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NOTES

INCREASING UNITED STATES INVESTMENT IN FOREIGN SECURITIES: AN EVALUATION OF SEC RULE 144A

VICKIE KOKKALENIOS

INTRODUCTION

In recent years, the financial community has witnessed the increasing internationalization (or globalization)[1] of world financial markets. Consistent with this internationalization, United States investment in foreign securities has increased,[2] a trend that financial experts expect will continue.[3] Foreign companies have turned to the larger and more sophisticated United States securities markets to raise capital and gain global recognition.[4]

Traditionally, however, foreign companies have been, and many still are, reluctant to offer their securities in the United States, where financial reporting requirements are much stricter than foreign securities regulations.[5] Furthermore, the resultant scarcity of foreign securities in the

1. *See* American Depositary Receipts, 56 Fed. Reg. 24,420, 24,421 (1991); Bank of N.Y., *Globalization: Its Effect on the Securities Industry*, 1 Sec. Issues 1, 1 (June 1990) [hereinafter *Globalization*]; Doty, *The Role of the Securities and Exchange Commission in an Internationalized Marketplace*, in Annual Survey of Financial Services and Regulation, Transnational Financial Services in the 1990s, 60 Fordham L. Rev. S77, S77-78 (1992); Note, *The Capital Markets in Transition: A Response to New SEC Rule 144A*, 66 Ind. L.J. 233, 235 n.15 (1990) [hereinafter *Capital Markets in Transition*] (citing Staff of the United States Securities and Exchange Commission, Report to Senate Comm. on Banking, Housing and Urban Affairs and House Comm. on Energy & Commerce Concerning the Internationalization of the Securities Markets (1987)).

2. *See* American Depositary Receipts, 56 Fed. Reg. 24,420, 24,421 (1991). It has been estimated that in 1990 United States investors bought approximately $130.9 billion and sold approximately $122.5 billion of foreign equity securities. *See id.* n.1 (citing U.S. Treas. Bull. 93 (Mar. 1991)). These figures can be contrasted with those in 1980, when United States investors purchased approximately $10.0 billion and sold approximately $7.9 billion of foreign equity securities. *See id.* at 24,421.

3. *See id.*

4. *See* McTigue, *Looking for a Bigger Market*, at 1 (Bank of N.Y. Oct. 1990) (on file at *Fordham Law Review*) [hereinafter *Bigger Market*]. In many of these foreign countries, capital is needed to support recent privatization programs. *See id.* For example, to facilitate Brazil's privatization programs, companies such as Compania de Rio Doce will be reserving portions of their offerings for distributions made to U.S. institutional investors under Rule 144A. *See Brazil's Privatization Ready to Resume*, 1 Private Placement Rep. No. 37, Oct. 14, 1991, at 1, *2, *available in* LEXIS, Nexis Library, BUS File. For a discussion of specific privatization attempts in foreign countries, see Note, *The World Bank and the IMF: At the Forefront of World Transformation*, in Annual Survey of Financial Services and Regulation, Transnational Financial Services in the 1990s, 60 Fordham L. Rev. S349, S359-86 (1992).

5. *See* Demick, *Exchanges Want Foreign Listing Eased*, Phil. Inquirer, Feb. 22, 1991, at 9-C, col. 1. [hereinafter *Exchanges Want Foreign Listing Eased*]; Perlman, *SEC Adopts Rule Easing Requirements on Unregistered Securities*, Reuter Bus. Rep., Apr. 19, 1990, at *1, *available in* LEXIS, Nexis Library, WIRES File [hereinafter *SEC Adopts*

United States market has forced United States investors wishing to purchase foreign securities to buy abroad, often at higher costs.[6] In response, many professionals in the United States investment arena have stressed the need for greater accommodation in foreign securities regulation.[7] Consistent with this response, the Securities and Exchange Commission ("SEC") has attempted to liberalize and clarify registration requirements in transnational securities transactions.[8] On April 30, 1990, the SEC adopted Rule 144A,[9] which was intended to provide an exemption from registration requirements for private[10] resales of restricted securities to qualified institutional investors.[11]

This Note will examine Rule 144A, the primary regulation that the SEC has promulgated to respond to the internationalization of the securities industry.[12] Part I provides a general background of the United

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Rule]. Foreign companies have been unwilling to offer securities in the United States and have instead turned to other "less stringent markets" such as Euromarkets. *See* Toh-Pantin, *SEC Rule Change Seen Boosting U.S. Capital Markets*, Reuters, Apr. 20, 1990, at *1, *available in* LEXIS, Nexis Library, WIRES File [hereinafter *Boosting U.S. Capital Markets*.

For example, securities regulation in Japan is much less stringent than in the United States. *See* Note, *Japanese Securities Regulations: Problems of Enforcement*, in Annual Survey of Financial Services and Regulation, Transnational Financial Services in the 1990s, 60 Fordham L. Rev. S255 (1992).

6. *See SEC Adopts Rule*, *supra* note 5, at *1. As an example, before the Mexican company Corpacion Industrial Sanluis experimented with American Depositary Receipts in 1990, United States investors interested in the company had to go to Mexico and establish trusts for investment purposes. *See Bigger Market*, *supra* note 4, at 2.

7. New York Stock Exchange chairman William H. Donaldson has stated that, rather than force Americans to buy foreign stocks in foreign markets, "we've got to make some sort of compromise in the name of investor protection." *See Exchanges Want Foreign Listing Eased*, *supra* note 5, at 9-C, col. 3.

United States investors can be expected to put even more pressure on the SEC with the adoption of the European Community's plan for a uniform economic unit this year, under which European corporations are expected to flourish. *See Globalization*, *supra* note 1, at 1.

8. In the past several years, the SEC has realized that certain issues regarding the reach of SEC registration requirements across national boundaries must be resolved. *See* Regulation S, 55 Fed. Reg. 18,306, 18,308 (1990).

9. 17 C.F.R. § 230.144A (1991).

10. Rule 144A applies solely to the private placement market and does not relate to disclosure requirements for public issuances. A private placement has been defined as " 'a non-registered security placed by an agent with non-bank, third party investors . . . hav[ing] a maturity of at least one year.' " *Capital Markets in Transition*, *supra* note 1, at 241 (quoting Maher, *Is the Party Over?*, Inv. Dealers' Dig., Sept. 4, 1989, at 13, 19).

11. *See* Rule 144A, 55 Fed. Reg. 17,933 (1990) (codified at 17 C.F.R. § 230.144A). In Rule 144A, eligible investors are called qualified institutional buyers. For a discussion of the requirements that must be satisfied to be considered a qualified institutional buyer, see *infra* notes 52-54 and accompanying text.

12. Rule 144A is part of SEC efforts to "adapt the more stringent U.S. securities regulatory environment to the globalization of the capital markets and to achieve greater harmony with prevailing (and more liberal) regulatory schemes in the European community." Cooper, *Misperceptions of a Move to Globalization*, Pensions & Invs., Oct. 29, 1990, at 16 [hereinafter *Misperceptions*].

For a discussion of more recently proposed changes in United States securities regulations, see Note, *Securities Exchange Commission's Proposed Regulations of Foreign Secur-*

States securities markets and their position in the international securities industry. This Part also discusses the adoption of Rule 144A and the conditions that must be satisfied for its use. Part II then reviews recent market results under Rule 144A and addresses criticisms of the Rule. Finally, this Note concludes that an amended Rule 144A is needed to make the United States more competitive internationally.[13]

I. BACKGROUND

A brief review of the different markets in the United States relevant to the adoption of Rule 144A and the role of the SEC in regulating these markets will aid in an understanding of the Rule. This review indicates that the SEC needed to adopt Rule 144A in response to globalization of financial markets and to differences in international securities regulations. Finally, the requirements for eligibility under Rule 144A are presented.

A. *The SEC and United States Securities Markets*

The SEC is the federal agency that seeks to regulate and "maintain[] the efficiency and integrity of the American securities markets."[14] The SEC regulates the actions of issuers in offering securities[15] publicly or in making private placements.

Publicly-held securities "are traded both on formal securities exchanges and in the more loosely organized 'over-the-counter' markets."[16] Because participants in public-market trading are often relatively unsophisticated, disclosure requirements for public offerings are extensive.

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ities Issued in the United States, in Annual Survey of Financial Services and Regulation, Transnational Financial Services in the 1990s, 60 Fordham L. Rev. S203 (1992) [hereinafter *SEC's Proposed Regulations*].

13. For a discussion of specific changes the SEC should address to further increase the effectiveness of Rule 144A, see *infra* notes 87-128 and accompanying text.

14. T. Hazen, The Law of Securities Regulation 9 (1985). In the United States, there are six federal securities acts. *See id.* at 10. One of these, the Securities Act of 1933, regulates the distribution of securities. *See id.* at 254. Another, the Securities Exchange Act of 1934, "charges the SEC with the authority to supervise daily market activity." *Id.*

15. The term "security" is defined, under the Securities Act of 1933, as:

> any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities . . . or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a 'security', or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

15 U.S.C. § 77b(1) (1988).

16. Hazen, *supra* note 14, at 3.

Specifically, an issuer that offers its securities in the public market must comply with the registration requirements set out in Section 5 of the Securities Act of 1933 (" '33 Act"),[17] which, absent an exemption,[18] requires an issuer to file and secure approval of a registration statement in order to offer or sell securities.[19] This broad disclosure requirement stems from one of the underlying policies of United States securities regulation—that disclosure is necessary whenever securities are issued in the United States in order to protect United States investors.[20]

Private placements, on the other hand, are exempt from the Section 5 registration requirements pursuant to Section 4(2).[21] In addition to affording issuers an exemption from onerous registration requirements, the private placement market provides other advantages over public offerings.[22] In fact, since the 1980s the private placement market has significantly challenged the public markets—a change that has transformed the United States capital markets.[23]

B. *Globalization of Capital Markets*

The recent trend toward globalization of financial markets has resulted

17. Securities Exchange Act of 1933, ch. 38, tit. 1, § 1, 48 Stat. 74 (1933) (codified as amended at 15 U.S.C. § 77 (1988)).

18. *See* Hazen, *supra* note 14, at 6.

19. *See* 15 U.S.C. § 77e(c) (1988).

20. *See Capital Markets in Transition, supra* note 1, at 247 (citing H.R. Rep. No. 85, 73d Cong., 1st Sess. 2 (1933)). This policy, "that no essentially important element attending the issue shall be concealed from the buying public," was an underlying principle behind the adoption of the '33 Act. *Id.*

"Disclosure has always been at the heart of our system of federal securities regulation." Doty, *supra* note 1, at S86. Many financial professionals have emphasized the SEC's concern that, in adopting its policies, it must not sacrifice this principle of investor protection. *See, e.g., Boosting U.S. Capital Markets, supra* note 5, at *2 (quoting Vice President Sherman of Shearson Lehman Hutton, noting that in increasing access to United States capital markets, the SEC must not to sacrifice investor protection); Greene & Beller, *Rule 144A: Keeping the U.S. Competitive in the International Financial Markets*, 4 L. & Bus. Insights (P-H) No. 6, June 1990, at 3, *1, *available in* LEXIS, Nexis Library, NWLTRS File (deregulatory actions are permitted by the SEC when it concludes that they "do not jeopardize the necessary protection of U.S. investors and markets") [hereinafter *Keeping the U.S. Competitive*].

21. *See* 15 U.S.C. § 77d(2) (1988) (codifying Section 4(2) of the '33 Act).

22. In addition to allowing foreign companies to circumvent the extensive Section 5 disclosure requirement for public issues, a private placement is also cheaper than a public issue in terms of administrative and transaction costs. *See Shaking Up America's Capital Markets*, Economist, Apr. 21, 1990, at 89 [hereinafter *Shaking Up America's Capital Markets*]. For example, fees for a $25 million public issuance could amount to $500,000 in "[f]ees for investment banks, lawyers and rating agencies." *Id.* A private issue, on the other hand, "could cost less than one-third of that [amount]." *Id.*

Private placement deals can also be completed in a much shorter time than public offerings, usually a few days or weeks, while mere registration of public issues can take a few months. *See id.* Furthermore, private placements can be "tailored to fit the buyers' requirements" as compared to the "off-the-peg nature of public issues." *Id.*

23. In 1981, the total dollar amount of securities placed privately in the United States was $18 billion. *See Capital Markets in Transition, supra* note 1, at 242. This figure increased to $139 billion in 1987 and $202 billion in 1988. *See id.*

in a dramatic change in the world marketplace.[24] Although the United States capital market has been the strongest, other markets have increased in importance and strength.[25] These other markets now provide numerous attractions[26] to investors and have provided significant competition to the United States market. In recent years, United States investors also have gone abroad either to diversify their portfolios or to purchase certain securities that were not available in the United States.[27] In light of globalization and competition among world markets, there has been increased pressure on the SEC to ensure that the United States maintains a competitive position in the international securities industry.[28] Both foreign issuers and United States investors have advocated easing United States disclosure requirements[29] in order to compete with those in less restrictive foreign markets.[30]

C. *Rule 144A as a Response to Globalization*

1. Background

At present, a foreign company seeking to issue securities in the United

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24. *See supra* notes 1-4 and accompanying text.

25. *See* Fuerbringer, *Investors' Hopes Overseas Shaded by Doubt*, N.Y. Times, Jan. 2, 1992, at D1, col. 1. Among the largest world markets, the United States came out on top for 1991, rising 27.44%. *See id.* at D11, col. 3. Other markets—both larger and less developed—performed rather well in 1991 and previous years. Of leading markets, France was up 14.18%, in dollar terms, and Britain 11.87%. *See id.* In Mexico, a country which has recently undergone extensive economic reforms, the market has led the Financial Times index of 24 markets for the past four years, and in 1991 that market was up 138.03%, in dollar terms. *See id.*

26. For one, the Euromarkets are generally less stringent in reporting requirements than the United States capital market. *See supra* note 5 and accompanying text. In addition, because of internationalization, there has been "increased competition among countries to establish 'major' securities trading centers, . . . [to] offer 'easy' regulation of securities professionals, [and] 'innovative trading structures,' " and to facilitate access to such markets for foreign companies. *See Need for Disclosure Rule Changes Debated at NASAA Annual Meeting*, 23 Sec. Reg. & L. Rep. (BNA) No. 43, at 1592 (Nov. 1, 1991) [hereinafter *Need for Disclosure Rule Changes*].

27. *See supra* note 6 and accompanying text. For a discussion of the interests of U.S. investors, including both small ones and also large institutions, in the stocks of foreign companies, see *American Depositary Receipts*, Economist, June 15, 1991, at 73 [hereinafter *American Depositary Receipts*; Fidler, *ADR Trading Volumes on U.S. Exchanges Rise 25%*, Fin. Times, Feb. 27, 1991, § 1, at 31, col. 6 [hereinafter *ADR Trading Volumes on U.S. Exchanges Rise 25%*].

28. *See Keeping the U.S. Competitive*, *supra* note 20, at *2. In fact, some investors see Rule 144A as being so effective as to potentially threaten Euromarkets. *See* Miller, *New U.S. Securities Rule Threatens Euromarkets*, Reuters, June 1, 1990, at *1, *available in* LEXIS, Nexis Library, WIRES File [hereinafter *Rule Threatens Euromarkets*]. Investment bankers expected that once the United States capital markets were changed under Rule 144A to reflect the more advantageous characteristics of the Euromarkets, issuers would turn to this "largely untapped investor base that could draw big-time issues." *Id.* at *1. Another said this could mean a "tremendous change in the way Japanese firms raise funds." *Id.* (statement by an official at Japanese Nikko Securities Co. Ltd.).

29. *See supra* notes 5-7 and accompanying text; *infra* notes 102-103 and accompanying text; Doty, *supra* note 1, at S86-87.

30. *See supra* note 5 and accompanying text.

States public markets must either provide full disclosure[31] or obtain an exemption.[32] The disclosure requirements for a public offering have limited the number of public offerings made in the United States by foreign companies.[33] Prior to the adoption of Rule 144A, however, the private placement market was not an adequate alternative.[34] The private placement market was relatively illiquid,[35] which made issuing securities in the United States expensive—more so than in the Euromarkets to which many foreign companies have turned.[36]

In an attempt to keep the United States competitive internationally,[37] the SEC adopted Rule 144A. The SEC adopted the Rule in response to the trend toward globalization and to take advantage of two other trends in the United States capital markets—the increasing role of institutional investors and the increasing importance of the private placement market.[38] Although Rule 144A liberalizes disclosure requirements, the SEC concluded that the Rule would not jeopardize the necessary protection of United States investors and markets.[39] Rule 144A protects the United States investor by limiting the group of eligible institutional investors[40]

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31. A foreign company could satisfy the disclosure requirement by fully reporting on Form 20-F of the Securities Exchange Act of 1934. *See* Bank of N.Y., American Depositary Receipts, *Rule 144A & Regulation S Regulatory Developments Impacting ADRs*, at 2 (1990) [hereinafter *Impacting ADRs*].

32. *See id.* Issuers often use the exemption in Rule 12g3-2(b), 17 C.F.R. § 240.12g3-2(b) (1991). *See* Hanks & Bushner, *Rule 12g3-2(b): Backdoor or Trapdoor?*, Int'l Fin. L. Rev., Apr. 1991, at 1.

Rule 12g3-2(b), first introduced in 1967, provides an exemption to the '33 Act registration requirements by "permit[ting] non-[U.S.] companies to rely on home country disclosure to fulfil [U.S.] requirements." *Id.* Despite the goal of United States securities regulation to protect United States investors, this exemption was allowed to accommodate the interests of foreign companies. *See id.* In order to obtain a 12g3-2(b) exemption, a foreign issuer must provide certain specified information to the SEC as soon as it is filed or disclosed in the issuer's home country. *See* 17 C.F.R. § 240.12g3-2(b)(1)(i) (1991). The Rule 12g3-2(b) exemption can be used to satisfy the information requirement under Rule 144A. *See Impacting ADRs*, *supra* note 31, at 2.

33. *See Boosting U.S. Capital Markets*, *supra* note 5, at *1.

34. *See id.* Foreign companies have not been permitted to issue their securities in the U.S. private placement market, although their securities can be traded in that market after the initial offering. *See id.*

35. *See* Perlman, *SEC Rule May Be First Step To Changing How Securities Are Sold*, Reuter Bus. Rep., Apr. 18, 1990, at *1, *available in* LEXIS, Nexis Library, WIRES File [hereinafter *SEC Rule May Be First Step*]. Illiquid securities have been defined as those that are "not readily convertible into cash . . . [and] that [are] not traded actively and would be difficult to sell at once without taking a large loss." Barrons Dictionary of Finance and Investment Terms (1987).

36. *See Shaking Up America's Capital Markets*, *supra* note 22, at 89.

37. The SEC's desire to maintain a competitive position for the United States in the world financial markets is indicated in the statement by Richard Breeden, the chairman of the SEC, that he foresees the SEC playing the role of world's securities policeman. *See American Depositary Receipts*, *supra* note 27, at 73.

38. *See Capital Markets in Transition*, *supra* note 1, at 235-36.

39. *See Keeping the U.S. Competitive*, *supra* note 20, at *2.

40. *See infra* notes 52-54 and accompanying text.

and the types of securities that are afforded the 144A exemption.[41] Furthermore, Rule 144A still maintains a disclosure requirement, even though it is less extensive than for public offerings.[42]

There were two essential reasons why foreign issuers were reluctant to issue their securities in the United States. First, the requirements and structures of the United States capital markets deterred foreign issuers from entering those markets.[43] Second, prior to Rule 144A's adoption, resale procedures in both the private and public markets were burdensome. In the private placement market in particular, these procedures were cumbersome and expensive,[44] leading issuers and investors to avoid that market.[45] This avoidance contributed to the market's illiquidity.[46] Furthermore, according to SEC Rule 144,[47] unregistered securities could not be resold in a public offering unless they were held for at least two years.[48]

Thus, the SEC sought a rule that would attract foreign issuers through the use of a market (the "144A market") that required limited disclosure and that also allowed issuers to trade privately placed securities more freely.[49] Rule 144A was designed to meet this need by exempting the

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41. *See infra* note 60 and accompanying text.

42. *See infra* notes 56-59 and accompanying text.

43. *See supra* notes 31-36 and accompanying text.

44. *See Impacting ADRs, supra* note 31, at 1. Prior to Rule 144A's adoption, resale procedures were decided on a case-by-case basis in SEC no-action letters. *See id.* A no-action letter generally is used to describe: (1) the favorable and unfavorable responses to private requests to SEC staff recommending that certain securities transactions not be prosecuted; and (2) staff advisory and interpretive positions that answer private inquiries. *See* Schneider, *infra* note 50, at 502 n.12.

45. *See SEC Rule May Be First Step, supra* note 35, at *1.

46. *See id.*

47. 17 C.F.R. § 230.144 (1991).

48. *See id.* § 230.144(d).

49. The SEC and other experts in the financial industry expected that, with the exemption of resales of certain securities in the United States from SEC registration requirements, foreign issuers would turn to the United States markets to raise capital. *See* Proposed Rule 144A, 54 Fed. Reg. 30,076, 30,077 (1989); Eichenwald, *Private Placement Off to a Slow Start*, N.Y. Times, Mar. 14, 1991, at D10, col. 2 [hereinafter *Slow Start*]. When the SEC proposed Rule 144A, it requested comments from experts and investors whose opinions it intended to follow. *See* Proposed Rule 144A, 54 Fed. Reg. at 30,076, 30,078 (1989). Most agreed that, under the Rule, the efficiency and liquidity of the private placement market would increase, thus attracting foreign and domestic issuers. *See id.* at 30,077.

Furthermore, the Rule eases resale procedures. Under the Rule, eligible institutions can resell securities to each other within the two- to three-year period necessary before a public resale can be made. *See Impacting ADRs, supra* note 31, at 2. By allowing investors to turn to the private placement market instead of waiting two to three years to resell securities in the public market, it was believed that the liquidity of the private placement market would increase while financing costs for issuers would decrease. *See SEC Rule May Be First Step, supra* note 35, at *1.

In addition to adopting Rule 144A, the SEC amended Rule 144 to allow tacking of subsequent holdings of securities, in most instances, to meet the two- to three-year requirement. *See* Rule 144A, 55 Fed. Reg. 17,933, 17,941-42 (1990) (amendment codified at 17 C.F.R. § 230.144). This change should accelerate the movement of previously re-

resale of privately placed securities from registration under the '33 Act. The registration exemption provided by Rule 144A is promulgated pursuant to the Section 4(1) and 4(2) exemptions of the '33 Act.[50]

2. The Requirements Under Rule 144A

In order to qualify for the Rule 144A exemption, four conditions must be satisfied.[51] First, only certain limited institutions, known as qualified institutional buyers ("QIBs"), can purchase the resales.[52] QIBs are institutions or broker-dealers registered under the Securities Exchange Act of 1934 (" '34 Act"), that own and invest at least $100 million, or $10 million in the case of broker-dealers, in securities not affiliated with that institution.[53] In addition to meeting the $100 million requirement, a bank or savings and loan institution, to qualify as a QIB, must have a net worth of at least $25 million.[54] Second, the seller must reasonably ensure that the buyer knows that the seller is relying upon the Rule 144A exemption from the '33 Act's registration requirements.[55] Third, prospec-

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stricted securities into the public market since resales could be made in a shorter time. *See* Rule 144A Proposing Release, 53 Fed. Reg. 44,016, 44,033 (1988)).

50. *See* 15 U.S.C. § 77d(1)-(2) (1988) (codifying Sections 4(1) and 4(2) of the '33 Act). Prior to the adoption of Rule 144A, a holder of restricted securities who wished to sell them privately without registering under the '33 Act had to rely on a combination of the principles in these two sections, commonly referred to as the " 'Section 4(1-1/2)' " exemption. Schneider, *Section 4(1-1/2)—Private Resales of Restricted or Control Securities*, in Symposium: Current Issues in Securities Regulation, 49 Ohio St. L.J. 501, 501 (1988). Section 4(2) exempts from registration "transactions by an issuer not involving any public offering." 15 U.S.C. § 77d(2) (1988). Section 4(1) of the Act exempts from registration "transactions by any person other than an issuer, underwriter, or dealer." 15 U.S.C. § 77d(1) (1988). Therefore, because these transactions involved private placements and because a holder of a secondary sale is presumably not an issuer, the exemption applied as long as such holder was not a dealer or underwriter. *See* Schneider, *supra*, at 503. The 4(1-1/2) exemption used prior to Rule 144A proved to be complex and cumbersome. Often, therefore, investors would not undergo wide marketing activities and "would offer securities only to a limited number of potential buyers." Glover, *Right Rules, Wrong Timing: The SEC's Spurs to Offshore Trading and Private Placement Resale Aren't Playing in this Economy*, Recorder, Jan. 22, 1991, at *2, *available in* LEXIS, Nexis Library, PAPERS File [hereinafter *Right Rules, Wrong Timing*]. Furthermore, investors would frequently have to ask for a covenant stating that the buyer would not resell the securities without registering them or obtaining an exemption. *See id.*

Rule 144A purports to eliminate the confusion in the Section 4(1-1/2) exemption by "*explicitly* exempting" resales made under the Rule. *See Capital Markets in Transition*, *supra* note 1, at 253 (emphasis added).

51. *See* 17 C.F.R. § 230.144A(d) (1991).

52. *See* 17 C.F.R. § 230.144A(d)(1) (1991). At present, approximately 3,300 institutions are eligible to use Rule 144A. *See Impacting ADRs*, *supra* note 31, at 4. Many of these include pension funds. *See Boosting U.S. Capital Markets*, *supra* note 5, at *1. Others include insurance companies. *See* Bavaria, *Thumbs Up for Rule 144A, According to SEC Report*, Inv. Dealers' Dig., Nov. 4, 1991, at 10 [hereinafter *Thumbs Up for Rule 144A*].

53. *See* Rule 144A, 55 Fed. Reg. 17,933, 17,936 (1990) (codified at 17 C.F.R. § 230.144A).

54. *See id.* To ensure that United States banks are not at a competitive disadvantage, this net-worth requirement applies to both foreign and domestic banks. *See id.*

55. *See id.* at 17,939 (codified at 17 C.F.R. § 230.144A(d)(2)).

tive purchasers must be able to obtain, at their request, certain financial information from issuers.[56] This information requirement is unnecessary, however, if the issuer files reports under the '34 Act,[57] maintains a 12g3-2(b) exemption by providing home-country disclosure,[58] or is a foreign government.[59] Finally, only non-fungible securities are eligible for the Rule 144A exemption.[60]

II. RESULTS AND CRITICISMS OF RULE 144A

With the adoption of Rule 144A, the SEC, commentators, and investors predicted an increase in issuance of European securities in the United States as more companies turned to the United States private placement market to raise capital.[61] Since its adoption, however, Rule

56. *See id.* at 17,938 (codified at 17 C.F.R. § 230.144A(d)(4)). This financial information entails "a very brief statement of the nature of the business of the issuer and the products and services it offers; and the issuer's most recent balance sheet and profit and loss and retained earnings statements, and similar financial statements for such part of the two preceding fiscal years as the issuer has been in operation (the financial statements should be audited to the extent reasonably available)." 17 C.F.R. § 230.144A(d)(4)(i) (1991).

Rule 144A also demands that the information be "reasonably current." *See id.* § 230.144A(d)(4)(ii). This requirement is presumed to be satisfied on two conditions. First, the provided balance sheet must be dated at most 16 months prior to the resale, and the provided income statement and, second, the statement of the nature of the business must be for the 12 months preceding the resale. *See id.* § 230.144A(d)(4)(ii)(A)-(B); *see also* Longstreth, Beekman & Rich, *Rule 144A: A Closer Look*, 4 L. & Bus. Insights (P-H) No. 8, Aug. 1990, at 16, *1, *available in* LEXIS, Nexis Library, NWLTRS File (discussing the controversy over this requirement) [hereinafter *A Closer Look*]. Second, for foreign private issuers, the information must meet the "timing requirements of the issuer's home country or principal trading markets." 17 C.F.R. § 230.144A(d)(4)(ii)(C).

57. If an issuer reports, under the '34 Act, to agencies other than the SEC, it may resell its securities without providing any further information. *See* Rule 144A, 55 Fed. Reg. 17,933, 17,939 n.52 (1990) (codified at 17 C.F.R. § 230.144A) (citing Section 12(i) of the '34 Act, 15 U.S.C. § 78l(i)).

58. *See* 17 C.F.R. § 230.144A(d)(4)(i) (1991). For a discussion of the requirements under Rule 12g3-2(b), see *supra* note 32 and accompanying text.

59. *See* 17 C.F.R. § 230.144A(d)(4)(i) (1991).

60. *See* 17 C.F.R. § 230.144A(d)(3) (1991). Non-fungible securities are securities not of the same class as securities listed on a United States exchange or quoted on an automatic inter-dealer quotation system such as NASDAQ. *See* Rule 144A, 55 Fed. Reg. 17,933, 17,935 (1990) (codified at 17 C.F.R. § 230.144A(d)(3)). Securities will be considered of the same class "if they are of substantially similar character and the holders thereof enjoy substantially similar rights and privileges." *Id.* For preferred equity securities, "same class" is indicated by "substantially identical" terms regarding, among others, dividend rate, cumulation, voting rights, and redemption. *See id.* For debt securities, the "same class" is indicated by "substantially identical" terms regarding, among others, interest rate, maturity, security, and redemption. *See id.*

Although 144A securities cannot be listed on United States exchanges or NASDAQ, they may be traded side by side with over-the-counter securities. *See* Bank of N.Y., *Questions & Answers: Rule 144A*, 1 Sec. Issues 2, 2 (Sept. 1990) [hereinafter *Questions & Answers: Rule 144A*].

61. *See supra* notes 37-48. Rule 144A was intended to make the U.S. capital markets more attractive than the Euromarkets. *See Rule Threatens Euromarkets*, *supra* note 28, at *1. By increasing its liquidity, the United States private placement market would then have approximately the same costs and disclosure requirements as the Euromarkets. *See*

144A has been met with a mixture of both praise and criticism. Supporters of the Rule have generally focused on how it has increased the number of foreign securities placed in the United States.[62] Critics, on the other hand, have suggested amendments to Rule 144A to further expand the 144A market.[63]

A. *The Increased Number of Foreign Securities Placed in the United States Under Rule 144A*

Within the last year, nineteen foreign companies raised approximately $700 million through 144A private placements.[64] In fact, a recent report indicates that in 1991, "Rule 144A issuers from [fourteen] countries accounted for [fifty-two percent] of the [private placement] market's debt by dollar volume."[65]

One way in which Rule 144A has been utilized is in conjunction with another important investment tool—the American Depositary Receipt ("ADR").[66] In recent years, the trading of ADRs has increased significantly.[67] Issuing ADRs publicly has proven advantageous for companies

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id. Under Rule 144A, the costs of private placements would decrease as transaction costs and liquidity premiums dropped. *See Capital Markets in Transition, supra* note 1, at 261.

American Stock Exchange chairman James Jones described Rule 144A as " 'a step forward [that] paves the way for the development of a network to facilitate this type of securities activity.' " *See SEC Adopts Rule, supra* note 5, at *2. At least one commentator has heralded the Rule as the most important step in the past twenty years to enable the U.S. to become more competitive. *See Boosting U.S. Capital Markets, supra* note 5, at *1.

62. *See Citibank and Rule 144A*, 1 Private Placement Rep. No. 29, Aug. 19, 1991, at 6, *2 *available in* LEXIS, Nexis Library, BUS File; *Thumbs Up for Rule 144A, supra* note 52, at 10. For a discussion of recent Rule 144A benefits for foreign issuers and United States investors, see *infra* notes 64-78 and accompanying text.

63. *See infra* notes 87-128 accompanying text.

64. *See American Depositary Receipts, supra* note 27, at 73. "Privately-placed debt issued under [SEC] Rule 144A rose to [$]23 billion . . . in 1991 from [$]12 billion . . . for the nine months of 1990 in which the new rule was in effect." *U.S. 144A Private Placements Up Sharply in 1991*, Reuters, Mar. 4, 1992, at *1, *available in* LEXIS, Nexis Library, WIRES File [hereinafter *U.S. 144A Private Placements Up*].

65. *U.S. 144A Private Placements Up, supra* note 64, at *1.

66. ADRs are certificates representing ownership of foreign securities. *See* American Depositary Receipts, 56 Fed. Reg. 24,420, 24,421 & n.5 (1991). ADRs provide several advantages for foreign issuers. First, because ADRs are treated as United States securities, those institutions that are prohibited from investing in non-U.S. securities are able to "enjoy the benefits of an internationally diversified portfolio" without violating such prohibitions, which are often in their charters. *Citibank Answers Questions on Rule 144A Market*, 1 Private Placement Rep. No. 28, Aug. 12, 1991, at 6, *2, *available in* LEXIS, Nexis Library, BUS File [hereinafter *Citibank Answers Questions*]. In addition, foreign companies, such as many of those in Mexico, often use ADRs as a way to gain recognition *before* making an offering. *See Bigger Market, supra* note 4, at 2.

67. *See* American Depositary Receipts, 56 Fed. Reg. 24,420, 24,421 n.2 (1991). ADR trading, including that on the over-the-counter market, has been estimated at approximately $125 billion in 1990. *See id.* (citing Bank of N.Y., 1990 ADR Mkt. Rev. & Year End Newsl. (Feb. 1991)). Excluding over-the-counter trading, ADR trading was valued at approximately $75 billion in 1990 and $60 billion in 1989. *See ADR Trading Volumes on U.S. Exchanges Rise 25%, supra* note 27, at 31, col. 6. Furthermore, it has been

that seek name recognition and a broad range of investors.[68] For companies that merely seek to raise capital, Rule 144A has provided a less expensive route than public offerings,[69] and thus has further increased the volume of ADR trading.[70] When an issuer sells ADRs in the Rule 144A market, as opposed to the United States public markets, it obtains the Rule 144A registration exemption.[71]

Issuers have also used Rule 144A in conjunction with Regulation S,[72] which the SEC adopted on May 2, 1990. The SEC intended Regulation S to help clarify the application of the registration requirements of the '33 Act in international transactions.[73] In addition, Regulation S estab-

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estimated that in the first half of 1991, $42.8 billion of ADRs were traded. *See Bank Expects 144A ADR Issuance to Keep Growing*, 1 Private Placement Rep. No. 33, Sept. 16, 1991, at 3, *1, *available in* LEXIS, Nexis Library, BUS File. In those six months, approximately $476 million of ADRs were issued under Rule 144A. *See id.*

For a discussion of SEC proposed regulations to further ease ADR registration and filing requirements in order to increase their trading, see *SEC's Proposed Regulations*, *supra* note 12, at S203.

68. *See Bigger Market*, *supra* note 4, at 2.

69. *See id.*

70. *See Citibank Answers Questions*, *supra* note 66, at *1. An interesting route was taken by the Singapore shipbuilder Koepel, which made a 144A offering and afforded buyers the option of purchasing ADRs *or* Singapore shares. *See Bigger Market*, *supra* note 4, at 2 (emphasis added).

71. *See Bigger Market*, *supra* note 4, at 2.

72. Regulation S, 55 Fed. Reg 18,306 (1990).

73. *See id.* Prior to the adoption of Regulation S, offshore planning of securities relied on SEC no-action letters, which proved tedious and expensive.

Offshore planning also relied on an outdated release for safe harbors. *See* Coogan & Kimbrough, *Regulation S Safe Harbors For Offshore Offers, Sales and Resales*, 4 L. & Bus. Insights (P-H) No. 8, Aug. 1990, at 3, *1, *available in* LEXIS, Nexis Library, NWLTRS File [hereinafter *Regulation S Safe Harbors*]. Under the pertinent release, Release No. 33-4708, securities sold in reliance on its safe harbor could not be sold or offered to a person in the United States, nor for the benefit of a United States person, for one year. *See Staff Issues Interpretation of Regulation S Resale Safe Harbor*, 22 Sec. Reg. & L. Rep. (BNA) No. 41, at 1503 (Oct. 19, 1990) [hereinafter *Staff Issues Interpretation*]. Furthermore, the release imposed transfer restrictions on the resales and required that issuers monitor them to assure compliance with its provisions. *See id.*

In its General Statement, Regulation S now provides that the Section 5 registration requirements—that all sales offerings be registered—do *not* include offers and sales of securities *outside* the United States. *See* Regulation S, 55 Fed. Reg. 18,306 (1990). Prior to the adoption of Regulation S, SEC policy was that the Section 5 requirements applied to any offers made to United States investors, regardless of whether the investors were in the United States or overseas at the time of the sale. *See Staff Issues Interpretation*, *supra*, at 1503. The SEC felt that, consistent with the expansion of global markets, Regulation S should allow participants in offshore transactions to rely on the laws of their home country. *See* Regulation S, 55 Fed. Reg. 18,306, 18,308 (1990).

In determining what constitutes an offer or sale outside the United States, Regulation S requires the satisfaction of two conditions. Under the first condition, all offers and sales must be made in "offshore transactions." *See* Regulation S, 55 Fed. Reg. 18,306, 18309 (1990). To constitute an offshore transaction, no offer can be made to persons in the United States and either: (1) the buyer must be (or at least the seller must believe that the buyer is) offshore when the buy order originates; or (2) if relying on the issuer safe harbor, the sale must be made through the facilities of an offshore securities market; or (3) if relying on the resale safe harbor, the sale must be made through the facilities of an off-lished two "safe harbors"—an issuer safe harbor and a resale safe harbor—for offshore transactions.[74] In establishing these safe harbors, the

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shore securities market and the transaction cannot be prearranged with a buyer in the United States. *See id.* at 18,309-10.

The following markets, as of May 1990, were included by the SEC within the definition of "designated offshore securities markets:"

> the Eurobond market, as regulated by the Association of International Bond Dealers; the Amsterdam Stock Exchange; the Australian Stock Exchange; 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.; 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.

Id. at 18,310 n.46. These markets had been designated as ready markets under Rule 15c3-1 of the '34 Act. *See id.*

Under the second condition, there must be no "directed selling efforts" in the United States relating to the offers or sales. *See id.* at 18,310-11. Directed selling efforts are activities made for the purpose of, or that could reasonably result in, conditioning the market in the United States for the securities being offered. *See id.* at 18,311. Directed selling efforts include:

> marketing efforts in the United States designed to induce the purchase of the securities purportedly being distributed abroad. Activities such as mailing printed materials to U.S. investors, conducting promotional seminars in the United States, or placing advertisements with radio or television stations broadcasting into the United States or in publications with a general circulation in the United States.

Id. (footnotes omitted).

As an example of how the SEC has interpreted this definition, a no-action letter which reviewed whether the activities of a Canadian company, Coral Gold Corp., would be considered directed selling efforts, stated that advertisements were excluded from the category of directed selling efforts "provided [they] contain[] no more information than is legally required and include[] a statement to the effect that the securities have not been registered under the 1933 Act and may not be sold in the United States." Coral Gold Corp., SEC No-Action Letter, at *3 (Feb. 19, 1991), *available in* LEXIS, Secreg Library, NOACT File. There, a circular filed with the SEC was not considered a directed selling effort even though it was available to the public. *See id.* at *1, *3.

Additionally, Regulation S states that legitimate selling activities, such as those relying on Rule 144A, do not constitute directed selling efforts. *See* Regulation S, 55 Fed. Reg. 18,306, 18,312 & n.64 (1990). This statement by the SEC has allowed Rule 144A and Regulation S to be used simultaneously in two-tranche operations. *See infra* notes 76-78 and accompanying text.

74. *See* Regulation S, 55 Fed. Reg. 18,306, 18,307 (1990).

The issuer safe harbor can be used by issuers, distributors, their respective affiliates, and their agents. *See id.* at 18,313. This safe harbor identifies three categories of securities and imposes restrictions on the offered securities coming to rest offshore. *See id.*

The first category includes foreign issuers with no substantial United States market interest in the securities, certain overseas directed offerings, securities of foreign governments, and employee benefit plans. *See id.* Offerings of these securities "need not be registered and there is *no* seasoning period before U.S. investors can buy [them]." *Impacting ADRs, supra* note 31, at 3 (emphasis in original). The second category consists of securities of United States or foreign reporting issuers, debt securities of non-reporting foreign issuers, non-participating preferred stock and asset-backed securities. *See* Regulation S, 55 Fed. Reg. 18,306, 18,315 (1990). Offerings of these securities "need not be registered, but there is a *40 day* seasoning period before U.S. investors can buy them."

SEC further reduced restrictions applicable to foreign companies.[75]

Using Rule 144A in conjunction with Regulation S has led, as the SEC expected,[76] to an increase in the number of foreign securities placed in the United States.[77] Indeed, most of the 144A transactions that have taken place in the United States have been two-part transactions where a foreign issuer established a listing on a European securities market but also placed a securities in the United States, thereby tapping into United States capital markets without going through the maze of SEC rules and regulations.[78]

Impacting ADRs, *supra* note 31, at 3 (emphasis in original). The final category consists of "[n]on-reporting U.S. issuers [and] equity offerings by non-reporting foreign issuers with substantial U.S. market interest." Regulation S, 55 Fed. Reg. 18,306, 18,318 (1990). These offerings "need not be registered, but there is a *one year* seasoning period before U.S. investors can buy [them]." *Impacting ADRs*, *supra* note 31, at 3 (emphasis in original).

The resale harbor is available for offshore resales of securities by persons other than issuers, distributors, and some of their affiliates. *See Regulation S Safe Harbors*, *supra* note 73, at *9. The requirement that the transaction be offshore with no directed selling efforts also applies. *See* Regulation S, 55 Fed. Reg. 18,306, 18,319 (1990). In addition, the Regulation requires that if the securities being resold were not part of the issuer safe harbor and if the resale is made before the expiration of any restricted period, the securities professional may not knowingly offer or sell them to a United States person. *See id.* Finally, the seller may be required to send a confirmation to the purchaser listing the applicable restrictions, if the seller knows the purchaser is a securities professional. *See id.* The SEC announced, in a staff release, that issuers who offered securities prior to the adoption of Regulation S must comply with prior restrictions under Release 33-4708. *See Staff Issues Interpretation*, *supra* note 73, at 1503. Resales sold prior to the Regulation's adoption, however, may now rely on the new resale safe harbors. *See id.* at 1504.

75. *See* Regulation S, 55 Fed. Reg. 18,306, 18,307 (1990).

76. The SEC and United States investors anticipated that Rule 144A would be used in conjunction with Regulation S, where "issuers [c]ould offer a tranche of securities in their home markets, relying on Regulation S. . . . [and then] place a tranche of securities in the United States by selling the securities to an intermediary that would then resell them in reliance on Rule 144A." *Right Rules, Wrong Timing*, *supra* note 50, at *4. In addition, the SEC expected that the resale safe harbor could permit more efficient offshore resale of certain restricted securities sold in the United States, making United States restricted securities more attractive. *See Right Rules, Wrong Timing*, *supra* note 50, at *3.

77. According to Citibank, which has set up a funding instrument called the GDR, issuers can now "raise capital simultaneously in both the U.S. private market and the non U.S. public markets also without the lengthy SEC registration and disclosure process" by using Regulation S in conjunction with Rule 144A. *Citibank Answers Questions*, *supra* note 66, at *2. By using Regulation S, GDRs are offered to persons outside the United States in offshore transactions and to QIBs in the United States through Rule 144A. *See id.* The GDR "provides for cross market fungibility, increased liquidity, multicurrency trading, greater settlement efficiency and a means by which to tap the global investment community through the issuance of *one* security." *Id.* (emphasis added).

78. *See Right Rules, Wrong Timing*, *supra* note 50, at *4. Examples of transactions using Rule 144A in conjunction with offerings abroad are numerous. For example, Cemex, a cement producer, is expected to launch a $300 million Eurobond issue, "with a tranche for placement in the US, under Rule 144A." Corrigan, *Borrowers Rediscover the Capital Markets*, Fin. Times, Apr. 5, 1991, § 1, at 30, col. 3. In addition, a Mexican cement producer, Apasco, placed $50 million of convertible subordinated debentures abroad and in the United States under Rule 144A. *See* Fidler, *An Open Season for Convertibles*, Fin. Times, May 22, 1991, § 1, at 27, col. 6. Also, Italy's telecommunications holding company, IRI, placed an international equity offering of $275 million which in-

B. *Analysis of Recent Criticisms of Rule 144A*

When the SEC adopted Rule 144A, it recognized that problems could arise in the future, in particular with respect to: (1) the nature and number of regular participants in the private placement market; (2) the extent of foreign issuer participation; and (3) the effect of Rule 144A on the public market.[79] Although the third concern—leakage of privately placed securities into the public market—has not yet been a problem,[80] much debate has arisen as to whether Rule 144A has *sufficiently* increased the number of foreign issues in the United States.[81]

Commentators have suggested several possible amendments to increase the effectiveness of Rule 144A in attracting foreign issuers to the United States market.[82] Some of the recommended changes are valid and must be considered. Other commentators, however, have suggested alternative limitations beyond the Rule itself to explain a possible stifling of the Rule's effects on the United States capital markets. For example, one commentator discredits criticisms about Rule 144A in light of the Rule's success in achieving the "facilitat[ion of] mutual access between U.S. institutional investors and foreign securities issuers."[83] Others explain that market conditions have on the whole been "terrible"[84] and

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cluded an offer in the United States as a private placement under Rule 144A. *See* Webb, *STET Plans Deal of $275m to Cut State Holding*, Fin. Times, June 12, 1991, § 1, at 29, col. 1.

79. *See* Rule 144A, 55 Fed. Reg. 17,933, 17,934 (1990) (codified at 17 C.F.R. § 230.144A).

80. *See SEC Report on Rule 144A Gets Failing Grade; GAO Asked to Tutor Agency*, Sec. Week, Mar. 11, 1991, at *1, *available in*, LEXIS, Nexis Library, OMNI File.

81. Several commentators have suggested that Rule 144A has proved deficient in attracting foreign companies to United States markets. *See Rule 144A Deemed Disappointing One Year After Implementation*, Int'l Fin. Daily (BNA), at *1 (July 25, 1991), *available in* LEXIS, Nexis Library, INTL File [hereinafter *Rule 144A Deemed Disappointing*]. Again, there are many commentators who hold, to the contrary, that foreign issuer participation, with or without Rule 144A, is quite substantial. *See supra* notes 64-78 and accompanying text. One such commentator is Richard Breeden, Chairman of the SEC, who has stated, "In the last two years, 135 foreign issuers have entered the US disclosure system for the first time. . . . So the suggestion that foreign companies aren't coming to US markets is just simply factually untrue." *Hearing of the House Telecommunications & Finance Subcommittee of the House Energy and Commerce Committee, reprinted in* Fed. Info. Sys. Corp., May 2, 1991, at *9, *available in* LEXIS, Nexis Library, OMNI File [hereinafter *Telecommunications & Fin. Hearing*]. Breeden did, however, go on to say that "we want to see [more] foreign companies come here." *Id.* Furthermore, Representative Rinaldo responded to the chairman's optimistic statement with, "the fact of the matter is we do lose some companies that we would like to have here." *Id.*

82. For discussion of reasons given for the infrequent use of Rule 144A, see *infra* notes 87-133 and accompanying text.

83. *Misperceptions*, *supra* note 12, at 16. This commentator asserts that there have been many misperceptions about what Rule 144A was really intended to accomplish, the most relevant being the misperception that "liquidity can be achieved merely by removal of regulatory impediments to free transferability." *Id.* "[L]iquidity requires [instead] market breadth and a steady and reliable flow of timely public information." *Id.* These elements require the effort of market participants and the maturity of the market itself.

84. *See US Private Placements Hampered by Economic Concern*, Reuters, Dec. 7, 1990, at *1, *available in* LEXIS, Nexis Library, WIRES File.

that private placements in general have decreased from prior levels.[85] These commentators hold an optimistic view for Rule 144A's future, emphasizing that, most importantly, the Rule needs time to be fully effective.[86] Nonetheless, criticisms leveled against technical aspects of Rule 144A should be addressed by the SEC in order to increase the Rule's effectiveness.

1. The Definition of QIB May Be Too Narrow

Many commentators have complained that the definition of QIB is too narrow, thus excluding potential investors and failing to meet the demands of foreign companies.[87] The Rule, as originally proposed, would have provided a safe harbor for three categories of transactions, varying in their definitions of eligible QIBs and securities.[88] The SEC, however, decided that it would be best to phase in Rule 144A; therefore, the Rule was made available only to large institutional buyers.[89] Although the SEC chose a definition of QIB based on its adherence to protective policy-making, the criticisms of the definition are numerous.

Some financial professionals believe that the limited QIB definition deters many foreign companies who do not want to market their securities only to large United States investors. Instead, foreign issuers would prefer the definition to include smaller institutions and individuals.[90] Others claim that the narrow definition has resulted in extensive use of the Reg-

85. *See* Glover, *Good Intentions in a Bad Economy*, Legal Times, Dec. 31, 1990, at 20, 21 [hereinafter *Good Intentions*]; *The Public World of Private Placements*, Economist, Sept. 22, 1990, at 86 [hereinafter *Public World of Private Placements*]. In the first half of 1991, in dollar figures, United States private placements totalled 49.6 billion whereas in the first half of 1990 this figure was 62.3 billion—20% higher. *See* Swimmer, *US Private Placement Market Outlook Strong Goldman*, Reuters, Oct. 30, 1991, at *2, *available in* LEXIS, Nexis Library, WIRES File. According to Moody's Investors Service, as "contrast[ed] to the traditional private placement debt market" there has been strong growth in the 144A private placement market. *U.S. 144A Private Placements Up*, *supra* note 64, at *1.

86. *See infra* note 111 and accompanying text.

87. *See, e.g.*, *Rule 144A Deemed Disappointing*, *supra* note 81, at *1; Glover, *Some Assembly Required: Given Time and a Little Adjustment New SEC Rules May Become Powerful Capital-Raising Tools*, Recorder, Jan. 24, 1991, at *2, *available in* LEXIS, Nexis Library, PAPERS File [hereinafter *Some Assembly Required*]; *A Closer Look*, *supra* note 56, at *8.

88. *See* Proposed Rule 144A, 54 Fed. Reg. 30,076 (1989) (citing Rule 144A Proposing Release, 53 Fed. Reg. 44,016 (1988).

89. SEC policies must be careful not to "sacrific[e] the investor protection principles of U.S securities laws." *Boosting U.S. Capital Markets*, *supra* note 5, at *2.

In a proposal to Rule 144A, the Commission stated that it "ha[d] attempted to establish a level at which it can be confident that participating investors have extensive experience in the private resale market for restricted securities." *See* Rule 144A Proposing Release, 53 Fed. Reg. 44,016, 44,028 (1988). The Commission essentially sought to "identify a class of investors that can be conclusively assumed to be sophisticated and in little need of the protection afforded by the ['33 Act's] registration provisions." *Id.*

90. *See Does 144A Threaten the Standardization of Accounting Statements?*, Institutional Investor, Aug. 1990, at 118.

ulation S resale market[91] instead of the Rule 144A resale market.[92] Critics of the Rule's definition also emphasize that eligible 144A purchasers are precisely those buyers who were not concerned about liquidity and therefore bought less-liquid securities prior to the Rule.[93] Thus, many of the QIBs in the 144A market were not affected by the problems that led to promulgation of the Rule in the first place.[94] Rather, those institutions that want to purchase 144A securities, such as money managers and smaller insurance companies, are still unable to do so.[95]

Commentators have suggested that the SEC broaden the definition to benefit excluded investors by: (1) decreasing the $100 million standard for QIB status;[96] (2) including currently excluded government and other securities in calculating the $100 million standard;[97] (3) expanding the QIB definition "to include a QIB that purchases a security for the account of a non-QIB, if the account is one over which the QIB has investment discretion";[98] and (4) including bank-managed trust accounts and insurance company-managed separate accounts as eligible QIBs.[99] In order to increase the types of investors utilizing 144A, the SEC should broaden the definition of QIB. Indeed, the SEC has already requested comments on the appropriateness of the present QIB standard.[100] In light of the numerous calls for change,[101] the SEC must reevaluate Rule 144A and determine whether the definition can now be expanded.

2. Rule 144A Disclosure Requirements May Still Be Too Stringent For Foreign Issuers

While the Rule 144A disclosure requirement is not as extensive as that for a public offering, critics have suggested that the requirement remains

91. For a discussion of the Regulation S resale market, see *supra* notes 73-74 and accompanying text.

92. *See Misperceptions, supra* note 12, at 16.

93. *See* Picker, *Will the 144A Market Be Slow Off The Mark?*, Institutional Investor, May 1990, at 25 [hereinafter *Slow Off the Mark?*]; *Thumbs Up For Rule 144A, supra* note 52, at 10. For a discussion of eligible institutional buyers under Rule 144A, see *supra* notes 52-54 and accompanying text.

94. *See Slow Off the Mark?, supra* note 93, at 25.

95. *See id.*

96. A managing director at Morgan Stanley & Co. suggested that the requirement be reduced to $50 million. *See Rule 144A Deemed Disappointing, supra* note 81, at *1.

97. *See Some Assembly Required, supra* note 87, *2.

98. *A Closer Look, supra* note 56, at *8.

99. *See* McLaughlin, *Identifying 'QIB's' Under SEC Rule 144A*, N.Y.L.J., Sept. 20, 1990, at 5, col. 1.

100. *See* Rule 144A, 55 Fed. Reg. 17,933, 17,936 (1990). The Rule, as adopted, requires that QIBs meet the $100 million threshold by investing in, rather than merely having assets worth, the required amount of securities. *See id.* The SEC believed that any subsequent suggestions by commentators to lower the threshold, to $50 or $25 million, for example, would therefore prove that those commentators must have felt the "investing in" standard was a sufficient safeguard. *See* Proposed Rule 144A, 54 Fed. Reg. 30,076, 30,079 (1989).

101. *See supra* notes 87-99.

burdensome.[102] Some foreign issuers are reluctant to enter the United States capital markets because the Rule requires disclosure of considerable information, may require regular updating, and may subject issuers to fraud liability if they fail to update disclosed information.[103]

Although arguments have been made in favor of further easing the disclosure requirement under Rule 144A, the Rule's requirement should not be changed. First, these arguments may be based on the false assumption that investors *want* less information about issuers. Investors have asserted that they will not accept "stingy disclosure" from issuers even though they are indeed interested in Rule 144A securities.[104] If QIBs are unsure of the information they receive from issuers, they may

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102. *See Good Intentions, supra* note 85, at 21. This view was expressed by SEC Commissioner Fleischman in his dissent written upon the adoption of Rule 144A. *See* Rule 144A, 55 Fed. Reg. 17,933, 17,947 (1990).

The Commissioner stated four reasons why an information requirement should not have been included in the Rule. First, the information requirement undermines the principle behind the proposal to Rule 144A—the notion that institutional investors can "fend for themselves." *See id.* Indeed, in Rule 144A's proposal, the SEC goes through a rather extensive look at legislative history to show the distinction between protecting individuals and protecting institutional investors. *See* Proposed Rule 144A, 53 Fed. Reg. 44,016, 44,023 (1988). In fact, the original proposal of the Rule did not require issuers to provide buyers with any information about the securities sold. *See* Rule 144A, 55 Fed. Reg. 17,933, 17,947 (1990). Commissioner Fleischman, in his dissent, proposed that the information requirement be stricken in accordance with the original proposal of the Rule. *See id.*

Second, Commissioner Fleischman anticipated that, because many securities held under rules prior to Rule 144A would be inappropriate for the Rule 144A market, their attempted resales would "either abort in midstream or struggle forward in the paperwork-burdened pre-Rule 144A manner." *Id.* Furthermore, the Commissioner stated, any prospective Rule 144A transactions would proceed slowly as a purchaser determines whether it wants the requested information and, if so, then waits to receive it. *See id.* The Commissioner explained that this procedure, although not foreign to pre-144A transactions, inherently contradicts the "thrust" of the Rule's justification—that purchasers must realize for themselves an issuer's Rule 144A reliance. *See id.*

Third, Commissioner Fleischman argued that issuers are reluctant to use the 144A exemption because they fear possible anti-fraud liability under the Rule if they fail to update the information they provide to purchasers. *See id.* at 17,948. According to the Commissioner, the information requirement will have at least three undesirable results: (1) the provocation of requests for the material mandated by the section; (2) issuer involvement beyond its traditional function of "merely reviewing the transaction for lawfulness prior to registration of transfer;" and (3) an automatic assumption that updating of material is obligatory. *See id.* Issuers, sellers, and purchasers would assume obligatory updating so as not to violate Sections 12(2) and 17(a) of the '33 Act—the antifraud provisions. *See id.* (citing 15 U.S.C. §§ 77 l(2), 77q(a) (1988)).

Finally, the Commissioner posed an administrative argument. He claimed that, contrary to the Administrative Procedure Act's requirements on informal rulemaking, expressed concerns of many commentators (that either the information requirements should be deleted or that the requirements should be placed on someone other than the sellers) had been disregarded by the Commission. *See* Rule 144A, 55 Fed. Reg. 17,933, 17,948 (1990) (codified at 17 C.F.R. § 230.144A).

103. *See Good Intentions, supra* note 85, at 21; *Some Assembly Required, supra* note 87, at *1.

104. *See* Henriques, *A Shortcut for Foreign Firms? Investors Say No*, N.Y. Times, Sept. 15, 1991, at 13 (Money), col. 3.

in fact be reluctant to buy 144A securities.[105]

Second, decreasing the disclosure requirement to the level under Rule 144A may have already increased the possibility of issuer or investor liability.[106] Also, an easing of disclosure requirements may increase fraud and result in a concomitant increase in the burden of securities regulation and enforcement placed upon the individual states in the United States.[107]

A minimum information requirement[108] balances the need for buyer confidence and facilitates increased transactions. To *further* relax the information requirement would require the SEC to forego one of the underlying policies of the '33 Act—that disclosure is essential in the issuance of securities.[109] Alterations in Rule 144A should not undermine the SEC's paramount goal: protecting investors.[110]

Furthermore, Rule 144A is still essentially new,[111] and therefore technical amendments, such as expanding the definition of QIB, should be adopted before those that would jeopardize SEC policies of investor protection.

3. Issuer Liability for Resales Made Without Compliance With 144A or Other Registration Requirements

Another criticism of Rule 144A is that issuers are unsure of their liability for resales made by investors without compliance with the Rule or another exemption.[112] Specifically, while Rule 144A permits transactions that do not involve public offerings pursuant to Section 4(2) of the '33 Act,[113] would a subsequent sale by the purchaser made outside the

105. *See A Closer Look, supra* note 56, at *5. "[D]oubts on the verification of the original issuance of Rule 144A securities could seriously impair the goal of liquidity of the Rule 144A market." *Id.*

106. *See generally SEC Rule May Be First Step, supra* note 35, at *2 (the tendency of Rule 144A to relax disclosure levels in the market could result in issuer or investor liability). For discussion of liability concerns, see *infra* notes 112-115 and accompanying text.

107. *See* Perry, *States Wary SEC Rule Would Lower U.S. Standards*, Reuters, Oct. 23, 1991, at *1, *available in* LEXIS, Nexis Library, WIRES File.

108. The information requirement under Rule 144A is no more extensive than necessary. *See A Closer Look, supra* note 56, at *4. This commentator argues that the "reasonably current" requirement is actually fairly limited because it only relates to specific periods and because virtually all issuers would also desire that such information is correct. *See id.*

109. *See Capital Markets in Transition, supra* note 1, at 247. For a discussion of SEC investor protection policies see *supra* notes 17-20 and accompanying text.

110. The SEC must maintain 'due regard' for investor protection, according to statute. *See* Hazen, *supra* note 14, at 295 (citing 15 U.S.C.A. § 78q(A)-1(1)).

111. *See Good Intentions, supra* note 85, at 21. One expert predicts that in 1992 the Rule will have fulfilled SEC and investor expectations. *See Slow Start, supra* note 49, at D10, col. 4. Another explained, "Everyone sort of expected [Rule] 144A . . . [to] be up and running in a few months. That is not how these types of changes work. Even the Euromarkets . . . took several years to develop." *Id.* at D10, col. 2.

112. *See SEC Rule May Be First Step, supra* note 35, at *2.

113. The SEC has indicated that if securities are sold pursuant to the Section 4(2) exemption and then resold to QIBs pursuant to Rule 144A, the initial exemption will not

Rule's safe harbor—one that enters the public market—vitiate the exemption? Furthermore, who would be liable?[114]

These questions regarding liability for subsequent resales that are made outside the Rule 144A exemption or other regulations may also explain why foreign companies are reluctant to enter United States markets.[115] Although SEC reports have shown that very few, if any, 144A securities have entered the public market thus far,[116] these securities could enter the public market in the future. Foreign companies are thus justifiably concerned, and the SEC should resolve this issue.

4. Problems of Foreign Investment Companies

Rule 144A has also presented problems when foreign investment companies, which underwrite the majority of foreign securities, are involved. Although Rule 144A liberalizes disclosure requirements for foreign issuers, foreign investment companies must comply with the Investment Company Act of 1940.[117]

Because foreign investment companies are "prohibit[ed] from using [a United States] jurisdictional means to offer or sell [their] securities in connection with a public offering in the [United States],"[118] they are faced with two alternatives. A foreign investment company can either form a separate, mirror United States investment company and offer that company's securities,[119] or it can privately place its securities.[120]

In choosing private placements, investment companies have often made simultaneous public offerings of the securities in foreign exchange markets.[121] The SEC, however, in the release adopting Rule 144A,[122] asserted that if there were more than 100 United States beneficial owners of a foreign investment company's securities following a private placement, those companies would have to apply for an order to register under the Investment Company Act of 1940.[123] The SEC has not resolved

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be jeopardized. *See Right Rules, Wrong Timing, supra* note 50, at *3. For a discussion of the Section 4(2) exemption, see *supra* note 50 and accompanying text.

114. *See SEC Rule May Be First Step, supra* note 35, at *2; *Keeping the U.S. Competitive, supra* note 20, at *8; *Good Intentions, supra* note 85, at 21.

115. *See SEC Rule May Be First Step, supra* note 35, at *2.

116. *See supra* note 80 and accompanying text.

117. Foreign investment companies must adhere to the requirements in Section 7(d) of the Investment Company Act of 1940. *See* 15 U.S.C. § 80a-7(d) (1988).

118. Sherman, *Restrictions on the Activities of Foreign Investment Companies in the U.S.*, 5 L. & Bus. Insights (P-H) No. 5, May 1991, at 30, *1, *available in* LEXIS, Nexis Library, NWLTRS File (referring to Section 7(d) of the Investment Company Act of 1940) [hereinafter *Restrictions on the Activities*].

119. The SEC urged this procedure because it recognized that the legal and regulatory environment in which foreign investment companies operate, in addition to Section 7(d) requirements, is problematic. *See id.* at *1 (citing SEC Release No. IC-13691 (Dec. 23, 1983)).

120. *See id.* at *2.

121. *See id.*

122. *See* Rule 144A, 55 Fed. Reg. 17,933 (1990) (codified at 17 C.F.R. § 230.144A).

123. *See id.* at 17,940-41.

whether secondary trading following the private placement should be included in calculating the 100-owner limit.[124] Foreign investment companies have great difficulty enforcing regulations that are strict enough to assure compliance with the 100-beneficial owner test if the test is interpreted to include secondary trading.[125] Many foreign companies thus refuse to offer their securities in the United States.[126] Commentators have described the 100-beneficial owner policy[127] as "contrary to current Commission policies recognizing the increased globalization, and encouraging the liberalization, of international securities markets."[128] Therefore, these commentators have suggested that the SEC abandon this policy. Since the policy is an obvious deterrent to foreign investment in the United States, this problem must be resolved.

5. Possible Liability Under Rule 10b-6

Another difficulty with Rule 144A arises when the Rule is used in conjunction with Regulation S.[129] The problem is that the SEC might apply Rule 10b-6 of the '34 Act to underwriters taking part in two-tranche deals.[130] According to SEC materials, "Rule 10b-6 prohibits persons participating in a distribution from bidding for or purchasing the security being distributed, or a related security, during the distribution."[131] Often, foreign underwriters conduct market-making activities that Rule 10b-6 would prohibit if performed in the United States.[132] Recently, however, the SEC granted certain limited exemptions to Rule 10b-6.[133]

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124. *See Restrictions on the Activities, supra* note 118, at *3; *Good Intentions, supra* note 85, at 21. The SEC has declined to assure foreign investment companies that no enforcement action will be taken if secondary-market trading results in surpassing the 100 owner limit. *See Restrictions on the Activities, supra* note 118, at *3 (citing Alpha Finance Corp., SEC No-Action Letter, n.4 (July 27, 1990)).

125. *See Restrictions on the Activities, supra* note 118, at *3.

126. *See id.*

127. Prior policies were set out in the Touche, Remnant & Co. no-action letter. Touche, Remnant & Co., SEC No-Action Letter (Aug. 27, 1984), *available in* LEXIS, Fedsec Library, NOACT File. This no-action letter states, "a foreign investment company . . . mak[ing] an offering in the U.S. . . . would be subject to the 1940 Act if upon completion of the offering there would be more than 100 persons resident in the U.S. who were beneficial owners of the securities." *Id.* at *1-*2 (footnotes omitted).

128. *Restrictions on the Activities, supra* note 118, at *5. This commentary holds that Section 7(d) only prohibits foreign investment companies from making public offerings if organized in accordance with the foreign jurisdiction's laws, and that Section 7, as the only section applicable to foreign investment companies, does *not* affect a company's ability to privately place its securities in the United States. *See id.* at *4.

129. *See Good Intentions, supra* note 85, at 21.

130. *See id.*

131. New Notification Requirements for Certain Exemptions From Rules 10b-6, 10b-7, and 10b-8, File No. 270-31, 56 Fed. Reg. 20,060 (1991) [hereinafter Exemption From Rule 10b-6].

132. *See Good Intentions, supra* note 85, at 21.

133. The SEC has recently granted an exemption for distributions pursuant to transactions exempt from the '33 Act:

> Exemptions from Rules 10b-6 . . . have been granted to permit non-U.S. transactions during the period where foreign securities eligible under Rule 144A

The SEC predicted that, had the exemption been enacted in 1990, ten other transactions would have qualified.[134] The SEC should therefore continue to respond to the suggestions posed by issuers and investors.

C. *Additional Developments*

Rule 144A utilized one route—resales in the private placement market—to attract foreign companies. To further the United States role in international markets, the SEC may facilitate changes in the public market.[135] Currently, foreign companies that list their securities on a public exchange or NASDAQ in the United States must still register their securities in adherence to SEC disclosure requirements.[136]

An avenue that the SEC has already pursued with Canada[137] is use of

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> are being offered and sold in the U.S. to [QIBs] . . ., provided that: (a) the non-U.S. transactions are effected on the ISE (on the SEAQ or SEAQ International systems), or on the Montreal, Paris, Tokyo, or Toronto Stock Exchanges; and (b) in addition to [having voting stock with an aggregate market value of at least U.S. $150 million held worldwide by non-affiliates] the issuer has an operating history of at least three years.

Securities Industry Association, No-Action Letter, at *5 (Apr. 25, 1991), *available in* LEXIS Library, NOACT File; *see also* Exemption From Rule 10b-6, *supra* note 131, 56 Fed. Reg. at 20,061 ("[t]ransactions conducted in compliance with rule 10b-7 are excepted from rule 10b-6"). The interpretive letter issued by the SEC provided two types of exemptive relief. *See SEC Okays Conditional Exemptive Relief for Non-U.S. Offerings, Rights Offers*, 23 Sec. Reg. & L. Rep. (BNA) No.17, at 589 (Apr. 26, 1991) [hereinafter *Conditional Exemptive Relief*]. The first exemption, applicable to "non-registered distributions by foreign issuers to U.S. institutional investors. . . . appl[ies] to Rule 144A transactions and certain other types of private placements." *Id.* The second exemption allows rights offerings ("offers of new stock made to existing shareholders, usually at a discount from the price to be offered to the public") to be made without meeting registration requirements. *Id.* at 590. Under either exemption, the securities must be currently traded on five foreign exchanges in London, Paris, Tokyo, Toronto, or Montreal, and must meet five other conditions. *See id.* Specifically:

> (1) the transaction must involve a distribution of foreign securities outside the United States; (2) the transaction also must be made outside the United States; (3) the foreign issuer must have voting shares held by non-affiliates with a market value of at least $150 million; (4) anyone using either exemption must notify the SEC of their actions; and (5) the transaction may not involve sales by issuers' affiliates. In addition, the foreign issuer must have an operating history for at least three years.

Id.

134. *See Conditional Exemptive Relief*, *supra* note 133, at 590.

135. *See Need for Disclosure Rule Changes*, *supra* note 26, at 1592. There have generally been few public offerings of foreign securities in the United States. *See id.* For a discussion of why foreign companies avoid United States public markets see *supra* notes 31-36 and accompanying text.

136. *See* Karmel, *Minimal Steps Toward Mutual Recognition for Foreign Issuers*, N.Y.L.J., Aug. 15, 1991, at 3, col. 1.

137. A "multi-jurisdictional disclosure system" ("MJDS") between the United States and Canada was approved by the SEC on May 30, 1991 and by the individual commissions in Canada's provinces by June 1991. *See Securities Sales Eased in Cross-Border Deals*, Amer. Banker-Bond Buyer, July 22, 1991, at *1, *available in* LEXIS, Nexis Library, FIN File [hereinafter *Securities Sales Eased*]. Under the MJDS, certain United States and Canadian companies are able to "sell securities in each other's markets with-

a cross-jurisdictional disclosure system under the theory of mutual recognition.[138] Generally, a cross-jurisdictional disclosure agreement means that eligible companies may sell securities in another country by relying on documents filed in their home countries.[139] The goal of such an agreement is "to lower the cost for companies to raise capital domestically and internationally."[140] These agreements, based on an expansion of Rule 12g3-2(b)[141] to include other securities defined by the SEC, are one aspect of mutual recognition.[142] The SEC has also considered establishing international accounting standards for disclosure requirements under a similar approach.[143] Extending mutual recognition to other foreign countries has been heavily debated and has been strongly considered by the SEC and other financial experts.[144] If such agreements are estab-

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out going through the expensive and time-consuming process of filing disclosure documents related to cross border offerings." *Id.*

The terms of the U.S.-Canada MJDS include: its limitation to Canadian 'substantial issuers' with a large market following, the requirement that a Canadian issuer have a reporting history with a Canadian securities commission of at least three years, and the requirement that an issuer be listed on one of the three Canadian stock exchanges for a minimum of one year. *See SEC Approves Rules Aimed at Promoting Cross-Border Offerings with Canadians*, Int'l Fin. Daily (BNA), at *1-*2 (May 31, 1991), *available in* LEXIS, Nexis Library, INTL File. Furthermore, for an equity offering the SEC requires "that the Canadian concern meet the $75 million (Canadian) float test and the three-year reporting test. . . . [and] have to have $360 million (Canadian) in market value." *Id.* at *2. For a rights offering, a Canadian company "would have to meet the market value, float, and reporting tests. . . . and have to be listed on one of the three Canadian exchanges for at least three years. . . . [or] could be listed on an exchange for only one year" if it had three years reporting history. *Id.*

Essentially, such an agreement between the United States and Canada is possible because they "have many disclosure requirements in common" and their systems "share the common purpose of ensuring that investors are given information adequate to make an informed investment decision." *Securities Sales Eased, supra*, at *1 (comments by Linda Quinn, director of the SEC's Division of Corporate Finance.).

138. *See* Karmel, *supra* note 136, at 3, col. 2.

139. *See id.* at 4, col. 4; *SEC Approves MJDS System With Canada; Canadian Provinces to Sign This Month*, 4 Int'l Sec. Reg. Rep. No. 13, at 1 (June 3, 1991) [hereinafter *SEC Approves MJDS*].

140. *SEC Approves MJDS, supra* note 139, at 1.

141. *See supra* note 32 discussing Rule 12g3-2(b).

142. *See* Karmel, *supra* note 136, at 3, col. 2.

143. *See id.*; *Need For Disclosure Rule Changes, supra* note 26, at 1592. The former chief of the SEC's Office of International Corporate Finance, Sarah Hanks, has expressed the view that, in the face of globalization of securities, the United States must give way and accept foreign disclosure standards. *See Need For Disclosure Rule Changes, supra* note 26, at 1592. Specifically, Ms. Hanks advocates that, in accounting standards, quarterly reporting must be eradicated and replaced with semi-annual reporting. *See id.*

SEC Chairman Richard Breeden has stated that he "believe[s] that we will have a nucleus of international accounting standards sometime in 1992." *Telecommunications & Fin. Hearing, supra* note 81 at *9. General Counsel to the SEC, James R. Doty, has reiterated that the SEC is "actively engaged in efforts to increase harmonization of world accounting standards and will continue these efforts." Doty, *supra* note 1, at S89.

144. *See* Karmel, *supra* note 136, at 3, col. 1; *see also, Need for Disclosure Rule Changes, supra* note 26, at 1592 ("the United States must begin to " 'accept overseas disclosure standards' "). SEC Chairman Richard Breeden said "he was interested in pursuing a similar cross-border offering system with Mexico, possibly as part of the U.S.-

lished between the United States and other foreign countries, these changes will further improve the position of the United States in the changing global economy.

CONCLUSION

Rule 144A appears to have helped the United States maintain its importance in the world financial markets by increasing access for foreign issuers to United States capital markets. This change reflects a well-planned response to the evolving international economy. Further changes, however, are still necessary. The SEC must address several specific areas—the definition of QIB, the relaxation of disclosure standards, issuer liability for subsequent resales, and the problems of foreign investment companies—that have left both United States investors and foreign issuers unsatisfied. This Note has focused on those problems with the Rule that affect the competitive position of the United States in the international securities market. In the above areas, with the exception of further relaxation of disclosure requirements, amendments should be considered in order to expand the Rule 144A market.

Mexico free-trade agreement." *Securities Sales Eased, supra* note 137, at *1. Manning Warren III, a University of Louisville law professor, firmly opposes these views, and believes, rather, that reduced disclosure methods, including Rule 144A, "when viewed 'in isolation, appear reasonable,' but collectively constitute a 'chipping away of disclosure standards.' " *Need for Disclosure Rule Changes, supra* note 26, at 1592.

For a discussion of the recent developments in such proposals, see *SEC's Proposed Regulations, supra* note 12, at S203.