KATHLEEN G. McGUINNESS*

Impact of United States Securities Laws on Distribution and Trading of Foreign Securities

The value of foreign securities publicly sold in the United States rose from $79 million in 1973 to $718 million in 1975.[1] This article will address three aspects of the sale of foreign securities: First, the jurisdictional basis of federal regulation of foreign securities transactions; second, the effect of the foreign character of the security on trading mechanics; and third, the application of specific provisions of the federal securities laws to foreign securities.

Six separate but interrelated statutes are the source of United States securities laws: the Securities Act of 1933,[2] the Securities Exchange Act of 1934,[3] the Public Utility Holding Company Act of 1935,[4] the Trust Indenture Act of 1939,[5] the Investment Advisers Act of 1940,[6] and the Investment Company Act of 1940.[7] These statutes are administered by the Securities and Exchange Commission (SEC). The laws form a "comprehensive pattern of federal regulation"[8] which, with the exception of the Public Utility Holding Company Act, may be imposed on those selling foreign securities in the United States.[9]

Commentators have suggested that securities laws, and the rules and regulations promulgated thereunder, be simplified and made less stringent for

---

*B.A. S.U.N.Y. College at Buffalo, 1970, J.D. University of San Diego School of Law 1977. This article was prepared in partial fulfillment of graduation requirements at the University of San Diego School of Law.

[1] 35 SEC STATISTICAL BULLETIN 142 (March 1976).

[2] 15 U.S.C. § 77a *et seq.* (1970).

[3] 15 U.S.C. § 78a *et seq.* (1970).

[4] 15 U.S.C. § 79a *et seq.* (1970).

[5] 15 U.S.C. § 77aaa *et seq.* (1970).

[6] 15 U.S.C. § 80b-1 *et seq.* (1970).

[7] 15 U.S.C. § 80a-1 *et seq.* (1970).

[8] Cohen and Throop, *Investment of Private Capital in Foreign Securities*, A LAWYER'S GUIDE TO INTERNATIONAL BUSINESS TRANSACTIONS 519, 524 (W. Surrey and C. Shaw eds. 1963) [hereinafter cited as Cohen].

[9] *Id.*

foreign securities.[10] A proposed double standard was hotly debated, but ultimately rejected, when the Securities Act was first considered and adopted.[11] Today, with several exceptions,[12] the SEC continues to apply its regulations equally to foreign and domestic securities.[13] The application of a single standard is based on important policy considerations. The remedial purposes of the Securities Acts, especially investor protection, would not be served by lowering requirements. It has also been suggested that United States investors need special protection when dealing in foreign securities because of their unfamiliarity with business conditions abroad and the decreased opportunity for redress against a foreign issuer.[14] These factors mandate equal enforcement. Although each securities enactment contains special provisions for foreign securities, they reflect the policy of holding all issuers to the same standard.

I. Jurisdictional Basis of Federal Regulation of Foreign Securities

There are two issues involved in the exercise of United States legislative jurisdiction over foreign securities transactions. One issue is the jurisdictional basis under international law.[15] The other issue is the jurisdicitonal basis under the particular federal law.[16]

Under international law two theories have been employed to justify United States jurisdiction. [*EDITOR'S NOTE:* Cf. *with Editorial Comment following the succeeding article by Geza Toth at p. 159.*] The first is subjective ter-

---

[10]*Cf.* Cohen, *supra* note 8, at 566.

[11]Brownell, Cohen, Heller, Loss, Stevenson, *Legal Problems of Issuing and Marketing Foreign Securities in the United States*, INTERNATIONAL FINANCING AND INVESTMENTS 430, 446 (J. McDaniels ed. 1964).

[12]The most significant exemption granted foreign issuers by the SEC is the exemption from § 12(g) of the Securities Exchange Act of 1934 — 15 U.S.C. § 781(g). *See* text accompanying notes 170-181 *infra.*

[13]SEC Chairman Ray Garrett, Jr., addressed the competing concerns and the SEC's resolution of them:

> As a general proposition, we understand the policy of our government to be one of encouraging the free flow of capital among nations, and we do not feel ourselves under any mandate or even pressure to use our various powers to impede foreign investment in the U.S. or investment by U.S. citizens in foreign securities as a matter of deliberate policy.
>
> On the other hand, foreign private or non-governmental issuers are treated basically the same as domestic issuers when they make a public offering to U.S. residents. No special registration forms are provided, and substantial compliance with all of our disclosure standards are required.

Address by Ray Garrett (June 10, 1974), *quoted* in Bator, *Foreign Offerings in the United States*, SIXTH ANNUAL INSTITUTE ON SECURITIES REGISTRATION 269, 271 (PLI Corp. L. Handbook No. 161, 1974).

[14]Cohen, *supra* note 8, at 566.

[15]Brownell, Cohen, Heller, Loss, Stevenson, *Legal Problems of Marketing Foreign Securities in the United States*, INTERNATIONAL FINANCINGS AND INVESTMENTS 430, 432 (J. McDaniels ed. 1964).

[16]*Id.* at 433.

ritorial jurisdiction which requires conduct within the state relating to some national interest.[17] This conduct need not have an effect with the state's boundaries. The second is objective territorial jurisdiction which is based on conduct outside the state producing an effect within a state.[18] The effect must not only occur as a direct and foreseeable result[19] of the extraterritorial act but must also be "substantial."[20]

In attempting to determine the international reach of federal securities law, courts have been guided by several other principles. Normally federal courts construe legislation to avoid an assertion of jurisdiction in violation of international law.[21] This results in a presumption against the applicability of federal statutes to activity outside the United States.[22] This presumption falls in the presence of Congressional intent of extraterritorial application.[23]

---

[17]The subjective territorial principle is stated in RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §17 (1965):

A state has jurisdiction to prescribe a rule of law

(a) attaching legal consequences to conduct that occurs within its territory, whether or not such consequences are determined by the effects of the conduct outside the territory, and

(b) relating to a thing located, or a status or other interest localized, in its territory.

Federal courts have adopted the RESTATEMENT (Second) as the international law standard. *See, e.g.*, Bersch v. Drexel Firestone, Inc., 389 F. Supp. 446, 454 (S.D.N.Y. 1974). *Accord*, Comment, *Subject Matter Jurisdiction in Transnational Securities Fraud Cases*, 17 B.C. INDUS. & COM. L. REV. 413, 421 n.68 (1976).

[18]The objective territorial principle is stated in RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §18 (1965):

A state has jurisdiction to prescribe a rule of law attaching legal consequences in conduct that occurs outside its territory and causes an effect within its territory, if either

(a) the conduct and its effect are generally recognized as constituent elements of a crime or tort under the law of states that have reasonably developed legal systems, or

(b) (i) the conduct and its effect are constituent elements of activity to which the rule applies; (ii) the effect within the territory is substantial; (iii) it occurs as a direct and foreseeable result of the conduct outside the territory; and (iv) the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems.

Another well-known formulation of this principle was put forth by Justice Holmes: "Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect, if the State should succeed in getting him within its power." Strassheim v. Daily, 221 U.S. 280, 285 (1911).

[19]RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 18(b)(iii) (1965).

[20]RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 18(b)(ii) (1965).

[21]"(A)n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804). *See* McCulloch v. Sociedad Nacional de Marineros de Honduros, 372 U.S. 10, 21 (1963); Lauritzen v. Larsen, 345 U.S. 571, 578 (1953); Cunard S.S. Co. v. Mellon, 262 U.S. 100, 107 (1923); *Development in the Extraterritorial Reach of United States Law*, 17 HARV. INT'L. L.J. 315, 316 (1976).

[22]*See, e.g.*, Blackmer v. United States, 284 U.S. 421, 437 (1932); American Banana Co. v. United Fruit Co., 213 U.S. 347, 355-57 (1909). *Accord*, Comment, *Subject Matter Jurisdiction in Transnational Securities Fraud Cases*, 17 B.C. INDUS. & COM. L. REV. 413, 419 (1976).

[23]*See, e.g.*, Foley Bros. v. Filardo, 336 U.S. 281, 285 (1940); Blackmer v. United States, 284 U.S. 42, 437 (1932). Further, if the congressional intent is sufficiently clear, federal courts will seemingly extend United States jurisdiction to extraterritorial acts even if such application violates international law. United States v. Aluminum Co. of America, 148 F.2d 416, 448 (2d Cir. 1945); *Accord*, Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1334 (2d Cir. 1972).

An analysis of securities laws reveals that Congress has not provided the courts with any clear indication of the intended scope of the Securities Acts.[24] Courts have examined the facts of each case in light of the remedial purposes of securities legislation in hopes of divining legislative intent.[25]

The first courts faced with possible extraterritorial application of securities laws adopted the subjective territorial principle and required conduct within the United States.[26] A significant extension of federal jurisdiction occurred in *Schoenbaum v. Firstbrook*.[27] Using the objective territorial principle, that court applied federal laws to acts taking place outside the United States but affecting United States investors and securities markets.[28]

The Second Circuit recently clarified the status of extraterritorial application of federal securities in *Bersch v. Drexel Firestone, Inc.*[29] and *IIT v.*

---

[24]Although the Second Circuit was able to reach conclusions as to congressional intent, the Court "freely acknowledge(d)" that if asked to cite supporting language in the statutes or the legislative history, "we would be unable to respond." Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 993 (2d Cir. 1975), *cert. denied,* 423 U.S. 1018 (1975).

Congress did consider jurisdiction over transnational securities sales on foreign exchanges and stated in section 30(b) of the 1934 Act, 15 U.S.C. § 78dd (1970):

> The provisions of this chapter or of any rule or regulation thereunder shall not apply to any person insofar as he transacts a business in securities *without the jurisdiction of the United States,* unless he transacts such business in contravention of such rules and regulations as the commission may prescribe to prevent the evasion of this chapter (emphasis added).

The purpose of this section is to permit securities professionals to engage in transactions outside the United States without meeting the Exchange Act's stringent regulatory provisions. Schoenbaum v. Firstbrook, 405 F.2d 200, 207 (2d Cir.), *rev'd. on other grounds,* 405 F.2d 215 (1968) (en banc), *cert. denied,* 395 U.S. 906 (1969). While brokers, dealers, and banks are covered by this section, investment companies probably are not. *See* Roth v. Fund of Funds, 405 F.2d 421, 422 (2d Cir. 1968) (dictum), *cert. denied,* 394 U.S. 975 (1969). This exemption is available only to professionals who regularly conduct their business abroad, not to those involved in isolated foreign transactions. *Id.*

[25]Comment, *Subject Matter Jurisdiction in Transnational Securities Fraud Cases,* 17 B.C. INDUS. & COMM. L. R. 413, 419-20 (1976).

[26]The first case to consider the extraterritorial application of the securities acts was Kook v. Crang, 182 F. Supp. 388 (S.D.N.Y. 1960). The court held that the Exchange Act did not cover transnational securities transactions unless a "necessary and substantial" act in the fraud took place in the United States. *Id.* at 390-91. Two subsequent cases applied the same standard. Ferraioli v. Cantor, 259 F. Supp. 842 (S.D.N.Y. 1966); S.E.C. v. Intercontinental Finance Corp., 223 F. Supp. 987 (S.D. Fla. 1963).

[27]405 F.2d 200 (2d Cir.) *rev'd on other grounds,* 405 F.2d 215 (1965) (en banc), *cert. denied,* 395 U.S. 906 (1969).

[28]*Id.* at 206. Banff, a Canadian corporation whose stock was traded on the American Stock Exchange and registered with the SEC, was controlled by Aquitane of Canada, Ltd., a wholly-owned subsidiary of a French corporation. The American plaintiff, a minority shareholder of Banff, brought a derivative action. He alleged that Aquitane conspired with the directors of Banff and used undisclosed inside information to purchase Banff securities at a price substantially lower than their true value.

[29]519 F.2d 974 (2d Cir. 1975), *cert. denied,* 423 U.S. 1018 (1975). *Bersch* was a class action brought on behalf of purchasers of I.O. S. Ltd., an international mutual fund management company organized in Canada with its main office in Geneva. All plaintiffs purchased pursuant to three distributions made outside the United States. While must of the plaintiffs were foreign nationals, a small minority were Americans. Plaintiffs alleged that officers of I.O.S., codefendant underwriters, and officers of a Bahamian subsidiary of I.O.S. had met in the United States to arrange the distributions and draft an allegedly misleading prospectus.

Vencap, Ltd.[30] In *Bersch*, Judge Friendly formulated three rules for United States jurisdiction over international securities fraud. First, the antifraud provisions apply to losses incurred in securities purchases by United States residents regardless of whether the fraudulent conduct was within the United States.[31] Second, losses incurred by foreign citizens residing abroad are covered by the federal antifraud provision only if the losses are directly caused by fraudulent conduct within the United States.[32] Third, United States residents abroad may recover under the antifraud provisions "if acts (or culpable failures to act) of material importance in the United States have significantly contributed (to losses from sales of securities)."[33] These rules apply to transactions in foreign securities whether or not the securities are registered with the Securities and Exchange Commission or traded on a United States exchange.[34]

The specific jurisdictional basis under the Securities Acts[35] is the direct or indirect use of the United States mails or instruments of transportation or communication in interstate commerce.[36] Commerce between any foreign country and the United States is included in the definition of interstate commerce.[37] The activities described in the legislation lay a foundation for the congressional exercise of power under the Commerce Clause.[38] However, federal courts have looked beyond these minimal required activities to principles of international law before finding federal jurisdiction.[39]

---

[30]519 F.2d 1001 (2d Cir. 1975). This action was brought by IIT, a Luxembourg investment trust, and its liquidators against Vencap, a Bahamian venture capital corporation. Pursuant to IIT's decision to invest in Vencap, IIT's American counsel in New York drafted a subscription agreement for Vencap shares. Counsel for both parties exchanged proposed drafts in New York and the closing occurred in the Bahamas. It was alleged that subsequently Vencap's founder, chairman, president and treasurer, one Robert Pistell, diverted substantial amounts of Vencap's funds to his own use.

[31]Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 989, 991-92, 993 (2d Cir. 1975).

[32]*Id.* at 986-87, 993, 1017-18. Subsequent decisions have required foreign plaintiffs to prove that the conduct within the United States was more substantial then mere preparatory acts. Venture Fund, Etc. v. Wilkie Farr & Gallagher, 418 F. Supp. 550, 555 (S.D.N.Y. 1976); F.O.F. Proprietary Funds, Ltd. v. Arthur Young & Co., 400 F. Supp. 1219 (S.D.N.Y. 1975). *But see* Straub v. Vaisman & Co., Inc., 540 F.2d 591 (3d Cir. 1976) which flatly states "[c]onduct within the United States is alone sufficient." *Id.* at 595.

Where the only parties injured by a security fraud are foreign nationals, the SEC may bring an action where "at least some activity designed to further a fraudulent scheme occurs within this country." SEC v. Kasser, 548 F.2d 109, 114 (3d Cir.), *cert. den.*, 45 U.S.L.W. 3778 (1977).

[33]Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 993 (2d Cir. 1975).

[34]Neither *Bersch* nor *IIT* involved securities traded on an American exchange or registered with the SEC. *See* notes 75 and 76 *supra. See also* Travis v. Anthes Imperial, Ltd., 473 F.2d 515 (8th Cir. 1973). In an action brought by foreign nationals, the Ninth Circuit held that the listing and registration of a security on a United States national exchange were "prima facie" sufficient to vest jurisdiction. Des Brisay v. Goldfield Corp., 549 F.2d 133, 136 (9th Cir. 1977).

[35]15 U.S.C. § 77a *et seq.* (1970).

[36]15 U.S.C. § 77e (1970).

[37]15 U.S.C. § 78c(a)(17) (1970).

[38]United States v. Robinson, 181 F. Supp. 158, 164 (S.D.N.Y. 1959); Comment, *Subject Matter Jurisdiction in Transnational Securities Fraud Cases,* 17 B.C. IND. & COMM. L.R. 413, 418 (1976).

[39]Comment, *Subject Matter Jurisdiction in Transnational Securities Fraud Cases,* 17 B.C. IN-

II. The Mechanics of Offering Foreign Securities in the United States

Trading Medium

Foreign securities are available to American purchasers in four forms: (a) as shares issued in the country of incorporation (known as "normal"[40] or "ordinary"[41] shares); (b) as shares issued specifically for United States trade[42] (known as "U.S. registry"[43] or "American"[44] shares); (c) as American Depositary Receipts[45] (ADRs); or (d) as shares of a United States investment fund, which holds foreign securities.[46]

The ADR is a significant "instrument of international finance."[47] Acting as

---

DUS. & COM. L. REV. 413, 419, 424 (1976).

[40]Williams, *Trading in the United States in Foreign Securities and Securities Distributed Outside the United States Without Registration Under U.S. Securities Act,* SIXTH ANNUAL INSTITUTE ON SECURITIES REGULATION 227, 280 (PLI Corp. L. Handbook No. 161, 1974).

[41]Tomlinson, *Federal Regulation of Secondary Trading in Foreign Securities,* 32 BUS. LAW 463, 464 (1977) (hereinafter cited as Tomlinson).

[42]When permitted by the law of the country of incorporation and by the issuer's charter, special shares are issued for United States trading. These shares would be in the form of United States style certificates as opposed to the bearer certificates common abroad. An "American" or "U.S. Registry" share might also provide for transferability by a United States transfer agent, payment of dividends in United States dollars, and simplification of exchange control approvals. Williams, *Trading in the United States in Foreign Securities and Securities Distributed Outside the United States Without Registration Under U.S. Securities Act,* SIXTH ANNUAL INSTITUTE ON SECURITIES REGULATION 275, 280-81 (PLI Corp. L. Handbook No. 161, 1974); Tomlinson, *supra* note 41, at 464.

[43]Williams, *Trading in the United States in Foreign Securities and Securities Distributed Outside the United States Without Registration Under U.S. Securities Act,* SIXTH ANNUAL INSTITUTE ON SECURITIES REGULATION 275, 280 (PLI Corp. L. Handbook No. 161, 1974).

[44]Tomlinson, *supra* note 41, 464.

[45]"An ADR is a certificate denominated in shares representing proof of ownership of foreign securities on deposit with a foreign depositary bank affiliated with an American bank." Tomlinson, *supra* note 41, at 464-65. The rights of the ADR holder and the number of ADR shares represented by the certificate is prominently printed on its face. Fountain, *American Depositary Receipts and Their Uses,* FINANCIAL ANALYSTS J. 17-18 (Jan.-Feb. 1976). Normally one ADR share is issued for each underlying foreign share. *Id.* at 16. This ratio may be altered when the underlying share has an usually high or low per-share value. Because Japan securities typically have small per-share values, the ratio of Japanese shares to an ADR share may reach eighty to one. Wall Street J. (Pac. Coast ed.), Feb. 17, 1976, at 24, col. 5.

[46]Bross, *Legal Problems Encountered in Investing in Foreign Equity Securities,* INTERNATIONAL FINANCINGS AND INVESTMENTS 461-62 (J. McDaniels ed. 1964).

[47]Moxley, *The ADR: An Instrument of International Finance and a Tool of Arbitrage,* 8 VILL. L. REV. 19 (1962). In 1963, $132 million of foreign securities already issued abroad were sold as ADRs in the United States. *Hearings on H.R. 8000, Interest Equalization Tax Act Before the Senate Comm. on Finance,* 88th Cong., 2d Sess. 64, 71 (1964). During the last two decades there has been a dramatic increase in the number of ADRs. For example, in 1955 Morgan Guaranty Trust Co. had 18 ADR issues; in 1975 it had approximately 180 ADR issues. Tomilson, *supra* note 41, at 464 n.4.

A European analog of the ADR has been created by Morgan Guaranty Trust Co.—the International Depositary Receipt (IDR, also known as European Depositary Receipt). Schiloni, *Giving Overseas Investors a Share in the Action,* BUSINESS ABROAD 32-33 (May 1970). Morgan issues both ADRs and IDRs for almost all underlying shares.

Because holders may at times find the bearer certificates of IDRs more useful than registered ADR certificates, Morgan will convert IDRs to ADRs (or ADRs to IDRs) for a small fee ($1 per

a depositary, a United States bank issues ADRs[48] in registered form against deposit of the issuer's shares with it (or with a foreign affiliate).[49] The issuing bank receives disbursements for ADR holders and forwards to holders the dollar equivalent of the payments.[50] The bank also exercises the rights and powers of shareholders of the foreign issuer in respect to the underlying shares.[51] The holder may sell an ADR on the United States market[52] or exchange it for the underlying securities.[53]

The holder of an ADR enjoys several advantages over the holder of an ordinary share of foreign securities. First, transfer of an ADR can be effected simply with little expense.[54] Second, expenses may be avoided on the death of the ADR holder.[55] Third, the holder benefits from the issuing bank's services as paying agent and information clearing house.[56]

However, the ADR holder suffers from some disadvantages not shared by

---

certificate). MORGAN GUARANTY TRUST CO., ADR/IDR 26 (July 1974). Tomlinson, *supra* note 41, at 465 n.9.

[48]Four United States banks issue almost all ADRs. They are: Morgan Guaranty Trust Co., First National City Bank, Irving Trust Co., and Chemical Bank. Two or more banks may issue ADRs for the same security. Tomlinson, *supra* note 41, at 467-68 and 468 n.24.

It should be noted that the actual marketing of the ADR shares is typically handled by major, international brokers. These brokers, professional arbitragers, usually make a market in the security. *Id.* at 469. For a thorough discussion of the role of arbitragers in ADR trading *see* the Tomlinson article. Id. at 469-70, 474-78.

[49]The foreign securities may be outstanding or newly issued. Cohen, *supra* note 8, at 579.

[50]*Id.*

[51]The services performed by the issuing bank in this respect are threefold. First, the bank remains current on corporate activities affecting the ADR holder. It routinely forwards English language summaries of important information. BUS. WEEK, Feb. 8, 1969, at 90. Upon specific request of the ADR holder, the bank will send annual and quarterly reports, proxy forms, and news releases sent to shareholders. Tomlinson, *supra* note 41 at 466 n.10. Second, the bank will sell all subscription rights for shares not registered under the 1933 Securities Act and remit the proceeds to the ADR holders. *Id.* at 466. Third, the bank consults the shareholders upon important corporate matters and votes accordingly. The bank foregoes solicitation of shareholder opinion and voting the shares on issues not concerning shareholder rights. *Id.* The issuing banks believe the solicitation of voting instructions is covered by the foreign issuer exemption; *see* text accompanying notes 194-96 *infra*, from §14 of the Securities Exchange Act of 1934. *Id.* at 466 n.14. *See* Morgan Guaranty Trust Co., (1974-75 Transfer Binder), FED. SEC. L. REP. (CCH) ¶ 80 075.

[52]The majority of ADR trading is on the over-the-counter market. Cohen, *supra* note 8, at 581 n.333. Only 28 non-Canadian foreign issues were listed on the New York or American stock exchanges in 1975. Tomlinson, *supra* note 41, at 469 n.34.

[53]Cohen, *supra* note 8, at 579.

[54]The ADR certificate is in a form and language more readily understandable to a United States investor than ordinary shares. The registered ADR certificates are transferable on the books of the issuing bank. Moxley, *The ADR: An Instrument of International Finance and a Tool of Arbitrage*, 8 VILL. L. REV. 19, 23 (1962). In contrast, ordinary shares are often negotiable bearer securities with potentially disastrous consequences when lost. Tomlinson, *supra* note 41, at 466. Further, the ordinary shares may be subject to high transfer fees and ownership restrictions. *Id.* The transfer process of foreign securities is cumbersome, requiring mailing the certificates to the country of origin for the actual transferral. *Id.* at 467.

[55]Foreign death taxes may be avoided by the use of ADRs. Tomlinson, *supra* note 41, at 467. Additional savings may result in transferring the ADR to decedent's heirs. If ordinary shares were held, foreign counsel might have to be retained to effect the transfer in the foreign country. *Id.*

[56]*See* notes 50 and 51, *supra*, and accompanying text.

holders of ordinary shares. The issuing bank charges for its various services. Typically there is a fixed, per share dividend collection fee.[57] Other charges are issuance, cancellation, and transfer fees.[58] The ADR holder cannot vote his underlying shares on many corporate matters unless he specifically requests proxy forms from the issuing bank.[59] Also, a delay of some weeks may occur in the ADR holder's receipt of dividends.[60]

Trading Mechanisms

With the exception of ADRs, other forms of foreign securities are sold in the same types of transactions as are United States securities.[61] A foreign issuer may raise new capital in this country through a private placement[62] or a public offering.[63] An issuer who makes a public offering subjects himself to the requirements of the federal Securities Act of 1933[64]—a burden avoided by private placement.[65] The mechanisms of private placement or public offering may also be employed in a secondary distribution[66] of a large block of outstanding[67] securities. A United States purchaser might therefore acquire foreign securities from an issuer or a holder of a large block of shares through

---

[57]Because foreign issuers tend to favor large numbers of outstanding shares with correspondingly smaller per share dividends, the per share collection fee may constitute a sizeable percentage of the distribution. Fountain, *American Depositary Receipts and Their Uses*, FINANCIAL ANALYSTS J. 15 (Jan.-Feb. 1969). Dividend collection fees per ADR shares are $.01. MORGAN GUARANTY TRUST CO., ADR/IDR 11 (July 1974).

[58]FORTUNE, July 1964, at 95. The range of issuance and cancellation fees per hundred ADR shares is from $2 to $5. MORGAN GUARANTY TRUST CO., ADR/IDR 11 (July 1974). Transfer fees are $1.50 per hundred ADR shares. Tomlinson, *supra* note 41, at 467 n.21.

[59]*See* note 51 *supra*.

[60]Bross, *Legal Problems Encountered in Investing in Foreign Equity Securities*, INTERNATIONAL FINANCINGS AND INVESTMENTS 461, 463 n.1 (J. McDaniels ed. 1964).

[61]Cohen, *supra* note 8, at 519.

[62]Private placement consists of sale of securities to "a limited number of sophisticated purchasers who are buying for investment and not with a view to distribution." Cohen, *supra* note 8, at 520.

[63]The public offering of securities of any magnitude will normally require the utilization of a substantial number of investment banking firms (the "underwriting group") who, under the management of one or more of their members, will effect the distribution of the issue through a much larger group of security dealers (the "selling group"), in which members of the underwriting group may or may not participate. The members of the underwriting group, through an agreement signed by the manager of the group in their behalf, may commit themselves to purchase the entire issue, or may merely agree with the issuer to use their best efforts to effect the successful distribution of the issue. Cohen, *supra* note 8, at 520.

[64]15 U.S.C. § 77a *et seq.* (1970).

[65]Cohen, *supra* note 8, at 521.

[66]A secondary distribution is also known as a secondary offering. It is the "redistribution of a block of stock some time after it has been sold by the issuing company." NEW YORK STOCK EXCHANGE, GLOSSARY: THE LANGUAGE OF INVESTING 28 (1973).

[67]Outstanding securities are "the amount of stock issued by a company and still in public hands, though not necessarily those of the original buyers. This includes all shares owned by officers of the company or shares owned by any other companies but it does not include treasury stock or shares bought back by the issuing company." N. MOORE, DICTIONARY OF BUSINESS, FINANCE, AND INVESTMENT 308 (1975).

either a public offering or a private placement.

Another type of transaction involves the purchase of outstanding foreign securities from another United States or foreign holder. This type of trading transaction is distinguished from the purchase of newly issued shares or the purchase of shares marketed as part of a secondary distribution.[68] Liability under federal securities laws will vary according to the type of transaction and the identity of the seller.[69]

Underwriting Agreements

One of the initial steps in the distribution of a new issuance of securities is the formation of the underwriting agreement between the issuer and an investment banker.[70] When the issuer is a foreign government or corporation, difficulties arise because foreign dealers often purchase foreign securities from United States underwriters.[71] These foreign dealers will subsequently sell the securities abroad.[72]

Because of this potential foreign resale, a number of special provisions must be added to the underwriting agreement. One which is often added is that the European dealers will not resell the securities in the United States.[73] This term prevents unregistered foreign dealers from conducting securities transactions in the United States, which is prohibited by the Exchange Act.[74] Another provision often included is a prohibition on the foreign dealers acting as agents for the underwriters in foreign transactions. In conjunction with this, the underwriters disclaim any responsibility concerning the right of the dealers to sell in foreign jurisdictions.[75] The underwriters include these terms to evade responsibility for compliance with the securities laws of foreign countries.[76]

Listing Requirements

If an issuer chooses to have its securities sold on a securities exchange, it

---

[68]Trading involves the purchase of securities "which are not at the time being issued or distributed for an issuer or an affiliate and which are not the subject of a secondary distribution." Cohen, *supra* note 8, at 521.

[69]For example, a secondary distribution conducted by a person in a control relationship with the issuer is subject to requirements of the Securities Act of 1933 imposed on few other individual sellers. Cohen, *supra* note 8, at 520-21.

[70]An investment banker is also known as an underwriter. "He is the middleman between the corporation issuing new securities and the public." The usual practice is for one or more investment bankers to buy outright from a corporation a new issue of stocks or bonds. The group forms a syndicate to sell the securities to individuals and institutions. NEW YORK STOCK EXCHANGE, GLOSSARY: THE LANGUAGE OF INVESTING 17 (1973).

[71]Stevenson, *Legal Aspects of the Public Offering of Foreign Securities in the United States' Market*, 28 GEO. WASH. L. REV. 194, 196 (1959) (hereinafter cited as Stevenson).

[72]*Id.*

[73]*Id.*

[74]15 U.S.C. § 780 (1970).

[75]Stevenson, *supra* note 71, at 202.

[76]*Id.*

must meet the listing requirements of the particular exchange. Each exchange has its own listing requirements.[77] In addition to the basic requirements which must be satisfied by both foreign and domestic issues, further conditions may be placed on foreign issues. A basic prohibition which would render either a foreign or domestic issue ineligible for listing on the New York Stock Exchange (NYSE) is the Exchange's refusal to list nonvoting common stock.[78] A prohibition specific to foreign issues is the NYSE's refusal to list foreign securities with restrictions on transferability imposed by the nation of incorporation incident to foreign exchange controls.[79]

After the initial decision to list an issue is made, an exchange may condition the listing. If American shares[80] are traded on the exchange, the foreign issuer must make arrangements for ready interchangeability with ordinary shares.[81] The issuer must also provide for distribution of dividends and other rights in line with United States practice.[82] If foreign securities are traded in the form of ADRs, the exchange may impose conditions such as the maintenance of facilities for transferring ADRs by means other than returning the certificates to the country of incorporation.[83]

A foreign issuer may elect not to have its securities listed on a national exchange for a number of reasons.[84] Foremost may be the required registration under the Exchange Act of any class of securities traded on a national securities exchange.[85] The SEC, which regulates exchanges, recently rejected a plan by the American Stock Exchange to list foreign securities not registered pursuant to the Exchange Act.[86]

However, another organized trading forum is open to the foreign issuer. Transactions may be conducted on the over-the-counter market[87] without

---

[77]Cohen, *supra* note 8, at 574.

[78]*Id.*

[79]NYSE COMPANY MANUAL 133-4, B 117-119.

[80]*See* text accompanying notes 42-44 *supra.*

[81]Cohen, *supra* note 8, at 574. *See* text accompanying note 32 *supra.*

[82]Cohen, *supra* note 8, at 574.

[83]*Id.* at 582.

[84]*See* Hovdesven, *Applicability of the Registration and Reporting Requirements of the Securities Exchange Act to Foreign Issuers,* in SIXTH ANNUAL INSTITUTE ON SECURITIES REGULATION 353, 365-76 (R. Mundheim, A. Fleischer, J. Schupper, J. Jewett & J. Thompson eds. 1975). *But see* Wall Street J. (Pac. Coast ed.) May 25, 1976, at 38, col. 2 (NYSE eases listing requirements for foreign securities).

[85]15 U.S.C. § 781(2) (1970).

[86]Rustin, *SEC Rejects Proposal by AMEX to Permit Unregistered Foreign Firms to be Listed,* Wall Street J. (Pac. Coast ed.), Nov. 5, 1975, at 6, col. 2.

[87]The over-the-counter market is

(a) negotiated market for securities trading outside of the stock exchanges between dealers acting as principals or as brokers for their customers. The OTC market handles all new issues and is the principal market for bank and insurance stocks, mutual funds, and industrial and utility issues that either cannot or do not wish to meet the listing requirements of national exchanges. Over-the-counter trading volume is far heavier than exchange trading volume, and it is also the most volatile in prices.

N. MOORE, DICTIONARY OF BUSINESS, FINANCE, AND INVESTMENT 308 (1975).

many of the responsibilities incurred by exchange trading.[88] Today trading on the over-the-counter market is done largely through the National Association of Securities Dealers Automated Quotation System.[89] Foreign securities are eligible for quotation on this system if the issuer is exempt from the registration requirements of section 12(g) of the Exchange Act or if the issuer files periodic reports with the SEC under section 15(d) of the Exchange Act.[90] ADRs are eligible for quotation on the system if they are issued for underlying securities which meet the requirements.[91]

Broker-Dealer Activities

Once a marketing forum is selected, the actual transactions are conducted by broker-dealers. The potential liability of these individuals may be greater if they are dealing in foreign securities. One source of such liability is the SEC rules promulgated under the Exchange Act requiring a determination of the securities' suitability to the investor's needs.[92] Another is the statutory prospectus delivery requirements of the Securities Act.[93] The delivery duty arises in several ways. One is by a transaction within 40 days after "the security was bona fide offered to the public."[94] A United States dealer might not be aware of a public offering made entirely abroad. He would certainly not have access to prospectuses for such offerings. Commentators disagree over the extent of the responsibility of United States dealers for prospectus delivery in a wholly foreign public offering.[95]

Effect of Federal Regulations on Simultaneous Foreign and Domestic Offerings

A determination of Securities Act liabilities for simultaneous public offerings is necessarily preceded by a determination of when such offerings occur. The question arises because of the doctrine of integration.[96] Under this doctrine, a private placement in the United States might be integrated with a

---

[88]15 U.S.C. § 781(2) (1970). *See generally,* L. ENGELL, HOW TO BUY STOCKS 108-119 (5th ed. 1971).

[89]*See* note 193 *infra.*

[90]Williams, *Trading in the United States in Foreign Securities and Securities Distributed Outside the United States Without Registration Under United States Securities Act,* SIXTH ANNUAL INSTITUTE ON SECURITIES REGULATION 275, 287 (PLI Corp. L. Handbook No. 161, 1974).

[91]*Id.*

[92]*See* text accompanying notes 213-18 *infra.*

[93]15 U.S.C. § 77e(b)(2) (1970).

[94]15 U.S.C. § 77d(3)(B) (1970).

[95]*Compare* Cohen, *supra* note 8, at 585-86, *with* 1 L. LOSS SECURITIES REGULATION 256-58 (2d ed. 1961).

[96]The doctrine of integration calls for a realistic appraisal of allegedly separate offerings, at least one of which is denominated "private," to determine "whether offers and sales should be regarded as a part of a larger offering." SEC Rule 146, Preliminary Note 3, 17 C.F.R. 230.146 (1977). *See* text accompanying note 258 for a discussion of factors relevant to integration.

public offering abroad and therefore be deemed a public offering in the United States subject to Securities Act regulation.[97] The circumstances under which the SEC would make such an integration are uncertain, but the following factors would be considered: (1) whether the offerings are part of a single plan of financing; (2) whether the offerings involve issuance of the same class of security; (3) whether the offerings are made at or about the same time; (4) whether the same type of consideration is to be received; and (5) whether the offerings are made for the same general purpose.[98]

If the offering in the United States is public, either because of integration into the larger transnational offering or because of its own scope, Securities Act liability is incurred. The simultaneous foreign offering adds several special considerations. One is the amount of the offerings to be registered with the SEC. Because of the difficulty in insulating the two markets, the securities offered abroad might be returned to the United States—especially if the offering were more successful here.[99] United States brokers reselling such shares would violate the Securities Act if the shares were unregistered.[100] If the entire offering is registered with the SEC, the foreign underwriters should be registered as underwriters.[101] However, if the foreign underwriters are included, they become liable for the accuracy of the registration statement.[102]

Foreign underwriters may also incur liability under the Exchange Act. The underwriter will be prohibited from making direct sales unless he is a registered broker-dealer under the Act.[103] Nonetheless, the SEC has not challenged unregistered foreign underwriters who purchase securities in the United States for distribution abroad or who participate in the United States in stabilizing transactions,[104] group sales to dealers and institutional investors, and transactions with other underwriters provided these acts within the United States "are effected for their account by managing underwriters who are themselves registered broker-dealers."[105]

Additionally, foreign underwriters and broker-dealers may have liability under the Exchange Act even though their transactions are conducted entirely abroad. *All* selling activities in simultaneous public offerings would be subject

---

[97]Brownell, Cohen, Heller, Loss and Stevenson, *Legal Problems of Issuing and Marketing Foreign Securities in the United States,* INTERNATIONAL FINANCINGS AND INVESTMENTS 430, 456 (J. McDaniels ed. 1964).

[98]Sec. Act. Rel. No. 33-4552 (November 6, 1962); SEC Rule 146, 17 C.F.R. 230.146 (1977).

[99]Stevenson, *supra* note 71, at 207.

[100]15 U.S.C. § 77e (1970).

[101]Stevenson, *supra* note 71, at 207.

[102]15 U.S.C. § 77k(a)(5) (1970).

[103]15 U.S.C. § 770(a)(1) (1970). Foreign broker-dealers may not be subject to this requirement if they make only occasional transactions in the United States. 2 L. LOSS, SECURITIES REGULATIONS 1291-92, n.15 (2d ed. 1961).

[104]*See* note 203 *infra.*

[105]Stevenson, *supra* note 71, at 204.

to the Act's provisions if the foreign and domestic broker-dealers acted in concert under the direction of the United States group.[106] Transactions by the foreign broker-dealers would have a definite effect on the sales of the same security in the United States.[107] Sales conduct in a foreign country deemed fraudulent or manipulative under the Exchange Act would be actionable. However, the SEC does have the power to exempt transactions from sections 10b-6, 10b-7 and 10b-8, which proscribe certain broker-dealer activities.[108] Requests for exemption are often received from those engaged in simultaneous offerings and have been granted although the activities in question were in violation of the rules.[109]

III. Application of Specific Provisions of United States Securities Laws

Securities Act of 1933

The purpose of this act is to protect potential investors by requiring disclosure from securities issuers.[110] Unless securities are first registered with the SEC, the public sale or offering for sale of such securities is unlawful.[111] Additionally, a prospectus containing information prescribed by the SEC must be delivered to every person to whom the securities are offered or sold.[112] The application of the Act's requirements to a foreign issuer varies with the issuer's character, i.e., governmental, corporate, or individual entity.

Unlike domestic government securities,[113] foreign government securities enjoy no exemption from registration. However, some special provisions have been made for foreign government issuers not available to foreign or domestic private issuers.[114] Section 6(a) provides that the registration statement of a

---

[106]Jurisdiction may exist without the presence of each of these conditions. Brownell, Cohen, Heller, Loss and Stevenson, *Legal Problems of Issuing and Marketing Foreign Securities in the United States,* INTERNATIONAL INVESTMENTS AND FINANCINGS 430, 454-55 (J. McDaniels ed. 1964).

[107]This hypothetical demonstrates both the subjective and the objective territorial principles. The effect on United States markets and investors exemplifies the basis for objective territorial jurisdiction. The acts in concert with and under the direction of the United States selling group would undoubtedly employ jurisdictional means. Therefore, jurisdiction could also be based on the subjective territorial principal. *See* Travis v. Anthes Imperial Ltd., 473 F.2d 515 (8th Cir. 1973) (Foreign defendants' communication into the United States constituted conduct therein when the mails and instrumentalities of interstate commerce were used); text accompanying notes 17-19 *supra.*

[108]*See* note 206 *infra.*

[109]Brownell, Cohen, Heller, Loss and Stevenson, *Legal Problems of Issuing and Marketing Foreign Securities in the United States,* in INTERNATIONAL INVESTMENTS AND FINANCING 430, 456 (J. McDaniels ed. 1964).

[110]D. RATNER, SECURITIES REGULATION 78 (1975).

[111]15 U.S.C. § 77e (1970).

[112]*Id.*

[113]Issues of the United States government and its subdivision are exempt from registration. 15 U.S.C. § 77c(a)(2) (1970).

[114]Cohen, *supra* note 8, at 557.

foreign government need be signed only by the underwriter.[115]

Schedule B specifies the information needed in a registration statement filed by a foreign government.[116] Disclosure must be made of the purposes of the offering, receipts and expenditures of the government, circumstances of any debt default in the past twenty years, outstanding funded and floating debt, and the terms and conditions of the offering.[117] The catch-all provision of Rule 408 requiring any additional information necessary to make the statement not misleading[118] often prompts the foreign government issuer to include such facts as the country's balance of payments, foreign trade, resources, and population.[119]

Using the authorization granted in section 7 to vary the requirements of Schedule B,[120] the SEC promulgated Rule 494.[121] This rule allows foreign government issuers to use a summary newspaper prospectus condensing the facts normally required to be set forth in detail.[122]

These are the only special provisions for foreign government issuers. No special registration form for such issuers has been adopted.[123]

A foreign corporate issuer must meet the same requirements under the Securities Act as a domestic corporation. Both use the S-1 registration form.[124] However, an additional requirement is imposed on the foreign corporate issuer. Section 6(a) requires the signature on the registration statement of a duly authorized representative of the corporation in the United States.[125]

A foreign corporate issuer may have to include special material in the prospectus to prevent it from being misleading.[126] The issuer may include important economic developments in its country which relate to the issuer's business.[127] Also generally included are brief descriptions of the effect any foreign tax or exchange control might have on the payment of interest or dividends on the securities.[128] Because of the different corporate structures used abroad, a detailed explanation of corporate management and rights of shareholders may be given.[129] Further, the SEC requires corporate issuers to

---

[115]15 U.S.C. § 77f(a) (1970).
[116]15 U.S.C. § 77aa (1970).
[117]*Id.*
[118]SEC Rule 408, 17 C.F.R. § 230.408 (1977).
[119]Cohen, *supra* note 8, at 558.
[120]15 U.S.C. § 77g (1970).
[121]SEC Rule 494, 17 C.F.R. § 230.494 (1977).
[122]A newspaper prospectus may contain a condensation of such items as the balance of payments and the statement of expenditures and receipts required to appear in detail in the statutory prospectus. *Id.*
[123]Cohen, *supra* note 8, at 558.
[124]SEC Form S-1, reprinted in 2 FED. L. REP. (CCH) ¶¶ 7 121-29 (1976).
[125]15 U.S.C. § 77f(a) (1970).
[126]SEC Rule 408, 17 C.F.R. § 230.408 (1977).
[127]Stevenson, *supra* note 71, at 206.
[128]*Id.*
[129]*Id.*

acknowledge early in the prospectus that there may be problems in both effecting service in the United States and collecting judgments by United States courts against the issuer.[130] An opinion by foreign counsel of the enforceability of Securities Act liabilities in the corporate domicile may also be required by the SEC.[131]

The additional information required of foreign corporate issuers is not the only problem they may encounter in complying with the Securities Act. Because of different accounting and managerial practices abroad, foreign corporate issuers often find some of the standard disclosure provisions troublesome.

The SEC has adamantly insisted that financial data included in registration statements and prospectuses be determined according to generally accepted accounting principles in the United States.[132] The SEC has also required that auditors be independent.[133] A foreign corporation may employ practices radically different from these standards. Depreciation may be calculated on the basis of replacement cost as opposed to historical cost.[134] Foreign auditors may forego physical verification of inventories.[135] Consolidated financial statements may be unavailable.[136] Foreign auditors may not meet the requisite standards of independence.[137]

These and other conflicts may be dealt with in three ways. First, the corporation may reclassify and restate its accounts in accordance with generally accepted accounting principles in the United States.[138] Second, explanatory footnotes may be used in the financial statements to point out any differences in the foreign accounting methods used.[139] Third, the financial statement may reveal not only the different foreign methods employed but also the effect on net income of the application of generally accepted accounting principles.[140] The problem of auditor independence may at times be cured only by the employment of new auditors.[141]

Foreign issuers are often hesitant to make the full disclosure of corporate affairs required by the Securities Act.[142] One source of great consternation is the required disclosure of total managerial compensation and of salaries paid to

---

[130] *Id.* at 207.
[131] *Id.*
[132] *Id.* at 208.
[133] *Id.*
[134] *Id.* at 209.
[135] *Id.*
[136] *Id.*
[137] Cohen, *supra* note 8, at 564.
[138] *Id.* at 565.
[139] *Id.*
[140] Stevenson, *supra* note 71, at 209.
[141] *Id.* at 208.
[142] Cohen, *supra* note 8, at 563.

all directors and the three highest paid officers in excess of $40,000.[143] Neither the securities laws nor the corporate laws of most countries mandate salary disclosure.[144] Another troublesome disclosure item is that of sales according to the lines of business of both the registrant and its subsidiaries for each line which accounts for 10 percent or more of the consolidated gross sales.[145] Many foreign issuers feel such disclosures put them at a competitive disadvantage.[146] Financial statements may also be a source of disclosure problems. Because of the power of stockholders under some foreign laws to declare dividends, management may have large hidden reserves which they are hesitant to reveal.[147] The need for making these disclosures under the SEC's policy of equal treatment for foreign and domestic issuers may militate against a public offering in the United States.

Even after a foreign corporate issuer satisfies the requirements of the Securities Act for his initial issuance, further problems in compliance with the Act may arise. It is customary in some foreign countries for corporations to make frequent rights offerings[148] to their shareholders.[149] However, under the terms of the Securities Act such an offering to United States shareholders would be illegal without registration.[150]

A rights offering poses problems for the shareholder as well. Because ordinary shares are often in bearer form, the only notice of a rights offering may be in foreign publications unavailable in the United States.[151] However, if the securities certificates are held by a custodian, such as a bank or a broker-dealer, the custodian may be aware of the offering and give notice to individual shareholders.[152] If a shareholder fails to exercise these rights, he risks a significant dilution in his investment and may incur "an immediate and

---

[143]SEC Form S-1, Item 17(a)(1), reprinted in 2 FED. SEC. L. REP. (CCH) ¶ 7 123 (1976).

[144]Brownell, Cohen, Heller, Loss and Stevenson, *Legal Problems of Issuing and Marketing Foreign Securities in the United States,* INTERNATIONAL INVESTMENTS AND FINANCINGS 430, 440 (J. McDaniels ed. 1964). The SEC often compromises on this point, requiring disclosure of only the aggregate compensation of officers and directors. *Id.* at 441.

[145]SEC Form S-1, Item 9(b)(1), reprinted in FED. SEC. L. REP. (CCH) ¶ 7 123 (1976).

[146]Brownell, Cohen, Heller, Loss and Stevenson, *Legal Problems of Issuing and Marketing Foreign Securities in the United States,* in INTERNATIONAL INVESTMENTS AND FINANCINGS 430, 441 (J. McDaniels ed. 1964).

[147]Cohen, *supra* note 8, at 564.

[148]In a rights offering "an issuer grants to its stockholders, or holders of debt securities convertible into stock, rights to subscribe to new equity securities of the issuer." Cohen, *supra* note 8, at 520. The subscription price in a rights offering may be substantially below the current market price in many cases. *Id.* at 560.

[149]In Japan many companies rely on frequent rights offerings to raise working capital because of the practice of disbursing almost all earnings and dividends. In other countries such as England, the law may require corporations to offer their shareholders a preemptive right to new issues. Cohen, *supra* note 8, at 560.

[150]*Id.*

[151]*Id.* at 560-61.

[152]*Id.* at 561.

calculable loss in the value of (his) holdings."[153]

Many foreign issuers do register their rights offerings in compliance with the Securities Act. However, the SEC has not objected to the sale abroad of rights offered to United States shareholders without registration.[154] Further, it has announced that it will not challenge the purchase of rights by broker-dealers from shareholders for sale abroad.[155]

An ADR issuer[156] must also comply with the requirements of the Securities Act. If the underlying foreign security need not be registered,[157] the ADR issuer may use a simplified registration statement, Form S-12.[158] This form requires the title of the ADRs, the names of the issuer and the depository, and the approximate date of availability.[159] The issuer must also agree to inform the SEC semiannually of the number of ADRs issued and to file all its public reports with the SEC.[160] If this simplified registration process is used, a prospectus need not be delivered to purchasers.[161]

Because of problems in acquiring personal jurisdiction, the SEC has few effective sanctions against foreign issuers who fail to comply with the Securities Act.[162] However, the SEC does promulgate a list of foreign companies whose securities have been and may still be the subject of distribution or sale within the United States in violation of the registration requirements of the Securities Act.[163] This is known as the Foreign Restricted List.[164] The SEC has imposed on brokers and dealers a duty to "satisfy themselves that any such security (on the Foreign Restricted List) purchased by them for resale, or acquired in the execution as broker of a customer's order, is not in fact part of an unlawful offering or distribution."[165]

---

[153]*Id.* at 560.

[154]*Id.* at 561.

[155]Sec. Act Rel. No. 33-3266 (November 25, 1947).

[156]The SEC has concluded that the ADR bank responsible for issuing the ADR is not the ADR issuer for purposes of the Securities Act. Because § 3(a)(2) of the Act exempts "any security issued or guaranteed by any bank," 15 U.S.C. § 77c(a)(2), the SEC has determined that the "entity created by the agreement for the issuance of American Depositary Receipts . . . (is) deemed to be the issuer of the American Depositary Receipts for all purposes . . . of the Act." 17 C.F.R. § 239.9(b) (1977). The ADR registration may not satisfy the Securities Act obligations of an arbitrager dealing in ADRs. Tomlinson, *supra* note 41, at 474-76.

[157]A registration covering both the ADR and the underlying foreign shares must be made when there is a public offering of the underlying shares as part of a primary or secondary distribution. Cohen, *supra* note 8, at 583.

[158]17 C.F.R. § 239.19(a) (1977); New Zealand Petroleum Co., Ltd. (1970-71 Transfer Binder) FED. SEC. L. REP. (CCH) ¶ 78166 (1971).

[159]SEC Form S-12, reprinted in 2 FED. SEC. L. REP. (CCH) ¶¶ 7253-56 (1972).

[160]*Id.* at ¶ 7254.

[161]SEC Rule 174, 17 C.F.R. § 230.174 (1976).

[162]*See* text accompanying note 130 *supra.*

[163]Williams, *Trading in the United States in Foreign Securities and Securities Distributed Outside the United States Without Registration Under United States Securities Act,* in SIXTH ANNUAL INSTITUTE ON SECURITIES REGULATION 275, 287 (PLI Corp. L. Handbook No. 161, 1974).

[164]*Id.*

[165]Foreign Restricted List, reprinted in 1 FED. SEC. L. REP. (CCH) ¶ 3060 (1976).

Securities Exchange Act of 1934

The Securities Exchange Act of 1934 extended federal regulation to trading in securities which are already issued and outstanding. The purpose of the Act was to prevent fraudulent and manipulative devices in the sale of these securities.[166] Unlike the Securities Act, which relies mainly on the regulatory provision of registration, the Exchange Act embodies several distinct remedial provisions, focused on the various participants in the securities trading process.

One of the basic requirements of the Exchange Act is registration with the SEC as in the Securities Act. However, this registration requires different information and is triggered by different events than that of the Securities Act.

The initial registration provision of the Exchange Act was section 12(b).[167] This section requires registration of any class of securities traded on a United States stock exchange.[168] The Securities Acts Amendments of 1964[169] added a second condition precedent to registration of a class of securities. Section 12(g) requires registration if the issuer has assets exceeding $1,000,000 in value and a class of equity securities held by at least 500 persons.[170] Foreign issuers with 500 shareholders and the requisite assets have no duty to register unless 300 of the shareholders are residents of the United States.[171]

Although foreign issuers have an absolute duty to register securities listed on an exchange, foreign issuers may be exempted from registration based on the amount of their assets and the number of shareholders.[172] Congress authorized the SEC to excuse a foreign issuer from compliance with section 12(g) if "such exemption is in the public interest and is consistent with the protection of investors."[173] The SEC has exempted foreign issuers that send the SEC the following documents: those required by the law of the issuer's place of incorporation to be made public, those filed with any stock exchange, and those

---

[166] *See* H.R. REP. NO. 85, 73d Cong., 1st Sess. 1-5 (1934); S. REP. NO. 792, 73d Cong., 2d Sess. 1-5 (1934).

[167] 15 U.S.C. § 781(b) (1970).

[168] *Id.*

[169] 15 U.S.C. §§ 77b-77h, 78c-78s (1970).

[170] 15 U.S.C. § 781(g) (1970).

[171] SEC Rule 12g3-2(a)(1), 17 C.F.R. § 240.12g3-2(a)(1) (1977). Holders of ADRs are calculated as holders of the underlying security for purposes of section 12(g). SEC Rule 12g5-1(b), 17 C.F.R. —§ 240.12g5-1(b) (1977).

The lower minimum for foreign issuers has been criticized as discriminatory. *Cf.* Buxbaum, *Securities Regulation and the Foreign Issuer Exemption: A Study in the Process of Accommodating Foreign Interests,* 54 CORNELL L.R. 358, 363 n.16 (1969). It is based on § 12(g)(4) which maintains reporting responsibility for a domestic issuer that has once met the 500 shareholder criterion until that issuer's number of shareholder's drops below 300. 15 U.S.C. § 781(g)(4) (1970).

[172] 15 U.S.C. § 781(g)(3) (1970).

[173] *Id.* The original legislative draft of § 12(g) automatically excluded foreign issuers unless the SEC felt they should be included. Tomlinson, *supra* note 32, at 479 n.83. However, the House amended the proposal to provide automatic coverage of foreign issuers unless the SEC decided to exempt them. H.R. REP. NO. 1418, 88th Cong., 2d Sess. 11 (1964).

mailed to the issuer's shareholders.[174] These requirements are narrowed further by excusing remittance of documents unrelated to "that about which investors need not be informed."[175]

However, this exemption is unavailable to foreign issuers meeting any of the following conditions: (1) United States residents hold more than 50 percent of the outstanding voting securities either directly or in the form of ADRs;[176] (2) the issuer's business is administered chiefly in the United States;[177] (3) United States residents compose 50 percent or more of the board of directors;[178] (4) the same or another class of the issuer's securities is registered under section 12;[179] (5) the security was registered earlier pursuant to the Securities Act;[180] or (6) the security was delisted from a national securities exchange.[181]

The SEC has devised special forms for foreign issuers that are required to register under the Exchange Act. Foreign governments and political subdivisions must complete Form 18.[182] Information must be provided on the issuer's ordinary and extraordinary receipts and expenditures, exchange controls, central bank reserve, and funded debt. The last fiscal year's exports and imports and balance of payments must be stated in addition to data on the security itself.[183]

Foreign corporate issuers must register their securities on a Form 20.[184] Besides information on the security itself, information is required about the issuer's organization, business history, employees, main installations, capital and financial structure.[185] Additional data is needed on the laws of the issuer's country of incorporation concerning exchange controls, restrictions on the payment of dividends to or the voting or holding of securities by aliens.[186]

---

[174]SEC Rule 12g3-2(b)(1), 17 C.F.R. § 240.12g3-2(b)(1) (1977). No document sent to the SEC pursuant to this exemption is deemed to be "filed" with the SEC as "filing" is used for a trigger to civil liability in § 18 of the Exchange Act. SEC Rule 12g3-2(b)(4), 17 C.F.R. § 240.12g3-2(b)(4) (1977). Sec. Ex. Act Rel. No. 34-8628 (June 16, 1969), *as rev.* Dec. 1971).

[175]SEC Rule 12g3-2(b)(3), 17 C.F.R. § 240.12g3-2(b)(3) (1977); Sec. Ex. Act. Rel. No. 34-8628 (June 16, 1969, *as rev.* Dec. 1971). Current regulations do not require that these documents be submitted in English although the SEC is considering a requirement that documents submitted pursuant to § 12(g) or its exemption be translated into English. Hovdesven, *Applicability of the Securities Exchange Act to Foreign Issuers,* in SIXTH ANNUAL INSTITUTE ON SECURITIES REGULATIONS 353, 358 (R. Mundheim, J. Schupper, J. Jewett and J. Thompson eds. 1975).

[176]SEC Rule 12g3-2(e), 17 C.F.R. 240.12g3-2(e) (1977).

[177]*Id.*

[178]*Id.*

[179]SEC Rule 12g3-2(f), 17 C.F.R. § 240.12g3-2(f) (1977).

[180]SEC Rule 12g3-2(f), 17 C.F.R. § 240.12g3-2(f) (1977).

[181]*Id.*

[182]SEC Form 18, reprinted in 3 FED. SEC. L. REP. (CCH) ¶¶ 29201-05 (1972).

[183]*Id.*

[184]17 C.F.R. § 249.220 (1977). Form 20 is less detailed than the form used by domestic corporate issuers, Form 10. *Comp.* SEC Form 20, reprinted in 3 FED. SEC. L. REP. (CCH) ¶¶ 29622-26 (1972) *with* SEC Form 10, reprinted in 3 FED. SEC. L. REP. (CCH) ¶¶ 27301-06 (1976). Foreign North American and Cuban issuers may have to complete Form 10 under certain circumstances. 17 C.F.R. 249.220 (1977).

[185]SEC Form 20, reprinted in 3 FED. SEC. L. REP. (CCH) ¶¶ 29622-26 (1972).

[186]*Id.*

In addition to registration a significant provision of the Exchange Act is that of continuing reporting under sections 13 and 15(d).[187] The reporting requirements set out in those sections must be met by foreign issuers having a class of securities registered under section 12 of the Exchange Act or a class of securities outstanding with at least 300 shareholders that was originally sold in the United States pursuant to registration under the Securities Act.[188] Those foreign issuers that made only minimal disclosures pursuant to the 12(g) exemption are not considered to have registered a class of securities under section 12.[189]

Foreign issuers required to report do not have to do so as extensively as domestic issuers.[190] An annual report on the financial status of the issuer is required.[191] Additionally, episodic reports must be made of any material information about the issuer, its domicile and its country of incorporation, or about a foreign exchange.[192] Foreign issuers are held to the same standard as domestic issuers as to the required reporting of any change of five percent or more in the total number of shares outstanding if the issuer has over-the-counter securities quoted on the National Association of Securities Dealers Automated Quotation System.[193]

The Exchange Act also regulates particular activities that are especially susceptible to fraud and manipulation. There are extensive provisions covering proxy and tender offer solicitations (section 14)[194] as well as insider trading (section 16).[195] With the exception of some North American and Cuban issuers, foreign issuers are exempt from the terms of these sections.[196]

Among the other fraudulent activities addressed by the Act is making false statements in documents filed with the SEC pursuant to the Act's reporting provisions. Section 18 creates a cause of action for a purchaser or seller defrauded by such misstatements.[197] However, documents tendered under the 12(g) exemption are not deemed to be filed with the SEC. Therefore, foreign issuers qualifying for the exemption escape civil liability under section 18.[198]

---

[187]15 U.S.C. § 78m, 78o(d) (1970).

[188]*Id.*

[189]Tomlinson, *supra* note 41, at 481.

[190]SEC Rule 13(a)-16, 17 C.F.R. § 240.13(a)-16 (1977).

[191]17 C.F.R. § 249.3920 (1977).

[192]SEC Rule 13(a)-16, 17 C.F.R. § 240.13(a)-16 (1977). All documents required by § 13 must be in English or be accompanied by an English translation. SEC Rule 12(b)-2(d), 17 C.F.R. § 240.12(b)-12(d) (1977).

[193]This system, known as NASDAQ, is a computer link providing "exact instantaneous retail price quotations of all dealers who make markets in important over-the-counter stocks." L. ENGEL, HOW TO BUY STOCKS 114 (5th ed. 1972). The reporting requirement triggered by a 5% increase or decrease is promulgated in SEC Rule 13a-7(a), 17 C.F.R. § 240.13a-7(a) (1974).

[194]15 U.S.C. § 78n (1970).

[195]15 U.S.C. § 78p (1970).

[196]SEC Rule 3(a)12-3(b), 17 C.F.R. § 240.3a12-3(b) (1977).

[197]15 U.S.C. § 78r (1970).

[198]*See* note 174 *supra.*

Another practice detrimental to investors that is regulated by the Exchange Act is market manipulation. Although manipulative devices are treated throughout the Act, Rules 10b-6,[199] 10b-7,[200] and 10b-8[201] are significant in the context of foreign securities. These rules proscribe respectively trading by persons interested in a distribution,[202] market stabilization to facilitate distribution,[203] and various deceptive acts during a rights offering.[204] Potential liability under these rules arises often in simultaneous foreign and United States distribution.[205] The SEC has the power to exempt transactions not within the purposes of these rules and has received many requests for exemptions in connection with offerings of foreign securities.[206] In granting exemptions, the SEC considers such factors as "the amount of trading activity in the United States, the location of the principal markets, the nature of the distribution, the proposed market activities of United States and European underwriters, and the differences in trading hours between the United States and foreign markets."[207]

The responsibilities of an ADR issuing bank under the Exchange Act are simple. A registration statement is required only if the ADRs are listed on a national securities exchange.[208] Since ADR holders are calculated as holders of the underlying security for purposes of section 12(g), the ADR issuing bank is exempt from the registration requirements of 12(g).[209] If a registration statement is required, the foreign issuer of the underlying shares must complete part of the form unless the underlying securities are already registered on the same exchange.[210] Similarly, an ADR issuing bank must make annual reports

---

[199]SEC Rule 10b-6, 17 C.F.R. § 240.10b-6 (1977).

[200]SEC Rule 10b-7, 17 C.F.R. § 240.10b-7 (1977).

[201]SEC Rule 10b-8, 17 C.F.R. § 240.10b-8 (1977).

[202]SEC Rule 10b-6, 17 C.F.R. § 240.10b-6 (1977).

[203]SEC Rule 10b-7, 17 C.F.R. § 240.10b-7 (1977). Stabilization is the "manipulation by the underwriters of a new issue designed to prevent the market price of a security from dropping below the public offering price until the entire issue is sold." N. MOORE, DICTIONARY OF BUSINESS, FINANCE, AND INVESTMENT 413 (1975).

[204]SEC Rule 10b-8, 17 C.F.R. § 240.10b-8 (1977) The prohibitions include: No more than one bid to purchase rights shall be maintained in any one market at the same price at the same time, no bid for rights shall be made until an independent market for such rights has been established, and purchases of rights shall be limited to those necessary to acquire the securities which the sole distributor, or the members of the syndicate or group have previously sold and reasonably expect to sell within five days after the expiration of the rights. *Id.*

[205]Cohen, *supra* note 8, at 471-721.

[206]*Id.* at 570.

[207]*Id.* at 571.

[208]17 C.F.R. §249.219 (1977). Note that for purpose of the Exchange Act the issuer of an ADR is the depositary bank. 15 U.S.C. §78c(8) (1970). *But see* note 156 *supra* for treatment of the depositary bank under the Securities Act.

[209]SEC Rule 12g5-1(b), 17 C.F.R. §240.12g5-1(b) (1977).

[210]*See* Instruction Book for Form 19, reprinted in 3 FED. SEC. L. REP. (CCH) ¶¶29408-12 (1972). It is unusual for a foreign issuer to initiate the creation of an ADR—to "sponsor" the ADR. Over 90% of all new ADRs issued are not sponsored. FORBES, Oct. 15, 1972, at 86. The foreign issuer does not play an active role in the creation of unsponsored ADRs and may, in fact, oppose the

only on ADRs listed on a national exchange.[211] The cooperation of the foreign issuer is again required to complete part of the annual report unless the underlying security is registered pursuant to the Exchange Act.[212]

The Exchange Act also imposes duties on broker-dealers. Some of these responsibilities become especially burdensome when foreign securities are involved. Before recommending a security, a broker-dealer must ascertain the stock's suitability for a particular customer. The broker-dealer should consider the investor's financial status and investment goals.[213] Special suitability problems occur with foreign securities. If the security is in the form of an ADR, dividends will be not only delayed,[214] but also diminished by the issuing bank's collection fee.[215] An additional drawback to foreign securities is the monetary fluctuation involved in transnational securities sales. Foreign securities may not be suitable for those seeking stable, high-yield investments.

The broker-dealer's decision to recommend a security cannot be based on consideration of these factors in the abstract, but must have a reasonable basis in fact.[216] The research required of brokers to evolve such a basis becomes more thorough when the security is not registered under the Securities Act, as is the case with many foreign securities.[217] To deal with this problem many large brokerage houses maintain international departments, which provide financial information on the foreign corporations whose securities are handled by the firm.[218]

The responsibilities imposed on broker-dealers have been seen by the SEC as a potential source of enforcement for the Exchange Act's registration provisions. The SEC has indicated an intent to publish a list of foreign issuers that seemed to be subject to section 12(g) registration but had not registered or received an exemption.[219] This list was to be employed by broker-dealers in deciding which securities to recommend.[220] However, the Commission has not yet published such a list.[221]

---

creation of ADRs. Tomlinson, *supra* note 41, at 468 n.25. Unsponsored ADRs may not be listed on a United States exchange. *Id.* at 469 n.34.

[211] *See* SEC Form 19k, reprinted in 3 FED. SEC. L. REP. (CCH) ¶¶32101-03 (1964).

[212] Tomlinson, *supra* note 41, at 483.

[213] SEC Rule 15b10-3, 17 C.F.R. §240.15b10-3 (1977).

[214] *See* text accompanying note 60 *supra.*

[215] *See* text accompanying note 57 *supra.*

[216] *See* Hanly v. SEC, 415 F.2d 589, 597 (2d Cir. 1969); Sec. Ex. Act Rel. Nos. 34-9239 & 33-5168 (July 1, 1971), reprinted in 2 FED. SEC. L. REP. (CCH) ¶22760 (1973); Sec. Ex. Act Rel. No. 34-6721 & 33-4445 (Fed. 2, 1962), reprinted in 2 FED. SEC. L. REP. (CCH) ¶22753 (1969).

[217] *See generally* Jacobs, *The Impact of Securities Exchange Act Rule 10b-5 on Broker-Dealers,* 57 CORNELL L. REV. 869, 889 (1972).

[218] Tomlinson, *supra* note 41, at 486.

[219] Sec. Ex. Act Rel. No. 34-8066 (April 28, 1967), reprinted in (1966-67 Transfer Binder) FED. SEC. L. REP. 77443.

[220] *Id.*

[221] Williams, *Trading in the United States in Foreign Securities and Securities Distributed Outside the United States Without Registration under United States Securities Act,* SIXTH ANNUAL IN-

Trust Indenture Act of 1939

The purpose of this Act is to insure continuing disclosure from the time of issuance to holders of debt securities and to assure that the security holders will have the services of a competent and disinterested indenture trustee.[222] The Act approaches securities issued by foreign government issuers differently than foreign corporate issuers. Section 304(6)[223] exempts from the indenture qualification requirements of section 305[224] "any note, bond, debenture or evidence of indebtedness issued or guaranteed by a foreign government or by a subdivision, department, municipality agency or instrumentality thereof."[225] However, Congress left exemptions for foreign corporate issuers from any of the Act's provisions to the discretion of the SEC. Under Section 304(d) the SEC may exempt securities of a foreign corporation if compliance is neither needed to protect investors nor in the public interest.[226]

Investment Company Act of 1940

This Act was designed to register and regulate investment companies in hopes of fostering honest management[227] and greater participation in management by shareholders.[228] The capital structure and accounting of finance companies are also regulated.[229] The Investment Company Act poses two problems in the context of foreign securities. The first is the possibility of registration of foreign investment companies. While prohibiting foreign investment companies from using jurisdictional means[230] to sell their securities, the Act conditions registration of foreign investment companies on a finding by the SEC that it is "legally and practically feasible" to enforce the provisions of the Act against the issuer.[231]

STITUTE ON SECURITIES REGULATION 275, 284 (PLI Corp. L. Handbook No. 161, 1974).

[222]An SEC report describes an indenture trustee's duties and characters as:

> Under modern trust indentures securing issues of corporate bonds, debentures, and notes, important powers are vested in the trustee. The security holders themselves are generally widely scattered and their individual interest in the issue is likely to be small. The trustee, on the other hand, is usually a single bank. By virtue of the broad discretionary powers vested in it under the typical trust indenture it is in a position to take immediate action in a variety of ways to protect or enforce the security underlying the bonds, debentures and notes.

6 SEC WORK ACTIVITIES, PERSONNEL AND FUNCTIONS OF PROTECTIVE AND REORGANIZATION COMM. REPORT 2 (1936).

For a statement of the purposes of the Trust Indenture Act *see* 2 L. LOSS, SECURITIES REGULATION 725 (2d ed. 1961).

[223]15 U.S.C. §77ddd(6) (1970)

[224]15 U.S.C. §77eee (1970).

[225]*Id.*

[226]15 U.S.C. §77ddd(d) (1970).

[227]1 L. LOSS, SECURITIES REGULATIONS 144 (2d ed. 1961).

[228]*Id.* at 144-151.

[229]*Id.* at 151-55.

[230]*See* text accompanying notes 35-37 *supra.*

[231]15 U.S.C. §80a-7(d) (1970). The SEC has promulgated Rule 7d-1, 17 C.F.R. §270.7d-1 (1977), which specifies the conditions under which Canadian investment companies may register.

The second problem is with domestic investment companies engaging largely in foreign securities transactions. There may be concern over the nonresidence of officers, directors and the investment adviser.[232] This difficulty has been overcome by consent of the individuals to jurisdiction of United States courts to enforce securities laws' liabilities for their investment company activities.[233] Another problem encountered by domestic investment companies with foreign holdings is the conflict between keeping the securities in the area of their principal trading market and storing the securities with banks in that area which meet the Act's requirements for securities custodians.[234] The SEC has granted an exemption to the custodial requirements and will allow a foreign bank to act as agent of a United States bank meeting the Act's requirements.[235]

State Securities Regulations

The securities law of each state may impose requirements on the foreign issuer. The Uniform Securities Act will be analyzed as representative of state securities legislation. The Act applies to securities offered or sold within the state.[236] Under Section 402(2) certain foreign securities are exempt from the basic requirements of the Act.[237] Securities issued by Canada, a Canadian province, or a province's political subdivisions or any other foreign government with which the United States maintains foreign relations are exempt from the registration[238] and prospectus filing[239] requirements. No similar exemption exists for foreign corporate issuers.[240]

Effect of Federal Regulations on United States Foreign Securities Holders

A holder of foreign securities in the United States may be prejudiced rather than protected by the workings of federal securities legislation. The

---

It also provides that investment companies incorporated in other countries will be considered for registration. The SEC staff has indicated that investment companies incorporated in nations not sharing the common law tradition may be scrutinized more thoroughly. In addition to Canadian investment companies, companies based in South Africa, Australia, Bermuda, and England have qualified under Rule 7d-1. Carlson, *Applicability of Investment Company Act of 1940 and Other Federal Securities Laws to Multi-National Investment Companies,* in INTERNATIONAL SECURITIES REGULATIONS 332-35 (H. Dale ed. 1973).

[232]Cohen, *supra* note 8, at 590.

[233]*Id.*

[234]15 U.S.C. §80a-17(f) (1970).

[235]*See, e.g.,* Eurofund, Inc., Invest. Co. Act. Rel. No. 2980 (March 1, 1960) and 3567 (November 2, 1962).

[236]UNIFORM SECURITIES ACT §414.

[237]*Id.* at §402 (2).

[238]*Id.* at §301.

[239]*Id.* at §403.

[240]A foreign corporate issue may be able to qualify for one of the Act's other exemptions such as that in §402(a)(8) for securities listed on the New York Stock Exchange, the American Stock Exchange, or the Midwest Stock Exchange. *Id.* at 402(a)(8).

shareholder may be hindered in his efforts to preserve his pro-rata interest in the company by exercising warrants or subscription rights or by electing a stock dividend in lieu of cash.

A foreign issuer would have to comply with the registration requirements of the Securities Act before it could make its stock available to United States shareholders through one of these devices.[241] Because of the expense registration entails, foreign issuers do not allow United States shareholders to elect a stock dividend.[242] United States holders of ordinary shares may not receive warrants or subscription rights or, if they do, the documents bear a legend prohibiting their exercise.[243] ADR holders may benefit monetarily from warrants and subscription rights since the SEC does allow the ADR depositary bank to sell the rights overseas.[244] However, regardless of the form of their securities, United States shareholders must buy stock on the market and pay brokerage commissions to maintain their pro-rata interest in the company.

Securities offered by the acquiring company in a stock for stock tender offer[245] must be registered under the Securities Act.[246] The expense of this registration militates against the inclusion of United States shareholders in a tender offer, especially if they are few in number and incidental to successful acquisition.[247] Excluded shareholders lose the price premium offered by the acquiring company during a take-over bid.[248] Once the bid is completed the trading market for shares of United may disappear or will at least be significantly thinner.[249]

Foreign companies attempting all stock for stock or stock for assets combination mergers face complex problems under United States securities laws.[250] The problem most acutely affecting United States shareholders is the requirement of Securities Act registration prior to solicitation of shareholder votes on

---

[241]Registration would not be required if the subscription rights and warrants were issued for no consideration. 15 U.S.C. §77b(1), 773 (1970). As to the registration requirements for stock dividends *see* Sec. Act Rel. No. 33-929 (July 29, 1936), reprinted in 1 FED. SEC. L. REP. (CCH) ¶1121 (1973).

[242]*See,* Morgan Guaranty Trust Co. (1974-75 Transfer Binder) FED. SEC. L. REP. (CCH) ¶80075 (1974).

[243]Tomlinson, *supra* note 41, at 490.

[244]Sec. Act Rel. No. 33-3266 (November 25, 1947); *See* note 51 *supra.*

[245]A tender offer is "a request submitted to stockholders of a certain company by one party wishing to purchase a large portion of that stock. Usually it is an attempt to gain controlling interest of the company. The request is announced publicly and usually offers to purchase the stock at a price substantially higher than the existing market price. The shareholders are being asked to tender, or submit, their stock to be purchased by the principal making the request." N. MOORE, DICTIONARY OF BUSINESS, FINANCE AND INVESTMENT 497-98 (1975).

[246]Tomlinson, *supra* note 41, at 492. The exemption granted foreign issuers from the Exchange Act provisions regulating tender offers (§14) does not extend to the Securities Act registration provisions (§5) for the securities to be used in the tender offer. *See* text accompanying note 194 *supra.*

[247]*See, e.g.,* Travis v. Anthes Imperial, Ltd., 473 F.2d 515, 519 (8th Cir. 1973).

[248]Tomlinson, *supra* note 41, at 493 n.140.

[249]*Id.*

[250]*Id.* at 493-94.

the merger.[251] Foreign corporations with few United States shareholders may forego soliciting their votes rather than undertake the expense of registration.[252] The shareholder effectively loses his voice in this crucial corporate decision.

VI. Conclusion

The complexities of foreign securities transactions arise from adaptations of trading mediums and mechanics to accommodate the foreign character of the security. Imposition of haphazard federal regulations on this trading scheme may only harm the United States shareholders. This danger arises from the application of provisions originally designed for domestic issues[253] to foreign issues. Additionally, the expense of complying with provisions designed for United States corporations may serve as a disincentive for smaller foreign issuers to raise capital in this country. When exemptions from the regulations are possible for foreign securities, the possibility is often left to the unpredictable discretion of the SEC.[254] The role of the United States as an international capital market mandates a thorough revision of federal securities laws to better accommodate the interests of both foreign issuers and United States holders of foreign securities.

[251]SEC Rule 145, 17 C.F.R. §240.145 (1977).

[252]Tomlinson, *supra* note 41, at 493. The federal regulations may detrimentally affect the foreign issuer as well as the United States shareholder. A foreign issuer who chooses to avoid the expense of registration and foregoes including American shareholders in a stock for stock merger may be open to Rule 10b-5 liability under the Exchange Act. SEC Rule 10b-5, 17 C.F.R. 240.10b-5 (1977). *See* Tomlinson, *supra* note 41, at 494-96.

[253]The Securities Acts were drafted in response to the collapse of the market in 1929 and the subsequent depression. There is little doubt that Congress directed the regulations at domestic issuers. *See* Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 993 (2d Cir. 1975); Comment, *Subject Matter Jurisdiction in Transnational Securities Fraud Cases,* 17 B.C. INDUS. & COMM. L. R. 413, 419 (1976).

[254]*See, e.g.,* 15 U.S.C. §781(g) (1970).