

**MEMO# 2882**

July 9, 1991

## **SEC SEEKS COMMENTS ON PROPOSALS INTENDED TO ENCOURAGE FOREIGN RIGHTS, TENDER AND EXCHANGE OFFERS IN THE U.S.**

July 9, 1991 TO: INTERNATIONAL COMMITTEE NO. 12-91 INVESTMENT ADVISERS  
COMMITTEE NO. 29-91 SEC RULES COMMITTEE NO. 37-91 CLOSED-END FUND COMMITTEE  
NO. 16-91 INVESTMENT ISSUES COMMITTEE NO. 6-91 RE: SEC SEEKS COMMENTS ON  
PROPOSALS INTENDED TO ENCOURAGE FOREIGN RIGHTS, TENDER AND EXCHANGE OFFERS  
IN THE U.S. \_\_\_\_\_ The Securities and  
Exchange Commission recently issued proposals intended to encourage foreign issuers to  
extend rights, tender and exchange offers to their U.S. securityholders by permitting such  
offers to proceed largely on the basis of home country offering documents and other  
foreign regulatory requirements. Excerpts from the proposing releases are attached. The  
proposals are designed to address concerns that U.S. investors frequently are excluded  
from potentially attractive transactions because foreign issuers are unwilling and/or unable  
to comply with current U.S. regulatory requirements. Set forth below are summaries of the  
proposals. Rights Offerings To facilitate extension of rights offerings to U.S. investors, the  
SEC has proposed a small issue exemptive rule (Rule 801 under the Securities Act of 1933)  
that would exempt foreign equity rights offerings meeting certain conditions from the  
requirements of Section 5 of the 1933 Act. Among other things, any such rights offering  
would be subject to a \$5 million limit on the aggregate offering price of securities subject to  
offers to U.S. holders. In addition, to accommodate larger equity rights offerings, the SEC  
has proposed a new registration form (Form F-11) that essentially would permit eligible  
foreign private issuers to use home country disclosure documents accompanied by a "wrap-  
around" form in connection with a rights offering to U.S. holders. Pursuant to a proposed  
rule under the Securities Exchange Act of 1934 (Rule 12h-5), foreign issuers not otherwise  
subject to 1934 Act reporting obligations would not become subject to such requirements  
solely as a result of filing a registration statement on Form F-11. As proposed, neither Rule  
801 nor Form F-11 would be available with respect to securities issued by an investment  
company that is registered, or required to be registered, under the 1940 Act. However, a  
foreign issuer that is permitted to make a public offering of its securities in the U.S. in  
reliance on Rule 6c-9 under the 1940 Act or pursuant to an exemptive order would not be  
disqualified from using Rule 801 or Form F-11 with respect to a rights offering. To eliminate  
additional potential disincentives to the extension of foreign rights offerings to U.S. holders,  
the SEC has proposed exemptions for such offerings from Rules 10b-6, 10b-7 and 10b-8  
under the 1934 Act (collectively, "anti-manipulation rules"). (Rule 10b-6 generally prohibits

persons engaged in a distribution of securities from bidding for or purchasing such securities or certain related securities during the distribution; Rule 10b-7 regulates stabilization transactions; and Rule 10b-8 governs distributions through rights offerings.) Under this proposal, rights offerings pursuant to proposed Rule 801 would be completely exempted from the anti-manipulation rules. Persons participating in a distribution of rights registered on proposed Form F-11 would be exempt from the anti-manipulation rules provided certain conditions were met. Tender and Exchange Offers In a second release, the SEC has proposed rules, amendments and forms that would permit tender and exchange offers to U.S. investors for a foreign target company's securities to proceed on the basis of home country regulation under certain circumstances. (The SEC previously issued a concept release regarding multinational tender and exchange offers, and the Institute filed a comment letter expressing general support for the SEC's proposed conceptual approach. See Memorandum to Investment Advisers Committee No. 32-90, SEC Rules Committee No. 52-90, Closed-End Fund Committee No. 21-90 and International Funds Task Force No. 22-90, dated September 24, 1990.) As in the case of the rights offering proposals, securities issued by an investment company registered or required to be registered under the 1940 Act would not be eligible to take advantage of these proposals, but the proposed rules would be available for the securities of a foreign issuer that is permitted to make a public offering in the U.S. in reliance on Rule 6c-9 or an exemptive order. To rely on the proposed exemptions from the requirements of Rule 13e-4 and Regulation 14D or 14E (other than the Rule 14e-3 insider trading prohibitions), a tender offer would have to meet the following conditions: (1) no more than 10 percent of the class of securities sought in the tender offer may be held by U.S. holders other than U.S. holders of more than 10 percent of the subject class; (2) with respect to a class of securities otherwise subject to Rule 13e-4 or Regulation 14D, an English translation of the offering materials must be submitted to (not "filed with") the Commission; (3) U.S. securityholders must be permitted to participate in the offer on terms not less favorable than those offered any other holders of the same class of securities sought in the offer; and (4) dissemination of the tender offer, if required by the target company's home jurisdiction, must be provided to U.S. securityholders on a comparable basis as provided to securityholders in the home jurisdiction. Two procedures are proposed with respect to the registration of exchange offers for securities of foreign private issuers. First, a proposed exemptive rule (Rule 802) would exempt from 1933 Act registration requirements any exchange offer where the aggregate dollar value of securities offered for exchange in the U.S. is \$5 million or less. Second, 1933 Act registration on the basis of the foreign target company's home jurisdiction would be permitted under cover of proposed Form F-12, if five percent or less of the foreign target company's securities prior to the exchange are held by U.S. holders and the offeror meets certain other eligibility standards. The proposing release specifically requests comments on whether closed-end funds should be permitted to use the proposed rule and form. The SEC has also proposed to issue an exemptive order that would permit third-party exchange and cash tender offers for securities of a U.K. chartered company that meets the definition of a foreign private issuer to be conducted simultaneously in the U.S. and the U.K. in accordance with both the Williams Act and the U.K. City Code on Take-overs and Mergers. Certain requirements under the Williams Act conflict with the requirements of the City Code, making exemptive relief necessary for any transaction subject to both regulatory schemes to proceed. Previously, such relief has been granted on a case-by-case basis. \* \* \* Comments on the multinational tender, exchange and rights offers proposals must be filed by September 11, 1991. If you would like complete copies of the proposing releases and/or if there are positions you would like the Institute to consider including in a comment letter, please contact me at 202/955-3514. Frances M. Stadler Assistant General Counsel

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