

**MEMO# 10732**

February 17, 1999

# **INSTITUTE COMMENT LETTER ON SEC PROPOSED RULES FOR CROSS-BORDER TENDER OFFERS, BUSINESS COMBINATIONS, AND RIGHTS OFFERINGS**

1 See Memorandum to Closed-End Investment Company Committee No. 28-98, Memorandum to International Committee No. 40-98, and Memorandum to SEC Rules Committee No. 128-98, dated December 22, 1998 ("Release"). 2 See Memorandum to Closed-End Investment Company Committee No. 2-99, Memorandum to International Committee No. 4-99, Memorandum to SEC Rules Committee No. 7-99, and Memorandum to Securities Operations Subcommittee, dated February 4, 1999. 1 [10732] February 17, 1999  
TO: CLOSED-END INVESTMENT COMPANY COMMITTEE No. 6-99 INTERNATIONAL COMMITTEE No. 6-99 SEC RULES COMMITTEE No. 13-99 SECURITIES OPERATIONS SUBCOMMITTEE RE: INSTITUTE COMMENT LETTER ON SEC PROPOSED RULES FOR CROSS-BORDER TENDER OFFERS, BUSINESS COMBINATIONS, AND RIGHTS OFFERINGS

The Institute recently filed the attached comment letter on the SEC's proposed exemptive rules for cross-border tender offers, business combinations, and rights offerings.<sup>1</sup> The proposals are intended to facilitate participation in these types of transactions by U.S. holders of the securities of foreign companies. Among other things, the Release proposes to (1) establish a two-tiered approach to exempt certain tender offers for the securities of foreign private issuers from the tender offer provisions of the Securities Exchange Act of 1934, and (2) establish two new rules under the Securities Act of 1933 that would provide exemptive relief from Securities Act registration requirements for securities issued in certain rights offerings, exchange offers, and business combinations. In all cases, the U.S. antifraud and anti-manipulation rules would continue to apply. The Institute's comment letter is substantially similar to the draft letter previously circulated to you.<sup>2</sup> It has been revised in certain respects to incorporate members' comments. The letter strongly supports the Commission's objectives as stated in the Release, but expresses concern that the proposals do not go far enough and may be unsuccessful in encouraging foreign issuers and bidders for such issuers to include U.S. investors. Specific comments and recommendations are summarized briefly below. Tender Offers Regarding the tender offer proposal, the letter supports the Tier I and Tier II proposals but recommends that the Tier I exemption be available when U.S. holders own twenty percent or less of the class of securities sought in the tender, as opposed to the ten percent currently proposed. 2Exchange Offers, Business Combinations, and Rights Offerings The Institute's letter supports the proposed Securities

Act exemptions, new Rules 801 and 802, for exchange offers, business combinations, and rights offerings. The letter recommends that, like the Tier I exemption, these rules should be available when U.S. holders of record hold twenty percent or less of the class of the issuer's securities that are the subject of the transaction, as opposed to the five percent currently proposed. The Institute's letter agrees with the Commission's proposal that the proposed exemptive relief should not be available for foreign private issuers that meet the definition of "investment company" contained in Section 3(a) of the Investment Company Act, unless an exception from the definition applies. The letter also responds to the Release's request for comment regarding closed-end funds by recommending that the Commission consider extending the proposed exemptive relief provided under Rule 802, as well as Rule 801, to domestic closed-end funds that are registered under the Investment Company Act. Interpretive Guidance Under Regulation S The letter urges the Commission to consider additional ways to encourage foreign private issuers and bidders to make foreign corporate actions available to U.S. investors. To achieve this, the letter suggests that the Commission provide interpretive guidance under Regulation S under the Securities Act to facilitate U.S. shareholder participation in foreign corporate actions, particularly in the case of institutional investors that are capable of making their own determinations as to the risks and rewards of choosing to participate in foreign investment opportunities. Barry Simmons  
Assistant Counsel Attachment

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