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# Securities Offerings Abroad By Domestic Issuers, Both Public and Private

by  
Michael J. Halloran† and Richard Scudellari\*

## INTRODUCTION

Within the last several years, U.S. corporations have increasingly turned to overseas markets to raise needed capital. For example in 1980, U.S. corporations completed about twelve percent of their total public debt financing abroad;<sup>1</sup> in 1986 twenty-six percent of U.S. corporate bond financings were being conducted abroad.<sup>2</sup> Use of the Euroequities market by large corporations seeking international placements of their shares has increased dramatically. In 1985, only three U.S. companies issued equity securities internationally; in 1986, the ten largest overseas equity issuances by U.S. issuers raised over \$610 million.<sup>3</sup>

London is the center of the international debt and equity markets. As of the beginning of 1986, foreign (non-U.K.) issuers accounted for twenty-one percent of the equity listed on the London Stock Exchange; in 1985, foreign issuers listed nearly three times as many debt issues on the London Stock Exchange as did U.K. issuers.<sup>4</sup> In addition, United States issuers now represent over six percent of the total capitalization of the Unlisted Securities Market [hereinafter USM] in the United Kingdom.<sup>5</sup>

A U.S. company which desires to issue its securities abroad must comply with both U.S. federal securities laws and the laws of the foreign jurisdictions

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1. STAFF OF THE UNITED STATES SECURITIES AND EXCHANGE COMM'N, REPORT TO THE SENATE COMM. ON BANKING, HOUSING AND URBAN AFFAIRS AND THE HOUSE COMM. ON ENERGY AND COMMERCE ON THE INTERNATIONALIZATION OF THE SECURITIES MARKETS, I-4 (1987) [hereinafter Internationalization Study].

2. *Id.*

3. *Id.* at III-49.

4. *Id.* at III-96 to 97.

5. *Id.* at III-96. See *infra* notes 203-05 and accompanying text for a discussion of the United Securities Market.

into which the offering is to be made. Foreign offerings may be made either concurrently with or independently of a U.S. offering.

An issuer offering securities abroad can comply with the registration requirements of the U.S. Securities Act of 1933 [hereinafter Securities Act]<sup>6</sup> in one of three ways. First, an issuer can make an offer pursuant to a registration statement filed with, reviewed, and declared effective by the Securities and Exchange Commission [hereinafter SEC]. Proper registration of the offering obviates the need to seek an exemption from the registration requirement of the Securities Act and has the added advantage of making the shares issued abroad freely tradeable in the United States. Unfortunately, the time and expense incurred in connection with such a registered offering may make it impractical from a business standpoint. In addition, certain practices in foreign public offerings are not entirely consistent with U.S. federal securities laws.<sup>7</sup> However, the problems posed by such inconsistencies often can be surmounted in a registered foreign offering if the underwriter is familiar with and willing to enforce compliance with the U.S. rules, i.e., if the underwriter is a foreign affiliate of a U.S.-based underwriter. Second, an issuer can conduct an offering in a manner which will make it exempt from the registration requirements of section 5 of the Securities Act. For example, an issuer can conduct an offering as a private placement pursuant to section 4(2) of the Securities Act which exempts a transaction by an issuer not involving any public offering. Finally, an issuer can make an offering pursuant to SEC Release 4708 which exempts an offering made by a domestic issuer solely to foreign persons from complying with the registration requirements of section 5. Since the first two methods of complying with the registration requirements of the Securities Act in an offering made abroad do not differ from analogous procedures utilized in domestic offerings, the first part of this article will address the mechanics and means of making offerings abroad without registration under the Securities Act pursuant to Release 4708.

The second part of this article presents a brief analysis of the primary structural differences between a U.S. public offering and a Eurosecurity public offering together with an analysis of those European Community [hereinafter EC] directives relating primarily to the issuer's disclosure requirements. Directives relating to listing, disclosures, financial reports, and accounting requirements are examined and compared with U.S. requirements. The third part of this article analyzes the distinctions between the U.S. and the U. K.

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6. Securities Act of 1933, 15 U.S.C. § 77a (1982) [hereinafter Securities Act].

7. The foreign law might not require delivery of a prospectus to the actual purchaser; e.g., the London Stock Exchange authorities merely require the issuer to inform the purchaser where he can get a copy if he wants it. International Stock Exchange of the United Kingdom and the Republic of Ireland, *Admission of Securities to Listing* (1984), § 2, ch. 3, paras. 1, 3.5 [hereinafter Yellow Book]. Certain jurisdictions (e.g., the United Kingdom) not only permit but actually encourage presale publicity and the use of "soft" information, such as business-related projections, with few restrictions. *Id.* § 3, ch. 2, para. 7.1(b).

issuance requirements. The United Kingdom's regulations regarding the issuance of securities are significant because London is the center of the European securities market. This analysis focuses on a discussion of the new Financial Services Act<sup>8</sup> provisions, which will be fully implemented in July of 1988.

## I.

### APPLICATION OF SEC SECURITIES ACT RELEASE 4708 TO SALES OF SECURITIES ABROAD

#### *A. Background*

The registration requirements of section 5 of the Securities Act apply to any offer or sale of a security involving interstate commerce or use of the mails unless an exemption is available.<sup>9</sup> "Interstate commerce" is defined by the Securities Act to include "trade or commerce in securities or any transportation or communication relating thereto . . . between any foreign country and any State, Territory, or the District of Columbia. . . ."<sup>10</sup> A strict reading of this requirement might mean that, barring an available exemption, registration is required under section 5 in almost all instances where a U.S. issuer offers or sells its securities, even if all offers and sales are made outside the United States to non-U.S. residents and citizens, since most such offers and sales would involve some use of U.S. telephone lines or the U.S. mail. For a U.S. issuer to conduct an offering of securities entirely without the use of U.S. telephone lines or the U.S. mails would be extremely difficult and impractical.

In 1964, a distinguished Presidential Task Force, charged with the task of finding methods of obtaining foreign financing for U.S. corporations operating abroad, and thereby reducing the United States' balance of payments deficit and protecting U.S. gold reserves, issued a report [hereinafter Fowler Report] recommending that the SEC promulgate a release providing guidance as to when, in the view of the SEC, the registration provisions of section 5 will be applicable to foreign issuances.<sup>11</sup> The SEC responded to the Fowler Report with Securities Act Release 4708 [hereinafter Release 4708]<sup>12</sup> in which it took the position that an offering sold in a manner "reasonably designed to preclude distribution or redistribution within, or to nationals of,

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8. Financial Services Act, 1986, ch. 60. This Act dramatically changed British securities and investment law, bringing it into line with the laws of other EC countries and precipitating a revolution in the London securities market, on October 13, 1986, commonly known as the "Big Bang."

9. 15 U.S.C. § 77e (1982) [hereinafter section 5].

10. Securities Act § 5, 15 U.S.C. § 77(b)(7) (1982).

11. REPORT TO THE PRESIDENT OF THE UNITED STATES FROM THE TASK FORCE ON PROMOTING INCREASED FOREIGN INVESTMENT IN UNITED STATES CORPORATE SECURITIES AND INCREASED FOREIGN FINANCING FOR UNITED STATES CORPORATIONS OPERATING ABROAD, Recommendation No. 4, at 7 (1964) [hereinafter Fowler Report].

12. Registration of Foreign Offerings by Domestic Issuers, Securities Act Release No. 4708, 1 Fed. Sec. L. Rep. (CCH) ¶ 1361, at 1363 (July 9, 1964) [hereinafter Release 4708].

the United States” did not require registration under the Securities Act, even if U.S. telephone lines, mail or other means of interstate commerce were involved in the offering. Release 4708 states the SEC position that the requirements of section 5 are primarily intended to protect American investors and that the SEC would take no enforcement action if securities are offered and sold abroad in a manner which will likely result in them “coming to rest abroad.”<sup>13</sup> Unfortunately, Release 4708 does not set forth pragmatic guidelines or a “safe harbor” for such transactions, and there are virtually no reported cases specifically interpreting Release 4708 or the applicability of the registration requirements of section 5 to an offer and sale of securities by a U.S. issuer outside the United States.

Notwithstanding the lack of judicial interpretation of Release 4708, certain securities counsel believe that it is supported by international law since it reflects precepts of international comity. These precepts generally provide (i) that the laws of the jurisdiction in which the transaction takes place should govern the transaction and (ii) that easily movable contacts, such as closings or the place where the selling effort originates, should not determine the outcome.<sup>14</sup> Under such an interpretation of Release 4708, if proper steps are taken to place the transaction outside the United States, application of U.S. law would not be appropriate; foreign law should govern the transaction.

Furthermore, the courts, in addressing legislative jurisdiction over other transnational securities issues,<sup>15</sup> have frequently relied on or cited sections 17, 18, and 30 of the Restatement (Second) of Foreign Relations Law of the United States [hereinafter Restatement]<sup>16</sup> in requiring either (i) substantial acts in the United States affecting things or interests in the United States,<sup>17</sup> (ii) substantial effects in the United States (e.g., effects on U.S. securities markets),<sup>18</sup> or (iii) a U.S. defendant (although a U.S. defendant alone is not

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13. *Id.* at 1362. Release 4708 does not address, and this article will not discuss, the related issue of federal and state court jurisdiction over claims of violations of the anti-fraud rules of federal and state securities laws. The jurisdictional reach of such courts in this area can be quite broad. *See, e.g.,* Grunenthal GmbH v. Hotz, 712 F.2d 421, 425 (9th Cir. 1983); *ITT v. Cornfeld*, 619 F.2d 909, 916-20 (2d Cir. 1980).

14. The authors feel these principles represent the generally accepted views of the U.S. securities bar. *See also dicta* in *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 985-89 & n.24 (2d Cir. 1975) (merely preparatory activities in the United States—e.g., organization of a primary offering which paved the way for the secondary offering complained of—would not have given rise to jurisdiction without sales to U.S. citizens).

15. *See, e.g.,* *Bersch*, 519 F.2d 974; *ITT v. Vencap, Ltd.*, 519 F.2d 1001, 1017 (2d Cir. 1975); *Travis v. Anthes Imperial Ltd.*, 473 F.2d 515 (8th Cir. 1973); *Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F.2d 1326 (2d Cir. 1972).

16. *See* RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 17, 18, 30 (1965) [hereinafter Restatement].

17. *See* *Bersch*, 519 F.2d at 985, 987; *Travis*, 473 F.2d at 524; *Leasco*, 468 F.2d at 1334, 1339.

18. *See* *Bersch*, 519 F.2d at 988; *ITT*, 519 F.2d at 1017; *Travis*, 473 F.2d at 530; *Leasco*, 468 F.2d at 1333-34, 1341.

generally sufficient without U.S. acts or U.S. effects).<sup>19</sup> Both the concept of comity and the reliance of U.S. courts on the Restatement give counsel comfort in rendering opinions regarding issuances that comply with Release 4708.

Through a succession of no-action letters, the SEC has provided guidance as to methods of offering and selling securities pursuant to Release 4708. Although the U.S. securities bar has relied heavily on SEC no-action letters, these letters have been fact specific and, until recently, have often provided the U.S. securities bar with inconsistent guidelines as to the procedures which should be utilized in order to assure that the transaction falls within the protection of Release 4708.<sup>20</sup> For example, in one instance concerning the offer and sale of equity securities, all transfers of securities were prohibited for a twelve-month period.<sup>21</sup> In another instance concerning similar equity securities, all transfers were prohibited for only a ninety-day period.<sup>22</sup> No-action letters have also set forth a full range of measures and procedures intended to assure that securities come to rest outside the United States; e.g., placement of restrictive legends on securities and offering materials, use of temporary "global" certificates, restricting participation of Canadian investors and having all offers of securities and closings related to the sale of securities take place entirely outside the United States<sup>23</sup>. Often the SEC has approved transactions without indicating which measures or procedures are essential to the availability of the protection afforded by Release 4708. This situation has led at least one commentator to suggest using as many of these procedures as possible in structuring an offering to foreign investors under Release 4708.<sup>24</sup> This uncertainty has caused securities counsel to seek no-action approval for specific deals almost routinely.

Recently, however, a more consistent practice has developed within the securities bar with respect to Release 4708. This practice relies on certain key no-action letters which the SEC staff has informally indicated as setting forth the staff's position regarding Release 4708. These no-action letters set forth certain SEC approved procedures which vary depending on the type of security involved. It should be noted that these procedures appear to be approved only for "plain vanilla" transactions and should probably not be relied upon

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19. See *Bersch*, 519 F.2d at 985; *ITT*, 519 F.2d at 1016. In *ITT v. Vencap, Ltd.*, Judge Friendly stated: "It is simply unimaginable that Congress would have wished the anti-fraud provisions of the securities laws to apply if, for example, [an American] while in London had done all the acts here charged and had defrauded only European investors." 519 F.2d at 1016.

20. Confusion in this area may be due, in part, to the fact that letters requesting no-action responses usually contain procedures which the requesting securities lawyer believes provide satisfactory safeguards to ensure that the securities "come to rest abroad." These procedures may, in fact, be more than the SEC would have required.

21. *Executive Management, Inc.*, SEC No-Action Letter (Oct. 28, 1983) (LEXIS, Fedsec library, Noact file).

22. *Foote, Cone & Belding Communications*, SEC No-Action Letter (May 20, 1976) (LEXIS, Fedsec library, Noact file); see also *Biogen N.V.*, SEC No-Action Letter (July 20, 1981) (LEXIS, Fedsec library, Noact file).

23. See, e.g., *Executive Management, Inc.*, *supra* note 21; *Biogen N.V.*, *supra*, note 22.

24. See *Evans, Offerings of Securities Solely to Foreign Investors*, 40 BUS. LAW. 76 (1984).

for any transactions which vary materially from those set forth in the applicable no-action letters. These no-action letters also appear to support the thesis originally set forth in Release 4708 that "it is immaterial whether the offering originates from within or outside the United States, whether domestic or foreign broker-dealers are involved, and whether the actual mechanics of the distribution are effected within the United States. . . ." Accordingly, many of the procedures which have developed over the years, and which were previously considered necessary to avail the issuer of the protection afforded by Release 4708, no longer seem applicable.<sup>25</sup>

### B. SEC Position on Straight Debt Securities

A series of mid-1970 no-action letters set forth certain standardized procedures respecting foreign issuances of "straight" debt securities (i.e., non-convertible debt, or debt without warrants or other equity "kickers") which ensured compliance with Release 4708.<sup>26</sup> These procedures impose a ninety-day "lock-up" preventing broker-dealers and purchasers involved in the offering from selling the offered securities in the United States or to U.S. nationals for ninety days after the completion of the offering.<sup>27</sup> Certain procedural and documentation requirements have developed to ensure that the ninety-day lock-up is not violated. These procedures were modified and updated most recently in the *Proctor & Gamble, Co.* no-action letter.<sup>28</sup> *Proctor & Gamble* is perceived to reflect procedures approved by the SEC staff for use in a "plain vanilla" issuance of straight debt securities. *Proctor & Gamble* implements a ninety-day lock-up and sets forth the following procedures:

- \* invitation telexes to underwriters and dealers stating that the debt securities will not be registered under the Securities Act and may not be offered or sold in the United States or to U.S. persons, as described more particularly in the offering circular relating to the securities;
- \* agreements between the underwriters and the selling group dealers containing certain provisions requiring the dealers to (a) observe the offering restrictions relating both to sales of their allotments in the United States or to U.S. persons, and to sales of otherwise acquired securities (e.g., in the marketplace after the offering) in the United States or to U.S. persons prior to ninety days after completion of the distribution; and (b) deliver confirmations of sales to other dealers which restate the same restrictions and impose on such dealers the obligation to further restate such restrictions and confirmations to other dealers;

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25. For example closings outside the U.S. and emanation of offers by issuers or their representatives from outside the United States.

26. See *Fairchild Camera and Instrument International Finance N.V.*, SEC No-Action Letter (Nov. 15, 1976)(LEXIS, Fedsec library, Noact file); *The Singer Company*, SEC No-Action Letter, [1974-1975 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 79,979 (Aug. 2, 1974).

27. It should be noted that the SEC has not taken the position that, upon the conclusion of such a lock-up period, resales of such securities may then be made to U.S. citizens. For a discussion of resales, see *infra* notes 59-61 and accompanying text.

28. *Proctor & Gamble Co.*, SEC No-Action Letter (Feb. 21, 1985)(LEXIS, Fedsec library, Noact file).

- \* a prominent statement<sup>29</sup> on the cover or inside cover page of the offering circular to the effect that the securities (a) have not been registered under the Securities Act; (b) may not be offered or sold in the United States or to U.S. persons as part of the distribution; and (c) initially will be represented by a temporary global certificate as described below;
- \* a statement in the underwriting section of the offering circular regarding the offering restrictions on underwriters and dealers, as well as a statement that offers and sales in the United States or to U.S. persons will constitute a violation of U.S. law unless made in compliance with the registration requirements of the Securities Act or pursuant to an exemption;
- \* a statement must be contained in requests for "all-sold"<sup>30</sup> telexes requiring confirmation from underwriters and dealers that the securities were sold outside the United States and to persons other than U.S. persons;
- \* a temporary "global" certificate delivered at the closing which is exchangeable for definitive certificates only (a) after at least ninety days have passed since the lead managing underwriter has advised the fiscal agent that the distribution has been completed and (b) upon presentation of a certification of non-U.S. beneficial ownership;
- \* a statement in each press release or tombstone advertisement by the issuer or the underwriters that the securities have not been registered under the Securities Act and may not be sold in the United States or to U.S. persons as part of the distribution.

These guidelines have simplified customary procedures. Now the offering restrictions and other arrangements to preclude a U.S. distribution are described primarily in the offering circular and therefore need not be described in any detail in invitation telexes or a special memorandum of procedures to underwriters and dealers. In addition, confirmations imposing offering restrictions on subsequent purchasers are no longer delivered to retail purchasers, and a statement to the effect that certain offers and sales will constitute a violation of U.S. law need be made only in the offering circular and not in public announcements or advertisements. In accepting such simplified procedures, the SEC agreed with Proctor & Gamble's counsel's view that the offering restrictions and lock-up are "routine."<sup>31</sup>

Critical to these procedures is the lock-up of the securities in a "global" certificate for ninety days after the completion of the offering. The issuance of the temporary global certificate evolved from a procedure whereby purchasers were individually issued temporary debt certificates (without interest coupons) upon which restrictive resale legends were set forth. These temporary certificates could be converted into definitive certificates with interest

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29. The following is an example of a standard debt legend statement:

THESE SECURITIES WERE NOT AND ARE NOT BEING OFFERED IN THE UNITED STATES OF AMERICA, INCLUDING ITS TERRITORIES AND POSSESSIONS AND ALL AREAS SUBJECT TO ITS JURISDICTION, OR TO ANY PERSON WHO IS A NATIONAL, CITIZEN OR RESIDENT THEREOF OR TO ANY PERSON PURCHASING FOR THE ACCOUNT OF OR FOR THE RE SALE TO SUCH PERSON.

30. An "all-sold" telex is sent by underwriters and dealers to the lead underwriters indicating that their allotments have been sold.

31. *Proctor & Gamble Co.*, *supra* note 28.

coupons ninety days after the completion of the distribution. The issuance of literally tens of thousands (depending on the size of the transaction) of individual temporary certificates which would be exchanged for definitive securities within ninety days proved to be a severe administrative problem.

Some commentators believe that the ninety-day lock-up period comes from section 4(3) of the Securities Act which limits resale of securities by dealers until a certain period of time has passed after the completion of an offering.<sup>32</sup> However, since the time limit with respect to section 4(3) commences with the date of the first offering of a security and relates to either forty or ninety days, other commentators believe that the ninety-day period was established for other reasons.<sup>33</sup> Notwithstanding the debate as to its genesis, a ninety-day lock-up is now clearly necessary for foreign offerings of straight debt securities under Release 4708.

When straight debt securities are offered in something other than a typical Eurobond transaction, issuers cannot necessarily rely comfortably on the *Proctor & Gamble* procedures. Where there is a registered concurrent U.S. public offering and an unregistered foreign offering, the procedures set forth in *Goldman Sachs & Co.*<sup>34</sup> seem to apply. In addition to the *Proctor & Gamble* procedures, *Goldman Sachs* sets out the following procedures:

- \* the foreign offering agreements and documents prohibit the private placement in the United States of a portion of the securities being offered abroad;
- \* the foreign debt securities are not to be available in registered form until one year after the completion of the distribution;
- \* the "all-in"<sup>35</sup> interest cost to the issuer in the foreign offering will not be greater than the "all-in" interest cost in the U.S. offering;
- \* interest payments in the foreign offering will be on an annual basis as compared to a semiannual basis in registered offering; and
- \* separate underwriting syndicates will be utilized in the transactions.<sup>36</sup>

The additional procedures stressed by the SEC in *Goldman Sachs* seem to result from a perceived increase in the likelihood that the foreign securities may flow back into the United States when the securities from the same issuer are offered concurrently in the United States.

In *Goldman Sachs*, the SEC took into consideration the fact that the issuer was offering its European bonds in bearer form, a fact which made

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32. 15 U.S.C. § 77d(3); see C. NATHAN & R. DAVIS, SPECIAL PROBLEMS ARISING AS A RESULT OF TRADING IN MULTIPLE MARKETS, A.L.I.-A.B.A. CONFERENCE ON INTERNATIONALIZATION OF THE CAPITAL MARKETS 211 (1981).

33. See 10A H. BLOOMENTHAL, INTERNATIONAL CAPITAL MARKETS AND SECURITIES REGULATION § 5.02[1] (1987).

34. *Goldman Sachs & Co.*, SEC No-Action Letter [1985-1986 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 78,164 (June 5, 1985).

35. The proceeds of an offering less selling discounts, concessions, and other expenses (e.g., legal, accounting, and printing) of conducting the offering.

36. *Goldman Sachs & Co.*, *supra* note 34.

them less attractive to U.S. nationals as a result of the onerous tax consequences of holding bearer bonds.<sup>37</sup> This feature made it less likely that the securities would be purchased by U.S. nationals or flow back into the United States.

### C. SEC Position on Equity Securities

Generally, the procedures required in order to effect an offering of equity securities pursuant to Release 4708 have been more stringent than those imposed in a debt offering. Such stringency has its genesis in the view that equity securities are generally more likely to flow back into the United States than debt securities. As discussed above, there has been some uncertainty with respect to which procedures must be utilized in the issuance of equity under Release 4708.<sup>38</sup> Specifically, securities counsel have debated the length of the required lock-up period respecting equity securities.<sup>39</sup> Recently, however, in the *InfraRed Associates, Inc.* no-action letter,<sup>40</sup> the SEC set forth certain procedures which are recognized by most securities counsel as sufficient to ensure the protection of Release 4708 in a typical foreign equity offering. *InfraRed Associates* requires a twelve-month lock-up period and the following procedures:

- \* all stock certificates and offering circulars must contain a legend<sup>41</sup> to the effect that the shares may not be sold to or for the benefit of North American citizens at any time prior to twelve months after the conclusion of the

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37. For an analysis of the current state of U.S. law regarding tax consequences of holding bearer bonds, see *infra* note 76.

38. See *supra* text accompanying note 25.

39. *Scientific Manufacturing, Inc.*, SEC No-Action Letter [1983-1984 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 77,707 (May 12, 1983); *Foote, Cone & Belding*, *supra* note 22.

40. *InfraRed Associates, Inc.*, SEC No-Action Letter (Sept. 13, 1985) (LEXIS, Fedsec library, Noact file).

41. The authors have used the following legend in past business transactions:

THE SHARES OF THE COMPANY REPRESENTED BY THIS CERTIFICATE HAVE NOT BEEN AND WILL NOT BE REGISTERED UNDER THE UNITED STATES SECURITIES ACT OF 1933, AS AMENDED, (THE "SECURITIES ACT") OR THE SECURITIES LAWS OF ANY STATE OF THE UNITED STATES ("STATE ACT"). THE SHARES MAY NOT BE OFFERED, SOLD, RENOUNCED OR TRANSFERRED, DIRECTLY OR INDIRECTLY, IN THE UNITED STATES OF AMERICA, ITS TERRITORIES, POSSESSIONS AND ALL AREAS SUBJECT TO ITS JURISDICTION ("UNITED STATES") OR IN CANADA (COLLECTIVELY "NORTH AMERICA") OR TO OR FOR THE BENEFIT OF ANY PERSON WHO IS A NATIONAL, CITIZEN OR RESIDENT OR NORMALLY A RESIDENT THEREOF, THE ESTATES OF SUCH PERSONS OR ANY CORPORATION OR ANY ENTITY CREATED OR ORGANIZED UNDER THE LAWS OF THE UNITED STATES OR CANADA OR ANY POLICAL SUBDIVISION THEREOF (COLLECTIVELY REFERRED TO AS "NORTH AMERICAN PERSONS") AT ANY TIME PRIOR TO \_\_\_\_\_, 1988. THEREAFTER, SUCH SHARES MAY NOT BE OFFERED, SOLD, RENOUNCED OR TRANSFERRED, DIRECTLY OR INDIRECTLY, IN NORTH AMERICA OR TO OR FOR THE BENEFIT OF NORTH AMERICAN PERSONS UNLESS (I) THE SHARES ARE DULY REGISTERED UNDER THE SECURITIES ACT AND ANY APPLICABLE STATE ACT, OR (II) AN

offering and thereafter may be sold to North American citizens only if (i) the shares are duly registered under the Securities Act and any applicable state act, or (ii) an exemption from such registration is available, or (iii) such shares are sold on the stock exchange on which they are listed in accordance with the procedures approved by the stock exchange;

- \* during the twelve-month lock-up period, securities may not be sold or transferred without certification of non-North American<sup>42</sup> beneficial ownership;
- \* the issuer's bylaws must prohibit registration of shares in the name of North American Persons prior to the expiration of the twelve-month lock-up; and
- \* during the twelve-month lock-up, the selling agent must undertake not to knowingly offer shares in North America or to North American Persons.<sup>43</sup>

*InfraRed Associates* is an especially important no-action response for two reasons. First, it states firmly the SEC staff's position that a twelve-month lock-up applies to equity securities. There is no doubt as to this point since the SEC refused to grant a no-action response until *InfraRed Associates* extended the six-month lock-up period set forth in its original request letter<sup>44</sup> to twelve months.

The second reason *InfraRed Associates* is important is that prior thereto, the SEC had not approved of resales of equity securities, sold in a Release 4708 offering, to U.S. citizens over a European stock exchange. This restriction, in effect, made such equity securities unavailable for trading over European stock exchanges, since the exchanges were unwilling to commit to verifying citizenship in perpetuity, and consequently made Release 4708 offerings less marketable. In *InfraRed Associates*, the SEC approved the resale over the London Stock Exchange of such securities to U.S. citizens but only after the lock-up period had expired. This ability to resell has been a vital

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EXEMPTION FROM REGISTRATION UNDER THE SECURITIES ACT AND ANY APPLICABLE STATE ACT IS AVAILABLE AND THE COMPANY HAS RECEIVED AN OPINION OF COUNSEL TO SUCH EFFECT REASONABLY SATISFACTORY TO IT, OR (III) THE SHARES ARE SOLD ON ANY AUSTRALIAN ASSOCIATED STOCK EXCHANGE IN ACCORDANCE WITH THE PROCEDURES OR SUCH EXCHANGE. FURTHER, ANY TRANSFER IN VIOLATION OF THE FOREGOING ON OR BEFORE \_\_\_\_\_, 1988, SHALL BE NULL AND VOID AND OF NO EFFECT AND THE TRANSFEREE THEREOF SHALL HAVE NO RIGHTS AS A SHAREHOLDER OF THE COMPANY.

42. "North America" is defined in *InfraRed Associates* to mean the United States, its territories, possessions, all areas subject to its jurisdiction, and Canada, and "North American Persons" is defined to mean "any person who is a national citizen or a resident, or normally a resident thereof, the estate of such persons or any corporation or other entity created or organized under any law of the United States or Canada or any political subdivision thereof. . . ." *InfraRed Associates, Inc.*, *supra* note 40. Whether it is necessary to exclude Canadians from the group of offering participants is discussed below. See *infra* notes 62-63 and accompanying text.

43. *InfraRed Associates, Inc.*, *supra* note 40.

44. *Id.* at Letter Dated Aug. 15, 1985.

factor in the recent phenomenon of U.S. private companies doing initial public offerings on foreign exchanges.<sup>45</sup> Such offerings can be done relatively quickly and inexpensively, making them an attractive alternative to going public in the United States. Of course, such exchanges must have trading and settlement procedures which can accommodate the *InfraRed Associates* procedures.

It should be noted, however, that foreign offerings (and the subsequent trading that may take place over an exchange, if the securities are listed) may result in the issuer having over 500 shareholders. If the issuer also has in excess of \$5 million in total assets, it will be required to file a registration statement in accordance with the requirements of section 12(g) of the Securities Exchange Act of 1934 [hereinafter Exchange Act].<sup>46</sup> The obligation to file a registration statement under section 12(g) applies notwithstanding the absence of U.S. shareholders.<sup>47</sup> As a section 12(g) company, an issuer has ongoing reporting requirements under the Exchange Act. Thus, the requirement of an Exchange Act registration statement to some degree defeats the goal of lowering costs—a primary purpose of issuing securities under Release 4708.

The SEC, however, has begun a practice under section 12(h) of the Exchange Act of exempting issuers from section 12(g) registration requirements where those issuers have no public market for their securities in the United States but have gone public abroad under Release 4708. Generally, the reasoning behind such exemptions is that the U.S. issuers in these situations are analogous to foreign issuers who qualify under Rule 12g3-2 for the exemption from section 12(g) registration. Rule 12g3-2 provides that such issuers need not file a section 12(g) registration statement until they have at least 300 U.S. shareholders.<sup>48</sup> While the SEC has granted exemptions to certain U.S. issuers, it has not stated a position on this matter with respect to future applications.

Considering the SEC's lack of guidance, the U.S. securities bar is currently split on the question of whether the principles set forth in Release 4708 apply to equity securities of U.S. issuers with a ready market existing in the United States. Some members believe that the existence of such an established trading market and the fact that equity securities are essentially fungible increase the likelihood of flow back into the United States to such a degree that the availability of protection afforded by Release 4708 is very questionable.

Another view, which is shared by the authors, is that the *InfraRed Associates* procedures effectively ensure that such issuances will "come to rest

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45. Process Systems, Inc. (December 1984), Pacer Systems, Inc. (July 1985) and InfraRed Associates, Inc. (September 1985) have gone public and are quoted by the USM. States Properties, Inc. (July 1987) has gone public over the Australian Associated Stock Exchange.

46. Securities Exchange Act of 1934, 15 U.S.C. § 78a (1982).

47. 15 U.S.C. § 78l(g) (1982).

48. 17 C.F.R. § 240.12g3-2 (1987).

abroad," i.e., not be acquired by U.S. investors for twelve months. According to this view, there are no policies which would justify the restriction of sales to U.S. investors based merely upon the existence of a ready secondary market in the United States for the same class of securities. Although the SEC has not clearly stated a position on this issue, it has approved foreign offerings under Release 4708 of certain Canadian issuers that have established Canadian and U.S. secondary markets,<sup>49</sup> and members of the SEC staff have recently made statements indicating liberalization of the SEC's views in this area.<sup>50</sup>

#### D. SEC Position on Convertible Debt Securities

A typical convertible debt offering poses another set of difficult issues. While the standard Release 4708 lock-up procedures for straight debt securities discussed above may be available for the debt security itself, how to handle the underlying common stock remains a question. Where an issuer has a U.S. public market for its common stock, the common stock to be issued upon conversion is generally registered prior to the earliest convertibility date.<sup>51</sup> One might argue, however, that the exemption provided by section 3(a)(9) of the Securities Act relating to "any security exchanged by an issuer with its existing security holders"<sup>52</sup> would apply to the issuance of the common stock upon conversion. Notwithstanding the section 3(a)(9) exemption, certain securities counsel believe that registration of the common stock is necessary because such common stock, in the instance of a U.S. public company, may make the convertible debt more likely to flow back into the United States and such registration provides additional protection to U.S. investors.<sup>53</sup> Many U.S. issuers entering the Eurosecurity market may use the simplified registration statement Form S-3, which provides a relatively quick and inexpensive means of registering such stock.

If an issuer registers the underlying common stock, it is questionable how long the issuer must maintain the effectiveness of the registration statement. The SEC staff has taken the informal position that a registration statement need only be filed and made effective prior to the time of convertibility; it is not necessary thereafter to continue the effectiveness of the registration statement. The reasoning behind this position involves weighing the administrative burdens against the benefit to U.S. investors of keeping a registration

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49. *Silverton Resources Ltd.*, SEC No-Action Letter (Jan. 4, 1985)(LEXIS, Fedsec Library, Noact file); *Silverado Mines Ltd.*, SEC No-Action Letter (Sept. 12, 1984)(LEXIS, Fedsec Library, Noact file).

50. See *infra* Part I.H.

51. *Fairchild Camera*, *supra* note 26.

52. 15 U.S.C. § 77c(a)(9) (1982).

53. Certain foreign convertible debt offerings by U.S. issuers have been done without a registration statement covering the common stock. In such instances, the market price of the underlying stock has been extremely stable, and, thus, the likelihood of conversion in the near future was deemed remote by the issuer and its counsel. Query whether this position is aggressive given the volatile markets of 1987 and 1988.

statement "evergreen."<sup>54</sup> Since the SEC has taken the informal position that, in convertible debt offerings under Release 4708, the prospectus delivery requirements of section 5 do not apply and issuers of such securities are usually Exchange Act reporting companies, little or no purpose would seem to be served by keeping a registration statement updated.

Another approach to this issue is that registration of the underlying common stock is unnecessary if the lock-up on the debt security is extended to the period of the lock-up pertaining to equity, i.e., twelve months, and the debt security is not convertible until the expiration of the lock-up. In such a case, the debt security and the common stock underlying the debt security will come to rest abroad, and, thereafter, issuing common stock upon conversion will be exempt pursuant to section 3(a)(9) of the Securities Act.

### *E. Integration with Domestic Offerings*

Release 4708 also proposes that foreign offerings which are designed to come to rest abroad will not be integrated with concurrent domestic offerings which come under the private placement exemption contained in section 4(2) of the Securities Act.<sup>55</sup> The SEC staff has specifically affirmed this position with respect to offerings conducted in accordance with Regulation D<sup>56</sup> and has extended it to intrastate offerings which are exempt under section 3(a)(11) of the Securities Act.<sup>57</sup> However, counsel should be wary of the possibility that such offerings may be integrated under any applicable state blue sky law. Certain state blue sky laws have very broad definitions as to when an offer or a sale is made in the subject jurisdiction and provide that virtually all offers and sales, wherever, are to be considered in determining whether the applicable state blue sky exemption is available.<sup>58</sup>

### *F. Resales in the United States or to U.S. Citizens*

In almost every no-action response regarding Release 4708, the SEC staff states that it is expressing no view as to when and under what circumstances

54. A registration statement is kept "evergreen" (current) so that an issuer may issue stock under it on a continuing basis.

55. Release No. 4708, *supra* note 12.

56. Regulation D, 17 C.F.R. § 230.501-06 (1987) (rules governing the limited offer and sale of securities without registration under the Securities Act); *NABU Manufacturing Corp.*, SEC No-Action Letter (Aug. 24, 1982)(LEXIS, Fedsec library, Noact file).

57. *Commonwealth Equity Trust*, SEC No-Action Letter [1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 78,412 (Jan. 20, 1987)(LEXIS, Fedsec library, Noact file). It is interesting to note that, at one point, the staff had taken a contrary position on this issue; *see, e.g., Seashore Investment, Inc.*, SEC No-Action Letter (Dec. 27, 1972)(LEXIS, Fedsec library, Noact file). However, it seems clear that the SEC staff's current position is that such exempt offerings should not be integrated.

58. For a good example of a very broad definition of when an offer or sale is made in a jurisdiction, see section 25008 of the California Corporate Securities Law of 1968. CAL. CORP. CODE § 25008 (West 1977). *See generally* Evans, *supra* note 24.

the securities sold abroad may be resold in the United States or to U.S. persons, notwithstanding a specific request from the issuer for such advice. The SEC staff usually makes a "black letter" statement to the effect that any such reoffers or resales must be made in compliance with the registration requirements of the Securities Act or pursuant to an available exemption, and that the availability of any such exemption would depend on the facts and circumstances existing at the time of such reoffers and resales. The SEC staff has stated, however, that it would raise no objections to resales by foreign investors in the United States or to U.S. persons in compliance with all of the terms of Rule 144 (including applicable holding periods) as long as the seller uses a domestic broker-dealer and is not an affiliate of the issuer.<sup>59</sup> In addition, in *InfraRed Associates*, the SEC approved the resale of equity securities to U.S. citizens over the London Stock Exchange, if done after the twelve-month lock-up period and in conformity with the rules of the Exchange.<sup>60</sup> Although the SEC has not specifically so stated, it is generally believed that such approval would apply to other established stock exchanges outside North America.

Notwithstanding the staff's reluctance to address this issue, some U.S. securities lawyers believe that an offering under Release 4708 may be analogized to an intrastate offering of securities under section 3(a)(11). Accordingly, the resale issue should be determined in the same manner as under a section 3(a)(11) analysis. Thus, securities should become freely tradeable after the expiration of the lock-up period imposed under Release 4708 in the same way that under Rule 147(e) securities issued in a section 3(a)(11) offering may be freely tradeable after the expiration of the applicable lock-up period.<sup>61</sup>

### G. Nature of Investor

Another question arising under Release 4708 is what types of investors must be excluded from a foreign offering for it to be exempt from section 5 registration requirements.<sup>62</sup> While it is presently unclear whether Release 4708 excludes Canadian and U.S. broker-dealers [hereinafter U.S. Brokers] who purchase securities for foreign investors from a foreign offering, the language of Release 4708 and the SEC's actions suggest that sales to either type of investor may satisfy the requirements of Release 4708.

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59. 17 C.F.R. § 230.144 (1987)(persons deemed not to be engaged in distribution and, therefore, not underwriters); *Biogen N.V.*, SEC No-Action Letter (Nov. 28, 1983)(LEXIS, Fedsec library, Noact file); *International Income Property, Inc.*, SEC No-Action Letter (Dec. 12, 1980)(LEXIS, Fedsec library, No act file).

60. *InfraRed Associates, Inc.*, *supra* note 40.

61. 17 C.F.R. § 230.147(e) (1987). In effect, the securities bar applies the same "come to rest" principle under Rule 147 as applies under Release 4708 for purposes of resale; carrying this a step further, some members of the U.S. securities bar believe that Rule 147 provides authority for the proposition that the lock-up respecting equity under Release 4708 should be nine months instead of twelve months.

62. Release 4708, *supra* note 12, at 1362.

It is uncertain how Release 4708 applies to Canadian investors. Release 4708 explicitly states that a distribution "through the facilities of the Canadian Stock Exchanges" may be expected to flow back to U.S. investors and, therefore, should be subject to registration. Yet, this language does not indicate to what extent Canadians must be precluded from a foreign offering. It is noteworthy, however, that many no-action letters which have received favorable responses from the SEC staff have not specifically excluded Canadians from the purchasing group.<sup>63</sup> Thus, it is plausible that the SEC would consider an offering or sale to Canadian investors to be within the protections of Release 4708.

Furthermore, U.S. Brokers who purchase securities for foreign investors are not always excluded from a Release 4708 foreign offering. The SEC has approved the sale of securities in a foreign offering to a registered broker-dealer in New York. The broker-dealer purchased them for foreign clients in an instance where he had discretionary trading authority, and the securities were acquired and held in custody in the United States. The SEC required, however, that the issuer take reasonable precautions to ensure that the securities would not be resold to U.S. citizens or residents prior to such securities coming to rest abroad.<sup>64</sup> The SEC's position on this issue is consistent with the text of Release 4708 which states that "it is immaterial whether domestic or foreign broker dealers are involved and whether the actual mechanics of the distribution are effected within the United States."<sup>65</sup> Moreover, the SEC staff indicated that, in certain instances, they will take no action if securities are offered and sold to foreign investors temporarily present in the United States.<sup>66</sup>

#### *H. Current Developments*

The SEC staff has been considering a revised approach to interpreting the jurisdictional reach of section 5 hopeful of issuing a proposing release during the summer of 1988.<sup>67</sup> The staff is contemplating a "territorial" approach which would apply the registration provisions of section 5 when an offer or sale of securities takes place in the United States.<sup>68</sup>

The staff is likely to propose a safe-harbor rule that will provide specific guidance as to when an offer or sale takes place outside the United States. The staff appears to favor an approach wherein the place of the transaction is

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63. *Goldman Sachs & Co.*, *supra* note 34; *Ni-Cal Finance N.V.*, SEC No-Action Letter (Apr. 30, 1984)(LEXIS, Fedsec library, No act file).

64. *Baer Securities Corp.*, SEC No-Action Letter (Oct. 12, 1979)(LEXIS, Fedsec library, Noact file).

65. Release 4708, *supra* note 12, at 1362.

66. *Israel Discount Bank Ltd.*, SEC No-Action Letter (July 23, 1981)(LEXIS, Fedsec library, Noact file).

67. Remarks of Linda Quinn, SEC Corporation Finance Division Director at Second Annual Institute, International Securities Activities of Banks, Financial Institutions and Companies, New York, New York, May 19, 1988.

68. *Id.*

determinative; therefore, the rule may focus on the location of execution and settlement and the presence and extent of selling efforts in the United States.<sup>69</sup> In addition, the rule may set forth other factors which must be given weight in determining where a transaction takes place.<sup>70</sup> Although the staff's approach seems reasonable, given today's high technology and securities industry practices, it may prove difficult to accurately determine where any particular transaction actually takes place.

The rule may also distinguish between issuers reporting under the Exchange Act and issuers which do not report under the Exchange Act. It is possible that the applicable lock-up for reporting issuer, in the case of both debt and equity issuances, will be ninety days, whereas the lock-up applicable to nonreporting issuers will be of a longer duration, possibly a year.<sup>71</sup> This approach rests on the theory that, in the instance of reporting issuers, investors are protected by the issuers' reporting obligations under the Exchange Act which require issuers to provide updated information regarding financial condition, operations, and certain other material information to the market.

The staff believes that a territorial approach is consistent with the principles of international comity and should not affect the broad reach of the anti-fraud rules of the federal securities laws.<sup>72</sup> The extent to which such a safe-harbor rule would preempt application of the current principles is not known; however, any further clarification of Release 4708 will be welcomed by the U.S. securities bar.

## II.

### EUROPEAN COMMUNITY

Although a U.S. issuer offering securities in any of the twelve Member States of the EC<sup>73</sup> may be exempt from the section 5 registration requirements of the Securities Act, it still must comply with the applicable regulations imposed by the EC. The twelve Member States of the EC have agreed, pursuant to the Treaty of Rome, to adopt and implement a number of directives of the Council of Ministers [hereinafter EC Council], which set minimum standards for the regulation of securities issuances in a Member State. After the EC Council has adopted a directive, it must be adopted and implemented by each individual Member State.<sup>74</sup> Although the EC directives provide a base for examining the regulation of security issuances in Europe, each

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69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. The Member States of the EC that signed the Treaty of Rome on March 25, 1957, are Belgium, France, The Federal Republic of Germany, Italy, Luxembourg, and The Netherlands. The United Kingdom, Ireland, and Denmark joined the EC on January 1, 1973. Greece joined January 1, 1981 and Spain and Portugal joined January 1, 1986.

74. Treaty of Rome, Mar. 25, 1957, art. 189, para. 3, 298 U.N.T.S. 11, 79.

Member State retains the right to choose the form and method of implementation.<sup>75</sup> An issuer conducting an offering in Europe must undertake a separate analysis of the compliance standards of each Member State in which the securities will be offered because the form and implementation of the directives will vary.

Section A of this Part presents an analysis of the primary structural differences between a U.S. public offering and a Eurosecurity public offering. Section B describes procedural aspects of securities issuances in the EC. Section C analyzes EC directives relating primarily to the disclosure requirements of the issuer. Directives relating to listing, disclosures, financing reports, and accounting requirements are examined and compared to U.S. requirements. Finally, since the economic center of the European market is in London, a specific analysis of the requirements governing the issuance of securities in the United Kingdom is presented in Part III.

#### *A. Structural Aspects of Securities Issuance in The EC*

A variety of structures are available for raising capital in Europe through the issuance of bond and equity securities. Structural aspects of Eurobond and Euroequity issues are generally similar to structures used in issuing bonds and equity in the United States. A few differences, however, are significant.

##### *1. Eurobonds*

Eurobond issues generally consist of bearer bonds.<sup>76</sup> Recently, however, bonds in registered form have become increasingly commonplace due to the role of institutional investors who do not demand the same anonymity commonly required by European individuals. Because European markets

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75. *Id.*

76. Ownership of bearer bonds is transferred through the transfer of possession, as opposed to either endorsement of the security or registration of the holder on a bond register, the methods of transfer used for registered bonds. In addition, interest on bearer Eurobonds may be paid to non-U.S. persons outside the United States in certain situations free from U.S. withholding taxes, including backup withholding taxes, and without being subject to United States information reporting. U.S. persons holding such bearer bonds are subject to certain "holder sanctions" under I.R.C. sections 1287(a) and 165(j). The sections referred to provide, with certain exceptions, that U.S. persons will not be entitled to deduct any loss, and will not be entitled to capital gain treatment (as applicable) on any gain on any sale, disposition or payment of principal on such bonds. For Eurobonds issued in registered form, the beneficial owner (or a chain of financial intermediaries and ultimately the beneficial owner) must also certify (generally on IRS Form W-8) that such owner is not a "United States person" (I.R.C., §§ 871(h), 881(c), 1441(c)(9), 1442(a); Temp. Treas. Regs., § 35a.9999-5(a), (b) (as amended in 1986); Prop. Treas. Regs., §§ 1.6045-1, 49 Fed. Reg. 22,283 (1984), 1.6049-5, 50 Fed. Reg. 23,680 (1985)). Eurobonds held by a person who is neither a citizen nor resident of the United States are generally not subject to U.S. estate tax upon the death of such person; the certification described above need not be given for Eurobonds issued in registered form to be eligible for this benefit. See I.R.C. §§ 2101, 2103, 2105(b)(3) (1986).

generally lack any extensive rating system for bonds,<sup>77</sup> the Eurobond market is utilized primarily by issuers with whom investors are familiar.

With one notable exception, the structure of a typical European offering syndicate in a Eurobond issue is similar to that of U.S. syndicates. In a European syndicate, each managing underwriter [hereinafter Manager] has joint and several liability with respect to the purchase of the entire issue from the issuer. Accordingly, it is theoretically possible that a single Manager could be obliged to purchase the entire issue in the event the other Managers defaulted. The determination as to the actual proportion of the issue that will be purchased by each Manager is set forth in an agreement among Managers, to which the issuer is neither a party nor privy.

In contrast, although the managing underwriters in a U.S. undertaking are contractually committed to purchase the entire issue from the issuer, each underwriter is obligated to purchase only a certain amount of the issue and an additional ten percent if another underwriter defaults.

## 2. *Euroequities*

Equity may be issued internationally for several reasons. Among these are the desire to broaden the shareholder base and to gain access to previously untapped markets. Recently created international clearinghouses such as Euroclear facilitate international issues of equity securities.

Although the structure of underwriting syndicates are constantly in a state of flux, structures utilized in multi-national Euroequity issues have recently been of two distinct structures. Representative of the first type of issuing structure is that used by Swiss Bank Corporation International [hereinafter SBCI] and involves separate underwriting syndicates in each country in which the securities are sold. One advantage of the SBCI underwriting method is that it allows each co-Manager to more firmly place the securities in its own geographic region. An obvious disadvantage of the SBCI approach, which naturally results from diversification of the syndicate, is that it affords less control to the issuer and Manager over placement of the issue.

The syndication structure utilized by Credit Suisse First Boston [hereinafter CSFB] is representative of the second type of structure. The CSFB method involves using a small group of co-Managers in a single syndicate. This method has the advantages of allowing the underwriting syndicate significant control over the terms and placement of the issue as well as requiring less delegation of duties and responsibilities. Use of the CSFB style of syndicate can be a key factor in limiting the flowback of securities to the home market in instances where flowback may be a problem.<sup>78</sup> This method facilitates tight control over the underwriters and, thereby, strict control over compliance with the marketing agreements.

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77. Bond ratings allow an investor to judge the relative risks associated with a particular bond regardless of the investor's degree of familiarity with the issuer.

78. See *supra* notes 11-13 and accompanying text.

*B. Procedural Aspects of Securities Issuances in the EC*

The customary procedure undertaken in issuing securities in the Euromarket is set forth in a series of recommendations made by the International Primary Market Association [hereinafter IPMA].<sup>79</sup> The procedure begins formally on the "Launch Date" when the announcement of the issue is made simultaneously with the commencement of syndication. It is at this time that the major terms of the issue will be fixed and announced, including issue size, maturity date and coupon (in the case of bonds), issue price, management and underwriting fees, the lead Manager's *praecipium*,<sup>80</sup> and the selling concession. Once the terms of the offer have been set, they are not subject to further negotiation.

The U.S. practice differs from European offering methods because in the United States the formal announcement of the issue is separate from and precedes final negotiation of the terms of the issue. The deal is first announced when the registration statement is filed with the SEC. This registration statement contains the preliminary prospectus, which sets forth price parameters, tentative issue size, and maturity date and coupon (in the case of bonds). Thereafter, the preliminary prospectus may be distributed, and the terms of the deal may be negotiated and changed before the registration statement is declared effective. Generally, the binding Underwriter's Agreement and the price of the offering are fixed after the close of the trading day immediately preceding the day on which the registration statement is declared effective.

During the day or so following the Launch Date, the European syndicate management groups are asked to state their "selling interest," i.e., the quantity of bonds they would like to purchase. The Managers negotiate their commitments subject to documentation which may still be subject to negotiation by the lead Manager and the issuer. The lead Manager then makes allotments to the selling group members prior to midnight on the third London business day from and including the Launch Date.<sup>81</sup>

The period between the Launch Date and the signing of formal documentation is generally between one and six weeks. IPMA requires only that

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79. IPMA is an association of investment bankers who have, by virtue of their membership, agreed to strive to abide by the IPMA recommendations. It is expected that in the majority of cases the recommendations will be followed by IPMA members. However, circumstances may arise where other arrangements are contemplated, and in those cases it is expected that members will draw attention to the fact that the IPMA recommendations are not to be followed in that instance. The recommendations are norms which represent good market practice and which should apply unless it is clearly communicated to all parties concerned that a different practice is going to be followed.

80. The lead Manager's "*praecipium*" is that part of the total Management Commission paid to the lead Manager in consideration of the extra work undertaken by him in connection with an issue of securities. The Management Commission minus the "*praecipium*" is then distributed among the Managers in accordance with sharing arrangements usually set out in an Agreement Amongst Managers.

81. Compliance with this IPMA recommendation is not always possible due to the short time period involved.

draft documentation of the Managers' commitments and a preliminary or proof prospectus be sent to the Managers for their comment and approval not less than twenty-four hours before the signing ceremony. In practice, however, a longer review period is generally allowed. On the signing date, the prospectus is printed in final form and distributed to the relevant stock exchange, the Managers, and selling group members for use as a marketing tool. A period of days or weeks then typically passes before the closing date, at which time the securities are issued and the Managers are required to pay the purchase price.

In a U.S. domestic offering, by comparison, the time period between filing the registration statement containing the preliminary prospectus and the time at which the SEC declares the registration statement (which will usually have been amended) effective can be, depending on the company, anywhere from a week (if the SEC decides not to review the registration statement) to two months (if the SEC reviews the registration statement and has significant comments). It is during this period that the underwriters and the issuers make presentations to dealers and institutional investors.

### C. European Community Directives

Five EC Council directives provide a regulatory framework that govern EC capital markets by setting minimum standards for the preparation and disclosure of information relating to securities offered to the public.

First, the EC Council Directive of March 5, 1979 [hereinafter Listing Directive],<sup>82</sup> sets forth conditions which must be met before a security can be listed on an official exchange in a Member State and continuing disclosure obligations which must be undertaken by issuers of listed securities. Second, the EC Council Directive of March 17, 1980 [hereinafter Information Directive]<sup>83</sup> contains requirements for "listing particulars" which are to be provided to investors when the securities to be offered are, or are to be, listed on an official stock exchange in a Member State. Third, the EC Council Directive of February 15, 1982 [hereinafter Interim Report Directive],<sup>84</sup> requires that companies whose equity securities are listed on an official exchange publish half-yearly reports detailing information regarding the first six months of their financial year. The Fourth EC Council Directive of July 25, 1978<sup>85</sup> requires that companies whose equity securities are listed on an official exchange publish annual financial accounts and, together with the Seventh EC

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82. *Council Directive of March 5, 1979*, 22 O.J. Eur. Comm. (No. L 66) 21, 1 Common Mkt. Rep. (CCH) ¶ 1721 (1980) [hereinafter Listing Directive].

83. *Council Directive of March 17, 1980*, 23 O.J. Eur. Comm. (No. L 100) 1, 1 Common Mkt. Rep. (CCH) ¶ 1731 (1980) [hereinafter Information Directive]. The Information Directive was formerly referred to as the Sixth Directive.

84. *Council Directive of February 15, 1982*, 25 O.J. Eur. Comm. (No. L 48) 26, 1 Common Mkt. Rep. (CCH) ¶ 1741 (1982) [hereinafter Interim Report Directive].

85. *Fourth Council Directive of July 25, 1978*, 21 O.J. Eur. Comm. (No. L. 222) 11, 1 Common Mkt. Rep. (CCH) ¶ 1371 (1978) [hereinafter Fourth Directive].

Council Directive of December 16, 1982<sup>86</sup> [hereinafter Accounting Directives] governs preparation, content, and presentation of information in financial statements.

Noticeably absent from the current EC disclosure requirements are any provisions requiring disclosure of information regarding security issuances not listed on an official exchange.<sup>87</sup> The absence of such provisions constitutes the primary difference between EC disclosure requirements and the provisions of the Securities Act and the Exchange Act of 1934. Specifically, the Securities Act requires extensive disclosure when securities are initially offered and issued to the public whether or not they will be traded on a securities exchange,<sup>88</sup> and the Exchange Act applies not only to issuers whose shares are traded on a stock exchange but also to issuers whose securities are traded over-the-counter or issuers who have in excess of certain shareholder and total assets thresholds.<sup>89</sup> It should be pointed out, however, that this difference is not as significant as it may appear since currently most issuers list Eurosecurities on an exchange to satisfy the needs of institutional investors who may be restricted by their domestic authorities as to the types of investments that they may acquire and hold.<sup>90</sup>

On January 13, 1981, the EC Council proposed a directive that would require information disclosures applicable to initial public offerings of securities not to be listed on an exchange [hereinafter Proposed Directive].<sup>91</sup> The type of information disclosure the Proposed Directive requires is equivalent to the disclosure requirements that the current Information Directive<sup>92</sup> requires for initial public offerings of securities not to be listed on an exchange, but falls considerably short of the disclosure requirements under the U.S. securities laws.

### *1. Listing Directive: Listing Standards and Continuous Disclosure Standards*

The Listing Directive enumerates several standard conditions which each EC Member State must incorporate into its regulatory scheme. Designed to establish uniformity of listing requirements among the Member States, the conditions apply to issuers seeking to list their securities on an official exchange. The Directive charges each Member State with the responsibility of designating a competent authority to review compliance with the

86. *Seventh Council Directive of June 13, 1983*, 26 O.J. Eur. Comm. (No. L 193) 1, 1 Common Mkt. Rep. (CCH) ¶ 1421 (1983) [hereinafter *Seventh Directive*].

87. *See infra* Part III.A.

88. Securities Act of 1933, § 7, sched. A, 15 U.S.C. § 77g(1982).

89. Securities Exchange Act of 1934 § 12(b), 15 U.S.C. § 78l(b), (g) (1982).

90. Internationalization Study, *supra* note 1, at III-40.

91. *Amended Proposal for a Council Directive*, 25 O.J. Eur. Comm. (No. C 226) 4, 1 Common Mkt. Rep. (CCH) ¶ 1751 (amended July 19, 1982) [hereinafter *Proposed Directive*].

92. *Compare id.*, art. 6 and scheds. A-C at 6, 14, 1 Common Mkt. Rep. (CCH) at 1751F, 1752F-H with *Information Directive*, *supra* note 83, art. 5 and scheds. A-C, 1 Common Mkt. Rep. (CCH) at 1731E, 1733-1733B.

Directive and, where appropriate, to deny the listing of, or to delist, securities. Certain conditions have separate though overlapping requirements for equity and debt securities.

The Directive is composed of two separate parts. The first part of the Directive imposes conditions precedent to listing, and the second part imposes continuing reporting obligations on the issuer once the securities have been listed.

Among the conditions precedent to listing equity securities are the following:

- \* the issuing company and the shares must be in compliance with the laws of the jurisdiction in which the issuing company was organized;
- \* the company must have a minimum capitalization of one million European Community Units [hereinafter ECU],<sup>93</sup> must have published or filed with the appropriate domestic agency within the jurisdiction in which the issue is to be listed, its annual accounts for the three financial years preceding the application for admission to listing,<sup>94</sup> and the shares must be freely negotiable and widely distributed to the public.<sup>95</sup>

The listing requirements applicable to a debt issue include requirements that the company be in compliance with the laws to which it is subject, that the debt be freely negotiable, and that the minimum amount of the loan must be 200,000 ECU.<sup>96</sup>

According to the terms of the Listing Directive, the competent authority must require companies which have been admitted to listing to agree to certain undertakings and to supply certain information on a continuing basis. Such undertakings include: giving equal treatment to all shareholders who are in the same position,<sup>97</sup> providing shareholders with notice of shareholder meetings, and providing shareholders with notice of dividends and rights of offerings, as well as an opportunity to exercise their rights to vote.<sup>98</sup> With regard to the disclosure obligation, the company must make available to the public on a continuing basis its financial statements consisting of its most recent annual accounts and its last annual report, the preparation of which is

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93. U.S.\$1,249,430.00 using a conversion rate as of March 14, 1988.

94. The Directive provides that the competent authorities in each Member State may derogate from this condition where "such derogation is desirable in the interests of the company or of investors and where the competent authorities are satisfied that investors have the necessary information available" to make informed investment decisions. Listing Directive, *supra* note 82, 1 Common Mkt. Rep. (CCH) at 1722I.3.

95. The Directive provides that so long as twenty-five percent of the equity issue is placed to individuals the requirement that the issue be widely distributed to the public will be deemed to have been met. Listing Directive, *supra* note 82, sched. A(II)(4) at 27, 1 Common Mkt. Rep. (CCH) at 1722. The purpose of requiring such equity placement is to ensure that individuals remain a part of the investment market which has increasingly come to be dominated by institutional investors. There is no comparable requirement under U.S. federal securities laws.

96. U.S.\$249,886.00 as of March 14, 1988.

97. I.e., holding the same type, class, and series of securities.

98. Listing Directive, *supra* note 82, sched. C at 30, 1 Common Mkt. Rep. (CCH) at 1722B.

governed by the Accounting Directives.<sup>99</sup> As part of its continuing disclosure obligation, a company which has listed its securities must undertake to "inform the public as soon as possible of any major new developments in its sphere of activity which are not public knowledge and which may . . . lead to substantial movements in the price of its shares."<sup>100</sup> The information the Directive requires must be published in a newspaper of general circulation or the "national gazette" in the jurisdiction in which the securities are to be listed. In the alternative, the issuer may publish a notice indicating the place at which such information can be obtained without charge. The Listing Directive also contains a provision which requires that equivalent information be made available to the market at exchanges in different Member States and in any other state in which the issuer has listed its securities.

There are several significant differences between the requirements set out in the Listing Directive and requirements under U.S. securities laws. The accounting standards which apply to financial statements issued pursuant to the Accounting Directives are generally considered not to be as stringent as those required in connection with U.S. securities regulation.<sup>101</sup> The disclosure requirement, which provides that an issuer inform the public as soon as possible of any "major new developments" in its sphere of activity which may lead to substantial movements in the price of the shares, is probably also a less stringent standard than that required pursuant to Rule 10b-5.<sup>102</sup> It is not apparent whether Rule 10b-5 requires any movement in the market price of the shares, let alone substantial movement, before the obligation to disclose arises; however, this may be a distinction of form rather than substance since it is market impact which causes damages, a necessary element of 10b-5 liability.

The SEC and EC requirements are similar with respect to requirements for filing information previously disclosed in other jurisdictions. The SEC requires such "equivalent information" disclosure under Form 6-K<sup>103</sup> of foreign issuers required to file pursuant to Rules 13a-16 or 15d-16 of the Exchange Act.<sup>104</sup> Such an issuer is required to file with the SEC any information which is "significant" with respect to several enumerated matters, affecting mainly its operation and profitability, if, in addition, either it was required to make the information public in its country of domicile, it has

99. See *infra* text accompanying notes 145-58.

100. Listing Directive, *supra* note 82, sched. C(5)(a) at 30, 1 Common Mkt. Rep. at 1722B. An exception can be obtained if disclosure would prejudice the legitimate interests of the company. *Id.*

101. See *infra* text accompanying notes 145-58.

102. 17 C.F.R. § 240.10b-5 (1987).

103. Form 6-K, general instruction B, 4 Fed. Sec. L. Rep (CCH) ¶ 30,971 (Dec. 6, 1979)(report of foreign issuer pursuant to rules 13a-16 under the Securities Exchange Act of 1934) [hereinafter Form 6-K].

104. 17 C.F.R. § 240.13a-16, .15d-16 (1987).

filed the information with a foreign exchange and such exchange has made it public, or it has provided the information to its security holders.<sup>105</sup>

The EC similarly requires "Equivalence of Information" under paragraph 6(b) of Schedule C of the Listing Directive.<sup>106</sup> This paragraph requires that equivalent information be filed with each exchange upon which the security is listed, rather than requiring that a single public filing be made, as required by SEC Form 6-K. Nevertheless, the content of the equivalence of information requirements of the Listing Directive and the content of Form 6-K are very similar.

The principal difference between these two requirements concerns the extent of the disclosure. The Listing Directive limits the information which must be provided to that which, "may be of importance for the evaluation of shares."<sup>107</sup> In contrast, 6-K requires the issuer to provide all information which is "significant" to several enumerated matters or "any other information the registrant deems of material importance to security holders."<sup>108</sup> As the U.S. Supreme Court made clear in *T.S.C. Industries v. Northway*,<sup>109</sup> the ambit of "materiality" extends beyond the mere value of the stock. Thus, U.S. securities laws require a broader spectrum of information disclosure than does the EC Listing Directive, which simply focuses on information regarding the value of shares.

## 2. Information Directive: Disclosures to Investors Upon Public Offering

The Information Directive<sup>110</sup> requires the disclosure of certain information regarding securities being offered to the public by issuers. The Information Directive applies to "securities which are the subject of an application for admission to official listing on a stock exchange situated or operating within a Member State"<sup>111</sup> and delineates numerous items of information [hereinafter Listing Particulars] which must be published as a condition precedent to an issuer being listed on an official exchange.<sup>112</sup> The information required is that which is necessary to "enable investors and their investment advisors to make an informed assessment of the assets and liabilities, financial position, profits and losses, and prospects of the issuer and of the rights attaching to such securities."<sup>113</sup> The minimum disclosure requirements for Listing Particulars are set out in detail with separate, though overlapping, requirements for

105. SEC Form 6-K, *supra* note 103, at 30,971.

106. Listing Directive, *supra* note 82, sched. C(6) at 31, 1 Common Mkt. Rep. at 1722B.

107. *Id.*

108. Form 6-K, *supra* note 103, at 30,971.

109. 426 U.S. 438, 449 (1976)(defining materiality as information which a reasonable investor would have considered important in making an investment decision).

110. Information Directive, *supra* note 83.

111. *Id.* art. 1, para. 1, at 2, 1 Common Mkt. Rep. (CCH) at 1731A.

112. *Id.* art. 3, at 2, 1 Common Mkt. Rep. (CCH) at 1731C.

113. *Id.* art. 4, para. 1, at 2, 1 Common Mkt. Rep. (CCH) at 1731D.

equity securities<sup>114</sup> and debt securities.<sup>115</sup> Exemption from the disclosure requirements can be obtained if the offering involves "securities which have been the subject of a public issue" and if "not more than 12 months before the admission of the securities to official listing, a document, regarded by the competent authorities as containing information equivalent to that of the Listing Particulars has been published in the same Member State."<sup>116</sup> The issuer may omit certain information set out in the Listing Particulars based upon the type of security offered, the nature of the offer, and the persons to whom the offer is directed.<sup>117</sup>

The information which must be disclosed generally covers the following areas:

- \* the issuer and its capital structure;
- \* those persons responsible for preparing the disclosure documents and for the auditing of financial accounts;
- \* the total amount of the issue or placing, the number of shares offered, the rights attaching to the shares, and information with respect to the listing application;
- \* the issue price, the period in which the offer is to remain open, the extent to which underwritten, and the expenses of the offering;
- \* the assets and liabilities, the financial position, and the profits and losses of the issuer;
- \* the recent developments and prospects for the issuer; and
- \* the underwriters, the underwriting discounts or commissions, and the net proceeds to the issuer.<sup>118</sup>

The Information Directive charges each Member State with selecting a competent authority to review and approve Listing Particulars prior to publication. Such review, however, is limited to a check that the information the issuer supplies is complete according to the Directive; no substantive review of the accuracy of the supplied information is required.<sup>119</sup> The Listing Particulars must be published within a reasonable time period prior to the date the listing is to become effective and must be published either in a newspaper or newspapers circulated throughout the Member State or widely circulated therein, or in the form of a free brochure. In addition, either the complete Listing Particulars or a notice stating where the Listing Particulars have been

114. *Id.* sched. A at 11, 1 Common Mkt. Rep. (CCH) at 1733.

115. *Id.* sched. B at 19, 1 Common Mkt. Rep. (CCH) at 1733A.

116. *Id.* art. 6, para. 1(a), at 3, 1 Common Mkt. Rep. (CCH) at 1731F.

117. *Id.* arts. 8-17, at 4-7, 1 Common Mkt. Rep. (CCH) at 1731H-1731S.

118. *Id.* art. 18, paras. 1-3, at 8, 1 Common Mkt. Rep. (CCH) at 1731T.

119. *Id.* art. 18, paras. 1-3, at 8, 1 Common Mkt. Rep. (CCH) at 1731T. In practice, the issuer is likely to carefully conduct due diligence investigations in order to protect itself from liability in anti-fraud litigation. In the United Kingdom, verification of disclosed information is accomplished by means of written responses from various of the issuer's insiders to a long series of written questions submitted by the underwriter's attorneys. The responses are designed to confirm every point of fact, regardless of its materiality. Wolfrom & Bennet, *Multinational Offerings: A United States Perspective After British Telecom, British Gas and British Airways*, 87 COLUM. BUS. L. REV. 339, 351 (1987).

published and where they may be obtained must be inserted in a publication designated by the Member State.<sup>120</sup>

There are important differences between the Directive's disclosure requirements and comparable U.S. requirements. Since the Directive applies to securities for which listing is sought, it is most comparable to the requirements of SEC Form 10-K.<sup>121</sup>

In general, disclosure requirements under the Directive are not as stringent as comparable U.S. requirements.<sup>122</sup> Specifically, there are five distinctions which are key to understanding a comparison between U.S. and EC disclosure laws. First, one major difference between the Information Directive and the requirements under U.S. law arises in connection with the required disclosure of the business prospects of the issuer, known as "soft information." The disclosure of soft information is encouraged under the Securities Act so long as it is made upon a reasonable basis, disclosed in good faith, and accompanied by a statement of the underlying assumptions.<sup>123</sup> In practice, however, few issuers supply such information since it is not possible to be adequately certain that one has met the above standard and because of the potential litigation which such projections may engender. By contrast, the Directive requires that certain soft information be disclosed with respect to the business prospects of the issuer.<sup>124</sup> An issuer must disclose information regarding its profit prospects for at least the current financial year.<sup>125</sup>

A second major difference between the Information Directive and requirements under U.S. law is that unlike the Securities Act, the Information

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120. Information Directive, *supra* note 83, art. 20 at 8, 1 Common Mkt. Rep. (CCH) at 1731V.

121. 4 Fed. Sec. L. Rep. (CCH) ¶ 27,302 (Nov. 20, 1986)(general form for registration of securities). However, since nonexempted newly offered securities would require the filing of either Form S-1; 2 Fed. Sec. L. Rep. (CCH) ¶ 7121 (Nov. 20, 1986), Form S-2, *id.* at 7141, or Form S-3, *id.* at 7151 (June 5, 1987), of the Securities Act, comparison to the requirements contained therein is also appropriate. Of course, the information required pursuant to an S-1 registration statement is substantially more extensive than that required by Form 10. A detailed analysis of such differences is not undertaken in this paper.

122. The less stringent requirements in the EC could well be a result of primarily cultural differences and may be a reflection of the less litigious nature of European society.

123. Regulation S-K, 17 C.F.R. § 229.303, instruction 7 (1987); Rule 175, 17 C.F.R. § 230.175(a),(c) (1987) (pertaining to "forward-looking statements").

124. Information Directive, *supra* note 83, sched. A, ch. 7, at 18, 1 Common Mkt. Rep. (CCH) at 1733. For example, the "Prospects" section of the Listing Particulars for Pacer Systems, Inc., prepared pursuant to a 1985 placing of equity securities on the London Stock Exchange, made several bold statements as to projected performance. After a brief summation of prior performance, there were numerical projections of revenues and earnings for the next year. It also made statements that the Company "has the potential to capture a major share" of certain product markets and that the Directors believe that "there is a substantial market" for newly developed products which the Company "is well placed to exploit." In the Listing Particulars for a 1985 offer of equity shares in London for Laura Ashley Holdings p.l.c., profits of the Company and dividends on the offered shares were forecast. As to future growth of the company, "further substantial growth" was forecast based upon certain features of the Company's structure and market.

125. Information Directive, *supra* note 83, sched. A, ch. 7.2, at 18, 1 Common Mkt. Rep. (CCH) at 1733.

Directive does not apply to classes of securities which are not officially listed and for which the issuers will not seek official listing.<sup>126</sup>

A third distinction between U.S. laws and the Directive regards disclosing information concerning the description of the issuer's business. Form 10 requires a broad disclosure of an issuer's business, including revenue, operating profits and losses, and identifiable assets attributable to the registrant's industry segments for the previous five fiscal years.<sup>127</sup> In contrast, the Directive requires only a breakdown of net turnover by category of activity and geographical market for the previous three fiscal years.<sup>128</sup>

The fourth area in which a significant difference exists involves the disclosure of management background, remuneration, and unusual transactions with the issuer. Form 10 requires disclosure of cash, cash equivalent, and contingent forms of remuneration for each of the five most highly compensated directors or executives earning \$60,000 or more per year.<sup>129</sup> Only the total amount of remuneration paid to administrative, management and supervisory bodies as a group must be disclosed under the Information Directive.<sup>130</sup> The Information Directive requires that only limited information be disclosed with respect to unusual transactions between the issuer and its managers, administrators, and supervisors.<sup>131</sup> With respect to loans granted to such persons or guaranteed for their benefit by the issuer, only the total amount of such loans and guarantees must be disclosed.<sup>132</sup> Limited information regarding the business background and experience of management must be disclosed under the Directive. Only the disclosure of names, addresses, and functions served on behalf of the issuing company of the members of the administrative, management or supervisory bodies (and founders, if the company is less than five years old) is required.<sup>133</sup> No extensive background or legal information need be provided. In contrast, Form 10 requires extensive disclosure of the business experience and background of management, including certain relationships which may result in conflicts with the managers' fiduciary duties and involvement in certain legal proceedings.<sup>134</sup>

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126. *But see infra* text accompanying note 159. However, newly issued securities of a class which are already listed must also be listed pursuant to the Listing Directive. Listing Directive, *supra* note 82 sched. C, Item 1, 1 Common Mkt. Rep. (CCH) at 1722B.

127. Regulation S-K, *supra* note 123, § 229.101(b).

128. Information Directive, *supra* note 83, sched. A, ch. 4.1.1, at 14, 1 Common Mkt. Rep. (CCH) at 1733.

129. Regulation S-K, *supra* note 123, § 229.402.

130. Information Directive, *supra* note 83, sched. A, ch. 6.2.0, at 18, 1 Common Mkt. Rep. (CCH) at 1733.

131. *Id.* ch. 6.2.2; *cf.* Regulation S-K, *supra* note 123, § 229.404 (disclosure of transactions between issuers and management).

132. Information Directive, *supra* note 83, sched. A, ch. 6.2.3, at 18, 1 Common Mkt. Rep. (CCH) at 1733.

133. *Id.* ch. 6.1.

134. Regulation S-K, *supra* note 123, § 229.402.

Finally, Form 10 and the Directive differ with respect to which shareholders must disclose interest information. The Directive only requires disclosure of the interests of shareholders who, directly or indirectly, own a portion of the capital of the issuer which meets a minimum designated threshold in amount. The Member States are permitted to fix the threshold as high as twenty percent of the issuer's equity shares.<sup>135</sup> Form 10 requires the disclosure of the name, address, and the amount of securities beneficially owned with respect to any person who holds more than five percent of any voting class of securities of the issuer.<sup>136</sup> Form 10 also requires that each director's holdings and the collective holdings of the directors and officers be disclosed.<sup>137</sup>

### 3. *Interim Report Directive*

The Interim Report Directive is designed to complement the Listing and Information Directives by requiring that companies having shares admitted to listing on an official exchange publish certain information on a regular basis. The Directive requires that each listed company publish half-yearly reports consisting of figures and an explanatory statement relating to net turnover, profits, and losses during the first six months of each fiscal year and requires a comparative analysis with respect to the corresponding period of the preceding year.<sup>138</sup> The Interim Report Directive applies only to equity securities and requires publication within four months of the end of the six-month period.<sup>139</sup> The report must include an "explanatory statement" designed to "enable investors to make an informed appraisal of the company's business during the relevant period."<sup>140</sup> The report is to be published in a widely circulated newspaper or newspapers or the "national gazette." In the alternative, it can be made available to the public at a place indicated in a published announcement or by other equivalent means and made available to the competent authorities in the Member State on or before the date it is published in such Member State.<sup>141</sup>

The Interim Report Directive can be analogized to the requirements of Form 10-Q, promulgated under the Exchange Act.<sup>142</sup> Form 10-Q requires certain financial information to be reported on a quarterly basis for debt and equity issuers. In addition to the information required by the Interim Report Directive, Form 10-Q also requires the presentation of a certain balance sheet

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135. Information Directive, *supra* note 83, sched. A, ch. 3.2.7, at 14, 1 Common Mkt. Rep. (CCH) at 1733.

136. Regulation S-K, *supra* note 123, § 229.403(a).

137. *Id.* § 229.403(b).

138. Interim Report Directive, *supra* note 84, art. 5, at 27, 1 Common Mkt. Rep. (CCH) at 1741E.

139. *Id.* art. 4, at 27, 1 Common Mkt. Rep. (CCH) at 1741D.

140. *Id.* art. 5, para. 6, at 28, 1 Common Mkt. Rep. (CCH) at 1741E.

141. *Id.* art. 7, at 28, 1 Common Mkt. Rep. (CCH) at 1741G.

142. Form 10-Q, 4 Fed. Sec. L. Rep. (CCH) ¶ 31,031 (March 16, 1982).

and statements of source and application of funds.<sup>143</sup> Another primary difference between the Interim Report Directive and Form 10-Q is that financial information and analysis comprise only part of the disclosure requirements under Form 10-Q; it also requires information regarding legal proceedings, changes in the securities' terms, information regarding matters submitted to shareholder vote, and other significant matters.<sup>144</sup> The Directive, thus, requires disclosure of a much narrower range of information than does Form 10.

#### 4. *Accounting Directives*

The EC has adopted accounting directives designed primarily to harmonize the financial reporting requirements throughout the Community. The Fourth Directive, adopted July 25, 1978<sup>145</sup> regulates the layout and standards for the financial reports which companies must publish in connection with the requirements of other directives and requires that the annual accounts and an annual report be published or otherwise made available to the public.<sup>146</sup> The annual accounts must (i) include a balance sheet, profit and loss account and notes including specified disclosures regarding the company's principal accounting policies,<sup>147</sup> (ii) give a "true and fair view of the company's assets, liabilities, financial position and profit or loss,"<sup>148</sup> and (iii) be drawn up in accordance with the provisions of the Directive.<sup>149</sup> The Directive also requires that the annual accounts be audited by an independent accountant and sets forth the layout and contents of the documents comprising the annual accounts.<sup>150</sup> The annual report must include a fair review of the company's business and position, describe the important events since the end of the financial year, and set forth information relating to the company's likely future developments, as well as activities in research and development.<sup>151</sup>

The primary difference between the Fourth Directive and U.S. requirements concerns the required contents of annual reports. The U.S. requirements emphasize nonfinancial disclosure to a greater degree than the Directive. Form 10-K, promulgated pursuant to the Exchange Act, can be analogized to the Directive. It requires, in addition to inclusion in the annual

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143. *Id.* pt. I, item 1.

144. *Id.* pt. II, items 1-6.

145. Fourth Directive, *supra* note 85.

146. *Id.* arts. 46, 47, at 27, 1 Common Mkt. Rep. (CCH) at 1372W, 1372X.

147. *Id.* arts. 2, 43, at 12, 25, 1 Common Mkt. Rep. (CCH) at 1371B, 1372T.

148. *Id.* art. 2, para. 3, at 12, 1 Common Mkt. Rep. (CCH) at 1371B.

149. *Id.* art. 2, para. 2, at 12.

150. *Id.* art. 51, at 28, 1 Common Mkt. Rep. (CCH) at 1373A.

151. *Id.* art. 46, at 27, 1 Common Mkt. Rep. (CCH) at 1372W.

report of conforming financial statements required by Regulation S-X,<sup>152</sup> extensive narrative disclosure with respect to the company's business, legal proceedings, and other significant matters.<sup>153</sup> Significantly, the Fourth Directive annual report requires more information of the type which U.S. companies would consider "soft information", requiring the company to discuss "the company's likely future development" in its annual report.<sup>154</sup>

The Seventh Directive of June 13, 1983<sup>155</sup> enumerates requirements for the preparation of consolidated accounts and consolidated annual reports for parent corporations with one or more subsidiaries.<sup>156</sup> It sets out in detail the layout and contents of the consolidated accounts and reports<sup>157</sup> and requires that they be audited by an independent accountant.<sup>158</sup>

### 5. Proposed Prospectus Directive

The Proposed Directive of January 13, 1981 [hereinafter Proposed Directive]<sup>159</sup> would require that an issuer offering shares to the public provide listing particulars to the public in form and substance equivalent to those required under the Information Directive. The Proposed Directive would apply to "securities which are offered directly or indirectly by the issuer for subscription or sale to the public within one or more Member States, whether or not listed on an official exchange."<sup>160</sup> For purposes of applying the provisions of the Directive, an offer to the "public" is an offer "not addressed exclusively to a restricted circle of persons."<sup>161</sup> A "restricted circle of persons" is defined as an "identifiable category of persons or bodies known to the offeror, to whom the offer is directly communicated" and who are "in possession of sufficient information to be able to make a reasonable evaluation of the offer."<sup>162</sup> The Proposed Directive provides that each Member State can designate the maximum number of persons (not to exceed 250) to which an offer may be made and still be considered an offer to a restricted circle of persons, regardless of the method by which the offer is communicated.<sup>163</sup>

Since the current EC directives do not apply to unlisted securities, adoption of the Directive by the EC Council would be a major step towards eliminating one of the principal differences between U.S. and EC disclosure

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152. Regulation S-X, 17 C.F.R. § 210.1-01 (1987).

153. Regulation S-K, *supra* note 123, § 229.101-.103.

154. Fourth Directive, *supra* note 85, art. 46, para. 2(b), at 27, 1 Common Mkt. Rep. (CCH) at 1372W.

155. Seventh Directive, *supra* note 86.

156. *Id.* art. 1, at 1, 1 Common Mkt. Rep. (CCH) at 1421A.

157. *Id.* arts. 16-36, at 7-13, 1 Common Mkt. Rep. (CCH) at 1421R-1422L.

158. *Id.* art. 37, at 13, 1 Common Mkt. Rep. (CCH) at 1422M.

159. Proposed Directive, *supra* note 91, 1 Common Mkt. Rep. (CCH) at 1751. The Proposed Directive has not yet been adopted and discussion of the Directive was recently suspended; however, discussions are expected to resume in the near future.

160. *Id.* art. 1, para. 1, at 4, 1 Common Mkt. Rep. (CCH) at 1751A.

161. *Id.* para. 2.

162. *Id.*

163. *Id.*

requirements; however, the same regulatory differences as those under the Information Directive would still apply.<sup>164</sup> In addition, exemption for securities offered to a "restricted circle" of persons is broader than the analogous safe harbor provided under Regulation D of the Securities Act which allows for private placements in excess of \$500,000 only if there are no more than thirty-five non-accredited purchasers,<sup>165</sup> and is certainly broader than the general private placement exemption provided by section 4(2) of the Securities Act, which sets out stricter standards for both offerees and purchasers.<sup>166</sup>

### III. SECURITIES OFFERINGS IN THE UNITED KINGDOM

This section will discuss the general requirements governing the offering of securities in the United Kingdom, the continuing reporting obligations, and the participants in a distribution.

#### A. General Requirements

Prior to the adoption of the Financial Services Act<sup>167</sup> [hereinafter FSA], the Companies Act of 1985<sup>168</sup> [hereinafter Companies Act] primarily governed securities regulation. The FSA represents an attempt to restore investor confidence in the U.K. securities market. Investor confidence had waned as a result of several financial scandals arising in large measure from the former self-regulatory aspects of the system incumbent under the Companies Act. The FSA supersedes the prospectus and public offer provisions of the Companies Act, thus providing a more rigid regulatory scheme.

The FSA provisions relevant to disclosure and official review of securities offerings are divided into two parts. The first, Part IV, provides the requirements which must be met if a security is to be listed on the Official List of the Stock Exchange. The second, Part V, applies to securities which are not listed in accordance with Part IV of the FSA. The FSA's primary significance is that it brings the regulation of public offers of unlisted securities generally in line with the requirements applicable to offers of listed securities. Under the FSA, no advertisement can be issued offering securities which are not listed or the subject of a listing application unless a prospectus containing specified information relating to the securities has been submitted to the Registrar of Companies and published,<sup>169</sup> although the Exchange Council may designate certain types of securities and offers to be exempted.<sup>170</sup>

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164. See *supra* text accompanying notes 120-37.

165. Regulation D, 17 C.F.R. § 230.506 (1987).

166. Securities Act of 1933, § 4(2), 15 U.S.C. § 77(d) (1982). See *supra* notes 55-56 and accompanying text.

167. Financial Services Act, 1986, ch. 60.

168. Companies Act, 1985, ch. 8.

169. Financial Services Act, *supra* note 167, § 142(6).

170. *Id.* § 160.

Section 142 of the FSA endows the Council of the Stock Exchange<sup>171</sup> [hereinafter Exchange Council] with the authority to make rules in connection with the official listing of securities.<sup>172</sup> The Exchange Council has adopted as listing rules under the FSA the requirements regarding listing set forth in a publication entitled the Admission of Securities to Listing [hereinafter Yellow Book].<sup>173</sup>

The Yellow Book conditions admission of securities to listing on the Stock Exchange upon the approval and publication of listing particulars designated by the Exchange Council, or the publication of a document which the Exchange Council specifies as containing equivalent information.<sup>174</sup> Listing particulars must contain such information as "investors and their professional advisors would reasonably require, and reasonably expect to find there, for the purpose of making an informed assessment of (i) the assets and liabilities, financial position, profits and losses, and prospects of the issuer of the securities; and (ii) the rights attaching to those securities."<sup>175</sup> The scope of the information required is subject to the Exchange Council's discretion, taking into account the nature of the securities offered, the nature of the issuer, the nature and sophistication of the prospective purchaser, and the availability of information through other sources.<sup>176</sup>

The issuer is under a continuing obligation to provide supplementary listing particulars in the event that there is a significant change affecting any matter contained in the listing particulars. In addition, the issuer must disclose any significant new matter which arises and which would have been required to be included at the time the listing particulars were prepared, if such change occurs following the securities' admission to the Official List.<sup>177</sup> A significant matter is one that would be considered significant for the purposes of making an informed investment decision.<sup>178</sup>

An issuer not incorporated in Great Britain or Northern Ireland must deliver a copy of the particulars, prior to their publication, to the appropriate Registrar of Companies in either England, Wales, or Northern Ireland.<sup>179</sup> Where listing particulars are, or are to be, published in connection with an

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171. The Council of the Stock Exchange is the governing body of the Stock Exchange. The "Stock Exchange" refers to the body having the full legal title of "The International Stock Exchange of the United Kingdom and the Republic of Ireland Limited." The "London Stock Exchange" refers only to the official stock exchange located in London.

172. Financial Services Act, *supra* note 167, § 142(6).

173. Yellow Book, *supra* note 7. See *infra* notes 179-95 and accompanying text.

174. Financial Services Act, *supra* note 167, § 144(2). Presumably, the drafters had in mind prospectuses which are prepared in accordance with the Yellow Book requirements, since the Exchange Council will have designated those requirements after the Act comes into effect.

175. *Id.* § 146(1). Note generally the similarity to portions of the disclosure requirements under the EC Information Directive. See *supra* note 113 and accompanying text.

176. *Id.* § 146(3).

177. *Id.* § 147(1).

178. *Id.* § 147(2); see *supra* notes 111-13 and accompanying text (comparison to EC standards).

179. *Id.* § 149(2)(c).

application for listing any securities, no advertisement is permitted until the contents of the advertisement have been approved.<sup>180</sup>

The Yellow Book's disclosure framework is comparable to that required pursuant to U.S. law under Regulation S-K. There are, however, a number of significant differences. The principal differences in the disclosure rules encompass requirements relating to the nature of the issuer's business, industry segment data, management's discussion and analysis of the company's financial condition and results of operations, management's business experience, remuneration and security ownership, and preparation of financial statements.

Under SEC regulations, an issuer must provide a detailed description of its business<sup>181</sup> and describe the general development of its business for the previous five years.<sup>182</sup> In comparison, the Yellow Book's requirements for historical development disclosure apply generally to issuers of equity securities, are substantially less detailed, and require only the disclosure of "any interruptions in the business which may have or have had a significant effect on the financial position of the company in the last twelve months."<sup>183</sup> Both the SEC regulations and the Yellow Book, however, provide for narrative descriptions of the business of the issuer.<sup>184</sup> The Yellow Book permits a substantially more limited discussion of business descriptions than the SEC regulations require. An issuer of equity securities in the United States is required to discuss six items in addition to those demanded by the Yellow Book, and an issuer of debt in the United States is required to discuss nine additional items.<sup>185</sup> Thus, an issuer which lists securities in the United Kingdom is not

180. *Id.* § 154(1).

181. Regulation S-K, *supra* note 123, § 229.101.

182. *Id.* § 229.101(a).

183. Yellow Book, *supra* note 7, § 3, ch. 2, paras. 4.9-4.11; *cf. id.* para. 4.12 (historical requirement applying to both equity and debt securities).

184. Regulation S-K, *supra* note 123, § 229.101(c); Yellow Book, *supra* note 7, § 3, ch. 2, pt. 4, para. 4.1.

185. Under Regulation S-K, an issuer of either debt or equity must disclose: (1) the principal products produced and services rendered, the principal markets for and methods of distribution of such products and services, and the amount or percentage of revenues produced by any group of similar products or services which account for greater than ten percent of total revenues; (2) the status of a new product or industry segment; (3) the sources and availability of raw materials; (4) the importance and the duration of all patents, trademarks, licenses, franchises, and concessions; (5) the seasonal fluctuations, if any, of an industry segment; (6) the practice of the issuer and the industry relating to working capital items; (7) the dependence of an industry segment on one customer or a few major customers and the identity of these customers; (8) the dollar amount of current backlog orders and the number of such orders as of a comparable date in the prior year; (9) the business contracts which may be renegotiated or canceled at the behest of the government; (10) the competitive conditions in the business; (11) the amounts spent on research and development; (12) material effect of complying with environmental regulations; and (13) the number of employees. Regulation S-K, *supra* note 123, § 229.101(c)(1).

The Yellow Book requires that a debt issuer discuss: (1) the products sold and services performed; (2) any significant new products or activities; (3) in cases where the issuer carries on two or more activities which are material, in terms of profits and losses, assets employed, or any other factor such figures and explanation as necessary to demonstrate the relative importance of each such activity; and (4) information regarding the extent to which the issuer is dependent on

required to provide as much detailed information in the business narrative as it must under U.S. law.

The second area where there are principal differences between the SEC regulations and the Yellow Book is the narrative and financial data description requirements. SEC regulations require that the business narrative aspect of a registration statement discuss each component of required information for each of its industry segments.<sup>186</sup> In addition, amounts of revenue and operating profit or loss, and identifiable assets derived from each industry segment must be discussed in the financial section.<sup>187</sup> The Yellow Book, on the other hand, does not require a segmented breakdown of either the narrative description of business activities or profit and loss information.<sup>188</sup>

A third difference arises in the area of management's discussion of the financial condition of the company. The SEC requires that the issuer disclose in detail its "financial condition, changes in financial condition, and results of operations."<sup>189</sup> The discussion must focus on the areas of liquidity, capital resources, and results of operations.<sup>190</sup> The analogous section of the Yellow Book only requires supplemental narrative of the raw financial data when the "annual accounts do not give a true and fair view of the assets and liabilities, financial position and profits or losses" of the company.<sup>191</sup> The provision is ambiguous in that it fails to designate what constitutes a "true and fair" view of the issuer's financial statements and also fails to designate the specific information which must be disclosed to supplement the information supplied.

Fourth, the SEC regulations and the Yellow Book differ in the area of management's business experience disclosure. The SEC regulations regarding disclosure of management's business experience, remuneration, and ownership of the issuer's shares are far more extensive than are the Yellow Book counterparts. Under U.S. Regulation S-K, detailed information concerning the background, business experience over the past five years, other corporate positions, involvement in legal or bankruptcy proceedings, compensation and amount of stock held must be disclosed generally for each of the directors and executives of the company.<sup>192</sup> Under the Yellow Book's comparable provisions, similar categories of disclosure are required; however, such disclosure generally relates only to the directors of the issuer and only to the directors as

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patents and licenses. In addition to the above four items, an issuer of equity is required to discuss (5) its policy over the previous three years on research and development; and (6) the average number of employees over the previous three years. Yellow Book, *supra* note 7, § 3, ch. 2, paras. 4.1, 4.2, 4.4, 4.8, 4.9, 4.11.

186. Regulation S-K, *supra* note 123, § 229.101(c).

187. *Id.* § 229.101(b).

188. Yellow Book, *supra* note 7, § 3, ch. 2, para. 4.1.

189. Regulations S-K, *supra* note 123, § 229.303(a). This is referred to as the "Management's Discussion and Analysis" section of a prospectus.

190. *Id.*

191. Yellow Book, *supra* note 7, § 3, ch. 2, para. 5.11.

192. Regulation S-K, *supra* note 123, § 229.401-.403.

a group.<sup>193</sup> For example, the Yellow Book requires that the issuer disclose the “[a]ggregate of the remuneration paid and benefits in kind granted to the directors” and charged to overhead or the profit appropriation account during the previous financial year.<sup>194</sup> Thus, the Yellow Book is easier to comply with than the SEC requirements.

Finally, the Yellow Book and the SEC requirements differ with respect to the preparation of financial statements. The Yellow Book provides that U.K. Generally Accepted Accounting Principles [hereinafter GAAP] apply to the preparation of financial statements, except in the case of a foreign issuer who is required to conform with the standards of the International Accounting Standards Committee [hereinafter IASC].<sup>195</sup> U.S. GAAP standards differ somewhat from IASC guidelines, and some additional burden in this area may fall on U.S. issuers offering securities in the United Kingdom.<sup>196</sup> At present, the Yellow Book does not require compliance with the IASC requirements relating to segmented accounting.<sup>197</sup> One notable difference with respect to financial reports arises in connection with the acceptable age of submitted reports. The Yellow Book allows issuers to submit financial reports which are 180 days old,<sup>198</sup> while SEC requirements do not permit issuers to submit reports older than 135 days at the effective date of the registration statement.<sup>199</sup>

The FSA provides that no advertisement shall be made with respect to any security offered on an “approved exchange” or in a primary or secondary offering unless a prospectus conforming to the provisions of the FSA has been filed with the Registrar of Companies.<sup>200</sup> The FSA authorizes two exemptions whose implementation requires that the Secretary of State for Trade and Industry issue a statutory instrument. As yet, no such instrument has been enacted. One authorized exemption from the prospectus requirement would apply where an advertisement is of a “private character,” whether by reason of a connection between the offeror and offeree, or otherwise.<sup>201</sup> A wholly private offering, therefore, would not need to comply with any of the FSA’s requirements, and no filings or applications for exemption would be required.

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193. Yellow Book, *supra* note 7, § 3, ch. 2, pt. 6.

194. *Id.* para. 6.3.

195. *Id.* § 4, para. 5.

196. Herbert, *Harmonization of Accounting Standards*, 3 J. COMP. CORP. L. & SEC. REG. (Dec. 1981) at 175, 184 app. XIII-C.

197. Yellow Book, *supra* note 7, § 4, para. 5.

198. *Id.* § 4, para. 6. It should be noted, however, that where more than nine months have elapsed since the end of the financial year to which the last published annual accounts related, an interim financial statement covering at least the first six months of the current financial year must be included. *Id.* § 3, ch. 2, para. 5.9.

199. Regulation S-X, *supra* note 152, § 210.3-01 to .12-29.

200. Financial Services Act, *supra* note 167, §§ 158-60. An approved exchange is one approved by the Secretary of State for the purposes of the Act. *Id.* § 158(6).

201. *Id.* § 160(6)(a).

Exemption is also authorized where the advertisements are "issued to persons sufficiently expert to understand any risks involved."<sup>202</sup>

In addition to the requirements of the FSA, the Unlisted Securities Market [hereinafter USM]<sup>203</sup> provides certain disclosure requirements for securities listed and traded thereon. The USM is not a market for start-up companies per se, since a three-year trading history is usually required for admission, but, in some cases, securities of start-up companies may be admitted to trading. USM disclosure requirements generally cover the same matters as those covered by the Yellow Book, but in more general terms and with less specific disclosure required. In particular, less detail is required with respect to the terms of the issue and the nature of the securities offered. Financial disclosure is also somewhat less detailed, and audited financials may be up to nine months old.<sup>204</sup> The company, generally, must have a three year trading history and must include a statement that its accounts for those years have not been qualified. Financial statistics under various headings must be produced for the previous five financial years, or since incorporation, and the issuer must disclose any material changes since the date of the last accounts.<sup>205</sup> Although the USM does not require detailed financial statements, in practice such statements are generally prepared at the request of the sponsor of the issue.

An issuer must also provide certain documents to the Quotations Department of the Quotation Committee of the Stock Exchange upon application for review.<sup>206</sup> Based upon its review of the documents submitted, which includes a copy of the company's prospectus, the Quotations Committee will either accept the application for admission to trading or reject the applicant based upon a determination that the company's condition is such that admission would be detrimental to investors' interests. Upon admission to trading, disclosure materials must be published in a newspaper and can be distributed.

### B. Continuing Reporting Obligations

The Yellow Book imposes on an issuer who has listed securities on the U.K. Stock Exchange certain ongoing reporting obligations.<sup>207</sup> The Yellow Book's continuing disclosure obligations require a company to disclose such information as would prevent a false market from arising in connection with

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202. *Id.* § 160(6)(c).

203. The Unlisted Securities Market [hereinafter USM] is a trading market established for companies that have an insufficient history for full listing on the London Stock Exchange.

204. *See generally*, 10B H. BLOOMENTHAL, *supra* note 33, at UK 4-14 to 22.

205. *Id.* at UK 4-18 to 19.

206. *Id.* at UK 4-8, 11, 24. The Quotation Committee of the Stock Exchange is the Committee which oversees admission to trading on the USM. The USM was organized by the Stock Exchange as an alternative market for companies which do not wish to list securities on the Stock Exchange.

207. Yellow Book, *supra* note 7, § 5.

the issuer's securities.<sup>208</sup> In general, the requirements parallel those set out in the EC Listing Directive.<sup>209</sup>

### C. *Participants in a U.K. Distribution*

Corporate securities in the U.K. are generally underwritten by a bank or stockbroker, although not all debt securities are underwritten. In order to be listed upon the Stock Exchange, an applicant must be sponsored by a current member of the Exchange. The sponsor has certain responsibilities with respect to the issuer, e.g., ensuring that the directors provide necessary documentation and arranging for financial institutions to underwrite the issue. The nature of the sponsoring institutions is undergoing change and, pursuant to the "Big Bang",<sup>210</sup> foreign individuals and corporations are permitted to acquire interests in the member firms of the Exchange. In contrast to U.S. law, specifically the Glass-Steagall Act,<sup>211</sup> banks are not prohibited from acquiring interests in member firms.

Securities are generally offered to the public by means of an "offer for sale", which involves the issuing agent purchasing or subscribing for a block of securities which it in turn offers to the public. Although the securities are actually sold by the issuing agent, the Companies Act treats the disclosure document as having been distributed to the public by the issuer.<sup>212</sup>

Alternatively, securities may be "placed" directly to individuals and financial institutions. The Stock Exchange requires that at least twenty-five percent of the existing equity be in public hands immediately prior to trading.<sup>213</sup> Similarly, at least ten percent of the existing equity must be in public hands prior to trading on the USM.<sup>214</sup> These requirements are designed to ensure that small investors have the opportunity to purchase securities which are generally offered at bargain prices due to the price pressures exerted by institutional buyers. A placing may take one of two forms: an issuing agent may subscribe for the issue and then invite its clients to purchase the securities from it at a premium price, or the issuing house may simply act as an agent for the issuer by selling shares on its behalf. Placings are the most common method of distribution on the USM.

208. *Id.* § 5, ch. 2, para. 1.

209. *See supra* notes 99-100 and accompanying text.

210. *See supra* note 8.

211. 12 U.S.C. §§ 347a-347b, 412 (1982).

212. Superseding provisions of the Financial Services Act are expected to be implemented in July, 1988.

213. "Public hands" is defined as persons who are not associated with the directors or major shareholders. Yellow Book, *supra* note 7, § 1, ch. 2, para. 8. Although the nationality of the individuals holding such percentage of shares is not specified, the Yellow Book does require that the individuals reside in a Member State of the EC, except that account may also be taken of persons in a non-Member State, if the shares are listed in that state. *Id.*

214. "Public hands" is defined as shareholders other than directors, their related interests, and, in certain circumstances, other substantial holders, particularly those with broad representation. H. BLOOMENTHAL, *supra* note 33, at UK 4-1 to 6-13.

Ordinarily, a large securities issue will involve a lead Manager, a group of managers, and a selling group. The lead Manager and the issuer generally enter into a contract setting forth the respective obligations, including certain warranties and undertakings by the company regarding the accuracy of the documents being distributed.

#### CONCLUSION

Foreign securities markets can provide a U.S. issuer with an attractive financing alternative to the highly regulated domestic securities market. Such markets, in addition to making new resources available, can provide a broad international base of security holders. Release 4708, while lacking the force of law, states the SEC position that the highly technical and costly registration requirements of section 5 of the Securities Act were not intended to protect foreign nationals and, thus, are not applicable to securities sales abroad to foreign nationals where adequate precautions are taken to preclude distribution or redistribution in the United States or to U.S. nationals.

Offerings in Europe have become particularly attractive as a result of the emergence of international clearing houses and the adoption by the EC of certain EC Council Directives. Although an issuer must still be concerned with the manner in which the Directives have been implemented by the country or countries in which it wishes to issue its securities, the Directives nonetheless provide basic uniform requirements, facilitating multinational European offerings of securities. Notably, the Directives' requirements are in general substantially less onerous than the comparable requirements of the Securities Act and the Exchange Act. The required disclosure is usually less detailed, and the accounting standards are less stringent.

Nothing in the EC Directives, however, prohibits a country from adopting more stringent requirements for sales of securities in that country or for listing of securities on that country's exchanges. Indeed, Great Britain, whose London Stock Exchange is the economic center of the European market, has done so under the FSA. Nonetheless, even the FSA requirements are generally less burdensome than the corresponding U.S. requirements.

Corporations increasingly look to world-wide sources of capital, not only to take advantage of possibly cheaper sources of funding, but also for world-wide exposure of the company to foreign nationals and their markets. The current trend towards liberalized availability of the protection of Release 4708, together with the generally less stringent requirements of the EC markets, makes foreign offerings, particularly in the EC, an increasingly attractive financing alternative to domestic offerings and assists in making sources of foreign capital available to U.S. corporations.