The Asset Management Industry
SERVING INDIVIDUAL INVESTORS
INVESTMENT COMPANY INSTITUTE

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

* 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. 1 [10697] February 4, 1999 TO: CLOSED-END INVESTMENT COMPANY COMMITTEE No. 2-99 INTERNATIONAL COMMITTEE No. 4-99 SEC RULES COMMITTEE No. 7-99 SECURITIES OPERATIONS SUBCOMMITTEE RE: DRAFT COMMENT LETTER ON SEC PROPOSED RULES FOR CROSS-BORDER TENDER OFFERS, BUSINESS COMBINATIONS, AND RIGHTS OFFERINGS

_____ Attached is a draft of the Institute's comment letter on the SEC's proposed exemptive rules for cross-border tender offers, business combinations, and rights offerings.* The proposals are intended to facilitate participation in these types of transactions by U.S. holders of the securities of foreign companies. Comments are due to the SEC by Tuesday, February 16th. Please provide your comments on the draft letter to Barry E. Simmons by phone at (202) 326-5923, by fax at (202) 326-5839, or by e- mail at simmonbe@ici.org, or to Amy B.R. Lancellotta by phone at (202) 326-5824, by fax at (202) 326-5827, or by e-mail at amy@ici.org, by Thursday, February 11th. The Institute's draft letter generally supports the Commission's initiatives but expresses concerns that the proposals do not go far enough and may be unsuccessful in encouraging foreign issuers and bidders to include U.S. investors. The letter recommends that the Commission consider additional ways to encourage foreign issuers to make significant corporate actions available to U.S. investors, including issuing interpretive guidance to clarify the circumstances under which Regulation S under the Securities Act of 1933 ("Securities Act") permits a foreign private issuer to extend rights offerings and other significant corporate actions to U.S. institutional investors, including investment companies. Specific comments are summarized briefly below. Tender Offers The Release proposes to 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. The draft letter supports this approach 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 2to the ten percent currently proposed. Alternatively, if the ten percent limit is adopted, the letter urges the Commission to direct the staff to reconsider and report to the Commission on the continued reasonableness of

the threshold after a specified period of time, e.g., two years. The letter also seeks member input on the Tier II exemption, which, among other things, lists those areas in which foreign law would pre-empt U.S. requirements. Specifically, the letter seeks input on whether there are other areas that should be added to the list, and whether any members have had experience that would support or rebut the Commission's statement that "[w]hen U.S. ownership exceeds 40 percent, it is unlikely that the offer would exclude U.S. security holders." Exchange Offers, Business Combinations, and Rights Offerings The Release proposes to create two new rules under the Securities Act that would exempt from the registration requirements of the Securities Act 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 draft letter notes the Institute's concern that the proposed rules would be unnecessarily restrictive if, as proposed, they would be available only when U.S. security holders of record hold no more than five percent of the class of the issuer's securities that are the subject of the transaction. The letter recommends that the threshold be increased to the same limit as would be provided for tender offer exemptive relief, which if the Commission were to adopt our recommendation, would be twenty percent. The draft letter also agrees that the proposed exemptive relief rules should not be available for foreign private issuers that meet the definition of "investment company" as defined in the Investment Company Act, unless an exception from such definition applies. The letter further recommends that the Commission consider extending the proposed exemptive relief to registered closed-end investment companies. Determination of U.S. Ownership The draft letter supports the proposed definition of "U.S. holder," and notes that it would establish clear, objective standards for foreign issuers and bidders to interpret and follow. The letter opposes, however, the imposition of any beneficial holder test that may be imposed if an issuer or bidder knows the percentage of U.S. beneficial owners or could obtain that information without unreasonable effort or expense. The letter explains that any such tests likely would reduce the willingness of foreign issuers and their bidders to avail themselves of the exemptive rules, without any discernible increase in protection for U.S. shareholders. Interpretive Guidance Under Regulation S The draft 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. The letter suggests that the Commission should provide interpretive guidance under Regulation S under the Securities Act, at least 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. The letter identifies the conditions under which U.S. investors may purchase foreign securities offshore in a Regulation S transaction – namely that no directed selling efforts may be made in the U.S. in connection with an offer or sale of foreign securities, and that an offer or sale made in reliance on Regulation S must be made in an offshore transaction. The letter suggests an approach under Regulation S that would permit foreign issuers and their U.S. shareholders that are investment companies or qualified institutional buyers (as defined in Regulation 144A under the Securities Act) to participate in foreign corporate actions through 3the shareholder's foreign custodian. Barry E. Simmons Assistant Counsel Attachment