



4-1-1983

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Recommended Citation

Kirk S. Schumacher, *Foreign Securities: Integration and Disclosure under the Securities and Exchange Acts*, 58 Notre Dame L. Rev. 911 (1983).

Available at: <http://scholarship.law.nd.edu/ndlr/vol58/iss4/8>

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Foreign Securities: Integration and Disclosure Under the Securities and Exchange Acts

As world trade has increased in the last twenty-five years, many corporations have taken a more international view toward sources of capital.¹ While American corporations have sought capital abroad, many foreign corporations have entered the United States capital markets to secure short and long-term financing. Thus, the value of foreign securities held by United States citizens rose from \$19.6 billion in 1970 to over \$62.1 billion in 1980.² This note examines how the Securities and Exchange Commission (SEC) has responded to increased foreign securities trade and how it has balanced the problems foreign issuers face versus the need for investor protection. This note also argues that the American investor would be better served by a system that would encourage foreign offerings and permit a wide range of investment vehicles. Part I examines the foreign securities markets in the United States. Part II reviews the SEC regulatory history regarding foreign securities. Part III explains and analyzes the recent SEC regulatory response including the integration of the Securities Act and Securities Exchange Act regulations.

I. Foreign Securities Trade

The American investor may acquire foreign securities in four basic forms: 1) "ordinary" securities—issued in the foreign country of origin;³ 2) "American" securities—issued specifically for the American market with procedural rights differing from "ordinary" securities;⁴ 3) American Depository Receipts (ADR)—issued by an

1 International world trade increased from \$128.3 million in 1970 to \$2,068.7 million in 1980. UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, HANDBOOK OF INTERNATIONAL TRADE AND DEVELOPMENT STATISTICS 1981 SUPPLEMENT 2 (1982).

2 Thomas, *Internationalization of the Securities Markets: An Empirical Analysis*, 50 GEO. WASH. L. REV. 155, 159 (1982). This note will not analyze the regulatory scheme applicable to Canadian issuers or foreign governmental entities as they are subject to differing regulatory requirements. All references to foreign corporations mean non-Canadian, foreign, private corporations.

3 The ordinary security may be in bearer or registered form. All dividends or interest are paid in a foreign currency. Registered securities must often be sent out of the United States to transfer ownership. See Moxley, *The ADR: An Instrument of International Finance and a Tool of Arbitrage*, 8 VILL. L. REV. 19, 20-1 (1962). Some United States brokerage firms will automatically collect foreign currency payments and convert them into dollars.

4 "American" securities are typically issued in registered form and have an American

American bank and representing the underlying "ordinary" security;⁵ and 4) American investment funds—a domestic holding company which holds the foreign "ordinary" security.⁶ An American investor can purchase these foreign securities in three major markets either directly or through an American broker/dealer: 1) the original foreign market—where the investor pays higher transaction costs;⁷ 2) the American over-the-counter market—through the active National Association of Securities Dealers Automated Quotation (NASDAQ) system or through the inactive National Daily Quotation Sheets, the "pink sheet" market;⁸ and 3) the American national security exchanges—where active and widely held foreign securities can be purchased.⁹

Foreign debt securities, known as "Yankee" bonds, comprise the majority of the foreign securities market.¹⁰ Foreign governmental issuers dominate this bond market but foreign corporate issuers have recently become more active.¹¹ These issuers seek two primary benefits from the "Yankee" bond market: relatively low financing costs

transfer agent. They are normally denominated in dollars and pay interest or dividends in dollars. See Tomlinson, *Federal Regulation of Secondary Trading in Foreign Securities*, 32 BUS. LAW. 463, 464 (1977).

5 The ADR is a "certificate, denominated in shares, representing proof of ownership of foreign securities on deposit with a foreign depository bank affiliated with an American bank." Tomlinson, *supra* note 4, at 464-65. The American bank acts as a transfer and collection agent, and converts payments into dollars. *Id.* See also Moxley, *supra* note 3; Note, *SEC Regulation of American Depository Receipts: Disclosure Ltd.*, 65 YALE L. REV. 862 (1956).

6 At least fifteen investment funds concentrate on foreign securities, either world-wide or from a specific geographic region. Thomas, *supra* note 2, at 162-63.

7 The American investor must pay a "foreign brokerage commission, currency conversion charges, cable and shipping charges, and any taxes and exchange controls imposed in the foreign market." *Id.* at 171.

8 NASDAQ links approximately 1,000 marketmakers and 3,500 dealers by a sophisticated quotation system which permits current quotations on a substantial number of over-the-counter securities. The National Daily Quotation Sheets or "pink sheets" also reflect quotations, but on a non-current basis. H. BLOOMENTHAL, 1981 SECURITIES LAW HANDBOOK § 3.02 (1981). See note 64 *infra*.

9 Twenty-four non-Canadian foreign issuers are listed on the New York Stock Exchange. Derived from NEW YORK STOCK EXCHANGE, DIRECTORY (revised to August 1, 1982). Twelve non-Canadian issuers are listed on the American Stock Exchange. Derived from STANDARD & POOR'S, STOCK REPORTS—AMERICAN STOCK EXCHANGE (Nov. 1982). See Thomas, *supra* note 2, at 166 (approximately 55 non-Canadian foreign issuers listed on any United States exchange). See also SEC, ANNUAL REPORT 1980, 128 (1980) (value of all foreign stocks and bonds traded on United States exchanges equals \$64,919 million).

10 Foreign corporate and governmental issuers raised \$3.8 billion of debt capital in 1982. *Investment Dealers Digest* 5 (Jan. 11, 1983). From 1976 to 1980, foreign issuers, including government entities, raised \$13.7 billion of debt capital while raising only \$1.4 billion of equity capital. Thomas, *supra* note 2, at 182.

11 Only three non-Canadian foreign corporate issuers raised non-convertible debt in the United States from 1974 to 1980. Coles, *Foreign Companies Raising Capital in the United States*, 3

and readily available long-term maturities.¹² The major American purchasers are institutional investors seeking risk diversification and attracted by the slight interest premium "Yankee" bonds carry.¹³ These institutional investors usually have direct access to the competing Eurobond market. Thus, the "Yankee" bond market and the Eurobond market have overlapping roles.¹⁴

Equity securities play a smaller but more visible role.¹⁵ Foreign corporations have diverse reasons for entering the United States stock markets.¹⁶ Some issuers seek the better stock prices paid by sophisticated American investors who value their stock more highly. Other issuers wish to use capital from the American market or newly issued stock to acquire American companies. Others seek to diversify financing sources or create employee stock option plans for American employees.

In addition to foreign corporations who voluntarily enter the United States markets by issuing new stock, other foreign corporations have stock traded in United States secondary markets. Some foreign corporations either avoid or actively discourage American trading in their shares. These corporations' shares are normally

J. COMP. CORP. L. & SEC. REG. 300, 302 (1981). See also Thomas, *supra* note 2, at 183 (only \$400 million raised by non-Canadian foreign corporate issuers from 1976 to 1980).

12 Interest rates are often slightly lower than a Eurobond issue and "Yankee" bonds can carry maturities of ten years or longer. Coles, *supra* note 11, at 304 (1981). See also Thomas, *supra* note 2, at 183 (\$300 million of "Yankee" bonds had maturities of 8 to 15 years while \$200 million of "Yankee" bonds had maturities of over 15 years).

13 The "foreign" premium on "Yankee" bonds is approximately 60 basis points. Coles, *supra* note 11, at 106; ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, FINANCIAL MARKET TRENDS 37 (Nov. 1982). Institutions purchase the majority of "Yankee" bonds. Coles, *supra* note 11, at 108. Many institutions have discovered that international diversification can reduce overall risk. Solnik & Noetzlin, *Optimal International Asset Allocation*, 9 J. PORTFOLIO MGT. 11 (1982); Agmon & Lessard, *Investor Recognition of Corporate International Diversification*, 32 J. FIN. 104 (1977); H. BLOOMENTHAL, 3B SEC. AND FED. CORP. L. § 15.07 (rev. ed. 1982).

14 Coles, *supra* note 11, at 304; Williams & Spencer, *Regulation of International Securities Markets: Towards a Greater Cooperation*, 4 J. COMP. CORP. L. & SEC. REG. 55 (1982).

15 Foreign corporations, including Canadian corporations, raised only \$138.6 million of equity capital in 1982. *Investment Dealers Digest* 6 (Jan. 11, 1982). See also note 10 *supra*. However, the interest shown in trading foreign securities can be demonstrated by the coverage increasingly given them by the investment services. For example, Moody's International Manual lists more than 3000 foreign corporations and governmental entities. MOODY'S INTERNATIONAL MANUAL (1982). The more widely read Moody's Industrial Manual gives information on more than 135 major foreign corporations. 2 MOODY'S INDUSTRIAL MANUAL 5851-6205 (1982). The Value Line Investment Survey, orientated toward individual investors, covers 18 foreign stocks in a new separate section. VALUE LINE INVESTMENT SURVEY (1982).

16 Coles, *supra* note 11, at 313; Note, *Neutralizing the Regulatory Burden: The Use of Equity Securities by Foreign Corporate Acquirers*, 89 YALE L.J. 1413 (1980).

traded on the inactive "pink sheet" market.¹⁷ Other foreign corporations actively work to develop an American trading market by obtaining a national exchange listing or by entering the NASDAQ system.¹⁸

Again, institutional investors are the primary purchasers of foreign equity.¹⁹ They seek to diversify portfolio risk and enjoy the higher expected return available in some foreign stocks.²⁰ However, individual investors are the predominant trading force in American markets for foreign securities.²¹ They account for over one-half the value and volume traded on the United States exchanges and over-the-counter markets.²² The institutional investors' direct access to foreign markets accounts for this apparent anomaly.

II. The Old SEC Regulatory Scheme

The Securities Act of 1933 (Securities Act)²³ and the Securities Exchange Act of 1934 (Exchange Act)²⁴ are the primary statutory bases for the SEC's regulation of foreign securities.²⁵ When enacting the Securities Act, Congress debated a proposal to provide a double

17 Stephens, *Reevaluation of Disclosure Requirements for Foreign Issuers: Securities Act of 1934*, 45 GEO. WASH. L. REV. 494, 509, 540 (1977). See also note 8 *supra*.

18 Foreign issuers must request a listing on a national stock exchange and agree to the exchange's disclosure requirements. NEW YORK STOCK EXCHANGE, COMPANY MANUAL § B-117 (1976). For example, the New York Stock Exchange requires more disclosure than the SEC in a few areas. 2 FED. SEC. L. REP. (CCH) ¶ 23,095 (1982) (comparison of SEC and New York Stock Exchange disclosure requirements). See also Securities Exchange Act § 6(b)(5), 15 U.S.C. § 78f(b) (1976) (SEC power to set security exchange rules). Foreign issuers must request entry into the NASDAQ system and two marketmakers must agree to make a market for the stock. The foreign issuer must provide disclosure similar to that required by the exchanges. H. BLOOMENTHAL, *supra* note 8, at § 3.02[2]; Stephens, *supra* note 17, at 509.

19 Institutional investors purchase the majority in value of foreign equity. Coles, *supra* note 11, at 310; Thomas, *supra* note 2, at 161.

20 See Thomas, *supra* note 2, at 163-66; Coles, *supra* note 11, at 310. See also note 13 *supra*.

21 Individual investors accounted for 62.5% of the shares and 50.2% of the market value of foreign securities traded in the United States during the fourth quarter of 1980. Thomas, *supra* note 2, at 162.

22 *Id.*

23 15 U.S.C. § 77a-77b (1976).

24 15 U.S.C. § 78a-78l (1976).

25 The SEC's definition of a foreign private issuer is subject to the qualification that the issuer cannot be essentially similar to a United States corporation. 17 C.F.R. § 240.3b-4(c) (1982). A foreign corporation will be treated as a United States corporation if:

1) more than 50 percent of the outstanding voting securities of such issuer are held of record either directly or through voting trust certificates or depositary receipts by residents of the United States; and (2) the business of such issuer is administered principally in the United States or 50 percent or more of the members of its Board of Directors are residents of the United States.

17 C.F.R. § 249.220f(2) (1982); 17 C.F.R. § 240.12g3-2(e) (1982).

standard for foreign securities.²⁶ Noting the history of foreign security abuses, Congress rejected the proposal because it apparently felt a double standard might impair the investor protection sought through disclosure.²⁷

From its inception, the SEC required foreign firms issuing new securities to conform to substantially the same Securities Act disclosure standards placed on United States issuers.²⁸ This attitude especially handicapped foreign issuers because of their unequal initial position.²⁹ Many foreign corporations preferred to avoid the rigors of Securities Act registration and thus, the American markets. As business became more international in scope and more foreign firms wanted to use the United States capital markets, the SEC's Securities Act disclosure requirements became more of a barrier to the free flow of international capital.³⁰ The SEC's failure to adequately recognize the unique position of foreign corporations largely prevented many foreign corporations from raising capital through new security issues in the United States.³¹

26 SENATE COMM. ON BANKING AND CURRENCY, STOCK EXCHANGE PRACTICES, S. REP. NO. 1455, 73d Cong. 2d Sess., 125 (1934)(noting a history of foreign security abuses); *Hearings on the Sale of Foreign Bonds or Securities in the United States Before the Senate Comm. on Finance*, 72d Cong., 2d Sess., pt. 1 (1931-1932).

27 *Id.*

28 The SEC made ad hoc accommodations with foreign issuers but generally required that all material information be disclosed to the same extent as United States corporations would be required to disclose for similar offerings. See Stephens, *Reevaluation of Disclosure Requirements for Foreign Issuers: Securities Act of 1933*, 45 GEO. WASH. L. REV. 135, 143-64 (1977). See also Note, *Impact of United States Securities Laws on the Distribution and Trading of Foreign Securities*, 12 INT'L LAW. 133, 146-48 (1978); Bodolus, *Internationalization of the Securities Markets*, 29 BUS. LAW. 107, 112 (1974).

29 Foreign issuers face an entirely different regulatory climate in their country of incorporation. For example, financial statements are prepared to meet non-United States generally accepted accounting standards. Stephens, *supra* note 28, at 146-56. Information the SEC seeks is often considered extremely sensitive by the foreign corporation. For example, some foreign corporations maintain large hidden reserves due to the ability of shareholders to declare dividends. *Id.* at 149. See generally Symposium, *Developments in Harmonization of Accounting Standards*, 3 J. COMP. CORP. L. & SEC. REG. 373 (1981); Project, *International Securities Project*, 30 BUS. LAW. 585 (1975); DeBruyne, *Global Standards: A Tower of Babel*, 48 FIN. EXEC. 30 (1980).

30 The United States has traditionally been a strong advocate of free trade. Part of this theory has been the "[a]dmission of foreign securities on domestic capital markets." ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, CODE OF LIBERALIZATION OF CAPITAL MOVEMENTS, Annex A, List A § 3 (March 1982). The SEC has often stated that the free flow of international capital is one of its goals. 46 Fed. Reg. 58,513 (1981).

31 It is very difficult to quantify how many foreign issuers are kept out of the United States capital markets by the SEC's actions. However, it is indicative that from 1971 to 1980 foreigners purchased \$25.8 billion of United States stocks while American investors purchased only \$2.5 billion of foreign stocks. Likewise, foreigners purchased \$70.8 billion of United States bonds while American investors purchased only \$34.3 billion of foreign bonds.

Foreign issuers could avoid Securities Act liability, however, by ensuring that no security came to rest, through the initial distribution, in the United States.³² Secondary trading could then infuse the security into the United States markets. This secondary trading is, however, subject to Exchange Act requirements, enacted to ensure that adequate information is available concerning securities traded in United States markets.³³ The Exchange Act requires any foreign corporation with more than one million dollars in assets and five hundred worldwide security holders, or any foreign corporation having a security listed on a national securities exchange, to disclose certain information.³⁴

In the Exchange Act, Congress gave the SEC the authority to make exemptions for foreign issuers, as the SEC deemed appropriate, in the public interest and in the interest of investor protection.³⁵ Under this authority, the SEC entirely exempted any foreign corporation that did not have at least three hundred American security holders.³⁶ The SEC also exempted from Exchange Act registration foreign corporations that sent the SEC any documents which the corporation sent to other governments, security exchanges, or its shareholders (the information-supplying exemption).³⁷ Despite the information-supplying exemption and its low disclosure requirements, many foreign corporations without substantial United States contacts simply ignored the SEC.³⁸ Jurisdictional limitations and

Thomas, *supra* note 2, at 186-7. See also Willingham, *Estimating Foreign Holdings of U.S. Equities*, 7 SEC. INDUS. TRENDS 1 (June 18, 1981).

32 Securities Act of 1933 § 4(1), 15 U.S.C. § 77d(1) (1976). See SEC Securities Act Rel. No. 4708 (July 9, 1964), 29 Fed. Reg. 828 (1964).

33 15 U.S.C. § 78b. Most developed nations base their systems of investor protection on some type of disclosure mechanism. Project, *supra* note 29; Pozen, *Disclosure and Trading in an International Securities Market*, 15 INT'L LAW. 84 (1981); Pierce, *The Regulation of the Issuance and Trading of Securities in the United States and the European Economic Community: A Comparison*, 3 J. COMP. CORP. L. & SEC. REG. 129 (1981). But see Widmer, *The U.S. Securities Laws—Banking Law of the World?*, 1 J. COMP. CORP. L. & SEC. REG. 39 (1978).

34 Securities Exchange Act of 1934 § 12(b), 15 U.S.C. § 78l(b) (1976); *id.* § 12(g), 15 U.S.C. § 78l(g) (1976).

35 Securities Exchange Act of 1934 § 12(g)(3), 15 U.S.C. § 781(g)(3) (1976).

36 17 C.F.R. § 240.12g3-2(a)(1) (1977). ADR holders are counted as holders of the underlying security. 17 C.F.R. § 240.12g5-1(b) (1977). However, the American bank sponsoring the ADR need only report the total number of ADRs outstanding. SEC Form S-12, 2 FED. SEC. L. REP. (CCH) ¶ 7,252 (1982). Thus, the SEC is often unaware when the requisite 300 American shareholders acquire the security. See Tomlinson, *supra* note 4, at 487; S. REP. NO. 379, 88th Cong., 1st Sess. 30 (1963).

37 17 C.F.R. § 240.12g3-2(b)(1) (1977). Approximately 110 foreign issuers were relying on the information-supplying exemption on August 13, 1982. SEC Exchange Act Rel. No. 19,117 (Oct. 12, 1982), 2 FED. SEC. L. REP. (CCH) ¶ 23,317 (1982).

38 See Tomlinson, *supra* note 4, at 487-8. See also SENATE COMM. ON BANKING AND

lack of information available to the SEC made the Exchange Act provisions largely unenforceable against foreign corporations with minimal United States contacts.³⁹

In contrast, foreign corporations that actively encouraged trade in their securities, for example, by listing a security on a national exchange or by having made a previous Securities Act issuance of new stock, could be effectively required to conform to a higher disclosure standard.⁴⁰ The SEC, however, required the foreign corporations seeking out the United States markets to make minimal disclosure.⁴¹ The foreign corporation had to initially file under the Exchange Act, make a minimal annual disclosure statement, and provide interim disclosure reports concerning information supplied to the press, foreign governments, or its security holders.⁴²

As American investors became more interested in foreign securities and as more foreign securities found their way into United States markets,⁴³ the SEC's Exchange Act disclosure requirements became increasingly untenable. More American broker/dealers began to sell foreign securities, and banks began to issue more ADRs which made foreign security ownership less onerous.⁴⁴ Yet the Exchange Act regulatory scheme provided little, if any, information on most foreign

CURRENCY, SECURITIES AND EXCHANGE COMMISSION LEGISLATION, S. REP. NO. 379, 88th Cong., 1st Sess., 29 (1963)(reflecting concern over enforceability of United States security laws); *Hearings On H.R. 6789, H.R. 6793, And S. 1642, Before a Subcomm. of The House Comm. on Interstate and Foreign Commerce*, 88th Cong., 1st Sess., pt. 1, at 179 (1963).

39 Tomlinson, *supra* note 4, at 487-8. See also Johnson, *Application of Federal Securities Laws to International Securities Transactions*, 45 ALBANY L. REV.890 (1981) and sources therein; note 66 *infra*.

40 Securities Exchange Act of 1934 § 15(c)(5), 15 U.S.C. § 78l(k) (1976)(10 day trading ban for any over-the-counter security); *id.* 19(a)(4), 15 U.S.C. § 78l(d) (1976)(power to delist a security from a national exchange); *id.* § 21, 15 U.S.C. § 78u (1976)(power to investigate); *id.* § 32, 15 U.S.C. § 78ff (1976)(criminal penalty for willful violation); *id.* § 15(b)(4), 15 U.S.C. § 78l(j) (1976)(prohibit broker/dealers from dealing in the security).

41 See Stephens, *supra* note 17, at 519-24; SEC Exchange Act Rel. No. 16,371, 44 Fed. Reg. 70,133 (1979).

42 SEC Form 20, 17 C.F.R. § 249.220 (1976), 4 FED. SEC. L. REP. (CCH) ¶ 29,621 (1976)(initial filing); SEC Form 20-K, 17 C.F.R. § 249.320 (1976), 4 FED. SEC. L. REP. (CCH) ¶ 32,221 (1976)(annual disclosure); SEC Form 6-K, 17 C.F.R. § 249.306 (1976), 4 FED. SEC. L. REP. (CCH) ¶ 30,971 (1979)(interim disclosure similar to that required by the information-supplying exemption).

43 In 1981, American residents participated in \$22,978 million of foreign equity transactions and \$37,960 million of foreign debt transactions. U.S. DEP'T OF TREASURY, TREASURY BULL. 103 (July 1982). These figures include transactions in Canadian securities.

44 The ADR bank typically performs such valuable services as acting as transfer agent, collecting dividends or interest, converting foreign currency to dollars, and appraising the ADR holder of subscription rights and other important corporate developments. See Tomlinson, *supra* note 4, at 465-6.

securities traded in the secondary markets.⁴⁵

Thus, the SEC required too little disclosure from those foreign corporations whose securities were actively traded in United States secondary markets. American investors consequently did not receive the protection the Exchange Act was meant to provide.⁴⁶ On the other hand, the SEC required too much disclosure from foreign corporations seeking to issue new securities in the United States.⁴⁷ The Securities Act regulations thus prevented the free flow of capital in an expanding international economy.

III. The SEC's Recent Regulatory Response

A. *The Exchange Act Regulations*

In 1977, the SEC significantly reevaluated its foreign issuer Exchange Act requirements.⁴⁸ Originally, the proposed changes would have required many foreign issuers to fulfill substantially the same disclosure requirements as United States corporations.⁴⁹ By not taking into account the special circumstances of foreign issuers, the SEC threatened to make the same mistake under the Exchange Act which it had made under the Securities Act. A high disclosure standard would largely prevent foreign corporations from encouraging a United States secondary market. This would reduce the investment opportunities available to the American investor. In addition, foreign issuers willing to meet the high Securities Act disclosure requirements during the initial distribution would be faced with continuing high Exchange Act disclosure requirements. This would further discourage willing foreign issuers from entering the United States capital markets.

The rules finally adopted under the Exchange Act indicate a new SEC attitude toward foreign corporations.⁵⁰ Rather than taking a parochial American stand and concentrating solely on protecting American investors, the SEC kept in mind the need to maintain a free flow of international capital and the public interest in affording

45 See Stephens, *supra* note 17, at 516-34.

46 See text accompanying notes 35-42 *supra*.

47 See Coles, *supra* note 11, at 110; Note, *supra* note 28.

48 SEC Exchange Act Release No. 14128 (Nov. 2, 1977), [1977-1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 81,361 (1977).

49 *Id.* See also Pozen, *supra* note 33, at 85; Coles, *supra* note 11, at 318 (foreign issuers showed great concern).

50 SEC Exchange Act Rel. No. 16,371, 44 Fed. Reg. 70,132 (1979) (codified at 17 C.F.R. §§ 240.3a12-3, 240.13a-16, 240.15d-16, 249.220f, 249.306 (1982)). See also note 30 *supra*.

American investors a wide range of investment opportunities.⁵¹ The SEC considered disclosure standards developed by international organizations and foreign governments, and modified its requirements where its standards differed radically from foreign practice.⁵² The SEC noted its action was "an important step . . . in the harmonization of international disclosure standards."⁵³

The new rules center on form 20-F, a registration and annual disclosure form.⁵⁴ The new form requires more disclosure than the old Exchange Act disclosure form but less than the form used by United States corporations. The major concessions to foreign corporations are in the areas of description of business (segment reporting),⁵⁵ management remuneration,⁵⁶ management interest in certain transactions,⁵⁷ and use of generally accepted accounting principles.⁵⁸

51 *Id.*

52 SEC Exchange Act Rel. No. 16,371, 44 Fed. Reg. 70,132, 70,133 (1979). The SEC mentions the Organization for Economic Cooperation and Development, the European Economic Community, the United Nations Commission on Transnational Corporation, and the International Accounting Standards Committee. *Id.* See also notes 55-58 and 87-88 *infra*.

53 *Id.* at 70,133.

54 SEC Form 20-F, 17 C.F.R. ¶ 249.220(f) (1982).

55 Item 101 of Regulation S-K requires United States corporations to disclose corporate revenue and profit (or loss) by industry segments. The SEC also requires an extensive narrative description of each industry segment. 17 C.F.R. § 229.101 (1982). Form 20-F requires disclosure of only corporate revenues by industry segment unless profit (or loss) varies materially from revenues by industry segment. Should profit (or loss) vary materially from revenue, the SEC requires only a narrative discussion of its significance and not the disclosure of actual dollar variance. The narrative description by industry segment is limited to those factors which may have a material impact on future financial performance. SEC Form 20-F, Item 1, 4 FED. SEC. L. REP. (CCH) ¶ 29,721 (1982).

56 Item 402 of regulation S-K requires a United States corporation to disclose the amount of money and other benefits paid to the five most highly compensated officers or directors individually and all officers and directors as a group. 17 C.F.R. § 229.402 (1982). Foreign corporations may respond to this item by disclosing only remuneration paid to all officers and directors as a group unless the individual information is otherwise disclosed to security holders or made public. 17 C.F.R. § 229.402 (1982). See also SEC Securities Act Rel. No. 6449 (Jan. 17, 1983)(proposed amendment retains prior scheme).

57 Item 404 of regulation S-K requires United States corporations to disclose any material management interest in transactions between management and the corporation. 4 FED. SEC. L. REP. (CCH) ¶ 71,044 (1982)(effective June 30, 1983). Foreign issuers are not required to comply with Item 404 at all unless the corporation makes such information public or discloses it to its security holders. *Id.* Current law contains a similar scheme. See SEC Form 20-F, Item 17, 4 FED. SEC. L. REP. (CCH) ¶ 29,721 (1979).

58 Regulation S-X describes the various accounting rules to be used by United States corporations. Regulation S-X generally incorporates United States generally accepted accounting principles. 17 C.F.R. § 210 (1982). Regulation S-X contains a separate regime for foreign issuers using form 20-F. 5 FED. SEC. L. REP. (CCH) ¶ 61,160 (1982). In addition, the foreign issuer may use non-United States generally accepted accounting principles if material variations with United States generally accepted accounting principles are disclosed and, to

Unlike United States corporations, foreign firms need not file a quarterly disclosure statement. Instead, the SEC retained the interim reporting scheme but made the information more helpful to American investors by requiring an English translation.⁵⁹ The SEC also retained the information-supplying exemption for foreign corporations which do not list their securities on a national exchange or have a security registered under the Securities Act.⁶⁰ Under the previous regulations, this exemption allowed foreign corporations whose securities were actively traded on the NASDAQ system to avoid high disclosure requirements as long as they did not obtain a national securities exchange listing.⁶¹ The foreign corporation therefore could actively encourage a secondary market without making significant disclosure. The SEC proposed to remedy this situation in 1982 by requiring companies whose securities are traded on the NASDAQ system to comply with the annual disclosure requirement.⁶² This rule will ensure that foreign corporations who seek to develop a United States secondary market make adequate disclosure and will also remove the disincentive to seek a national exchange listing.⁶³

The only foreign corporations that will be able to use the information-supplying exemption are those whose securities are traded on the "pink sheet" market.⁶⁴ This market's current status makes it unlikely that a foreign corporation could use the market to encourage trading in its securities.⁶⁵ Also, three factors weigh against raising the low level of disclosure required from these foreign corporations. First, since these foreign corporations have taken no action to develop a United States trading market, the SEC's asserted jurisdiction

the extent practicable, if the effect of the variation is given. 4 FED. SEC. L. REP. (CCH) ¶ 29,721 (1982).

59 Form 6-K, 17 C.F.R. § 249.306 (1982). The failure to require an English translation evoked the most criticism of form 6-K. See Stephens, *supra* note 17, at 526, 538.

60 17 C.F.R. § 240.12g3-2(b)(5)(f) (1982).

61 *Id.*

62 SEC Exchange Act Rel. No. 19,187 (Oct. 28, 1982), [1982 Transfer Binder] FED SEC. L. REP. (CCH) ¶ 83,272 (1982).

63 See Stephens, *supra* note 17, at 516.

64 The "pink sheet's" main use is to refer broker/dealers to market-makers in the security. The quotations are on a non-current basis so the broker/dealer must contact the market-maker for the current quotation. H. BLOOMENTHAL, *supra* note 8, at 13. Since the market-maker is not required to make a market, the order may not be executed. *Id.* Since the "pink sheet" issuers will presumably be left out of the national market system, the inefficiencies in the market, such as spreads between bid and ask, and non-existent limit orders, can only increase. Pozen, *supra* note 50, at 88. The SEC can best control this market through broker/dealer restrictions. 17 C.F.R. § 240.12c2-11(a) (1982); 17 C.F.R. § 240.15c2-11(a)(4) (1982).

65 *Id.* See Stephens, *supra* note 17, at 516.

may violate international customary law.⁶⁶ Second, the SEC enforcement mechanisms cannot reach the foreign corporation to require compliance with any higher standard.⁶⁷ Third, an SEC-imposed trading ban would primarily affect the American investor who seeks a market and reduced trading costs in the United States.⁶⁸ Some commentators have argued that the SEC should not require any disclosure from such issuers since enforcement and jurisdiction are so problematical.⁶⁹

B. *The Securities Act Regulations*

In 1982, the SEC adopted a complex series of rules to liberalize the treatment of foreign corporations offering new securities to American investors.⁷⁰ The Securities Act disclosure requirements were integrated with the Exchange Act's annual disclosure statements and interim reporting requirements. The integration is not complete because most foreign corporations will have to provide significantly greater financial information for certain security offerings than that required for their Exchange Act annual statement and interim reporting obligations.

The SEC created three new Securities Act registration documents.⁷¹ These forms parallel the three forms used by United States

66 The "effects" jurisdictional doctrine of international law provides that "a state may, under international law, exercise jurisdiction to prescribe and apply its law with respect to . . . conduct outside its territory which has or is intended to have substantial effect within its territory . . ." RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 402 (Tent. Draft No. 2, 1981). *See also id.* § 403. Jurisdictional limitations are particularly involved when a foreign corporation has merely passively allowed trading in its securities in the United States. *See* Stephens, *supra* note 17, at 531; Johnson, *Application of Federal Securities Laws to International Securities Transactions*, 45 ALBANY L. REV. 890, 900 (1981); Loomis & Grant, *The U.S. Securities and Exchange Commission, Financial Institutions Outside the U. S. and Extraterritorial Application of the U.S. Securities Laws*, 1 J. COMP. CORP. L. & SEC. REG. 3 (1978). The perceived international application of United States laws increasingly has been met by sharp rebuffs from other nations. Widmer, *supra* note 33; Gordon, *Extraterritorial Application of United States Economic Laws: Britain Draws the Line*, 14 INT'L LAW. 151 (1980); Sornarajah, *The Extraterritorial Enforcement of U.S. Antitrust Laws: Conflict and Compromise*, 31 INT'L COMP. L.Q. 127 (1982); Pettit & Styles, *International Response to the Extraterritorial Application of United States Antitrust Laws*, 37 BUS. LAW. 697 (1982).

67 *See* Tomlinson, *supra* note 4, at 487-8. *See also* note 40 *supra*.

68 *See* SENATE COMM. ON BANKING AND CURRENCY, SECURITIES AND EXCHANGE COMMISSION LEGISLATION, S. REP. NO. 379, 88th Cong. 1st Sess. 29 (1963).

69 *See* Stephens, *supra* note 17, at 540-4.

70 SEC Securities Act Rel. No. 6437 (Dec. 4, 1982), 47 Fed. Reg. 54,764 (1982); SEC Exchange Act Rel. No. 19,258 (Dec. 4, 1982), 47 Fed. Reg. 54,764 (1982).

71 SEC Form F-1, 47 Fed. Reg. 54,771 (1982), 2 FED. SEC. L. REP. (CCH) ¶ 6038D; SEC Form F-2, 47 Fed. Reg. 54,773 (1982), 2 FED. SEC. L. REP. (CCH) ¶ 6038E; SEC Form

corporations in the domestic integrated disclosure system.⁷² The proper form to be filed depends on the issuer, the issue, the issuer's prior reporting experience, and the issuer's use of a prior annual disclosure statement. Additionally, for certain issues, some issuers must disclose financial information substantially identical to that required from United States corporations. The minimal disclosure form, form F-3, can be used only by "world-class" issuers reporting with the SEC for at least three years.⁷³ The SEC defines a "world-class" issuer as a foreign corporation with more than three hundred million dollars of value in voting securities held by non-affiliates worldwide.⁷⁴ The "world-class" issuer can integrate the annual Exchange Act financial disclosure for offerings to security holders or for offerings of investment grade nonconvertible debt. Form F-3 can be used for other security offerings but must include financial information identical to that required of United States corporations.

The intermediate disclosure form, form F-2, can be used by a foreign corporation which has either filed one prior annual disclosure statement or reported to the SEC for three years, but only for offers to existing security holders.⁷⁵ The SEC does not require increased financial disclosure for this type of offer. Form F-2 may be used for other offerings only if the issuer has reported to the SEC for three years or is a "world-class" issuer who has filed one prior annual disclosure statement.⁷⁶ These offerings, however, require the increased financial disclosure.

The highest disclosure form, form F-1, must be used for all other offers including exchange offers.⁷⁷ Foreign issuers required to use this form include: corporations making shareholder offerings who have neither reported for three years nor filed one annual disclosure statement; corporations making other offerings who have not reported for three years; and "world-class" issuers making nonshareholder offer-

F-3, 47 Fed. Reg. 54,776 (1982), 2 FED. SEC. L. REP. (CCH) ¶ 6038F. Adopted in SEC Securities Act Rel. No. 6437 (Dec. 4 1982), 47 Fed. Reg. 54,764 (1982).

72 SEC Forms S-1, S-2, and S-3, 17 C.F.R. 239.11 - 239.13 (1982). These forms were altered or adopted in SEC Securities Act Release No. 6383 (May 24, 1982), 47 Fed. Reg. 11,380 (1982). See Greene, *Integration of the Securities Act and The Exchange Act: A Case Study of Regulation in the Division of Corporation Finance of the United States Securities and Exchange Commission*, 3 J. COMP. CORP. L. & SEC. REG. 75 (1981); Note, *Securities Regulation: Integration of Securities Offerings*, 34 OKLA. L. REV. 864 (1982).

73 47 Fed. Reg. 54,776 (1982)(to be codified at 17 C.F.R. § 239.33).

74 47 Fed. Reg. 54,777 (1982)(to be codified at 17 C.F.R. § 239.33a-4).

75 47 Fed. Reg. 54,773 (1982)(to be codified at 17 C.F.R. § 239.32b-1).

76 47 Fed. Reg. 54,773 (1982)(to be codified at 17 C.F.R. § 239.32b-2).

77 47 Fed. Reg. 54,771 (1982)(to be codified at 17 C.F.R. § 239.31a).

ings who have neither reported for three years nor filed a prior annual disclosure statement.⁷⁸ The high disclosure form requires higher financial disclosure for all issues except offerings to existing security holders.

Looking at the entire regulatory scheme, only a "world-class" issuer offering investment-grade nonconvertible debt can completely incorporate the Exchange Act's annual and interim disclosure with the Securities Act's requirements for a nonshareholder offering. All other corporations and security offerings must meet the more strenuous financial disclosure standard which requires information identical to that required from United States corporations. While some individual investors may benefit from greater access to such debt, the action seems aimed at providing competition to the Eurobond market which is dominated by institutional investors.⁷⁹ The SEC's emphasis on requiring United States accounting techniques and information for these other issues presents the most severe hurdle for foreign issuers.⁸⁰ It keeps many foreign issuers out of United States capital markets and thus impedes the free flow of international capital.⁸¹

The SEC defends the increased financial disclosure on two grounds. First, the increased disclosure protects the American investor.⁸² Second, certain requirements, especially segment accounting, are becoming popular techniques in international disclosure practice.⁸³

Any accommodations the SEC reaches with foreign issuers result in lowered United States investor protection. Some commentators, suggesting that investor protection is paramount, argue that the issuer should have to meet all United States disclosure requirements if it wants to sell securities in the United States.⁸⁴ The SEC has not adopted this view, preferring instead to balance investor protection with concern for the free flow of international capital and the investor's interest in having a wide range of investment opportunities.⁸⁵ The SEC does assess the voluntariness of the issuer's acts in appraisal-

78 *Id.*

79 *See* Coles, *supra* note 11, at 110; Stephens, *supra* note 28, at 140. *See also* Pozen, *supra* note 50, at 87.

80 *Id.*

81 *See* note 31 *supra*.

82 47 Fed. Reg. 54,765 (1982).

83 46 Fed. Reg. 58,513 (1981).

84 Brownell, *Legal Problems of Issuing and Marketing Foreign Securities in the United States*, INT'L FIN. & INV. 430, 446 (J. McDaniels ed. 1964)(comments of former SEC Chairman Cohen).

85 *See* note 30 *supra*.

ing the appropriate disclosure standard.⁸⁶ The issuance of new securities under a Securities Act registration is clearly voluntary, and the SEC has responded by keeping very high disclosure standards for most foreign issuers. Unfortunately, this response will continue to prevent many foreign issuers from entering the United States capital markets.

The SEC has also justified the higher financial disclosure standards as in keeping with developing international disclosure practice.⁸⁷ However, the SEC has failed to distinguish between the aspirations of international organizations and the actual disclosure standards required by nations. For example, the International Accounting Standards Committee's pronouncements have no legal force and apparently little persuasive effect on national accounting professions or national legislatures.⁸⁸ Likewise, although the European Economic Community has begun a program to require disclosure similar to that now required by the SEC, actual implementation appears to be many years in the future.⁸⁹ Thus, the SEC is leading the way to increased international disclosure at the price of reduced international flow of capital and decreased investment opportunities in the United States.

86 46 Fed. Reg. 54,512 (1981). See also Thomas, *supra* note 2, at 158.

87 *Id.* at 58,513. The SEC mentioned the European Economic Community, the International Accounting Standards Committee, the Organization for Economic Cooperation and Development and the United Nations.

88 INTERNATIONAL ACCOUNTING STANDARDS COMMITTEE, INTERNATIONAL ACCOUNTING STANDARD NO. 14: REPORTING FINANCIAL INFORMATION BY SEGMENT (Aug. 1981); INTERNATIONAL ACCOUNTING STANDARDS COMMITTEE, INTERNATIONAL ACCOUNTING STANDARD NO. 15: INFORMATION REFLECTING THE EFFECTS OF CHANGING PRICES (Nov. 1981); INTERNATIONAL ACCOUNTING STANDARDS COMMITTEE, INTERNATIONAL ACCOUNTING STANDARD NO. 16: ACCOUNTING FOR PROPERTY, PLANT AND EQUIPMENT (March 1982). Various studies indicate that the International Accounting Standards Committee has little or no influence on national accounting practice. Choi & Bavishi, *Financial Accounting Standards: A Multinational Synthesis and Policy Framework*, 18 INT'L J. ACCT. 159 (1982); Evans & Taylor, "Bottom Line Compliance" with the IASC: A Comparative Analysis, 18 INT'L J. ACCT. 115 (1982).

89 The Fourth Directive on Annual Accounts, 21 O.J. EUR. COMM. (No. L. 222)1(1978); The Sixth Directive on Company Law Harmonization, 23 O.J. EUR. COMM. (No. L. 100)1(1980); The Seventh Directive Concerning Group Accounts(Proposed), 22 O.J. EUR. COMM. (No. C. 14)2(1979). A Council Directive is binding on member States only as to the result to be achieved and therefore must generally be implemented by national legislation. Treaty Establishing The European Economic Community, March 25, 1957, art. 189, 298 U.N.T.S. 3. But see Easson, "Direct Effect" of EEC Directives, 28 INT'L COMP. L.Q.319, 334-7 (1979). Several years may pass between the adoption of a Council Directive and its implementation by the member States. Easson, *supra* at 349-51. Therefore, the gap between aspiration and reality is often substantial. See also Pozen, *supra* note 50, at 86; Coles, *supra* note 11, at 316.

IV. Conclusion

The SEC has taken several steps in the last few years to accommodate foreign issuers. The simplified Exchange Act annual disclosure form and Securities Act integration should increase the availability of foreign issues in the United States. While the SEC has tried to balance competing interests, the recent integration efforts seem geared to make the United States markets more competitive with the Eurobond market. The United States investor would be better served by a system that would not discourage foreign offerings and that would permit a wider array of investment vehicles.

The SEC should concentrate on increased international disclosure through international cooperation, not merely setting a strict United States example for the rest of the world. High United States disclosure requirements interfere with international harmonization of securities regulation and the free flow of international investment capital.

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