ." S. Rep. No. 91-184, 91st Cong., 1st Sess. 32 (1969). The Commission has generally recognized that there is no Congressional policy behind the 1970 Amendments which calls for the extension of the normal meaning of the word "employee" to encompass people who do not meet this description. See Loomis-Sayles, infra (citing S. Rep. No. 91-184, 91st Cong., 1st Sess. 32 (1969)); In the Matter of Donald J. Robinson, et al., Investment Company Act Release Nos. 19444 (April 30, 1993)(notice) and 19494 (May 26, 1993)(order) (the Commission granted an order of exemption from Section

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[6] Section 10(a) of the Act generally provides that no registered investment company shall have a board of directors more than sixty percent of the members of which are persons who are interested persons of such investment company.

2(a)(19) of the Act for purposes of Section 15(f) of the Act for a member of the boards of trustees of registered investment companies who was also a partner at a law firm which rendered limited legal services to various life-insurance affiliates of the advisers to the investment companies and to a registered broker-dealer affiliate).

The 1970 Amendments devised the term "interested person" to cover certain individuals who might not be independent of an investment company's management, including "partners" and "employees" of a law firm providing services to the adviser. However, there is no suggestion in any of the legislative history of the Act or the 1970 Amendments that the Commission and Congress were attempting to treat as "interested" all persons who might have a connection, however remote, with an investment company.

Where the Applicants will not retain Mr. Eisenberg or any other attorney at Kramer Levin to provide legal services in the future, it is clear that neither Ms. Collins nor Kramer Levin has or will have "strong ties" to the Manager, or "substantial business or professional relationships" with the Applicants. Thus, the Applicants submit that Ms. Collins does not now, nor will she, have the type of relationship with the Applicants that Congress was concerned with when it adopted Section 2(a)(19).

In short, if Ms. Collins rejoins Kramer Levin, Mr. Eisenberg's prior representation of the Manager would in no manner impair or otherwise affect Ms. Collins' ability to exercise sound independent business judgment in the fulfillment of her fiduciary duties and obligations as an independent trustee of the Trusts.

For the reasons set forth above, we request the concurrence of the Staff that Ms. Collins will not constitute an "interested person" of the Applicants within the meaning of Section 2(a)(19) of the Act if she rejoins Kramer Levin and accordingly, your confirmation that the Staff will not recommend that the Commission take any enforcement action against the Applicants based on Ms. Collins' status under Section 2(a)(19).

Very truly yours,

David C. Sullivan

DCS/alr
cc: Robert Bagnall, Esq.
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