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ARTICLES

SEC REGULATION OF MULTIJURISDICTIONAL OFFERINGS

*Roberta S. Karmel**

I. INTRODUCTION

The international equity market encompasses the underwriting and distribution of equity securities to investors in one or more markets outside the issuer's home country. This market has grown tremendously in recent years.¹ Despite its growth and importance, the Euroequity market is small compared to the Eurobond market.² Impediments to the further growth of mul-

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1. In 1983 there were only \$200 million of common and preferred stocks offered in the Euroequity market. T. CHUPPE, H. HAWORTH & M. WATKINS, *THE SECURITIES MARKETS IN THE 1980S: A GLOBAL PERSPECTIVE* 39 (Jan. 26, 1989) (on file at the *Brooklyn Journal of International Law* library) [hereinafter T. CHUPPE, H. HAWORTH & M. WATKINS]. By 1987 there were \$20.3 billion of common and preferred Euroequity offerings. *Id.* Even after the October 1987 stock market crash, institutional investors predicted increasing growth of the international equity markets. *See generally* COOPERS & LYBRAND, *OPPORTUNITY AND RISK IN THE 24-HOUR GLOBAL MARKETPLACE* (1987) (on file at the *Brooklyn Journal of International Law* library). Although there was a sharp decline in Euroequity offerings during the first 10 months of 1988, there was a surge during the month of October 1988 in which \$1.8 billion of equity offerings were brought to the Euromarket. T. CHUPPE, H. HAWORTH & M. WATKINS, *supra*, at 39.

2. Eurobond offerings totalled \$177.2 billion in 1988, \$140.5 billion in 1987, and \$187.7 billion in 1986. Securities Act Release No. 6,841, [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,432, at 80,204 n.12 (July 26, 1989) [hereinafter Securities Act Release No. 6,841]. Further, large privatizations of state-owned enterprises have accounted for an estimated 25% of offerings in the Euroequity market. *Id.* at 80,284 n.16; T. CHUPPE, H. HAWORTH & M. WATKINS, *supra* note 1, at 40. Insofar as offerings by foreign issuers in the United States are concerned, the securities of over 2,000 foreign issuers are traded in this country. Only 150 foreign securities are traded on United States securities ex-

tijurisdictional equity markets include the federal securities laws and Securities and Exchange Commission (SEC) regulation.

Such regulation inhibits internationalization of the markets in two ways: first, by requiring securities offerings made in the United States or to United States investors to be registered with the SEC under the Securities Act of 1933 (Securities Act);³ second, by prohibiting the development of secondary or after-market trading of unregistered foreign securities in the United States and the participation in such trading by United States investors abroad.⁴ Although the SEC has long been interested in facilitating transnational capital formation, it has been unwilling to compromise its own disclosure, accounting, or auditing standards. The accelerated pace of internationalization of the securities markets is forcing the SEC to seek new ways to accommodate its regulatory system to the needs of foreign regulators, issuers, and investors, but despite the progress made in recent initiatives, the SEC still has much to do in order to adjust its regulations for globalization.

During the past year the SEC has made a number of far-reaching proposals that would significantly alter its historically conservative approach to multijurisdictional offerings and possibly foster the growth of a global trading market in equity securities. A major policy statement concerning the international securities markets made by the SEC at the end of 1988 highlighted the importance of a sound, integrated international disclosure system with a minimum of regulatory impediments. According to the SEC:

Investors participating in the international securities markets should be protected through a sound disclosure system based on mutually agreeable accounting principles, auditing standards, auditor independence standards, registration and prospectus provisions, and listing standards. The goal in addressing international disclosure and registration problems should be to minimize regulatory impediments without compromising investor protection.⁵

changes. An additional 291 foreign issues are traded on the National Association of Securities Dealers, Incorporated Automated Quotation (NASDAQ) system. Securities Act Release No. 6,841, *supra*, at 80,284 n.14.

3. See *infra* notes 14-17 and accompanying text. See also Securities Act of 1933, 15 U.S.C. §§ 77a-bbbb (1988).

4. See *infra* notes 19-25 and accompanying text.

5. Policy Statement of the Securities and Exchange Commission on the Regulation of International Securities Markets, [1988-1989 Transfer Binder] Fed. Sec. L. Rep.

This Article discusses the present and proposed SEC regulations applicable to offerings by foreign issuers to United States investors, and criticizes the SEC's failure to adjust its registration requirements to the needs of the international marketplace. This Article concludes that in order to facilitate the offering of foreign securities in United States markets, the SEC will have to assume a larger role in the harmonization of accounting standards by international bodies. The creation of an international regulatory body, which would establish harmonized accounting and disclosure standards for public companies in the financial centers of the world, might even be necessary.

II. SEC REGULATIONS AS IMPEDIMENTS TO MULTIJURISDICTIONAL EQUITY MARKETS

In general, under section 5 of the Securities Act,⁶ any issuer, whether foreign or domestic, that makes use of any means or instruments of transportation or communication in interstate commerce or the mails to offer or sell any security must register that offering with the SEC and make the disclosures required in a United States prospectus.⁷ Furthermore, a foreign issuer, like a domestic issuer, must register its securities under section 12 of the Securities Exchange Act of 1934 (Exchange Act)⁸ and thus becomes subject to the annual and periodic reporting and disclosure requirements of the Exchange Act if the issuer has used United States jurisdictional means or instruments of transportation or communication, and has assets of more than five million dollars and more than 500 shareholders worldwide.⁹

The federal securities laws, however, do make some accommodations to foreign issuers. First, special annual disclosure forms for foreign issuers have been developed by the SEC, which differ from the requirements imposed upon United States issuers with regard to compliance with generally accepted accounting principles (GAAP),¹⁰ segment reporting, disclosure of direc-

(CCH) ¶ 84,341, at 89,578 (Nov. 23, 1988).

6. Securities Act of 1933, 15 U.S.C. § 77e (1988).

7. These prospectuses must include audited financial information. See L. Loss, *FUNDAMENTALS OF SECURITIES REGULATION* 144-64 (1988).

8. Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-kk (1988).

9. Section 12(g)(1) only requires \$1,000,000 and 500 shareholders. The asset requirement has been increased to \$5,000,000. 17 C.F.R. § 240.12g-1 (1989). See Securities Act Release No. 6,779, [1987-1988 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,242, at text accompanying notes 51-53 (June 10, 1988) [hereinafter Securities Act Release No. 6,779].

10. See *infra* notes 53-58 and accompanying text.

tor and officer compensation, and information regarding transactions with management.¹¹ Full reconciliation to United States GAAP is required, however, for most foreign issuer public equity offerings.¹²

Second, the registration of American Depositary Receipts (ADRs), which represent foreign securities held by a United States depository, is easier than the registration of foreign securities offered directly to the public.¹³ Third, an issuer that did not go public in the United States is exempt from Exchange Act reporting requirements if it has fewer than 300 United States resident shareholders or furnishes to the SEC materials required to be filed with a stock exchange on which its securities are traded and such materials are made publicly available.¹⁴

Nevertheless, as the SEC itself acknowledges, foreign issuers that consider an equity offering in the United States "frequently are dissuaded by the substantial differences in disclosure standards, particularly with respect to accounting standards."¹⁵ Further, the SEC has taken an expansive view of its jurisdiction, especially in cases that involve enforcement of the antifraud provisions.¹⁶ Yet, the distinction between fraud and failure to comply with registration requirements is not always clear-cut because the SEC may view the lack of customary United States mandated disclosure in an unregistered offering as fraudulent.¹⁷ In addition, United States courts have applied the securities laws extraterritorially where conduct occurs overseas and the impact of such conduct on United States investors or securities markets is significant.¹⁸

The domestic or home market is normally the primary mar-

11. U.S. SECURITIES AND EXCHANGE COMM'N, REPORT ON INTERNATIONALIZATION OF THE SECURITIES MARKETS TO SENATE COMM. ON BANKING, HOUSING, AND URBAN AFFAIRS AND THE HOUSE COMM. ON ENERGY AND COMMERCE, at III-67-68 (July 29, 1987) [hereinafter INTERNATIONALIZATION REPORT].

12. INTERNATIONALIZATION REPORT, *supra* note 11.

13. Lorenz, *EEC Law and Other Problems in Applying the SEC Proposal on Multinational Offerings to the U.K.*, 21 INT'L LAW. 795, 801 (1987).

14. 17 C.F.R. § 240.12g3-2 (1989).

15. Securities Act Release No. 6,841, *supra* note 2, at 80,282.

16. Goelzer, Mills, Gresham & Sullivan, *The Role of the U.S. Securities and Exchange Commission in Transnational Acquisitions*, 22 INT'L LAW. 615, 619 (1988) [hereinafter Goelzer, Mills, Gresham & Sullivan]. Cf. Exchange Act Release No. 27,017, [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,428, at 80,232 (July 11, 1989).

17. See H. KRIPKE, THE SEC AND CORPORATE DISCLOSURE: REGULATION IN SEARCH OF A PURPOSE 13-18 (1979).

18. This is known as the "effects theory" of jurisdiction. See Goelzer, Mills, Gresham & Sullivan, *supra* note 16, at 619.

ket for any security, so shares offered in the Eurosecurity markets tend to flowback to the domicile of the issuer.¹⁹ Partly for this reason, SEC policy on extraterritorial application of the Securities Act registration provisions has been designed to prevent flowback of an offering into the United States.²⁰ Since 1964 the SEC has taken the position that it will not insist on the initial registration of a foreign offering, whether by a United States or foreign issuer, if the circumstances of the offering are reasonably designed to prevent the distribution or redistribution of the securities into the United States or to United States nationals living abroad.²¹ Recognized procedures for assuring that unregistered foreign offerings come to rest abroad include agreements in underwriting and selling group documents not to sell to United States persons and the imposition of a lock-up period during which securities may not be sold to United States investors. Further refinements as to appropriate implementing procedures have to some extent distinguished between debt and equity offerings.

The SEC has long taken the position that it would not integrate private offerings in the United States with unregistered foreign offerings.²² The availability of such foreign securities in private placements in a climate of increased internationalization led to a dissatisfaction with current law on the part of institutional investors.²³ Accordingly, in no-action letters concerning the ongoing privatization in France, the SEC permitted French issuers to sell private placements of French securities to United States institutions concurrently with public offerings in France, without precautions assuring that the securities sold in the public offerings would come to rest abroad.²⁴ In addition, the SEC permitted United States institutions to resell the purchased shares on the Paris bourse without investigation as to the na-

19. INTERNATIONALIZATION REPORT, *supra* note 11, at II-54.

20. Securities Act Release No. 4,708, 1 Fed. Sec. L. Rep. (CCH) ¶ 1,361 (July 9, 1964).

21. *Id.*

22. *Id.* See also Preliminary Note 7 to Regulation D, 17 C.F.R. §§ 230.501-30.506 (1989).

23. See, e.g., College Retirement Equities Fund, SEC No-Action Letter, [1987-1988 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 78,503 (June 4, 1987); French Privatization Program, SEC No-Action Letter, [1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 78,439 (Apr. 17, 1987) [hereinafter French Privatization Program]; College Retirement Equities Fund, SEC No-Action Letter, [1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 78,420 (Feb. 18, 1987) [hereinafter College Retirement Equities Fund of Feb. 18, 1987].

24. French Privatization Program, *supra* note 23.

tionality or residence of the purchaser.²⁵ Sales by French issuers to United States citizens living in France were also authorized by the no-action letters.²⁶

III. SEC PROPOSALS TO RECONCILE MULTIJURISDICTIONAL OFFERINGS WITH INVESTOR PROTECTION

The continuing unwillingness of foreign issuers to comply with SEC registration requirements and the increasing desire of United States financial institutions and investors to participate in the international markets have increased the pressure on the SEC to change its policies and regulations. Confronting the reality of an internationalized market where the SEC is only one regulator among many, the SEC has acknowledged that rule changes and new approaches are necessary.²⁷ For better or worse, however, the SEC has set off in three different directions at once in trying to reconcile the needs of the market for multijurisdictional offerings with investor protection. The SEC has amended its forms and requirements for foreign issuers;²⁸ developed harmonized prospectus requirements;²⁹ and exempted foreign offerings from registration.³⁰

Recent SEC amendments to forms and requirements for foreign issuers that enter the United States disclosure system are designed to better accommodate overseas concerns.³¹ In this connection, for example, the SEC now permits foreign issuers, which list on the New York or American Stock Exchanges, to dispense with quarterly reporting, if this is consistent with their home country regulation, and instead report semiannually.³² Because disclosure requirements are minimum standards, foreign issuers motivated to take the trouble and pay for the expense of complying with both their home country and United States dis-

25. College Retirement Equities Fund of Feb. 18, 1987, *supra* note 23.

26. College Retirement Equities Fund of Feb. 18, 1987, *supra* note 23.

27. Exchange Act Release No. 34-24,634, 52 Fed. Reg. 24,230 (1987) [hereinafter Exchange Act Release No. 34-24,634].

28. See *infra* notes 32-35 and accompanying text.

29. See *infra* notes 36-52 and accompanying text.

30. See *infra* notes 62-89 and accompanying text.

31. Exchange Act Release No. 34-24,634, *supra* note 27.

32. Exchange Act Release No. 34-24,634, *supra* note 27. This has not given foreign private issuers complete relief from quarterly reporting requirements since rule 3-19 of regulation S-X requires that a registration statement include on its effective date a balance sheet as of an interim date within six months of such effective date. 17 C.F.R. § 230.3-19(b) (1989).

closure requirements, including financial statement reconciliation, generally can do so. Complying with inconsistent requirements concerning underwriting mechanics is more difficult,³³ but the SEC has granted no-action relief when necessary.³⁴

A second, and not incompatible, initiative, which the SEC has begun, is the development of harmonized prospectus requirements with certain foreign regulators. In its 1985 concept release titled "Facilitation of Multinational Securities Offerings,"³⁵ the SEC requested comment on various proposals to harmonize the prospectus disclosure standards and distribution systems of the United States and other countries.³⁶ In the release the SEC recognized four problem areas in any effort to harmonize securities regulations to foster simultaneous offerings in several countries. These were: the mechanics of a distribution as mandated by the operation of section 5 of the Securities Act; differences in disclosure regarding the nature and character of the issuer, its business, and management; differences in GAAP; and differences in liability provisions for the sale of securities.³⁷ The SEC proposed two ways to overcome these problems: reciprocity, whereby participating jurisdictions would accept one another's home country standards for a prospectus; and a common prospectus approach, whereby regulators would agree on disclosure standards for an offering document.³⁸

Commentators on the concept release strongly endorsed the SEC's initiative, but suggested, however, that while the common prospectus approach might be ideal, it was probably impractical.³⁹ Despite the difficulties, the SEC has now proposed an initial multijurisdictional registration experiment with the Ontario and Quebec Securities Commissions covering offerings of world class Canadian issuers, including rights and exchange offers.⁴⁰

33. See Securities Act Release No. 6,841, *supra* note 2, at 80,287, 80,288 n.51.

34. Securities Act Release No. 6,841, *supra* note 2, at 80,287. For a discussion of complexities of underwriting mechanics in multinational offerings, see the analysis of the B.P. offering in Boughton, *Multinational Securities Offerings*, 14 BROOKLYN J. INT'L L. 339 (1988).

35. Securities Act Release No. 6,568, [1984-1985 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 83,743, at 87,318 (Feb. 28, 1985) [hereinafter Securities Act Release No. 6,568]. See Karmel, *The SEC Goes International*, N.Y.L.J., June 20, 1985, at 1, col. 1.

36. Securities Act Release No. 6,568, *supra* note 35, at 87,318.

37. Securities Act Release No. 6,568, *supra* note 35, at 87,321-22.

38. Securities Act Release No. 6,568, *supra* note 35, at 87,318.

39. The SEC published a summary of the 70 commentators in January 1986.

40. Securities Act Release No. 6,841, *supra* note 2, at 80,204.

Under the SEC proposal "substantial" Canadian companies⁴¹ would be permitted to use documents prepared according to Canadian securities laws to register securities with the SEC.⁴² Annual and periodic Exchange Act reporting and even tender offer requirements could similarly be met with corresponding Canadian disclosure documents.⁴³ This rule is a significant step toward multinational offerings and cross-border financing based on principles of comity rather than extraterritoriality.

The multijurisdictional prospectus proposed with the Ontario and Quebec Securities Commissions is actually a hybrid between a reciprocal and common prospectus. The proposed rules would permit the disclosure for an offering to be prepared in accordance with the requirements of the issuer's home jurisdiction and the regulatory authorities of the home jurisdiction would be responsible for establishing the applicable disclosure standards.⁴⁴ Review of the documents would take place according to the regulations in the home jurisdiction.⁴⁵ Nevertheless, issuers would be subject to the civil liability and antifraud provisions of the offering country.⁴⁶ Some rather complex adjustments to the regulation of stabilizing activity⁴⁷ and tender offer mechanics have also been proposed.⁴⁸

The SEC's willingness to harmonize United States and Canadian requirements is to a large extent based on the similarity of United States and Canadian securities regulations and accounting and auditing standards, as well as the existence of Memoranda of Understanding concerning mutual cooperation in matters relating to the administration and enforcement of United States and Canadian securities laws.⁴⁹ Nevertheless, differences between United States and Canadian GAAP do exist,

41. Companies with a total market value for common stock of (CN) \$180 million and a public float of (CN) \$75 million will be eligible to use the F-9 registration form for investment grade debt and preferred stock offerings; companies with a market value for common stock of (CN) \$360 million and a public float of (CN) \$75 million will be eligible to use the F-10 registration form for equity offerings. Securities Act Release No. 6,841, *supra* note 2, at 80,303.

42. Securities Act Release No. 6,841, *supra* note 2, at 80,303.

43. Securities Act Release No. 6,841, *supra* note 2, at 80,303.

44. Securities Act Release No. 6,841, *supra* note 2, at 80,283.

45. Securities Act Release No. 6,841, *supra* note 2, at 80,283.

46. Securities Act Release No. 6,841, *supra* note 2, at 80,283.

47. Securities Act Release No. 6,841, *supra* note 2, at 80,283.

48. Securities Act Release No. 6,841, *supra* note 2, at 80,283.

49. Securities Act Release No. 6,841, *supra* note 2, at 80,282.

and there are different independence standards for auditors.⁵⁰ Accordingly, the SEC has proposed reconciliation of Canadian financial statements to United States GAAP for equity offerings only.⁵¹

Since financial statements and related disclosures are at the heart of the SEC mandated disclosure system, the key to the success of a joint disclosure project is harmonization of accounting standards. Although reconciling different accounting principles has enjoyed little success in the past, a recent exposure draft of international accounting principles released by the International Accounting Standards Committee (IASC)⁵² may provide a major breakthrough in efforts toward an agreement on international GAAP.⁵³

The IASC proposals were issued on January 1, 1989, and cover a broad range of issues including assignment of costs to inventories, recognition of revenue and net income on construction contracts, measurement of property, plant, and equipment, recognition of foreign exchange gains and losses, business combinations, good will, and measurement of investments and retirement benefits.⁵⁴ If the IASC proposals become accepted as an international GAAP, they could provide a benchmark for securities regulatory agencies, including the SEC.⁵⁵ An issuer making a multijurisdictional offering would then provide financial statements prepared in accordance with GAAP in its home country, and only have to provide one set of reconciled financial statements based on the IASC's standards.⁵⁶ To achieve international harmonization of accounting principles, the IASC is attempting to eliminate as many free-choice alternatives as possible, specify circumstances that justify an alternative treatment, require reconciliation to a benchmark when an alternative is used, resist allowing new free-choice alternatives to develop, and obtain the cooperation and support of standard-setting bodies.⁵⁷

Even if accounting principles become internationalized, au-

50. Securities Act Release No. 6,841, *supra* note 2, at 80,294.

51. Securities Act Release No. 6,841, *supra* note 2, at 80,299, 80,303.

52. IASC Exposure Draft, Comparability of Financial Statements (E32) (Jan. 1989).

53. *Id.*

54. *Id.* See *Accounting Body Proposes Harmonizing Financial Statement Rules Worldwide*, 21 Sec. Reg. & L. Rep. (BNA) 46 (Jan. 6, 1989) [hereinafter *Accounting Body*].

55. *Accounting Body*, *supra* note 54, at 46.

56. *Accounting Body*, *supra* note 54, at 47.

57. Collins, *The Move to Globalization*, J. Acct., Mar. 1989, at 82-84.

ditioning standards in some countries differ significantly from United States generally accepted auditing standards (GAAS). For example, in Belgium, France, Italy, and Spain, accountants performing statutory audits need not be independent.⁵⁸ Yet, financial statements that are not audited by independent auditors will not be accepted by the SEC.⁵⁹ The SEC has launched a review of auditor independence standards in various countries, but any international agreement on GAAS seems even farther away than an agreement on international GAAP.⁶⁰

Adjusting United States registration requirements to fit the needs and practices of foreign issuers and creating a common prospectus are initiatives that are designed to coax foreign issuers into the SEC's jurisdiction and mandated disclosure system. A quite different approach is reflected in the SEC's third effort to reconcile the securities laws with internationalization: the exemption of foreign offerings from registration. This approach is embodied in two outstanding rule proposals: regulation S⁶¹ and rule 144A.⁶² In addition, the American Stock Exchange (Amex) and the National Association of Securities Dealers, Inc. (NASD) have proposed exempt marketplaces for the trading of unregistered foreign securities that bear the acronyms of SITUS and PORTAL, respectively.⁶³

It has proven very difficult for the SEC to clarify the circumstances under which securities issued abroad, by foreign and domestic issuers, can be sold to United States investors and then freely resold by the purchasers. The SEC initially proposed regulation S and rule 144A in 1988.⁶⁴ Many commentators were critical of the scope of the proposals, raising concerns about a

58. G. WATT, R. HAMMER & M. BURGE, ACCOUNTING FOR THE MULTINATIONAL CORPORATION 214-15 (1977).

59. 17 C.F.R. §§ 210.2-01-210.2-05 (1989).

60. See *SEC Chief Accountant Launches Study of Auditor Independence Requirements*, 21 Sec. Reg. & L. Rep. (BNA) 1197 (Aug. 4, 1989).

61. Securities Act Release No. 6,838, [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,426, at 80,209 (July 11, 1989) [hereinafter Securities Act Release No. 6,838].

62. Securities Act Release No. 6,839, [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,427, at 80,220 (July 11, 1989) [hereinafter Securities Act Release No. 6,839].

63. Securities Act Release No. 6,806, [1988-1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,335, at 89,545 n.191 (Oct. 25, 1988) [hereinafter Securities Act Release No. 6,806]. The American Stock Exchange (Amex) proposal is contained in SEC File No. SR-Amex-87-32. The National Association of Securities Dealers, Inc. (NASD) proposal is contained in SEC File No. SR-NASD-88-23.

64. Securities Act Release No. 6,806, *supra* note 63, at 89,545; Securities Act Release No. 6,779, *supra* note 9.

deterioration in public securities markets for noninstitutional investors,⁶⁵ leading the SEC to repropose more modest versions of the regulations.⁶⁶ Nevertheless, the reproposals are based on discrimination between institutional and individual investors, and mark a shift in SEC policy concerning the extraterritorial application of the securities laws from a "nationality" focus to a "territorial" focus.⁶⁷

Proposed regulation S is intended to clarify the extraterritorial application of section 5 of the Securities Act through an interpretative statement and safe harbor provisions.⁶⁸ A general statement within proposed regulation S would provide that section 5 does not apply to offers and sales that occur outside the United States as determined by four elements: the locus of the offer or sale; the absence of directed selling efforts in the United States; the likelihood of the securities sold coming to rest outside the United States; and the justified expectations of the parties to the transaction concerning the applicability of section 5.⁶⁹

The proposed rule then contains two safe harbors, one for offers and sales by issuers and securities professionals involved in the distribution process (issuer safe harbor),⁷⁰ and one for resales (resale safe harbor).⁷¹ Both safe harbors generally require that for an offer or sale to be exempt from SEC registration, it must be made in an offshore transaction. Additionally, no directed selling efforts can be made into the United States.⁷²

The issuer safe harbor would distinguish between three categories of issuers. The first category, which would impose no restrictions other than the two general conditions listed above, would apply to offerings by foreign issuers targeted at their home country markets and offerings by foreign issuers with no

65. Securities Act Release No. 6,839, *supra* note 62.

66. *See* Securities Act Release No. 6,838, *supra* note 61; Securities Act Release No. 6,839, *supra* note 62.

67. *See* Securities Act Release No. 6,838, *supra* note 61; Securities Act Release No. 6,839, *supra* note 62.

68. Securities Act Release No. 6,779, *supra* note 9, at 89,123.

69. Securities Act Release No. 6,779, *supra* note 9, at 89,123 (referring to Proposed Reg., 53 Fed. Reg. 42,868 (1988) (to be codified at 17 C.F.R. § 230.901(b))).

70. Proposed Reg., 53 Fed. Reg. 42,868 (1988) (to be codified at 17 C.F.R. § 230.905).

71. Proposed Reg., 53 Fed. Reg. 42,868 (1988) (to be codified at 17 C.F.R. § 230.906).

72. Proposed Reg., 53 Fed. Reg. 42,868 (1988) (to be codified at 17 C.F.R. § 230.904(b)).

substantial United States market interest, whether or not the issuer is subject to the reporting requirements of the Exchange Act.⁷³ The second issuer safe harbor category would apply to offerings of any reporting issuer and offerings of debt securities of foreign issuers where there is a substantial United States market interest for the issuer's debt securities. Such offerings would be required to be made in conformity with offering restrictions and could not be sold in the United States or to a United States citizen for forty days.⁷⁴ The third issuer safe harbor category would be primarily of use for offerings of nonreporting United States issuers and equity offerings of foreign issuers with substantial United States market interest for the class of securities offered. This category would impose more restrictive procedures designed to guard against flowback of securities to the United States.⁷⁵ The resale safe harbor would impose restrictions beyond the general conditions only where the securities were sold by a dealer or similar person. Resales on established foreign securities exchanges or organized markets would be permitted.⁷⁶

As initially proposed, rule 144A would have provided a safe harbor exemption from Securities Act registration requirements for specified resales of restricted securities to institutional investors with assets in excess of five million dollars.⁷⁷ Moreover, rule 144A was not limited to foreign securities.⁷⁸ Some commentators felt the rule would encourage the development of a private, unregulated securities market alongside the public regulated markets, as outlined in the SITUS and PORTAL market place proposals.⁷⁹ In response, the SEC's reproposal would apply only to offers and sales of securities to specified large institutions that have one hundred million dollars of assets invested in securities

73. Proposed Reg., 53 Fed. Reg. 42,868 (1988) (to be codified at 17 C.F.R. § 230.905(a)).

74. Proposed Reg., 53 Fed. Reg. 42,868 (1988) (to be codified at 17 C.F.R. § 230.905(b)(2)). The definition of a United States citizen would not include any discretionary or custodial account held by a United States fiduciary for a foreign account. Proposed Reg., 53 Fed. Reg. 42,868 (1988) (to be codified at 17 C.F.R. § 230.902(m)).

75. Securities Act Release No. 6,779, *supra* note 9, at 89,138-39.

76. Proposed Reg., 53 Fed. Reg. 42,868 (1988) (to be codified at 17 C.F.R. § 230.906). See Securities Act Release No. 6,779, *supra* note 9, at 89,139-40.

77. See Securities Act Release No. 6,779, *supra* note 9.

78. See Securities Act Release No. 6,806, *supra* note 63.

79. See Letter from Securities Industry Ass'n to SEC, SEC File No. S7-9-88 (Oct. 31, 1988). See also *Proposed Rule 144A May Attract Foreign Issuers to U.S. Markets*, SEC Told, 21 Sec. Reg. & L. Rep. (BNA) 413 (Mar. 17, 1989) [hereinafter *Attracting Foreign Issuers*].

or securities under management.⁸⁰ Further, the revised proposal would exclude from rule 144A securities already traded on a national stock exchange or on the National Association of Securities Dealers, Incorporated Automated Quotation System (NASDAQ). While conceptually these changes in proposed rule 144A do not limit the rule to resales of foreign securities, widely traded domestic securities are listed on an exchange or NASDAQ.

How significant rule 144A will be is a matter of conjecture. Some commentators assert that foreign issuers may be wary of utilizing rule 144A if this means they become reporting companies under the Exchange Act.⁸¹ Others assert that rule 144A will exacerbate the institutionalization of the markets.⁸² Nevertheless, even as repropoed, rule 144A is a significant departure from over fifty years of SEC policy forcing securities distributions into the registration process.

Indeed, both the regulation S and rule 144A initiatives are philosophically at odds with efforts to develop an integrated international disclosure system. No doubt the SEC is bowing to reality in fashioning safe harbor exemptions from registration for foreign issuers. The development of an exempt institutional marketplace for foreign securities, whether offshore or onshore, could prove instructive in suggesting what disclosure standards are good business practice and are appropriate for a mandated system.

Yet, why should individual investors and small institutions be deprived of foreign securities investment opportunities through the proposed regulations? Moreover, the SEC has not endeavored to attract foreign issuers into the United States capital markets and the United States disclosure scheme, while competing marketplace regulators in London and Tokyo have been more accommodating. The result of the SEC's failure to deregulate foreign issuer disclosure requirements has been that, during the twelve-year period ending in 1986, the United States share of world equity markets declined from over sixty-one percent to just over thirty-nine percent.⁸³ Foreign issues registered in the United States, as a percentage of total registrations in the

80. Securities Act Release No. 6,839, *supra* note 62, at 80,221.

81. *Attracting Foreign Issuers*, *supra* note 79, at 413.

82. *Attracting Foreign Issuers*, *supra* note 79, at 414.

83. SECURITIES INDUSTRY ASSOCIATION, *THE INTERNATIONAL MARKET: GROWTH IN PRIMARY AND SECONDARY ACTIVITY* 9 (1987).

United States, declined from thirteen percent in 1977 to three percent in 1986.⁸⁴ At the end of 1986, the London Stock Exchange had 512 foreign listings, while only fifty-nine foreign issuers, one third of which were Canadian, were listed on the New York Stock Exchange.⁸⁵ Thus, the harmonization of prospectus requirements with Canada⁸⁶ is an important step toward comity in offering requirements, but a more sweeping reexamination of foreign issuer disclosure standards is necessary.

IV. CONCLUSION

The SEC has always been preoccupied with maintaining its jurisdiction to enforce the antifraud provisions of the Securities Act and the Exchange Act,⁸⁷ but exempting transactions from the registration provisions and moving markets offshore is hardly the best way to protect either United States investors or the United States securities markets. In order to facilitate the offering of foreign securities in United States markets, the SEC will have to more enthusiastically embrace the harmonization of accounting standards by international bodies.

The creation of an international regulatory body may well be necessary to fully accomplish these reforms. As various directives of the European Community (EC) come to fruition, the need for an international body to establish accounting and disclosure standards for public companies may become more acute to harmonize the regulatory schemes of the EC, the United States, Japan, and other emerging important financial centers. Possibly emerging as a regulator is the International Organization of Securities Commissions (IOSCO). Important contributions can also be made by the IASC, the International Federation of Stock Exchanges, and other governmental and private sector bodies. There are, however, two problems with existing organizations. First, there are numerous bodies with overlapping and competing interests. Second, none of them, including IOSCO, which is composed of government regulators, can impose regulatory standards and solutions. The SEC can accept or

84. INTERNATIONALIZATION REPORT, *supra* note 11, at II-82.

85. Longstreth, *Global Securities Markets and the SEC*, 10 U. PA. J. INT'L BUS. L. 183 (1988).

86. See Securities Act Release No. 6,568, *supra* note 35.

87. The SEC has repeatedly emphasized its claim to worldwide jurisdiction of the antifraud provisions. See, e.g., Exchange Act Release No. 27,017, [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,428, at 80,236 n.41 (July 11, 1989).

reject IOSCO's proposals as it sees fit and politically expedient.

Traditionally, in enforcement matters the SEC has been quick to advocate international cooperation. Hopefully, this international outlook will carry over into the formulation of international disclosure and accounting standards for issuers. To do so, it will be necessary for the SEC to become less parochially attached to some of the sacred cows of the United States disclosure system and to recognize the merits of different regulatory approaches.

