

MEMO# 10597

December 22, 1998

SEC PROPOSES RULES FOR CROSS-BORDER TENDER OFFERS, BUSINESS COMBINATIONS, AND RIGHTS OFFERINGS

1 Cross-Border Tender Offers, Business Combinations and Rights Offerings, SEC Rel. Nos. 33-7611, 34-40678; Int'l Series Rel. No. 1171 (Nov. 13, 1998); 63 Fed. Reg. 69136 (Dec. 15, 1998) (the "Release"). In summary, the Commission is proposing the following new and amended rules and forms: (1) new Rules 800, 801 and 802 under the Securities Act of 1933 (the "Securities Act"); (2) Rule 4d-10 under the Trust Indenture Act of 1939; (3) revisions to Form F-X and Rule 144 under the Securities Act; (4) revisions to Rules 10b-13, 13e-3, 13e-4, 14d-1, 14d-2, 14d-7, 14d-10, 14e-1, and 14e-2 under the Securities Exchange Act of 1934 (the "Exchange Act"); (5) revisions to Rules 30-1 and 30-3 of the Commission's Rules Delegating Authority to the Directors of the Division of Corporation Finance and Market Regulation, respectively; and (6) new Form CB under the Securities Act and Exchange Act. [10597] December 22, 1998 TO: CLOSED-END INVESTMENT COMPANY COMMITTEE No. 28-98 INTERNATIONAL COMMITTEE No. 40-98 SEC RULES COMMITTEE No. 128-98 RE: SEC PROPOSES RULES FOR CROSS-BORDER TENDER OFFERS, BUSINESS COMBINATIONS, AND RIGHTS OFFERINGS

The Securities and Exchange Commission has issued a release proposing tender offer and Securities Act registration exemptive rules for cross-border tender offers, business combinations, and rights offerings.¹ The proposals are intended to facilitate participation in these types of transactions by U.S. holders of securities of foreign companies by encouraging issuers and bidders, through a series of exemptions under and modifications to the securities laws, to include U.S. holders in multinational offers. The Release is attached and summarized below. Comments are due to the SEC by Tuesday, February 16, 1999. If there are comments you would like the Institute to consider in its comment letter, please forward them to Barry Simmons at (202) 326-5923 (phone), (202) 326-5839 (fax), or simmonbe@ici.org (e-mail) by Friday, January 15, 1999. The Release proposes to establish a two-tiered exemption that would exempt certain tender offers for the securities of foreign private issuers from the tender offer provisions of the Exchange Act. The Release also proposes to amend Rule 10b-13 under the Exchange Act to allow, under certain circumstances, purchases outside the tender offer during the offer. In addition, the Release proposes two new rules under the Securities Act that would provide exemptive relief from Securities Act registration requirements for securities issued in certain rights offerings, exchange offers, and business combinations. Finally, the Release proposes to amend the Commission's general organization rules in order to delegate to the Directors of the

Divisions of Corporation Finance and Market Regulation authority to exempt certain 2 Those rules, specifically, Exchange Act Rules 13e-3, 13e-4, Regulation 14D, Rules 14e-1 and 14e-2, impose requirements related to disclosure, filing, dissemination, minimum offering period, withdrawal rights, and proration. 3 According to the Release, and as used therein, the term "U.S. holder" is based on shareholder residence and is derived from the definition of "foreign private issuer" under the Exchange Act. The Release notes that the proposed definition does not turn on the residence of the beneficial owner of the securities, nor is there a requirement to identify beneficial owners in order to determine their residence. Also, with respect to depositaries and American Depositary Receipts ("ADRs") and other depositary receipt facilities, the Release notes that for securities registered in the name of a nominee of a depositary maintaining a book-entry system, the issuer or third party may rely on how the participants' names appear on the records of the depositary, which would be consistent with the determination of "record holder" under Section 12(g) of the Exchange Act. An ADR, Global Depositary Receipt ("GDR") or other depositary facility will not be treated as the record holder of the ADR; rather, shares deposited in an ADR depositary will be presumed to be held solely by U.S. residents in determining the percentage of shares held by U.S. security holders. Moreover, if the issuer receives information to the contrary from the depositary, it may rely on that information in calculating U.S. security holders. 4 Form F-X is used by certain non-U.S. companies to appoint an agent for service of process in the U.S. 2 tender offers from specific tender offer requirements. In all cases, however, the U.S. anti-fraud and anti-manipulation rules would continue to apply. Significant aspects of the proposals are discussed in greater detail below.

I. Tier I Exemption Under the proposed Tier I exemption, eligible tender offers would be exempt from certain tender offer rules under the Exchange Act.² This exemption would be available to U.S. and foreign bidders, regardless of the bidder's domicile or reporting status. The Tier I exemption is available so long as: (1) U.S. security holders of record hold ten percent or less of the class of securities sought in the tender offer;³ (2) in the case of a class of securities subject to Rule 13e-4 or Regulation 14D under the Exchange Act, bidders submit, rather than file, an English language translation of the offering materials to the Commission under cover of proposed Form CB and file a consent to service on Form F-X⁴; (3) U.S. security holders participate in the offer on terms at least as favorable as those offered to any other holders, including price, type of consideration, and choice among different alternatives being offered; and (4) bidders provide U.S. security holders with the tender offer circular or other offering document, in English, on a comparable basis as that provided to other security holders. The Release states that instead of complying with the U.S. tender offer rules, a bidder taking advantage of this exemption would comply with any applicable rules of the foreign target company's home jurisdiction or exchange. That bidder would be required, however, to submit any offer materials prepared under foreign law to the Commission for notice purposes only, under the cover of proposed Form CB, which must be received by the Commission no later than the next business day after the tender offer is commenced. In addition, if the bidder is a foreign company, it must also file a Form F-X with the Commission contemporaneously with the submission of the Form CB.

II. Tier II Exemption Under the proposed Tier II exemption, bidders would be entitled to limited tender offer relief from the U.S. tender offer rules in order to minimize conflicts between U.S. and foreign regulatory requirements. The Release states that a bidder may rely upon the Tier II exemption if (1) the target company is a foreign private issuer, and (2) U.S. security holders do not hold of record more than 40% of the securities sought in the offer. Just like the Tier I exemption, this exemption also would be available to U.S. and foreign bidders, regardless of the bidder's domicile or reporting status. The Release states that the Tier II exemption would codify current Commission exemptive and interpretive positions, and noted that if relief beyond this exemption is necessary, the staff would consider such

requests on an expedited basis under the proposed delegated authority. 5 Rule 10b-13 prohibits a person who is making a tender or exchange offer from purchasing or arranging to purchase, directly or indirectly, the security that is the subject of the offer (or any security that is immediately convertible into or exchangeable for the subject security) otherwise than pursuant to the offer. 6 The Commission refrained from extending this exception to Tier II offers because of its belief that there is greater U.S. interest in those offers, although the staff will continue to review requests for relief from the rule for offers other than Tier I eligible offers on a case-by-case basis. 3 The Release also provides that, rather than creating a country-specific approach, the Tier II exemption would be available regardless of the home jurisdiction of the foreign subject company, thereby providing U.S. security holders a greater opportunity to participate in offers for foreign companies without regard to national boundaries. The Release cautions, however, that any tender offers relying upon this exemption would still be subject to any disclosure, filing, and most of the procedural and equal treatment requirements of the U.S. tender offer rules that would otherwise apply to the offer, including the going private disclosure and procedural requirements of Exchange Act Rule 13e-3. Furthermore, the Tier II exemption would not allow the offer to proceed on the basis of the home country disclosure documents, nor would it provide relief from the U.S. dissemination standards.

III. Other Rules Governing Tender Offers The Release provides additional tender offer relief by proposing to amend Exchange Act Rule 10b-13 to allow, under certain circumstances, purchases outside the tender offer during the offer.⁵ This relief is limited to offers where U.S. persons hold of record ten percent or less of the class of securities sought in the offer. As proposed to be amended, Rule 10b-13 would include an exception for Tier I tender or exchange offers provided that: (1) the U.S. offering documents disclose prominently the possibility of any purchases, or arrangements to purchase, or the intent to make such purchases otherwise than pursuant to the terms of the tender or exchange offer; (2) the bidder discloses information in the U.S. regarding such purchases in the U.S. in a manner comparable to disclosure made in the home jurisdiction; and (3) the purchases comply with the applicable tender offer laws and regulations of the home jurisdiction.⁶ The Release notes that this relief largely would codify the conditions contained in exemptive orders previously granted by the Commission.

IV. Exchange Offers, Business Combinations, and Rights Offerings The Release proposes two new rules under the Securities Act that would provide exemptive relief from Securities Act registration requirements for securities issued to U.S. security holders of a foreign private issuer in exchange offers, business combinations, and rights offerings. Proposed Rule 801 would apply to rights offerings and proposed Rule 802 would apply to business combinations and exchange offers. The exemptions are available only if the target company (or the issuer in an issuer tender offer or rights offering) is a foreign private issuer and U.S. security holders hold of record no more than five percent of the subject securities. The Release notes that these rules would not be available for securities issued by any foreign or domestic investment company that is registered under the Investment Company Act of 1940 (the "1940 Act"). The Release explains that foreign investment companies were excluded because the 1940 Act prohibits them from publicly offering securities in the U.S. or to U.S. persons; domestic investment companies were excluded because these companies, unlike other issuers, are required to register the securities they offer or sell outside the U.S. The following additional conditions apply. First, the terms and conditions of each type of offer must be the same for U.S. and foreign security holders, subject to certain exceptions similar to the Tier I exemption under the tender offer provisions.⁴ Also, both rules would impose certain restrictions on the transferability of the securities that an acquiror may issue in exchange offers or business combinations, or the equity securities that may be purchased pursuant to Rule 801 upon the exercise of the rights. Moreover, regarding informational requirements, the Release

notes that neither Rule 801 nor Rule 802 would mandate that specific information, including offering circulars, be sent to U.S. security holders. Instead, when any document, notice or other information is provided to offerees, English-translated copies must be provided to U.S. security holders. Furthermore, the Release notes that the exemptions contemplated under both rules are non-exclusive; therefore, an issuer making an offering in reliance on either rule may claim any other available exemption under the Securities Act. For rights offerings specifically, Rule 801 would be available only for offerings of equity securities made on a pro rata basis to existing security holders of the same class, including holders of ADRs evidencing those securities. In addition, the rule would be available only for all-cash transactions and would also require that the rights granted to U.S. security holders not be transferable except offshore in accordance with Regulation S. For exchange offers and business combinations, Rule 802 does not contain any limitations based on the domicile or reporting status of the offeror, thus enabling an offeror to use the rule regardless of whether it is a U.S. company or a foreign private issuer, and regardless of whether it is a reporting company. As noted, however, the target company must be a foreign private issuer. Finally, the Release notes that the Commission is not proposing any restrictions on the type of securities that an issuer could offer in reliance on proposed Rule 802. Thus, the proposed rules would permit offerors to offer debt securities in an exchange offer or business combination for the subject company's equity or debt securities. Barry E. Simmons
Assistant Counsel Attachment