REGULATORY PRINCIPLES AND THE INTERNATIONALIZATION OF SECURITIES MARKETS

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I

INTRODUCTION

There are several ways in which securities may be offered for sale in more than one country. A domestic issuer might make a new issue of debt or equity securities available in a single foreign jurisdiction, or he might issue the security simultaneously in foreign and domestic markets. A shareholder might sell domestic securities abroad, or sell foreign securities (or, in the United States, depository receipts representing them) in a domestic market. The expression *multinational securities offering* has been used in recent times to refer exclusively to the simultaneous multinational new equity issue. Given the obvious connections between simultaneous equity issues, however, non-simultaneous multinational issues, and cross-jurisdictional trading, and the perceived view that principles are needed for all aspects of the *internationalization* of securities markets, this essay will adopt a broader focus. It will touch upon aspects of multinational securities offerings in both the new issues and the trading senses, investigate the relationships of these phenomena to other forms of the *internationalization* of securities markets, and evaluate the appropriateness of certain regulatory approaches.

This article will explore and assess the attitude of the Securities and Exchange Commission towards some central questions concerning multinational securities offerings. It will evaluate conflicts of jurisdiction in an administrative rather than a curial field. To an outsider, it is striking that there exists a recurring appeal to "principles" in the SEC's decisionmaking process, rather than a focus on purely pragmatic considerations. The Commission justified the development of the integrated disclosure regime for foreign issuers during the period from 1979 to 1982 by invoking a principle of

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voluntarism.¹ A somewhat different principle of voluntarism has guided the Commission's rule-making on the question of disclosure exemptions to foreign issuers. This principle was especially noticeable in 1983 when the Commission decided to restrict the "information-supplying" exemption to section 12(g) of the Securities Exchange Act of 1934.² On the question of whether the registration requirements of the Securities Act of 1933 apply to offers and sales of U.S. securities to foreign investors, the Commission has consistently appealed to a principle enunciated twenty-two years ago: The Act will not apply if distribution is affected in a manner which will result in the securities coming to rest abroad.³

In 1984 and 1985, the Commission asked for comments on a wide range of questions about the *internationalization* of securities markets.⁴ Characteristically, the SEC seems to be searching for principles to guide its response to the questions which it has raised, and there is more than a hint that it wants to arrive at a set of principles regarding (or responding to) the *internationalization* of securities markets.

This article makes several arguments. First, *internationalization* is not a phenomenon to be regulated. Instead, various international economic, financial, and technological changes have created a new backdrop against which the old questions of market efficiency, investor confidence, and investor protection must be re-examined. Second, in the light of certain international trends, the Commission's old principles now tend to obscure the central questions about benefitting U.S. markets and U.S. investors. Third, and most important, good reasons exist for encouraging foreign issuers to use U.S. capital markets and for loosening the registration requirements of U.S. offerings sold abroad.

The article begins by exploring the idea of the *internationalization* of securities markets, and its relationship to regulatory policy. Next, attention is directed to the position of foreign issuers whose securities are traded in U.S. markets. The piece first considers the general arguments for treating these issuers differently from domestic issuers, and then evaluates the adequacy of the Commission's principles dealing with integrated disclosure, voluntary entry, and the "information-supplying" exemption to the section 12(g) reporting obligation. The article then focuses on the position of U.S. issuers abroad, considering the general arguments for qualified application of the

1. See *infra* notes 72-73 and accompanying text.

2. See *infra* notes 76-77 and accompanying text.

3. See *infra* notes 93-95 and accompanying text.

4. See, respectively, Request for Comments on Issues Concerning Internationalization of the World Securities Markets, Exchange Act Release No. 21,958, [1984-1985 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 83,759 (Apr. 18, 1985) [hereinafter Release No. 21,958]; Facilitation of Multinational Securities Offerings, Securities Act Release No. 6,568, [1984-1985 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 83,763 (Feb. 28, 1985) [hereinafter Release No. 6,568]; Request for comments concerning a concept to improve the Commission's ability to investigate and prosecute persons who purchase or sell securities in the U.S. markets from other countries, Exchange Act Release No. 21,186, [1984 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 83,648 (July 30, 1984) [hereinafter Release No. 21,186].

1933 Act, and assessing the Commission's principles. Finally, some remarks will be offered on the problems raised by simultaneous multinational equity offerings, which raise questions about both U.S. issuers abroad and foreign issuers in the United States.

II

THE COMPONENTS OF *INTERNATIONALIZATION*

Over the last decade, there has been much talk about the *internationalization* of securities markets. The expression is italicized to signify its uncertainty on two fronts. First, there have undoubtedly been some important recent developments in international securities practices, but doubt remains about the actual scale of *internationalization* to date, and much of the evidence has an anecdotal appearance. Perhaps responses to the SEC's request for information are helping the Commission to clarify the facts.⁵ To the extent that hard evidence is lacking, however, it would be prudent to bear in mind the distinction between (1) practices which are now technically possible and may come to pass and (2) practices which are currently established. Further, all should be wary (especially when it comes to making regulatory policy) of the "gee-whiz" responses of some financial journalists.

Second, *internationalization* is a highly ambiguous term. If the SEC ever organized a television quiz program, it could be the securities regulator's version of *I've Got a Secret*. The contestant thinks of a fraudulent securities transaction and gives us the clue that it contains at least one U.S. and one non-U.S. element. The panelists and audience would have to guess the true blend of domestic and foreign elements in the transaction. Upon calculation, any of thirty-two guesses would logically be accurate and empirically feasible responses to the clue, provided that the transaction's variable elements are limited to the nationality of the issuer, the place of issue, the nationality of the buyer, the nationality of the seller, and the place of the transaction. The game could, of course, be made harder by recognizing as relevant variables such matters as the principal places of business of the parties' broker-dealers, the place of the preparatory conduct of the defendant, and the location of all securities markets affected by the transaction.

Moving from the world of hypothetical quiz games to the reality of learned papers and conference after-dinner speeches, it is equally difficult to guess which kind of *internationalization* the speaker contemplates when he urges us not to forget the powerful movement in that direction. He might have in mind one or more aspects of cross-national securities transactions. For instance, he may be thinking of the various Eurobond and Euronote markets or the exotic world of SNIFs and RUFs,⁶ which U.S. issuers use

5. Release No. 21,958, *supra* note 4. For additional valuable information, see Thomas, *Internationalization of the Securities Markets: An Empirical Analysis*, 50 GEO. WASH. L. REV. 155 (1982).

6. For a survey of some practical and legal problems regarding syndicated note issuance and revolving underwriting facilities, and the Euromarkets generally, see Dunstan, *Eurocurrency Lending and Note Issues*, in R. AUSTIN & R. VANN, *PUBLIC COMPANY FINANCE* 324ff (1986).

extensively.⁷ It is probable (given market capitalization well beyond the resources of even the redoubtable Belgian dentists) that U.S. investors have a very substantial interest in all kinds of Eurosecurities in spite of transfer restrictions to U.S. citizens, such as "ninety-day lock-up" clauses, designed to avoid the registration requirements of the Securities Act of 1933.⁸ Conversely, one may be thinking of the growth of issues of U.S. bonds by foreign private and government issuers,⁹ or of foreign investor trading in debt securities issued in the United States.¹⁰ One may also be referring to equity matters—to issues of equities by U.S. corporations abroad,¹¹ to overseas trading in U.S. equities,¹² to overseas trading by U.S. investors,¹³ to foreign companies issuing equity in the United States,¹⁴ to the creation of ADR trading of foreign equities in the United States,¹⁵ or to trading by foreign investors in U.S. equity markets.¹⁶

In a very active takeover market, *internationalization* may be a reminder of the difficulties which arise when bidder and target are from different jurisdictions. When the bid includes a share exchange offer, the takeover will involve a double dose of international share trading, since target shares will cross to the bidder and the bidder's stock will cross to the sellers.

7. U.S. issuers raised \$6.2 billion in Eurobonds in 1983 and \$6.8 billion in the first half of 1984. See Release No. 21,958, *supra* note 4, at 87, 384.

8. See Henderson, *The Impact of U.S. Law on Euronote Facilities*, INT'L FIN. L. REV., Apr. 1985, at 26, 27-28; Stoakes, *How Public is a Euronote?* EUROMONEY, Jan. 1986, at 27.

9. Release No. 21,958, *supra* note 4, at 87,384, reports that 19 foreign private issuers raised \$2.3 billion and foreign governments raised \$3.1 billion of debt in the United States in 1984. See Scott, *Registration Requirements for Yankee Bond Issues in the U.S.*, INT'L FIN. L. REV., Mar. 1986, at 14.

10. Between early January and mid-March 1986, U.S. companies raised almost \$40 billion in straight and convertible bonds in the United States, at an annual rate of almost double the previous year's rate. See *The Unleveraging of America*, ECONOMIST, Mar. 29, 1986, at 61. The removal of interest-withholding tax has increased the appeal of these securities to foreign investors.

11. See Evans, *Offerings of Securities Solely to Foreign Investors*, 40 BUS. LAW. 69 (1984).

12. In January 1985, approximately 200 NYSE-listed companies were also listed on the LSE, 43 on the Paris Bourse, and 6 on the Tokyo Stock Exchange. See Release No. 21,958, *supra* note 4, at 87,385. There is a well-established over-the-counter (OTC) Euro-equities market in which U.S. stocks are traded. For a description of this market, see R. BURGESS, *CORPORATE FINANCE LAW* 25-27 (1985); Lim, *Nestle—Euro-equity Pioneer*, EUROMONEY, July 1985, at 14; *The International Equity League*, EUROMONEY, Nov. 1985, at 70; *A World of Global Shares*, ECONOMIST, May 31, 1986, at 90. The bulk of the trading is handled by merchant and investment banks rather than by members of the LSE. Allard & Shale, *The Death Throes of the London Stock Exchange*, EUROMONEY, Dec. 1985, at 16.

13. 1985 estimates were that U.S. institutions held \$10-13 billion in foreign stocks, compared to \$1.2 billion five to ten years ago. Release No. 21,958, *supra* note 4, at 87,384, citing *The Great Deregulation Explosion*, EUROMONEY, Oct. 1984, at 61.

14. Eighteen foreign companies (excluding Canadians) raised approximately \$1 billion in equity in the U.S. in 1983 and large amounts were raised from the 1984 Reuters and British Telecom issues. Release No. 21,958, *supra* note 4, at 87,384.

15. At the start of 1984, 46 foreign securities or ADRs were listed on the NYSE, 52 were listed on Amex, and 294 were quoted in NASDAQ. Release No. 21,958, *supra* note 4, at 87,385. In 1985, ADR trading in some British stocks exceeded trading turnover on the LSE, leading the LSE to announce that as from October 22, 1985, it would allow the New York affiliates of London member firms to take part in ADR trading, notwithstanding the Exchange's single capacity rules. See Shale & Winder, *Reuters Squares up to SEAQ*, EUROMONEY, Nov. 1985, at 85.

16. Net foreign purchases of U.S. equities increased from \$3.9 billion in 1982 to \$5.2 billion in 1983. Release No. 21,958, *supra* note 4, at 87,384.

Alternatively, *internationalization* may be intended to identify certain operational changes to securities markets, rather than the crossing of national boundaries by issuers and investors. Securities markets are becoming *internationalized* in this sense with the help of information technology, which permits some limited linkages of stock exchanges, automated clearing agencies, and quotation systems.¹⁷ Although progress has not yet been spectacular, given the capabilities of the electronic equipment, it has recently been argued that linkages will develop which will cause search and transaction costs of foreign investment to decline to a point of comparability with domestic investment.¹⁸

Another aspect of *internationalization* focuses on the establishment of multinational securities firms. Entry barriers have been rapidly breaking down over the past five years.¹⁹ Although significant changes have occurred elsewhere,²⁰ the progressive relaxation during 1986 by the London Stock Exchange of membership and other restrictive rules seems especially important, given the Exchange's market capitalization and turnover. Changes introduced on March 1, 1986, permit foreign external membership of the exchange,²¹ and on October 27th of that year (the date of London's "Big Bang") the fixed-rate commission and single capacity (jobbing) requirements will be removed.²² It will then become straightforward for some U.S.

17. The following developed or proposed linkages of exchanges are described by the SEC: The Singapore International Monetary Exchange and the Chicago Mercantile Exchange; the Sydney Futures Exchange and the Commodities Exchange of New York; the Boston Stock Exchange and the Montreal Exchange. See Release No. 21,958, *supra* note 4, at 87,385. The arrangements are far from uniform. A limited linkage between Amex and the Toronto Stock Exchange has begun, and there are proposals for linkages between the clearance and settlement systems of the major U.S. exchanges. As to a linkage of the settlement systems, see *London's Shield*, *ECONOMIST*, Mar. 29, 1986, at 68. The LSE is establishing an automated quotation system called SEAQ, structured similarly to NASDAQ, and there is now a two-year pilot linkage between these systems. Reuters already has a London based quotation system, which may become integrated with SEAQ. Shale & Winder, *supra* note 15, at 85. See generally Lim, *Can the Trading Floor Survive?* *EUROMONEY*, Dec. 1985, at 31.

18. Langevoort, *Information Technology and the Structure of Securities Regulation*, 98 *HARV. L. REV.* 747, 762-63 (1985).

19. For a description of some constraints to foreign entry which are now dissolving, see Miles, *Constraints on Broker-Dealers Operating Outside Their Home Country*, 4 *J. COMP. CORP. L. & SEC. REG.* 36 (1982). For a description of deregulatory progress up to early 1985, see Release No. 21,958, *supra* note 4.

20. For example, during 1984 non-residents were permitted to acquire at first fifteen percent and then fifty percent of Australian stockbroking companies. The proposals of the Ontario Securities Commission for limited entry have not yet been implemented and are controversial. See Release No. 21,958, *supra* note 4, at 87,391 (proposals noted).

21. See Note, *Stock Exchange Implements Three Key Changes*, *COMPANY LAW* 288 (1985). At least some U.S. securities firms and banks are strengthening their already significant London operations. See, e.g., *ECONOMIST*, Mar. 1, 1986, at 70 (Security Pacific's purchase of Hoare Govett). According to an address by the Governor of the Bank of England to the American Chamber of Commerce on January 21, 1986, ten U.S. commercial banks have bought participations in LSE member firms. See Grant, *Wall Street Plugs into London*, *EUROMONEY*, Apr. 1986, at 108. The City Panel on Takeovers and Mergers has issued a somewhat nervous release about problems of conflicts of interest. Multi-service Financial Organizations and the Code (May 29, 1986) (press release on file in the office of Law and Contemporary Problems).

22. For accounts of other major changes expected to be made in British securities regulation in 1986, see Abrams, *The Financial Services White Paper—A Legal Analysis*, 6 *COMPANY LAW* 77, 122 (1985); Pimlott, *The Reform of Investor Protection in the U.K.—An Examination of the Proposals of the Gower Report*

securities firms to execute orders directly on the London Exchange at a negotiated fee using their own internal communications technology. Further, the United Kingdom stamp duty on share transactions was reduced in March 1986 to one-half percent, compared with the 1984 rate of two percent.²³ This combination of factors may mean that the transaction costs for a U.S. investor using a New York multinational securities firm to acquire shares listed on both the New York and London Stock Exchanges will be almost the same whether the purchase is executed in New York or London.

In the absence of comprehensive empirical data, one's impression is that *internationalization* is much more advanced in some fields than in others. Cross-border issues of securities appear to occur much more frequently for debt securities than for equities. As to equities, cross-border trading (in the United States, ADR trading) is well-established but cross-border equity issues are relatively uncommon.²⁴ Although market linkages appear to be limited and rudimentary to date, the development of multinational securities firms seems to have reached an advanced stage, especially on the New York/London axis with the reduction of entry and ownership barriers in London.²⁵ In fact, the *internationalization* of securities firms seems to be functionally the most important aspect of *internationalization* at this time. It raises major questions for securities regulators, especially regarding conflicts of interest.²⁶

Because relatively few of its pronouncements have referred to non-U.S. matters, the Securities and Exchange Commission seems to have adopted an isolationist policy towards securities regulation for most of its fifty-two years. Recently, however, the Commission has become very interested in transnational problems. Difficulties concerning the enforcement of U.S. securities laws and the collection of evidence of violations,²⁷ especially in the teeth of secrecy and blocking laws,²⁸ have driven the SEC into contact with

and the U.K. Government's White Paper of January, 1985, 7 J. COMP. BUS. & CAP. MARKET L. 141 (1985). The Financial Services Bill, based on the White Paper, was before the Parliament in 1986. It must be remembered, however, that although Euro-issues are very frequently listed on the LSE, most of the trading is off-market; see Allard & Shale, *supra* note 12, at 16. Those authors also draw attention to a new self-regulatory authority which was established in October 1985, the International Securities Regulatory Organization, which will seek to regulate the Eurodebt and Euro-equity markets. *Id.* at 16.

23. See *Before the Bang*, ECONOMIST, Mar. 22, 1986, at 60.

24. See *infra* Part V of this article, especially at *infra* note 115.

25. See *supra* notes 17, 21 and accompanying text.

26. See Varn, *The Multi-Service Securities Firm and the Chinese Wall: A New Look in the Light of the Federal Securities Code*, 63 NEB. L. REV. 197 (1984).

27. See Fedders, *Policing Internationalized U.S. Capital Markets: Methods to Obtain Evidence Abroad*, 18 INT'L LAW. 89 (1984). Recently, steps have been taken by the International Association of Securities Commissions to address difficulties of international enforcement. See FIN. TIMES (London), July 17, 1986, at 1, col. 3.

28. For a useful overview of secrecy and blocking laws, see Fedders, Wade, Mann & Beizer, *Waiver by Conduct—A Possible Response to the Internationalization of the Securities Markets*, 6 J. COMP. BUS. & CAP. MARKET L. 1, 30-39 (1984) [hereinafter Fedders, *Waiver by Conduct*]. The waiver by conduct proposal is that the act of engaging in a securities transaction in the United States should be treated as a waiver of any foreign secrecy position upon which the trader might otherwise rely. *Id.* at 25-28. This proposal has stimulated vigorous debate. For responses to the waiver by conduct article, see

foreign governments and securities agencies. Commissioner Thomas, in particular, took notice of the *internationalization* of securities markets in a series of articles and public addresses in the early 1980's.²⁹ In 1984 and 1985 the Commission made three concept releases drawing attention to *internationalization* problems across a broad spectrum, focusing on problems of simultaneous multinational equity issues and the enforcement of U.S. laws in the face of foreign secrecy laws.³⁰ Although the releases raise a host of particular problems, it appears that the Commission seeks to develop general principles regarding *internationalization*, perhaps hoping that new principles will provide solutions to the specific questions posed.³¹ Is it feasible, however, to seek general principles on *internationalization*? Is the Commission asking the right questions?

Respectfully, but without the deference which prudence might recommend, this writer argues that the answer to the two questions is negative. While a strategy is necessary in this area, it makes no sense to expect that a set of economic and technological circumstances brought together under the rubric of *internationalization* will supply the policy framework. At least two reasons support this proposition.

First, seeking principles on *internationalization* entails a confusion between the regulatory setting and the regulatory substance. For example, suppose you are a nineteenth-century Boston Fire Brigade chief who has just heard of a major technological change, the invention of the safety match. When production gets underway, ordinary people will have a cheaper, simpler, and more accessible method of making fires than ever before. Naturally, you are worried about the increased fire hazard inevitably associated with this invention. City Hall asks you to draft a policy which will respond to your concerns in a balanced fashion. It would be understandable if your first draft

Boyle & Thau, *The Newest Configuration of the Ugly American: A Response to Mr. Fedders*, 6 J. COMP. BUS. & CAP. MARKET L. 323 (1984); Bschorr, "Waiver by Conduct": Another View, 6 J. COMP. BUS. & CAP. MARKET L. 307 (1984); Capitani, *Response to Fedders' "Waiver by Conduct"*, 6 J. COMP. BUS. & CAP. MARKET L. 331 (1984); Fedders & Mann, *The Waiver by Conduct Concept—A Reply*, INT'L FIN. L. REV., Dec. 1984, at 10; Lepine, *A Response to Fedders' "Waiver by Conduct"*, 6 J. COMP. BUS. & CAP. MARKET L. 319 (1984); Singer, *The Internationalized Securities Market and International Law—A Reply to John M. Fedders*, 6 J. COMP. BUS. & CAP. MARKET L. 345 (1984); Wymeersch, *Response to Fedders' "Waiver by Conduct"*, 6 J. COMP. BUS. & CAP. MARKET L. 339 (1984); see also Release No. 21,186, *supra* note 4.

29. See, e.g., Thomas, *Internationalization of the World's Capital Markets: Can the S.E.C. Help Share the Future?*, 15 N.Y.U.J. INT'L L. & POL. 55 (1982) [hereinafter Thomas, *Can the S.E.C. Help?*]; Thomas, *Internationalization of the Securities Markets*, *supra* note 5; Thomas, *Extraterritorial Application of the United States Securities Laws: The Need for a Balanced Policy*, 7 J. CORP. L. 189 (1982) [hereinafter Thomas, *Extraterritorial Application*]; Thomas, *Extraterritoriality in An Era of Internationalization of the Securities Markets: The Need to Revisit Domestic Policies*, 35 RUTGERS L. REV. 453 (1983) (an expanded version of the preceding article) [hereinafter Thomas, *Extraterritoriality in an Era*]; Thomas, *International Harmonization—Recent Developments in the Pursuit of Comparability in General Purpose Reports of Multinational Enterprises*, 38 BUS. LAW 1397 (1983); Thomas, *Increased Access to United States Capital Markets: A Brief Look at the SEC's New Integrated Disclosure Rules for Foreign Issuers*, 5 J. COMP. BUS. & CAP. MARKET L. 129 (1983) [hereinafter Thomas, *Increased Access*]. This list is not exhaustive.

30. See, respectively, Releases Nos. 21,958, 6,568 & 21,186, *supra* note 4.

31. Thus, the Commission's expression of interest in "any additional investor protection, competitive, or market efficiency concerns raised by the internationalization of secondary market trading." Release No. 21,958, *supra* note 4, at 87,387 (this release was confined to secondary trading because its earlier Release No. 6,568 *supra* note 4, covered new equity issues).

was headed *Principles for Regulating the Safety Match*. That focus on regulation might lead you to look for ways of curtailing the manufacture or distribution of safety matches, or even making Boston a match-free zone. Your initial regulatory focus, in other words, would be a focus on regulating the new technology. On further reflection, however, you will probably come to realize that regulation might skew the development and availability of the new technology, but the technology will, in the long run, be uncontrollable. You may well conclude that the safety match does not change your task, but simply makes it harder. The thrust of regulation should continue where it always was, in providing safe, non-flammable surroundings which are adjusted in detail to minimize the risk of abuse, but which reflect the *overall* policy concern of fire prevention. So you submit your report, *Improvement of Fire Prevention and Control Techniques in the Context of Increased Risks*.

The analogy between firemen and securities regulators is an imperfect one. The securities regulator must respond to a multitude of new fire-starters, some of which are manufactured by his regulatory colleagues—especially by the regulators in the monetary, fiscal, and antitrust fields. It sometimes must seem as if someone at City Hall is advertising free matches for arsonists. Yet the analogy is strong enough to make the present point. The enduring concerns of U.S. securities regulators are to promote efficient U.S. markets, investor confidence in those markets, and investor protection for those who are entitled to expect it from the United States. Several kinds of *internationalization* affect the way in which those goals are pursued, generally making the regulators' job harder. It would be wrong, however, to develop a policy response to *internationalization* as such. Many influences shape the development of markets and trading practices—influences such as return on investment, political risk, currency restrictions, tax laws, and the availability of technology. Regulation and regulatory cost may also be relevant factors,³² but the influences of economics and technology are likely to be inexorable. What is needed is a process of continuing review of regulatory policies which is sensitized to changes in trading and the operation of markets.

A second objection to the quest for principles regarding *internationalization* arises out of the chronic ambiguity of that expression, an ambiguity which has already been noted.³³ Suppose that the SEC decided, as a matter of policy, to encourage the development of *internationalization* on all fronts. Eventually, it would find itself doing inconsistent things. For instance, suppose that the SEC devised an effective method of encouraging the issuance and trading of foreign securities in the United States. The consequential growth in the use of U.S. markets by foreign issuers and traders would, to a certain extent, hurt overseas issues and trading, and would discourage the development of stock market linkages because the *domestication* within the United States of foreign

32. See Jarrell, *The Economic Effects of Federal Regulation of the Market for New Securities Issues*, 24 J.L. & ECON. 613, 624 (1981). As to the effect of banking regulations on investment, see Harfield, *International Money Management: The Eurodollar*, 89 BANKING L.J. 579 (1972).

33. See *supra* notes 6-23 and accompanying text.

capital and securities would reduce the pressure to establish such links. If, pursuant to its policy of encouraging *internationalization* on all fronts, the Commission then introduced measures to promote investor participation in overseas markets, the result would act against the goals intended to be achieved by freeing foreign issues and investment within the United States.

Regulatory policy must address questions which are much the same as they were when the micro-chip was just a splinter, but current economics and technology have made us ask them more insistently. The remainder of this article will discuss aspects of multinational offerings of securities for sale or subscription. The regulatory implications of other international movements, such as market linkages and the establishment of multinational securities firms, will be returned to only to the extent that the movements might influence policy formation regarding multinational offerings. There shall be more than one occasion to note the way that some new questions raised by *internationalization* dissolve on analysis into questions about the old themes of securities regulation.

III

FOREIGN ISSUERS IN UNITED STATES CAPITAL MARKETS

A. A Case for Differentiated Treatment

The arguments in favor of a differentiated system (which shall be called the *encouragement to foreign issuers* approach) were forcefully presented by Commissioner Thomas in a series of articles written more or less contemporaneously with the Commission's deliberations on integrated disclosure.³⁴ These deliberations led to the 1982 integrated disclosure requirements.³⁵ The main arguments for requiring less disclosure from foreign issuers than domestic issuers may be summarized as follows:

- (a) U.S. investors should have every opportunity to diversify their investment portfolios to spread risk and maximize returns. Accordingly, an increase in the availability of foreign securities in U.S. markets will benefit U.S. investors by:
 - (i) enabling them to trade quickly and inexpensively in foreign securities through liquid U.S. markets; and
 - (ii) improving the quantity and quality of information and analysis available to them concerning those foreign issuers;
- (b) to apply the same disclosure rules to foreign and domestic issuers is to put the foreign issuers at a disadvantage, because some U.S. domestic disclosure requirements are inconsistent with foreign commercial practices and accounting principles;³⁶
- (c) U.S. markets will compete more effectively with the Euromarkets if concessions in disclosure requirements are made;³⁷
- (d) Disclosure requirement concessions will also aid the development of uniform international standards, which may eventually permit issuers an almost free choice

34. See *supra* note 29.

35. See *infra* notes 55-69 and accompanying text.

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

37. See *infra* notes 49-50 and accompanying text.

between foreign and domestic markets, promoting efficient capital formation on a global basis.³⁸

These arguments assume that a reduction of U.S. disclosure requirements will cause an increase in the use of U.S. markets by foreign issuers. Although no empirical data exist on the effect of disclosure requirement concessions, there is some evidence of rises since 1982 in the dollar volume of debt and equity issuances by foreign companies in the United States. These rises, however, may be explicable in purely economic and financial terms.³⁹ The disclosure reforms have narrowed the information gap between the United States and other countries, as have reforms upgrading the disclosure required in Britain and elsewhere.⁴⁰ Yet, very significant and inconvenient differences remain, especially regarding reconciliation of foreign accounts with U.S. Generally Accepted Accounting Principles (GAAP), where segment reporting remains one of several bones of contention.⁴¹ Therefore, it may remain generally true that the disclosure reforms have not had much effect, and foreign issuers who trade in the U.S. capital markets do so in spite of the regulatory regime rather than because of it.⁴² This result suggests that if the *encouragement to foreign issuers* approach is to be taken seriously, more concessions will be required from the Commission. The arguments in favor of this approach will have to be weighty to overcome the disposition towards a uniform system, and so those arguments must be scrutinized.

Point (a) sets out the case for investing in foreign securities in order to diversify risk.⁴³ Evidence that foreign securities have frequently out-

38. Contrast the current limited developments, *supra* note 12.

39. For a summary indicating increases in debt and equity offerings in the United States in 1983, see Release No. 21,958, *supra* note 4, at 87,383-87.

40. See The Stock Exchange (Listing) Regulations, 1984 (U.K.). For a general discussion of the effects of disclosure requirements, see Carmichael, *Listing Eurobonds in London*, 4 INT'L FIN. L. REV. 32 (1985); Posen, *International Securities Markets: Comparative Disclosure Requirements*, 3 J. COMP. CORP. L. & SEC. REG. 392 (1981).

41. The segmented reporting requirement has produced substantial research literature in the United States. See Ajinkya, *An Empirical Evaluation of Line-of-Business Reporting*, 18 J. ACCT. RES. 343 (1980); Baldwin, *Segment Earnings Disclosure and the Ability of Securities Analysts to Forecast Earnings Per Share*, 59 ACCT. REV. 376 (1984); Mohr, *The Segmental Reporting Issue: A Review of Empirical Research*, 2 J. ACCT. LITERATURE 39 (1983). This literature supports the view that decisions can be influenced beneficially by the availability of segmental data. However, studies examining the cost of segmental disclosure are inconclusive. See Mohr, *supra*, at 63-64. Cost of compliance seems to be the main problem for foreign issuers, and their particular case has yet to be subjected to full empirical analysis. Other controversial accounting questions relate to the use of the last-in-first-out (LIFO) cost flow assumption, expensing of research and development costs, valuation of fixed assets, accounting for pensions, and (perhaps to a diminishing extent) foreign currency translation. See generally Release No. 6,568, *supra* note 4, at 87 (references to the SEC staff's comparative disclosure survey).

42. See Nathan, *Special Problems Arising as a Result of Trading in Multiple Markets*, 4 J. COMP. CORP. L. & SEC. REG. 1 (1982). According to Nathan, foreign issuers "are concerned that they will be caught up in a disclosure system over which they have no control. . . . [A]ll it [the foreign issuer] cares about is staying away from the SEC and the SEC's disclosure system." *Id.* at 8. This article is a legal practitioner's account of clients' attitudes and is necessarily impressionistic, but has an air of plausibility. One hopes that empirical research will eventually provide us with better evidence.

43. There is a large amount of literature on the use of foreign securities to diversify risk. See, e.g., Agmon & Lessard, *Investor Recognition of Corporate International Diversification*, 32 J. FIN. 1049 (1977).

performed U.S. securities supports this argument.⁴⁴ Thus, it is fair to assume that U.S. investors will deal in foreign securities—"the issue is not *whether* . . . but *where* they will purchase such securities."⁴⁵ It will become progressively less true, however, that the execution speed of orders and the transaction costs for U.S. investors will be significantly reduced by opening up U.S. markets to foreign issuers, particularly where the foreign security is listed on the London Stock Exchange. This situation is due to the removal of barriers in London against entry by U.S. securities firms and the reduction of the stamp duty.⁴⁶ If foreign issuers are driven away from U.S. markets, U.S. investors will simply use the services of a multinational securities firm for trading overseas. The real losers might be the smaller securities firms whose size prevents them from operating multinationally. The argument thus becomes one about the welfare of small broker-dealers, and about competitiveness in that segment of the market.

If foreign issuers were really attracted to U.S. markets under a regime which provides less disclosure than domestic U.S. issuers (although much more than they would otherwise make), then it would necessarily be true that U.S. investors would have more information about those issuers than they would have if trading overseas. The weakness of this argument may be in its premise, for it is probable that foreign issuers will in fact be discouraged from using United States markets because of the extra disclosure which they would be required to make upon entry. There exists another aspect of the information question, however. If a foreign security is listed on a U.S. stock exchange or (more probably) NASDAQ, there will be increased incentives for financial analysts to study that security. It stands to reason that the more popular the security becomes, the greater this incentive and consequently, the higher the likelihood that the market will obtain the information needed to assess the security. If the security is not traded on U.S. markets, this pressure to develop an analysis of the stock will be confined to the specialist or larger securities firms. Given the strength and depth of the financial services sector in the United States, entry of a foreign security into the U.S. markets is likely to expand considerably the attention given to the security by U.S. brokers and analysts. Consequently, the quantity and quality of information about the stock and the issue will also expand. Thus it is beneficial, in terms of increasing the information available to U.S. investors, to encourage foreign investors to enter U.S. markets.

Ultimately, the question raised by point (a) does not concern the desirability of encouraging foreign issuers; rather, it is the securities regulator's traditional question about the best way of benefiting investors. Evaluations must direct attention to the recurrent questions of fire prevention, rather than the regulation of the safety match. It is rational to

44. See Thomas, *Internationalization of the Securities Markets*, *supra* note 5, at 164.

45. Thomas, *Can the SEC Help?*, *supra* note 29, at 58.

46. See *supra* notes 21-23 and accompanying text.

conclude that U.S. investors will benefit if steps are taken which increase trading of foreign securities on U.S. markets.

Point (b) sets out the case for equal treatment. A foreign issuer seeking to comply with U.S. domestic disclosure requirements may be forced to engage U.S. accountants and auditors, and to dig up information which its normal accounting records would not contain.⁴⁷ The cost of doing this could be high. The U.S. domestic issuer, geared to U.S. disclosure requirements, accounting procedures, and financial standards, will have a compliance system in place. Accordingly, to impose the same disclosure requirements upon foreign issues would effectively discriminate against foreign issuers.

It would be difficult to sustain at a theoretical level the proposition that foreign issuers have a civil right to equal treatment. Yet, at an empirical level, point (b) has substance. For example, it seems plausible to say that the costs of compliance with U.S. regulations are higher for foreign issuers than for domestic issuers and that this higher cost discourages the use of U.S. markets.

Of course, the domestic issuer might reply that the *encouragement to foreign issuers* approach will impose more disclosure on itself than on foreign issuers who may be its business competitors. Thus, the additional disclosure might give the foreign issuer a direct competitive advantage.⁴⁸ However, if this is true, it is true whether the foreign business competitor raises capital in the United States, or stays out of the U.S. capital markets while nevertheless collecting all publicly-disclosed information about its U.S. competitor. The domestic issuer's point would be met more effectively by lowering the level of U.S. domestic disclosure than by raising the level of foreign issuer disclosure.

In the end, consideration of this argument leads to a review of whether certain ingredients of current U.S. domestic disclosure policy are necessary. If the extra U.S. requirements are really necessary for the protection of U.S. investors, it would be improper to excuse an issuer using U.S. markets from full compliance. If the extra requirements are not necessary, what is the justification for insisting on them at all? Once again, we have returned to a question of basic investor protection—fire prevention rather than regulation of the safety match.

Point (c) addresses competition between U.S. markets and the Euromarkets. It could be argued that U.S. regulation (especially banking regulation) has been instrumental in the dramatic increase in use of the Euromarkets during the last fifteen years.⁴⁹ The argument hints that with a less severe U.S. regulatory regime most of the enormous volume of Eurobond and Euronote business would have been transacted in the United States, and that U.S. deregulation will bring the business onshore. An evaluation of this argument turns upon the significance of high disclosure requirements as a

47. See *supra* note 41.

48. Conversely, of course, the foreign issuer's foreign competitors may be given an advantage to the extent that the disclosure required of the foreign issuer by the SEC exceeds the disclosure required by the foreign jurisdiction.

49. See Harfield, *supra* note 32, at 582-90.

disincentive to market use, relative to other factors such as yield, risk, and tax. As yet, the evidence is sketchy and impressionistic.⁵⁰

The competition argument is reminiscent of the much-debated *race to the bottom* in U.S. state corporate regulation.⁵¹ It might be contended, as critics of the Delaware Code have argued,⁵² that competition between legal systems will lead to a decline in the protection of those interests which the law exists to serve. It might be argued that, to the contrary, competition between legal systems will cause protective standards to be set at their optimal level.⁵³ In the international context, establishing a uniform code will be even more difficult than achieving federal uniformity of U.S. corporation laws. It does not necessarily follow, however, that the international competitive pressure to reduce disclosure standards should be resisted at all costs. International competition is less manageable than domestic interstate competition, and one may speculate that information technology is likely to raise international competitive intensity over time. If, therefore, disclosure requirements are shown to affect the listing decisions of issuers, it may become necessary to reduce U.S. requirements in the interests of U.S. investors and U.S. markets. Again, the old theme of securities regulation emerges: promoting efficient markets and investor protection.

The emergence of this theme leads to (d), which relates to the need for international minimum disclosure standards. If the SEC were able to set disclosure standards at a level which both adequately protected investors and was more attractive to foreign issuers than foreign alternatives, those standards would soon be accepted internationally as the norm for standardization. To the extent that foreign issuers and regulators perceive U.S. disclosure requirements as much more onerous than necessary, it will be impracticable to set an international disclosure standard approaching the U.S. level. Once again, there arises the question of whether the current U.S. disclosure requirements, to the extent that they go beyond the levels generally accepted elsewhere, really are necessary for the protection of U.S. investors.

To summarize, tucked behind the arguments supporting the *encouragement to foreign issuers* approach are some good arguments favoring the relaxation of U.S. disclosure requirements in order to benefit U.S. investors and strengthen U.S. capital markets. The cumulative effect of the arguments is to require that the Commission reassess the elements of U.S. disclosure requirements which

50. See *supra* notes 32, 42.

51. There is also a degree of competition between the SEC, which regulates financial options, and the CFTC, which regulates financial futures. Langevoort, *supra* note 18, at 762.

52. See Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663 (1974).

53. In the corporate law context, see R. WINTER, GOVERNMENT AND THE CORPORATION 9-11 (1978); Dodd & Leftwich, *The Market for Corporate Charters: "Unhealthy Competition" vs. Federal Regulation*, 53 J. BUS. 259 (1980); Fischel, *The "Race to the Bottom" Revisited: Reflections on Recent Developments in Delaware's Corporation Laws*, 76 NW. U.L. REV. 913 (1982). Note especially the perspicacious analysis in Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J. L. ECON. & ORGANIZATION 225 (1985). See also R. GILSON, THE LAW AND FINANCE OF CORPORATE ACQUISITIONS 1077 (1986) (comment on the Romano article).

take the United States beyond the disclosure levels acceptable in such countries as the United Kingdom. In the end, the reassessment depends on empirical questions. If the system would work from day to day as effectively without as with a particular disclosure requirement for foreign issuers, and removal would encourage increased use of U.S. markets by foreign issuers, then the case for removing that item becomes irresistible. Because these empirical hypotheses are difficult to test in the abstract, and because there is so much to be gained if the hypotheses turn out to be true, the Commission might try an evolutionary, guardedly experimental approach. Perhaps the Commission, having identified the disclosure requirements which foreign issuers complain about most, could remove all or some of them for a trial period. The Commission could even confine the experiment initially to world-class issuers and non-convertible debt offerings. It might be appropriate to revise the definition of world-class issuer, so that lower-rated or smaller issuers could "insure up" to the standard with domestic insurers. The experiment would require monitoring to determine, as far as possible, the effect of the concessions on issuing and trading patterns. The object should be to meet the arguments set out above by progressively achieving a substantial reduction of disclosure standards for foreign issuers on the controversial accounting and other questions which seem to be causing difficulty at present.⁵⁴ Eventually the same standards might perhaps be applied to domestic issuers. No obvious justification exists for treating the very modest 1979-82 reforms as a satisfactory settlement.

B. Integrated Disclosure

From 1979 to 1983, the Commission extensively changed the rules governing disclosure by foreign issuers under the 1933 and 1934 Acts.⁵⁵ In public releases, the SEC made strenuous efforts to justify the changes by recourse to general policies and principles. Practical and workable ideas were liable to be rejected if the Commission found them to lack a theoretical basis.⁵⁶ What were the policies and principles generating change? For simplicity's sake, the following discussion will be confined to non-North American private issuers, and will disregard the special arrangements affecting Canadian, Mexican, and foreign government issues.

Three principal changes altered the level of disclosure for foreign issuers. First, in 1979, the Commission overhauled the content of annual reports filed by foreign issuers under the 1934 Act, and introduced Form 20-F.⁵⁷ That

54. See *supra* note 41.

55. Foreign Securities, Exchange Act Release No. 6,493, [1983-1984 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 83,435 (Oct. 6, 1983) [hereinafter Release No. 6,493].

56. Thus, various suggested alternatives to the controversial 1983 amendments to Rule 12g3-2, restricting the information-supplying exemption from the section 12(g) registration requirement, were rejected by the Commission partly because of "the lack of any specific theoretical basis for a particular test." Release No. 6,493, *supra* note 55.

57. Rules, Registration and Annual Report Form for Foreign Private Issuers, Exchange Act Release No. 16,371, [1979-1980 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,363 (Nov. 29, 1979) [hereinafter Release No. 16,371].

form was similar to the standard form for domestic issuers (Form 10-K) but allowed for differences in some important respects.⁵⁸

Second, in 1982, an integrated system of disclosure was introduced, which corresponded with the integrated system for domestic issuers.⁵⁹ The new arrangements introduced three registration documents for filings under the 1933 Act, called Forms F-1, F-2, and F-3.⁶⁰

Finally, from 1979 to 1982 a series of revisions refined the content of Form 20-F.⁶¹ As a result, disclosure by foreign issuers under Form 20-F (and hence under the integrated system) differs from disclosure by domestic issuers in four main respects. First, there are significant accounting differences. Foreign issuers are permitted to use financial statements prepared in accordance with their country's accounting principles, but they must quantify any material differences between their financial statements and figures which would have been reached using Regulation S-X and U.S. GAAP.⁶² Further (subject to the exception noted below), they must reconcile their financial statements to Regulation S-X and U.S. GAAP by providing information on various matters including full segment reporting.⁶³

The second difference applies only to two sub-groups of foreign issuers, namely certain issuers of highly-rated non-convertible debt securities and issuers of rights offerings to shareholders and employees. These issuers enjoy an exception to the requirement that foreign accounts be reconciled to Regulation S-X and U.S. GAAP.⁶⁴ The main significance of the exception is that it permits debt and rights issuers to avoid full segment reporting—that is, the disclosure of profits, revenues, and assets for each geographic and industry segment.⁶⁵ U.S. GAAP requires such disclosure, but foreign GAAP normally requires segment reporting of revenues only.⁶⁶ Nevertheless, if a sector's revenue contributions differ materially from its profit contributions,

58. *Id.*

59. See Integrated Disclosure System for Foreign Private Issuers, Exchange Act Release No. 6,360, [1981-1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 83,054 (Nov. 20, 1981) [hereinafter Release No. 6,360].

60. A foreign issuer using Form F-3, which can be used for all types of securities offerings except exchange offers, can incorporate by reference the information contained in the 1934 Act's Form 20-F. The issuer must deliver Form 20-F on request. To qualify to use Form F-3 the issuer (called loosely a "world class issuer") must have filed reports under the 1934 Act throughout the preceding 36 months and at least \$300 million of its voting stock must be held by non-affiliates. The latter prerequisite does not apply to issuers of highly-rated non-convertible debt securities. Issuers using Form F-2 may attach Form 20-F to the F-2 prospectus, instead of repeating all of the information in both documents. Like Form F-3, Form F-2 may be used for all securities offerings except exchange offers. Form F-2 is available to a foreign issuer which has either filed under the 1934 Act throughout the preceding 36 months or has so filed only once and has at least \$300 million of voting stock held by non-affiliates. All other foreign issuers (and all foreign issuers making exchange offers) must use Form F-1, which requires full and detailed disclosure.

61. See Release No. 16,371, *supra* note 56; Release No. 6,360, *supra* note 59. See also Thomas, *Increased Access*, *supra* note 29.

62. Release No. 6360, *supra* note 59, at 84,647.

63. *Id.* at 84,648.

64. *Id.*

65. *Id.*

66. *Id.* See also Release No. 6,568, *supra* note 4, at 87,322.

the issuer must give a narrative explanation relating segment revenue to total operating profits.⁶⁷ The third difference concerns directors' remuneration, which may be disclosed in aggregate rather than, as in the case of domestic issuers, for each individual director, unless individual remuneration has previously been disclosed to shareholders or to the public. Directors' interests in certain transactions must be disclosed only if they have been previously disclosed to shareholders or the public.⁶⁸

Fourth, foreign issuers may use financial statements up to six months old (twelve months for certain offerings to shareholders), as opposed to 135 days in the case of domestic issuers, although more current information must be supplied if it has been issued pursuant to foreign law.⁶⁹

How did the SEC justify these changes? To a considerable extent, integration of 1933 and 1934 Act forms was just a matter of keeping foreign issuers in step with domestic issuers, for whom an integrated system had already been planned.⁷⁰ What is interesting is the way in which the Commission was prepared to differentiate between foreign and domestic issuers on the question of disclosure content. Indeed, this differentiation represented a change of heart by the Commission, which had in 1977 proposed a disclosure form for foreign issuers which would basically have required that they follow the rules applicable to domestic issuers.⁷¹

The Commission's stated justification for the changes was a curious one. Originally it had given qualified support to the *encouragement to foreign issuers* approach when it promulgated Form 20-F.⁷² In 1981, however, it professed that it endorsed neither the *encouragement to foreign issuers* approach nor the *identical disclosure* approach, preferring instead to balance the competing policies by using a *principle of voluntarism*:

[T]he more voluntary steps a foreign company has taken to enter the United States capital markets, the degree of regulation and amount of disclosure more closely approaches the degree of regulation of domestic registrants.⁷³

This comment is very puzzling. The principle of voluntarism is the Commission's basis for determining whether a foreign issuer whose securities are traded in U.S. markets should be required to file reports under the 1934 Act.⁷⁴ Such a principle is not appropriate support for a graduated scale of regulation. Nor do the changes in the level of disclosure for foreign issuers during the period from 1979 to 1982 actually reflect the policy contained in this quotation. The integrated system has introduced degrees of disclosure by recognizing three classes of foreign issuers for the purpose of entitlements to use Forms F-3 and F-2. The classification is based on the size of the issuer

67. Release No. 6360, *supra* note 59, at 84,648.

68. See Form 20-F, Item 11, 4 Fed. Sec. L. Rep. (CCH) 21,754 (1985).

69. See Form 20-F, Items 17, 18, 4 Fed. Sec. L. Rep. (CCH) 21,757-58 (1985).

70. Release No. 6,360, *supra* note 59, at 84,644.

71. See Posen, *International Securities Markets*, *supra* note 40, at 209; Thomas, *Extraterritoriality in an Era*, *supra* note 29, at 469.

72. Release No. 16,371, *supra* note 57.

73. Release No. 6,360, *supra* note 59.

74. See *infra* notes 76-77 and accompanying text.

and its familiarity to U.S. markets, rather than the number of "voluntary steps" which the issuer has taken to enter the U.S. capital markets. Has the Commission implicitly elected to take the *encouragement to foreign issuers* approach by the very acts of introducing the reforms of 1979 to 1982? If so, it has watered down its decision without recourse to any rational principle by accommodating foreign issuers far less completely than it might have done.

C. The Reach of Disclosure Laws and the Information-Supplying Exemption

In addition to the contention over levels of disclosure, the early 1980's also saw debate on the question of the reach of the U.S. disclosure laws. The registration requirements of the 1933 Act apply to the offer or sale of any security involving the use of interstate commerce or the mails. Section 2(7) defines "interstate commerce" 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." Furthermore, unless exempted the foreign issuer must file under the 1934 Act if it has previously offered securities in the United States, has securities listed on a U.S. exchange, or has more than 500 shareholders and \$300 million in assets. The main relevant exemptions to the 1934 Act reporting requirements are contained in Rule 12g3-2(a) and (b). Rule 12g3-2(a) provides an exception where fewer than 300 shareholders of the foreign issuer reside in the United States. Rule 12g3-2(b), the "information-supplying" exemption, allows the foreign issuer to avoid filing under section 12(g) if the issuer supplies the Commission with copies of documents made publicly available overseas. Rule 12g3-2(b) was controversially amended in 1983 to remove the exemption in cases where the foreign securities (or ADRs representing them) are quoted on NASDAQ.⁷⁵

In developing its rules about exemption for foreign issuers, the Commission has applied a principle of voluntarism. According to the Commission, Rule 12g3-2(b), adopted in 1967 before the start of the automated quotation system, was intended to exempt from registration foreign issuers whose securities were traded in the United States without any voluntary action by the issuer.⁷⁶ It was possible at one stage for foreign securities to be included in NASDAQ without the participation of the issuer, but for some time the approach of NASDAQ has been to require that the issuer's consent be obtained. In its 1983 revision of the rule, the Commission concluded (notwithstanding overwhelming opposition by respondents to the Release in which the proposal was made) that foreign issuers which consent to

75. See Release No. 6,493, *supra* note 55.

76. Securities or ADRs which enjoyed the exemption on October 5, 1983 were "grandfathered." See Exchange Act Rule 12g3-2(d)(3), 17 C.F.R. § 240.12g3-2(d)(3) (1987). For present purposes, it is unnecessary to distinguish between the foreign securities themselves and the American Depositary Receipts which are usually created to simplify trading and settlement. As to ADRs, see Royston, *The Regulation of American Depositary Receipts: Americanization of the International Capital Markets*, 10 N.C.J. INT'L L. & COM. REG. 87 (1985).

the quotation of their securities on NASDAQ should be treated as voluntarily seeking U.S. trading markets, and hence should be denied the exemption from filing. Two supplementary justifications for the change were also given: (1) that some Canadian issuers had misused the exemption, and (2) that there should be no *undue differences* between disclosure requirements for U.S. and foreign issuers.⁷⁷

The 1983 decision has been strongly criticized.⁷⁸ The *principle of voluntarism* has about it the air of technical lawyering. It proceeds from the premise that because both are, strictly speaking, cases of voluntary action, the consequences previously attached to the active seeking out of U.S. markets must now extend to mere consent to another's application to use those markets. Worse still, the principle of voluntarism is a diversion from the central regulatory questions which the Commission had addressed just a year earlier.⁷⁹ The reasoning which supports the 1983 decision never directly refers to the interests of U.S. investors in having domestic access to foreign securities, although the 1982 decision on integrated disclosure considered it one balancing factor.⁸⁰ The 1982 decision also attempted to take into account the foreign issuer's difficulties in meeting domestic disclosure requirements, but the 1983 decision attempts to eliminate *undue* differences of disclosure standards for domestic and foreign issuers.⁸¹ The word *undue* avoids direct inconsistency with the 1982 Release, but does not fully disguise a tension between the 1982 and 1983 decisions. In 1982, the *principle of voluntarism* led the Commission to the view that the degree of disclosure should rise in proportion to the extent of the issuer's voluntary entry into U.S. markets. We have seen that this approach was not in fact applied in 1982.⁸² In the 1983 decision this approach appears to have been abandoned, for it would have led the Commission to conclude that mere consent to NASDAQ quotation was a tiny step justifying a degree of disclosure significantly less than a Form 20-F.

An attempt could be made to justify the 1983 decision through reasoning which the Commission did not in fact employ. The Commission has a certain responsibility to maintain a level playing field between NASDAQ and the stock exchanges. If a foreign issuer lists on an exchange, it becomes a reporting company, but if it allows its shares or ADRs to be quoted on NASDAQ, it would have been exempt from reporting before 1983. The pre-1983 exemption would accordingly mean that competitors (NASDAQ and the stock exchanges) would be treated differently by the law. However, because a foreign company must necessarily be more actively involved when it seeks

77. Release No. 6,493, *supra* note 55.

78. See, e.g., The (London) Stock Exchange, Comments on U.S. Securities and Exchange Commission Concept Release No. 33-6568, at 6-7 (Aug. 2, 1985) (available in the office of *Law and Contemporary Problems*). But see Buxbaum, *Securities Regulation and the Foreign Issuer Exemption: A Study in the Process of Accommodating Foreign Interests*, 54 CORNELL L. REV. 358 (1968).

79. Release No. 6,360, *supra* note 59.

80. *Id.*

81. Release No. 6,493, *supra* note 55.

82. See *supra* note 74 and accompanying text.

stock exchange listing than when it consents to the quoting of its shares on NASDAQ, a good case exists for treating NASDAQ differently from the stock exchanges. Furthermore, it is far from self-evident that equal treatment of NASDAQ and the stock exchanges should be achieved by raising mandatory disclosure on NASDAQ rather than by reducing the level of disclosure required of foreign issuers seeking a stock exchange listing.

It would be interesting to know the effect of the 1983 decision on applications for new quotations of foreign securities on NASDAQ. One would expect that they would be reduced, especially in cases where quotation is sought primarily for the convenience of U.S. shareholders. However, the evidence is inconclusive.⁸³

The arguments supporting the *encouragement to foreign issuers* approach to the question of levels of disclosure apply *mutatis mutandis* to the question of exemption for NASDAQ-quoted foreign securities.⁸⁴ Ultimately, it may be rational to reduce the disclosure requirement for foreign issuers and simultaneously remove the exemption. Until the former step is taken, however, the information-supplying exemption is needed.

IV

UNITED STATES ISSUERS IN FOREIGN CAPITAL MARKETS—A CASE FOR QUALIFYING THE EXTRATERRITORIAL EXTENSION OF THE REGISTRATION REQUIREMENTS OF THE SECURITIES ACT OF 1933

There are, of course, many contexts in which questions may arise about the extraterritorial reach of U.S. securities laws. Much of the debate has concentrated on the scope of the insider trading and market manipulation laws,⁸⁵ although problems also arise from the disclosure requirements concerning acquisitions of corporate control.⁸⁶ In order to make this discussion manageable and to integrate it with the rest of this article, attention

83. The number of British companies whose shares are traded in ADR form on NASDAQ rose from eleven at the end of 1984 to seventeen by Feb. 28, 1986. See *ECONOMIST*, Mar. 29, 1986, at 86. Further study would be needed before any conclusions could be drawn as to the regulatory effect of the 1983 decision. The same magazine report notes the British budget decision to impose a five percent tax on the "conversion" of shares in British companies into American Depositary Receipts. The objective was apparently to encourage investors to buy British shares in Britain. It was highly controversial and was subsequently reversed.

84. See *supra* notes 34-38 and accompanying text.

85. See Marano, *Extraterritorial Application of the Antifraud Provisions of the Securities Exchange Act of 1934*, 2 INT'L TAX & BUS. L. 298 (1983); Morgenstern, *Extraterritorial Application of U.S. Securities Law: A Matrix Analysis*, 7 HASTINGS INT'L COMP. L. REV. 1 (1983); Norton, *Extraterritorial Jurisdiction of U.S. Antitrust and Securities Laws*, 28 INT'L & COMP. L.Q. 597 (1979); Thomas, *Extraterritorial Application*, *supra* note 29; Thomas, *Extraterritoriality in an Era*, *supra* note 29 (an expanded version of the preceding article); Note, *Regulation of Offshore Investment Companies Through Extraterritorial Application of Rule 10b-5*, 1982 DUKE L.J. 167; Note, *Expanding the Jurisdictional Basis for Transnational Securities Fraud Cases: A Minimal Conduct Approach*, 6 FORDHAM INT'L L.J. 308 (1982); Note, *Offshore Funds and Rule 10b-5: An International Law Approach to Extraterritorial Jurisdiction under the Securities Exchange Act of 1934*, 8 FORDHAM INT'L L.J. 396 (1984); Note, *Extraterritorial Application of the Federal Securities Laws: The Need for Reassessment*, 14 J. INT'L L. & ECON. 529 (1980).

86. Fedders, *Waiver by Conduct*, *supra* note 28, at 5.

will be confined to the SEC's administration of the registration requirements of the 1933 Act with respect to extraterritorial offers and sales of the securities of a U.S. issuer. What attitude should the SEC take if unregistered U.S. securities are issued or traded offshore?⁸⁷

It is worth noting again that this article focuses on administrative rather than curial problems; it addresses the question of the SEC's attitude or policy as a regulator, not the judicial definition of the principles of extraterritoriality. Of course, if the courts refuse to extend a U.S. securities law far enough to reach a foreign transaction, they necessarily limit the SEC's powers and functions as well as rights of civil plaintiffs. The converse is not true, however, for even if a securities law applies to a certain foreign transaction as a matter of law, the SEC still has a degree of choice as to whether to enforce it.

Broadly speaking, there are two approaches open to the Commission. They will be called the *nexus* approach and the *balancing* approach. The nexus approach is the administrative equivalent of the judicial approach, which prevailed until recently, to issues of extraterritorial jurisdiction.⁸⁸ If the SEC adopted this approach, it would resolve to require registration whenever a certain territorial nexus (or one of a stated list) existed, without regard to the presence of any other influences. An example of this approach would be to require registration if and only if the securities are offered or sold to an American national. In contrast, the balancing approach precludes the SEC from using any universal rule to determine policy.⁸⁹ This approach asserts that there are too many pertinent variables, and requires a balancing of all relevant circumstances in each case. The only guiding principles are the promotion of efficient U.S. markets (often not relevant in this context) and the protection of U.S. investors.

The balancing approach is preferable, somewhat by default. The main difficulty with the nexus approach is how to identify a criterion or criteria which is or are adequate to distinguish those transactions which should be regulated from those which should not.

Suppose that the SEC were to say, "We expect registration in all cases involving securities of a U.S. issuer, whoever trades and wherever they trade." The effect would be to hobble U.S. issuers in the Euromarkets, where the opportunity to take advantage of a window in the market may well depend on making a very swift issue.⁹⁰ Alternatively, the Commission may decide to require registration whenever the securities are sold to U.S. nationals. That approach may induce the persons responsible for the issue or selling to exclude U.S. investors entirely, in order to avoid registration. In an effort to protect U.S. investors, the SEC would have achieved an arrangement in which

87. The SEC's policy may be thwarted because of difficulties of investigation and enforcement, such as the problems posed by foreign secrecy and blocking laws. But problems of investigation and enforcement will not be discussed in this essay. For a discussion of these problems, see sources cited *supra* note 28.

88. See Norton, *supra* note 85.

89. See Thomas, *Extraterritoriality in an Era*, *supra* note 29, at 459-60.

90. See Nathan, *supra* note 42, at 229.

U.S. investors would be deprived entirely of an investment opportunity which may be economically advantageous.

It is arguable that these problems can be avoided by making the principal nexus the place of the sale transaction. If the securities have settled outside the United States, U.S. nationals who go offshore to buy them should not look to the SEC for protection. The Commission has taken an approach like this, consistent with its general preference for principles over pragmatism.⁹¹ The Commission's pronouncements should be investigated before an assessment of this approach is attempted.

Although the definition of interstate commerce⁹² might be construed to encompass virtually any offering of securities made by a domestic issuer to foreign investors, the SEC has stated that it will not take enforcement action for failure to register securities if the distribution is effected in a manner which will result in the securities coming to rest abroad.⁹³ This test would not be met, said the Commission, in a distribution through facilities of Canadian stock exchanges or in a distribution specifically directed toward American nationals abroad (including servicemen).⁹⁴ Apart from such situations, however, the registration provisions will not be enforced "so long as the offering is made under circumstances reasonably designed to preclude distribution or redistribution of the securities within, or to nationals of, the United States," even if the offering originates in the United States, involves U.S. broker-dealers, and the mechanics of distribution are effected within the United States.⁹⁵

The *coming to rest abroad* principle has been worked out by the Commission in the process of considering requests for no-action letters. Issuers who have received favorable responses to requests for no-action letters have taken precautions such as the following. Legends have been placed in the offering circular and on the securities sold in the offering, stating that the securities have not been registered under the 1933 Act and are not being offered for sale in the United States or to its nationals.⁹⁶ The legend also states that the securities may not be transferred within ninety days after the completion of the offering, and thereafter may not be transferred in the United States or to U.S. nationals unless the transaction is registered under the Act and any applicable state act, or counsel certifies that an exemption is available.⁹⁷ One commentator recommends that foreign investors be required to make representations as to their residency and agree to abide by the transfer restrictions, and that selling agents be required to agree to sell only to foreign

91. See *infra* notes 93-95 and accompanying text.

92. Securities Act of 1933, 15 U.S.C. § 77a2(7) (1982).

93. Statement of Securities and Exchange Commission relating to registration of foreign offerings by domestic issuers and registration of underwriters of foreign offerings as broker-dealers, 17 C.F.R. § 231.4708 (1967).

94. *Id.*

95. *Id.*

96. Evans, *Offerings of Securities Solely to Foreign Investors*, 40 BUS. L. 69, 71 (1984).

97. *Id.* at 72.

investors.⁹⁸ The same commentator also suggests that closing should take place outside the United States and that, as a safety net, the offering should be structured to comply with the private offering exemption if possible.⁹⁹ Recently, however, the SEC staff appears to have adopted a benevolent interpretation of the Commission's policy statement, and it might now be satisfied with less severe precautions.¹⁰⁰

When will the SEC permit securities offered or sold abroad to be resold in the United States or to U.S. citizens? It seems, on the basis of interpretations of the Commission's rule by its staff, that foreign investors who are not affiliated with the issuer and who have beneficially owned the securities for three years may sell at any time and in any manner—even where the issuer is a non-reporting company.¹⁰¹

The first and most obvious comment to be made about the Commission's policy is that it has generated some extraordinary boilerplate in Eurodollar documentation and, especially if the views of the more cautious U.S. counsel are followed, has probably added significantly to the cost of U.S. issuer Eurofunding.¹⁰² To what effect? Either U.S. investors wish to purchase these securities or they do not. If they do, it is hard to believe that documentary incantations will defeat their ingenuity, and if they do not, what is the point of the policy?¹⁰³

Second, it seems ironic that one of the main day-to-day consequences of the Commission's approach has been to deprive U.S. investors of some very real advantages. Judging by their popularity in recent times, Eurobonds and Euronotes appear to have been a notably successful form of investment in terms of yield, liquidity, and the efficiency of issue and transaction procedures. When the securities are listed on a stock exchange such as

98. *Id.* at 72-76.

99. *Id.* at 75; *see also* Henderson, *supra* note 8, at 26; Nathan, *supra* note 42.

100. Klegerman, *Offshore Resale Option*, 4 INT'L FIN. L. REV. 38 (1985) (referring to the SEC interpretive letter to Trilogy Resource Corporation, SEC Interpretive Letter (Aug. 3, 1984) (WESTLAW, SEC No-Action Letters database) and the SEC No-Action Letter to Silverton Resources, Ltd., SEC No-Action Letter (Jan. 4, 1985) (WESTLAW, SEC No-Action Letters database)). In *InfraRed Associates, Inc.*, SEC No-Action Letter (Sept. 11, 1985) (WESTLAW, SEC No-Action Letters database), the SEC regarded it as sufficient (after a 12-month lock-up) that the transaction be executed on the London Stock Exchange. In *First Interstate Bancorp*, SEC No-Action Letter (March 15, 1985) (WESTLAW, SEC No-Action Letters database), the SEC was influenced by the fact that the securities were short term notes that would not be rolled over.

101. Evans, *supra* note 96, at 80.

102. The inconvenience of a now-superseded procedure whereby each bond purchaser received his own temporary certificate, replaced by a definitive certificate after ninety days had elapsed, must have been prodigious. *See* Nathan, *supra* note 42, at 228. Cigna Corporation, which has numerous insurance subsidiaries operating wholly outside the United States, has recently found it necessary to obtain an SEC no-action letter to enable those subsidiaries which are branches of U.S.-formed companies to invest in securities issued by non-U.S. companies outside the United States. Underwriters had refused to sell to Cigna branches because of the standard restrictions of their underwriting agreements. *See* Cigna Corp., Letter to SEC (Jan. 17, 1986) (WESTLAW, SEC No-Action Letter database).

103. The discussants to Nathan's paper expressed the opinion that Eurobonds and notes are designed to be attractive to European investors and that flow-back into the United States was not a practical problem. Nathan, *supra* note 42, at 228.

London or Luxembourg and accepted for clearance through Euro-clear or Cedel S.A., the level of investor protection is not insubstantial, because the investor will have access to an offering circular which conforms to the disclosure requirements of the European Economic Community's Sixth Directive for the Harmonization of Company Law as well as to stock exchange requirements.¹⁰⁴ Yet the Commission's approach (to the extent that it is effective) deprives U.S. investors of access to that market until the expiration of a seasoning period. The present point is really part of a larger issue concerning the effects on U.S. investors of the extension of registration requirements offshore. Foreign issuers with U.S. shareholders may feel constrained to exclude the U.S. shareholders from rights offerings in order to avoid U.S. registration requirements (which remain substantial for rights issues notwithstanding the concessions made in the 1982 reforms).¹⁰⁵ This is a bizarre form of investor protection. Takeovers have highlighted this tendency to exclude U.S. shareholders in order to avoid U.S. disclosure laws. Thus, there is at least anecdotal evidence that a foreign bidder for control of a foreign target which has U.S. shareholders will probably exclude U.S. shareholders from the exchange offer component of its takeover bid, thereby depriving them of the chance to participate in the combined venture.

Third, in view of the technological changes affecting securities firms and, to a lesser extent, securities markets, it is becoming less and less sensible to define the reach of securities regulation by recourse to a jurisdictional rule about the physical location of trading. The physical location of transactions should not be disregarded, but it must already be the case that some internationally-traded securities do not *come to rest* in any significant sense at all.

Fourth, the *coming to rest abroad* principle seems to exclude some highly relevant factors from consideration. Two matters seem particularly pertinent. First, the Commission should consider the expectations of the parties to a transaction concerning the applicable securities regulation regime. Even without the *aide de memoire* provided by the offering circular, parties transacting a sale of Euronotes listed on the London Stock Exchange would surely not expect U.S. law to apply, even if the issuer is a U.S. corporation. Second, the Commission's approach does not take into account the presence or absence of a directly-applicable foreign system of securities regulation, and the interest of the foreign country in having its laws applied in a given situation. Insistence by the Commission on a higher disclosure regime for a sub-group of the securities traded on an overseas exchange may have a distorting effect on the overseas market as a whole. Furthermore, it is hardly in the interests of international comity for the SEC to take the view that a particular overseas system of investor protection is inadequate, especially where (as in the case of the United Kingdom) the system has recently been overhauled.¹⁰⁶

104. See Welch, *Breach of Prospectus Requirements*, 6 COMPANY LAW. 247 (1985).

105. See *supra* notes 55-69 and accompanying text.

106. See *supra* note 22.

The *coming to rest abroad* principle is flawed and should be replaced. But with what? No other suitable nexus is in sight. It would be imprudent for the Commission to adapt administratively the courts' *conduct* and *effect* tests. They would extend the registration requirements too widely, and incidentally, play havoc with Euromarket practices. There also exist signs that those tests are coming to be regarded as unsatisfactory in their own context.¹⁰⁷ It is time for the Commission to move from a nexus approach to a balancing approach.

In addressing the judicial approach to the extraterritorial application of U.S. securities laws, former Commissioner Thomas has advocated such a new test:

[T]he law, regulatory practices and national policies of all foreign nations which might have an interest in a specific transnational securities transaction, rather than just the conduct of the parties or the effect of their actions, should be carefully and explicitly balanced before United States laws are applied extraterritorially. Specifically, the relevant factors to be weighed by a court should include the location of the transnational transaction, the domicile of the parties, the importance to each interested country of having its laws applied in a given situation, the public policies of such interested country that would be furthered by the application of its law, the likelihood that another country will assert jurisdiction over the transaction, and the expectations of the parties with respect to the applicable governing laws.¹⁰⁸

With slight changes in the wording to reflect the fact that it would be an SEC policy rather than a judicial doctrine, this quotation enunciates a sensible balancing approach for the Commission to adopt regarding the reach of the registration requirements of the 1933 Act. Indeed, the Commission is better equipped than a court to handle such an approach, for its staff has the flexibility to assess and reassess foreign policies and systems, and the Commission may minimize the problem of uncertainty by issuing no-action letters and concept releases.

Clearly, the Commission must not allow parties to an otherwise registrable transaction to take it offshore solely to escape the registration requirements. Where a new issue of securities occurs, however, using and complying with the rules of a well-regulated foreign market, there should be no suggestion of an SEC claim to regulation. The interests of U.S. investors would be well served if the Commission made it clear now that it has no interest in enforcing the registration requirements of the 1933 Act with respect to new issues by any issuer in the Euro-debt markets, provided that the securities are listed with the London, Luxembourg, or certain other stock exchanges, and are accepted for clearance by a reputable clearing system.

V

SIMULTANEOUS NEW MULTINATIONAL EQUITY OFFERINGS

On February 28, 1985, the Commission requested comments on some proposed approaches to the facilitation of simultaneous equity issues in the

107. See sources cited *supra* note 85.

108. Thomas, *Extraterritoriality in an Era*, *supra* note 29, at 459-60.

United States, the United Kingdom, and Canada.¹⁰⁹ The release suggested two alternative methods. First, the *common prospectus* approach would involve settling a common form of disclosure document for use by multinational issuers in all countries, and a common flotation procedure.¹¹⁰ Second, under the *reciprocal* method, a statement or prospectus registered in the country of domicile of the issuer would be recognized in the other two.¹¹¹ In addition to requesting comments at large, the Commission asked seventeen specific questions about these proposals, identifying some of the difficulties of integration and hinting at possible solutions.¹¹²

Proposals for the harmonization and eventual integration of national systems for regulating new equity issues were discussed in journals in the early 1980's.¹¹³ In 1977, the British Petroleum Company Limited had made a public offering of shares to raise over \$900 million in the United Kingdom, the United States, and Canada, but the offering was not quite simultaneous; it had expired in Britain three days before it became effective in the United States, and there was already an established market for BP's securities in each country. In 1980, Tricentol, Ltd., a British company, made a \$55 million public offering of ADRs in the United States and Canada, but not in Britain. Evidently, however, it was not until 1984 that the full range of practical difficulties of complying simultaneously with the new-issue laws of several countries came into focus, when some major British issuers attempted to satisfy London and Washington (and in one case, Toronto and Tokyo as well) at the same time, and found that their commercial objectives could be achieved only by a frustratingly difficult procedure.¹¹⁴

A variety of motives may lead a foreign issuer to seek entry into the U.S. capital markets. For instance, the issuer may wish to introduce itself to the U.S. business community in order to establish product goodwill and facilitate U.S. sales. If the U.S. investment community becomes familiar with its securities, it may become feasible to finance the future acquisition of a U.S. business by exchange of securities. The U.S. market may at the relevant time be deeper and more buoyant than the markets of the issuer's country of

109. See Release No. 6,568, *supra* note 4.

110. *Id.* at 87,322.

111. *Id.*

112. *Id.* at 87,323.

113. Pierce, *Regulation of Issuance and Trading of Securities in the United States and the European Economic Community: A Comparison*, 3 J. COMP. CORP. L. & SEC. REG. 129 (1981); Thomas, *Can the SEC Help?*, *supra* note 29, at 65; Williams & Spencer, *Regulation of International Securities Markets: Towards Greater Cooperation*, 4 J. COMP. CORP. L. & SEC. REG. 55 (1982). In Australia, the National Companies and Securities Commission has expressed guarded willingness to permit prospectuses offering foreign securities to be circulated in Australia, on a case by case basis. See Australian Company L. & Practice (CCH) ¶ 90-911 (Feb. 19, 1986).

114. For information regarding the Reuters and British Telecom issues, see Pryor & Henderson, *Dual Public Offerings in the U.K. and the U.S.*, 4 INT'L FIN. L. REV. 16 (1985); Cooper, *Euro-American Multi-market Offerings of Equity Securities of Foreign Issuers* (May 1985) (unpublished manuscript presented to the Fourth Annual National Institute on Securities Regulation held May 29-31, 1985). An adapted extract of the latter paper appears as an appendix to the American Bar Association (section on Corporation, Banking and Business Law) submission dated July 15, 1985, to the SEC on Release No. 6,568, *supra* note 4. This account relies partly on that extract.

domicile. It is not as easy to see why an issuer would want to make an offering of new securities *simultaneously* in several jurisdictions. In fact, the instances of simultaneous offerings to date are so special they suggest that there may be only a limited demand for *simultaneous* offerings.¹¹⁵ In both the Reuters and British Telecom issues, the companies wished to raise very large amounts, approximately \$300 million and \$4.5 billion, respectively. There was some doubt that the British capital market would be able to absorb the Reuters issue, and overseas offerings of British Telecom were an obvious necessity. Neither company had an existing international market for its securities. Reuters had been a private company owned by newspaper proprietors and British Telecom was a government instrumentality. There was a risk of claims being made that the issues had extended into the United States in violation of U.S. securities laws by virtue of the unavoidable international publicity which both offerings would attract. Because of this, the best protection against such a risk seemed to be to make the U.S. offering simultaneously with the U.K. offering (and in British Telecom's case, simultaneously with offerings in Canada and Japan). This is not to say that all simultaneous multinational issues will be by enormous enterprises in spectacular circumstances. Tricentol, Ltd. made a simultaneous offering in Canada and the United States in 1980, although, with a total market capitalization of approximately \$460 million, it must be considered relatively small.¹¹⁶ The circumstances were again very special, and related to the need for a British oil and gas company to gain swift entry into the business and financial markets of the huge and sophisticated North American oil and gas sector.

Special circumstances will of course occur again. The British Conservative Party's program of privatization of public instrumentalities will likely produce several large offerings on a multinational and probably simultaneous basis, including, perhaps, British Gas, British Airways, and Rolls Royce. There also will be comparable cases in other countries. Unless the procedures of simultaneous issues are made much less complicated than they are at present, however, simultaneous new offerings will probably be exceptional.

The main barriers to simultaneous offerings should be briefly noted. First, there are differences relating to underwriting and selling arrangements. In the United Kingdom the securities are not offered to the public until a fixed or minimum price is set, the final prospectus is registered, and the underwriting agreement is signed.¹¹⁷ The underwriter's commitment runs from that time. The date of the offer to the public (the *impact day*) is determined well in advance by the Government Broker's queue procedure, and cannot normally be changed. The offer period is very short, typically about a week. Although no offer to the public is permitted until the prospectus is registered, earlier

115. Cooper, *supra* note 114.

116. Coles, *Foreign Companies Raising Capital in the United States*, 3 J. COMP. CORP. L. & SEC. REG. 300, 311-13 (1981).

117. See Pryor & Henderson, *supra* note 114. The account of the U.K. and U.S. systems in this paragraph is based on their article.

private approaches can be made to investors (such as institutions), and the company is permitted to run a limited advertising campaign during the offer period. In the United States, the company first files a registration statement including a preliminary prospectus, which is then circulated to prospective investors and reviewed by the Commission and state *Blue Sky* authorities over a period of several weeks. The prospective underwriter cannot begin to market the offering until the Commission accepts the filing. Thereafter, the underwriter may take indications of interest from investors but cannot advertise in the British fashion. When the process of review is complete, the issue is priced and the registration statement is made effective; the underwriter's commitment arises only at that time.¹¹⁸

While these are formidable differences, an accommodation was arrived at nevertheless in the Reuters and British Telecom issues. In the case of Reuters, the British offer was an offer for sale by tender, the registered prospectus stating only a minimum tender price. A fixed price was set simultaneously in the United States and the United Kingdom after the expiration of the U.K. offer period and the completion of the SEC and *Blue Sky* review of the registration statement. The arrangements were not perfect, because they left the U.S. underwriter with only thirteen business days for the marketing of the issue in the United States and there would have been difficulties accommodating changes in Britain if they had been necessitated by the U.S. review.

In the case of British Telecom, the adoption by the United Kingdom of the EEC's Sixth Directive on the Harmonization of Company Law made it feasible for the company to file a *pathfinder* prospectus similar to the U.S. preliminary prospectus, prior to the announcement of the offer price and the commencement of the U.K. underwriter's risk. This made it possible to allow three weeks for U.S. marketing and for accommodating changes to the preliminary prospectus. Furthermore, the Bank of England acted in the novel role of initial underwriter of a portion of the shares allocated to the overseas offerings, transferring this commitment when the overseas underwriters were ready to take it.¹¹⁹

While no standard or routine solution exists as yet, similar ad hoc arrangements can be expected to be hammered out in future negotiations. The differences in underwriting and selling present a serious problem but not an insoluble one. Regulators could play a useful role as catalysts toward the evolution of standard procedures. The regulators should be prepared (and evidently the SEC is prepared¹²⁰) to pre-clear certain critical portions of the prospectus. It would be premature, however, to respond to the underwriting and selling problems by changing the regulatory apparatus.

The disclosure requirements of the United States raise a second barrier to simultaneous offerings. We have already noted the Commission's position

118. *Id.* at 16.

119. *Id.*

120. *Id.*

regarding Form 20-F disclosure.¹²¹ The arguments presented above in favor of making further concessions, in the interests of U.S. investors and U.S. markets, carry through to the present context. In addition, there are some further causes of dissension concerning the style and content of prospectuses. In the United Kingdom, investors expect to see in the prospects section of the prospectus some predictions by directors as to the future, and some expression of optimism. The SEC, to the contrary, is disposed to emphasize risks and discourage favorable predictions. Much the same contrast exists regarding profit forecasts.¹²² The qualified assertions in a U.S. prospectus will appear gloomy to British readers. An illustration of this can be seen in the SEC required statement that "although the Board believes the assumptions [upon which a profit forecast is based] to be reasonable in the light of the Company's operating experience in previous years, no assurance can be given that the projected result will be realized."¹²³

To the extent that these are merely differences of style, they are not a substantial impediment to simultaneous offerings. If a compromise formula cannot be worked out, then different styles can be adopted to suit each investment community. To the extent that they constitute differences in substantive disclosure requirements, they must be assessed in terms of the arguments about disclosure and encouragement to foreign issuers which were discussed above.¹²⁴ In a simultaneous offering, the issuer can hardly give an optimistic profit forecast in the United Kingdom and a heavily qualified one in the United States. If the issue is primarily directed to the United Kingdom with an intention to *top up* the capital raising in the United States, the issuer may prefer to abandon the U.S. markets rather than to run the risk that enforced gloominess will prejudice the success of the issue in the United Kingdom.

In summary, a set of minimum disclosure standards is needed, which offers the kinds of general protections given by the European Sixth Directive and Form 20-F,¹²⁵ but does not insist upon those controversial matters in which the U.S. system extends beyond European standards. Purely as a matter of practicality, it may be easier to introduce this by using the *reciprocal* rather than the *common prospectus* technique.

The civil liability provisions for material misstatements in the prospectus causes a third barrier. In the United States, the issuer has absolute liability with respect to the information contained in the registration statement.¹²⁶ In the United Kingdom and the British Commonwealth, the statutory and

121. See *supra* notes 55-69 and accompanying text.

122. See Pryor & Henderson, *supra* note 114, at 18.

123. *Id.*

124. See *supra* notes 34-38 and accompanying text.

125. See *supra* notes 60, 104.

126. Securities Act of 1933, 15 U.S.C. § 77a(11) (1982). See L. LOSS, FUNDAMENTALS OF SECURITIES REGULATION 1029-46 (1983).

common law liability is more qualified, and litigation is infrequent.¹²⁷ Foreign issuers will likely be apprehensive about the stricter U.S. liability. Fueling that apprehension will be the knowledge that the United States is simply a more litigious forum than Britain and the Commonwealth.¹²⁸

To a certain extent, the problem about prospectus liability is just an aspect of the much wider question of the liability of foreign issuers and other foreign actors for violations of U.S. securities laws. It would be hard to justify giving foreign issuers who use the U.S. markets a general exemption from liability for violations of the U.S. securities laws. A case exists, however, for creating a narrowly defined safe-harbor protection for the issuer with respect to the strict-liability rule of section 11¹²⁹ and also with respect to market practices which are standard in his home jurisdiction but which might be regarded as illegal market manipulation under U.S. law.¹³⁰ The *safe harbor* proposal presents implementation difficulties. Statutory amendment of section 11 may be out of the question as a practical matter. No administrative rules could override the terms of section 11, but it may be possible to achieve the desired objective by a rule which "defines" some crucial component of section 11, such as the notion of materiality. Obviously, this proposal will need to be considerably refined before its implementation.¹³¹

All in all, the proposals for facilitating simultaneous new equity issues should be supported, and are consistent with the arguments advanced earlier in this article regarding both foreign issuers in U.S. markets and U.S. issuers abroad. However, their development is perhaps less urgent than reform of the integrated disclosure requirements for foreign issuers, given that issuer demand for simultaneous offerings is likely to be moderate.¹³²

VI

CONCLUSION

All other things being equal, securities business will gravitate towards the largest, deepest markets. If it is true, however, that issuers and investors are significantly deterred by the disclosure requirements of U.S. securities laws, then all other things are not equal, and we can expect a tilting of the center of gravity away from U.S. markets. That process will be accelerated by the increasing willingness of issuers and investors to look beyond national

127. Most countries of the British Commonwealth model their statutory liability provisions on the British Companies Act, 1948, § 43. See L. GOWER, *THE PRINCIPLES OF MODERN COMPANY LAW* 384ff (4th ed. 1979).

128. See Release No. 6,568, *supra* note 4, at 87,322.

129. Securities Act of 1933, 15 U.S.C. § 77a(11) (1982).

130. For a similar safe harbor proposal, see Cooper, *supra* note 114. See also Larose, *Extraterritorial Application of Securities Regulation and Internationalization of Securities Markets: The United States Approach*, 4 COMPANY & SEC. L.J. 80, 90 (1986).

131. Security Act Rule 175, 17 C.F.R. § 230.175 (1987) (projections), and Regulation D, 17 C.F.R. §§ 230.501-506 (1987) (limited offer and sale of securities) suggest that a rule could be devised.

132. See Exchange Act Rule 12g3-2(d)(3), 17 C.F.R. § 240.12g3-2(d)(3) (1987). See also Release No. 4,708, *supra* note 93.

frontiers, and by the deregulatory and technological changes which have facilitated international communications linkages and the growth of multinational securities firms. It seems timely, in the interests of U.S. markets and U.S. investors, for the SEC now to review its treatment of foreign issuers in U.S. markets and of U.S. issuers overseas, as well as to facilitate simultaneous equity offerings.