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U.S. Securities Law for International Financial Transactions and Capital Markets

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Abstract

This book review assesses Guy P. Lander's two-volume work on U.S. Securities Law for International Financial Transactions and Capital Markets. The review finds Landers' volumes reliable and complete, believing that they will be utilized in much the same manner and with the degree of regularity with which such established treatises as the Lipton and Steinberger work, *Takeovers & Freeze-Outs*, are consulted. The present state of U.S. securities laws and their application to international transactions are presented in a logical and instructive fashion. The material is presented with clarity, but without oversimplification.

BOOK REVIEW

U.S. SECURITIES LAW FOR INTERNATIONAL FINANCIAL TRANSACTIONS AND CAPITAL MARKETS

*Reviewed by Richard T. McDermott**

INTRODUCTION

The timeliness and utility of Guy P. Lander's two-volume work on *U.S. Securities Law for International Financial Transactions and Capital Markets* are illustrated by the following recent developments. An article, which appeared in *The Wall Street Journal* about the time of the commencement of the preparation of this Book Review, read in pertinent part as follows:

Finnish paper giant Stora Enso Oyj reached across the Atlantic to scoop up Wisconsin-based Consolidated Papers Inc. in a planned stock-and-cash deal valued at about \$3.86 billion, or \$42.37 a share, signaling that a globalization of the forest-products industry is gathering pace.

The paper industry . . . still is catching its breath from [the February 17, 2000] groundbreaking agreement by Finland's UPM-Kymmene Corp. to buy Champion International Corp., Stamford, Conn., for \$5.65 billion.¹

Prior to the issuance of the press release upon which the article was based, Stora Enso Oyj and Consolidated Papers Inc. had filed copies thereof with the U.S. Securities and Exchange Commission ("SEC") pursuant to the requirements of the Securities Act of 1933² ("Securities Act") and the Securities Exchange Act of 1934³ ("Exchange Act"), respectively. The shares of Stora

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1. Dean Starkman, *Stora Enso To Buy Consolidated Papers*, WALL ST. J., Feb. 23, 2000, at A3.

2. 15 U.S.C.A. §77a *et. seq.* (1999).

3. 15 U.S.C.A. §78a *et. seq.* (1999).

Enso Oyj to be offered to the stockholders of Consolidated Papers Inc. will be registered under the Securities Act.

At about the same time, the management of German-based Mannesmann AG withdrew its opposition to a hostile takeover attempt by the United Kingdom's Vodafone AirTouch PLC, and instead agreed that the acquisition could proceed on substantially improved terms, *i.e.*, a US\$73.76 billion increase in the purchase price. It has been widely reported that a principal reason for Mannesmann's decision was that a number of U.S. stockholders of Mannesmann insisted that they be allowed to receive the substantial premium ultimately offered by Vodafone in the form of the latter's shares. Interestingly, approximately twenty percent of Mannesmann's stock was held in the United States, notwithstanding that Mannesmann had neither made an offering of its shares in the United States, nor did it list its shares in the NASDAQ Stock Market or on any U.S. securities exchange. The US\$183 billion purchase price is to be paid to the Mannesmann stockholders in the form of Vodafone shares and is the biggest hostile takeover to date.⁴ As required by the Securities Act, the Vodafone offering was registered with the SEC.

On March 8, 2000, *The Wall Street Journal* reported that:

Ratings concern Moody's Investors Service Inc. gave Mexico a coveted investment-grade rating, opening the door to lower financing costs for corporate and government issuers and triggering a rally in the value of Mexican assets.

The move, which had been expected since early February, elevates Mexico to a select club of developing countries, including Chile, South Korea and Poland, that can receive investment by a broad group of U.S. institutional investors that typically can't buy emerging-market assets.⁵

Each of these developments is a manifestation of the present globalization era, which has been described as follows:

To begin with, the globalization system, unlike the Cold War system, is not static, but a dynamic ongoing process: globalization involves the inexorable integration of markets,

4. Edmund L. Andrews, *The Metamorphosis of Germany Inc.*, N.Y. TIMES, Mar. 12, 2000, at C1.

5. Jonathan Friedland & Pamela Druckerman, *Mexico Gets Coveted Investment-Grade Rating*, WALL ST. J., Mar. 8, 2000, at A14.

nation-states and technologies to a degree never witnessed before

The driving idea behind globalization is free-market capitalism—the more you let market forces rule and the more you open your economy to free trade and competition, the more efficient and flourishing your economy will be. Globalization means the spread of free-market capitalism to virtually every country in the world. Globalization also has its own set of economic rules—rules that revolve around opening, deregulating and privatizing your economy.⁶

Because of the desire of international corporations to access the U.S. securities markets and to make acquisitions or form strategic alliances with U.S. businesses, the U.S. securities laws have become applicable to a myriad of cross-border capital formation and acquisition transactions involving multinational corporations. The number of foreign companies filing under the Exchange Act “increased from 434 in 1990 to approximately 1,200 currently.”⁷ Indeed, the attractiveness of the U.S. securities markets is in many ways a tribute to the efficacy of those laws. Born out of the economic depression in the 1930s and cobbled together by three young lawyers during a weekend negotiating session,⁸ the Securities Act is a codification of the overarching principle that economic recovery and expansion are dependent upon capital formation, *i.e.*, the transfer of funds from investors who have them to businesses that need them. This process, in turn, is dependent upon a credible capital market system. The contribution of the Securities Act to the efficacy of the U.S. securities markets can be said to make the work of those negotiators, who ultimately agreed to a system that, to a remarkable degree, has been both practicable and legally effective, an accomplishment reasonably comparable to Lord Mansfield’s development of commercial law in the eighteenth century.⁹

Of course, the cross-border matters referred to above and

6. THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE* 7-8 (1999).

7. International Accounting Standards, Securities Act Release No. 33,7801, Fed. Sec. L. Rep. (CCH) ¶ 86,237, at 82,974 (Feb. 16, 2000) [hereinafter Accounting Release].

8. NANCY LISAGOR & FRANK LIPSUS, *A LAW UNTO ITSELF: THE UNTOLD STORY OF THE LAW FIRM SULLIVAN & CROMWELL* 174-76 (1988); see generally JORDAN A. SCHWARZ, *THE NEW DEALERS* 138 (1993).

9. JAMES STEVEN ROGERS, *THE EARLY HISTORY OF THE LAW OF BILLS AND NOTES: A STUDY OF THE ORIGINS OF ANGLO-AMERICAN COMMERCIAL LAW* 210-22 (1995).

numerous other completed, pending, or proposed transactions must be carried out in compliance with the U.S. securities laws. The present state of those laws and their application to international transactions are presented in a logical and instructive fashion in Mr. Lander's two-volume work. The material is presented with clarity, but without oversimplification. The emphasis is on substance.

The author begins with a well-organized, concise discussion of the fundamentals. The purposes and effects of the various U.S. securities laws are discussed. There is also a very helpful definitional discussion of the various types of securities issued by a business corporation. The completeness of the volumes is illustrated by the inclusion in this material of such financial products as re-purchase instruments and swaps.

Chapter Two is devoted primarily to an explanation of American Depositary Receipts ("ADR"), which Mr. Lander describes as "a negotiable certificate, a receipt issued by a U.S. depository that represents ownership of shares of securities of a foreign issuer" that "enabl[es] the holder to transfer title to the underlying foreign securities simply by transferring the ADR."¹⁰ The applicability of the registration requirements of the Securities Act to ADRs is also discussed.

Chapter Three delineates the legal requirements for the listing on trading markets of a non-U.S. corporation's equity securities in the United States to permit secondary trading before an actual equity offering in the United States. Such equity offerings are dealt with in Chapter Four, which covers U.S. registration and underwriting processes, as well as the legal aspects of pre-offering sales related activities such as roadshows and offshore press communications. Matters pertaining particularly to foreign issuers are highlighted.

Chapter Five is devoted primarily to the offering of debt securities. It includes a detailed explanation of the "shelf registration" procedure, which involves accelerated clearance by the SEC of securities offerings in order to permit U.S. offerings to compete with European ones, which can be made without equivalent administrative review.

Chapter Six covers the registration and reporting require-

10. 14 GUY P. LANDER, *U.S. SECURITIES LAW FOR INTERNATIONAL FINANCIAL TRANSACTIONS AND CAPITAL MARKETS* 2-3, § 2:2 (1999).

ments under the Exchange Act with respect to equity or debt securities issued by foreign corporations. The discussion of the applicability of those requirements to foreign entities is particularly helpful to a securities practitioner, whose previous experience may have been limited to the representation of domestic issuers and underwriters.

The discussion of financial statements and accounting issues in Chapter Seven is a user-friendly "accounting for lawyers" treatment of a subject with which counsel must be familiar because of the importance of financial statements to the preparation of securities offerings under the Securities Act and periodic reports filed under the Exchange Act. The accounting material in Chapter Seven will be revised¹¹ in the event that, as a result of its presently pending deliberations,¹² the SEC decides to modify the financial statement requirements applicable to non-U.S. issuers and accept to some extent the international accounting standards promulgated by the International Accounting Standards Committee for use in SEC filings by non-U.S. issuers.

Because a private placement of securities in the United States is exempt from the registration requirements of the Securities Act as well as the reporting requirements of the Exchange Act, that type of capital formation transaction is attractive to many foreign issuers. Accordingly, Mr. Lander discusses private placements in detail in Chapter Eight. In addition, this Chapter provides a clear and detailed examination of re-sales by private places pursuant to SEC Rule 144A,¹³ which permits such sales by persons other than the issuer to qualified institutional investors, a development that was intended to make the U.S. market more attractive to foreign issuers.

The treatment of offerings outside the United States, which, like private placements, are also exempt from the registration requirements of the Securities Act and are particularly relevant to cross-border offerings, is dealt with in the discussion of Regulation S of the SEC in Chapter Nine.

The first volume of the work is logically concluded by a discussion of global offerings, in which international corporations

11. The two-volume work is structured in a manner that permits the substitution of pages; revisions will be made to the work annually.

12. Accounting Release, *supra* note 7, at 82,970-82.

13. Private Resales of Securities to Institutions Rule, 17 C.F.R. §230.144A (1998).

distribute securities in more than one country simultaneously. These offerings may include a public offering in one country and a private placement in another, or public offerings in the United States and in one or more other countries. This Chapter, however, is limited to a discussion of the U.S. laws affecting such global offerings because an analysis of the applicable laws of other countries is beyond the scope of the book.

The second volume begins with an informative explanation of the beneficial ownership reporting obligations and filing requirements applicable to foreign or domestic acquirers of more than five percent of the outstanding shares of a corporation, the equity securities of which are registered under the Exchange Act. These requirements are particularly important for foreign owners of such securities because, as a result of an acquisition transaction, the foreign entity may become subject to the U.S. securities laws for the first time. Chapter Eleven's primary focus, however, is the Exchange Act's requirements applicable to tender and exchange offers for securities registered under the Exchange Act. The Chapter also contains a discussion of the legal aspects of tender offers made to U.S. holders of a foreign target company's securities. The reader is also alerted to the applicability of state takeover statutes to such transactions. This material will also be revised in an annual supplement, which will discuss the SEC's Regulation M-A, which became effective on January 24, 2000.¹⁴ Finally, the completeness of Mr. Lander's work is further illustrated by his inclusion in Chapter Eleven of the Exon-Florio law, which is applicable to acquisitions of a U.S. business by a foreign person if such an acquisition would affect national security.

Chapter Twelve is a thorough exposition of the multijurisdictional disclosure system. Since 1991, this system has permitted certain Canadian issuers to offer securities in the United States by filing with the SEC and distributing to U.S. investors the disclosure documents, which comply with Canadian but not U.S. law. Mr. Lander further discusses the mirror image multijurisdictional disclosure system adopted by Canadian authorities. That system permits U.S. issuers to sell their securities in Canada using documents prepared in accordance with U.S. rules.

14. Regulation of Takeovers and Security Holder Communications, Securities Act Release No. 33,7760, Fed. Sec. L. Rep. (CCH) ¶ 86,215, at 82,576 (Oct. 22, 1999).

Matters pertaining to the registration and substantive regulation of broker-dealer and investment advisors, both of which are essential to an efficient trading market in securities, are dealt with in Chapters Thirteen and Fourteen. Finally, the important subject of state and territorial Blue Sky laws, which must be complied with in connection with any securities offering in the United States, is thoroughly treated in Chapter Fifteen. The chapter includes a very helpful analysis of the New York state Blue Sky law relating to private placements, a subject that has been vexing for practitioners for many years.

Mr. Lander's volumes are reliable and complete. As such, I believe that they will be utilized in much the same manner and with the degree of regularity, with which such established treatises as the Lipton and Steinberger work, *Takeovers & Freeze-Outs*, are consulted.