

COMMENT LETTER

August 12, 2004

Comment Letter on Disclosure Filings, SEC Staff Responses (pdf)

August 12, 2004 Mr. Jonathan G. Katz Secretary Securities and Exchange Commission 450 Fifth Street N.W. Washington, D.C. 20549-0609 Re: Release of Comment Letters and Responses (File No. S7-28-04) Dear Mr. Katz: The Investment Company Institute¹ appreciates the opportunity to comment on the Securities and Exchange Commission's announcement that it will make publicly available its comment letters relating to disclosure filings that are selected for review by the Divisions of Investment Management and Corporation Finance, as well as filers' letters responding to the staff's comments. In connection with staff reviews of disclosure filings, the SEC currently releases the staff's comment letters and related responses only after a request under the Freedom of Information Act ("FOIA"). According to the announcement, an increasing number of comment and response letters are being released publicly through the FOIA process, but only to those persons making the FOIA request. The staff has determined that it is appropriate to expand the transparency of the comment process so that this information is available to a broader audience, free of charge. Accordingly, beginning with disclosure filings made after August 1, 2004, the staff intends to make comment and response letters available through the SEC's Public Dissemination Service and on the agency's website at least 45 days after completion of a staff review.²

¹ The Investment Company Institute is the national association of the American investment company industry. Its membership includes 8,605 open-end investment companies ("mutual funds"), 630 closed-end investment companies, 135 exchange-traded funds and 5 sponsors of unit investment trusts. Its mutual fund members manage assets of about \$7.499 trillion. These assets account for more than 95% of assets of all U.S. mutual funds. Individual owners represented by ICI member firms number 86.6 million as of mid 2003, representing 50.6 million households.

² Under applicable SEC rules, a filer requesting confidential treatment for portions of a written response to a staff comment letter is required to submit a response with the confidential information redacted, and a complete response that is marked "confidential." Pursuant to the new process, the staff currently intends to release only the redacted version of any response letter that is subject to a request for confidential treatment. The announcement specifies that anyone wishing to view the full response letter would be required to submit a FOIA request seeking that information.

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As the SEC noted in its announcement, the comment letters set forth the staff's positions on a particular filing and do not constitute an official expression of the SEC. Further, staff comment letters do not necessarily apply to other filings and have no formal precedential value in addressing future comments to the subject filer or other filers. In order to accurately reflect these facts, we recommend that all comment letters include disclosure to the following effect: "This document sets forth SEC staff comments on the

filing to which the comments relate. This document does not constitute an official position or other expression of the SEC.” Such a legend would help to ensure that filers and other interested parties do not wrongly assume that the staff’s comments represent official statements by the SEC. We note that such comments do not go through the formal rulemaking process and, even on the same or similar disclosure issues, can differ between staff personnel or Divisions. In addition, although the SEC intends to change its policy and make comment letters and related responses publicly available, the announcement does not indicate whether the comment process will otherwise change. We are concerned that this change in the comment process could negatively affect the nature and timing of comments provided by the staff to filers. Such a change, we believe, could negate the benefits that may otherwise be gained from the release of the letters.³ Consistent with these concerns, we recommend that the SEC evaluate the initial public release of comment letters and related responses on an interim or pilot program basis. For instance, a two-year pilot program with six-month interim reviews would provide the SEC with the opportunity to determine whether the new policy has caused a material change in the number or type of staff comments or negatively affected the timing of staff comments. The pilot program would also allow the SEC to evaluate filers’ experience with the so called “Tandy” letter representations that the SEC may require filers to make in their responses and whether such representations have caused unfair or adverse consequences to filers in any securities-related litigation. * * * * 3 The availability of comment and response letters of filers with similar disclosure issues could serve as a potential resource for other filers in preparing disclosure documents and responses to staff comments. Mr. Jonathan G. Katz August 12, 2004 Page 3 The Institute appreciates the opportunity to comment on the SEC’s announcement. Any questions regarding our comments may be directed to the undersigned at 202-326-5824 or Jane G. Heinrichs at 202-371-5410. Sincerely, Amy B.R. Lancellotta Senior Counsel cc: Alan L. Beller Director, Division of Corporation Finance Paul F. Roye Director, Division of Investment Management Barry D. Miller Associate Director, Division of Investment Management Securities and Exchange Commission