

**MEMO# 15814**

March 26, 2003

## **SEC PROPOSAL REGARDING CERTIFICATIONS UNDER SECTIONS 302 AND 906 OF THE SARBANES-OXLEY ACT**

[15814] March 26, 2003 TO: ACCOUNTING/TREASURERS COMMITTEE No. 14-03 CLOSED-END INVESTMENT COMPANY COMMITTEE No. 19-03 COMPLIANCE ADVISORY COMMITTEE No. 24-03 SEC RULES COMMITTEE No. 28-03 SMALL FUNDS COMMITTEE No. 11-03 RE: SEC PROPOSAL REGARDING CERTIFICATIONS UNDER SECTIONS 302 AND 906 OF THE SARBANES-OXLEY ACT The Securities and Exchange Commission has issued a release proposing technical amendments to its rules and forms under the Securities Exchange Act of 1934 and the Investment Company Act of 1940 related to filings of certifications under Sections 302 and 906 of the Sarbanes-Oxley Act of 2002.<sup>1</sup> Specifically, the Commission's proposal would require issuers to file the certifications required by Section 302 of the Sarbanes-Oxley Act of 2002 as an exhibit to the periodic reports to which they relate. The Commission's proposal, however, would not apply to registered management investment companies, because Item 10 of Form N-CSR already requires them to file their Section 302 certifications as an exhibit to a report on Form N-CSR. The Commission's proposal also would amend Exchange Act Rules 13a-14 and 15d-14 and Investment Company Act Rule 30a-2 to require issuers, including registered management investment companies, to "furnish" their Section 906 certifications as an exhibit to the periodic reports to which they relate.<sup>2</sup> The proposing release points out that, unlike Section 302, which requires the certification to be included "in" the periodic report, Section 906 requires that the certifications "accompany" the periodic report to which they relate. In recognition of this difference, the Commission's proposal would require issuers to "furnish," rather than "file," the Section 906 certification with the Commission.<sup>3</sup> Thus, these certifications would not be subject to liability under Section 18 of the Exchange Act or automatic incorporation by reference into an issuer's Securities Act registration statements, which are subject to liability under Section 11 of 1 Certification of Disclosure in Certain Exchange Act Reports, SEC Release Nos. 33-8212, 34-47551, and IC-25967 (March 21, 2003). The release is available on the SEC's web site at <http://www.sec.gov/rules/proposed/33-8212.htm>. 2 Thus, registered management investment companies would furnish their Section 906 certifications as an exhibit to their shareholder reports that are filed with Form N-CSR. 3 In this regard, the Commission plans to amend Item 10 of Form N-CSR to add the Section 906 certification as a required exhibit. 2 the Securities Act (unless the issuer takes steps to include such certifications in a registration statement). Finally, the Commission's proposal provides interim guidance on how issuers may submit a Section 906 certification to the Commission, pending the adoption of final rules. The Commission notes that, to date, issuers have employed a variety of methods to submit the Section 906 certifications to the Commission, including: (1) submitting the statement as non-public paper correspondence;

(2) submitting the statement as non-public electronic correspondence with the EDGAR filing of the periodic report; (3) submitting the statement under (1) or (2) above, supplemented by an Item 9 Form 8-K report so that the statement is publicly available; (4) submitting the statement as an exhibit to the periodic report; or (5) submitting the statement in the text of the periodic report (typically, below the signature block for the report). Of these methods, the Commission prefers that issuers submit the Section 906 certifications as an exhibit to the periodic reports to which they relate. Comments on the Commission's proposal are due on or before 45 days after publication in the Federal Register. If there are any comments that you would like the Institute to consider in a possible comment letter, please submit them to Barry Simmons by Friday, April 18th. Barry may be reached by telephone at (202) 326-5923, by fax at (202) 326-582, or by email at [bsimmons@ici.org](mailto:bsimmons@ici.org). Barry E. Simmons  
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