

INTRODUCTION

EXEMPTIONS FOR INSTITUTIONAL INVESTORS OR CONCEPTS OF NON-PUBLIC OFFERINGS: A COMPARATIVE STUDY

1991 Annual Project of the Committee on International
Banking, Securities and Financial Transactions of the
International Law and Practice Section of the
New York State Bar Association

TOPIC: "An examination of the exemptions for
institutional investors or concepts of non-public offerings
in the law of selected jurisdictions and consideration of the
extent to which such exemptions can solve the regulatory
issues—especially disclosure and market regulation
issues—raised by the application of national securities laws
to transactions with an international aspect."

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The exemptions for institutional investors or concepts of non-public offering in the law of selected jurisdictions and the extent to which such exemptions can solve the regulatory issues—especially disclosure and market regulation issues—raised by the application of national securities laws to transactions with an international aspect were examined by lawyers from those jurisdictions as the 1991 annual project of the Committee on International Banking, Securities and Financial Transactions of the International Law and Practice Section of the New York State Bar Association.¹

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¹ The Committee on International Banking, Securities and Financial Transactions of the International Law and Practice Section of the New York

The study derived from the view that in the examination of international regulatory issues in the distribution of securities, and consideration of possible harmonized standards,² careful consideration should be given to the use and utility of the institutional investor or non-public offering exemptions.

The debate over whether disclosure in multijurisdictional offerings should be regulated by minimum standards, common standards or mutual recognition or reciprocity may be enlightened by an understanding of the practical application of the institutional investor or non-public offering exemptions in a number of jurisdictions.

The Articles on selected jurisdictions reveal many different approaches to these exemptions. In some jurisdictions the concept of an institutional investor or non-public offering exemption is well-defined and well developed while in other jurisdictions the law cannot be derived from statutes, cases or textbooks but only from those familiar with market practice. Some jurisdictions require registration or a prospectus unless there is an exemption whereas others require a disclosure document only in specified situations. In some jurisdictions

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² For a discussion of international regulatory issues in the distribution of securities of possible harmonized standards, see *Fédération Internationale des Bourses de Valeurs, International Capital Markets Group, Part III Paper, Recommendations on International Regulatory Issues* (Mar. 1991).

whether securities are listed is significant, in others the availability of the institutional investor or non-public offering exemption does not turn on whether the securities are listed.

The absence of a common definition of "public offer" means uncertainty about that term in the European Community's harmonization efforts. The European Community definition of a "public offering" as a sale of securities which is not a private placement contrasts with the absence in French law of a regulatory or judicial definition of a private placement.

In seeking to compare or rationalize the rules in different jurisdictions one must study not only exempted transactions but exempted securities. Should securities of world class issuers, however defined, be treated specially?

On the market regulation side, Ontario's concept of the international dealer permitted to trade only with designated institutions and Quebec's rule that a foreign underwriter need not register if its dealing activities are limited to distributing securities to sophisticated purchasers do not seem to have been adopted elsewhere but merit close examination.

The International Capital Markets Group of the Fédération Internationale des Bourses de Valeurs ("ICMG") has stated that disclosure for institutional investors "is in part different because of an assumed lesser need for required disclosure of information about certain large companies to large, sophisticated investors."³ Although the ICMG sees regulatory and philosophical problems with this assumption, the institutional investor or non-public offering exemption has enormous practical viability.

Careful review of the Articles prepared for each jurisdiction and consideration of contemporary practice suggests that the typical securities offering may be distributed globally, albeit on a limited basis, by taking advantage of an exemption, however defined, for sales to institutional investors, or, alternatively, not made to the public but to a limited circle. In the recent British Telecommunications secondary offering the managers prepared a schedule of selling restrictions in a number of jurisdictions indicating that it was thought feasible to sell on a limited basis in those markets.

The internationalization of securities markets may mean

³ *Id.* at 10.

that at some time in the future a common prospectus will be used for such a global offering. But until such time the institutional investor or non-public offering exemption will have continuing utility.

The Committee members who participated in preparing the Articles that follow hope that their efforts will contribute to the discussion of regulatory issues as international securities markets increasingly become one global market.