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Regulation S - Securities Offerings outside the United States

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Regulation S - Securities Offerings outside the United States

Cover Page Footnote

International Law; Commercial Law; Law

Regulation S — Securities Offerings Outside the United States

Guy P. Lander[†]

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I. Introduction

Since its adoption in 1990, Regulation S¹ has become both well known and controversial. Regulation S is used in a wide variety of transactions, ranging from project and real estate financings to sales of equity securities in private and public offerings. Because of its usefulness, Regulation S has been the focus of great interest. But, its usefulness coupled with its complexity has also led to its misunderstanding and abuse.²

Regulation S is a series of rules that clarify when securities offered outside the United States need not be registered with the Securities and Exchange Commission (SEC).³ Regulation S provides that any offer or sale that occurs within the United States is subject to the registration requirement of section 5 of the Securities Act and that any offer or sale that occurs outside the United States is not subject to section 5.⁴ The regulation also provides two safe harbors,⁵ and offers and sales that comply with the conditions of either safe harbor will be deemed to occur outside the United States and will not be subject to the registration requirement of section 5.⁶

Consequently, Regulation S affects all offerings of U.S. securities that are conducted abroad. Before its adoption, these offerings were governed by a release issued in 1964 and numerous no-action letters.⁷ To modernize this area of the law, and to make it more accessible to practitioners, Regulation S was adopted. Regulation S was created with large, publicly-held companies in mind.⁸ Large companies, like General Motors, for example, regularly conduct offerings abroad, their

¹ Securities Act Rules 901-904, 17 C.F.R. §§ 230.901-904 (1995) [hereinafter Regulation S]. Proposed in Offshore Offers and Sales, Securities Act Release No. 6779, [1987-1988 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,242 (June 10, 1988) [hereinafter Proposing Release]; repropoed in Offshore Offers and Sales, Securities Act Release No. 6838, [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,426 (July 11, 1989) [hereinafter Reproposing Release]; adopted in Offshore Offers and Sales, Securities Act Release No. 6863, [1989-1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,524 (April 24, 1990) [hereinafter Adopting Release].

² For a discussion of some of these abuses, see *infra* part III.E.5.

³ See Adopting Release, *supra* note 1, at 80,661.

⁴ *Id.*; see Securities Act Rule 901, 17 C.F.R. § 230.901 (1995).

⁵ Adopting Release, *supra* note 1, at 80,661, 80,663.

⁶ *Id.* at 80,661-62, 80,663.

⁷ *Id.* at 80,664; Proposing Release, *supra* note 1, at 89,124 & n.8.

⁸ Laurie P. Cohen, *Rules Permitting Offshore Stock Yields Deals that Spark SEC Concerns*, WALL ST. J., Apr. 26, 1994, at C1.

securities trade in more than one market, and arbitrage between markets is considered desirable. When contemplating its adoption, the SEC believed that if a regular reporting company (particularly one of these large companies) conducted an offering abroad, and the securities flowed back into the U.S. markets, no harm would result.⁹ The SEC reasoned that because these companies are reporting regularly under the securities laws, they are in effect providing the markets with the same information that an investor would have received if a registration statement had accompanied the offering.¹⁰ Consequently, U.S. investors would be adequately protected if shares offered abroad flowed back into the U.S. markets.¹¹

However, theory and reality have parted. Now Regulation S is also being used by small over-the-counter companies, which have a greater need for financing than large companies. If small companies can avoid SEC registration and obtain money faster and cheaper abroad for that reason, they will do so. Regulation S has been controversial because this consequence was unintended by the SEC. Furthermore, the SEC believes that certain abusive practices, purportedly relying on Regulation S, have developed.¹² Consequently, some uncertainty has surrounded the regulation's use. This Article is intended to provide a detailed explanation of the regulation in an effort to make it more accessible.

II. Historical Background: Release 4708

When read literally, the registration requirement of section 5 of the Securities Act applies to any offer or sale of a security involving the use of the U.S. mails or "any means or instruments of transportation or communication in interstate commerce."¹³ "Interstate commerce" is defined to include trade or commerce in securities and related communications, between the United States and any foreign country.¹⁴ As a result, unless a specific exemption is present, the registration requirement of the Securities Act could be interpreted to extend to securities offerings conducted primarily outside the United States, but with only superficial contacts to the United States, e.g., telephone

⁹ Adopting Release, *supra* note 1, at 80,675; Proposing Release, *supra* note 1, at 89,136; Samuel Wolff, *Offshore Distributions Under the Securities Act of 1933: An Analysis of Regulation S*, 23 LAW & POLY INT'L BUS. 101, 114 (1992).

¹⁰ Adopting Release, *supra* note 1, at 80,675; Proposing Release, *supra* note 1, at 89,136; Wolff, *supra* note 9, at 114.

¹¹ Adopting Release, *supra* note 1, at 80,675; Proposing Release, *supra* note 1, at 89,136; Wolff, *supra* note 9, at 114.

¹² Problematic Practices Under Regulation S, Securities Act Release No. 7190, 1 Fed. Sec. L. Rep. (CCH) ¶ 3059C (June 27, 1995) [hereinafter Problematic Practices Release].

¹³ Securities Act of 1933 § 5(a)(1), 15 U.S.C. § 77e(a)(1); Adopting Release, *supra* note 1, at 80,664.

¹⁴ Securities Act § 2(7), 15 U.S.C. § 77b(7).

calls, or a letter to or from the United States.

Historically, the SEC has recognized that offerings with only "incidental jurisdictional contacts" should not be required to be registered.¹⁵ In 1964, the SEC issued Securities Act Release No. 33-4708 (Release 4708), which set forth its views on whether the registration requirement of section 5 of the Securities Act applies to offerings of securities by U.S. issuers outside the United States to foreign purchasers.¹⁶ Release 4708 stated the following:

[T]he Commission has traditionally taken the position that the registration requirements of section 5 of the Act are primarily intended to protect American investors. Accordingly, the Commission has not taken any action for failure to register securities of United States corporations distributed abroad to foreign nationals, even though use of jurisdictional means may be involved in the offering. It is assumed in these situations that the distribution is to be effected in a manner which will result in the securities coming to rest abroad [I]t is immaterial whether the offering originates from within or outside the United States, whether domestic or foreign broker-dealers are involved and whether the actual mechanics of the distribution are effected within the United States, so long as the offering is made under circumstances reasonably designed to preclude distribution or re-distribution of the securities within, or to nationals of, the United States.¹⁷

As indicated above, the SEC believed that the flowback of securities into the United States after a distribution abroad could be an indirect distribution in the United States subject to registration.¹⁸

Release 4708 had various shortcomings, some of which the Staff of the SEC addressed over the years. First, Release 4708 did not define "coming to rest abroad." Over the years, the securities bar developed various procedures through requests for no-action letters that were intended to ensure that securities sold in reliance on Release 4708 were sold outside the United States to non-U.S. persons and "came to rest abroad."¹⁹ These procedures were intended to prevent the "flowback" of the securities into the United States, so that offerings could be made outside the United States without registration under the Securities Act.²⁰ For nonconvertible debt securities, these procedures included: (a) not providing definitive certificates until

¹⁵ Adopting Release, *supra* note 1, at 80,664.

¹⁶ Registration of Foreign Offerings by Domestic Issuers, Securities Act Release No. 4708, 1 Fed. Sec. L. Rep. (CCH) ¶ 1361-1363, (July 9, 1964) [hereinafter Securities Act Release 4708]. This release was issued in response to a report submitted by the Presidential Task Force on Promoting Increased Foreign Investment in United States Corporate Securities and Increased Foreign Financing for United States Corporations Operating Abroad. *Id.* at 2123-24.

¹⁷ *Id.*

¹⁸ See *supra* text accompanying note 17.

¹⁹ Adopting Release, *supra* note 1, at 80,664.

²⁰ See 1 EDWARD F. GREENE ET AL., U.S. REGULATION OF THE INTERNATIONAL SECURITIES AND DERIVATIVE MARKETS 5-5 (3d ed. 1996).

ninety days after completion of the distribution, and even then, only after receiving a certificate that the owner was not a U.S. national or resident; (b) agreements by the underwriters and dealers in any selling group that they would not (i) sell unsold allotments in the United States or to U.S. persons at any time, nor (ii) sell other securities sold in the offering and acquired later in the after market until ninety days after completion of the distribution; and (c) agreements by the underwriters and dealers in the selling group that they would deliver confirmations to other dealers under which the purchasing dealer agreed to maintain the same restrictions and to restate the restrictions in its confirmations to other dealers.²¹

Second, Release 4708 related to offerings by U.S. issuers.²² The release did not specify the types of offering to which it applied, debt or equity offerings, and it did not address foreign issuers, convertible securities, or continuous offerings. Nonetheless, over the years the SEC extended the Release to cover those types of offerings.²³ For equity and convertible securities, more stringent variations on the procedures used for debt were developed. For example, the restricted period for equity securities of U.S. issuers offered abroad with no U.S. market for their shares was one year.²⁴

Third, the SEC Staff later interpreted Release 4708 to permit resales abroad of securities not acquired in reliance on the Release. The SEC permitted the resale of restricted securities outside the United States when the issuers of the securities were not reporting companies, had no active market for their securities in the United States, and there was "no reasonable likelihood that such a market [would] develop."²⁵ However, the Staff generally required sellers to ensure that resales were not made to U.S. persons.²⁶

²¹ Singer Co., SEC No-Action Letter, [1974-1975 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 79,979, at 84,514-15 (Aug. 2, 1974), *modified by* Proctor & Gamble, 1985 SEC No-Act. LEXIS 1870 (Feb. 21, 1985) [hereinafter Proctor & Gamble].

²² Securities Act Release 4708, *supra* note 16, at 2124.

²³ Proctor & Gamble, *supra* note 21, at 1 (for non-convertible debt); InfraRed Assocs., Inc., 1985 SEC No-Act. LEXIS 2617, at 1-2 (Sept. 13, 1985) [hereinafter InfraRed] (for equity offerings); Vizcaya Int'l N.V., 1973 SEC No-Act. LEXIS 1935, at 1-2 (April 4, 1973); Republic of Iceland, 1971 SEC No-Act. LEXIS 2554, at 1-3 (Feb. 19, 1971) (for foreign issuers); Sperry Rand Corp., 1974 SEC No-Act. LEXIS 1692, at 1-8 (March 1, 1974) [hereinafter Sperry Rand] (for convertible debt); Sears Overseas Finance, N.V., 1982 SEC No-Act. LEXIS 2516, at 1-10 (June 11, 1982) (for continuous offerings of securities underlying warrants).

²⁴ Proposing Release, *supra* note 1, at 89,124-25, 89,124-25 nn.11-12; *see* InfraRed, *supra* note 23, at 1 (for equity securities); Sperry Rand, *supra* note 23, at 6 (for convertible debt securities).

²⁵ WCRS Group, PLC, 1987 SEC No-Act. LEXIS 1488, at 1-2, 4 (Dec. 9, 1986); Wordplex Info. Systems, PLC, 1985 SEC No-Act. LEXIS 2786, at 1, 8 (Dec. 5, 1985); Trilogy Resource Corp., 1984 SEC No-Act. LEXIS 2538, at 1-2, 11-12 (Aug. 3, 1984).

²⁶ Wolff, *supra* note 9, at 115. *But see* College Retirement Equities Fund, SEC No-Action Letter, [1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 78,420, at 77,363 (Feb. 18, 1987) [hereinafter CREF I] (allowing resales of private placement securities on the Paris Bourse without investigation of the nationality or residence of the counterparty to the trade).

Finally, the SEC stated in Release 4708 that it would not integrate a foreign offering with a simultaneous private placement in the United States (a position which was restated in Preliminary Note 7 to Regulation D and which was elaborated on in no-action letters).²⁷ Similarly, the Staff permitted unregistered public offerings made outside the United States to be conducted simultaneously with registered offerings of substantially similar securities in the United States, provided certain precautions were taken in the foreign offering to ensure that those securities came to rest abroad.²⁸

However, other difficulties remained. One difficulty with Release 4708 was that as more U.S. investors purchased foreign securities in foreign markets people questioned whether those investors should receive the protection of the Securities Act.²⁹

Secondly, neither Release 4708 nor the Staff of the SEC offered any guidance on when or under what circumstances securities issued outside the United States under Release 4708 could be resold in the United States or to U.S. persons after the securities came to rest abroad.³⁰ Rather, the Staff indicated that such resales could only be made in compliance with registration or an exemption,³¹ and the two exemptions thought to be applicable to such resales were the

²⁷ Proposing Release, *supra* note 1, at 89,126 & nn.22-23. For example, in a no-action letter concerning French privatizations, the SEC stated that the presence of a U.S. private offering would not impose on the simultaneous foreign public offering any procedures other than those that would have been required in the absence of the U.S. private offering. College Retirement Equities Fund, SEC No-Action Letter, [1987-1988 Transfer Binder] Fed. Sec. L. Rep. CCH ¶ 78,503, at 77,613 (June 4, 1987). Additionally, the SEC did not integrate intrastate offerings made under § 3(a)(11) of the Securities Act and Rule 147 thereunder with Release 4708 foreign offerings. Commonwealth Equity Trust, 1987 SEC No-Act. LEXIS 1631, at 1-2 (Jan. 20, 1987); Scientific Mfg., Inc., SEC No-Action Letter, [1983-1984 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 77,505, at 78,625 (May 12, 1983).

²⁸ Goldman, Sachs & Co., SEC No-Action Letter, [1985-1986 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 78,164, at 76,714 (June 5, 1985) [hereinafter Goldman, Sachs]; Williams Island Assocs., Ltd., 1983 SEC No-Act. LEXIS 2403, at 1-5 (June 3, 1983) [hereinafter Williams Island]. In Goldman, Sachs, *supra*, these precautions included the following procedures: (1) the foreign offering agreements and documents prohibited a private placement in the United States of the foreign securities; (2) the foreign securities could not be obtained in registered form until one year after the distribution was completed; (3) the fixed interest rate in the foreign offering would not exceed the rate in the U.S. offering; (4) interest payments in the foreign offering would be made annually, while such payments in the U.S. offering would be made semi-annually; and (5) each offering would use a separate underwriting syndicate. In Williams Island, *supra*, which involved U.S. and foreign public offerings of condominium securities, the sales contracts used in both the U.S. and foreign offerings (with one exception) would prohibit assignment or resale of the condominium securities until 90 days after all the condominium units had been sold to the public. *Id.* at 4-5.

²⁹ 1 GREENE, *supra* note 20, at 5-6.

³⁰ Adopting Release, *supra* note 1, at 80,664. Under Release 4708, resales could not be made in the United States or to U.S. persons before the securities came to rest abroad. Wolff, *supra* note 9, at 138, 143.

³¹ See, e.g., Proctor & Gamble, *supra* note 21, at 2.

exemptions provided by sections 4(1) and 4(3) of the Securities Act.³²

On the one hand, section 4(1) of the Securities Act exempts transactions “by any person other than an underwriter, issuer, or dealer.”³³ Section 2(11) of the Securities Act defines underwriter to include (1) persons who acquire securities from an issuer with a view towards their distribution and (2) persons who directly or indirectly participate in the offering, selling, or underwriting process.³⁴

On the other hand, section 4(3) of the Securities Act exempts transactions by a dealer (including an underwriter no longer acting as such for the security involved in the transaction), except in the cases of (1) sales of unregistered securities during the forty days after the first day on which the securities were bona fide offered to the public by the issuer or an underwriter, and (2) sales of securities which are a part of an unsold allotment to the dealer as a participant in the distribution.³⁵ The definition of underwriter, however, excludes a person “whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributors’ or sellers’ commission.”³⁶

The exemptions provided by sections 4(1) and 4(3) interacted in a complex and uncertain way for both resales and unsold allotments in offerings outside the United States.³⁷ These uncertainties were:

a. Was a particular seller still participating in a distribution and, therefore, sections 4(1) and 4(3) were unavailable;

b. Was a particular dealer selling unsold allotments, a transaction which is not exempt under section 4(3); and

c. Was a distribution participant required to avoid resales into the United States until all distributors had sold their allotments or only until that participant had sold its allotment.³⁸

Thus, under the regulatory scheme outlined above, it was uncertain when securities offered abroad could be resold in the United States and when an unsold allotment lost its status as such.³⁹ For resales, it was unclear whether a particular seller was still participating in a distribution, because by buying and reselling the securities offered it may have been “directly or indirectly” participating in the offering and excluded as an underwriter under sections 4(1) and 2(11).⁴⁰

³² See 1 GREENE, *supra* note 20, at 5-6.

³³ Securities Act § 4(1), 15 U.S.C. § 77d(1).

³⁴ Securities Act § 2(11), 15 U.S.C. § 77b(11). The definition of underwriter also includes persons selling on behalf of a control person of the issuer in connection with the distribution of any security. *Id.*

³⁵ Securities Act § 4(3), 15 U.S.C. § 77d(3).

³⁶ Securities Act § 2(11), 15 U.S.C. § 77b(11).

³⁷ 1 GREENE, *supra* note 20, at 5-6; see 1 *id.* at 5-3 to 5-4.

³⁸ 1 *id.* at 5-6; see 1 *id.* at 5-3 to 5-4.

³⁹ 1 *id.* at 5-6; see 1 *id.* at 5-3 to 5-4.

⁴⁰ 1 *id.* at 5-6; see 1 *id.* at 5-3.

Similarly, when a dealer (other than a syndicate member) purchased and resold the securities being offered abroad, it was unclear whether that dealer was participating in a distribution and, therefore, an underwriter unable to rely on section 4(3).⁴¹ Additionally, unsold allotments (which are excluded from the section 4(3) exemption) might include securities purchased directly or indirectly from an issuer in a chain of transactions involving securities dealers without an end retail investor.⁴² Therefore, dealers who purchased the securities from an underwriter, or from another dealer who purchased the securities from an underwriter, might not be permitted to resell the securities into the United States because section 4(3)'s exemption is not available for "unsold allotments."⁴³

Generally, practitioners believed that ninety days after completion of the distribution was an appropriate seasoning period for debt securities and equity securities with no active U.S. market, offered abroad, and that after the seasoning period, the securities were freely tradeable into the United States under sections 4(1) and 4(3).⁴⁴ The SEC Staff, however, indicated informally its view that up to nine months or a year was the proper seasoning period for equity and convertible debt of all U.S. issuers (even those with no U.S. market for their securities) and for foreign issuers with active U.S. markets.⁴⁵

The lack of clarity in this area of law together with the development of active international trading markets and the significant increase in offshore offerings eventually resulted in the SEC's creation of Regulation S, which was adopted in 1990.⁴⁶

III. Regulation S: Rules Governing Offers and Sales Made Outside the United States Without Registration Under the Securities Act

A. Introduction

Regulation S clarifies the extraterritorial application of the section 5 registration requirement of the Securities Act⁴⁷ by providing that when securities are offered and sold outside the United States, they need not be registered with the SEC.⁴⁸ Regulation S, based on a

⁴¹ See 1 *id.* at 5-3. However, as discussed above, the term "underwriter" does not include a person "whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributors' or sellers' commission." Securities Act § 2(11), 15 U.S.C. § 77b(11).

⁴² 1 GREENE, *supra* note 20, at 5-3 to 5-4.

⁴³ See 1 *id.* at 5-4.

⁴⁴ 1 *id.* at 5-7.

⁴⁵ 1 *id.*; see *InfraRed*, *supra* note 23, at 1, 3 (one year seasoning period for the equity of a U.S. issuer with no U.S. market for its securities); *Sperry Rand*, *supra* note 23, at 6, 9-10 (seasoning period exceeding one year for the convertible debt of a U.S. issuer).

⁴⁶ 1 GREENE, *supra* note 20, at 5-6 to 5-7; see *Adopting Release*, *supra* note 1, at 80,664.

⁴⁷ *Adopting Release*, *supra* note 1, at 80,661, 80,662.

⁴⁸ *Id.* at 80,663.

territorial approach to section 5 of the Securities Act,⁴⁹ is intended to limit section 5's reach so that it protects the U.S. capital markets and investors that purchase securities in the U.S. markets, whether they are U.S. or foreign nationals.⁵⁰

The Regulation consists of four rules; a General Statement (Rule 901), Definitions (Rule 902), and two safe harbors (Rules 903 and 904). The General Statement provides that the registration requirement of section 5 of the Securities Act does not apply to offers or sales of securities that occur outside the United States (both the offer and related sale must be outside the United States).⁵¹ The first safe harbor (Issuer Safe Harbor) applies to offers and sales by issuers, securities professionals involved in the distribution process by contract, their respective affiliates, and persons acting on behalf of any of them.⁵² The second safe harbor (Resale Safe Harbor) applies to resales by persons other than the issuer, securities professionals involved in the distribution by contract, their affiliates (except certain officers and directors), and persons acting on behalf of any of them.⁵³ An offer, sale, or resale of securities that meets all the conditions of either safe harbor is deemed to be outside the United States within the meaning of the General Statement and, therefore, is not subject to the registration requirements of section 5.⁵⁴

B. Preliminary Notes

The preliminary notes contain some important principles which should be kept in mind when working with Regulation S.

a. If a person attempts compliance with any rule in Regulation S, that does not constitute an exclusive election. For example, a person who offers and sells securities in reliance on Regulation S may also rely on any other applicable exemption from registration.⁵⁵ And the failure to meet the terms of either safe harbor does not create a presumption that the transaction is subject to section 5.⁵⁶

b. Regulation S relates solely to the applicability of the registration requirements of section 5 of the Securities Act; it does not limit

⁴⁹ *Id.* at 80,665.

⁵⁰ *See id.*

⁵¹ Securities Act Rule 901, 17 C.F.R. § 230.901 (1995); Adopting Release, *supra* note 1, at 80,662-63.

⁵² Adopting Release, *supra* note 1, at 80,663; Securities Act Rule 903, 17 C.F.R. § 230.903 (1995).

⁵³ Adopting Release, *supra* note 1, at 80,663; Securities Act Rule 904, 17 C.F.R. § 230.904 (1995).

⁵⁴ Adopting Release, *supra* note 1, at 80,662-63.

⁵⁵ Regulation S, *supra* note 1, at Preliminary Note 5 (1995).

⁵⁶ Adopting Release, *supra* note 1, at 80,663-64; Richard M. Kosnik, *Foreign Issuers and the U.S. Market*, in FOREIGN ISSUERS AND THE U.S. MARKET: AN UPDATE ON LEGAL DEVELOPMENTS AND FINANCIAL OPPORTUNITIES 157, 207 (1993).

the "extraterritorial application of the antifraud or other provisions of the federal securities laws or provisions of state law relating to the offer and sale of securities."⁵⁷ Furthermore, Regulation S does not affect the need for compliance with the securities registration or broker-dealer registration requirements of the Securities Exchange Act, where applicable.⁵⁸

c. Regulation S is not available for any transaction or series of transactions that, although in technical compliance with the rules, is part of a plan or scheme to evade the registration requirements of the Securities Act.⁵⁹

d. Regulation S applies only to offers and sales of securities outside the United States. Securities acquired overseas, pursuant to Regulation S or otherwise, may be resold in the United States only upon registration or in compliance with an available exemption from registration.⁶⁰

C. Rule 901: The General Statement

The General Statement sets forth the territoriality principle, i.e., offers and sales that occur within the United States are subject to section 5 of the Securities Act while those that occur outside the United States are not subject to section 5.⁶¹ The determination as to whether a transaction is outside the United States is based on the facts and circumstances of each case.⁶² If it can be demonstrated that both the offer and sale of the securities occurred outside the United States, the registration requirement of section 5 will not apply regardless of

⁵⁷ Regulation S, *supra* note 1, at Preliminary Notes 1, 4. The courts broadly apply the antifraud provisions of the U.S. securities laws to protect U.S. investors and investors in U.S. markets when either significant conduct occurs in the United States (the "conduct" test), or the conduct occurs outside the United States but has a significant effect in the United States or on the interests of U.S. investors (the "effects" test). Adopting Release, *supra* note 1, at 80,665.

⁵⁸ Regulation S, *supra* note 1, at Preliminary Note 3.

⁵⁹ *Id.* at Preliminary Note 2. For example, a participant in a distribution who takes all the steps required to comply with Regulation S will not have its protection if that participant knows or is reckless in not knowing that a person to whom it sells securities in reliance upon the Regulation will not comply with its requirements. Accordingly, if an underwriter were told by a dealer to whom it intended to sell securities under Rule 903 that the dealer had a customer in the United States waiting for the securities, that underwriter could not rely on the protection of the Rule for its sale to that dealer, even if the underwriter complied with all the Regulation's requirements. The same would be true if the underwriter knew or was reckless in not knowing that the dealer to whom it intended to sell had consistently sold to U.S. residents in violation of resale restrictions in other offerings made under Regulation S. Adopting Release, *supra* note 1, at 80,681. For a discussion of problematic practices under Regulation S, see *infra* part III.E.5.

⁶⁰ Regulation S, *supra* note 1, at Preliminary Note 6.

⁶¹ Adopting Release, *supra* note 1, at 80,665; see Securities Act Rule 901, 17 C.F.R. § 230.901 (1995).

⁶² Adopting Release, *supra* note 1, at 80,665.

whether the conditions of the safe harbor were met.⁶³ Although all transactions should be structured to meet the conditions of the safe harbors provided by the Regulation, a person might rely on the General Statement if a safe harbor condition was inadvertently not met.⁶⁴

D. Rule 902: Definitions

The following are definitions of terms used in Regulation S:

1. Distributor

“Distributor” includes all underwriters, dealers, and others who participate in a Regulation S distribution pursuant to contractual arrangements, such as subunderwriters.⁶⁵

2. Foreign Employee Benefit Plans

Category 1 of the Issuer Safe Harbor permits securities to be offered and sold to employees (including consultants or advisors) of a U.S. or foreign issuer or its affiliates pursuant to an employee benefit plan established and administered under the laws, customary practices, and documentation of a country other than the United States, provided that:

(a) the securities are issued as payment for bona fide services rendered to the issuer or its affiliates in connection with their businesses and these services are not rendered in connection with the offer and sale of securities in a capital raising transaction;

(b) the interests in the plan cannot be transferred except by will or by the laws of descent or distribution;

(c) the issuer takes reasonable steps to prevent the offer and sale of interests in the plan or securities under the plan to U.S. residents (except employees on temporary assignment in the United States); and

(d) documentation used in connection with any offer under the plan contains a statement that the securities have not been registered under the Securities Act and may not be offered or sold in the United States except upon registration or an available exemp-

⁶³ *Id.* at 80,665-66.

⁶⁴ *See* Wolff, *supra* note 9, at 127-28.

⁶⁵ Securities Act Rule 902(c), 17 C.F.R. § 230.902(c) (1995); Adopting Release, *supra* note 1, at 80,666. However, the term “distributor” does not apply to persons participating pursuant to contract only in ancillary positions (e.g., as fiscal agents or as persons hired to perform clearing services). Adopting Release, *supra* note 1, at 80,666. Furthermore, as defined in § 2(12) of the Securities Act, the term “dealer” includes “those who engage in the business of securities trading or dealing as agent, broker or principal.” *Id.* at 80,666 n.30.

tion.⁶⁶

Foreign employee benefit plans have received two concessions. First, an issuer may satisfy the "offshore transaction requirement" of the Regulation even though a plan trustee makes open market purchases in the United States to obtain the securities to be offered and sold to employees under the employee benefit plan.⁶⁷ Second, a foreign plan which otherwise qualifies will continue to do so, even if offers or sales are made to employees on temporary assignment in the United States, i.e., the "offshore transaction" requirement will be deemed satisfied.⁶⁸

3. Foreign Issuer

Rule 902(f)(1) states that a "foreign issuer" means any issuer that is: "(i) [a] foreign government; (ii) [a] national of any foreign country; or (iii) [a] corporation or other organization incorporated or organized under the laws of any foreign country."⁶⁹ But, under Rule 902(f)(2), an issuer other than a foreign government shall not be deemed a "foreign issuer" if:

(i) [m]ore than 50 percent of the outstanding voting securities of such issuer is held of record⁷⁰ by persons for whom a U.S. address appears on the records of the issuer, its transfer agent, voting trustee, depositary, or person performing similar functions; and

(ii) [a]ny of the following factors are present:

(A) [t]he majority of the executive officers or directors of the issuer are U.S. citizens or residents;

(B) [m]ore than 50 percent of the assets of the issuer are located in the United States; or

(C) [t]he business of the issuer is administered principally in the United States.⁷¹

4. Offering Restrictions

To comply with the conditions of Categories 2 and 3 of the Issuer Safe Harbor, offering restrictions must be implemented by the issuer, distributors, their affiliates, and persons acting on behalf of any of

⁶⁶ Securities Act Rule 903(c)(1)(iv), 17 C.F.R. § 230.903(c)(1)(iv) (1995). For consultants and advisors, see Adopting Release, *supra* note 1, at 80,675.

⁶⁷ Adopting Release, *supra* note 1, at 80,675. For a discussion of the "offshore transaction" requirement of Regulation S, see *infra* part III.E.I.

⁶⁸ See Cleary, Gottlieb, Steen & Hamilton, SEC No-Action Letter, [1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 79,490, at 77,497 (July 24, 1990); see also Securities Act Rule 903(c)(1)(iv)(C), 17 C.F.R. § 230.903(c)(1)(iv)(C) (1995).

⁶⁹ Securities Act Rule 902(f)(1), 17 C.F.R. § 230.902(f)(1) (1995).

⁷⁰ The term "held of record" has the meaning as provided in Rule 12g5-1 under the Exchange Act. Securities Act Rule 902(g), 17 C.F.R. § 230.902(g) (1995). The SEC states that "[s]ecurities held of record include those known to be held through voting trusts, deposit agreements or similar arrangements." Adopting Release, *supra* note 1, at 80,674 n.91.

⁷¹ Securities Act Rule 902(f)(2), 17 C.F.R. § 230.902(f)(2) (1995).

them.⁷² The failure to implement the offering restrictions precludes the availability of the Issuer Safe Harbor for everyone.⁷³ Each distributor, i.e., each underwriter, selling group member, and other distribution participant who participates in the distribution by a contractual relationship, must agree in writing that all its offers and sales of securities during the restricted period will be made outside the United States in accordance with Regulation S (or pursuant to registration under the Securities Act or an available exemption).⁷⁴ Furthermore, all offering materials and documents, including prospectuses, offering circulars, and advertisements (other than press releases) used during the restricted period must include statements that the securities have not been registered with the SEC and may not be offered or sold in the United States or to U.S. persons (other than a distributor) unless the securities are registered under the Securities Act or are exempt from such registration.⁷⁵ These statements must appear: (a) on the cover or inside cover page of any prospectus or offering circular used in the offering; (b) in the underwriting section of any prospectus or offering circular used in the offering; and (c) in any advertisement made by the issuer, any distributor, their respective affiliates, or any person acting on behalf of any of them.⁷⁶ These statements may appear in summary form on the prospectus cover pages and in the advertisements.⁷⁷

5. Overseas Directed Offerings

Under Category 1 of the Issuer Safe Harbor, securities may be offered and sold in overseas directed offerings upon compliance with only the two general conditions of Rule 903(a) and (b).⁷⁸

Rule 902(j)⁷⁹ defines an "overseas directed offering" as either:

(a) an offering of securities of a foreign issuer (even one with substantial U.S. market interest (SUSMI))⁸⁰ that is directed to residents of a single country outside the United States under the laws, practices, and documentation of that country; or

(b) an offering of nonconvertible debt securities (or nonparticipating preferred stock or asset-backed securities), of a U.S. issuer that

⁷² Securities Act Rule 902(h), 17 C.F.R. § 230.902(h) (1995).

⁷³ Adopting Release, *supra* note 1, at 80,679.

⁷⁴ Securities Act Rule 902(h)(1), 17 C.F.R. § 230.902(h)(1) (1995).

⁷⁵ Securities Act Rule 902(h)(2), 17 C.F.R. § 230.902(h)(2) (1995); *see* Adopting Release, *supra* note 1, at 80,679.

⁷⁶ Securities Act Rule 902(h)(2), 17 C.F.R. § 230.902(h)(2) (1995).

⁷⁷ *Id.*

⁷⁸ Securities Act Rule 903(c)(1)(ii), 17 C.F.R. § 230.903(c)(1)(ii) (1995). The two general conditions of Rule 903(a) and (b) are discussed *infra* at part III.E.1.

⁷⁹ Securities Act Rule 902(j), 17 C.F.R. § 230.902(j) (1995).

⁸⁰ *See infra* text accompanying notes 92-104 for a definition of substantial U.S. market interest.

is directed to residents of a single country outside the United States under the laws, practices, and documentation of that country, provided that the principal and interest of those securities (or par value, as the case may be) are not denominated in U.S. dollars and those securities are not convertible into U.S. dollar-denominated securities nor linked to U.S. dollars in any way that in effect converts the securities into U.S. dollar-denominated securities. However, the securities may be "linked to U.S. dollars" by related currency or interest rate swap transactions that are commercial in nature. Those commercial swap transactions will not cause securities denominated in a currency other than the U.S. dollar to be treated as if they were denominated in U.S. dollars.⁸¹

To qualify as an overseas directed offering, it is particularly important that such offerings be directed at a single country. The SEC emphasizes that "[w]here the foreign issuer, a distributor, their respective affiliates, or a person acting on behalf of any of the foregoing knows or is reckless in not knowing that a substantial portion of the offering will be sold or resold outside that country, the offering will not qualify as an overseas directed offering."⁸²

6. Reporting Issuer

A "reporting issuer" means an issuer (other than an investment company required to be registered under the Investment Company Act) that has a class of securities registered under section 12(b) or (g) of the Exchange Act or is subject to Exchange Act reporting under section 15(d) and that has filed all required Exchange Act reports for at least the twelve months immediately preceding the Regulation S offering.⁸³

7. Restricted Period

The "restricted period" begins on the later of two dates: (a) the date that the securities were first offered under Regulation S to persons other than distributors, or (b) the date of the closing of the offering.⁸⁴ Expiration of the restricted period takes place at either forty days or one year later.⁸⁵ Nonetheless, all offers and sales by a distributor of an unsold allotment are deemed to be made during the

⁸¹ Adopting Release, *supra* note 1, at 80,674; Securities Act Rule 902(j)(2), 17 C.F.R. § 230.902(j)(2) (1995).

⁸² Adopting Release, *supra* note 1, at 80,674; *see* Regulation S, *supra* note 1, at Preliminary Note 2.

⁸³ Securities Act Rule 902(l), 17 C.F.R. § 230.902(l) (1995).

⁸⁴ *See* Securities Act Rule 902(m), 17 C.F.R. § 230.902(m) (1995); *see also* Securities Act Rule 903(c)(2)(iii), (c)(3)(ii)(A), (iii)(A), 17 C.F.R. § 230.903(c)(2)(iii) (40 day period) (1995), § 230.903(c)(3)(ii)(A) (40 day period) (1995), § 230.903(c)(3)(iii)(A) (1 year period) (1995).

⁸⁵ *Id.*

restricted period.⁸⁶ This means that: (a) distributors may sell unsold allotments only in offshore transactions, and not to, or for the benefit or account of, U.S. persons, and (b) distributors may not sell other securities which were sold in the offering and acquired in the after market, to U.S. persons during the forty day or one year restricted period described above.⁸⁷ After the restricted period has ended, a distributor may sell securities which are not part of an unsold allotment free of the restrictions of Regulation S, even though that distributor, or other distribution participants, still have unsold allotments.⁸⁸

In a continuous offering, the restricted period generally begins upon completion of the distribution, as determined and certified by the managing underwriter or person performing similar functions.⁸⁹ However, in a continuous offering of nonconvertible debt sold in identifiable tranches, the restricted period for securities in a tranche begins upon completion of the distribution of that tranche, as determined and certified by the managing underwriter or person performing similar functions.⁹⁰ The SEC has stated its belief that medium term note programs⁹¹ may be offered in reliance on Regulation S on a tranche by tranche basis without having to wait forty days between tranches.

8. *Substantial U.S. Market Interest*

Regulation S treats those foreign issuers that have SUSMI in their securities as if they were U.S. issuers. The determination of whether SUSMI exists is made at the commencement of the offering and is

⁸⁶ Securities Act Rule 902(m), 17 C.F.R. § 230.902(m) (1995).

⁸⁷ 1 GREENE, *supra* note 20, at 5-14. *But see infra* part IV.A. (concerning resales to U.S. persons during the restricted period pursuant to an available exemption).

⁸⁸ 1 GREENE, *supra* note 20, at 5-15. However, because the term "unsold allotment" includes not only securities purchased directly from the issuer, but also securities purchased in an uninterrupted chain of transactions between dealers, it may be difficult to determine which securities are not part of an unsold allotment. 1 *id.*

⁸⁹ Adopting Release, *supra* note 1, at 80,677-78; see Securities Act Rule 902(m), 17 C.F.R. § 230.902(m) (1995).

⁹⁰ Securities Act Rule 902(m), 17 C.F.R. § 230.902(m) (1995); Adopting Release, *supra* note 1, at 80,677. Although not defined in Regulation S, "identifiable tranches" are thought to be: (a) notes with different terms, even if issued on the same day, and (b) identical notes issued on different days if the second tranche is not issued until the distribution of the first tranche is completed. However, special considerations apply to notes that are designed to be fungible with previously issued tranches. 1 GREENE, *supra* note 20, at 5-4 n.124.

⁹¹ A medium-term note program is one method for the continuous offering of debt securities. Adopting Release, *supra* note 1, at 80,677 n.124. In a medium-term note program, an uncommitted arrangement is made between the issuer and a dealer (or dealers) for the issuance, at different times, of notes with differing terms. The terms of the notes may differ as to several matters, including the maturity date, the currency, and the interest rate basis. Medium-term note programs are used to exploit market opportunities as they occur by matching the terms of the notes to the needs of the issuer or the demands of potential buyers. 1 GREENE, *supra* note 20, at 5-40.

based on the reasonable belief of the issuer.⁹² Without knowledge to the contrary, distributors may rely on the written statement of the issuer that it has a reasonable belief that no SUSMI exists in its securities.⁹³

“Substantial United States Market Interest” means:

a. For equity securities, either (i) the U.S. markets (exchanges and interdealer quotation systems)⁹⁴ in the aggregate are the largest single market for such class of securities in the prior fiscal year (or the period since the issuer's incorporation, if shorter) or (ii) twenty percent or more of the trading in that class of securities in the prior fiscal year (or the period since the issuer's incorporation, if shorter) took place on U.S. markets and less than fifty-five percent of such trading took place in one foreign country's markets.⁹⁵ If a market for the issuer's securities does not record all trading in a security, then only the trading that is recorded (to the extent that information is available), is otherwise known to the issuer, or can be reasonably measured or approximated need be considered.⁹⁶ If a substantial market for the issuer's equity securities does not record trading volume, then the issuer may reasonably believe that there is no SUSMI if less than twenty percent of that class of securities is held of record by persons with a U.S. address on the records of the issuer, its transfer agent, voting trustee, depository, or person performing similar functions.⁹⁷

b. For debt (including nonparticipating preferred stock and asset-backed securities), if (i) the issuer's debt securities (excluding commercial paper)⁹⁸ in the aggregate, are held of record⁹⁹ by 300

⁹² Securities Act Rule 902(n), 17 C.F.R. § 230.902(n) (1995); Adopting Release, *supra* note 1, at 80,673.

⁹³ Adopting Release, *supra* note 1, at 80,674.

⁹⁴ These markets include the U.S. stock exchanges, NASDAQ, quotes in the current “pink sheets” of Commerce Clearing House's National Quotation Bureau, Inc., and the Private Offering, Resale and Trading through Automated Linkages (PORTAL) system. *Id.* at 80,673 n.88. The pink sheets, so named because of their color, are a listing of market maker quotations and names which is updated and distributed daily to securities brokerage firms. American Depository Receipts, Securities Act Release No. 6894, [1990-1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,740, at 81,590 (May 23, 1991) [hereinafter ADR 1991 Release]. PORTAL is a trading system for secondary trading of unregistered securities in transactions exempt from the Securities Act registration and prospectus delivery requirements under Rule 144A. Linda C. Quinn, *Foreign Issuers and the U.S. Market*, in INTERNATIONAL SECURITIES MARKETS at 45 (1995). “Inter-dealer quotation system” means any system of general circulation to broker-dealers which regularly disseminates quotations of identified brokers or dealers, as defined in Exchange Act Rule 15c2-11(e)(2). Adopting Release, *supra* note 1, at 80,673 n.87.

⁹⁵ Securities Act Rule 902(n)(1), 17 C.F.R. § 230.902(n)(1) (1995); Adopting Release, *supra* note 1, at 80,673.

⁹⁶ Adopting Release, *supra* note 1, at 80,673.

⁹⁷ *Id.*

⁹⁸ SUSMI for debt securities is calculated without reference to securities which qualify for the exemption provided by § 3(a)(3) of the Securities Act (i.e., notes which arise out of

or more U.S. persons, and (ii) \$1 billion or more of: the principal amount outstanding of its debt securities, the greater of liquidation preference or par value for its nonparticipating preferred stock, and the principal amount or principal balance for its asset-backed securities, in the aggregate, is held of record by U.S. persons, and (iii) twenty percent or more of: the principal amount outstanding of its debt securities, the greater of liquidation preference or par value for its nonparticipating preferred stock, and the principal amount or principal balance for its asset-backed securities, in the aggregate, is held of record by U.S. persons.¹⁰⁰

Under Regulation S three types of debt securities are aggregated to determine substantial U.S. market interest in an issuer's debt securities. In addition to traditional debt securities, nonparticipating preferred stock and asset-backed securities are included in the determination of SUSMI in debt.¹⁰¹

Nonparticipating preferred stock is defined as "[n]on-convertible capital stock, the holders of which are entitled to a preference in payment of dividends and in distribution of assets on liquidation, dissolution, or winding up of the issuer, but are not entitled to participate in residual earnings or assets of the issuer."¹⁰²

Asset-backed securities are defined as securities of a type that either:

- (A) [r]epresents an ownership interest in a pool of discrete assets, or certificates of interest or participation in such assets (including any rights designed to assure servicing, or the receipt or timeliness of receipt by holders of such assets, or certificates of interest or participation in such assets, of amounts payable thereunder), provided that the assets are not generated or originated between the issuer of the security and its

current transactions or the proceeds of which have been or will be used for current transactions, and which have a maturity date of nine months or less). Securities Act Rule 902(n)(3), 17 C.F.R. § 230.902(n)(3) (1995); Adopting Release, *supra* note 1, at 80,674 n.92; LOUIS LOSS & JOEL SELIGMAN, SECURITIES REGULATION 148 (3d ed. Supp. 1993); *see 3 id.* at 1187-88 (3d ed. 1989) (discussing securities exempt under § 3(a)(3)).

⁹⁹ See *supra* note 70 for the definition of the term "held of record."

¹⁰⁰ Securities Act Rule 902(n)(2), 17 C.F.R. § 230.902(n)(2) (1995). Although the text of Regulation S refers to debt securities being "held of record," the regulation also applies to debt securities held in bearer form. However, it is not clear how an issuer should form a reasonable belief as to debt held in bearer form. One commentator suggests that in the absence of official guidance, the following guidelines should be used: (1) when the issuer does not have at least \$1 billion of debt securities (excluding commercial paper) outstanding worldwide, there is *per se* no SUSMI; (2) when the issuer has greater than \$1 billion of debt securities (excluding commercial paper) outstanding worldwide but (i) has not offered any securities in the United States except for commercial paper, (ii) does not have debt or equity listed on an exchange (or quoted on NASDAQ) in the United States or in an unlisted American Depository Receipt program, and (iii) has no knowledge of significant holdings of its debt securities by U.S. investors, it would be reasonable to conclude that no SUSMI exists for the issuer's debt securities; (3) in every other case, the offering should be treated as a Category 2 offering or U.S. counsel should be consulted. 1 GREENE, *supra* note 20, at 5-13.

¹⁰¹ Adopting Release, *supra* note 1, at 80,673.

¹⁰² Securities Act Rule 903(c)(4)(i), 17 C.F.R. § 230.903(c)(4)(i) (1995).

affiliates; or

(B) [i]s secured by one or more assets or certificates of interest or participation in such assets, and the securities, by their terms, provide for payments of principal and interest (if any) in relation to payments or reasonable projections of payments on assets meeting the requirements of [(A) above], or certificates of interest or participations in assets meeting such requirements.¹⁰³

"Assets" for purposes of the definition of asset-backed securities, means "securities, installment sales, accounts receivable, notes, leases or other contracts, or other assets that by their terms convert into cash over a finite period of time."¹⁰⁴

9. U.S. Persons

Rule 902(o)(1)(i) defines "U.S. person" as any natural person residing in the U.S.¹⁰⁵ Unlike no-action letters under Release 4708, U.S. residency rather than U.S. citizenship determines a natural person's status under Regulation S.¹⁰⁶ For example, a French citizen resident in the United States is a U.S. person.¹⁰⁷ For partnerships and corporations, the place of organization or incorporation generally controls (i.e., a corporation incorporated under U.S. law is a U.S. person, and generally, a corporation incorporated under foreign law is not a U.S. person).¹⁰⁸ A corporation or partnership incorporated or organized under foreign law by a U.S. person principally to invest in unregistered securities is a U.S. person unless incorporated or organized and owned by accredited investors (as defined in Regulation D) who are not natural persons, estates, or trusts.¹⁰⁹ The status of subsidiaries and affiliated companies, which generally have separate legal identities, is governed by their place of incorporation or organization.¹¹⁰

A branch or agency of a foreign entity is considered a U.S. person if it is located in the United States.¹¹¹ Branches and agencies of U.S.

¹⁰³ Securities Act Rule 903(c)(4)(ii)(A), (B), 17 C.F.R. § 230.903(c)(4)(ii)(A), (B) (1995).

¹⁰⁴ Securities Act Rule 903(c)(4)(ii)(B), 17 C.F.R. § 230.903(c)(4)(ii)(B) (1995). For a discussion of how SUSMI is determined for convertible securities see *supra* notes 216-30 and accompanying text. For a discussion of how SUSMI is determined for warrants see *supra* notes 231-45 and accompanying text. See also Securities Act Rule 903(c)(1)(i)(C), (D), 17 C.F.R. § 230.903(c)(1)(i)(C), (D) (1995).

¹⁰⁵ The term "United States" includes the United States of America, its territories and possessions, any state in the United States, and the District of Columbia. Securities Act Rule 902(p), 17 C.F.R. § 230.902(p) (1995).

¹⁰⁶ Adopting Release, *supra* note 1, at 80,676.

¹⁰⁷ *Id.*

¹⁰⁸ Wolff, *supra* note 9, at 118-19; see Securities Act Rule 902(o)(1)(ii), 17 C.F.R. § 230.902(o)(1)(ii) (1995).

¹⁰⁹ Securities Act Rule 902(o)(1)(viii), 17 C.F.R. § 230.902(o)(1)(viii) (1995); Adopting Release, *supra* note 1, at 80,676.

¹¹⁰ Adopting Release, *supra* note 1, at 80,676.

¹¹¹ Securities Act Rule 902(o)(1)(v), 17 C.F.R. § 230.902(o)(1)(v) (1995).

banks and insurance companies located outside the United States are not considered U.S. persons, provided they (i) operate for valid business reasons; (ii) are engaged in the banking or insurance business; and (iii) are subject to substantive local banking or insurance regulation.¹¹²

For purposes of Regulation S, trusts and estates generally are U.S. persons, if any executor, administrator, or trustee is a U.S. person.¹¹³ However, in response to concerns about the competitive effects on U.S. professional fiduciaries, an estate with a U.S. professional fiduciary acting as executor or administrator is not deemed a U.S. person if the executor or administrator that is not a U.S. person has sole or shared investment discretion for the estate's assets, and the estate is governed by foreign law.¹¹⁴ An exclusion from the definition of U.S. person is also provided for a trust with a U.S. professional fiduciary acting as trustee, if a trustee who is not a U.S. person has sole or shared investment discretion for the trust assets, and no beneficiary (and no settlor, if the trust is revocable) is a U.S. person.¹¹⁵

For fiduciary accounts (other than trusts and estates), the definition generally treats the person with the investment discretion as the buyer and the status of that person governs.¹¹⁶ If a U.S. person has discretion to make investment decisions for the account of a non-U.S. person, the account is treated as a U.S. person.¹¹⁷ And when a non-U.S. person makes investment decisions for the account of a U.S. person, that account is not treated as a U.S. person.¹¹⁸ Consistent with that principle, a nondiscretionary account (other than an estate or trust) held for the benefit or account of a U.S. person, is treated as a U.S. person.¹¹⁹

Nonetheless, for competitive business reasons, U.S. professional fiduciaries acting with investment discretion for accounts (other than trusts and estates) of non-U.S. persons are deemed not to be U.S. persons even though these fiduciaries may be located in the United States.¹²⁰ That is, U.S. professional fiduciaries acting with investment

¹¹² Securities Act Rule 902(o)(6), 17 C.F.R. § 230.902(o)(6) (1995); Adopting Release, *supra* note 1, at 80,676-77.

¹¹³ Adopting Release, *supra* note 1, at 80,676; *see* Securities Act Rule 902(o)(1)(iii), (iv), 17 C.F.R. § 230.902(o)(1)(iii), (iv) (1995).

¹¹⁴ Adopting Release, *supra* note 1, at 80,676; *see* Securities Act Rule 902(o)(3), 17 C.F.R. § 230.902(o)(3) (1995).

¹¹⁵ Securities Act Rule 902(o)(4), 17 C.F.R. § 230.902(o)(4) (1995); Adopting Release, *supra* note 1, at 80,676.

¹¹⁶ Adopting Release, *supra* note 1, at 80,677.

¹¹⁷ *Id.*; *see* Securities Act Rule 902(o)(1)(vii), 17 C.F.R. § 230.902(o)(1)(vii) (1995).

¹¹⁸ Adopting Release, *supra* note 1, at 80,677.

¹¹⁹ Securities Act Rule 902(o)(1)(vi), 17 C.F.R. § 230.902(o)(1)(vi) (1995).

¹²⁰ Adopting Release, *supra* note 1, at 80,677; *see* Securities Act Rule 902(o)(2), 17 C.F.R. § 230.902(o)(2) (1995). This approach is consistent with a no-action letter under Release 4708 stating that a U.S. broker-dealer acting with discretion for a non-U.S. person would not

discretion are treated as U.S. persons only when they are acting for the accounts of U.S. persons.¹²¹

Certain international organizations,¹²² and their agencies, affiliates, and pension plans are deemed not to be U.S. persons even though they may be located in the United States, and offers and sales to them are deemed to be "offshore,"¹²³ and contacts with them are deemed not to be "directed selling efforts."¹²⁴

Transient visitors not resident in the United States are not deemed U.S. persons. However, offers and sales to such persons are transactions in the United States and thus generally do not satisfy the offshore transaction requirement.¹²⁵

Lastly, an employee benefit plan established and administered under the laws, customary practices, and documentation of a country other than the United States is not a U.S. person.¹²⁶

E. Rules 903 and 904: The Safe Harbors

Rules 903 and 904 set forth nonexclusive safe harbors for offers, sales and resales of securities outside the United States, and the safe harbors include conditions to protect against indirect, unregistered offerings into the United States.¹²⁷

(a) Rule 903, the Issuer Safe Harbor, applies to offers and sales by issuers, distributors, their respective affiliates, and persons acting on behalf of any of them.¹²⁸

(b) Rule 904, the Resale Safe Harbor, applies to resales by persons other than those eligible to rely upon the Issuer Safe Harbor (i.e., persons other than issuers, distributors, their respective affiliates) and persons acting on behalf of any of them, as well as certain

be treated as a U.S. person. *Baer Securities Corp.*, 1979 SEC No-Act. LEXIS 3573, at 1-2 (Oct. 12, 1979).

¹²¹ Adopting Release, *supra* note 1, at 80,677. If a U.S. professional fiduciary was offered and sold securities for the accounts of non-U.S. persons in reliance on Regulation S, but placed those securities in accounts held for the benefit of U.S. persons, that fiduciary could be deemed an underwriter and may have violated § 5. *Id.*

¹²² Listed in Securities Act Rule 902(o)(7), 17 C.F.R. § 230.902(o)(7) (1995) as follows: the International Monetary Fund, the International Bank for Reconstruction and Development, the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, the United Nations, and any other similar international organizations.

¹²³ Securities Act Rule 902(i)(3), 17 C.F.R. § 230.902(i)(3) (1995).

¹²⁴ Securities Act Rule 902(b)(3), 17 C.F.R. § 230.902(b)(3) (1995).

¹²⁵ See Wolff, *supra* note 9, at 130-31; see also Adopting Release, *supra* note 1, at 80,676 n.115, 80,675 n.102.

¹²⁶ Securities Act Rule 902(o)(5), 17 C.F.R. § 230.902(o)(5) (1995).

¹²⁷ Adopting Release, *supra* note 1, at 80,666.

¹²⁸ Securities Act Rule 903, 17 C.F.R. § 230.903 (1995); Adopting Release, *supra* note 1, at 80,671.

affiliated officers and directors of the issuer or the distributors.¹²⁹

1. General Conditions

Two general conditions apply to all offers, sales, and resales made pursuant to the safe harbors. First, any offer, sale, or resale must be made in an “offshore transaction,” and second, no “directed selling efforts” may be made in the United States in connection with an offer, sale, or resale of securities made under the safe harbors.¹³⁰

[1] Offshore Transaction

The first of the two general conditions that apply to both Regulation S safe harbors requires that all transactions be made outside the United States. All offers, sales, and resales must be made in an “offshore transaction,” which means that no offer may be made to a person in the United States and that either:

(a) the buyer (who may be a U.S. person, as defined above)¹³¹ is (or the seller and any person acting on its behalf reasonably believe that the buyer is) outside the United States when the buy order is originated; or

(b) (i) for Rule 903 (the Issuer Safe Harbor, if a primary offering), the sale is made in, on, or through the physical trading floor of an established foreign securities exchange located outside the United States; or

(ii) for Rule 904 (the Resale Safe Harbor, if a resale), the sale is made in, on, or through the facilities of a “designated offshore securities market” and neither the seller nor any person acting on its behalf knows that the transaction has been prearranged with a buyer in the United States.¹³²

Nonetheless, offers and sales of securities that are specifically targeted at identifiable groups of U.S. citizens abroad, such as members of the U.S. armed forces serving overseas, are not considered to be made in offshore transactions.¹³³

To meet requirement (a) above, generally the buyer himself, rather than his agent, must be outside the United States.¹³⁴ However, (a) above will be met if the buyer is a corporation or partnership, when an authorized employee places the buy order while outside the United States.¹³⁵ Also, offers and sales of securities will be consid-

¹²⁹ Securities Act Rule 904, 17 C.F.R. § 230.904 (1995); Adopting Release, *supra* note 1, at 80,680.

¹³⁰ *Id.*

¹³¹ 1 GREENE, *supra* note 20, at 5-8.

¹³² Securities Act Rule 902(i)(1), 17 C.F.R. § 230.902(i)(1) (1995).

¹³³ Securities Act Rule 902(i)(2), 17 C.F.R. § 230.902(i)(2) (1995).

¹³⁴ 1 GREENE, *supra* note 20, at 5-8.

¹³⁵ Adopting Release, *supra* note 1, at 80,667. When the buyer is an investment company, if an authorized person employed by either the investment company or its investment adviser places the buy order while outside the United States, the requirement that

ered to be made in offshore transactions if they are made to persons excluded from the definition of U.S. person by Rule 902(o)(7) (which exempts certain international organizations and their agencies, affiliates, and pension plans)¹³⁶ or persons holding accounts excluded from the definition of U.S. person by Rule 902(o)(2) (basically, discretionary or similar accounts other than estates or trusts, held for the benefit or account of a non-U.S. person by a U.S. dealer or fiduciary), acting solely in their capacities as holders of such accounts.¹³⁷

The second alternative, (b) above, provides that certain transactions executed on or through certain foreign securities markets are outside the United States, without regard to the location of the buyer.¹³⁸ The phrase "designated offshore securities markets" includes a list of seventeen foreign securities markets¹³⁹ as well as any other organized foreign securities markets the SEC may designate.¹⁴⁰

the buyer be outside the United States will be satisfied. *Id.*

¹³⁶ See *supra* note 122 for a list of these exempt organizations.

¹³⁷ Securities Act Rule 902(i)(3), 17 C.F.R. § 230.902(i)(3) (1995); see Securities Act Rule 902(o)(2), (7), 17 C.F.R. § 230.902(o)(2), (7) (1995).

¹³⁸ Adopting Release, *supra* note 1, at 80,667. "Trades executed between sessions, reported to the exchange and included in exchange trading volume, will be deemed on that market." *Id.* at 80,667 n.40. Also, through trading linkages, orders placed on a foreign exchange may actually be executed on a U.S. exchange. Currently, a trading linkage exists between the Boston and Montreal Stock Exchanges. Transactions executed on a U.S. exchange through this trading linkage, as currently structured, will be deemed to have been executed on the Montreal Stock Exchange. *Id.* at 80,667 n.41.

¹³⁹ Securities Act Rule 902(a)(1), 17 C.F.R. § 230.902(a)(1) (1995); Adopting Release, *supra* note 1, at 80,667. Regulation S lists the following as "designated offshore securities markets": the Eurobond market, as regulated by the Association of International Bond Dealers; the Amsterdam Stock Exchange; the Australian Stock Exchange Limited; the Bourse de Bruxelles; the Frankfurt Stock Exchange; the Stock Exchange of Hong Kong Limited; The International Stock Exchange of the United Kingdom and the Republic of Ireland, Ltd. (now called the London Stock Exchange); the Johannesburg Stock Exchange; the Bourse de Luxembourg; the Borsa Valori di Milan; the Montreal Stock Exchange; the Bourse de Paris; the Stockholm Stock Exchange; the Tokyo Stock Exchange; the Toronto Stock Exchange; the Vancouver Stock Exchange; and the Zurich Stock Exchange. Securities Act Rule 902(a)(1), 17 C.F.R. § 230.902(a)(1) (1995). This list was derived from markets designated as ready markets under Rule 15c3-1 under the Exchange Act. Adopting Release, *supra* note 1, at 80,668 n.46.

¹⁴⁰ Securities Act Rule 902(a)(2), 17 C.F.R. § 230.902(a)(2) (1995); Adopting Release, *supra* note 1, at 80,667. Several markets have already been designated: the Alberta Stock Exchange, Alberta Stock Exchange, SEC No-Action Letter (Mar. 9, 1993), [1993] Wash. Serv. Bur. Microfiche, fiche 2212, frame E10; the Helsinki Stock Exchange, Shearson Lehman Hutton Inc., SEC No-Action Letter, [1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 79,498, at 77,533 (July 7, 1990); the Istanbul Stock Exchange, Istanbul Stock Exchange, SEC No-Action Letter, [1993-1994 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 76,810, at 78,264 (Oct. 26, 1993); the Mexican Stock Exchange, Mexican Stock Exchange, SEC No-Action Letter (Feb. 15, 1991), [1993] Wash. Serv. Bur. Microfiche, fiche 2190, frame A12; the Oslo Stock Exchange, Oslo Stock Exchange, SEC No-Action Letter (Dec. 13, 1991), [1991] Wash. Serv. Bur. Microfiche, fiche 1976, Frame F14; and the Stock Exchange Automated Quotation ("SEAQ") International System (which was designated because it is a part of the London Stock Exchange), First Boston Corp., SEC No-Action Letter, [1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 79,462, at 77,380 (June 14, 1990). The SEC will consider additional

Rule 902(a)(2) provides a nonexclusive list of attributes that the SEC will consider in designating such foreign markets, although the presence of all the listed attributes is not necessary for a designation, and no single attribute is necessary.¹⁴¹

[2] Directed Selling Efforts

The second of the two general conditions that apply to both Regulation S safe harbors prohibits directed selling efforts in the United States. Therefore, no directed selling efforts may be made in the United States in connection with an offer or sale of securities made under a safe harbor.¹⁴² Directed selling efforts are those activities that could reasonably be expected to condition the market in the United States for the securities being offered in reliance on the Regulation.¹⁴³ This prohibition covers any marketing efforts in the United States designed to induce the purchase of the securities purportedly being distributed abroad.¹⁴⁴

Under the Issuer Safe Harbor, directed selling efforts may not be made in the United States by the issuer, the distributors,¹⁴⁵ their affiliates, or persons acting on behalf of any of them during the offering and selling of the securities and any applicable restricted period (for Categories 2 and 3 offerings, described below).¹⁴⁶ If any directed selling efforts are being made in the United States by the issuer, a distributor, their affiliates, or persons acting on behalf of any of them, any person making an offer or sale, even if otherwise in accordance with the conditions of the Issuer Safe Harbor, will be unable to rely on that safe harbor.¹⁴⁷

For resales under the Resale Safe Harbor, a directed selling effort by a seller, its affiliates, or an agent of either, will prevent that seller

designations on request. Adopting Release, *supra* note 1, at 80,668 n.46.

¹⁴¹ Adopting Release, *supra* note 1, at 80,668 & n.44; *see* Securities Act Rule 902(a)(2), 17 C.F.R. § 230.902(a)(2) (1995).

¹⁴² Adopting Release, *supra* note 1, at 80,663.

¹⁴³ Securities Act Rule 902(b)(1), 17 C.F.R. § 230.902(b)(1) (1995); Adopting Release, *supra* note 1, at 80,668. "Directed selling efforts" under Regulation S is not co-extensive with "solicitation" for purposes of registration as a broker-dealer. Adopting Release, *supra* note 1, at 80,670. Limited activities directed at a single customer may be offers for purposes of Regulation S or solicitations for purposes of Rule 15a-6 of the Exchange Act, but generally they will not constitute directed selling efforts. *Id.* at 80,671. However, certain activities will constitute both a solicitation and directed selling efforts. For example, if distribution participants disseminate information, opinions, or recommendations about the securities being offered under Regulation S to groups of investors in the United States, that would constitute both offers and directed selling efforts under Regulation S and a solicitation under Rule 15a-6. Reproposing Release, *supra* note 1, at 80,211-12.

¹⁴⁴ Securities Act Rule 902(b)(1), 17 C.F.R. § 230.902(b)(1) (1995); Adopting Release, *supra* note 1, at 80,668.

¹⁴⁵ "Distributor" is defined *supra* part III.D.1.

¹⁴⁶ Adopting Release, *supra* note 1, at 80,668; ROBERT J. HAFT, ANALYSIS OF KEY SEC NO-ACTION LETTERS 2-4 (1994).

¹⁴⁷ Adopting Release, *supra* note 1, at 80,668.

from being able to rely on the safe harbor.¹⁴⁸ However, directed selling efforts by an issuer, distributor, or other person unaffiliated with and not acting on behalf of the seller will not prevent the seller from relying on the Resale Safe Harbor.¹⁴⁹ For example, directed selling efforts made in the United States by the issuer or a distributor will not prevent officers and directors of the issuer or distributor who are otherwise eligible to rely on the Resale Safe Harbor from relying on that safe harbor. However, directed selling efforts must not be made on behalf of those officers and directors and such officers and directors must not act as conduits to sell securities for persons ineligible to rely on the Resale Safe Harbor or otherwise act on behalf of the issuer or distributor or their affiliates.¹⁵⁰

The Adopting Release lists activities which would constitute directed selling efforts, such as mailing printed material to U.S. investors, conducting promotional seminars in the United States, placing advertisements with radio or television stations broadcasting into the United States or in publications with a general circulation in the United States, that discuss the offering or are designed to condition the market or could reasonably be expected to condition the market for the securities offered abroad.¹⁵¹ Also, offers aimed at identifiable groups of U.S. citizens abroad, such as members of the armed forces overseas, constitute directed selling efforts in the United States.¹⁵²

The Regulation lists specific activities which do not constitute directed selling efforts.¹⁵³ Specifically excluded are:

- (1) "advertisements required to be published under United States or foreign law, or the rules or regulations of a United States or foreign regulatory or self-regulatory

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 80,681; see Wolff, *supra* note 9, at 141.

¹⁵⁰ Bogle & Gates, SEC No-Action Letter, [1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 79,489, at 77,496 (July 3, 1990).

¹⁵¹ Adopting Release, *supra* note 1, at 80,668. "Publications with a general circulation in the United States" include publications printed primarily for distribution in the United States and all publications that, on average during the preceding year, had a circulation in the United States of 15,000 copies or more per issue. *Id.*; see Securities Act Rule 902(k)(1), 17 C.F.R. § 230.902(k)(1) (1995). If a foreign publication produces a separate edition which, by itself, has a general circulation in the United States, only the U.S. edition will be considered a publication with a general circulation in the United States provided that the affiliated non-U.S. editions together do not meet the definition if the U.S. edition is disregarded. See Securities Act Rule 902(k)(2), 17 C.F.R. § 230.902(k)(2) (1995).

¹⁵² Adopting Release, *supra* note 1, at 80,666 n.35. These types of offers are also not considered to be made in offshore transactions. See *supra* text accompanying note 133.

¹⁵³ Activities specifically excluded from the definition of "directed selling efforts" also will not be considered offers made in the United States for purposes of the "offshore transaction" requirement of Regulation S. Adopting Release, *supra* note 1, at 80,669 n.53. See *supra* notes 131-41 and accompanying text discussing the "offshore transaction" requirement.

- authority" (such as a stock exchange);¹⁵⁴
- (2) contacts with persons excluded from the definition of U.S. person by Rule 902(o)(7) (certain international organizations) or persons holding accounts excluded from the definition of U.S. person by Rule 902(o)(2) (basically, discretionary accounts, other than estates or trusts, held for the benefit or account of a non-U.S. person by a U.S. dealer or fiduciary);¹⁵⁵
- (3) tombstone advertisements, if they appear in a publication with a general circulation in the United States, provided the publication has less than twenty percent of its circulation in the United States (aggregating U.S. and comparable non-U.S. editions);¹⁵⁶
- (4) visits to the United States by prospective investors to

¹⁵⁴ Securities Act Rule 902(b)(2), 17 C.F.R. § 230.902(b)(2) (1995); Adopting Release, *supra* note 1, at 80,669. To qualify, the advertisement must contain no more information than legally required and state that the securities have not been registered under the Securities Act and may not be offered or sold in the United States (or to a U.S. person, if the advertisement relates to an offering under the second or third Issuer Safe Harbor categories) without registration or an exemption. Securities Act Rule 902(b)(2), 17 C.F.R. § 230.902(b)(2); Adopting Release, *supra* note 1, at 80,669.

Additionally, filing with the SEC an offering circular under cover of Form 6-K pursuant to Rule 13a-16(b) under the Exchange Act, which contains no more information than the foreign issuer's jurisdiction legally requires, will not constitute "directed selling efforts" under Rule 902(b) of Regulation S, provided that the offering circular contains a legend stating that the securities have not been registered under the 1933 Act and may not be offered or sold in the United States or to U.S. persons (other than distributors) except pursuant to registration or an available exemption. Coral Gold Corp., SEC No-Action Letter, [1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 79,707, at 78,229 (Feb. 19, 1991).

¹⁵⁵ Securities Act Rule 902(b)(3), 17 C.F.R. § 230.902(b)(3) (1995); LOSS & SELIGMAN, *supra* note 98, at 144.

¹⁵⁶ Securities Act Rule 902(b)(4), 17 C.F.R. § 230.902(b)(4) (1995). To qualify, a tombstone advertisement must: (a) state that the securities have not been registered under the Securities Act and may not be offered or sold in the United States (or to a U.S. person, if the advertisement relates to an offering under the second or third Issuer Safe Harbor categories, described below) without registration or an exemption; and (b) include no more information than the issuer's name; the amount and title of the securities being sold; a brief indication of the issuer's general type of business; the price of the securities; the yield of the securities, if debt securities with a fixed (noncontingent) interest provision; the name and address of the person placing the advertisement, and whether such person is participating in the distribution; the names of the managing underwriters; the dates, if any, upon which the sales began and concluded; whether the securities are offered or were offered by rights issued to security holders and, if so, the class of securities that are entitled or were entitled to subscribe, the subscription ratio, the record date, the dates (if any) upon which the rights were issued and expired, and the subscription price; and any legend required by law or any foreign or U.S. regulatory or self-regulatory authority. *Id.*; Adopting Release, *supra* note 1, at 80,669.

Where the above requirements are not satisfied, a distribution participant should not place a tombstone advertisement in a publication with a general circulation in the United States until the applicable restricted period ends and the distribution participant has sold its allotment. 1 GREENE, *supra* note 20, at 5-11. For a definition of the restricted period see *supra* notes 84-91 and accompanying text. For further discussion of the restricted period see *infra* notes 184-208 and accompanying text.

- inspect real estate, plants, or other facilities;¹⁵⁷
- (5) distribution in the United States of a foreign broker-dealer's quotations by a third-party system that distributes those quotations primarily in foreign countries provided that (i) securities transactions cannot be executed through the system between the foreign broker-dealers and persons in the United States and (ii) the issuer, distributors, their affiliates, agents of any of the above, foreign broker-dealers and other system participants do not initiate contacts with U.S. persons or persons within the United States beyond contacts exempt under Rule 15a-6 of the Exchange Act; and¹⁵⁸
- (6) notice by an issuer that it proposes to make a registered offering of its securities, provided the notice complies with Rule 135 of the Securities Act, and notice by an Exchange Act reporting issuer or a foreign issuer exempt from Exchange Act reporting under Rule 12g3-2(b) of the Exchange Act, that it proposes to make, is making, or has made a securities offering not registered or required to be registered under the Securities Act, provided the notice complies with Rule 135c.¹⁵⁹

Also excluded from "directed selling efforts" are legitimate selling activities conducted in the United States for an offering registered under the Securities Act or for an offering exempt from registration, such as selling activities which are part of a private placement or Rule

¹⁵⁷ Securities Act Rule 902(b)(5), 17 C.F.R. § 230.902(b)(5) (1995); Adopting Release, *supra* note 1, at 80,670.

¹⁵⁸ Securities Act Rule 902(b)(6), 17 C.F.R. § 230.902(b)(6) (1995). For example, a quotation on the SEAQ system, which has no execution capability, of a security of a foreign issuer will not constitute a directed selling effort if the quote is not made for the purpose of conditioning the U.S. market and the issuer, distributors, their affiliates, and agents agree not to (and do not) initiate contacts with U.S. persons or persons within the United States beyond those contacts permitted under Rule 15a-6 of the Exchange Act. Skadden, Arps, Slate, Meagher & Flom, SEC No-Action Letter, [Current Binder] Fed. Sec. L. Rep. (CCH) ¶ 76,677, at 77,904 (May 18, 1993).

¹⁵⁹ Securities Act Rule 902(b)(7), 17 C.F.R. § 230.902(b)(7) (1995). A notice issued under Rule 135 or Rule 135c may only contain certain limited information, including the name of the issuer; the title, amount, and basic terms of the securities offered or proposed to be offered; the timing of the offering; and a brief statement of the manner and purpose of the offering. The notice may not contain the names of the underwriters. *See* Securities Act Rules 135(a), 135(a)(3), 17 C.F.R. §§ 230.135(a), 230.135c(a)(3) (1995).

Where Rule 135c is not available (e.g., where shares in a subsidiary are being offered in an unrequested offering under Regulation S or in a private placement), the parent should still be allowed to publish a Rule 135c type notice if: (a) the parent is reporting under the Exchange Act or is exempt from such reporting under Rule 12g3-2(b), and (b) in the opinion of the parent's U.S. counsel, that information is "material" for purposes of the U.S. securities laws and, therefore, must be disclosed to comply with the exchange rules or NASDAQ rules. 1 GREENE, *supra* note 20, at 5-9 n.15; *see* Securities Act Rule 902(b)(2), 17 C.F.R. § 230.902(b)(2) (1995).

144A¹⁶⁰ offering.¹⁶¹

Furthermore, the SEC did not intend an "isolated, limited contact" in the United States to constitute directed selling efforts that could result in loss of a safe harbor for the entire offering,¹⁶² nor did the SEC intend generally to inhibit routine advertising and corporate communications normally published by an issuer unrelated to any securities selling effort.¹⁶³

Nonetheless, distribution or publication in the United States of research reports (i.e., information, opinions, or recommendations about an issuer or any of its securities) could constitute directed selling efforts, depending upon the facts and circumstances.¹⁶⁴ However, directed selling efforts will not be deemed to exist if the information, opinion, or recommendation of a distributor (or its affiliate) about a reporting issuer: (i) is in a publication that is normally distributed with reasonable regularity, and includes similar information, opinions, or recommendations about a substantial number of other companies in the same industry or subindustry, or contains a comprehensive list of recommended securities; (ii) is given materially no more space or prominence in that publication than that given to securities of other issuers; and (iii) for an opinion or recommendation, is no more favorable than that opinion or recommendation published in the last issue addressing the issuer or its securities.¹⁶⁵ When the issuer is not a reporting issuer, the effect on the market of publication of informa-

¹⁶⁰ Securities Act Rule 144A, 17 C.F.R. § 230.144A (1995).

¹⁶¹ Adopting Release, *supra* note 1, at 80,670 & n.64.

¹⁶² LOSS & SELIGMAN, *supra* note 98, at 146; Adopting Release, *supra* note 1, at 80,670. Nevertheless, such a contact could constitute an offer made in the United States for purposes of the "offshore transaction" requirement. See Adopting Release, *supra* note 1, at 80,670 & n.60.

¹⁶³ LOSS & SELIGMAN, *supra* note 98, at 146; Adopting Release, *supra* note 1, at 80,670. For example, press releases about the financial results of the issuer or the occurrence of material events concerning the issuer usually will not constitute "directed selling efforts." Adopting Release, *supra* note 1, at 80,670.

Similarly, Regulation S is not intended to interfere with the flow of normal corporate news about foreign issuers. *Id.* Accordingly, access by journalists for publications with a general circulation in the United States to offshore press conferences, press releases, and meetings with company spokespersons in which an offshore offering or tender offer is discussed is permitted if the information is made available to the foreign and U.S. press generally and is not intended to induce purchases or tenders by U.S. persons. Regulation S, *supra* note 1, at Preliminary Note 7.

However, the requirement that the information be made available to the foreign and U.S. press generally conflicts with the practice in Europe of granting one-on-one interviews to a small number of financial publications in connection with an offering. If the publication has a general circulation in the United States or a U.S. edition that will publish the interview, this practice would constitute directed selling efforts in the United States. Therefore, unless the publication agrees to restrict news and editorial coverage of the offering to editions that do not have a general circulation in the United States, contacts with that publication must be limited. GREENE, *supra* note 20, at 5-10 n.19.

¹⁶⁴ Adopting Release, *supra* note 1, at 80,669.

¹⁶⁵ *Id.*

tion, opinions, or recommendations about the issuer or its securities can be expected to be greater due to the possible absence of other publicly available information about the issuer.¹⁶⁶ Consequently, distributors (and their affiliates) should exercise even greater caution in publication or distribution of information, opinions, or recommendations about nonreporting issuers or their securities.¹⁶⁷

Regulation S generally will not affect activities conducted outside the United States when those activities are legal and customary in the foreign country. Those activities may concern a foreign distribution or the ordinary course of an issuer's business.¹⁶⁸ Thus, granting interviews or conducting promotional seminars abroad, or advertising in newspapers or magazines with no general circulation in the United States, will not constitute directed selling efforts if these activities are not aimed at the United States.¹⁶⁹

2. Rule 903: Issuer Safe Harbor

The Issuer Safe Harbor is available for issuers, distributors, their affiliates, and persons acting on behalf of any of them.¹⁷⁰ This safe harbor distinguishes among three classes of securities and imposes different procedural safeguards on each category to ensure that the securities offered abroad come to rest outside the United States.¹⁷¹ The three categories of securities offerings are divided based upon criteria such as the nationality and reporting status of the issuer, and the degree of U.S. market interest in the issuer's securities, because these criteria reflect the likelihood of flowback into the United States and the degree of information available to U.S. investors about the securities.¹⁷² The two general conditions, requiring offshore transactions and no directed selling efforts, apply to all three categories. Category 1 has only the two general conditions, while Categories 2 and 3 have additional procedural and transactional restrictions that are intended to ensure that the securities come to rest abroad. These additional restrictions include certain restricted periods (during which offers and sales may not be made to any U.S. person)¹⁷³ and notices

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 80,669-70. Where these requirements have not been met, a distribution participant should not circulate a research report in the United States until the applicable restricted period has ended and the distribution participant has sold its allotment. 1 GREENE, *supra* note 20, at 5-11.

¹⁶⁸ Adopting Release, *supra* note 1, at 80,670. For example, U.S. issuers or distributors may still rely on Regulation S if they initiate sales communications to non-U.S. persons from the United States. *Id.* at 80,670 n. 65.

¹⁶⁹ *Id.* at 80,670.

¹⁷⁰ *Id.* at 80,671.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *But see infra* part IV.A. (discussing resales to U.S. persons during the restricted period pursuant to an available exemption).

of the offering restrictions.

[1] Category 1: Most Offerings by Foreign Issuers, Some by U.S. Issuers; Rule 903(c)(1)

Category 1 offerings of securities can be made outside the United States under the Issuer Safe Harbor without complying with any restrictions other than the two general conditions, i.e., in an offshore transaction and with no directed selling efforts.¹⁷⁴ The four kinds of offerings in category 1 are:

(a) Foreign Issuers with No SUSMI.¹⁷⁵ Offerings by a foreign issuer that reasonably believes when the offering begins that there is no substantial U.S. market interest in the class of securities offered or sold (if equity is offered or sold), or in its debt securities (if debt is offered or sold). For warrants, the foreign issuer must reasonably believe that there is no SUSMI in the underlying securities issuable on exercise. And, for convertible securities, the foreign issuer must reasonably believe that there is no SUSMI in either the convertible securities or the underlying securities issuable on conversion.¹⁷⁶

(b) "Overseas Directed Offerings." An overseas directed offering is an offering by a foreign issuer (even one with SUSMI) or an offering of nonconvertible debt securities (or nonparticipating preferred stock or asset-backed securities) by a U.S. issuer that is directed into a single country (other than the United States) to that country's residents in accordance with local laws and customary practices.¹⁷⁷

(c) Offerings of Securities Backed by the Full Faith and Credit of a Foreign Government.¹⁷⁸

(d) Certain Employee Benefit Plan Offerings.¹⁷⁹ Offerings to employees of the issuer or its affiliates pursuant to an employee benefit plan established and administered in accordance with the laws of a country other than the United States and in accordance with that country's practices and documentation.¹⁸⁰

The first safe harbor, for foreign issuers with no SUSMI under (a)

¹⁷⁴ Adopting Release, *supra* note 1, at 80,672.

¹⁷⁵ "SUSMI" is defined *supra* part III.D.8.

¹⁷⁶ Securities Act Rule 903(c)(1)(i), 17 C.F.R. § 230.903(c)(1)(i) (1995); LOSS & SELIGMAN, *supra* note 98, at 149.

¹⁷⁷ Securities Act Rule 903(c)(1)(ii), 17 C.F.R. § 230.903(c)(1)(ii) (1995). The term "overseas directed offering" is defined *supra* part III.D.5.

¹⁷⁸ Securities Act Rule 903(c)(1)(iii), 17 C.F.R. § 230.903(c)(1)(iii) (1995). The term "foreign government" includes the government of any foreign country or the government of any political subdivision of a foreign country, provided that such issuer would qualify to register securities under the Act on Schedule B. Securities Act Rule 902(e), 17 C.F.R. § 230.902(e) (1995).

¹⁷⁹ Adopting Release, *supra* note 1, at 80,672; *see* Securities Act Rule 903(c)(1)(iv), 17 C.F.R. § 230.903(c)(1)(iv) (1995).

¹⁸⁰ "Foreign employee benefit plan" offerings are discussed in greater detail *supra* part III.D.2.

above, was based on the likelihood that securities of foreign issuers with no substantial U.S. market interest in their securities are expected to flow back or remain in their home market, and were thought not likely to flow into the United States after an offshore offering.¹⁸¹ Foreign issuers with no SUSMI may rely on Category 1 of the Issuer Safe Harbor, whether or not they are reporting under the Exchange Act, have securities listed on a U.S. exchange or quoted on NASDAQ, or sponsor an American depository receipt facility.¹⁸² Furthermore, offers and sales of securities to U.S. investors who are overseas at the time of the offering will not preclude reliance on the safe harbor for securities in Category 1.¹⁸³

[2] Category 2: Offerings by Reporting Issuers and Foreign Issuers of Debt; Rule 903(c)(2)

Category 2 offerings of securities can be made outside the United States under the Issuer Safe Harbor provided they are one of two kinds of offerings and comply with certain restrictions. The two kinds of offerings are: (a) offerings by U.S. Exchange Act reporting issuers (both U.S. and foreign issuers)¹⁸⁴ of all securities and (b) offerings by nonreporting¹⁸⁵ foreign issuers with SUSMI, of debt (including nonparticipating preferred stock and asset-backed securities).¹⁸⁶ Offerings in this category must satisfy the following requirements:

(a) the two general conditions, i.e., offshore transactions and no directed selling efforts;¹⁸⁷

Plus, certain selling restrictions:¹⁸⁸

(b) a forty day restricted period (described in the definitions above) must be observed during which no offers or sales may be made to a U.S. person or for the account or benefit of U.S. person (other than a distributor);¹⁸⁹ and

(c) certain offering restrictions must be implemented by each underwriter, selling group member, and other participants in the distribution. The offering restrictions require each distributor to agree in writing to make all of its offers and sales during the restricted period in accordance with Regulation S or pursuant to registration or

¹⁸¹ LOSS & SELIGMAN, *supra* note 98, at 147; Adopting Release, *supra* note 1, at 80,672.

¹⁸² Adopting Release, *supra* note 1, at 80,674.

¹⁸³ *Id.* at 80,672-73.

¹⁸⁴ Issuers supplying information to the SEC under Rule 12g3-2(b) of the Exchange Act are not reporting issuers. *Id.* at 80,675 n.105.

¹⁸⁵ Wolff, *supra* note 9, at 136.

¹⁸⁶ Under the safe harbor, pass-through asset-backed securities and other asset-backed securities are treated the same. Adopting Release, *supra* note 1, at 80,676 n.107.

¹⁸⁷ Securities Act Rule 903(c)(2), 17 C.F.R. § 230.903(c)(2) (1995).

¹⁸⁸ In Categories 2 and 3, the selling restrictions other than the offering restrictions are referred to as "transactional restrictions." Wolff, *supra* note 9, at 136.

¹⁸⁹ Securities Act Rule 903(c)(2)(iii), 17 C.F.R. § 230.903(c)(2)(iii) (1995). *But see infra* part IV.A., discussing resales to U.S. persons during the restricted period pursuant to an available exemption.

an available exemption. Any offering materials, other than press releases, used during the restricted period must contain a notice that the securities were not registered and may not be offered or sold in the United States or to U.S. persons unless registered or exempt;¹⁹⁰ and

(d) during the forty day restricted period, each distributor must send a confirmation or other notice¹⁹¹ stating that the purchaser (if a distributor, dealer, or person receiving remuneration with respect to the securities) is subject to the same restrictions on offers and sales that apply to the distributors.¹⁹²

These selling restrictions are intended to prevent an indirect unregistered public offering from occurring in the United States during the period when the market is most likely to be affected by selling efforts offshore. Even if there is flowback of the reporting issuer's securities after the restricted period ends, the information publicly available about those securities under the Exchange Act ordinarily should be enough to protect investors.¹⁹³

[3] Category 3: Other Offerings; Rule 903(c)(3)

Category 3 is the residual category, i.e., it covers those securities offerings not covered by Categories 1 and 2. In effect, this category covers securities offerings by nonreporting U.S. issuers and equity offerings by nonreporting foreign issuers with SUSMI for the class of securities being offered.¹⁹⁴ This category requires procedures in addition to the two general conditions and other restrictions of Category 2, to protect against an unregistered U.S. distribution when there is little, if any, information available to the marketplace about the issuer and its securities and there is a significant likelihood of flowback.¹⁹⁵

Offerings by issuers in this category must satisfy the following requirements:

- (1) the two general conditions, i.e., offshore transactions and no "directed selling efforts;"¹⁹⁶

¹⁹⁰ Securities Act Rule 903(c)(2)(ii), 17 C.F.R. § 230.903(c)(2)(ii) (1995). The offering restrictions are defined in more detail in the definitions section. See *supra* part III.D.4.

¹⁹¹ "Other notice" would include a notice given on a screen, rather than on paper, or a notice given by telephone, if the seller kept written records of notices given. Adopting Release, *supra* note 1, at 80,678.

¹⁹² Securities Act Rule 903(c)(2)(iv), 17 C.F.R. § 230.903(c)(2)(iv) (1995); Adopting Release, *supra* note 1, at 80,676. Compliance with Regulation S requires transmission, rather than receipt or delivery, of the confirmation. Adopting Release, *supra* note 1, at 80,678.

However, securities professionals receiving such a confirmation, who are not distributors, are not required to deliver confirmations or to comply with the offering restrictions. *Id.* at 80,676 & n.113.

¹⁹³ Adopting Release, *supra* note 1, at 80,675.

¹⁹⁴ *Id.* at 80,679.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

Plus, certain selling restrictions as in Category 2 above:

- (2) the offering restrictions described in Category 2 above (and in more detail in the definitions above) must be adopted;¹⁹⁷
- (3) a restricted period must be observed—forty days for debt,¹⁹⁸ one year for equity¹⁹⁹—during which no offers or sales may be made to a U.S. person or for the account or benefit of a U.S. person (other than a distributor);²⁰⁰
- (4) during the restricted period, each distributor must send a confirmation or other notice stating that the purchaser (if a distributor, dealer, or person receiving remuneration with respect to the securities) is subject to the same restrictions on offers and sales that apply to the distributors;²⁰¹

Plus, certain transactional restrictions must be complied with:

- (5) debt securities must be represented on issuance by a temporary global certificate, which is not exchangeable for definitive securities until the forty day restricted period expires and, for nondistributors, until certification of beneficial ownership of the securities by a non-U.S. person or a person who purchased securities in a transaction that did not require registration under the Securities Act;²⁰²
- (6) equity securities may be sold before the restricted period expires, in accordance with the following conditions:
 - (a) the purchaser (other than a distributor) must certify that it is not a U.S. person and is not acquiring the securities for the account or benefit of any U.S. person, or that it is a U.S. person who purchased its securities in an exempt transaction;²⁰³

¹⁹⁷ Securities Act Rule 903(c)(3)(i), 17 C.F.R. § 230.903(c)(3)(i) (1995); Adopting Release, *supra* note 1, at 80,679.

¹⁹⁸ Securities Act Rule 903(c)(3)(ii)(A), 17 C.F.R. § 230.903(c)(3)(ii)(A) (1995).

¹⁹⁹ Securities Act Rule 903(c)(3)(iii)(A), 17 C.F.R. § 230.903(c)(3)(iii)(A) (1995).

²⁰⁰ *But see infra* part IV.A. discussing resales during the restricted period to U.S. persons pursuant to an available exemption.

²⁰¹ Securities Act Rule 903(c)(3)(iv), 17 C.F.R. § 230.903(c)(3)(iv) (1995).

²⁰² Securities Act Rule 903(c)(3)(ii)(B), 17 C.F.R. § 230.903(c)(3)(ii)(B) (1995). Certification of beneficial ownership by a financial institution or clearing organization through which the beneficial owner holds the securities is sufficient. Adopting Release, *supra* note 1, at 80,680 n.136.

²⁰³ Securities Act Rule 903(c)(3)(iii)(B)(1), 17 C.F.R. § 230.903(c)(3)(iii)(B)(1) (1995); *see* Adopting Release, *supra* note 1, at 80,679-80. Such a certification may be made by a qualified institutional buyer who purchased its securities pursuant to Rule 144A. HAFT, *supra* note 146, at 2-10.

- (b) the purchaser (other than a distributor) must agree to resell the securities only in accordance with Regulation S, after registration, or pursuant to an exemption;²⁰⁴
- (c) securities of a U.S. issuer must contain a legend stating that transfer is prohibited except in accordance with Regulation S;²⁰⁵
- (d) the issuer must be required (either by contract, or by a provision in its bylaws, articles, charter, or comparable document) to refuse to register any transfer of the securities which does not comply with Regulation S.²⁰⁶

As in the other categories, for purposes of Category 3, debt securities includes nonparticipating preferred stock and asset-backed securities.²⁰⁷ This means that offerings of those two types of securities by a nonreporting foreign issuer are governed by Category 2, while offerings of those two types of securities by a nonreporting U.S. issuer are governed by Category 3.²⁰⁸

[4] Certain Financings

[a] Guaranteed Debt

Rule 903(c)(5) provides that, for offerings of debt securities that are fully and unconditionally guaranteed by the issuer's parent, the status of the parent will govern.²⁰⁹ For example, whether there is SUSMI depends on whether SUSMI exists for the debt securities of the parent.²¹⁰ Thus, if a foreign subsidiary of a reporting U.S. parent company makes an offering in Europe and Asia of debt securities fully and unconditionally guaranteed by the parent, the securities will fall under Category 2.²¹¹

When the debt securities of an issuer are fully and unconditionally guaranteed by multiple parents of the issuer, the status of the ultimate parent will govern. For example, if a U.S. issuer, which is wholly owned by a U.S. subsidiary of a foreign company with no substantial U.S. market interest in its debt securities, makes an offering of debt

²⁰⁴ Securities Act Rule 903(c)(3)(iii)(B)(2), 17 C.F.R. § 230.903(c)(3)(iii)(B)(2) (1995); Adopting Release, *supra* note 1, at 80,680.

²⁰⁵ Securities Act Rule 903(c)(3)(iii)(B)(3), 17 C.F.R. § 230.903(c)(3)(iii)(B)(3) (1995); Adopting Release, *supra* note 1, at 80,680.

²⁰⁶ Securities Act Rule 903(c)(3)(iii)(B)(4), 17 C.F.R. § 230.903(c)(3)(iii)(B)(4) (1995). However, if the securities are in bearer form or if foreign law prevents the issuer from refusing to register securities transfers, other reasonable procedures (such as the legend described in (iii) above) must be implemented to prevent any transfer of the securities not made in accordance with Regulation S. *Id.*

²⁰⁷ Adopting Release, *supra* note 1, at 80,679.

²⁰⁸ *See id.*

²⁰⁹ *Id.* at 80,671; *see* Securities Act Rule 903(c)(5), 17 C.F.R. § 230.903(c)(5) (1995).

²¹⁰ I GREENE, *supra* note 20, at 5-13.

²¹¹ Adopting Release, *supra* note 1, at 80,671.

securities fully and unconditionally guaranteed by that U.S. issuer's direct and indirect parents, the securities will fall under Category 1.²¹² Additionally, when the debt securities of an issuer are fully and unconditionally backed by the full faith and credit of a foreign government, either directly or by guarantee, the securities will also fall into Category 1."²¹³

However, other offerings of guaranteed securities will be generally subject to the most restrictive of the categories that apply to the guaranteed security and any related guarantees.²¹⁴ For example, when debt securities are guaranteed by an entity that is not a parent of the issuer, such as a foreign bank, SUSMI must be determined separately for the debt securities of each entity. If SUSMI exists in the debt securities of either entity, the offering will fall under Category 2.²¹⁵

[b] Convertible Debt Securities

To understand the treatment of convertible debt securities under Regulation S, three issues must be addressed:

- (1) When a convertible debt offering is made by a foreign issuer, how is SUSMI determined?
- (2) For purposes of Regulation S, are convertible bonds debt or equity?
- (3) When a convertible debt offering falls under Category 3, is the restricted period based on the convertible security or the underlying security?²¹⁶

To determine whether SUSMI exists in the convertible debt of a foreign issuer, both the convertible security and the underlying security must be examined. If SUSMI exists in either the convertible security or the underlying security, there is SUSMI in the convertible debt.²¹⁷ However, SUSMI is determined differently for debt than for equity.²¹⁸ Accordingly, if convertible bonds are debt, the determination of SUSMI for the convertible security would be based on aggregate indebtedness, while the determination for the underlying equity

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ 1 GREENE, *supra* note 20, at 5-13. To determine whether SUSMI exists in the debt securities of a foreign bank or other entity that guarantees debt securities, reference must be made to all securities issued or guaranteed by such bank or entity. 1 *id.* at 5-13 n.29. And, if a foreign bank has guaranteed many debt securities in bearer form, it may be prudent to treat the offering of debt securities guaranteed by that bank as falling under Category 2 (offerings by a foreign non-reporting issuer with SUSMI of debt). 1 *id.* at 5-13.

²¹⁶ 10B INTERNATIONAL CAPITAL MARKETS AND SECURITIES REGULATION § 5.01[9], at 5-40.15 (Harold S. Bloomenthal & Samuel Wolff eds., 1982) [hereinafter Bloomenthal & Wolff].

²¹⁷ Adopting Release, *supra* note 1, at 80,672.

²¹⁸ See *supra* part III.D.8.

security would be based on market trading criteria.²¹⁹ By comparison, if convertible bonds are equity, the determination of SUSMI for both the convertible and underlying equity security would be based on market trading criteria. Although Regulation S does not define the term “debt security,” presumably, convertible bonds are debt for the purpose of determining whether SUSMI exists.²²⁰

Whether convertible bonds are debt or equity is also important for offerings by nonreporting issuers. When a convertible debt offering is made by a nonreporting foreign issuer with SUSMI, if convertible bonds are debt, the offering falls under Category 2. But, if convertible bonds are equity, the offering falls under Category 3 and is subject to the more stringent transactional restrictions within Category 3. Also, for nonreporting U.S. issuers, although both debt and equity offerings fall under Category 3, the nature and length of the transactions restrictions will vary depending on whether the convertible bonds are debt or equity.²²¹

For purposes of applying the restricted periods of the Issuer Safe Harbor, convertible securities (except for convertible nonparticipating preferred stock)²²² generally are treated as the underlying security into which they are convertible.²²³ However, when the securities are not convertible before the end of the restricted period which would have applied to the underlying securities, if the underlying securities were themselves being offered and sold under Regulation S, then the restricted period would be determined by the convertible security.²²⁴ These rules mean that a convertible bond is an equity security unless it cannot be converted before the end of the restricted period which would have applied to the underlying security had the underlying security been offered under Regulation S.²²⁵ For example, an offering of convertible debt securities by a nonreporting foreign issuer with SUSMI in its debt and equity securities would fall within Category 2 if the debt securities are not convertible for thirteen months, but would fall within Category 3, and would be subject to the Category 3 restrictions relating to equity, if the debt securities were convertible

²¹⁹ 10B Bloomenthal & Wolff, *supra* note 216, § 5.01[9] at 5-40.15.

²²⁰ 10B *id.*

²²¹ 10B *id.* at 5-40.16.

²²² Convertible nonparticipating preferred stock of nonreporting foreign private issuers will be treated as equity unless it cannot be converted before the end of any restricted period that would have applied to equity of the foreign issuer, in which case it would be treated as nonconvertible nonparticipating preferred stock (i.e., it would be classified in Category 2 and treated like debt). Adopting Release, *supra* note 1, at 80,675-76 & n.106; Securities Act Rule 903(c)(4)(i), 17 C.F.R. § 230.903(c)(4)(i) (1995).

²²³ Adopting Release, *supra* note 1, at 80,671.

²²⁴ *Id.* at 80,671-72.

²²⁵ 10B Bloomenthal & Wolff, *supra* note 216, §5.01[9], at 5-40.16.

after eleven months.²²⁶

When a convertible bond offering is made, the issuance of the underlying securities upon conversion must also be registered under the Securities Act unless an exemption is available.²²⁷ The issuance of the underlying securities generally will be exempt from registration under section 3(a)(9) of the Securities Act²²⁸ unless compensation is given for soliciting the conversion or unless the underlying securities are those of a different issuer.²²⁹ If the conversion is not exempt under section 3(a)(9), the analysis applicable to the conversion is that which applies to the exercise of warrants under Regulation S.²³⁰

[c] Warrants

To understand the treatment of warrants under Regulation S, a series of issues must be separately analyzed. For most warrants, SUSMI is measured by the level of market interest in the underlying securities to be purchased upon the exercise of the warrants.²³¹

To determine the appropriate Issuer Safe Harbor category, warrant offerings are usually treated as equity. However, when the warrants can be settled in cash, it may be prudent to view the warrants

²²⁶ Adopting Release, *supra* note 1, at 80,672; 10B Bloomenthal & Wolff, *supra* note 216, § 5.01[9], at 5-40.16 to 5-40.17. When the bonds are convertible into securities of a guarantor who is the parent of the issuer, the offering will fall into whichever category is more restrictive, the category for the guarantor's debt or the category for the underlying securities. 1 GREENE, *supra* note 20, at 5-38 n.114. But, when the guarantor is not the issuer's parent, the offering will fall into the most restrictive of the following categories: the category for the issuer's debt, the category for the guarantor's debt, or the category for the underlying securities. 1 *id.*

²²⁷ See 1 GREENE, *supra* note 20, at 5-38.

²²⁸ Securities Act § 3(a)(9), 15 U.S.C. § 77c(a)(9).

²²⁹ Adopting Release, *supra* note 1, at 80,671 n.75; 1 GREENE, *supra* note 20, at 5-38 to 5-39. If the bonds of a finance subsidiary are guaranteed by its parent and are convertible into the securities of its parent, the issuance of the securities on conversion will be exempt from registration under the Securities Act by § 3(a)(9). 1 GREENE, *supra* note 20, at 5-39 n.116 (citing Attwoods PLC, 1991 SEC No-Act. LEXIS 150, at 1-2 (Jan. 28, 1990)). However, if the issuer is an operating subsidiary of the parent guarantor, consideration should be given to whether a no-action letter is required to permit the offering of the underlying securities in reliance on § 3(a)(9). 1 *id.* at 5-39 n.116. Greene opines that the SEC probably would not provide a no-action letter in many cases. 1 *id.*

If a conversion exempt under § 3(a)(9) occurs during the restricted period, the underlying securities issued on conversion will be restricted for the remainder of the restricted period. Adopting Release, *supra* note 1, at 80,671 n.75. For example, if a nonreporting U.S. issuer makes an offering under Regulation S of immediately convertible debt, on conversion, the holder could tack the period from the date the convertible debt was acquired to the conversion date to determine when the one year restricted period ends for the underlying security. 10B Bloomenthal & Wolff, *supra* note 216, § 5.01[9], at 5-40.17.

²³⁰ Adopting Release, *supra* note 1, at 80,671 n.75. This means that where § 3(a)(9) is unavailable, the convertible debt offering should be treated as a continuous offering of the underlying securities. Accordingly, in Category 2 and 3 transactions, the restricted period should begin upon the completion of the distribution of the convertible securities instead of on the closing date (provided procedures (a)-(c) below are implemented). 1 GREENE, *supra* note 20, at 5-39 n.117; see *infra* notes 233-37 and accompanying text.

²³¹ 1 GREENE, *supra* note 20, at 5-14 n.31; see Securities Act Rule 903(c)(1)(i)(C), 17 C.F.R. § 903(c)(1)(i)(C) (1995).

as debt if doing so would result in the offering falling under a more restrictive category.²³²

The next issue is the restricted period that applies to warrant offerings. A warrant offering is viewed as an offering of the warrants themselves as well as a continuous offering of the underlying securities so long as the warrants are exercisable.²³³ Therefore, absent a provision to the contrary, the restricted period for the underlying securities would not begin until the distribution of the underlying securities is complete, which does not occur until all the warrants have been exercised or have expired.²³⁴

However, Regulation S changes that result and states that for warrants, the restricted period of the underlying securities coincides with the restricted period for the warrants. The restricted period for the underlying securities begins upon completion of the distribution of the warrants, as determined and certified by the managing underwriter or person performing similar functions, rather than upon completion of the distribution of the underlying securities, provided certain procedures are implemented to ensure that the underlying securities are not sold to U.S. persons except in a registered or exempt transaction.²³⁵ The required procedures are: (a) the warrants must bear a legend stating that they and the underlying securities have not been registered under the Securities Act and that the warrants may not be exercised by, or on behalf of, a U.S. person unless they are so registered or an exemption is available;²³⁶ (b) when exercising the warrant, the holder must certify in writing that it is not a U.S. person and is not exercising the warrant on behalf of a U.S. person, or the holder must provide a written opinion of counsel that the warrant and the securities delivered on exercise have been registered under the Securities Act or an exemption is available; and (c) procedures must be adopted to ensure that the warrants may not be exercised in the United States and that the underlying securities may not be delivered within the United States upon exercise, unless they are registered under the Securities Act or an exemption is available.²³⁷ If the

²³² 1 GREENE, *supra* note 20, at 5-14 n.31.

²³³ Adopting Release, *supra* note 1, at 80,678 n.125.

²³⁴ *Id.*; 10B Bloomenthal & Wolff, *supra* note 216, § 5.01[10], at 5-40.21; see the definition of restricted period, *supra* part III.D.7. stating when the restricted period ordinarily begins for continuous offerings.

²³⁵ Adopting Release, *supra* note 1, at 80,678; 10B Bloomenthal & Wolff, *supra* note 216, § 5.01[10], at 5-40.21.

²³⁶ If no physical instrument is delivered to represent the warrants, another procedure, such as delivery of a notice, must inform the recipient of information that otherwise would be contained in the legend. Adopting Release, *supra* note 1, at 80,678 n.127.

²³⁷ Securities Act Rule 902(m), 17 C.F.R. § 230.902(m) (1995); Adopting Release, *supra* note 1, at 80,678. Nonetheless, certain U.S. professional fiduciaries and multinational organizations excluded from the definition of U.S. person by Rule 902(o)(2) and (7) may exercise the warrants and receive them in the United States. Adopting Release, *supra* note

procedures listed in (a) through (c) are not implemented, the restricted period will begin upon the expiration of the warrants (i.e., when the distribution of the underlying securities ends), regardless of when the warrants are actually exercised.²³⁸

The length of the restricted period and the procedures which must accompany the exercise of the warrants will both vary depending on the category of the offering and the type of underlying securities.²³⁹ When the warrants are exercisable for (i) securities of the issuer of the warrants, (ii) securities of an affiliated company of the issuer of the warrants or (iii) securities whose offer and sale is not otherwise exempt from registration, the restricted period (if any) for the underlying securities will coincide with the restricted period for the warrants and both will begin when the distribution of the warrants is complete, provided procedures (a) through (c) above are implemented to ensure that the underlying securities are not sold to U.S. persons except in a registered or exempt transaction.²⁴⁰

For Category 1 offerings, which have no restricted period, procedures (a) through (c) above will apply only to warrants that are unsold allotments.²⁴¹ Although Category 1 lacks a certification requirement, to ensure compliance with the "offshore transaction" requirement there should be certification upon exercise that the person exercising the warrants is not in the United States.²⁴² For Category 2 offerings, the restricted period is generally forty days after the distribution of the warrants is completed, provided procedures (a) through (c) above are implemented.²⁴³ However, when warrants are exercisable for underlying securities which are outstanding and freely transferable securities of a company that is unaffiliated with the issuer of the warrants, the underlying securities may be sold to U.S. persons with no restrictions on delivery nor certifications on exercise necessary

1, at 80,678 n.128; see Securities Act Rule 902(m)(3), 17 C.F.R. § 230.902(m)(3) (1995); see also Securities Act Rule 902(i)(3), 17 C.F.R. § 230.902(i)(3) (1995).

²³⁸ 10B Bloomenthal & Wolff, *supra* note 216, § 5.01[10], at 5-40.22. However, Regulation S does not state when the restricted period begins for the warrants themselves. 1 GREENE, *supra* note 20, at 5-42 n.127. The Adopting Release provides that the restricted period for the underlying securities "will coincide with the restricted period for the warrants" if the procedures listed in (a) through (c) above are met. Adopting Release, *supra* note 1, at 80,678. Therefore, because the restricted period for the underlying securities begins upon the completion of the distribution of the warrants if the required procedures are implemented, the restricted period for the warrants themselves must also begin upon the completion of the distribution of the warrants. 1 GREENE, *supra* note 20, at 5-42 n.127.

²³⁹ GREENE, *supra* note 20, at 5-42.

²⁴⁰ Adopting Release, *supra* note 1, at 80,678; 1 GREENE, *supra* note 20, at 5-42.

²⁴¹ 1 GREENE, *supra* note 20, at 5-42, 5-43 & n.129.

²⁴² 1 *id.* at 5-42, 5-43 & n.129.

²⁴³ 1 *id.* at 5-42; see Securities Act Rule 902(m), 17 C.F.R. § 230.902(m) (1995). The certification required on the exercise of the warrants (whether in a Category 1 or Category 2 offering), does not prevent the warrants from being sold into the United States or to U.S. Persons before they are exercised. 1 GREENE, *supra* note 20, at 5-43 n.129.

(i.e., procedures (a) through (c) need not be implemented).²⁴⁴

Warrants on an index are settled only in cash, and therefore, an offering of such warrants should be treated the same way under Regulation S as a debt offering.²⁴⁵

[d] Unit Securities

To determine the applicable category within the Issuer Safe Harbor, a unit securities offering is treated as if it were an offering of each security separately and the most restrictive of the applicable categories will govern the units offering. However, if the securities comprising the units may be separately traded immediately after issuance, to the extent feasible, the restrictions of the Issuer Safe Harbor may be applied as if the securities comprising the units were separately distributed. For example, if a unit consisting of both debt and equity securities is offered and sold under Category 3, the restricted period for equity would apply to the debt security unless the securities comprising the unit may be separately traded immediately after issuance, in which case the debt and equity securities would have their separate restricted periods.²⁴⁶

[5] Common Stock of Listed U.S. Issuers

Regulation S provides an exemption for offerings outside the United States of shares of common stock of U.S. issuers including issuers that are listed on a U.S. exchange or are quoted on NASDAQ.²⁴⁷ Nevertheless, because the principal market for such shares is usually in the United States, several problems arise for an issuer considering relying this exemption.²⁴⁸

(1) Because the shares probably will flow back into their home market, which is in the United States, the SEC could take the position that, although the offering technically complies with Regulation S, the issuer is using the Regulation to evade registration. The SEC is likely to take that position if the shares are offered at a discount from their current trading price. If the SEC were to take that position, Regulation S would be unavailable;²⁴⁹

(2) Because shares sold under Regulation S would be fungible with shares already trading in the U.S. securities markets and

²⁴⁴ 1 GREENE, *supra* note 20, at 5-43 (citing Securities Act § 4(1), 15 U.S.C. § 77d(1)).

²⁴⁵ 1 *id.* at 230.2.

²⁴⁶ Adopting Release, *supra* note 1, at 80,672.

²⁴⁷ 1 GREENE, *supra* note 20, at 5-34; see Securities Act Rule 903(c)(2), 17 C.F.R. § 230.903(c)(2) (1995). All listed U.S. companies are reporting issuers as defined *supra* part III.D.6. Accordingly, offerings of shares of listed U.S. companies fall under Category 2. 1 GREENE, *supra* note 20, at 5-34 n.108.

²⁴⁸ 1 GREENE, *supra* note 20, at 5-34.

²⁴⁹ 1 *id.* at 5-34 to 5-35. This problem is unlikely to arise when a listed U.S. issuer conducts a global offering of its shares because the shares that flow back into the United States will usually be covered by an effective registration statement under the Securities Act. 1 *id.* at 5-35 n.109.

are likely to quickly flow back to those securities markets, market participants might inadvertently violate Regulation S restrictions, thereby violating section 5 of the Securities Act. Distributors and their affiliates, to avoid inadvertently offering and selling shares that are part of the Regulation S offering in the United States or to U.S. persons during the forty day restricted period, might limit or cease their trading in any shares of the issuer in the United States during the restricted period.²⁵⁰

(3) Distributors and their affiliates might also decide to reduce their market making activities in the shares outside the United States because the primary market for the shares (the United States) would effectively be inaccessible to them during the restricted period, which reduces the demand for shares they buy,²⁵¹

(4) Because the Regulation S securities would be indistinguishable from shares already trading in the market, other securities dealers that are not distributors (or their affiliates) may decide not to sell any shares in the United States for forty days after the offering commences because inadvertent sales of the Regulation S securities would not be exempt under section 4(3) during this period.²⁵²

Certainly, if many securities dealers stopped trading a listed security, the market for the issuer's securities would be seriously affected.²⁵³ Therefore, it is necessary to distinguish the shares being offered outside the United States from the shares already being traded in the United States. One possible method of distinguishing the shares is to require physical delivery of share certificates for the new shares and to obtain a separate CUSIP number for them.²⁵⁴ A second possible method of distinguishing the shares would be to use provisional allotment letters represented by bearer certificates that could be settled using the European clearing systems. After the restricted period expires, the security holders could receive their shares.²⁵⁵ Additionally, it would be advisable to reduce the probability that securities offered abroad would flow back into the United States by having buyers agree not to resell the shares in the United States during

²⁵⁰ 1 *id.* at 5-35.

²⁵¹ 1 *id.*

²⁵² 1 *id.* at 5-35 to 5-36.

²⁵³ 1 *id.* at 5-36.

²⁵⁴ 1 *id.* The shares sold outside the United States are legended and may be transferred during the restricted period only if the purchaser provides a certification of its non-U.S. status. Alternatively, the shares sold outside the U.S. are deposited with a depository bank in exchange for depository receipts which contain a legend restricting their resale into the United States during the restricted period. The depository receipts bear a separate security number and may be exchanged for the underlying shares only after the restricted period expires and the holder provides a certification of non-U.S. status. A third approach is for the depository bank to maintain a book-entry system which requires certification of non-U.S. status for every transfer during the restricted period. 1 *id.* at 5-36 n.112.

²⁵⁵ 1 *id.* at 5-36.

the Regulation S restricted period (or to conduct derivative transactions having the effect of a sale during this period). The discount of the offering price to the then current market price should be limited to a small amount, e.g., five percent, to minimize buyers' incentives to resell (directly or through derivative transactions) during the restricted period.²⁵⁶

3. Rule 904: The Resale Safe Harbor

[1] Generally

The Resale Safe Harbor is available for sales of securities by persons other than the issuer, a distributor, certain of their affiliates, and persons acting on their behalf.²⁵⁷ Resales by (a) any person other than the issuer, a distributor, their affiliates, and persons acting on their behalf, and (b) any officer or director of the issuer or a distributor who is an affiliate solely by virtue of holding such position are deemed to occur outside the United States if the two general conditions are satisfied (i.e., an offshore transaction has taken place and there have been no directed selling efforts).²⁵⁸ For resales under the Resale Safe Harbor, the offshore transaction requirement is met if the buyer is (or the seller and any person acting on its behalf reasonably believe that the buyer is) outside the United States when the buy order is originated (even if the buyer is a U.S. person), or the transaction is executed on a "designated offshore securities market" and neither the seller nor any person acting on its behalf knows that the transaction has been prearranged with a buyer in the United States.²⁵⁹ The transaction is not required to occur on a physical trading floor.²⁶⁰

To qualify for the Resale Safe Harbor, the qualifying officers and directors must pay only the customary broker's commission.²⁶¹ While

²⁵⁶ 1 *id.* at 5-36.

²⁵⁷ Securities Act Rule 904, 17 C.F.R. § 230.904 (1995); Adopting Release, *supra* note 1, at 80,666. The SEC has taken the position that securities which were issued before the adoption of Regulation S (i.e., in reliance on Release 4708) may be resold under the Resale Safe Harbor and that Regulation S has no bearing on whether Release 4708 procedures must continue to be maintained to ensure that registration under the Securities Act is not required. Bogle & Gates, SEC No-Action Letter, [1990-1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 79,617, at 77,786 (Sept. 28, 1990).

²⁵⁸ Securities Act Rule 904(a), (b), 17 C.F.R. § 230.904(a), (b) (1995); *see* Adopting Release, *supra* note 1, at 80,680.

²⁵⁹ *See supra* notes 131-41 and accompanying text.

²⁶⁰ *See* Securities Act Rule 902(i)(1)(ii)(B), 17 C.F.R. § 230.902(i)(1)(ii)(B) (1995).

²⁶¹ Securities Act Rule 904(c)(2), 17 C.F.R. § 230.904(c)(2) (1995); Wolff, *supra* note 9, at 140. However, if such officer or director is being used as a conduit to offer and sell securities in reliance on the Resale Safe Harbor by a person ineligible to rely on that safe harbor, the safe harbor will not be available. Accordingly, securities being offered in a distribution by the issuer could not be resold under the Resale Safe Harbor by an officer or director during the distribution or during any applicable restricted period. Adopting Release, *supra* note 1, at 80,680, 80,680 n.139.

officers and directors who are affiliates solely by virtue of their positions (i.e., not because of their stockholdings, are eligible to rely on the Resale Safe Harbor), other affiliates must comply with the requirements of the Issuer Safe Harbor.²⁶²

Resales outside the United States before the expiration of the appropriate restricted period by a dealer or other person receiving a selling concession, fee, or other remuneration in connection with an offering (such as a subunderwriter), are permitted if, in addition to the two general conditions, additional requirements designed to reinforce the restriction on directed selling efforts in the United States and the offshore transaction requirement are implemented.²⁶³

These requirements are:

- (i) neither the seller nor any person acting on its behalf knows that the offeree or buyer of the securities is a U.S. person,²⁶⁴ and
- (ii) where the selling securities professional or its agent knows that the purchaser is a dealer or other person receiving a selling concession for the securities sold, the seller (or person acting on the seller's behalf) sends to the purchaser a confirmation or other notice stating that the securities may be offered and sold during the restricted period only in accordance with Regulation S, pursuant to registration under the Securities Act, or pursuant to an exemption from registration.²⁶⁵

The Resale Safe Harbor is available for the resale outside the United States of any securities, whether or not acquired offshore in a Regulation S transaction.²⁶⁶ For example, securities acquired in a Rule 144A or other private placement transaction may be immediately resold under the Rule 904 Resale Safe Harbor.²⁶⁷ Securities originally sold in a private placement may be resold outside the United States under Rule 904 without affecting the validity of the original private

²⁶² Memorandum from Rogers & Wells 48-49 (June 1991) (distributed at the National Membership Meeting of the National Society of Compliance Professionals held on October 15-16, 1992) [hereinafter Rogers & Wells Memorandum]; see Securities Act Rules 903-904, 17 C.F.R. §§ 230.903-904 (1995).

²⁶³ See Securities Act Rule 904(c)(1), 17 C.F.R. § 230.904(c)(1) (1995).

²⁶⁴ Securities Act Rule 904(c)(1)(i), 17 C.F.R. § 230.904(c)(1)(i) (1995). The Resale Safe Harbor does not impose a duty of inquiry on the securities professional. Adopting Release, *supra* note 1, at 80,681 n.140.

²⁶⁵ Securities Act Rule 904(c)(1)(ii), 17 C.F.R. § 230.904(c)(1)(ii) (1995); Adopting Release, *supra* note 1, at 80,681. As in the Issuer Safe Harbor, compliance with the confirmation requirement of the Resale Safe Harbor occurs on transmission of the confirmation, rather than on receipt or delivery. Adopting Release, *supra* note 1, at 80,681 n.141.

²⁶⁶ Adopting Release, *supra* note 1, at 80,681.

²⁶⁷ 1 GREENE, *supra* note 20, at 4-26 to 4-28.

placement exemption relied upon by the issuer.²⁶⁸

An important aspect of the Resale Safe Harbor is that it permits U.S. investors to resell immediately outside the U.S. securities they purchased in Rule 144A or other private placement transactions. Accordingly, the Resale Safe Harbor has increased the attractiveness of privately placed securities of foreign issuers because those securities may now be resold immediately into their primary market outside the United States.²⁶⁹

[2] Resales on a Nondesignated Exchange

A seller could also potentially rely on the French privatization line of no-action letters to resell equity securities on an exchange not designated by the SEC, if there is no active U.S. trading market for the securities, and there is a low level of U.S. participation on that exchange.²⁷⁰ For example, under CREF I, private placements in the United States of equity securities, with no U.S. market, were to be conducted by various issuers concurrently with public offerings in France and other foreign countries. The Division of Corporate Finance stated that each issuer's private placement would not be integrated with its public offering and the section 4(2) exemption for that private placement would not be destroyed if, without many procedures to prevent their distribution in the United States, the securities were resold in regular way transactions on the Paris Bourse without inquiry of the nationality or residence of the counterparty. These resales would not involve a distribution or redistribution into the United States or to U.S. nationals, because there was no U.S. market for that issuer's securities, and hence, little chance of flowback into the United States. (However, under CREF I, in each public offering made outside the United States, the underwriters, dealers, and other distributors were contractually prohibited from distributing or redistributing those securities within the United States or to U.S. nationals.)²⁷¹

[3] Distributors

Distributors and their affiliates are not precluded by Regulation S from engaging in secondary transactions in securities of the same class as those being distributed if the securities are not borrowed or replaced with shares from the offering.²⁷² The SEC stated, "[a] distributor holding an unsold allotment of securities in a segregated

²⁶⁸ Adopting Release, *supra* note 1, at 80,681.

²⁶⁹ 1 GREENE, *supra* note 20, at 5-19.

²⁷⁰ 1 *id.* at 5-18 to 5-20.

²⁷¹ See CREF I, *supra* note 26; see also French Privatization Program, 1987 SEC No-Act. LEXIS 2033 (Apr. 17, 1987) (allowing the resale of private placement securities on the Paris Bourse without investigation of the nationality or residence of the counterparty to the trade when there was no U.S. market for the securities of the issuers except for their nonconvertible debt securities with maturities of less than one year).

²⁷² Adopting Release, *supra* note 1, at 80,666.

identifiable account may sell as a nondistributor other securities of the same class, so long as such securities were not borrowed from and will not be replaced by securities that are part of the unsold allotment."²⁷³

Once the distribution and any restricted period have ended, distributors that have sold their allotments no longer have distributor status and can rely on Rule 904's Resale Safe Harbor. But, as long as the distributor holds some part of his unsold allotment, it cannot rely on Rule 904 for the offer and sale of the unsold allotment.²⁷⁴

4. *Protections for Safe Harbors*

If an issuer, distributor, or their affiliates (other than officers and directors relying on the Rule 904 Resale Safe Harbor) or persons acting on behalf of any of them, either (a) fails to comply with the offering restrictions or (b) engages in a directed selling effort in the United States, then the Rule 903 Issuer Safe Harbor is unavailable to every person involved in the offering. However, if an issuer, distributor, any of their affiliates (other than officers and directors relying on the Resale Safe Harbor), or agent of any of them fails to comply with any other requirement of the Issuer Safe Harbor, then the safe harbor is not available for any offer or sale made by the person failing to comply (or its affiliates or agents), but it remains available for other persons' offers and sales.²⁷⁵

The Resale Safe Harbor is stronger, and it is generally unaffected by the actions of the issuer, distributor, any of their affiliates (other than certain officers and directors relying on the Resale Safe Harbor), or persons acting on behalf of any of them. That is, an offer or sale of securities made in compliance with the Resale Safe Harbor remains unaffected by noncomplying offers or resales made by other persons unaffiliated with and not acting on behalf of the seller.²⁷⁶

5. *Problematic Practices Under Regulation S*

The SEC has identified certain abusive practices that developed in offerings purportedly made in reliance on Regulation S.²⁷⁷ These practices generally involved offerings by U.S. reporting companies of unregistered equity securities that were traded principally, if not solely, in the United States.²⁷⁸ These practices probably never were permis-

²⁷³ *Id.* at 80,666 n.32.

²⁷⁴ *Id.* at 80,666.

²⁷⁵ *Id.* at 80,681.

²⁷⁶ *Id.* Affiliates of the seller (except for the issuer or a distributor, in the case of an officer or director thereof selling in reliance on the Resale Safe Harbor) will be deemed to be acting on behalf of the seller. *Id.* at 80,681 n.144.

²⁷⁷ See Problematic Practices Release, *supra* note 12.

²⁷⁸ *Id.* at 3067-16 to -17.

sible under a fair reading of the regulation, but, in any event, the SEC has stated its views concerning these problematic practices.

Preliminary Note 2 to Regulation S, discussed above, states that the regulation is not available for transactions that, although in technical compliance with the regulation, are part of a plan or scheme to evade the registration requirements of the Securities Act. The practices identified by the SEC run afoul of Preliminary Note 2, and, therefore, would not be covered by the two safe harbors of Regulation S, and would not constitute an offer and sale outside the United States under the Rule 901 General Statement. The problematic offerings are those purportedly conducted offshore when the circumstances indicate that the securities are being placed offshore only temporarily with the result that they are, in reality, being distributed in the United States. The SEC considers the following factors to determine whether the securities are being distributed in the United States: (a) whether the incidence of ownership of the securities ever leaves the U.S. market, (b) whether a substantial part of the economic risk of owning those securities is left in, or returned to, the U.S. market during the restricted period, and (c) whether the transaction was such that there was no reasonable expectation that the securities could be viewed as actually coming to rest abroad.²⁷⁹

Additionally, the SEC has stated its views concerning specific abusive practices. First, schemes for parking securities with offshore affiliates of the issuer or distributor, such as selling the securities to affiliated shell entities that hold the securities for the restricted period, at the end of which period, proceeds from the U.S. sale find their way to the issuer or distributor, are nothing more than sham offshore transactions designed to evade the registration requirements of the Securities Act. Second, the Rule 904 Resale Safe Harbor cannot be used to “wash off” resale restrictions, such as the holding period for restricted securities under Rule 144 of the Securities Act. Similarly, the restricted status of securities is not affected by a prearranged sale conducted offshore. If a holder of restricted securities sells them in an offshore transaction and replaces them by repurchasing fungible unrestricted securities, the replacement securities are subject to the same restrictions as those replaced.²⁸⁰

Lastly, any one of the following practices may indicate that the economic or investment risk never shifted to the offshore purchaser, or that it returned to the United States during the restricted period:

1. where nonrecourse promissory notes are used for all or almost

²⁷⁹ *Id.* at 3067-17.

²⁸⁰ *Id.* at 3067-18. This sentence is repeated in the text as it is set forth in the release. Although if taken alone the sentence is ambiguous, it should be limited to those situations where the sale and purchase are prearranged. *See id.*

all of the purchase price, and repayment is expected from the resale of the securities in the United States;

2. where recourse notes from an entity unknown to the seller, or from an entity with little or no assets, are used, and repayment is expected from the resale of the securities in the United States;

3. where the purchaser receives fees to hold the securities for the restricted period, whether directly or through significant discounts to the U.S. market price for the securities, and the fees or discounts are so steep as to be unrelated to the economics of the transaction (thereby indicating a parking or similar scheme); or

4. short selling or other hedging transactions (such as option writing, equity swaps, or other types of derivative transactions) that occur in the U.S. markets, i.e., where the purchaser transfers the benefits or burdens of owning the securities back to the U.S. market during the restricted period.²⁸¹

In each of these cases, the transaction is viewed as a delayed sale by the seller in the United States, with the purported offshore purchaser acting as a statutory underwriter.²⁸²

F. Related Matters

1. Nonintegration

Offshore transactions made under Regulation S will not be integrated with concurrent registered U.S. offerings or U.S. offerings which are exempt from registration under the Securities Act.²⁸³

2. Interaction of Regulation S and the Trust Indenture Act

The Trust Indenture Act of 1939²⁸⁴ applies generally to the offer and sale of debt securities and certain other securities²⁸⁵ through the means or instruments of interstate commerce or the mails.²⁸⁶ These securities must be issued under an indenture which complies with the requirements of and has been qualified under the Trust Indenture Act, unless an exemption is available.²⁸⁷ The SEC has stated that it will not take any enforcement action under the Trust Indenture Act when

²⁸¹ *Id.* at 3067-18 & nn. 14, 16. Similarly, the securities will not be deemed to have come to rest abroad during the restricted period if the securities are pledged as collateral, in a margin account or otherwise, where the expectation is that the collateralization will transfer the benefits and burdens of owning those securities to the lender instead of the purchaser and the lender is in the United States. *Id.* at 3067-18 n.15.

²⁸² *Id.* at 3067-18.

²⁸³ Adopting Release, *supra* note 1, at 80,681.

²⁸⁴ Trust Indenture Act of 1939, §§ 301-328, 15 U.S.C. §§ 77aaa-77bbb (1994).

²⁸⁵ The Trust Indenture Act covers "indebtedness, certificates of interest or participations in indebtedness, or temporary certificates for, or guarantees of, indebtedness or certificates of interest therein." Wolff, *supra* note 9, at 153, 153 n.337.

²⁸⁶ Adopting Release, *supra* note 1, at 80,682.

²⁸⁷ *Id.*

an offer and sale of securities is made without a qualified indenture, if the offer and sale comply with the safe harbors of Rules 903 or 904.²⁸⁸

3. *Investment Companies*

Like any other issuer, an investment company may not use the means of interstate commerce to offer and sell securities except pursuant to registration or an exemption.²⁸⁹ Regulation S applies to offers and sales of securities issued by registered closed-end investment companies²⁹⁰ and to investment companies that are not registered or required to register under the Investment Company Act of 1940.²⁹¹ However, the regulation does not apply to the offer and sale of securities issued by open-end investment companies²⁹² or unit investment trusts²⁹³ registered or required to be registered under the Investment Company Act or to closed-end investment companies required to be registered, but not registered, under the Investment Company Act.²⁹⁴

4. *Rights Offerings by Foreign Issuers*

Although rights offerings by foreign issuers are not expressly addressed in Regulation S, nevertheless, Regulation S could still apply to such offerings. In a rights offering, the new securities are offered directly by the issuer to holders of the outstanding securities and there is no "distributor." For Category 1 offerings, although there are no offering restrictions, nonetheless, the issuer should obtain a certification from security holders to ensure that the "offshore transaction"

²⁸⁸ *Id.*

²⁸⁹ Wolff, *supra* note 9, at 149.

²⁹⁰ Adopting Release, *supra* note 1, at 80,683. "Closed-end investment company" means any management company except an "open-end investment company" (defined *infra* note 292). Wolff, *supra* note 9, at 151 n.317 (citing Investment Company Act of 1940 § 5(a)(2), 15 U.S.C. § 80a-5(a)(2) (1988)). "Management company" means any investment company except a face-amount certificate company (defined in Investment Company Act § 4(1), 15 U.S.C. § 80a-4(1)) or a unit investment trust (defined *infra* note 293). Wolff, *supra* note 9, at 149 n.308 (citing Investment Company Act § 4(3), 15 U.S.C. § 80a-4(3) (1988)).

²⁹¹ Adopting Release, *supra* note 1, at 80,682.

²⁹² "Open-end investment company", or mutual fund, means a management company which is offering to sell or has outstanding any redeemable security of which it is the issuer. Wolff, *supra* note 9, at 149 n.308 (citing Investment Company Act § 5(a)(1), 15 U.S.C. § 80(a)-5(a)(1) (1988)).

²⁹³ "Unit investment trust" means an investment company which: is organized under a trust indenture, contract of custodianship or agency, or like instrument; lacks a board of directors; and "issues only redeemable securities which represent an undivided interest in a unit of specified securities (but does not include a voting trust)." Wolff, *supra* note 9, at 150 n.315 (citing Investment Company Act § 4(2), 15 U.S.C. § 80(a)-4(2) (1988)).

²⁹⁴ Regulation S, *supra* note 1, at Preliminary Note 8. Comment was solicited with respect to extending the application of the regulation to offers and sales of securities issued by registered open-end mutual funds and unit investment trusts. See Adopting Release, *supra* note 1, at 80,683.

requirement is satisfied. In Category 2 and 3 offerings, the issuer should obtain from security holders a certification that the buyers are not U.S. persons.²⁹⁵

Because there are no distributors, the prohibition against offers or sales in the United States or to U.S. persons during the restricted period is moot.²⁹⁶ In theory, (and subject to the forty day period imposed by section 4(3)(A) for sales by dealers),²⁹⁷ securities sold offshore in a rights offering should be permitted to be traded freely into the United States immediately thereafter under sections 4(1) and 4(3).²⁹⁸

However, when the rights offering is underwritten, the Regulation S restrictions would apply to the offering in the same way as they do to a standard underwritten offering.²⁹⁹

5. *ADR Facilities During the Restricted Period*

A depositary may issue American Depositary Receipts (ADRs)³⁰⁰ representing securities of the same class as that being offered under Regulation S during the restricted period. An ADR depositary may issue ADRs in exchange for the deposit of the underlying securities (and permit the withdrawal of deposited securities by ADR holders) during the Regulation S restricted period provided the ADRs do not represent the same securities being offered under Regulation S — i.e., if the ADRs represent securities acquired by the depositary before the offering or the depositary can identify the certificate (by examining it or otherwise)³⁰¹ as not a part of the offering which is subject to the restricted period, and the certificate was neither borrowed nor deposited with the intention that it be replaced with securities subject to the restricted period.³⁰²

²⁹⁵ 1 GREENE, *supra* note 20, at 5-43 to 5-44. However, foreign laws requiring that all shareholders be treated the same may prevent such certification. 1 *id.* at 5-44.

²⁹⁶ 1 *id.* at 5-44.

²⁹⁷ In a rights offering by a foreign issuer, the § 4(3)(A) 40 day period begins on the first day that existing shareholders can apply to subscribe for the shares. 1 *id.* at 5-44 n.135.

²⁹⁸ 1 *id.* at 5-44.

²⁹⁹ 1 *id.* at 5-43 n.134.

³⁰⁰ An ADR is a negotiable certificate (a receipt), which represents ownership of a specified number of securities of a foreign issuer. Thus, an ADR is a "substitute" certificate for trading foreign securities which enables the holder to transfer title to the underlying foreign securities by transferring the ADR. ADR 1991 Release, *supra* note 94, at 81,587; 2 LOSS & SELIGMAN, *supra* note 98, at 774, 774 n.72, 1054.

³⁰¹ Examples of possible methods of distinguishing newly distributed securities from those already trading in the markets include underlining dates, using different colored certificates, using legends, using identified certificate numbers, and the coding of securities by the transfer agent. Adopting Release, *supra* note 1, at 80,678; 10B Bloomenthal & Wolff, *supra* note 216, § 5.01[11][b][i], at 5-40.30.

³⁰² 10 B Bloomenthal & Wolff, *supra* note 216, § 5.01[11][b][i], at 5-40.29; *see* Adopting Release, *supra* note 1, at 80,678.

IV. Protections from Liability

A. During the Restricted Period

Although securities sold offshore under Regulation S may be resold under the Resale Safe Harbor, they may also be resold under an exemption from registration, even during the Regulation S restricted periods of Categories 2 and 3.³⁰³ The right to resell to U.S. persons during the restricted period is not expressly stated in the regulation, but is implicit in the offering restrictions defined in Rule 902(h).³⁰⁴ That is, a literal reading of the transactional restrictions of Categories 2 and 3 (specifically, Rules 903(c)(2)(iii), 903(c)(3)(ii)(A), and 903(c)(3)(iii)(A)), raises the question of whether the prohibition on sales to U.S. persons during the restricted period is absolute, or whether sales may be made to U.S. persons at any time under an exemption.³⁰⁵ As repropoed, the transactional restrictions for Category 2 prohibited offers and sales in the United States or to U.S. persons who were not distributors “except pursuant to registration . . . or an available exemption from registration.”³⁰⁶ On adoption, the statement that resales could be made during the restricted period to U.S. persons pursuant to an exemption was deleted from the transactional restrictions.³⁰⁷ However, on adoption, the offering restrictions in Rule 902(h) retained the right to resell during the restricted period to U.S. persons.³⁰⁸ Accordingly, the text of the offering restrictions supports the conclusion that resales may be made during the restricted period to U.S. person under by Rule 144A.³⁰⁹ Section 4(1) provides an exemption for sales not involving an issuer, underwriter, or dealer.³¹⁰ Although it is generally believed that investors who are not securities dealers and who receive no selling concession may resell their securities into the United States at any time under 4(1), at least one commentator believes it is not practical to do so during the restricted period.³¹¹

³⁰³ Wolff, *supra* note 9, at 142.

³⁰⁴ *Id.*

³⁰⁵ *Id.* at 137.

³⁰⁶ *Id.* (quoting *Offshore Offers and Sales*, 545 Fed. Reg. 30,063, 30,073-74 (1-989)) (emphasis added).

³⁰⁷ Wolff, *supra* note 9, at 137.

³⁰⁸ *Id.*

³⁰⁹ Wolff, *supra* note 9, at 142; J. WILLIAM HICKS, *RESALES OF RESTRICTED SECURITIES* 629 (1994).

³¹⁰ Securities Act § 4(1), 15 U.S.C. § 77d(1) (1994).

³¹¹ Wolff, *supra* note 9, at 142-43. Wolff states that such a seller into the United States “would carry a heavy burden,” presumably, to prove that it was not an underwriter. Wolff also notes that such sales into the United States were not possible under Release 4708 before the securities came to rest abroad. See also 1 GREENE, *supra* note 20, at 5-18 n.52. However, since Category 1 securities have no restricted period, those securities (other than unsold

Of the other possible means of reselling, section 4(3) provides an exemption for transactions by a dealer (including an underwriter no longer acting as such), except for transactions which occur during the forty days after the security was first bona fide offered to the public (and unsold allotments). Therefore, sales of unregistered securities into the United States by dealers during the forty days after the securities were offered outside the United States under Regulation S are not exempt under section 4(3) of the Securities Act.³¹²

Lastly, for sales under Rule 144A, that rule provides an exemption under section 4(1) for a seller other than an issuer or dealer and an exemption under section 4(3) for a dealer, reselling securities immediately (i.e., during the forty day period of section 4(3)(A)), on the basis that under Rule 144A the securities were not offered to the public.³¹³

B. After the Restricted Period

After the Regulation S restricted period ends, a seller must establish the availability of section 4(1), section 4(3), or some other exemption for resales into the United States of the securities offered and sold outside the United States under Regulation S because all sales of securities in the United States using the means of interstate commerce must be either registered under section 5 of the Act or exempt from such registration.³¹⁴

allotments) may be sold into the United States immediately, subject to the 40 day limitation imposed on dealers by § 4(3). 1 *id.* at 5-17 to 5-18.

³¹² See Adopting Release, *supra* note 1, at 80,672 n.84. A Regulation S offering is a bona fide public offering for purposes of § 4(3)(A), which triggers its 40 day period. See 1 GREENE, *supra* note 20, at 5-20.

Because a research report about an issuer's shares may, in certain circumstances, constitute an "offer" of those shares, § 4(3) may also prevent the circulation of research reports in the United States during the § 4(3) 40 day period by both distribution participants and nonparticipants. 1 *id.* at 5-20 n.58. Despite the risk, nonparticipating broker-dealers generally continue to distribute research reports in the United States during the § 4(3) 40 day period. 1 *id.* However, participating broker-dealers usually refrain from circulating research reports in the United States during the period, except possibly under circumstances where they have sold their allotments and there was a substantial pre-existing trading market for the shares (because, in such circumstances, the research report arguably could relate to the outstanding shares trading in the market rather than the shares that are part of the offering). 1 *id.* If such research report stimulates orders, the broker-dealer must deliver only the pre-existing shares (i.e., not the shares sold in the offering) to satisfy those orders. 1 *id.* Furthermore, it should be permissible for a participating broker-dealer to distribute research reports in the United States about the issuer's debt securities where equity securities are being offered (and vice versa) if that broker-dealer has already sold its allotment. 1 *id.*; see Securities Act Rule 138, 17 C.F.R. § 230.138 (1995).

³¹³ Wolff, *supra* note 9, at 144. However, there are some practitioners who believe that dealers cannot sell under Rule 144A during the 40 day § 4(3)(A) period. *Id.*

³¹⁴ *Id.* at 143. In the Adopting Release, the SEC stated in a footnote that "[u]pon expiration of any restricted period, securities (other than unsold allotments) will be viewed as unrestricted." Adopting Release, *supra* note 1, 80,676 n.110. Hicks interprets footnote 110 to mean that, after the Regulation S restricted period, nonaffiliates can resell Regulation S

After the restricted period, section 4(1) would be available for routine trading or resale transactions.³¹⁵ Resales in the United States or to U.S. persons after the restricted period may also be made, as described above, under Rule 144A.³¹⁶ As discussed above, section 4(3) provides an exemption for transactions by dealers except, among others, transactions involving the offer or sale of unsold allotments and transactions occurring within forty days after the securities were first bona fide offered to the public.³¹⁷ Accordingly, even though Category 1 has no restricted period, dealers relying on section 4(3) may not resell Category 1 securities in the United States for forty days after the commencement of the Regulation S offering.³¹⁸

V. Tax Regulations

Around the time Regulation S was adopted, the Department of the Treasury adopted regulations, generally referred to as the "TEFRA D" or "D Rules,"³¹⁹ which established new procedures for offerings of bearer debt obligations outside the United States.³²⁰ The interrelationship of Regulation S and the U.S. tax regulations is important because each one applies independently of the other to offerings of debt in bearer form³²¹ and they sometimes conflict.³²² Although this section gives a brief overview of the applicable tax issues, an extensive discussion is beyond the scope of this Article.

Generally, for U.S. issuers and foreign issuers that are U.S. taxpayers, interest paid to a foreign individual or corporation on a

securities into the United States without any limitations (presumably under §§ 4(1) and 4(3)) and affiliates can resell pursuant to Rule 144. HICKS, *supra* note 311, at 629-30. After the Regulation S restricted period, affiliates presumably can resell Regulation S securities into the United States under another available exemption as well. See Regulation S, *supra* note 1, at Preliminary Note 6. Note though that §4(1) is unavailable for a deferred distribution involving special selling efforts in the United States. Wolff, *supra* note 9, at 143 n.267. Consistently, the SEC has stated that footnote 110 does not permit public resales in the United States by persons that would be deemed underwriters under § 2(11) of the Securities Act (i.e., statutory underwriters) without registration or an exemption from registration. Problematic Practices Release, *supra* note 12, at 3067-18 n.17.

³¹⁵ Wolff, *supra* note 9, at 143. However, a seller's exemption under § 4(1) might be attacked by the SEC when that person purchased securities offshore under Regulation S, waited 40 days, and then on day 41 resells those securities into the only available secondary market for them which is located in the United States. *Id.*; HICKS, *supra* note 311, at 630. Such attack might be along the lines of Preliminary Note 2, that this transaction was designed to evade registration under the Securities Act or that the seller is really an "underwriter." HICKS, *supra* note 311, at 630 n.28.

³¹⁶ See Wolff, *supra* note 9, at 142.

³¹⁷ *Id.* at 143-44.

³¹⁸ 1 GREENE, *supra* note 20, at 5-20.

³¹⁹ 1 *id.* at 5-23; S. Douglas Borisky & Mike Liu, *New Tax Regulations Governing Bearer Debt Offerings in the International Capital Markets*, INSIGHTS, July 1990, at 3, 3.

³²⁰ Treas. Reg. § 1.163-5(c)(2)(i)(D) (as amended by T.D. 8300, 55 FR 19624, May 10, 1990); Borisky & Liu, *supra* note 321, at 3; see Kosnik, *supra* note 56, at 207-208.

³²¹ Wolff, *supra* note 9, at 146.

³²² Rogers & Wells Memorandum, *supra* note 262, at 52; see Wolff, *supra* note 9, at 148.

debt instrument is subject to U.S. withholding tax³²³ unless the interest qualifies as portfolio interest.³²⁴ The interest paid on debt issued in registered form qualifies as portfolio interest if the holder provides a statement that the beneficial owner is not a U.S. person as defined in the Internal Revenue Code.³²⁵ However, interest paid on debt issued in bearer form qualifies as portfolio interest only if: (1) there are arrangements reasonably designed to ensure that the obligation will be sold (or resold in connection with its original issuance) only to a person who is not a U.S. person (the "arrangements reasonably designed" test); (2) the interest is payable only outside the United States and its possessions; and (3) the debt instrument bears the "TEFRA legend,"³²⁶ which states that any U.S. person who holds the obligation will be subject to certain limitations under the U.S. income tax laws.³²⁷ Generally, if a bearer obligation is issued which does not comply with these requirements, the issuer is subject to a punitive excise tax,³²⁸ and an issuer that pays U.S. tax loses its interest deduction for the interest paid on the instrument.³²⁹

The D Rules contain three requirements which, if satisfied, meet the "arrangements reasonably designed" test.³³⁰ The three requirements impose: (1) restrictions on offers and sales of bearer debt obligations within the United States or to U.S. persons during a restricted period; (2) restrictions on the delivery of bearer debt obligations in definitive form within the United States, for obligations sold during a restricted period; and (3) a certification requirement — i.e., on the earlier of the date of first payment of interest on the obligation or the date of delivery by the issuer of the obligation in definitive form, the beneficial owner of the obligation must certify to its non-U.S. status.³³¹

³²³ I.R.C. §§ 871(a)(1), 881(a)(1) (1994); § 871(g)(1)(B)(i) (1994).

³²⁴ *Id.* §§ 871(h)(1), 881(c)(1); Rogers & Wells Memorandum, *supra* note 262, at 51; *see* 1 GREENE, *supra* note 20, at 5-21 to 5-22.

³²⁵ Rogers & Wells Memorandum, *supra* note 262, at 51; *see* I.R.C. §§ 871(h)(2)(B), 881(c)(2)(B) (1994); *see also* 1 GREENE, *supra* note 20, at 5-22.

³²⁶ 1 GREENE, *supra* note 20, at 5-28.

³²⁷ *See* I.R.C. §§ 871(h)(2)(A), 881(c)(2)(A), 163(f)(2)(B) (1994).

³²⁸ *Id.* § 4701(a). This tax equals one percent of the principal amount of the obligation multiplied by the number of calendar years (or portions thereof) from the issuance date to the maturity date of the obligation. *Id.*; 1 GREENE, *supra* note 20, at 5-22 n.62.

An obligation issued in registered form will be subject to the U.S. tax laws governing bearer form obligations if it can be converted into a bearer form obligation before maturity. 1 GREENE, *supra* note 20, at 5-21.

³²⁹ *See* I.R.C. § 163(a), (f)(1), (2)(A),(B) (1994); *see also* Wolff, *supra* note 9, at 144-45; 1 GREENE, *supra* note 20, at 5-21 & n.61, 5-22.

³³⁰ Treas. Reg. § 1.163-5(c)(2)(i) (as amended in 1990).

³³¹ *Id.* § 1.163-5(c)(2)(i)(D). Generally, foreign issuers of bearer debt obligations to non-U.S. persons need not be concerned with the D Rules because they may rely on Treas. Reg. § 1.163-5(c)(2)(i)(C) (as amended in 1990) (the "TEFRA C rules" or the "C Rules") which provide an alternative set of procedures which foreign issuers (and, under limited circumstances, U.S. issuers) may use to satisfy the "arrangements reasonably designed" test

The Rules differ from Regulation S in several important respects, including the ability to sell to U.S. persons during a restricted period following a distribution, the definition of U.S. person, and the imposition of certification requirements.³³²

To comply with TEFRA D, the securities generally may not be offered or sold within the United States or to U.S. persons during a forty day restricted period.³³³ Thus, the D Rules cancel the benefit of Regulation S, which permits, under Category 1, sales to U.S. persons during a distribution, as well as the immediate resale, under all categories, to U.S. persons pursuant to Rule 144A or another exemption during the restricted period.³³⁴

As mentioned above, the D Rules generally prohibit offers and sales of bearer debt during the TEFRA D restricted period to persons within the United States. Therefore, even though Regulation S permits offers and sales during the restricted period to U.S. professional fiduciaries acting with investment discretion for non-U.S. persons, to comply with TEFRA D, offers apparently may not be made to the U.S. offices of such fiduciaries during the TEFRA D restricted period.³³⁵

Also, in contrast to Regulation S, which defines the term "U.S. person" to mean U.S. residents, the Internal Revenue Code³³⁶ defines "U.S. person" more broadly to include U.S. citizens residing abroad.³³⁷ Accordingly, to comply with TEFRA D, sales of bearer debt obligations cannot be made during the TEFRA D restricted period to U.S. citizens residing abroad even though sales to such

(i.e., the offering must be conducted outside the United States and may not significantly involve interstate commerce). See 1 GREENE, *supra* note 20, at 5-27 to 5-28 (discussing the C Rules). However, to avoid the one percent excise tax discussed above, foreign issuers may not issue bearer debt to "U.S. persons" (as that term is defined in the Internal Revenue Code). Rogers & Wells Memorandum, *supra* note 262, at 51 n.1.

³³² Wolff, *supra* note 9, at 146.

³³³ *Id.* at 146-47 & n.290, 148. Under TEFRA D, the "restricted period" begins on the earlier of the closing date (or the date when the issuer receives the loan proceeds where there is no closing) or the first date on which the obligation is offered to nondistributors, and ends on the expiration of the 40 day period beginning on the closing date (or the date when the issuer receives the loan proceeds where there is no closing). Treas. Reg. § 1.163-5(c)(2)(i)(D)(7) (as amended in 1990). However, all offers and sales by the issuer or a distributor of securities which are part of an unsold allotment are deemed to be made during the restricted period. *Id.*

³³⁴ Wolff, *supra* note 9, at 148; see *supra* part IV.A. (discussing resales within the United States or to U.S. persons during the Regulation S restricted period).

³³⁵ 1 GREENE, *supra* note 20, at 5-25.

³³⁶ The term "U.S. person" is not defined in the D Rules, so the general definition of the Internal Revenue Code applies. Wolff, *supra* note 9, at 148 (citing 54 Fed. Reg. 35,200, 35,201 (1989)).

³³⁷ Wolff, *supra* note 9, at 148. Compare I.R.C. § 7701(a)(30) (1994) ("The term 'United States Person' means . . . a citizen or resident of the United States . . .") with Securities Act Rule 902(o)(1)(i), 17 C.F.R. § 230.902(o)(1)(i) (1995) ("U.S. Person means . . . [a]ny natural person resident in the United States . . .").

persons would be permitted under Regulation S.³³⁸

Finally, the D Rules generally require certification of non-U.S. beneficial ownership,³³⁹ a requirement which Regulation S lacks for offerings falling under Categories 1 and 2.³⁴⁰

VI. Conclusion

Although complex, Regulation S is important to the capital raising process for a wide range of issuers and to the continuing internationalization of the U.S. capital markets. The SEC, through an interpretative release, has removed some of the uncertainty surrounding use of Regulation S and has taken a step towards curbing abusive practices purportedly relying on the regulation. Consequently, significant revisions to the regulation are probably unnecessary, and any further concerns of the SEC should be handled through another interpretative release.

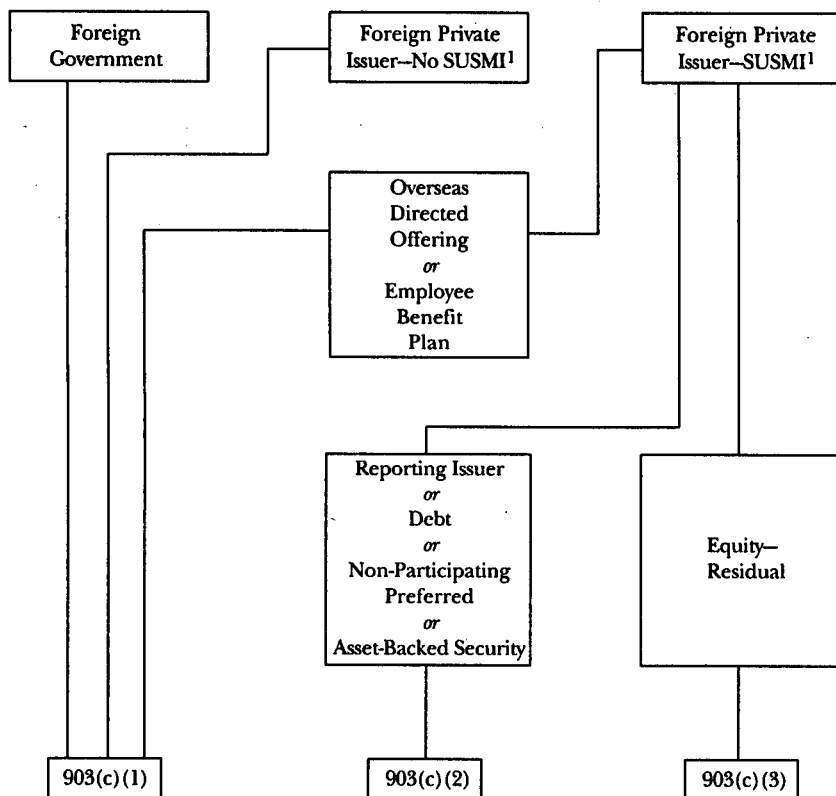
³³⁸ Borisky & Liu, *supra* note 321, at 5. In addition, while foreign branches of U.S. banks and insurance companies are not U.S. persons under Regulation S, they are U.S. persons under TEFRA D. Securities Act Rule 902(o)(6), 17 C.F.R. § 230.902(o)(6) (1995); 1 GREENE, *supra* note 20, at 5-23 n.69. Consequently, to comply with TEFRA D, bearer debt obligations may not be sold during the TEFRA D restricted period to such entities even though sales to those entities would be permitted under Regulation S.

³³⁹ There are two exceptions where certification is not required under TEFRA D. See Treas. Reg. § 1.163-5(c)(2)(i)(D)(3)(iii) (as amended in 1990); see also Temp. Treas. Reg. § 35a.9999-5(a), Q&A 5 (as amended in 1990); 1 GREENE, *supra* note 20, at 5-26.

³⁴⁰ Wolff, *supra* note 9, at 147-49.

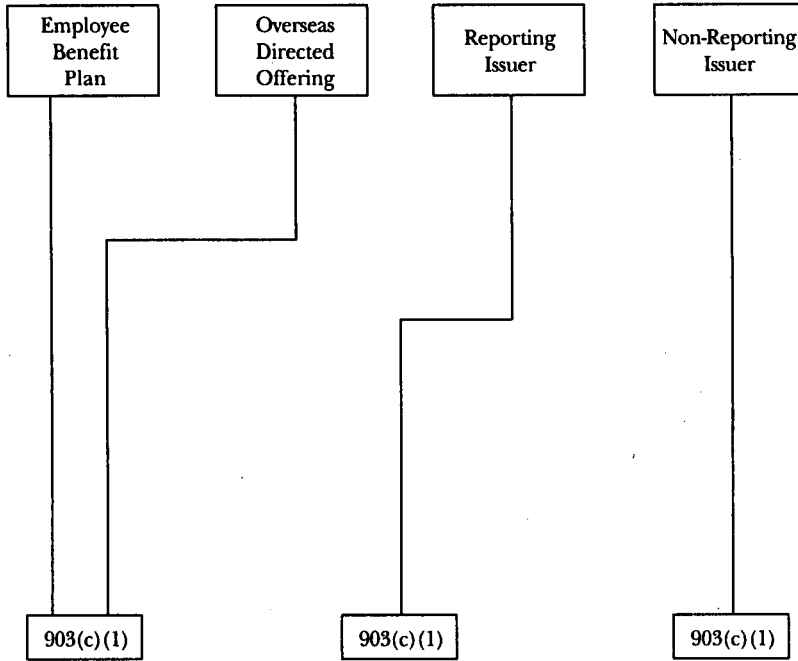
APPENDIX
Securities Act Release No. 4708
Regulation S with accompanying charts

903(c) CHART
FOREIGN ISSUERS



¹SUSMI is substantial U.S. market interest, as defined in Rule 902(n).

**903(c) CHART
DOMESTIC ISSUERS**



Note. These charts have been prepared [by the S.E.C.] to give a convenient overview of Regulation S. Because the chart necessarily abbreviates terms and otherwise simplifies the requirements of the safe harbor, they should not be used as a substitute for analysis of an offering under Regulation S itself.