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Abstract

This Note argues that the SEC must clarify and modernize its present approach to facilitate participation by U.S. institutional investors in global offerings. Part I examines the French privatization program. Part II analyzes the Act's relevant provisions and the SEC's no-action letters addressing the application of these provisions to involvement by U.S. investors in the initial French offerings. Part III proposes alternatives to the SEC procedures that currently apply to simultaneous multinational offerings. This Note concludes that the SEC must eliminate unnecessary barriers to participation by U.S. investors in global securities offerings and adopt a new approach that recognizes and promotes the interests of U.S. institutional investors.

REVISITING MULTINATIONAL SECURITIES OFFERINGS AFTER THE FRENCH PRIVATIZATION NO-ACTION LETTERS

INTRODUCTION

The accelerating internationalization of the world's securities markets[1] poses a serious challenge to the regulatory scheme of the U.S. Securities and Exchange Commission ("SEC" or "Commission"). Recent multinational stock offerings made by the French Government pursuant to its privatization program[2] illustrate the uncertainties facing U.S. institutional investors in offshore offerings. Specifically, the stocks were not registered with the SEC, and both the French Government and U.S. institutional investors were unsure whether the Securities Act of 1933[3] (the "Act" or "Securities Act") would apply to the initial offerings. The SEC issued three no-action letters[4] at the requests of an institutional investor and the French Government.[5] Although the no-action letters did clarify the specific issues presented in the requests, they failed to articulate a method that would facilitate involvement by U.S. institutional investors in future multinational offerings. Thus, persistent uncertainties about the Act's application to unregistered global securities offerings still plague potential U.S. institutional investors.

This Note argues that the SEC must clarify and modernize its present approach to facilitate participation by U.S. institutional investors in global offerings. Part I examines the French privatization program. Part II analyzes the Act's relevant provisions and the SEC's no-action letters addressing the application of these provisions to involvement by U.S. investors in the

1. United States investors made foreign equities transactions totaling US$45.5 billion in the first half of 1986, almost equaling 1985's total record of US$45.6 billion. Ketchum, *Internationalization of the Securities Markets*, in INTERNATIONAL SECURITIES ACTIVITIES OF BANKS, FINANCIAL INSTITUTIONS AND COMPANIES 6 (E. Greene, R. Ketchum & L. Quinn chairmen 1987). The 1985 record was, in turn, double the 1982 total. *Id.* During the same period, U.S. investors were net purchasers of US$4.2 billion in foreign stocks, already exceeding the 1985 annual record of US$3.9 billion. *Id.*

2. *See infra* notes 6-28 and accompanying text.

3. 15 U.S.C.A. §§ 77a-77r, 77s-77aa (West 1981 & Supp. 1988).

4. *See infra* note 35.

5. *See infra* notes 86-135 and accompanying text.

initial French offerings. Part III proposes alternatives to the SEC procedures that currently apply to simultaneous multinational offerings. This Note concludes that the SEC must eliminate unnecessary barriers to participation by U.S. investors in global securities offerings and adopt a new approach that recognizes and promotes the interests of U.S. institutional investors.

I. *THE FRENCH PRIVATIZATION PROGRAM*

During the summer of 1986, the French legislature adopted one of the most ambitious privatization programs of any Western democracy.[6] Law No. 86-793 of July 2, 1986, mandates that the state-owned majority interests in sixty-five companies[7] be transferred from the public to the private sector by March 1, 1991.[8] This legislation not only reverses the widespread nationalizations that took place in 1982,[9] but also extends to a majority of the assets nationalized immediately after World War II.[10] Law No. 86-912[11] was subsequently passed, creating the regulatory scheme for implementation of the denationalization program.[12]

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6. Marquardt, *Privatising Finance and Industry in France*, INT'L FIN. L. REV., Nov. 1986, at 11. The French boast that the projected US$35 billion of state-owned companies to be sold in a five-year period is four times as much as what Margaret Thatcher's government has privatized in the United Kingdom in seven years. Revzin, *Selling Capitalism: France Urges Citizenry To Break with Habit, Become Stockholders*, Wall St. J., Nov. 5, 1986, at 1, col. 6.

7. The companies to be privatized include Banque Nationale de Paris, Crédit Lyonnais, and Société Générale, France's three largest deposit banks, as well as many insurance and industrial companies. *See* Law No. 86-793, July 2, 1986, art. 4 annex, 1986 Journal Officiel de la République Française [J.O.] 8240, 8241, *reprinted in France: Laws Concerning the Privatization of Nationalized Enterprises*, 26 I.L.M. 1388, 1394 (1987) (E. Gaillard trans.) [hereinafter *Laws Concerning Privatization*].

8. *Id.* art. 4, 1986 J.O. at 8240, *translated in Laws Concerning Privatization*, *supra* note 7, at 1391; *see also* Marquardt, *supra* note 6, at 11 (discussing Law No. 86-793).

9. Marquardt, *supra* note 6, at 11. On February 11, 1982, the French Legislature passed Law No. 82-155, Feb. 11, 1982, 1982 J.O. 566, *translated in France: Law of Nationalization*, 21 I.L.M. 815 (1982), which provided for "the most sweeping nationalisations of any country in the free world since the immediate post-war period." Marquardt, *supra* note 6, at 11. The law included the nationalization of major industrial companies, banks, and financial institutions. *Laws Concerning Privatization*, *supra* note 7, at 1388.

10. Marquardt, *supra* note 6, at 11.

11. Law No. 86-912, Aug. 6, 1986, arts. 1-22, 1986 J.O. 9695, 9695-97, *translated in Laws Concerning Privatization*, *supra* note 7, at 1395-1407.

12. *Laws Concerning Privatization*, *supra* note 7, at 1388.

Law No. 86-912 authorizes the French Government "to take diverse measures of a social and economic order"[13] in furtherance of denationalization. Article 1 includes a list of transactions by which the privatization of enterprises may be accomplished.[14] The law also establishes different methods for privatization depending on whether the majority of an enterprise's capital is state-owned.[15] One such method is the so-called private placement,[16] through which the securities may be offered to institutional investors in the United States.[17] However, the law imposes a twenty percent ceiling on purchases by foreigners or by entities under foreign control.[18]

Although the details of each offering vary, public offerings within France are usually made concurrently with an international offering.[19] A public offering in France is conducted pur-

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13. Law No. 86-912, Aug. 6, 1986, art. 1, 1986 J.O. at 9695, *translated in Laws Concerning Privatization*, *supra* note 7, at 1395.

14. *Id.*; Marquardt, *supra* note 6, at 11. The transactions include

> the sale of shares, the exchange of shares for subordinated preferred shares (*titres participatifs*) or non-voting common shares (*certificats d'investissement* or *certificats pétroliers*), the waiver or sale of any preferential right to subscribe to an increase in capital, an increase in capital through the contribution of shares or other assets, a merger or split, the issuance of securities, the dissolution or liquidation of the enterprise, and the transfer by an issuance company of its portfolio of policies.

Marquardt, *supra* note 6, at 11 (discussing Law No. 86-912, art. 1).

15. Law No. 86-912, Aug. 6, 1986, art. 1, 1986 J.O. at 9695, *translated in Laws Concerning Privatization*, *supra* note 7, at 1395.

16. *Id.*, art. 4, 1986 J.O. at 9695, *translated in Laws Concerning Privatization*, *supra* note 7, at 1397. However, the majority of the privatizations will probably occur through public offerings. Marquardt, *supra* note 6, at 11-12.

17. *See infra* notes 86-135 and accompanying text.

18. Law No. 86-912, Aug. 6, 1986, art. 10, 1986 J.O. at 9696, *translated in Laws Concerning Privatization*, *supra* note 7, at 1399-1400. Article 10 provides that: "Whatever the means of transfer the sum total of the shares sold directly or indirectly by the State to foreign individuals or corporations or those under foreign control, . . . should not exceed 20% of the capital of the enterprise." *Id.*

The ceiling was raised to 20% from 15% to allow greater foreign ownership of the companies to be privatized. Kamm, *France Clears a Bill To Sell State Concerns*, Wall St. J., Aug. 1, 1986, at 21, col. 4. The Minister of the Economy may lower this ceiling if the national interest requires protection. Law No. 86-912, Aug. 6, 1986, art. 10, 1986 J.O. at 9696, *translated in Laws Concerning Privatization*, *supra* note 7, at 1400. Any entity possessing holdings in excess of these limits is subject to sanctions, including: forfeiture of voting rights for the excess shares and an obligation to sell these shares within three months. Law No. 86-912, Aug. 6, 1986, art. 10, 1986 J.O. at 9696, *translated in Laws Concerning Privatization*, *supra* note 7, at 1401; *see also* Marquardt, *supra* note 6, at 12 (discussing Law No. 86-912).

19. College Retirement Equities Fund, SEC No-Action Letter, [1987 Transfer

suant to an *Offre Publique de Vente* ("OPV").[20] The OPV procedures require that offers and sales of securities in the OPV be made to all individuals who are French citizens or residents.[21]

In terms of attracting shareholders to the initial offerings, the privatization program was a resounding success.[22] After the sale of the first ten companies, the number of French people owning shares increased from two million to five million,[23] and the offerings were oversubscribed by as much as sixty-five times the number of available shares.[24] In addition, the foreign quota, restricted to a twenty-percent ceiling, was enormously oversubscribed for the first two issues.[25]

This oversubscription of the foreign quota, however, was achieved with little participation by U.S. investors[26] because

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Binder] Fed. Sec. L. Rep. (CCH) ¶ 78,420, at 77,362 (Feb. 18, 1987) [hereinafter *CREF I*].

20. French Privatization Program, SEC No-Action Letter, [1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 78,439, at 77,434 (Apr. 17, 1987) [hereinafter *French Privatization Program*].

21. *Id.* French citizens and residents who want to participate in the OPV are required to subscribe on forms under categories "A," "B," and "C" as follows:

> Category "A" will be available to French and foreign resident individuals seeking to purchase that minimum number of shares which will be sold in equal number and on a priority basis (up to 10) in conformity with Law No. 86-912.
>
> Category "B" will be available to French and foreign resident individuals who have subscribed under Category "A" and who wish, if possible, to purchase shares additional to those which they may receive under Category "A".
>
> Category "C" will be available to French entities which are not under foreign control.

Id. at 77,435; *see also SEC Says No Integration in French Privatization Offerings*, 19 SEC. REG. & L. REP. (BNA) 731, 732 (May 15, 1987) (discussing *French Privatization Program*, *supra* note 20). Through these OPV procedures, the French Government hopes to achieve two main goals: to quintuple, at the least, the number of individual share owners, and to spread ownership of State companies so broadly that the companies can never be renationalized. Revzin, *supra* note 6, at 1, col. 6.

22. Greenhouse, *France Embraces 'Popular Capitalism'*, N.Y. Times, June 8, 1987, at D10, col. 1.

23. *Id.*

24. *Id.* In fact, many shareholders complained that they could not purchase as many shares as they wanted. As a result, many subscribers requested more shares than they expected to receive in the hope of acquiring approximately the number they had originally wanted. *Id.* at cols. 2-3.

25. *Privates on Parade*, EUROMONEY FRANCE, June 1987 Supp., at 11. The first two issues were Compagnie de Saint-Gobain and Compagnie Financière de Paribas. *Id.*

26. Americans bought less than one percent of the first two offerings. *French Courting American Investment*, Proprietary to the U.P.I., Apr. 20, 1987 (LEXIS, NEXIS library, UPI file) [hereinafter *French Courting*].

the concurrent international offering did not meet SEC requirements. Specifically, the international offering was not registered under the Securities Act.[27] Consequently, underwriters of the offering stressed that the shares were not being offered in the United States and that they were not seeking U.S. investors.[28]

II. *SEC REGULATIONS AND OFFSHORE OFFERINGS*

French issuers were disappointed with U.S. investment in their first two stock offerings, and they blamed complicated SEC rules for the minimal U.S. participation.[29] The Securities Act of 1933 requires registration of securities with the SEC prior to their offer or sale in the United States unless an exemption from registration is available.[30] However, French issuers were concerned that they would unintentionally violate these SEC regulations because of the lack of clarity in U.S. law regarding U.S. investment in foreign equities.[31] Moreover, the twenty-percent ceiling on foreign investment made registration more trouble than it was worth for most of the French companies.[32] Thus, both U.S. institutional investors, who wanted to participate in the initial offering through the U.S. private placement,[33] and the French Government, which welcomed U.S. participation, were forced into a complex analysis of the applicable SEC regulations and the available exemptions.[34] Ultimately, a potential institutional investor and the French Government sought no-action letters from the SEC[35]

27. *See infra* note 37.

28. Browning, *France Today Begins Sale of State Firms with an Offering of 60% of Saint Gobain*, Wall St. J., Nov. 24, 1986, at 34, col. 2, col. 3; *see also* Marquardt, *supra* note 6, at 13 ("the application of U.S. regulatory requirements . . . often has a chilling effect on the foreign issuer's desire to gain access to [the U.S. capital] markets").

29. *French Courting*, *supra* note 26. The French complained that only a few "sophisticted institutional investors were able to make a limited number of non-solicited bids. Procedural restraints tended to limit the number of shares available to American investors." *Id.*

30. Securities Act § 5, 15 U.S.C. § 77e (1982).

31. *French Courting*, *supra* note 26.

32. *Id.*

33. *See supra* notes 16-17 and accompanying text.

34. *See infra* notes 86-135 and accompanying text.

35. In a no-action letter, an authorized SEC official indicates that the SEC staff will not recommend any enforcement action to the Commission if the proposed transaction described in the correspondence is consummated. Procedures Utilized by the Division of Corporation Finance for Rendering Informal Advice, SEC Securi-

to confirm that the prospective U.S. private placements would fall within an exemption from the Act.

A. *Exemptions From Registration and Integration of Offerings*

1. Section 4(2) of the Securities Act of 1933

Section 4 of the Act[36] lists transactions that are exempt from the registration requirements of section 5.[37] Under section 4(2), "transactions by an issuer not involving any public offering" are exempt.[38] The legislative history of section 4(2) indicates an intent to exempt transactions "where there is no practical need for [the Act's] application or where the public benefits are too remote."[39]

Although the Act does not define the phrase "public offering," the SEC and U.S. courts have decided that whether a transaction involves a public offering is a question of fact that necessitates consideration of all the surrounding circumstances.[40] In a leading case, *SEC v. Ralston Purina Co.*,[41] the Supreme Court held that the section 4(2) exemption must be viewed in light of the statutory purpose to "protect investors by promoting full disclosure of information thought necessary to informed investment decisions,"[42] and that its applicability

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ties Act Release No. 33-6253, 45 Fed. Reg. 72,644, 72,644 n.2 (Nov. 3, 1980). Sometimes the staff will respond to a no-action request by saying that it cannot provide such assurances. *Id.* The public can rely on no-action letters as representing the Division's views. *Id.* at 72,644 n.4. However, the letters represent staff positions only and do not constitute an official expression of the SEC's views. *Id. See generally* Lemke, *The SEC No-Action Letter Process*, 42 Bus. Law. 1019 (1987).

36. 15 U.S.C. § 77d (1982).

37. 15 U.S.C. § 77e (1982). Section 5 of the Act forbids the use of any means of interstate commerce or of the mails to sell or offer to sell securities without having first filed a registration statement with the SEC. *Id.*

38. 15 U.S.C. § 77d(2). This exemption is often referred to as the private offering or private placement exemption; *see supra* text accompanying notes 16-17.

39. H.R. Rep. No. 85, 73d Cong., 1st Sess. 5 (1933); *see also Integration of Securities Offerings: Report of the Task Force on Integration*, 41 Bus. Law. 595, 603 (1986) [hereinafter *Integration of Securities Offerings*] (discussing integration of exempt transactions). Traditionally, § 4(2) has been interpreted as "providing an exemption from registration, *available only to the issuer of the securities*, for bank loans, private placement of securities with institutions, and the promotion of a business venture by a few closely related persons." R. Haft, Analysis of Key SEC No-Action Letters, 1987-88 Edition § 3.01, at 3-1 (1987) (emphasis in original).

40. *See* cases cited *infra* notes 45-48 and accompanying text.

41. 346 U.S. 119 (1953).

42. *Id.* at 124.

"should turn on whether the particular class of persons affected needs the protection of the Act."[43]

In accordance with the reasoning in *Ralston Purina*, courts have developed flexible tests under section 4(2).[44] These courts have focused on a variety of factors, including: (1) the number of offerees;[45] (2) the sophistication of the offerees;[46] (3) the size and manner of the offering;[47] and (4) the relationship of the offerees to the issuer.[48] U.S. institutional investors like those wishing to participate in the initial offerings of the French privatization program are routinely regarded as sophisticated investors under section 4(2) of the Act.[49] Thus, it seems clear that the section 4(2) exemption applies to the U.S. private placement of the French offerings, thereby insulating the French issuer, participating underwriters, and the French Government from exposure to civil or criminal liability under U.S. law for failure to register the offerings.[50]

2. Exemptions Under Regulation D of the Act

To ease the burden of meeting the requirements for available exemptions, principally private placements and limited offerings, the SEC adopted a series of six rules to provide certain issuers with additional limited-offering exemptions from the Act's registration and prospectus-delivery requirements.[51]

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43. *Id.* at 125.

44. *See, e.g.*, Mary S. Krech Trust v. Lakes Apartments, 642 F.2d 98 (5th Cir.), *reh'g denied*, 645 F.2d 72 (5th Cir. 1981); SEC v. Murphy, 626 F.2d 633, 644 (9th Cir. 1980); General Life of Mo. Inv. Co. v. Shamburger, 546 F.2d 774 (8th Cir. 1976).

45. *See, e.g.*, Doran v. Petroleum Management Corp., 545 F.2d 893, 900 (5th Cir. 1977); SEC v. Continental Tobacco Co. of S.C., 463 F.2d 137, 158 (5th Cir. 1972); Hill York Corp. v. American Int'l Franchises, Inc., 448 F.2d 680, 687 (5th Cir. 1971).

46. *See, e.g.*, Cook v. Avien, Inc., 573 F.2d 685, 691 (1st Cir. 1978); *Doran*, 545 F.2d at 902; *Hill York Corp.*, 448 F.2d at 690.

47. *See, e.g.*, *Doran*, 545 F.2d at 900; *Continental Tobacco Co.*, 463 F.2d at 158; *Hill York Corp.*, 448 F.2d at 689.

48. *See, e.g.*, *Cook*, 573 F.2d at 691; *Doran*, 545 F.2d at 902; *Continental Tobacco Co.*, 463 F.2d at 158; *Hill York Corp.*, 448 F.2d at 687.

49. Institutional investors are routinely regarded as sophisticated investors under section 4(2) of the Act because they have access to all the information that a registration statement would have provided. *See* cases cited *supra* note 46.

50. *See infra* text accompanying notes 141-45.

51. Revision of Certain Exemptions from Registration for Transactions Involving Limited Offers and Sales, Securities Act Release No. 6389, [1981-1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 83,106 (Mar. 8, 1982) [hereinafter Release 6389]. These rules were "designed to simplify and clarify existing exemptions, to expand their availability, and to achieve uniformity between federal and state exemptions in

These rules,[52] designated "Regulation D,"[53] fall into two groups: (1) Rules 501, 502, and 503 define common terms, provide general conditions for the exemptive rules, and establish a uniform notice-of-sales form, Form D, for use with exempted offerings under Regulation D and section 4(6) of the Act; (2) Rules 504, 505, and 506 replace exemptions previously available under Rules 240,[54] 242,[55] and 146,[56] respectively.[57]

Rule 501(a) incorporates the institutional investors listed in section 2(15)(i) of the Act into Regulation D as accredited investors.[58] Rules 505 and 506 permit a maximum number of thirty-five purchasers;[59] however, accredited investors are not

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order to facilitate capital formation consistent with the protection of investors." *Id.* at 84,907. The Rules became effective on April 15, 1982. *Id.* Regulation D was proposed in SEC Securities Act Release No. 6339, [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 83,014 (Aug. 7, 1981).

52. Rules 501-506, 17 C.F.R. §§ 230.501-.506 (1987).

53. The official title is "Regulation D—Rules Governing the Limited Offer and Sale of Securities Without Registration Under the Securities Act of 1933."

54. 17 C.F.R. § 230.240 (1982), *removed by* Revision of Certain Exemptions from Registration for Transactions Involving Limited Offers and Sales, SEC Securities Act Release No. 33-6389, 47 Fed. Reg. 11,251, 11,262 (Mar. 8, 1982).

55. 17 C.F.R. § 230.242 (1982), *removed by* SEC Securities Act Release No. 33-6389, 47 Fed. Reg. at 11,262.

56. 17 C.F.R. § 230.146 (1982), *removed by* SEC Securities Act Release No. 33-6389, 47 Fed. Reg. at 11,261.

57. *See generally* J. HICKS, LIMITED OFFERING EXEMPTIONS: REGULATION D §§ 1.01-.06 (1987); Knipprath, *Regulation D: Rationalizing The Exemptions Under The 1933 Securities Act*, 7 GLENDALE L. REV. 97 (1987).

58. *See* 17 C.F.R. § 230.501(a). Section 2(15) of the Securities Act reads:

(15) The term "accredited investor" shall mean—

> (i) a bank as defined in section 3(a)(2) of the Act whether acting in its individual or fiduciary capacity; an insurance company as defined in section 2(13) of the Act; an investment company registered under the Investment Company Act of 1940 or a business development company as defined in section 2(a)(48) of that Act; a Small Business Investment Company licensed by the Small Business Administration; or an employee benefit plan, including an individual retirement account, which is subject to provisions of the Employee Retirement Security Act of 1974, if the investment decision is made by a plan fiduciary, as defined in section 3(21) of such Act, which is either a bank, insurance company, or registered investment advisor; or
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> (ii) any person who, on the basis of such factors as financial sophistication, net worth, knowledge, and experience in financial matters, or amount of assets under management qualifies as an accredited investor under rules and regulations which the Commission shall prescribe.

15 U.S.C. § 77b(15) (1982).

59. *See* 17 C.F.R. §§ 230.505(b)(2)(ii), 230.506(a)(2).

counted toward the thirty-five.[60] Thus, an issuer hoping to rely on either exemption may find it essential that a purchaser qualify as an "accredited investor." Accordingly, the Regulation D exemptions are available if the French private placements to U.S. institutional investors[61] comply with the general requirements of Rules 504, 505, and 506.[62]

3. Integration and SEC Securities Act Release No. 33-4708

Shortly after the adoption of the Act, the SEC embraced the "integration" concept[63] to protect investors from issuers who sought to circumvent the Act's registration provisions by dividing one non-exempt offering into two or more exempt offerings.[64] Essentially, the SEC uses integration to combine two or more separately structured and otherwise exempt securities offerings into a single offering that does not qualify for exemption from registration under the Act.[65] This procedure results in one unregistered illegal offering.[66] The SEC promulgated a five-factor test in its basic release on integration[67] that has been subsequently applied in securities proceedings.[68]

60. *Id.* § 230.501(e)(1)(iv).

61. Foreign issuers may use Regulation D pursuant to amendments that clarified the disclosure requirements applying to such issuers. Adoption of Foreign Issuer Integrated Disclosure System, SEC Securities Act Release No. 33-6437, 47 Fed. Reg. 54,764, 54,764 (Dec. 6, 1982).

62. For detailed discussions of these rules and the requirements thereunder see R. HAFT, *supra* note 37, §§ 3.01-.12. *See generally* J. HICKS, *supra* note 57; Knipprath, *supra* note 57.

63. *See* Extracts from Letters of Federal Trade Commission Relating to Applications of Various Sections of the Act, SEC Securities Act Release No. 97, 11 Fed. Reg. 10,949 (Dec. 28, 1933).

64. *Integration of Securities Offerings*, *supra* note 37, at 599.

65. *Id.* at 595.

66. *Id.*

67. Non-Public Offering Exemption, SEC Securities Act Release No. 33-4552, 27 Fed. Reg. 11,316 (Nov. 6, 1962). The five-factor test is as follows:

(1) Are the offerings part of a single plan of financing?
(2) Do the offerings involve issuance of the same class of security?
(3) Are the offerings made at or about the same time?
(4) Is the same type of consideration to be received?
(5) Are the offerings made for the same general purpose?

Id. at 11,317; *see also Integration of Securities Offerings*, *supra* note 37, at 610-23 (discussing five-factor test).

68. *See, e.g.*, *SEC v. Murphy*, 626 F.2d 633 (9th Cir. 1980) (court applied SEC's five-factor test to find sale of limited partnership interests in 30 separate partnerships was single offering); LaserFax, Inc., SEC No-Action Letter, [1985-1986 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 78,137 (Aug. 15, 1985) (SEC used five-factor test

The concept of integration arises in the context of the French privatization program because, in most cases, there is a public offering within France and a concurrent international offering, neither of which is registered under the Act.[69] Therefore, an exemption from registration under either section 4(2) or Regulation D is lost if the private offering in the United States is integrated with the concurrent public offering in France.

The applicable SEC policy regarding integration of offshore offerings with concurrent domestic offerings is enunciated in Release No. 33-4708 ("Release 4708").[70] In Release 4708 the SEC asserts that "the registration requirements of section 5 of the Act are primarily intended to protect American investors."[71] Release 4708 provides that registration under the Act is not required if the distribution of the securities is effected in a way that results in the securities *coming to rest abroad* and if the offering is made under circumstances reasonably designed to preclude the distribution or redistribution of the securities to U.S. nationals.[72] In addition, because the Act does not apply to an offering of securities distributed abroad to foreign nationals, Release 4708 further provides that such offerings need not be integrated with offerings made concurrently with a U.S. private offering, if the latter otherwise meets the standards for a private offering under section 4(2) of the Act.[73]

Although Rules 504 and 505 are not promulgated under

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to determine proposed sale of convertible debentures under Regulation D would be integrated with prior Regulation D offering). *See generally* R. HAFT, *supra* note 37, §§ 6.01-.09.

69. *See supra* notes 26-27 and accompanying text.

70. SEC Securities Act Release No. 33-4708, 29 Fed. Reg. 9828 (July 9, 1964) [hereinafter Release 4708]. The SEC promulgated this Release pursuant to a presidential task force's recommendations that the Commission publish its position on the applicability of the Act's registration provisions to securities offered by domestic issuers to foreign investors. *Id. See generally Integration of Securities Offerings*, *supra* note 37, at 638-41; Haseltine, *United States Tax and Securities Laws: Working "Together" Toward Different Goals in Eurobond Financings*, 11 MD. J. INT'L L. & TRADE 221, 226-29 (1987).

71. Release 4708, *supra* note 70. Therefore, the SEC takes no remedial action for failure to register securities that originate in the United States and are later distributed abroad to foreign nationals. *Id.*

72. *Id.* (emphasis added).

73. *Id.*; *see also supra* notes 36-50 and accompanying text (discussing § 4(2) exemption).

section 4(2),[74] the SEC's rationale for integrating simultaneous multinational offerings under Release 4708 applies equally to offerings under Rules 504 and 505.[75] However, when Regulation D was adopted it contained no express provisions for integrating concurrent domestic and foreign offerings.[76] The SEC corrected this omission in 1982 by adding preliminary note 7, which states: "Offers and sales of securities to foreign persons made outside the United States effected in a manner that will result in the securities *coming to rest abroad* generally need not be registered under the Act."[77] In addition, the note to Rule 502(a) was similarly amended to address whether transactions exempt under Regulation D would be integrated with simultaneous foreign offerings.[78] The note, as amended, provides that "[g]enerally, transactions otherwise meeting the requirements of an exemption will not be integrated with simultaneous offerings being made outside the United States effected in a manner that will result in the securities *coming to rest abroad*."[79]

Thus, Release 4708 provides the framework for integration by mandating that otherwise exempt foreign offerings in the United States will be integrated unless the offers or sales of the securities are effected so that the securities come to rest abroad, that is, will not flow back into the hands of U.S. investors. During the more than twenty years since the SEC promulgated Release 4708, the SEC's Division of Corporate

74. The statutory source of Rules 504 and 505, which limit the size of offerings to US$500,000 and US$5 million, respectively, is § 3(b), 15 U.S.C. § 77b (1982).

75. *Integration of Securities Offerings*, *supra* note 37, at 639.

76. Release 6389, *supra* note 51, [1981-1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 83,106, at 84,910-11.

77. 17 C.F.R. pt. 230 reg. D, preliminary note 7, at 425, *as amended at* 47 Fed. Reg. 54,771 (1982) (emphasis added). The note continues, stating that:

> This interpretation may be relied on for such offers and sales even if coincident offers and sales are made under Regulation D inside the United States. Thus, for example, persons who are not citizens or residents of the United States would not be counted in the calculation of the number of purchasers. Similarly, proceeds from the sales to foreign purchasers would not be included in the aggregate offering price. The provisions of this note, however, do not apply if the issuer elects to rely solely on Regulation D for offers or sales to foreign persons.

Id.

78. Adoption of Foreign Issuer Integrated Disclosure System, SEC Securities Act Release No. 33-6437, 47 Fed. Reg. 54,764, at 54,771 (1982); *see* 17 C.F.R. § 502(a) note (1987).

79. 17 C.F.R. § 502(a) note (emphasis added).

Finance ("Division") has emphasized that the crucial factor in integrating is whether the distribution of the securities is "reasonably designed to preclude distribution or redistribution of the securities within or to nationals of, the United States."[80] Accordingly, to avoid integration of concurrent foreign and domestic offerings, the issuer must take precautions[81] to ensure that the securities will come to rest abroad.[82]

Release 4708 has been implemented and interpreted exclusively through no-action letters,[83] thereby causing great uncertainty about the application of Release 4708 to situations not previously addressed by the Division. In particular, the offerings made by the French Government in its privatization program raised questions about the legal consequences in the United States of privately placing the securities with U.S. investors. This uncertainty arose because of the absence, in the French placements, of any precautionary measures[84] that are commonly used in Eurobond offerings to comply with the mandate of Release 4708, which is to prevent the distribution or redistribution of the securities in the United States or to U.S. nationals.[85]

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80. R. HAFT, *supra* note 37, § 2.03; *see Integration of Securities Offerings*, *supra* note 37, at 638-41.

81. The SEC has taken no-action positions when foreign offerings used some or all of the following anti-flowback provisions: (1) no sales may be made to American nationals, which includes both American citizens and resident aliens, *see CREF I*, *supra* note 19, [1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 78,420, at 77,362; (2) each foreign investor must represent that he is purchasing the securities for his own account and not for the account of an American national, *see French Privatization Program*, *supra* note 20, [1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 78,439, at 77,435; (3) the underwriters and investors must represent that they will not resell the securities in the United States or to U.S. residents, *see CREF I*, *supra* note 19, [1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 78,420, at 77,362-63. *Integration of Securities Offerings*, *supra* note 37, at 640.

82. The SEC apparently adopts the argument that, under Release 4708, offerings to *foreign nationals* abroad are beyond the intended scope of the Act and should therefore have no effect upon otherwise available exemptions from registration. *See Integration of Securities Offerings*, *supra* note 37, at 640 (citing Scientific Mfg., Inc., SEC No-Action Letter, [1983-1984 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 77,505, at 78,625-26 (May 12, 1983)).

83. R. HAFT, *supra* note 37, § 2.03; *see supra* note 35.

84. *See supra* note 81.

85. Release 4708, *supra* note 70.

B. *The No-Action Letters*

The SEC has responded to three no-action requests addressing the application of the Securities Act of 1933 to potential U.S. investment in the initial French privatization offerings. The French Government was the initiator of one such request, while the other two were initiated by a U.S. institutional investor, the College Retirement Equities Fund ("CREF").[86]

1. The *CREF I* Letter

The Division issued the first no-action letter in response to CREF's request, which asked the SEC to concur in CREF's view that it could participate in the U.S. private placements of the French privatization offerings without registration of the securities under the Act.[87] CREF asserted that a major portion of its long-term investment strategy—purchasing the securities of French issuers—could not be pursued if it remained unable to participate in the French privatization offerings.[88] Furthermore, CREF claimed that the uncertainties surrounding the Act's application to the French privatization offerings placed it at an unnecessary disadvantage in relation to non-U.S. institutions worldwide, which were able to participate in the offerings at the initial price.[89] Finally, CREF stressed that the Act was

86. CREF is a New York corporation that forms the variable annuity arm of the Teachers Insurance Annuity Association-College Retirement Equities Fund, a pension system for U.S. teachers. Quickel, *U.S. Investors: Caution or Mulish Obstinacy?*, EUROMONEY, Oct. 1986, at 23. CREF's management of a commingled Employee Retirement Income Security Act fund of approximately US$28 billion involves over US$3 billion invested in foreign equities abroad. *Id.* CREF has engaged in global investing since 1978 and, as of February 1987, held securities of French issuers worth over US$160 million. *CREF I*, *supra* note 19, [1987 Transfer Binder] Fed. Sec L. Rep. (CCH) ¶ 78,420, at 77,361; *see also SEC Staff Clears Path for Institutions Investing in Privatization Offerings*, 19 SEC. REG. & L. REP. (BNA) 283 (Feb. 27, 1987) (discussing *CREF I*, *supra* note 19). CREF is easily the largest U.S. investor in foreign markets. Quickel, *supra*, at 23. *See generally* Davis, *$60 Billion in the Balance*, N.Y. Times, Mar. 27, 1988, § 6 (Magazine), pt. 2, at 17.

87. *CREF I*, *supra* note 19, [1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 78,420, at 77,362. CREF was forced to submit a no-action request to the SEC after an unsuccessful attempt to convince the French Government that CREF's participation in the initial offerings would not expose French issuers to liability under the Act. Stamas, *SEC Issues Major Interpretive Letter For U.S. Firms Investing Abroad*, SEC. WEEK, Feb. 23, 1987, at 1; *see infra* text accompanying notes 141-45.

88. *CREF I*, *supra* note 19, [1987 Transfer Binder] Fed. Sec L. Rep. (CCH) ¶ 78,420, at 77,362.

89. *Id.*

"not intended to have this sort of prejudicial effect on U.S. institutional investors."[90] Accordingly, CREF suggested that its participation in the privatization offerings would not expose the French issuer, participating underwriters, or the French Government to liability for failure to register the offerings if certain conditions were met.[91]

CREF's brief analysis of the U.S. legal issues was based on the premise that the Act clearly would not apply and that precautionary measures[92] would not be required if the offerings were made only outside the United States and only to non-U.S. nationals.[93] CREF expanded this premise by asserting that its

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90. *Id.*

91. *Id.* The conditions, which apply to each concurrent domestic private offering and foreign public offering, are as follows:

> 1. At the time of the Offerings there exists no active public market in the United States for the securities being offered or for other securities of the issuer;
>
> 2. CREF and other U.S. institutional investors participating in the Private Offering each represents and warrants (a) that it is purchasing such securities for investment and not with a view to distribution in the United States or to U.S. nationals and (b) that it will not resell such securities within the United States or knowingly to any U.S. national, except in each case pursuant to an effective registration statement or in a transaction not requiring registration under the 1933 Act, it being understood that any such institutional investor may sell securities purchased in the Private Offering on the Paris Bourse in regular way transactions without investigation as to the nationality of the counterparty;
>
> 3. The character of the offerees and the other circumstances of the Private Offering meet the requirements for a valid private placement of securities exempt under section 4 of the 1933 Act;
>
> 4. The documents for the Offerings state that such securities are not being offered within or to nationals of the United States (other than to institutional investors in transactions exempt from registration under the 1933 Act), the underwriters, dealers and other distributors of such securities participating in such offerings agree with the issuer and the French government that such securities may not be sold by them within or to nationals of the United States other than pursuant to an effective registration statement or in a transaction not requiring registration under the 1933 Act; and
>
> 5. No other precautionary measures to prevent distribution or redistribution within the United States or to U.S. nationals of securities sold in the Offerings are imposed.

Id. at 77,362-63; *see also* Chubb & Kelly, *SEC No-Action Letter Relaxes the Market*, INT'L FIN. L. REV., Apr. 1987, at 21, 21-22 (discussing *CREF I*, *supra* note 19); *SEC Staff Clears Way For Investigating Privatization Offerings*, Daily Rep. for Executives (BNA) No. 42, at A-30 (Mar. 5, 1987) (discussing *CREF I*, *supra* note 19).

92. *See supra* note 81.

93. *CREF I*, *supra* note 19, [1987 Transfer Binder] Fed. Sec L. Rep. (CCH) ¶ 78,420, at 77,363.

participation in the private offering under such conditions would not trigger application of the Act because the probability of the securities reaching the United States or the possession of U.S. nationals would not be greater than if the offering completely excluded all U.S. persons.[94] CREF stated that the policy underlying the Act's registration requirement was "the protection of financially unsophisticated investors at the retail level within the U.S. capital markets."[95] Thus, CREF argued that, because it is a sophisticated investor, this underlying policy is achieved without mandating registration of the private offerings or attaching precautionary measures to the public offerings simply because the two offerings occur simultaneously.[96]

Finally, CREF sought the Division's affirmance that resale of the securities on the Paris Bourse ("Bourse") without first investigating the nationality or residence of the purchaser would not trigger the Act's application.[97] As support, CREF noted that the amount of procedural precautions necessary to satisfy the requirements of Release 4708 increases as the possibility that such securities will come to rest abroad decreases.[98] CREF urged the Division to recognize that the possibility of securities flowing back into U.S. markets was substantially decreased because the privatization offerings involve French rather than U.S. issuers, and because there is no active public market for the securities in the United States.[99] Therefore, CREF asserted that the requirements of Release 4708 would be satisfied "without the full panoply of procedures currently applied in eurodollar offerings by U.S. issuers,"[100] if certain provisions were met.[101] The provisions were that all distributors of such securities were contractually barred from distributing or redistributing the securities within or to nationals of the United States and that these limitations were clearly disclosed on the offering documents.[102]

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94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*

The Division agreed with all of CREF's opinions.[103] First, the Division stated that the foreign public offerings would not be integrated with and would not affect the availability of either the section 4(2) exemption or Regulation D exemption for offerings in the United States.[104] Next, the Division agreed that if the conditions of the offering were met,[105] additional precautionary measures in the foreign offerings would not be necessary simply because of the simultaneous U.S. private placements.[106] Finally, the Division responded that CREF's ability to resell the securities in so-called regular-way transactions on the Bourse without investigating the nationality or residence of the counterparty would not affect these conclusions.[107]

2. The *French Privatization Program* Letter

Although the SEC viewed *CREF I* as a landmark interpretation of Release 4708,[108] subsequent no-action requests exposed the need for further clarification of the Act's impact on multinational offerings. Despite *CREF I*, the French Government remained unsure about the application of the Act's registration requirements to its privatization offerings within France.[109] This uncertainty arose because Law No. 86-912 required the French Government to sell the securities in the public offering within France to all French residents, including U.S. citizens residing in France.[110] Prior to the Division's issuance of the *French Privatization Program* letter, the SEC limited offerings to U.S. citizens resident abroad to registered securities only.[111]

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103. *Id.*

104. *Id.*

105. *See supra* note 91 and accompanying text.

106. *CREF I, supra* note 19, [1987 Transfer Binder] Fed. Sec L. Rep. (CCH) ¶ 78,420, at 77,363.

107. *Id.* Although neither CREF's request nor the Division's response addressed the question of when the securities could be resold on the Paris Bourse, it is implicit in the Division's response that such resales may occur immediately. Chubb & Kelly, *supra* note 91, at 23.

108. *See SEC Asked to Clarify Parts of Letter to CREF on Foreign Private Offerings*, SEC. WEEK, Apr. 13, 1987, at 3 [hereinafter *SEC Asked to Clarify*].

109. *See SEC Issues No-Action Letter to French Gov't on Sales to U.S. Firms Abroad*, SEC. WEEK, May 4, 1987, at 4 [hereinafter *SEC Issues No-Action Letter to French Gov't*].

110. *See supra* notes 19-21 and accompanying text.

111. *SEC Issues No-Action Letter to French Gov't, supra* note 109, at 4.

In its no-action request the French Government emphasized the absence, at the time of the privatization, of an active public market in the United States for the securities of the privatized companies.[112] The request also stated that while the international privatization offerings would "employ traditional Euro-market anti-integration measures,"[113] the U.S. private placements would be conducted substituting OPV procedures for such measures.[114] The OPV procedures would, in effect, preclude offers and sales of the securities to U.S. persons other than U.S. individuals residing in France.[115] The French Government thus expected the OPV procedures to be more effective in precluding such sales than the traditional Euromarket measures.[116] Furthermore, the French Government noted that, because the OPV is not directed at U.S. persons, it would be "appropriate as a matter of comity and otherwise that the rights of U.S. citizens resident in France be governed by French legal requirements [*i.e.*, Law No. 86-912] rather than by

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112. *French Privatization Program*, *supra* note 20, [1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 78,439, at 77,434.

113. *Id.* at 77,435. The traditional Euromarket anti-integration measures include:

> (a) disclosure that the securities have not and will not be registered under the '33 Act and may not be offered or sold in the United States or to or for the account of U.S. persons, (b) agreements by underwriters and sub-underwriters not to offer or sell any of the securities acquired in the distribution in the United States or to or for the account of any U.S. person and (c) in connection with sales of the securities to dealers, customary written notices delivered to such dealers of the U.S. selling restrictions, which notice will contain deemed representations and agreements from such dealers relating to the selling restrictions and will require such dealers to deliver a similar notice to any dealer to whom they sell these securities.

Id.

114. *Id.* The no-action letter states the OPV procedures as follows:

> Each investor will sign a non-distribution letter which will confirm that the purchase is made for the investor's own account or for accounts as to which it exercises sole investment discretion. Each investor will agree not to make any reoffers or resales of the securities unless such offer and sale (a) are pursuant to an exemption from the registration requirements of the '33 Act, (b) are made in a transaction to which the registration requirements of the '33 Act would not apply or (c) are made on the Paris Bourse in regular way transactions without any requirement to make an investigation as to the nationality or residence of the counterparty.

Id.

115. *Id.*

116. *Id.*

an extraterritorial application of U.S. securities laws."[117] Finally, the request asked for the Division's concurrence in the opinion that, first, the French and international public offerings would not be integrated with, and would not affect the availability of the Act's exemptions for, the U.S. private placements, and, second, that the concurrent U.S. private placements would not necessitate the use of additional procedures in the foreign offerings.[118]

The Division concurred with both parts of the French Government's final opinion.[119] In addition, the Division's no-action response carefully expanded the scope of *CREF I* by allowing offers and sales to U.S. citizens residing in France under OPV privatization procedures.[120] The response recognized that the OPV procedures were the means of implementing the denationalization,[121] and that the French portions of the offerings were not targeted at U.S. persons.[122]

3. The *CREF II* Letter

The Division received yet a third no-action request,[123] the second request on behalf of CREF ("*CREF II*"), asking for further clarification of both the Act's registration requirements and of the subtle technicalities of integration. In *CREF II*,[124] CREF asked the Division to agree that U.S. institutional investors could participate in "rights offerings"[125] by foreign issuers

117. *Id.*

118. *Id.*

119. *Id.* at 77,436.

120. *Id.* Regarding this portion of the Division's response, an SEC source said, "[i]t's not an interpretation that it's ok now to universally sell to U.S. citizens residing abroad. It's just in this case, where you are dealing with conflicting law. When a foreign Government mandates this kind of thing, we are taking a no-action position." *SEC Issues No-Action Letter to French Gov't, supra* note 109, at 4.

121. *French Privatization Program, supra* note 20, [1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 78,439, at 77,436; *see supra* notes 19-21 and accompanying text.

122. *French Privatization Program, supra* note 20, [1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 78,439, at 77,436.

123. *College Retirement Equities Fund II*, SEC No-Action Letter (June 4, 1987) (available at *Fordham International Law Journal* office) (No-Action Letter Request available on LEXIS, Fedsec library, Noact file) [hereinafter *CREF II*].

124. *Id.*

125. *Id.* at 3. Rights offerings are the offer of the privilege to buy additional stock of the same kind. BLACK'S LAW DICTIONARY 1272 (5th ed. 1979). Rights are traded in the market, and are valuable because the holder may buy such additional stock at a price less than the market quotation. *Id.*; *see also* Wolfram & Bennet, *Mul-*

without the necessity of foreign issuers taking special steps to avoid violation of U.S. securities laws.[126] Echoing *CREF I*, *CREF II* expressed discontent with the uncertain application of the Act's registration requirements, an uncertainty that prevented CREF from realizing the full value of its foreign investments by rendering it unable to exercise its rights as securityholder.[127] CREF's no-action request explicitly set out the economic injuries it suffered, including costly recourse on the secondary markets, as a result of these uncertainties.[128] CREF argued that these uncertainties deprive U.S. institutions of their rights as securityholders, and that such monetary loss "is unnecessary as a matter of law and would be perverse as a matter of policy."[129]

CREF suggested that when a U.S. institutional investor who qualifies as a section 4(2) sophisticated investor validly holds foreign securities, and through a private placement subsequently acquires either additional securities or securities or rights through an exchange offer, the presence of the U.S. private offering does not impose procedures on the concurrent foreign public offering that would be required absent the U.S. private offering.[130] In addition, CREF stated that, assuming the required nondistribution procedures were employed for the foreign public offering, the offering would not be integrated with, and therefore would not affect the Act's available

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tinational Offerings: A United States Perspective After British Telecom, British Gas and British Airways, 2 COLUM. BUS. L. REV. 339, 353 (1987) (discussing rights offerings and exchange offers).

126. *CREF II*, *supra* note 123, at 3.

127. *Id.* at 2. *CREF II* included in these lost investment opportunities the exercise of warrants or preemptive rights, the participation in dividend reinvestment plans and in exchange offers by other foreign issuers, and the right to receive stock dividends or meet payment calls on partly paid shares and thereby receive fully paid shares. *Id.*

128. *Id.* In addition, the request noted that CREF suffered economic injury when it was limited to receipt of cash in an offering to existing holders of a foreign issuer's securities. *Id.* CREF stated that when it cannot exercise non-transferable preemptive rights or tender payment on partly paid shares at the call, its foreign securities or rights can, as a result, become worthless. *Id.*

129. *Id.* at 3.

130. *Id.*; *see also Institutional Investors May Participate in Foreign Rights Offerings, Staff Says*, 19 SEC. REG. & L. REP. (BNA) 932, 933 (June 19, 1987) [hereinafter *Institutional Investors May Participate*] (discussing *CREF II*, *supra* note 123).

exemptions for, the concurrent U.S. private offerings.[131] Finally, CREF asserted that no additional flowback procedures would be required and that no integration should be found regardless of whether securities of the foreign issuer are actually traded in the United States.[132]

In its response, the Division concurred with all of CREF's opinions.[133] First, the Division said that the concurrent offerings would not be integrated, and that therefore any available exemptions for the U.S. private offering would not be lost.[134] In addition, the Division noted that the simultaneous nature of the offerings would not impose on the foreign public offerings "any procedures in addition to those, if any, that would be required in the absence of the U.S. private offering."[135]

III. *MODERNIZING THE SEC'S POLICIES ON CONCURRENT MULTINATIONAL OFFERINGS*

The Division has issued several no-action letters to clarify the Act's application to U.S. institutional investors wishing to participate in concurrent domestic and foreign securities offerings. However, the letters are more instructive in illustrating the inadequacies of present methods than they are in providing the solutions because institutional investors continue to suffer unnecessary economic losses and foreign issuers fear violating U.S. securities laws either by failing to register or by unintentionally filing a faulty registration statement with the SEC.

A. *The SEC Must Implement A More Modernized Approach*

1. Unnecessary Economic Injuries

In *CREF II*, CREF emphasized that it suffered lost investment opportunities and was left with the costly recourse of acquisition on the secondary market as a result of the Act's uncertainties.[136] CREF suffered these losses because foreign is-

131. *CREF II*, *supra* note 123, at 3; *see also Institutional Investors May Participate*, *supra* note 130, at 933 (discussing *CREF II*, *supra* note 123).

132. *CREF II*, *supra* note 123, at 4; *see also Institutional Investors May Participate*, *supra* note 130, at 933 (discussing *CREF II*, *supra* note 123).

133. *CREF II*, *supra* note 123, Division's Response.

134. *Id.*

135. *Id.*

136. *Id.* at 2.

suers often systematically exclude U.S. persons from such offerings rather than risk violation of the Act.[137] CREF estimates that these exclusionary practices deprived it of over ten million dollars in investment benefits.[138] Because the intent of the U.S. securities laws is to protect U.S. investors, not to foster uncertainty or hamper investment opportunities,[139] the Act's requirements must be clearly delineated so that CREF and other U.S. institutional investors "can enjoy the economic rights to which they are entitled as investors in foreign capital markets."[140]

2. Foreign Issuers' Fear of the Unknown

Two significant obstacles impede foreign companies in making registered U.S. offerings.[141] The first is the Act's imposition of liability for noncompliance with its provisions. Foreign issuers fear that they will unintentionally file a faulty registration statement and will thus expose themselves to criminal and civil liability.[142] Section 11 of the Act mandates that an issuer is strictly liable for any damages incurred by any person acquiring a security, if the registration statement contains untrue statements of material facts or fails to state a required material fact.[143] Moreover, the Act provides that any person who offers or sells a security in violation of section 5 or through a

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137. *Id.*

138. *Id.* This estimate was made by CREF when *CREF II* was written in June 1987. *Id.*; *see also Institutional Investors May Participate*, *supra* note 130, at 933 (discussing CREF's loss of investment benefits). In addition, SEC rules and the uncertain reach of U.S. securities laws have cost other U.S. institutional investors millions of dollars, particularly in the context of rights offerings by British companies. *Poor Stock Settlement Systems Seen Hampering International Stock Trading*, 19 SEC. REG. & L. REP. (BNA) 248, 250 (Feb. 20, 1987) [hereinafter *Poor Stock Settlement Systems*].

139. Securities Act of 1933, ch. 38, preamble, 48 Stat. 74, 74 (Act's purpose is "[t]o provide full and fair disclosure of the character of securities sold in . . . commerce and . . . to prevent frauds in the sale thereof"); *see also* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 195 (1976) (Act "was designed to provide investors with full disclosure of material information concerning public offerings of securities . . . to protect investors against fraud and . . . to promote ethical standards of honesty and fair dealing"). *See generally* Landis, *The Legislative History of the Securities Act of 1933*, 28 GEO. WASH. L. REV. 29 (1959).

140. *CREF II*, *supra* note 123, at 3.

141. *Poor Stock Settlements Systems*, *supra* note 138, at 250.

142. *Id.*

143. 15 U.S.C. § 77k (1982). However, the issuer has one defense to section 11 strict liability: proving that the plaintiff knew of the "untruth or omission" at the time he acquired the security. Securities Act § 11(a), 15 U.S.C. § 77k(a) (1982).

prospectus or oral communication that contains "an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements . . . not misleading" is liable to anyone purchasing from him for the consideration paid for the security, plus interest.[144] Finally, in addition to civil sanctions, anyone who willfully violates any of the Act's provisions or any of the rules or regulations promulgated by the SEC under the Act may be subject to fines, imprisonment, or both.[145]

The second barrier to U.S. registration by foreign issuers is fear of the SEC,[146] which can be characterized as fear of the unknown.[147] Issuers fear that registration with the SEC will force them to comply with additional requirements that may be imposed by the SEC or Congress in the future.[148] This psychological barrier is premised on resistance by foreign issuers to U.S. legal concepts and on misinformation about the SEC's policies.[149] In fact, before the French Government received the Division's no-action response, France considered the SEC unsupportive of its privatization program.[150] In view of the small initial U.S. investment in the privatization, the French Government understandably blamed the SEC's complicated rules for the seeming lack of U.S. interest.[151]

B. *Proposals for Facilitation of Multinational Offerings*

The SEC recognizes the unprecedented degree to which

144. Securities Act § 12, 15 U.S.C. § 77*l* (1982).

145. Securities Act § 24, 15 U.S.C. § 77x (1982).

146. *Poor Stock Settlement Systems*, *supra* note 138, at 250; *see also SEC Convenes Internationalization Roundtable*, THE SEC TODAY, Feb. 19, 1987, at 2 [hereinafter *Internationalization Roundtable*] (discussing foreign issuers' fear of the SEC).

147. Nathan, *Special Problems Arising as a Result of Trading in Multiple Markets*, 4 J. COMP. CORP. L. & SEC. REG. 1, 9 (1982); *Poor Stock Settlement Systems*, *supra* note 138, at 250.

148. *Poor Stock Settlement Systems*, *supra* note 138, at 250. To alleviate this fear of future regulations, commentators have suggested that foreign issuers who initially complied with U.S. requirements should be allowed a subsequent grace period during which to decide whether to extricate themselves from the system. *Id.* (citing suggestion by D. Hawes at the SEC's Feb. 17, 1987, roundtable on internationalization of securities markets); *see also Internationalization Roundtable*, *supra* note 146, at 2 (discussing foreign issuers' fears and suggesting methods to alleviate those fears).

149. Nathan, *supra* note 147, at 9.

150. *French Courting*, *supra* note 26.

151. *Id.*

the world's security markets have become internationalized.[152] However, it has yet to move beyond this preliminary recognition to address the issues raised by participation by U.S. institutional investors in global offerings. While proposals are regularly made to clarify the SEC's position at frequent discussions on the internationalization of the securities markets,[153] none has been enacted.[154]

1. Revisiting Release 4708 and Exploring a More Territorial Approach

Large U.S. firms investing in international markets viewed *CREF I* as a major development because, prior to its issuance, it was unclear whether foreign governments could sell new shares to U.S. institutional investors absent compliance with the Act's registration requirements.[155] As a result, U.S. investment firms had been precluded from participation in initial offerings abroad, and thus were forced to seek recourse on the costly international secondary markets.[156] Key SEC officials

152. On August 5, 1987, the SEC released its long-awaited report on internationalization of the securities markets: *Report of the Staff of the U.S. Securities and Exchange Commission to the Senate Committee on Banking, Housing and Urban Affairs and the House Committee on Energy and Commerce on the Internationalization of the Securities Markets.* The report is "a comprehensive study of internationalization issues, running over 900 pages." *Internationalization Report Sent to Congress by SEC Staff*, 19 SEC. REG. & L. REP. (BNA) 1187 (Aug. 7, 1987). SEC officials expect the report to be used in formulating recommendations in the area of internationalization. *Id.* Congress directed the SEC to prepare the comprehensive study on the internationalization of the world's security markets. *See* S. REP. No. 426, 99th Cong., 2d Sess. 23-24 (1986); H.R. REP. No. 155, 99th Cong., 1st Sess. 6-8 (1985). On October 9, 1986, the SEC provided Congress with an interim progress report discussing its recent significant activities in the internationalization area. *Report of the Securities and Exchange Commission to the House Committee on the Internationalization of the Securities Markets*, SEC Interim Progress Report, [1986-1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,037 (Oct. 9, 1986).

153. For example, at the SEC roundtable, participants agreed that the Act creates an impediment to global market offerings. *Internationalization Roundtable*, *supra* note 146, at 2. In addition, at the 1988 annual Securities Regulation Institute conference, Division Director Linda Quinn discussed the need for determining the proper reach of section 5 of the Act to offshore transactions and to institutional investors. *Insider Trading Enforcement, Arbitration Takeover Issues Discussed at SRI Meeting*, 20 SEC. REG. & L. REP. (BNA) 143, 145 (Jan. 29, 1988) [hereinafter *Insider Trading Enforcement*].

154. *See infra* notes 155-191 and accompanying text.

155. Stamas, *supra* note 87, at 1.

156. *Id.*; *see also CREF I*, *supra* note 19, [1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 78,420, at 77,362 ("Uncertainties surrounding the application of the 1933

viewed *CREF I* as the first significant step towards modernizing the concepts implicit in Release 4708 because the letter gives guidance on the appropriate circumstances for permitting U.S. participation in foreign offerings.[157]

After the Division issued *CREF I*, SEC sources said that the Commission was planning a "major overhaul" of Release 4708.[158] Such revision of the Release is essential because it remains the last comprehensive expression of SEC policy on the reach of the Act's registration requirements to international transactions.[159] In 1964, when the Division issued Release 4708, few U.S. investors were interested in transactions abroad.[160] Today, however, U.S. investors often rely on foreign investments to diversify their portfolios.[161]

Accordingly, the SEC must modernize Release 4708 to address integration of contemporaneous multinational offerings and the scope of section 5 in today's globalized markets. The Division recognizes that establishing the proper reach of section 5 is critical, and thus plans to restructure Release 4708 into a "safe harbor" rule.[162] Under this safe harbor approach, the focus would be on the location of the offering or sale of the securities, rather than on the purchaser's identity as set forth in Release 4708.[163] The safe harbor rule proposes that an is-

Act to the French privatizations have hampered CREF's ability to participate in the first two offerings . . . making recourse to the secondary market costly to CREF.").

157. Stamas, *supra* note 87, at 1. Division Director Linda Quinn said that "[t]here's been considerable urging of the Commission to revisit Release 4708 and to modernize its concepts and to give more guidance. This letter represents a step in that direction." *Id.*

158. *SEC Asked To Clarify*, *supra* note 108, at 3.

159. *Insider Trading Enforcement*, *supra* note 153, at 145 (Division Director Linda Quinn commented that Release 4708 is the "last and most definitive word to date on the application of § 5 to offshore offerings.").

160. In 1976, Congress repealed legislation that imposed a 15% tax on the purchase of foreign securities, and thereby facilitated dealings by U.S. investors in such securities. Tax Reform Act of 1976 § 1307(b), Pub. L. No. 94-455, sec. 1307(b), § 4911, 90 Stat. 1520, 1723-26 (codified as amended at 26 U.S.C. § 4911 (1982)), *repealing* the Interest Equalization Tax Act § 2(a), Pub. L. No. 88-563, sec. 2(a), § 4911, 78 Stat. 809, 809-10 (1964).

161. Revzin, *French Denationalization Lures U.S. Firms*, Wall St. J., Oct. 24, 1986, at 32, col. 3; *see also* Sebit, *U.S. Institutions Find Buying Foreign Stocks Can Be Very Profitable*, Wall St. J., June 3, 1986, at 1, col. 6 ("Foreign stocks are in vogue among U.S. . . . money managers.").

162. *ALI-ABA Panel Discusses Insider Trading Developments*, 20 SEC. REG. & L. REP. (BNA) 132, 134 (Jan. 29, 1988) [hereinafter *ALI-ABA Panel*].

163. *Id.*

suer would not have to take precautions to prevent flowback if its unregistered securities were sold offshore.[164] This proposal is premised on the condition that the issuer is a reporting company and is not conducting its offshore offerings solely to avoid SEC requirements.[165] However, there is a problem inherent in this seemingly simple approach. Because many complex transactions occur in electronic markets, focusing on the location of the offering and determining where the sale takes place could be difficult.[166]

Nevertheless, the safe-harbor approach correctly confines U.S. securities laws to domestic markets. Large U.S. institutional investors would benefit immensely by this more territorial standard, which would enable them to buy foreign securities in initial offshore offerings without implicating the Act's uncertain registration requirements.

2. New Exchanges: Creation of "Onshore-Offshore" Markets

In addressing the need for modernization of Release 4708, SEC officials have suggested that the purpose behind the Act's registration requirements is obviated when the offerings and sales of the securities are made to institutional, professional investors.[167] Such investors do not require the protection of the registration process.[168] Accordingly, two U.S. stock markets—the National Association of Securities Dealers ("NASD") and the American Stock Exchange ("AMEX")—have proposed creating new "onshore-offshore" markets where sophisticated investors can buy non-U.S.-registered securities of foreign companies.[169] Three main factors precipi-

164. *SEC Staff to Work on Developing Safe Harbor Rule for Foreign Offerings*, 19 SEC. REG. & L. REP. (BNA) 1444, 1445 (Sept. 25, 1987).

165. *Id.*

166. *Id.*; *ALI-ABA Panel*, *supra* note 162, at 134.

167. *Poor Stock Settlement Systems*, *supra* note 138, at 250. At the SEC roundtable, Division Director Linda Quinn said, "sales of securities to institutional, professional investors could explicitly be recognized as outside the necessary protections of the Securities Act and thus be permitted, either in direct sales from an issuer, or upon resale, to proceed without Section 5 implications." *Id.*

168. *Id.*

169. *Two Exchanges Close to Submitting New Market Proposals, Grundfest Says*, 19 SEC. REG. & L. REP. (BNA) 1519, 1520 (Oct. 9, 1987) [hereinafter *Two Exchanges Close to Submitting*]; *see also Insider Trading, Internationalization, Rule '144A' Discussed at ABA Conference*, 19 SEC. REG. & L. REP. (BNA) 1242, 1244-45 (Aug. 14, 1987) [hereinafter *Insider Trading*] (discussing new exchange idea).

tated the proposals: (1) the increase in the desire of U.S. investors to invest in foreign equity securities; (2) the desire of foreign issuers to expand their markets; and (3) the obstacles presented by the SEC's registration process that inhibit issuers from gaining access to U.S. capital markets.[170]

Both proposals demonstrate concerted efforts to remove the impediments placed on U.S. institutional investors by the Act's uncertain application. Each of the proposed onshore-offshore markets would facilitate the trend towards internationalization in two important ways. First, by providing a forum in which sophisticated U.S. institutional investors have the opportunity to trade unregistered foreign securities, the proposed markets address the needs of today's capital markets.[171] The idea of creating such markets properly recognizes that if sophisticated U.S. investors will go abroad to buy foreign securities with the best risk-adjusted return, the transactions might as well occur in a domestic market where there are greater assurances that the counterparty will pay.[172] Second, the proposed exchange solution will serve to "institutionaliz[e] the private placement process"[173] so that foreign issuers will have access to the U.S. institutional market without the concomitant uncertainties arising from the Act's registration provisions.[174]

On December 23, 1987, AMEX filed a proposed rule change with the SEC seeking the Commission's approval of a

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170. *Insider Trading*, *supra* note 169, at 1245.

171. *See Insider Trading Enforcement*, *supra* note 153, at 145 ("The proposal is the latest step in an effort that has been going on for some time—in the form of complex private placements and relief through no-action letters—to give foreign issuers access to U.S. markets without being forced to comply with . . . requirements imposed by '33 Act registration.").

172. *Two Exchanges Close to Submitting*, *supra* note 169, at 1520. As one legal commentator noted, "The issue is not *whether* U.S. investors will purchase foreign securities, but *where* they will purchase such securities." Thomas, *Internationalization of the World's Capital Markets: Can the S.E.C. Help Shape the Future?*, 15 N.Y.U. J. INT'L L. & POL. 55, 58 (1982) (emphasis in original).

173. *Insider Trading*, *supra* note 169, at 1245 (*citing* Richard Scribner, executive vice-president of AMEX). "Institutionalization" refers to the pooling of savings through large institutions and the high-volume, block securities transactions managed by these entities. Thus, these institutional funds are replacing the individual investor by acting as intermediaries and actually purchasing the securities from the issuer. Gruson, *The Global Securities Market: Introductory Remarks*, 2 COLUM. BUS. L. REV. 303, 305 (1987).

174. *Insider Trading*, *supra* note 169, at 1245.

new domestic market for institutional trading of unregistered securities.[175] The proposed "System for Institutional Trading of Unregistered Securities" ("SITUS") would attract U.S. institutional investors currently trading in foreign markets. The system allows such investors to purchase and resell unregistered securities of foreign issuers "without the need for the traditional procedures . . . used in current U.S. private placements of such securities."[176]

SITUS would be operated as a division of AMEX, and would be used for trading debt and equity securities of qualified foreign private issuers and debt securities of qualified foreign government issuers.[177] These approved securities could be traded only with eligible institutions that meet the accredited investor requirements of Regulation D.[178] Thus, access to SITUS would be limited to those who do not need the Act's protection.[179] In addition, AMEX's proposal would allow institutions purchasing unregistered securities through SITUS to resell those securities only on foreign exchanges, to foreign dealers, and to non-U.S. persons purchasing abroad.[180]

The proposal recognizes that private placements of foreign securities in the United States would increase if institutional investors could efficiently resell the securities.[181] AMEX officials noted that current procedures require "customary, but cumbersome safeguards" that hinder institutions' ability to resell "without significantly improving the SEC's ability to monitor compliance with the law."[182] Although SITUS offers an alternative that would facilitate such securities transactions, it is unclear whether the SEC will adopt AMEX's proposal.[183]

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175. *AMEX Proposal Would Create Market for Institutional Foreign Stock Trading*, 20 SEC. REG. & L. REP. (BNA) 6 (Jan. 8, 1988) [hereinafter *AMEX Proposal*].

176. *Id.*

177. *Id.*

178. *Id.*; *see also* notes 51-62 and accompanying text. In addition, the Commission has adopted several amendments to Regulation D that expand the definition of "accredited investor." Regulation D Revisions, SEC Securities Act Release No. 33-6758, 53 Fed. Reg. 7866, 7866-67 (Mar. 3, 1988); *see* 53 Fed. Reg. at 7868-69 (to be codified at 17 C.F.R. §§ 230.215, 230.501-.504).

179. *AMEX Proposal*, *supra* note 175, at 6; *see supra* text accompanying notes 167-168.

180. *AMEX Proposal*, *supra* note 175, at 6.

181. *Id.* at 7.

182. *Id.*

183. Remarks of Edward Greene at the annual Securities Regulation Institute

Thus, foreign issuers and U.S. institutional investors alike must continue to attempt to comply with the Act's uncertain requirements while they wait for the SEC to adopt a new approach.

3. Rule 144A and the Free-Trade Zone Policy

CREF officials viewed *CREF I* as a step towards the creation of a so-called free-trade zone policy for U.S. institutional investors.[184] The policy, which SEC officials also refer to as Rule 144A,[185] is based on exempting offers and sales to institutional investors from the Act's registration and reporting requirements.[186] In addition, the suggested rule would allow for less restrictive resales of the securities by those investors.[187]

Although the SEC staff has not yet issued a rule proposal for public comment, the mere suggestion of this exemption is another manifestation of the SEC's growing acceptance of the notion that sophisticated institutional investors can participate in international transactions without the Act's protections. Such a rule accurately assesses the distinction between institutional investors and individual, nonprofessional investors in the retail markets by recognizing that the Act was designed to protect nonprofessional investors.

Rule 144A is designed to codify, in part, the "section 4(1-1/2) exemption," which provides methods to resell securities that are issued initially in a private placement without registration under the Act.[188] In addition, SEC officials expect the rule proposal to be issued with two alternatives.[189] Essentially, the first alternative would provide that any Regulation D-qualified institutional investor could be a buyer, but that there would be a limit on the securities that could be resold.[190] The second

conference (Jan. 20-22, 1988), *summarized in Insider Trading Enforcement*, *supra* note 153, at 145.

184. Stamas, *supra* note 87, at 1.

185. *Insider Trading*, *supra* note 169, at 1245.

186. *Poor Stock Settlement Systems*, *supra* note 138, at 249.

187. *Id.*

188. *Insider Trading*, *supra* note 169, at 1245.

189. *ALI-ABA Panel*, *supra* note 162, at 135; *Insider Trading*, *supra* note 169, at 1245.

190. *ALI-ABA Panel*, *supra* note 162, at 135. The limitation would be to senior investment-grade debt securities of companies that have been reporting companies for at least three years. *Id.*

alternative would limit the buyers by size, thus enabling only large institutions to qualify for the exemption.[191]

CONCLUSION

The SEC has received several proposals that would clarify application of the Securities Act of 1933 to multinational offerings, and would thus facilitate participation by U.S. institutional investors in such offerings. The proposals correctly recognize that, as sophisticated investors, institutional investors do not require the protection of the Act's registration requirements. However, until the SEC adopts such a proposal, U.S. institutional investors' ability to purchase securities of foreign issuers will continue to be hindered by the Act's uncertain application. Only when the SEC implements a proposal that facilitates participation by institutional investors in multinational offerings will U.S. institutional investors be able to recognize fully the myriad investment opportunities offered by today's international securities markets.

Jodi E. Freid *

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191. *Insider Trading*, *supra* note 169, at 1245-46. Although "large institutions" has not been defined, Division Director Linda Quinn indicated the possibility of "something that would roughly parallel the same type of institutions that would fall in the 13-F area." *Id.* This alternative will probably have a condition that one of the security's terms entitles the holder of the security to the issuer's disclosure information if the issuer had produced such information to comply with the requirements of his home exchange. *Id.*; *ALI-ABA Panel*, *supra* note 162, at 135.

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