

**PUBLIC**

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RESPONSE OF THE OFFICE OF CHIEF COUNSEL  
DIVISION OF INVESTMENT MANAGEMENT

Our Ref. No. 96-135-CC  
Rowe Price-Fleming  
International Inc.  
File No. 811-25982

Your letter of March 12, 1996 requests our assurance that we would not recommend enforcement action to the Commission under Section 10(f) of the Investment Company Act of 1940 ("1940 Act") or Rule 10f-3 thereunder if investment companies advised by Rowe Price-Fleming International Inc. ("Price-Fleming") apply the percentage limitations described in paragraph (d) of Rule 10f-3 to the total principal amount of securities offered in a particular type of global securities offering, as described below.

Price-Fleming is the adviser to the T. Rowe Price International Funds, Inc., the T. Rowe Price International Series, Inc., and the Institutional International Funds ("Funds"). You state that the Funds contemplate acquiring securities in a particular type of global offering in which affiliates of Price-Fleming may serve as principal underwriter. The global offering will be a firm commitment offering that consists of several constituent offerings, referred to as tranches, that occur concurrently in more than one country, continent or geographic area. You state that each tranche will be offered with identical terms and sold at identical offering prices, and that the closing of the global offering will be conditioned on the closing of all the tranches. While each tranche may have a separate underwriting syndicate, the activities of the various syndicates generally will be coordinated under one intersyndicate agreement. The intersyndicate agreement will, prior to the closing, permit the coordinators of the global offering to direct the transfer of securities among the underwriters in response to market demand.

The tranche offered to U.S. investors will be registered under the Securities Act of 1933 ("1933 Act").<sup>1</sup> Tranches that are offered for sale outside the United States may be offered in reliance on an exemption from registration under the 1933 Act, such as the exemption provided by Regulation S. Finally, the prospectus for the U.S. tranche will contain extensive disclosure about the global offering, including information with respect to the underwriting arrangements, the nature of the securities, the use of the proceeds, and the effects of the offering upon the issuer's capitalization and financial condition.

Section 10(f) of the 1940 Act, as relevant here, generally prohibits a registered investment company from purchasing any security during the existence of an underwriting syndicate when the company's investment adviser, or an affiliate of the investment adviser,

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<sup>1</sup> Consequently, only the U.S. tranche would be eligible for purchase by the Funds under paragraph (a) of Rule 10f-3, which, in relevant part, requires that the securities be registered under the 1933 Act. The Commission recently proposed amendments to Rule 10f-3 that would, among other things, permit funds to purchase securities of foreign issuers in certain offerings even though the securities are not registered under the Securities Act. Exemption for the Acquisition of Securities During the Existence of an Underwriting Syndicate, Investment Company Act Release No. 21838 (March 21, 1996) ("Release 21838").

is one of the principal underwriters of the security.<sup>2</sup> Section 10(f) was intended principally to prevent underwriters from "dumping" otherwise unmarketable securities in the portfolio of an affiliated investment company by forcing or encouraging the investment company to purchase such securities from another member of the syndicate.<sup>3</sup> Rule 10f-3 under the 1940 Act permits a registered investment company to engage in a transaction that is otherwise prohibited by Section 10(f) under certain specified conditions that are designed to ensure that the purchase of securities from an underwriting syndicate in which an affiliated underwriter is participating is consistent with the protection of investors.<sup>4</sup> Paragraph (d) of Rule 10f-3 limits the purchase of securities by a fund and other funds having the same investment adviser to the greater of four percent of the principal amount of the offering of any class of an issue, or \$500,000 (but not to exceed ten percent of the offering).<sup>5</sup>

You have asked the Division to concur in your view that the Funds may apply the percentage limitations in paragraph (d) of Rule 10f-3 to the total principal amount of securities offered globally, and not just to the principal amount of the U.S. tranche, when one class of securities is offered at the same public offering price as part of a contemporaneous, firm commitment offering that is coordinated across various jurisdictions by closings that are conditioned upon each other. You believe that this interpretation of the term "offering" is appropriate because, in these circumstances, all the tranches together comprise a single, integrated offering.

We agree. Therefore, on the basis of the foregoing, we would not recommend that the Commission take any enforcement action under Section 10(f) or Rule 10f-3 if the Funds apply the percentage limitations of paragraph (d) of Rule 10f-3 to the total principal amount of the type of global offering described above in determining the amount of the securities

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<sup>2</sup> Section 10(f) provides that:

No registered investment company shall knowingly purchase or otherwise acquire, during the existence of any underwriting or selling syndicate, any security (except a security of which such company is the issuer) a principal underwriter of which is an officer, director, member of an advisory board, investment adviser, or employee of such registered company, or is a person (other than a company of the character described in section 12(d)(3)(A) and (B)) of which any such officer, director, member of an advisory board, investment adviser, or employee is an affiliated person, unless in acquiring such security such registered investment company is itself acting as principal underwriter for the issuer. . . ."

<sup>3</sup> Congress also was concerned that fund assets could be used to absorb the risks of an underwriting in more subtle ways, such as to facilitate price stabilization in connection with an underwriting. These concerns were discussed in INVESTMENT TRUSTS AND INVESTMENT COMPANIES, Part Three, Chapter VII, *Deficiencies in the Organization and Operation of Investment Trusts and Investment Companies*, H.R. Doc. No. 279, 76th Cong., 2d Sess. 2519-2624 (1941).

<sup>4</sup> See Release 21838, *supra* note 1.

<sup>5</sup> The proposed amendments to Rule 10f-3 would increase the percentage of an underwriting that an investment company may purchase to the greater of ten percent of the offering or \$1,000,000 (but not to exceed fifteen percent of the offering). Release 21838, *supra* note 1.

that they may purchase in an underwriting in which an affiliate of Price-Fleming serves as principal underwriter.<sup>6</sup> Because this response is based on the facts and representations in your letter, you should note that different facts or representations might require a different conclusion.

*Marjorie S. Riegel*

Marjorie S. Riegel  
Senior Counsel

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<sup>6</sup> If the proposed amendments to Rule 10f-3 are adopted, *see supra* notes 1 and 5, the Funds could apply the revised percentage limitations to the total principal amount of securities offered globally.

T. Rowe Price Associates, Inc.

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RULE \_\_\_\_\_  
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March 12, 1996

Amy R. Doberman, Esq.  
Assistant Chief Counsel  
Division of Investment Management  
U.S. Securities & Exchange Commission  
450 Fifth Street, N.W. Mail Stop 10-6  
Washington, D.C. 20549

Re: *No-Action Request Concerning the Meaning of "Offering" in Rule 10f-3(d) under the Investment Company Act of 1940.*

Dear Ms. Doberman:

We are writing on behalf of the T. Rowe Price International Funds, Inc., the T. Rowe Price International Series, Inc., and the Institutional International Funds, Inc. ("Price International Funds"), and any other registered investment company, or separate series thereof, which is currently or in the future advised or sub-advised by Rowe Price-Fleming International, Inc. ("Price-Fleming"), to request that the staff of the Commission (the "Staff") take a certain no-action position with respect to Rule 10f-3 under Section 10(f) of the Investment Company Act of 1940 (the "1940 Act"). Specifically, in the context of certain global offerings conducted on a firm commitment basis, it is our view that the percentage limitations described in paragraph (d) of Rule 10f-3 should be applied to the total amount of securities being offered globally by the underwriting syndicate, and not just the amount registered under the Securities Act of 1933 (the "1933 Act") and offered for sale in the United States. Accordingly, we request the Staff's assurance that it will not recommend enforcement action to the Commission if the Price International Funds purchase securities in certain global offerings subject to Rule 10f-3 that meet the conditions outlined below and provided that the amounts purchased by the Price International Funds do not exceed the percentage limitations in Rule 10f-3(d) as applied to the total amount of the global offering.

T. Rowe Price 

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**Background.**

Issue.

With the internationalization of the securities markets and the privatization of national industries, issuers are raising capital concurrently in the United States and overseas in what are commonly known as "global" or "combined" offerings. As explained below in greater detail, a contemporaneous firm commitment offering can be conducted in various countries and geographic regions whereby the same securities are offered at the same public offering price to investors by an underwriting syndicate coordinated on a global basis. Typically, only the portion offered to U.S. investors (the "U.S. Tranche") is registered under the 1933 Act. For registered investment companies participating in such offerings in reliance on Rule 10f-3, a question arises as to whether the amount offered globally or in the U.S. Tranche should be considered the "offering" for purposes of the percentage purchase limitations in paragraph (d) of the rule.

The Price International Funds.

From time to time, affiliates of the Price International Funds participate in global offerings. The Price International Funds are registered investment companies managed by Price-Fleming, a registered investment adviser and affiliate of T. Rowe Price Associates, Inc. ("Price Associates"). Price-Fleming was incorporated in Maryland in 1979 and is a joint venture between Price Associates and Robert Fleming Holdings Ltd. ("Fleming"). The common stock of Price-Fleming is 50% owned by a wholly-owned subsidiary of Price Associates, 25% owned by a subsidiary of Fleming and 25% owned by Jardine Fleming Group Ltd. ("Jardine Fleming") (half of Jardine Fleming is owned by Fleming and half by Jardine Matheson Holdings Ltd.). Price Associates has the right to elect a majority of the board of directors of Price-Fleming, and Fleming has the right to elect the remaining directors, one of whom will be nominated by Jardine Fleming.

Fleming is a diversified investment organization with offices worldwide and incorporated in 1974 in the United Kingdom as successor to the business founded by Robert Fleming in 1873. Fleming and its affiliates participate from time to time as underwriters in international offerings, particularly those conducted in Southeast Asia and the Pacific Region. Because of the ownership structure of Price-Fleming, Price-Fleming is presumed under the 1940 Act to be controlled by Fleming and Jardine Fleming.<sup>1</sup> This in effect establishes a presumption that Price-Fleming, Fleming and Jardine Fleming are "affiliated persons" of each other within

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<sup>1</sup> Section 2(a)(9) of the 1940 Act defines the term "control" to mean the power to exercise a controlling influence over the management or policies of a company, unless such power is solely the result of an official position with such company. Section 2(a)(9) further provides that any person who owns beneficially, either directly or through one or more controlled companies, more than 25 percent of the voting securities of a company shall be presumed to control the company.

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the meaning of Section 2(a)(3) of the 1940 Act.<sup>2</sup> Section 10(f) of the 1940 Act, as relevant for purposes of this letter, prohibits registered investment companies from purchasing securities in underwritings where an affiliate of the company's investment adviser is one of the underwriters in the syndicate. Thus, the Price International Funds, which are advised by Price-Fleming, must comply with the conditions of Rule 10f-3 under the 1940 Act in order to purchase securities from any underwriting syndicate in which Fleming, Jardine Fleming or any affiliate thereof participates as principal underwriter ("Affiliated Underwritings").<sup>3</sup>

Global or Combined Offerings.

Global or combined offerings typically involve a concurrent, firm commitment global offering in more than one country, continent or geographic region that is conducted by an international underwriting syndicate. There may be one or more "global coordinators" which act in a role similar to that of a managing underwriter. Each offering in each locality may have a separate underwriting syndicate. The activities of the syndicates generally are coordinated by an intersyndicate agreement that conditions the closing of the global offering on the closing of each of the separate constituent offerings. For example, a combined global offering may involve a U.S., European and Asian offering with the closing of each a condition to the closing of the entire global offering. The intersyndicate agreement may also prohibit underwriters in one geographic region from making offers to sell securities in other geographic regions until the completion of the distribution of the securities in all the offerings of the global offering. In addition, the global coordinators may direct the transfer of securities under the intersyndicate agreement among the underwriters in response to market demand.<sup>4</sup>

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<sup>2</sup> Section 2(a)(3) of the 1940 Act defines the term "affiliated person" to include, among other things, any entity directly or indirectly controlling, controlled by or under common control with a second entity.

<sup>3</sup> Under Section 2(a)(29) of the 1940 Act, a principal underwriter of a security includes any underwriter who in connection with a primary distribution of the security (a) is in privity of contract with the issuer, (b) acting alone or in concert with one or more other persons, initiates or directs the formation of an underwriting syndicate, or (c) is allowed a rate of gross commission, spread or other profit greater than the rate allowed another underwriter participant in the distribution.

<sup>4</sup> It is our understanding that any such reallocation by the global coordinators occurs during the building of the underwriters' books up to the closing of the offering. Most foreign underwritings are conducted on the basis of what is referred to as "bookbuilding with soft underwriting." In these underwritings, the size, price and allocation of securities among the members of the syndicate are determined on the basis of indications received from investors during a pre-designated offer period. Soft underwriting occurs during the final hours of pricing, before the opening of the market and immediately after the size and price of the offering have been set. At that time, the capital of the syndicate is committed and the syndicate members become liable for their allocable share of the issue which is not subsequently sold. This is called

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In such combined offerings, the same securities are typically offered to both U.S. and international investors at the same initial offering price. The U.S. Tranche may be registered under the 1933 Act which would enable the Price International Funds to participate in an Affiliated Underwriting in accordance with the provisions of Rule 10f-3.<sup>5</sup> The other international tranches may be offered in reliance upon an exemption from registration under the 1933 Act and in accordance with the applicable securities laws of the locality where the offering is made.<sup>6</sup> Since the constituent offerings are being made concurrently and are conditioned upon each other, the prospectus for the U.S. Tranche typically contains extensive disclosure about the global offering including information with respect to the underwriting arrangements, the nature of the securities, the use of proceeds and the effects of the offering upon the issuer's capitalization and financial condition. Thus, under the federal securities laws, the global offering is treated as a single, integrated offering for disclosure purposes. It has been our experience that the typical level of disclosure in the offering circulars for the international tranches in such combined offerings parallels that of the U.S. prospectus.

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"soft underwriting" because the syndicate's exposure is limited in practice. Because the price and size of the issue are set based upon the interest indicated by offerees during the offer period, the risk that the syndicate will be unable to place the shares is reduced. For all intents and purposes, these underwritings are similar to the traditional firm commitment offerings conducted in the domestic markets in which underwriters commit their capital based upon indications of interest received during the waiting period prior to the effectiveness of a registration statement filed under the 1933 Act.

In each of the global offerings we have reviewed, the underwriting arrangements are commonly described as "a commitment by the underwriters to purchase all of the securities offered if any are purchased." You may assume that, for purposes of our letter, the global offerings in which the Price International Funds participate will otherwise meet the "firm commitment" condition of paragraph (a)(3) of Rule 10f-3.

<sup>5</sup> Because Rule 10f-3(a) requires that the securities being purchased either be registered under the 1933 Act or be municipal securities, the Price International Funds are generally unable to rely upon Rule 10f-3 to purchase foreign securities in Affiliated Underwritings. This condition has caused the Price International Funds to apply for an exemptive order.

<sup>6</sup> Regulation S under the 1933 Act provides an exemption from domestic registration requirements for offshore offerings made in compliance with its provisions, including the absence of any "directed selling efforts" in the U.S. The Commission has taken the position that legitimate marketing activities carried out in the U.S. in connection with a registered or exempt U.S. offering will not constitute directed selling efforts such that it would result in the loss of the Regulation S exemption for a simultaneous overseas offering. See 1933 Act Rel. No. 33-6863, n. 64 (April 24, 1990).

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### Legal Analysis and Conditions for Relief.

Section 10(f) of the 1940 Act, in relevant, part, prohibits a registered investment company from knowingly purchasing or otherwise acquiring, during the existence of any underwriting or selling syndicate, any security (except a security of which the company is the issuer) a principal underwriter of which is an investment adviser of the company or an affiliated person of any investment adviser. Section 10(f) was specifically designed to prevent underwriters from "dumping" unmarketable securities in affiliated investment companies, either by forcing the investment company to purchase unmarketable securities from the underwriting affiliate itself, or by forcing or encouraging the investment company to purchase such securities from another member of the syndicate. See 1940 Act Rel. No. 10592 (Feb. 13, 1979). Rule 10f-3 provides an exemption from the prohibitions of Section 10(f). Rule 10f-3 contains prophylactic provisions intended to implement the statutory prohibition against overreaching through the imposition of a number of restrictions on an investment company's purchase of securities from an underwriting syndicate which includes an affiliate of the investment company's adviser, among other persons. The condition in paragraph (d) of the rule relating to the limitation on the amount of securities purchased is the subject of this no-action request.

Paragraph (d) of Rule 10f-3 permits an investment company, or two or more investment companies having the same investment adviser, to purchase up to four percent or \$500,000 (but not to exceed 10% of the offering), whichever is greater, of an issue of securities where such purchase would be otherwise prohibited by Section 10(f). The exact purpose served by the purchase limitations, and the reasons for setting them at those particular levels, have never been articulated by the Commission in connection with the adoption or subsequent amendments of the rule.<sup>7</sup> However, quite obviously these limitations operate as a substantive restriction on the amount of securities purchased by an investment company from an affiliated underwriting syndicate, thus, ensuring that a large portion of the offering is sold to persons unaffiliated with the fund. The purchase limitations of paragraph (d) apply to the "principal amount of the offering." This language is relatively straightforward when applied in the context of registered domestic offerings, and it is reasonable to assume that this is the type of offering that was contemplated at the time of the rule's adoption and subsequent amendment. The term "offering", however, is not as clear when viewed in the context of a global, combined offering. In these circumstances, it is our view that the "offering" for purposes of the purchase limitations should be deemed the global underwriting, including the U.S. Tranche, for the following reasons:

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<sup>7</sup> Rule 10f-3 was originally adopted in 1958. The release adopting the original rule stated that its conditions were designed to permit purchases without an exemptive order when the circumstances would make it unlikely that such purchases would be inconsistent with the purposes of Section 10(f). See 1940 Act Rel. 2797 (Dec. 2, 1958). That release offers little explanation for the conditions set forth in the rule. The Commission did note, however, that the purchase limitations were within the range of those contained in most of the exemptive orders issued by the Commission prior to the rule. In 1979, the Commission increased the purchase limitations to their current percentages. See 1940 Act Rel. No. 10736 (June 14, 1979).

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• Adequate Integrated Disclosure. Due to the requirements of the 1933 Act, the disclosure in the U.S. prospectus will contain all material information about the issuer and the securities being offered as well as extensive information about the other international offerings and the effects of the entire offering upon the issuer. Therefore, to the extent the registration requirement of Rule 10f-3 is designed to ensure adequate disclosure with respect to the securities purchased by the investment company, this purpose is accomplished.<sup>8</sup>

Any dangers associated with the non-disclosure of information due to the inapplicability of the 1933 Act registration requirements will not be present. From a disclosure perspective, the practice is to treat the U.S. underwriting as part of a global, firm commitment offering notwithstanding the fact that only the U.S. Tranche is registered.

• Identical Securities & Pricing. The same securities will be offered globally with identical terms at an identical offering price in the constituent offerings.<sup>9</sup> These conditions will assure that the Price International Funds will not purchase different securities, or identical securities at different prices, from those offered to the general investing public. Thus, if the same securities are sold publicly at the same time and at a uniform price as part of a single, global firm commitment underwriting for the same issuer, there would be no greater opportunity for the affiliated underwriter to "dump" unmarketable securities from the international tranches than if the investment company were to purchase from the U.S. Tranche alone. Again, as in the case of disclosure, to the extent registration under the 1933 Act is designed to ensure a single offering of identical securities at identical prices, these purposes will be accomplished. Registration of the U.S. Tranche ensures these benefits and lack of registration of the non-U.S. tranches should not be an impediment to an increased level of participation in the global offering.<sup>10</sup>

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<sup>8</sup> The Commission apparently imposed the registration requirement in Rule 10f-3 to ensure that the investment company purchased marketable securities, at the same public offering price, which ordinarily would not exist absent registration. See *Protecting Investors: A Half Century of Investment Company Regulation*, Division of Investment Management (May 1992), at 500 n. 74. Registration also provides the protections of the federal securities laws and makes available to investment companies the antifraud and civil liability provisions and other remedies thereunder.

<sup>9</sup> For purposes of this request, American Depositary Receipts (ADRs) or American Depositary Shares (ADSs) will be treated as "identical" to the deposited securities when the same class of securities as the deposited securities are offered in a constituent offering in the same global offering.

<sup>10</sup> While securities in foreign underwritings may be offered at a discount to certain specified groups within a particular locality or jurisdiction (i.e., employees of the issuer or the government, citizens of the issuer's home country) from that offered to the rest of the investors in a global offering, the Price International Funds typically would not be eligible for the discount price and therefore would purchase securities at the public offering price in the combined, global offering.

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• Conditional Closings. The closing of each of the constituent offerings will be a condition to the closing of the global offering which effectively ties the success of the offerings together. Further, the underwriters of each constituent offering will agree to purchase all of the securities being offered in the constituent offering if any are purchased as required by paragraph (a)(3) of Rule 10f-3. *See supra* note 4. These factors are further indicia that the combined offering should be treated as a single, firm commitment "offering" for purposes of the purchase limitations in Rule 10f-3(d).

Notwithstanding the protections offered by registration of the U.S. Tranche and the fact that identical securities will be offered at the same price upon conditional closings, it could be argued that there is still a danger that an affiliated person could improperly influence an investment company to purchase a disproportionate amount of a separate, constituent tranche. Although such an amount could be no more than 4% of the entire global offering, if it constituted a very large portion of the given tranche it could present the potential for abuse against which the 4% restriction is designed to protect. In such a scenario, purchases significantly in excess of 4% of the U.S. Tranche could result in the investment company holding disproportionate amounts of the U.S. Tranche to a degree that would cause the securities to be illiquid.

We do not believe this should be a cause for concern if the global offering meets all the conditions outlined herein (i.e., registration of the U.S. Tranche, the same securities, identical offering prices, and conditional closings) since the underwriting syndicate is coordinated on a global basis with allocations among regions made in response to market demand. The suggested abusive scenario could result only if the U.S. Tranche were very small relative to the other tranches. This is a highly improbable result given the nature of global offerings and the active interest of U.S. persons in foreign securities. In the global offerings in which the Price International Funds have participated, the U.S. Tranche has been at least as large, and sometimes larger than, the other tranches. Further, given the internationalization of the securities markets and the global dissemination of market information, it is not reasonable to expect that an offering of "unmarketable" securities of a particular issuer will be successful in other countries when market interest in the U.S. is lacking. Thus, the realities of the market place and the structure of global offerings can be relied upon to protect against any danger of selling a disproportionate amount of the securities from one of the constituent tranches to an affiliated investment company. We believe that 4% of the global offering is the appropriate measure under Rule 10f-3(d) because, effectively, the global offering is one integrated "offering".

#### Request.

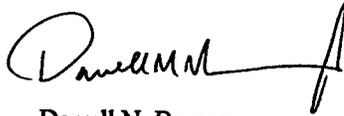
On the basis of the conditions outlined below, it is our opinion that the Price International Funds could participate in an Affiliated Underwriting and purchase in the U.S. Tranche (or any other tranche registered in the U.S.) up to 4% of the total amount offered in a combined, global offering under Rule 10f-3(d). In this context, for purposes of paragraph (d), "offering" shall mean a global offering when the same class of securities is offered at the same public offering price as part of a contemporaneous, firm commitment offering that is coordinated across U.S. and foreign jurisdictions by closings which are conditioned upon each other. Further, there shall be adequate public disclosure of the terms of the global offering through registration of

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the U.S. Tranche. Accordingly, we respectfully request your advice that you concur with our opinion or, in the alternative, that you will not recommend that the Commission take any enforcement action against the Price International Funds, Price Associates, Price Fleming, or Fleming alleging violations of Section 10(f) of the 1940 Act or Rule 10f-3 thereunder if the Funds participate in an Affiliated Underwriting for a global offering in accordance with the above conditions, and purchase an amount in the U.S. Tranche (or any other tranche registered in the U.S.) based upon 4% of the entire global offering. In connection with this request, we also represent that the Price International Funds' participation in such Affiliated Underwritings will otherwise satisfy all other applicable conditions of Rule 10f-3.

If you have any questions regarding this request, please feel free to contact either of the undersigned. We will be pleased to provide you with any additional information you may require in your review of this matter.

Sincerely,

   
Forrest R. Foss                      Darrell N. Braman