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Foreign Securities Offerings in the United States: The Impact of SEC Clearance of Denationalized French Stock Issues

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NOTES

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I. INTRODUCTION

In response to the growing internationalization of financial markets and the internal deregulation of foreign national securities structures,[1]

1. Legal scholars, securities analysts and the financial press have extensively followed the liberalization of European capital markets, especially the market in Great Britain. The financial community's observations have focused upon whether Britain's deregulation program, the "Big Bang," will serve as a useful model for other countries, including France, that plan to liberalize their financial markets. For an analysis of British deregu-

the United States Government, through the Securities and Exchange Commission (SEC or Commission), has entertained suggestions and has implemented measures to facilitate the flow of capital across United States borders.[2] The world financial community has generally applauded these actions, but has nonetheless continued the call for more reform and liberalization of capital markets.[3] The ideas behind the voices of reform have appeal: less federal regulation means more corporate access to international capital, more opportunities for investors, and a more efficient allocation of scarce financial resources.[4]

Little discussion, though, has been raised about whether the foundation of federal regulation of the United States securities market, the Securities Act of 1933 (Securities Act),[5] and the Securities Exchange Act of 1934 (Exchange Act),[6] will still protect the investing public if reforms are carried through at their present pace. The Securities Act was established to prevent the reoccurrence of the stock frauds and the dangerous price manipulations that spurred the market crash of 1929.[7] But today,

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lation efforts, see Barnard, *Internationalization: The United Kingdom Financial Services Bill—A New Regulatory Framework*, in BROKER-DEALER INSTITUTE 1986: NEW PRODUCTS, 24-HOUR TRADING, FINANCIAL STRUCTURES, MARKET INFORMATION, 530 PRAC. L. INST. (B4-6769) 9 (1986); Recent Development, *International Trade: Regulation of London's Financial Markets—The Financial Services Act, 1986, ch. ___*, 28 HARV. INT'L L.J. 196 (1987).

2. *See, e.g.*, Kübler, *Regulatory Problems in Internationalizing Trading Markets*, 9 U. PA. J. INT'L BUS. L. 107 (1987); Merloe, *Internationalization of Securities Markets: A Critical Survey of U.S. and EEC Disclosure Requirements*, 8 J. COMP. BUS. & CAP. MKT. L. 249 (1986); Thomas, *Extraterritorial Application of the United States Securities Laws: The Need for a Balanced* Policy, 7 J. CORP. L. 189 (1982); Note, *SEC Proposals to Facilitate Multinational Securities Offerings: Disclosure Requirements in the United States and the United Kingdom*, 19 N.Y.U.J. INT'L L. & POL. 457 (1987) [hereinafter Note, *SEC Proposals*]; Note, *Barriers to the International Flow of Capital: The Facilitation of Multinational Securities Offerings*, 20 VAND. J. TRANSNAT'L L. 81 (1987).

3. *See, e.g.*, *Poor Stock Settlement Systems Seen Hampering International Stock Trading*, 19 Sec. Reg. & L. Rep. (BNA) 248 (Feb. 20, 1987) (roundtable of securities industry experts, institutional investors and SEC representatives discuss reforms).

4. Thomas, *supra* note 2, at 190. Among the measures the SEC has taken is the introduction of simplified filing forms for foreign corporations, Forms F-1, F-2 and F-3. *See infra* notes 134-43. The SEC has also made proposals, with mixed success, for multinational securities offerings and proposals for extraterritorial enforcement of United States securities laws. *See infra* notes 151-60; *see also* Note, *SEC Proposals*, *supra* note 2.

5. 15 U.S.C. §§ 77a-aa (1982 & Supp. IV 1986).

6. *Id.* §§ 78a-kk.

7. *See* E. MCCORMICK, UNDERSTANDING THE SECURITIES ACT AND THE S.E.C. 18-25 (1948).

the ability of each Act to combat irregularities in the domestic capital system may be drastically reduced if a more open system of international securities regulation is established. The evolutionary changes of United States regulation of international capital placements could also redefine standard concepts aimed at protecting investors, such as the "integration" doctrine: a set of guidelines used to prevent issuers from fragmenting a public offering into multiple stages so that each stage qualifies for a registration exemption.[8] The prevention of resales of unregistered stock, initially issued lawfully under a registration exemption to the Securities Act, could also be significantly altered if reforms are carried to their apex.[9]

To further reform of the capital markets, the SEC recently issued a series of no-action letters that held that foreign securities would not have to be registered under the Securities Act if the stock issue met foreign government guidelines precluding resales to United States citizens.[10]

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8. *Integration of Securities Offerings*, 1985 A.B.A. SEC. CORP. BANKING & BUS. L. REP. 3 (Report of the Task Force on Integration, created by the Committee on Federal Regulation of Securities) [hereinafter ABA Report]. Integration of unregistered and registered stock offerings primarily concerns domestic offerings. In 1985, the American Bar Association commissioned a task force to examine this problem in detail. The Report of the Task Force on Integration noted the diminishing role of the integration doctrine in general. Yet the Report concluded that subsequent court decisions and SEC rule changes have strengthened the investor protection mechanisms of the Securities and Exchange Acts in ways not thought of during each Act's inception. *See also infra* notes 183-224.

The Task Force also proposed amendment of rule 152 of the Securities Act Rules, 17 C.F.R. § 230.152 (1984), to more clearly delineate the requirements for offerings to meet a "safe harbor" or exemption from registration. ABA Report, *supra*, at 67-71.

9. *See infra* notes 225-258 and accompanying text. Most shareholders may resell their stocks without registering the securities under a § 4(1) Securities Act registration exemption which allows sales of non-registered shares so long as the transaction is not by an "issuer, underwriter or dealer." 15 U.S.C. § 77d (1) (1982). A seller, however, who is in close connection with an issuer of unregistered securities, and who soon resells such securities will be deemed an underwriter under § 2(11) of the Securities Act which presumes that such a seller initially purchased the securities with a view to distribution. 15 U.S.C. § 77b (1) (1982). The Securities Act thus considers this resale process to have been part of one unregistered stock transaction from issuer to sales customer (deemed an underwriter by the SEC) to resale customer. *See* L. SODERQUIST, SECURITIES REGULATION: A PROBLEM APPROACH 266-68 (1982).

10. College Retirement Equities Fund, SEC No-Action Letter, [1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 78,420, at 77,361 (Feb. 18, 1987) [hereinafter CREF I]; French Privatization Program, SEC No-Action Letter, [1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 78,439, at 77,434 (Apr. 17, 1987) [hereinafer France Letter]; *see also United States: Securities and Exchange Commmission No-Action Letters Concerning French Privatization Program*, 36 I.L.M. 1400, 1409-21 (1987) (introductory note by E. Galliard & W. Lee) (reprint of CREF and France Letters) [hereinafter

These no-action letters involved a United States institutional investor who wished to participate in a private placement of securities pursuant to the French Government's denationalization and stock offerings of state-owned companies.[11] The French Government also requested assurances from the SEC that its proposed program would not violate United States laws.[12] In response, the SEC declared it would not recommend enforcement action against the United States investor if all parties followed through with the purchase as described in the no-action requests.[13] The SEC approval thereby allowed the United States institutional investor to participate in the accompanying private placement component of the French Government's stock offering to French citizens and residents.[14]

The Commission's decision by itself does not signal a revolutionary change in international stock transactions. It is significant, however, because by carving out an additional exemption to SEC registration of foreign securities, the Commission has indicated that it will defer to the

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French Privatization].

CREF sent a second no-action letter request to clarify the Commission's first answer. College Retirement Equities Fund, SEC No-Action Letter, [1987-1988 Transfer Binder] Fed. Sec. L. Req. (CCH) ¶78,503, at 77,612 (June 4, 1987) (hereinafter CREF II). In this second letter, CREF wished to ascertain whether acquisition of share rights, such as stock warrants, could be made by an American institutional investor without integration with a public offering conducted abroad. This Note, however, will discuss only the ramifications of the first CREF letter to the SEC, along with the no-action request sent by the French Government.

[Ed. Note: No-action Letters not cited to a reporter service or the Federal Register may be found through LEXIS or WESTLAW. LEXIS, Fedsec library, Noact file; WESTLAW, FSEC-NAL database. For the purposes of this Note, page citation to such no-action letters will be to the pagination of the original letters currently on file with the SEC. These letters may be obtained by contacting the SEC in Washington, D.C.]

11. The offerings in question were for such major French enterprises as *Compagnie de Saint-Gobain, Compagnie générale d'Electricité, Crédit Commercial de France* and *Société Généale*. Law No. 86-793 of July 2, 1986, art. 4 annex [1986] Journal Officiel [J.O.] 8340, *Dalloz-Sirey, Législation* [D.S.L.] 391 [hereinafter Law 86-783], *reprinted in France: Laws Concerning the Privatization of Nationalized Enterprises*, 26 I.L.M. 1508, 1394 (E. Galliard & W. Lee trans. 1987) [hereinafter *Nationalized Enterprises*]. For a discussion detailing the rationale behind the sales and the need for French President Mitterand to obtain capital, see Berss, *Move over, Margaret*, FORBES, Dec. 31, 1984, at 98.

12. The French Government apparently made SEC approval a condition for participation in the offerings so that "participating underwriters and brokers are not placed at risk under the registration provisions of the [Securities] Act." CREF I, *supra* note 10, at 77,362.

13. *Id.* at 77,363; France Letter, *supra* note 10, at 77,436.

14. France Letter, *supra* note 10, at 77,436.

judgment of other responsible authorities in determining whether an issue contains adequate safeguards to protect investors.[15] The decision also reflects a trend by which the SEC will not adhere to strict interpretation of what constitutes integration of stock placements, or what requirements are necessary to preclude the loss of a registration exemption due to possible impermissible resales of unregistered stock. Given the facts surrounding the no-action requests, the SEC's decision is surprising, considering that under the French program United States citizens resident in France could purchase the offerings.[16] The ruling is also unprecedented because the SEC knew and understood that the United States institutional investors could resell their privately-placed shares on the Paris Bourse:[17] the Commission must have understood that such sales, at least in theory, could place the shares with unsophisticated United States public investors.[18]

This Note will explore the possibilities of future international securities offerings in the United States in light of the SEC's answers to the no-action requests of the United States institutional investor, College Retirement Equities Fund, and of the French Government (CREF-France Letters). The Note will also review the Letters' foreseeable effects on traditional securities law concepts such as integration, and the "coming to rest" doctrine on resales of foreign-issued securities as well as analyze the decision's ramifications on United States securities law enforcement. Moreover, the Note will review the French privatization program and how the unusual nature of this program may have influenced the SEC's

15. *French Privatization*, *supra* note 10, at 1408. "It is also our view that additional procedures would not be required in the foreign offerings as a result of the concurrent U.S. offerings." France Letter, *supra* note 10, at 77,436 (reply of SEC). Essentially the SEC relied on the safeguards of French law by granting the no-action letter. Some experts have held that the decision signals a more territorial approach to securities enforcement. *French Privationization*, *supra* note 10, at 1408; *see also* Chubb & Kelly, *SEC No-Action Letter Relaxes Market*, INT'L FINANCIAL L. REV., Apr. 1987, at 21.

16. Law No. 86-912 of August 6, 1986, art. 13, [1986] J.O. 9695-97, 1986 D.S.L. 431 [hereinafter Law 86-912], *reprinted in* Nationalized Enterprises, *supra* note 11, at 1395, 1403.

17. Despite the promise of resale limits similar to those in Securities Act rule 144, 17 C.F.R. § 230.144 (1988), the distribution plan stated: "Each investor will agree not to make any reoffers or resales . . . unless . . . [such sale can be] made on the Paris Bourse in regular way transactions. . . ." France Letter, *supra* note 10, at 77,435.

18. No clear definition of "sophisticated" investor exists under the Securities Act per se. Rule 506 of regulation D of the Securities Act Rules, however, alludes to a definition of "sophistication": sales are permissible to those who have "such knowledge and experience in financial and business matters that [such persons are] capable of evaluating the merits and risks of the prospective investment." 17 C.F.R. § 230.506(b)(2)(ii) (1988).

decision. This latter purpose assumes importance because only through an understanding of the French program can securities specialists realize the full implication of the SEC rulings and plan for clients who deal in international securities offerings in order to meet SEC requirements.[19]

II. Situation Study: SEC Approval of Placement of French Privatized Securities

A. *Elements of the French Privatization Program*

To meet a budgetary crisis and to stimulate the French economy,[20] the French Government commenced in mid-1986 a major denationalization of leading industrial companies and financial institutions in which the Government owned a controlling interest.[21] The privatization reflected a radical shift in French economic policy since many of the sixty-five firms to undergo privatization were nationalized by the Government only four years earlier, soon after the election of socialist President François Mitterand.[22] The law promulgating the denationalization program, Law No. 86-793 of July 2, 1986, resembled a resolution instead of a full-fledged planning program: the law merely encouraged the French Government to formulate policy and guidelines to effect denationalization.[23]

Law 86-793 centers around two major provisions. Article 4 delineates the companies to be placed in the denationalization program by the Government.[24] The world financial community had considerable interest in

19. Privatization measures in the United States have been limited to sectors, such as prisons, which traditionally the government managed. *See, e.g.*, Savas, *Privatizations and Prisons*, 40 VAND. L. REV. 889 (1987). Yet the issue of privatization is important for securities specialists, especially for those dealing with foreign countries that have a long history of government-run operations in areas normally sponsored by the private sector. *See, e.g.*, MacKenzie, *On the Road to Privatization: Mining and Airlines*, MID. E. EXEC. REP., Sept. 1985, at 21 (Turkish denationalization efforts); *see also supra* note 1.

20. *See* Berss, *supra* note 11. Declining capital rates, and the need to spur the French industrial sector were the main reasons for the privatizations.

21. *See* Law 86-793, *supra* note 11.

22. Law No. 82-155 of Feb. 11, 1982 [1982] J.O. 566, 1982 D.S.L. 921, *reprinted in France: Law of Nationalization*, 21 I.L.M. 815 (P. Anderegg trans. 1982). For background on the nationalization program and the mixed progress it achieved, see Jacquillat, *Nationalization and Privatization in Contemporary France*, 8 GOV'T UNION REV. 21 (1987). *See generally* Loyrette & Gaillot, *The French Nationalizations: The Decision of the French Constitutional Council and Their Aftermath*, 17 GEO. WASH. J. INT'L L. & ECON. 17 (1982); Note, *The Territorial Exception to the Act of State Doctrine: Application to French Nationalization*, 6 FORDHAM INT'L L.J. 121 (1982).

23. Law 86-793, *supra* note 11, art. 4.

24. *Id.*

several of the listed companies, which included some of the premier financial houses in France.[25] The second main provision, article 7-I, requires that participating companies must have at least fifty percent Government ownership, or that they must have been previously nationalized under the Mitterand Administration's earlier decree.[26]

Other provisions of the law provide a foundation for the privatization program. Article 5 establishes guidelines to determine the offering price of each enterprise, the legal and financial means of transfer, and the conditions of payment.[27] Article 5 also has special importance for international securities holders because the provision mandates procedures for the development of public shareholding and for the protection of the national public interest.[28] Because of, or perhaps despite, this directive, the subsequent privatization measure, Law No. 86-912 of August 6, 1986 (Law 86-912), expressly allowed non-French citizens resident in France to acquire the denationalized securities.[29]

Law 86-912 specifically states, "The requests of individuals of French nationality, or [of those] resident in France, which do not exceed 10 shares are to be fully respected."[30] Although this statement does not squarely endorse unrestricted sales to United States citizens or corporations, the statement belies the Law's orientation towards wide customer distribution. Other points exemplifying the philosophy of Law 86-912 include the provisions for discounting of shares,[31] payment extensions,[32] and gratuitous distribution of shares[33] up to fifty shares per individual or up to a value of less than 25,000 French Francs.[34] Other aspects of Law 86-912 emphasize its goal of facilitating sales to a wide range of small French investors. Articles 11 and 12 direct the Government to offer holdings to salaried employees of the denationalized companies and such firms' subsidiaries, if such employees have attained five years seniority at

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25. Rossant, *Come One, Come All to the Great French Sell-Off*, BUS. WK., Sept. 22, 1986, at 46. Speculation existed that many European companies and financial "raiders" showed considerable interest in the program. *Id.* In addition, financial analysts considered the privatized stocks among the more promising issues in Europe. *Id.*

26. Law 86-793, *supra* note 11, art. 7-I.

27. *Id.* art. 5.

28. *Id.*

29. Law 86-912, *supra* note 16, art. 13.

30. *Id.*

31. *Id.* art. 11.

32. *Id.*

33. *Id.* arts. 12-13.

34. *Id.* art. 13.

their company.[35] Law 86-912 does not require employees to purchase their shares directly from the Government; shares may be transferred to the privatized corporation which then has one year to resell the shares to eligible employees.[36]

Coupled with these articles are provisions that limit foreign purchases to twenty percent of an enterprise. The Ministry of the Economy retains the power to lower the limit on foreign purchases if such measures are in the national interest.[37] This latter provision reflects another feature of Law 86-912: the limitation of large holdings. For example, if an enterprise conducts business pursuant to articles 55, 56 and 223 of the European Economic Community, the Ministry of the Economy must review requests for holdings exceeding five percent.[38] EEC law considers firms subject to these articles as corporations performing services in the individual state's national interest; therefore, despite EEC guidelines favoring unfettered access to capital, EEC law defers to the member state's regulation of such industries.[39] Certain "extraordinary shares," issued by the Ministry, provide the only exception to the limit on shareholding: through these shares, single entities or groups may control over ten percent of the capital of a corporation.[40]

Despite the laws' slant toward protection and encouragement of small, public purchasers, the privatization program has been only partially successful in attaining some of its goals. As a result of the program, about five to six million residents hold stocks of denationalized firms,[41] thus

35. *Id.* arts. 11-12.

36. *Id.* art. 11.

37. *Id.* art. 10. An exception to the trend toward exclusion of secondary buyers was the offering of Compagnie générale d'Electricité, which held a combined equity and second offering. Jacquillat, *supra* note 22, at 43.

38. Law 86-912, *supra* note 16, art. 10.

39. Treaty of Rome, March 25, 1957, arts. 55, 56, 223, 298 U.N.T.S. 3. Articles 55 and 56, part of chapter 2 of the Treaty, guarantee that the Community and its members will not interfere with the right of "establishment." This right includes ownership of stock. Treaty of Rome, art. 54. Exceptions to chapter 2, however, deal with actions of official authority—acts of the Member States themselves that concern purely internal matters. For example, article 55 provides: "Activities which in any State include, even incidentally, the exercise of public authority shall, in so far as that State is concerned, be excluded from the application of the provisions of this Chapter." 298 U.N.T.S. at 39.

Because of the official connection between some of the privatization firms and the French Government, the requirement of French ministerial approval for securities sales of these corporations is understandable.

40. Law 86-912, *supra* note 16, art. 10. Such shares may be converted into common stock for up to five years.

41. *French Flock to Buy Stocks*, N.Y. Times, Nov. 24, 1987, at 37, col. 3.

absorbing about $30-40 billion into the French capital market.[42] Experts have concluded, however, that the French Government vastly undervalued the privatized issues. For example, nonvoting shares of Saint-Gobain, a major packing company, resold on the French stock exchange at twenty times their 1986 per share earnings,[43] thus driving out secondary buyers.[44] Considering that Law 86-912 called for the objective valuation of denationalized corporations,[45] it seems that in this respect the program failed.

B. *French Securities Law*

The French stock system today combines established traditions with modern Wall Street procedures. This amalgam's goal is to make France one of the leaders in twenty-first century capital markets. And while the privatization program serves as a means of measuring French progress in the area of capital market reform, it remains to be seen whether France can continue to successfully graft new ideas onto the stock system's foundation. For example, despite the liberalization measures undertaken elsewhere in Europe with regard to stockbrokers,[46] French stock dealers still enjoy a monopoly on the stock exchange.[47] Unlike Wall Street, the French financial community considers brokers to be members of a venerable profession, not only because of the work brokers do, but also because the State appoints brokers to the Bourse.[48] As a result, France sees brokers as holders of public office.[49] In addition to their regular duties, brokers, also known as *agents de change*, have the legal power to suspend trading, to officially define controlling interests in a firm, and to recommend that firms be admitted to the Bourse.[50]

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42. Rossant, *supra* note 25, at 46.

43. *Id.*

44. CREF's application for the no-action letter contended the rise in price of such stocks was a reason for the exemption. CREF I, *supra* note 10, at 77,362.

45. Law 86-912, *supra* note 16, art. 3.

46. *See, e.g.*, Grass, *Internationalization of the Securities Trading Markets*, 9 HOUS. J. INT'L L. 17, 24-27 (1986) (changing duties of British stockbrokers following the Big Bang).

47. CODE DE COMMERCE [C. COM.] art. 76 (83 ed. Petits Codes Dalloz 1987-88); *see also* 2 SIMÉON MOQUET BORDE & ASSOCIÉS, DOING BUSINESS IN FRANCE § 15.04[2][C] (1988) [hereinafter DOING BUSINESS].

48. C. COM. art. 74; *see also* Mazet, *Foreign Investments in French Listed Equity* in LEGAL ASPECTS OF DOING BUSINESS WITH FRANCE, 407 PRAC. L. INST. (A4-4176) 27, 39 (1987).

49. Mazet, *supra* note 48, at 39.

50. *Id.* at 39-40. *See generally* Grass, *supra* note 46, at 27-30.

In contrast to the wide powers of brokers, the *Commission des Opérations de Bourse* (COB), established in 1967,[51] supervises only limited functions. The Board is comprised of a president appointed by the Council of Ministers, and four members chosen by the Ministry of the Economy.[52] Although the COB operates under the Ministry of Finance and has a managerial status over the stock brokers association, the *Compagnie des Agents de Change*, the brokers and their association have greater control, in that the association has extensive authority over trading.[53] The COB, however, in addition to reviewing issuer prospectuses,[54] has power to promulgate regulations on the procedural functioning of the stock market and thus may approve an issuer's listing on the stock exchange.[55] More important, however, unlike in the United States where the SEC has the authority to interrupt stock price quotations, French law vests such power in the *Chambre Syndicale* (the Chamber), the

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51. Ordinance No. 67-833 of Sept. 28, 1967, [1967] J.O. 9589, 1967 D.S.L. 373 [hereinafter Ordinance 67-833]; *see also* 2 DOING BUSINESS, *supra* note 47, at § 15.04[2][b]; Mazet, *supra* note 48, at 38-39.

52. Ordinance 67-833, *supra* note 51, art. 2; *see also* 2 DOING BUSINESS, *supra* note 47, § 15.04[2][b].

53. *See* Mazet, *supra* note 48, at 39-40.

54. Ordinance 67-833, *supra* note 51, art. 3(2). A prospectus must set forth the following:

1. all relevant facts concerning the transactions in question.
2. general information concerning the issuer, such as its name, juridical form, corporate purpose, registered capital, activities, etc.,
3. a description of the principal activities of the issuer, including, without limitation, information on its turnover, employees, subsidiaries, etc.,
4. certain financial information, including, without limitation, the issuer's balance sheets, profit and loss statements and consolidated accounts for the last three fiscal years as well as certain other information relating to its last five fiscal years,
5. the names of the members of the issuer's management and controlling shareholders, as well as the nature of their relationships with it,
6. a brief summary of the recent evolution of the business of the issuer and of its prospects for the future,
7. the motivation for the public offering and the use to which the proceeds thereof are to be put, and
8. the names of the persons or legal entities responsible for disseminating the prospectus and, where appropriate, information concerning the bank or other credit establishment which guarantees the placement of the securities constituting the public offering (*garante du placement*).

Instruction of February 2, 1982 of the *Commission des Opérations de Bourse* Relating to Prospectuses by Companies Making Public Offerings, ch. I, § Annex I (Pub. Commission des Opérations de Bourse 1982) [hereinafter 1982 Instruction]; 2 DOING BUSINESS, *supra* note 47, § 15.04[3][b] n.45, 52.

55. 2 DOING BUSINESS, *supra* note 47, § 15.04[2][a].

managing group of the stockbrokers association, not the COB.[56] Yet despite the differences between the COB and the SEC, to which the COB has suffered in comparison because of the variance of duties and powers,[57] the COB remains the main investigatory body for insider trading violations. In addition, France recently expanded the COB's power to intervene in publicly traded companies to ensure greater financial accountability.[58]

According to article 4 of Law 86-912, issuance of the privatized stocks was to take place using procedures prescribed by Paris Stock Exchange.[59] This, in turn, entailed use of a public offering method known as *Offres Publiques de Vente* (OPV).[60] For an issue to meet OPV requirements, the amount of shares issued must conform with minimum registered capital and value levels.[61] Because the privatization encompassed a total divestment of major sectors of the French economy, the OPV measures caused large amounts of potential capital ownership to flow into the hands of the average French resident or citizen.[62] In addition, to qualify as an OPV, an issue must meet certain minimum share requirements, namely that the stock represents:

1. at least 10 percent of the registered capital of the issuer and be valued at at least five million Francs, [or]
2. at least 5 percent of the registered capital of the issuer and be valued at at least ten million Francs, or
3. a quantity of shares equal to at least twenty times the average daily

56. Règlement Général de la Compagnie des Agents de Change, art. 109, *approved by* Arrêté of Aug. 8, 1973, [1973] J.O. 9175, 1973 D.S.L. 354, *amended by* Decree No. 83-360 of May 2, 1983, [1983] J.O. 1361, 1983 D.S.L. 233, Arrêté of Oct. 18, 1983, [1983] J.O. 9561, 1983 D.S.L. 503, Arrêté of Oct. 15, 1985, [1985] J.O. 12259, 1985 D.S.L. 558, Arrêté of Mar. 11, 1986, [1986] J.O. 3848, 1986 D.S.L. 283, Arrêté of June 19, 1986, [1986] J.O. 7640, 1986 D.S.L. 389 [hereinafter Règlement Général]; *see also* 2 DOING BUSINESS, *supra* note 47, § 15.04[2][b] fn. 7.

57. Grass, *supra* note 46, at 29.

58. Law No. 84-148 of March 1, 1984, [1984] J.O. 751, 1984 D.S.L. 222; *see also* Quintin, *French Corporate Law and the Choice of a Corporate Entity*, in LEGAL ASPECTS OF DOING BUSINESS WITH FRANCE, 407 PRAC. L. INST. (A4-4176) 105, 137-38 (1987).

59. Law 86-912, *supra* note 16, art. 4.

60. 2 DOING BUSINESS, *supra* note 47, § 15.04[4][c].

61. Règlement Général, *supra* note 56, art. 209-1.

62. *See French Flock, supra* note 41. Presently 9.5 million French citizens—one of six in the entire country—own stock in French companies. Of this figure, about two-thirds purchased stock through the privatization program. *Id.* Ironically, French politicians and the press have faulted the government for undervaluing the stocks. *See, e.g., Primitive Privatizations*, ECONOMIST, June 27, 1987, at 17.

volume of the shares of the issuer traded during the six months preceding the OPV.[63]

French procedures for establishing public offerings are relatively straightforward. First, all shares outstanding must have been paid in to the company before a new issue may commence.[64] In addition, the issuing corporation must hold a special meeting of the stockholders, a quorum of which must approve the issuance of the new stock.[65] This step is important because French law allows such stockholders to exercise preferential rights.[66] After shareholder approval occurs, the company must file specified reports with the stockbrokers association and with the COB.[67] Within the file to the Chamber, the corporation must list the basic parameters of the transaction including the number of shares to be sold and the objectives of the transaction.[68] If the Chamber approves the measures of the applicant company, the Chamber will publish public notice of its approval.[69] Simultaneously, the COB reviews the file, particularly the prospectus, to ensure that the corporation has submitted accurate information concerning the following: facts underlying the stock placement; normal information concerning the issuer; registered capital and corporate purpose;[70] profit and loss information over the past three years; names of the members of the issuer's management and shareholders; a brief summary of the evolution of the business; reasons supporting the public offering; and information on the underwriters who will back the issuer in the securities placement.[71]

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63. Règlement Général, *supra* note 56, art. 209-1, *reprinted in* 2 DOING BUSINESS, *supra* note 47, § 15.04[4][c].

64. Law No. 66-537 of July 24, 1966, [1966] J.O. 6402, 1966 D.S.L. 265, art. 38, *amended by* Law No. 82-596 of July 10, 1982 [1982] J.O. 2204, 1982 D.S.L. 323 [hereinafter Law 66-537]. For a translation of the preamended laws, see FRENCH LAW ON COMMERCIAL COMPANIES 33 (CCH 1971). For a more detailed outline of the French public offering procedure, see 2 DOING BUSINESS, *supra* note 47, § 15.04. *See also* Quintin, *supra* note 58, at 142.

65. Law 66-537, *supra* note 64, art. 180.

66. *Id.* art. 183, *amended by* Law No. 85-1321 of Dec. 14, 1985, [1985] J.O. 14595, 1986 D.S.L. 43.

67. Law 66-537, *supra* note 64, art. 74.

68. Règlement Général, *supra* note 56, art. 209-2(1); *see also* 2 DOING BUSINESS, *supra* note 47, § 15.04[4][c].

69. Règlement Général, *supra* note 56, art. 209-4; 2 DOING BUSINESS, *supra* note 47, § 15.04[4][c].

70. Most of this information is available to the public when the company initially registers itself pursuant to French law. Law 66-537, *supra* note 64, § II (Organization of Corporations).

71. 1982 Instruction, *supra* note 54.

French underwriters play a role in stock transactions different from that of their United States counterparts. All issuers, even those registrants who do not list themselves on the Bourse, must have a transfer agent.[72] The purpose of this requirement is to free issuer company personnel from performing transfer agent tasks.[73] French underwriters continually supervise all aspects of the issuance, from payment of coupons, to the distribution of stock dividends long after placement.[74] Moreover, an underwriter normally may purchase all or part of its client's issue, even if the underwriting firm plans to redistribute the stocks to its own customers.[75] Program underwriters for the privatization, however, cannot exercise this option because Government policy goals mandate distribution to ordinary citizens.[76]

Some similarities do exist between United States and French underwriting. Under both systems, underwriters may act as intermediaries between market customers and the issuer, and may offer new securities to their customers.[77] Also, as in the United States, underwriters in France may contract with the issuer to guarantee that the entire issuance will be purchased. If the issue is not completely sold, the underwriters will purchase the remaining securities themselves.[78]

C. *Elements of the SEC Approval*

Because the French Privatization program released millions of dollars worth of stock, and because such securities included those of highly respected banking, insurance, credit and public utility companies,[79] United States institutional investors expressed interest in obtaining holdings of subsequent issues. Based on this interest, College Retirement Equities Fund (CREF), the manager of a $28 billion ERISA fund, $3 billion of which is in foreign securities,[80] approached French authorities, seeking to participate in the international private placement undertaken

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72. *See* Mazet, *supra* note 48, at 44-47.
73. *Id.*
74. 2 DOING BUSINESS, *supra* note 47, § 15.03[10][a].
75. The French call this process *prise ferme. Id.*
76. Law 86-912, *supra* note 16, arts. 11-13.
77. *Compare* 2 DOING BUSINESS, *supra* note 47, § 15.03[10][a], *with* L. SODERQUIST, *supra* note 9, at 35-37.
78. 2 DOING BUSINESS, *supra* note 47, § 15.02[10][a]. *Id.* French law states that plans to increase capital must be completed within five years. Law 66-537, *supra* note 64, art. 181, *amended by* Law. No. 83-1, of Jan. 3, 1983, [1983] J.O. 162, 1983 D.S.L. 89.
79. Law 86-793, *supra* note 11, art. 4 Annex.
80. CREF I, *supra* note 10, at 77,361.

concurrently with the public offering.[81] French officials supervising the program indicated that they would allow CREF participation in the offering "*provided* that, in so doing, the French Government and participating underwriters and brokers [were] not placed at risk under the registration provisions of the 1933 Act."[82] Incidentally, CREF held securities of French issuers valued at over $160 million, most of which CREF maintained in France thus bolstering CREF's standing with the French Government.[83]

In order to obtain French administrative approval to be a recipient of the privately placed securities,[84] CREF, through counsel, petitioned the SEC for a no-action letter.[85] CREF based its request on three grounds. First, CREF argued that current SEC restrictions on unregistered foreign offerings unnecessarily hampered CREF's strategy of long-term securities investment and that because of these restrictions,[86] CREF could not participate in the French program.[87] CREF's second argument was more persuasive. Because of stringent United States securities law restrictions, responsible issuers such as France had been continually wary of including United States participation in any private stock placement.

The previous privatizations, Compagnie de Saint-Gobain and Compagnie financière de Paribas, quickly sold out at the initial offering price and soon rose in value on the secondary market.[88] United States institutional investors such as CREF could make purchases on the secondary market, but such acquisitions could be made only at a less favorable

81. Law 86-793, *supra* note 11, arts. 11, 13.

82. CREF I, *supra* note 10, at 77,362.

83. *Id.*

84. *Id.* at 77,361.

85. To obtain a no-action letter, counsel for the applicant corporation outlines the proposed transaction to the chief counsel of the particular operating division administering the regulation for which the exemption is sought. The Chief Counsel for the Division of Corporation Finance handles applications for no-action requests addressing Securities or Exchange Act questions. Lemke, *The SEC No-Action Letter Process*, 42 BUS. LAW. 1019, 1024 (1987). Usually, the SEC grants letters freely so long as the issuer meets the relevant securities rules and laws. While no-action letters do not have the force of law, in practice, recipients of such letters may rely on them with confidence. L. SODERQUIST, *supra* note 9, at 22.

Although counsel for a particular division of the SEC grants a no-action request, this Note will refer to answers by the Chief Counsel of the Division of Corporation Finance as answers by the SEC in general.

86. CREF I, *supra* note 10, at 77,362.

87. *Id.*

88. *Id.*; *see also supra* note 62.

price.[89] Therefore, since United States securities laws made foreign issuers hesitant and since CREF could eventually purchase the shares, the only effect the SEC's rules had was to make purchases of foreign-issued securities more expensive than they otherwise would have been.[90] CREF's third argument charged that this "prejudicial effect" was not an intended aim of the applicable United States securities laws.[91]

Legal counsel for CREF supported their contentions by finally arguing that under section 4(2) of the Securities Act,[92] CREF qualified as a sophisticated investor; thus, France, as an issuer, would not have to register the privatized offerings.[93] If one accepted this argument, it logically followed that French officials and participating underwriters did not have to face the possibility of sanctions for failing to register such an offering with the SEC.[94] CREF also contended that the factors behind the offering made the grant of a registration exemption particularly compelling. No public market in the United States existed for the French securities; agreements would be concluded among issuers, dealers and underwriters to ensure that the securities would not be sold to United States nationals; and CREF would send out warrants to the SEC and to potential resale customers that CREF was purchasing such stocks for investment purposes and would not knowingly resell the stock to United States investors.[95]

On the other end of the transaction, the French Government, through the French branch of a United States law firm,[96] contacted the SEC to request assurances that the Division of Corporation Finance would not

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89. CREF I, *supra* note 10, at 77,362.

90. *Id.*

91. *Id.* From the Securities Act's inception, legal commentators have noted the inherent tension in the Act between "giving maximum protection to investors [and] minimum interference to business." Douglas & Bates, *The Federal Securities Act of 1933*, 43 YALE L.J. 171, 173 (1933).

92. Section 4(2) provides an exemption for transactions that are not public offerings. 15 U.S.C. § 77d(2) (1982).

93. CREF I, *supra* note 10, at 77,362.

94. *Id.*

95. *Id.* at 77,362-63. A possible exemption could also exist under section 4(6) of the Securities Act for "sales by an issuer solely to one or more accredited investors." 15 U.S.C. § 77d(6) (1982). However, the maximum limit for such an exemption is $5 million, presumably too low a figure for the French privatizations. *Id.* § 77c(b).

96. Foreign issuers seeking a no-action letter typically use United States law firms that either have offices located in the issuer's home country or possess strong securities law experience. For example, CREF employed the New York-based firm of Debevoise & Plimpton and the French Government used the Paris branch of Shearman & Sterling. *French Privatization*, *supra* note 10, at 1410, 1417.

recommend enforcement action if the privatization program proceeded as planned.[97] The Government asked specifically whether the private placements to United States institutional investors would be integrated with the public offering.[98] The French Government's letter outlined the OPV procedure for public offerings and highlighted the categories of stock subscriptions available: Category "A" allowed for a purchase of up to ten shares by French citizens and foreign citizens resident in France, and Category "B" allowed for additional purchases of stock by French citizens and foreign resident nationals residing in France.[99]

Because the French Government developed the privatization program to encourage wide distribution of shares, the Government was concerned that its institutional placement would be integrated with the public offering, thus eliminating the private placement exemption of section 4(2) of the Securities Act.[100] French authorities, on their own initiative, and perhaps with an eye toward settling some uncertainties evolving from the answer to the CREF no-action letter,[101] proposed to structure the international private placement offering with additional restrictions. Such measures included notices to offerees stating that the Securities Act would not cover the privately-placed securities, and that such securities could not be resold in the United States or to United States citizens.[102] In addition, France promised to conclude agreements with underwriters forbidding sales to United States citizens and that advisory statements would be sent to dealers in the private placement warning of the United States selling restrictions.[103]

To bolster its argument that United States institutional investors should be included in the private placement, France contended to the SEC that section 4 of the Securities Act created an exemption allowing a private placement without registration.[104] Under this exemption, private

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97. France Letter, *supra* note 10, at 77,434.

98. *Id.* at 77,435.

99. *Id.* OPV laws provide another procedure for stock purchases, Category "C," which is available only to French entities not under foreign control.

100. *See supra* note 92.

101. *See supra* note 10. Even though *CREF II* did not mention the French privatization program, one could assume the SEC's first no-action letter left some questions open. By the nature of the letter, it may be assumed that CREF was concerned about whether American institutional investors could do more than merely purchase stocks in a foreign offering. Hence, the question posed in the second letter centered on whether American institutional investors could obtain and exercise stock warrants of foreign-issued shares. CREF II, *supra* note 10, at 77,612.

102. France Letter, *supra* note 10, at 77,435.

103. *Id.*

104. *Id.*

offerees could not make offers or resales unless another Securities Act exemption applied. Therefore, because of these restrictions, it was unnecessary for the United States to deny an exemption because no practicable way existed for the United States institutional investors to resell the stock.[105] An interesting facet of the the French proposal was that despite the French Government's reliance on established Securities Act registration exemptions, no such exemption covered the "regular way," *i.e.* standard, Bourse transactions that Law 86-912 of the denationalization program allowed.[106] SEC approval of the French request seems unusual because under a French "regular way" transaction, no requirement exists that an investigation be held to determine the nationality of the buyer.[107] Therefore it appears that despite any guidelines the French Government and CREF agreed to place on the offerings, a party could resell the securities on the Bourse without having a duty to inquire whether the purchaser was a United States citizen.

The CREF and the French Government requests resulted in no-action statements holding that the securities would not have to be registered under the Securities Act[108] and that OPV measures were adequate to preclude integration of the public and private offerings.[109] Both sets of letters, though, raise interesting points that relate to the application of United States securities laws to foreign issuers. First, the SEC staff accepted the argument that certain procedures used to ensure prevention of resales to United States investors were not necessary. Because of the close relationship between the parties to the underwriting, the SEC accepted CREF's assertion that the use of either temporary share certificates or the employment of legends on share certificates forbidding resales was unnecessary.[110]

Second, and more important, the CREF no-action letter emphasizes that through Securities Act Release No. 4708[111] (an interpretative release which holds that foreign offerings by United States issuers need not be registered with the Commission) a foreign public offering combined

105. *Id.*

106. Law 86-912, *supra* note 16, art. 4.

107. France Letter, *supra* note 10, at 77,435.

108. CREF I, *supra* note 10, at 77,363 (response to CREF by SEC Chief Counsel, Division of Corporation Finance).

109. France Letter, *supra* note 10, at 77,436 (response to French Government by SEC Chief Counsel, Division of Corporation Finance).

110. CREF I, *supra* note 10, at 77,363.

111. Registration of Foreign Offerings by Domestic Issuers; Registration of Underwriters of Foreign Offerings by Broker-Dealers, Securities Act Release No. 4708, 29 Fed. Reg. 9828 (July 22, 1964) [hereinafter Release 33-4708].

with a United States private placement should not require registration.[112] The CREF no-action request pointed out that while Release 33-4708 deals with United States issuers, the spirit of the Release still applies if a foreign issuer makes a non-United States public and a United States private offering.[113] If the SEC continues to approve the non-registration of such offerings, based on its decision in the CREF-France Letters, foreign issuers will have greater opportunities for access to United States markets without concern about SEC intervention. The decision in the CREF-France Letters has thus removed one of the major obstacles that foreign issuers have encountered in obtaining United States capital. Even if the SEC's decision is narrowly interpreted, future issuers with a strong connection to a trustworthy government may encounter little resistance in making stock placements with large, sophisticated institutional investors.

Several negative aspects to the letters, though, exist. Despite the SEC's holding that the French plan will not result in an integrated stock offering, the lack of resale constraints could pose problems. The French Government's no-action request mentioned the possibility of resales of the privately-placed securities on the Paris Bourse in "regular way" transactions, which seems to circumvent the precautions that CREF and the French Government argued they would undertake in order to prevent resales to United States citizens.[114] In addition, the letter from the French Government indicates few precautions were established to protect United States citizens who are eligible to purchase the privatized stock because of their legal status as French nationals.[115] Because of this last loophole, a situation could easily arise in which a French resident, who is also a United States citizen, could purchase unregistered stock. If problems arose concerning these transactions, the question would ensue of whether United States securities fraud laws would apply to the purchase in question.

In granting registration exemptions to CREF and to France, the SEC opened the door for greater flexibility in foreign-issued share distributions, the benefits of which will help nations with sophisticated financial structures. Yet by giving blanket approval to the proposals, the SEC may have failed to ensure that investors are properly protected if difficulties

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112. *Id.*; *see also* CREF I, *supra* note 10, at 77,363.

113. France Letter, *supra* note 10, at 77,435.

114. *Id.* at 77,434-35.

115. France deems individuals of foreign nationality who have established habitual residence in France as legal residents. Arrêté of August 9, 1973, art. 3 [1973] J.O. 8701, 1973 D.S.L. 345. *See generally* 1 DOING BUSINESS, *supra* note 47, § 3.02[1][b].

develop with such offerings. Only through an analysis of the SEC's decision as it applies to the traditional measures of securities regulation, will the full impact of the Commission's decision become clear.

III. International Stock Offerings Involving the United States

In order to glean the rationale behind the SEC's no-action assurances to CREF and the French Government, Commission attitudes towards international securities offerings, and the application of United States securities laws to such offerings, must be explored. Initially the Securities Act and the Exchange Act seem to apply to foreign investors and issuers so long as the transaction peripherally involves the United States or its citizens. The Securities Act states that interstate commerce includes "transportation or communications relating thereto among the several States . . . or between any foreign country and any State, Territory, or the District of Columbia."[116] The Exchange Act further states that means or instrumentalities of interstate commerce cannot be used to defraud, manipulate or to carry out contrivances that contradict SEC rules.[117] From reading the rules in conjunction with each other, some securities law experts have argued that the Acts are applicable in their entirety to international securities transactions that affect, in some manner, the United States.[118]

While various United States judicial decisions have limited this philosophy,[119] the nature of international securities markets has also served to prevent a stringent interpretation of the Acts. First of all, it is procedurally difficult for foreign companies to follow United States guidelines, especially in light of differing foreign accounting and financial standards.[120] Other points countering the idea of strict enforcement include economic costs: if meeting SEC guidelines becomes too expensive, foreign

116. Securities Act § 2(7), 15 U.S.C. § 77b(7) (1982).

117. Securities Exchange Act § 10(b), 15 U.S.C. § 78j(b) (1982).

118. *See, e.g.*, Larose, *Conflicts, Contacts and Cooperation: Extraterritorial Application of the United States Securities Laws*, 12 Sec. Reg. L.J. 99, 101-02 (1984). Through the "conduct" and "effects" tests, United States courts have effectively reduced the likelihood that the SEC will bring suits against foreign entities for violation of the Securities and Exchange Acts. *See also* Comment, *Extraterrtorial Application of United States Commodity and Securities Laws to Market Transactions in an Age of Intercontinental Trading Links*, 7 Nw. J. Int'l L. & Bus. 351, 362-67 (1985).

119. Larose, *supra* note 118, at 101-02; *see also infra* notes 287-307 and accompanying text.

120. Lorenz, *EEC Law and Other Problems in Applying the SEC Proposal on Multinational Offerings to the U.K.*, 21 Int'l Law. 795, 796 (1987).

issuers will be less inclined to seek investment opportunities in the United States.[121] Secondary arguments include the propositions that stringent SEC behavior unnecessarily hampers the free flow of capital,[122] and that general barriers on the trading of securities has a deleterious effect on United States economic foreign policy.[123] In addition to these somewhat abstract economic arguments, a few real world practicalities have prevented the SEC from having a wider role in policing international placements.

The United States judiciary has set up major limitations by reducing the territorial scope of United States securities laws. In *Schoenbaum v. Firstbrook*,[124] a United States shareholder of Banff Oil, a Canadian corporation, brought a derivative suit alleging that Banff directors, among others, forced Banff to sell its treasury shares at a market price the defendants knew, from inside information, did not represent the true value of such shares. The court's analysis focused on the American citizenship of some of the parties involved, even though all transactions occurred in Canada. The court held that "Congress intended the Exchange Act to have extraterritorial application in order to protect *domestic investors* who have purchased foreign securities on American exchanges, and to protect the domestic securities market from the effects of improper foreign transactions in United States securities."[125] Despite affirming the grant of summary judgment for the defendant, the court found that Exchange Act review did not exclude foreign transactions per se.[126] As a

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121. Thomas, *Internationalization of the Securities Markets: An Empirical Analysis*, 50 GEO. WASH. L. REV. 155, 158 (1982).

122. *Id.* at 158.

123. *Id.*

124. 405 F.2d 200 (2d Cir. 1968), *aff'd in part, rev'd in part*, 405 F.2d 215 (2d Cir. 1968) (en banc), *cert. denied*, 395 U.S. 906 (1969); *see also* Larose, *supra* note 118, at 103-04; Comment, *supra* note 118, at 362-65.

125. Schoenbaum, 405 F.2d at 206 (emphasis added). The court stated:

> We find that the language and [the] purpose of § 30(b) show that it was not meant to exempt transactions that are conducted outside the jurisdiction of the United States unless they are part of a "business in securities." Indeed, since Congress found it necessary to draft an exemptive provision for certain foreign transactions and gave the Commission power to make rules that would limit this exemption, the presumption must be that the Act was meant to apply to those foreign transactions not specifically exempted.

Id. at 208.

126. *Id.* The court affirmed the grant of summary judgment partly on the ground that, despite valid subject matter jurisdiction, the defendants' conduct did not give rise to a cause of action under rule 10b-5 or under section 10(b) of the Exchange Act. *Id.* at 212-214. Later, the Second Circuit, en banc, reversed the lower court and held that the plaintiff's claim was cognizable under rule 10b-5. Therefore, summary judgment in favor

result the decision did set guidelines as to the applicability of United States securities laws in policing fraudulent conduct that has effects in this country.

Leasco Data Processing Equipment Corp. v. Maxwell[127] subsequently reduced the scope of the *Schoenbaum* effects test. In *Leasco*, a foreign defendant allegedly caused a United States firm and other plaintiffs to purchase shares of a British company at an inflated price on the London Stock Exchange. The Second Circuit distinguished the facts of *Leasco* from *Schoenbaum* noting that the United States company purchased shares on a reputable exchange.[128] Because of this factor, the court believed that to enter judgment for the plaintiff on the basis of the plaintiff's United States nationality stretched the meaning of the effects test too far.[129] The court instead focused on the legislative intent behind the Securities and Exchange Acts, holding that Congress enacted the rules so as to prevent fraudulent conduct within the United States.[130] As a result of this case, the "conduct" test has been the other major barometer by which United States courts have measured fraud in international securities dealings.

The SEC actively encourages registration of foreign stock issues, in part because of judicial limitations upon the extraterritorial enforcement of the securities laws. Yet, pressures toward liberalization stemming from the internationalization of capital markets have had some effect on the Commission. Therefore, to facilitate registration, the SEC in 1982

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of the defendants, except for one corporate party, was improper. 405 F.2d 215, 219-220.

127. 468 F.2d 1326 (2d Cir. 1972); *see also* Larose, *supra* note 118, at 104-05; Comment, *supra* note 118, at 365-67.

128. *Leasco*, 468 F.2d at 1332.

129. *Id.* at 1334.

130. *Id.* at 1336-37.

> Our case, however, is not the simple one thus hypothesized. In that instance not only the fraudulent misrepresentation but the issuance of the check and the receipt of the securities occurred in the United States, although the check was deposited and the security mailed in Canada. Here it was understood from the outset that all the transactions would be executed in England. Still we must ask ourselves whether, if Congress had thought about the point, it would not have wished to protect an American investor if a foreigner comes to the United States and fraudulently induces him to purchase foreign securities abroad—a purpose which its words can fairly be held to embrace. While, as earlier stated, we doubt that impact on an American company and its shareholders would suffice to make the statute applicable if the misconduct had occurred solely in England, we think it tips the scales in favor of applicability when substantial misrepresentations were made in the United States.

Id. at 1337. For a throrough analysis of the "conduct" and "effects" tests, see Larose, *supra* note 118, at 103-05, 112-19.

revised the 20-F form, an application similar to a consolidated registration statement and an annual report form.[131] Items required on the 20-F form include descriptions of the registrant's business, accounting principles used by the registrant, and the registrant's current business prospects.[132] To complement the 20-F form, the Commission also promulgated three new instruments to ease foreign registration:[133] forms F-1,[134] F-2,[135] and F-3.[136] Analogous to forms S-1,[137] S-2[138] and S-3[139] used by domestic issuers, this new system created an integrated disclosure system for foreign registrants. [140]

Form F-1, like its S-1 counterpart, requires only basic information, similar to that required by 20-F. Form F-2, however, may be utilized only by issuers who have completed all other reporting requirements under sections 12 and 15(d) of the Exchange Act,[141] or who have completed a 20-F form. Form F-2 applicants must also be "world class" issuers (those whose shares have a market value exceeding $300 million).[142] F-3 qualifications are almost identical to those of F-2, but "non-world class" issuers may use Form F-3 if the offering is investment grade non-convertible debt.[143]

The SEC has also redesigned certain traditional financial instruments in order to encourage registration. For example, American Depositary Receipts (ADR's) have existed since 1927,[144] but their growth has

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131. Integrated Disclosure System for Private Investors, Securities Act Release No. 6360, 46 Fed. Reg. 58511 (Dec. 2, 1981).

132. *Id.* at 58514.

133. Adoption of Foreign Integrated Disclosure System, Securities Act Release No. 6437, 47 Fed. Reg. 54764 (Dec. 6, 1982).

134. 17 C.F.R. § 239.31 (1988).

135. 17 C.F.R. § 239.32 (1988).

136. 17 C.F.R. § 239.33 (1988).

137. 17 C.F.R. § 239.11 (1988).

138. 17 C.F.R. § 239.12 (1988).

139. 17 C.F.R. § 239.13 (1988).

140. *See* Lorenz, *supra* note 120, at 799-801. *See also* Cox, *Internationalization of the Capital Markets: The Experience of the Securities and Exchange Commission*, 11 MD. J. INT'L L. & TRADE 201, 203 (1987).

141. 17 C.F.R. § 239.32(b)(1) (1988). These provisions mandate registration of companies with the Commission if the firms are listed on an exchange or possess over 300 shareholders of record. *Id.*

142. Form F-2, General Instructions (I)(B)(2), 47 Fed. Reg. 54,774 (Dec. 6, 1982).

143. Form F-3, General Instructions (II)(A)(4), 47 Fed. Reg. 54,778 (Dec. 6, 1982).

144. Royston, *The Regulation of American Depositary Receipts: Americanization of the International Capital Markets*, 10 N.C.J. INT'L L. & COM. REG. 87, 87-88 (1985); *see also* Lorenz, *supra* note 120, at 801-04.

skyrocketed since the amending of both Form F-6[145] and rule 12g3-2.[146] ADR's are "negotiable receipts issued by a United States bank or trust company (the Depositary) to evidence ownership of securities of a foreign company deposited with the Depositary's office or agent in the foreign country."[147] ADR's possess certain advantages over normal forms of foreign stock ownership because of the "voluntarisim principle:"[148] in exchange for volunteered information pursuant to Form F-6 (which can be used only if the issuer does not plan share distribution),[149] the SEC will not demand more comprehensive information from the issuer or security holder.[150] Absent the shortcut provided to issuers by ADR's, United States non-institutional holdings of non-registered securities would be much more difficult to maintain.

In more recent years, the SEC has not only attempted to break down internal barriers to capital flow, but has entertained the idea of a common information disclosure system involving other countries. In Securities Act Release No. 6568,[151] the Commission requested comment on a proposed standardized prospectus for use within the United States, Canada and the United Kingdom. Reasons for the program ranged from the wide flow of capital among the three nations to the existence of similar underwriting systems.[152] The Release also suggested a reciprocity system: an offering document used by an issuer in one country would fulfill similar document requirements in the other two nations.[153] One problem with this proposal was that British and Canadian issues would

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145. 17 C.F.R. § 239.36 (1988).

146. In 1983 the Commission promulgated rule 12g3-2 of the Exchange Act which allowed registration exemption for American Depositary Receipts and other select foreign securities. 17 C.F.R. 240.12g3-2 (1988). The rule exempts securities of foreign issuers from compliance with § 12(g) of the Exchange Act, 15 U.S.C. § 78l(g) (1988), if the securities have fewer than 300 resident holders in the United States. *Id.* An important part of this regulation pertaining to the CREF-France Letters is that under subsection (b) of the new rule, private issues do not have to be registered so long as the issuer files information required by the issuer's home country. *See also* L. LOSS, FUNDAMENTALS OF SECURITIES REGULATION 68-72 (1988); Lorenz, *supra* note 120, at 801-04.

147. Royston, *supra* note 144, at 87.

148. *Id.* at 88-89.

149. 17 C.F.R. § 239.36 (1988).

150. Royston, *supra* note 144, at 89. For an example of how the ADR system facilitates complex offerings, see Banco Central, S.A., SEC No-Action Letter (June 20, 1987) (Spanish bank offering of ADR's); *see also Relief Granted in International Offering of Spanish Bank Securities*, 19 Sec. Reg. & L. Rep. (BNA) 1068 (July 17, 1987).

151. Facilitation of Multinational Securities Offerings, Securities Act Release No. 6568, 50 Fed. Reg. 9281 (Mar. 7, 1985).

152. *Id.* at 9281-83.

153. *Id.* at 9283.

still face civil liability under section 11 of the Securities Act for material misstatements in a stock registration, even if such statements complied with British or Canadian registration requirements.[154] The SEC also proposed that fair statutory standards be enacted to allow for synthesization of the proposals, even though some United States liability provisions would again apply.[155] Comments from the American Bar Association and others, though, indicate that while Release 33-6568 generated interest in the financial community, uncertainty over SEC interpretation of what constitutes appropriate disclosure effectively postponed the reciprocity and common prospectus proposals.[156]

United States and world financial community reception of other SEC proposals has been even less enthusiastic. In mid-1980s, the Director of the SEC's Division of Enforcement, John Fedders, suggested a "waiver by conduct" rule whereby illegal activities in the United States by foreign issuers would constitute a waiver of the protection of the securities laws of that party's home country.[157] This meant an accused party would be subject to United States jurisdiction. Equalization of treatment for foreign and domestic violators of United States securities law seemed attractive, but opposition was immediate.[158] Commentators believed that the measures would cause an opposite result:[159] to protect their sovereignty, foreign governments would hinder United States investigations of foreign securities fraud. In turn, cooperation among nations in furthering international capital movements would be reduced.[160]

Even though reform in the area of public international offerings appears likely to occur, questions remain as to how private offerings fit within the spirit of internationalization. Normally, foreign private placements of stock in the United States must first meet an exemption in the Securities Act, usually under regulation D.[161] Foreign issuer usage of

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154. *Id.*

155. *Id.*

156. *See* Lorenz, *supra* note 120, at 807-08.

157. Fedders, *Policing Trans-Border Fraud in the United States Securities Markets: The "Waiver by Conduct" Concept—a Possible Alternative or a Starting Point for Discussions?*, 11 BROOKLYN J. INT'L L. 477 (1985).

158. *Id.*

159. De Capitani, *Response to Fedders' "Wavier by Conduct"*, 6 J. COMP. BUS. & CAP. MKT. L. 331 (1984); *see also* Singer, *The Internationalized Securities Market and International Law—A Reply to John M. Fedders*, 6 J. COMP. BUS. & CAP. MKT. L. 345 (1984); Wymeersch, *Response to Fedders' "Wavier by Conduct"*, 6 J. COMP. BUS. & CAP. MKT. L. 339 (1984).

160. De Capitani, *supra* note 159, at 332-34.

161. 17 C.F.R. §§ 230.501-.506 (1988).

this regulation is conditioned upon filing of a 20-F form.[162] Outside of meeting this requirement, most foreign issuers may freely distribute their securities to United States citizens. Regulation D states that "[o]ffers and sales of securities to foreign persons made outside the United States effected in a manner that will result in the securities coming to rest abroad generally need not be registered under the Act."[163] If the foreign issuer places its stock with only sophisticated or accredited investors,[164] issuers can raise unlimited dollar amounts.[165] Regulation D, however, contains ceilings on the amounts offerors may raise, based on the number of non-accredited investors who wish to participate: the more investors present, the lower the ceiling on funds the unregistered offering may garner.[166]

One source of international securities placement law that has generated much discussion is Securities Act Release No. 4708. The product of a specially created executive task force,[167] the Release called for reform of certain aspects of the registration requirements under the Securities Act. In the first part of the Release, the SEC reviewed the broad interpretation section 2(7) of the Securities Act gives to the term "interstate commerce," and how courts have interpreted section 5 of this Act to protect primarily United States investors.[168] The Release also noted that even though the SEC previously held that the Securities Act properly encompassed all securities issued to United States citizens, certain limitations should prevail. Securities issued to United States service personnel abroad, for example, would still be protected, but other foreign-based issues that included a few United States citizens were not in the true sense "public offerings."[169] Because of the reduced scope of these offerings, the Commission would henceforth grant such issues an exemption

162. *See supra* notes 131-32.

163. Regulation D, 17 C.F.R. §§ 230.501-.506 preliminary note 7 (1988).

164. *See* 17 C.F.R. § 230.501 (1988).

165. 17 C.F.R. § 230.506 (1988).

166. 17 C.F.R. § 230.504-.505 (1988); *see also* L. SODERQUIST, *supra* note 9, at 549-50 (Supp. 1985).

167. Release 33-4708, *supra* note 111. The group's official name was the "Presidential Task Force on Promoting Increased Foreign Investment in the United States Corporate Securities and Increased Foreign Financing for United States Corporations Operating Abroad." *Id.*

168. *See, e.g.*, Schoenbaum v. Firstbrook, 405 F.2d 200 (2d Cir. 1968). Although the Second Circuit decided the case after the SEC published Release 33-4708, the decision reflected judicial attitudes about whether certain conduct would actually ensure that the securities remain in foreign hands. *See also* Evans, *Offerings of Securities Solely to Foreign Investors*, 40 BUS. LAW 69, 70 (1984).

169. *See* Release 33-4708, *supra* note 111.

under section 4(2) of the Securities Act.[170]

Release 33-4708 also addressed the applicability of section 15(a) of the Exchange Act to foreign underwriters.[171] Section 15(a) prohibits brokers and dealers from using means of interstate commerce to induce purchases or sales of a security unless each underwriter has registered with the SEC.[172] The Release emphasized that future regulation of foreign underwriters was unnecessary even in circumstances in which United States securities were being distributed abroad.[173] The Release stated that registration of underwriters was necessary only if the foreign underwriter belonged to an underwriting syndicate in the United States, and if such underwriter during the stock issue would exercise greater powers over transactions than that exercised by the underwriter's United States counterparts.[174]

An interesting aspect of Release 33-4708 as it relates to the French privatizations is that the Release previously stood only for the proposition that foreign or United States-issued securities primarily intended for foreign markets did not have to be registered.[175] CREF, however, correctly dissected an unanswered question of Release 33-4708: technically the Release applied to brokers dealing with securities issued in the United States, not shares issued abroad.[176] CREF contended, though, that the Release applied by analogy since the likelihood of the securities "coming to rest" in the United States secondary markets was remote.[177] CREF further argued that by extending the logic of the Release and since redistribution to the United States was unlikely, warnings regard-

170. At the time when the SEC published Release 33-4708, the public offering exemption was codified at section 4(1) of the Securities Act. 15 U.S.C. §§ 77d(1) (1958). Subsequent legislation placed this exemption at section 4(2) of the Securities Act, 15 U.S.C. § 77d(2) (1964). Securities Act Amendment of 1964, Pub. L. No. 88-467, 1964 U.S. CODE CONG. & ADMIN. NEWS (78 Stat.) 565, 580; *see also supra* note 92.

171. Release 33-4708, *supra* note 111.

172. 15 U.S.C. § 78o(a) (1982).

173. Release 33-4708, *supra* note 111.

174. *Id.*

175. *See, e.g.*, Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 981 n.12 (2d Cir. 1975), *cert. denied sub nom.* Bersch v. Arthur Andersen & Co., 423 U.S. 1018 (1975); F.O.F. Proprietary Funds, Ltd. v. Arthur Young & Co., 400 F. Supp. 1219, 1220 n.2 (S.D.N.Y. 1975) (dismissal of Canadian company's suit over unregistered foreign debentures); *see also* InfraRed Assoc., Inc., SEC No-Action Letter (Sept. 13, 1985) (American company's offering solely to European investors granted a 33-4708 exemption so long as issuer complied with restrictions preventing resales of shares in the United States).

176. CREF I, *supra* note 10, at 77,363; *see also French Privatization, supra* note 10, at 1408.

177. CREF I, *supra* note 10, at 77,363.

ing the prohibition of resales such as reminders on share certificates, were unnecessary.[178]

Statements by CREF and the French Government in their no-action letter requests belie the uncertainty that the international financial community experiences with United States securities regulations in general and Release 33-4708 in particular. If the CREF-France Letters are a major step in the liberalization of international securities placements, the SEC used an unusual forum in which to show its change in attitude. Most policy changes in United States securities regulation have come about through interpretative releases or through court decisions.[179] Yet the gradual changes in United States regulation of offerings reflect the SEC balance between easy capital access and investor protection. The unusual aspect of the CREF-France Letters is that in a single effort the SEC has enabled foreign issuers greater flexibility and access to United States capital markets.

Despite the slow pace of reform heretofore, some procedures still must be readjusted. Perhaps the common prospectus proposal[180] could be integrated with EEC reporting requirements resulting in a uniform code for registration of European issues.[181] But despite the reforms so far, foreign issuers seem to want to have it both ways. They wish complete access to United States markets but with limited acquiescence to United States laws. Whether the balance between liberalization and investor protection has been tipped to the former can only be determined after a restructured foreign security placement system has been operating in the United States for some time. Once this occurs, though, it may be too late to protect defrauded investors.

IV. INTEGRATION ISSUES

A primary issue in the CREF-France Letters was whether the private placements to the American institutional investors would lose any exemption under the Securities Act because of the placements' coincidence with the public offering to French citizens and residents.[182] Under the

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178. *Id.*; *see also* France Letter, *supra* note 10, at 77,435.

179. The no-action letter process allows the Commission to redevelop new policies and gauge industry response before a final promulgation is made. Lemke, *supra* note 85, at 1022-23.

180. *See* Facilitation of Multinational Securities Offerings, *supra* note 151.

181. Lorenz, *supra* note 120, at 815. Lorenz does not minimize the inherent difficulties of integrating EEC law with the common prospectus approach, yet the proposal itself does not contradict any current Canadian, British, or EEC laws. *Id.*

182. *See, e.g.*, CREF I, *supra* note 10, at 77,363.

"integration doctrine," issuers must not attempt to divide stock issues into multiple stages so that each stage qualifies as an exempted issue. If this does occur, the SEC compels the issuer to register the securities or face possible violations of the Securities Act.[183]

The SEC considers five factors in determining whether transactions are part of an integrated distribution:

> Whether (1) the different offerings are part of a single plan of financing, (2) the offerings involve issuance of the same class of security, (3) the offerings are made at or about the same time, (4) the same type of consideration is to be received, [and] (5) the offerings are made for the same general purpose.[184]

The number of integration doctrine exemptions has expanded over the years,[185] but explicit SEC guidelines on integration of international stock issuances remains unformulated. This, in part, resulted from the SEC's refusal to issue no-action letters on integration questions between 1979 and 1984.[186] Therefore, Release 33-4708 by default, served as the law on the integration of international stock placements. According to the Release, section 4(2) of the Securities Act exempts "transactions by an issuer not involving any public offering."[187] More important, the Release states: "Generally, transactions otherwise meeting the requirements of [33-4708] need not be integrated with simultaneous offerings being made abroad and, therefore, are not subject to the registration requirements of the Act solely because a foreign offering is being made concurrently with

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183. *See generally* ABA Report, *supra* note 8, at 4.

184. Non-Public Offering Exemption, Securities Act Release No. 4552, 27 Fed. Reg. 11316, 11317 (November 16, 1962).

185. ABA Report, *supra* note 8, at 25-41. The Act presently contains five transaction exemptions pertaining to integration:

> a) the single issuer exchange exemption found in section 3(a)(9) . . . ;
> b) the regulated exchange exemption found in section 3(a)(10) . . . ;
> c) the intrastate offering exemptions found in section 3(a)(11) of the Act and in SEC rule 147 thereunder;
> d) the private offering exemptions found in section 4(2) of the Act and in SEC rule 506 thereunder; and
> e) the *de minimis* offering exemptions found in sections 3(b) and 4(6) of the Act and in SEC rules 504 and 505 and regulation A thereunder.

Id. at 10.

186. *See id.* at 7-8 & n.4. In 1985 the SEC Division of Corporate Finance publicly announced it would reinstitute answering no-action letters on integration questions. *Commissioners Debate Delaware Poison Pill Case at 'SEC Speaks'*, 17 Sec. Reg. & L. Rep. (BNA) 400, 403 (Mar. 8, 1985). This change probably resulted from the introduction of regulation D, rather than from an internal policy change by the SEC.

187. Release 33-4708, *supra* note 111; *see also supra* note 170.

the American private placement. . . ."[188]

Rules 504, 505 and 506 of regulation D contain guidelines for registration exemption, based on dollar amounts to be raised or the number of investors.[189] In contrast, Release 33-4708 emphasizes that the different placements of the stock alone—one issue in the United States, the other abroad— renders integration problems moot.[190] Some experts have debated whether regulation D, and not Release 33-4708, is the legitimate source for exempting concurrent international and domestic stock placements that otherwise would pose integration problems.[191] In 1982, the SEC twice modified regulation D,[192] including rule 502,[193] to read that international stock transactions otherwise meeting the requirements for a regulation D exemption would not be considered at all integrated.[194] In addition, the amended regulation D stated that foreign offerees would not be counted toward the maximum amount of purchasers allowable for a registration exemption.[195] To coincide with this measure, the Commis-

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188. Release 33-4708, *supra* note 111.

189. 17 C.F.R. §§ 230.504-.506 (1988). Rule 504 provides an exemption for limited offers and sales of securities not exceeding $1 million. Rule 505 limits issues under this exemption to $5 million or less. In addition, only thirty-five unaccredited investors may participate in such an offering. Rule 506 allows offers of unlimited dollar amounts, but only thirty-five unaccredited investors, each of whom (or their representative) must have knowledge of financial or business matters, may participate.

190. Release 33-4708, *supra* note 111.

191. *See, e.g.*, ABA Report, *supra* note 8, at 65.

192. Revision of Certain Exemptions From Registration for Transactions Involving Limited Offers and Sales, Securities Act Release No. 6389, 47 Fed. Reg. 11251, 11262 (1982); Adoption of Foreign Issuer Integrated Disclosure System, *supra* note 133, at 54771.

193. 17 C.F.R. § 230.502 (1988).

194. Current rule 502(a) reads in part:

> (a) *Integration.* All sales that are part of the same Regulation D offering must meet all of the terms and conditions of Regulation D. Offers and sales that are made more than six months before the start of a Regulation D offering or are made more than six months after completion of a Regulation D offering will not be considered part of that Regulation D offering, so long as during those six month periods there are no offers or sales of securities by or for the issuer that are of the same or a similar class as those offered or sold under Regulation D, other than those offers or sales of securities under an employee benefit plan as defined in rule 405 under the Act. . . .

17 C.F.R. § 230.502 (1988) (citations omitted).

195. Regulation D, 17 C.F.R. §§ 230.501-.506 preliminary note 7 (1988). Preliminary note 7 states in part:

> Offers and sales of securities to foreign persons made outside the United States effected in a manner that will result in the securities coming to rest abroad generally need not be registered under the [Securities] Act. This intrepretation may be

sion held it would not count proceeds from foreign purchasers in aggregating the dollar amounts of stock issued under the revenue ceilings of rules 504 and 505.[196]

Various no-action letters by the SEC show a continuing expansion of Release 33-4708's interpretation of the integration question. The SEC will not deem as integrated concurrent stock issues that involve one non-United States offering so long as the situs of each offering is different.[197] This policy decision oddly began during the time in which the Commission maintained a moratorium on no-action letters concerning integration under regulation D. The Commission in *Griffith Laboratories, Inc.*,[198] used a no-action letter response to state that Release 33-4708 could be the basis for non-integration of multiply-placed offerings.

In *Griffith*, an Illinois corporation proposed an offer to the shareholders of its Canadian affiliate to exchange Griffith United States shares for all the outstanding Griffith Canadian stock. Complicating the scenario, the original founders and immediate family members of Griffith U.S.A. also founded the Canadian affiliate.[199] As the decades passed, ownership in the affiliate came under the control of another family close to the American founders. Yet because of the tax laws in effect in the early 1970s, both companies believed that consolidation of the two firms would be in their best interest.[200]

The difficulty for integration purposes was that United States citizens held over sixty percent of Griffith Canada.[201] This left open the existence of two concurrent offerings: one to Griffith Canada shareholders in

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

Id. (citations omitted). *See generally* Evans, *supra* note 168, at 78.

196. Release 33-4708, *supra* note 111. This provision has served as a primary source from which exceptions to registration have been made, even without reliance on regulation D. *See, e.g.*, Intron, Ltd. SEC No-Action Letter (Nov. 8, 1984) (concurrent offerings to Utah and West European citizens not subject to regulation D if issuer meets 33-4708 guidelines); *see also European Offering of Block of Shares Does not Defeat Compliance with Rule 504*, 16 Sec. Reg. & L. Rep. (BNA) 2009 (Dec. 21, 1984).

197. *See, e.g.*, L. Texas Petroleum, Inc., SEC No-Action Letter (July 16, 1981).

198. Griffith Laboratories, Inc., SEC No-Action Letter (June 17, 1974).

199. *Id.* (letter of applicant at 3-4)

200. *Id.* (letter of applicant at 4).

201. *Id.* (letter of applicant at 5).

the United States, the other to Griffith Canada shareholders outside of the United States. Counsel for Griffith urged the SEC to pass favorably on their no-action request because of a possible private placement exemption in the Securities Act. According to the company, the offering to Griffith Canada shareholders of United States citizenship did not constitute a public offering.[202] The SEC refused to answer the issue of whether the offering qualified under as a section 4(2) exemption and cited its policy of not responding to integration questions.[203] The SEC, however, did respond affirmatively to Griffith's other contention that the proposed offering met Release 33-4708 standards on integration of foreign and domestic offerings.[204] Because Griffith planned to offer the shares to a fairly large number of non-United States citizens, the SEC granted an exemption.[205]

The Commission next applied Release 33-4708 to questions of integrated partnership rights in no-action letters such as *Forest Oil Co.*[206] In *Forest Oil Co.*, the applicant, a United States corporation, planned to sell limited oil drilling partnership rights[207] to interested parties outside the United States and Canada.[208] Forest Oil, however, had just made similar partnership offers to United States citizens. To differentiate the offerings, Forest planned to segregate the foreign and domestic partnerships into different exploration projects. The company also proposed to alter significantly the terms of the partnership agreements between the two sets of investors.[209] Two other Forest proposals, however, probably swayed the SEC. Forest planned measures to prevent United States and Canadian investor access to the new limited partnership interests, and the company promised to maintain official silence during the concurrent

202. *Id.* (letter of applicant at 6).

203. *Id.* (SEC response at 3).

204. *Id.*

205. *Id.*

206. Forest Oil Co., SEC No-Action Letter (July 10, 1980).

207. Partnership rights qualify as a security. 15 U.S.C. § 77b(2) (1982); *see also*, SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344 (1943); Evans, *supra* note 168, at 71-72.

208. The exemption included Canadian issues because of regulation A of the Securities Act Rules. 17 C.F.R. §§ 230.251-.264 (1988). This regulation states that offerors with principal businesses in Canada must gain eligibility for its offering in the home province of its business before a United States exemption for registration will be granted. 17 C.F.R. § 230.253(b) (1988); *see* Pioneer Ventures Limited Partnership, SEC No-Action Letter (Mar. 31, 1983); Evans, *supra* note 168, at 76.

209. Neither the no-action letter application, nor the SEC's reply describes the actual differences in the terms.

issue as a means to abate market speculation in the offerings.[210]

The growth in Release 33-4708's use in international integration matters escalated with the Commission's application of the intrastate offering exemption of the Securities Act[211] to the Release to produce an exemption for concurrent intrastate and foreign offerings. Section 3(a)(11) of the Securities Act exempts from registration securities belonging to an issue offered and sold to investors within a single state so long as the issuer resides and does business within that state.[212] The SEC previously held that the corresponding Securities Act rule provision, rule 147,[213] did not apply to foreign investors because the rule considered share offers to foreign investors to be part of the same issue offered to intrastate investors. Since the Commission interpreted rule 147 at that time to cover just intrastate investors, the presence of foreign investors would remove any exemption.[214]

The SEC changed its position on this question in *Scientific Manufacturing, Inc.*[215] in which a privately-held California hospital equipment corporation wished to issue shares to citizens of Hong Kong, as well as to California residents. In its no-action request, the company admitted its knowledge of SEC practice against applying Release 33-4708 to intrastate foreign offerings.[216] The applicant stressed, however, it would apply the resale restrictions of rule 147(e) and (f) (the intrastate "safe harbor" rule)[217] to prevent United States citizens outside of California from

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210. Forest Oil Co., *supra* note 206 (letter of applicant June 17, 1980).

211. 15 U.S.C. 77c(a)(11) (1982).

212. *Id.*

213. 17 C.F.R. § 230.147 (1988).

214. *See* ABA Report, *supra* note 8, at 65. For a general overview of the § 3(a)(11) exemption, see section 3(a)(11) Exemption for Local Offerings, Securities Act Release No. 4434, 26 Fed. Reg. 11896 (Dec. 13, 1961). *See also* Notice of Adoption of Rule 147 under the Securities Act of 1933, Securities Act Release No. 5450, 39 Fed. Reg. 2353 (Jan. 7, 1974); L. SODERQUIST, *supra* note 9, at 251-270.

215. Scientific Manufacturing, Inc., SEC No-Action Letter [1983-1984 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 77,505, at 78,625 (May 12, 1983); *see also* Evans, *supra* note 168, at 77.

216. Scientific Manufacturing, Inc., *supra* note 215, at 78,625.

217. 17 C.F.R. § 230.147(e)-(f) (1988). Relevant parts state:

(e) *Limitation of resales.* During the period in which securities that are part of an issue are being offered and sold by the issuer, and for a period of nine months from the date of the last sale by the issuer of such securities, all resales of any part of the issue, by any person, shall be made only to persons within such state or territory.

(f) *Precautions against interstate offers and sales.* (1) The issuer shall, in connection with any securities sold by it pursuant to this rule:

(i) Place a legend on the certificate or other document evidencing the security obtaining the shares.[218] Noting these resale barriers, the SEC granted an exemption. Surprisingly, though, the Commission also stated that the previous no-action finding that intrastate foreign offerings would be integrated could be ignored.[219]

The majority of Release 33-4708 exemptions have dealt with foreign public and domestic private offerings, but a recent no-action letter indicated that private foreign and private domestic offerings may be made simultaneously without becoming integrated.[220] A Canadian film exhibitor with shares traded on the Toronto Stock Exchange, Cineplex Odeon Corp., planned to make a United States private offering along with a private placement to company executives in Canada. After reviewing the company's assurances that limits on resales would be enacted, the SEC issued a no-action letter without requiring additional procedures.[221]

By liberalizing the integration exemption in the CREF-France Letters, the SEC may have also made it difficult to limit future public offerings of foreign corporate securities, even if such securities come to rest in the United States. Rule 152 of the Securities Act[222] provides that the public offering exemption continues even though the issuer makes subsequent offerings. The rule, however, does not prescribe a time limit in which exempt offerings must be made.[223] Given this factor and the SEC's broad interpretation of rule 152, the rule could easily work against SEC enforcement of securities laws. For example, because Law 86-793 mandates that the French Government maximize revenues from the privatized stock sales,[224] France could restructure the public offer-

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stating that the securities have not been registered under the Act and setting forth the limitations on resale contained in paragraph (e) of this section;

(ii) Issue stop transfer instructions to the issuer's transfer agent, if any, with respect to the securities, or, if the issuer transfers its own securities make a notation in the appropriate records of the issuer; and

(iii) Obtain a written representation from each purchaser as to his residence.

Id. § 230.147(e)-(f)(1) (1988) (notes omitted). *See also* Evans, *supra* note 168, at 77.

218. Scientific Manufacturing, Inc., *supra* note 215, at 78,625.

219. *Id.* at 78,626.

220. Cineplex Odeon Corp., SEC No-Action Letter, [1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 78,474 at 77,750 (Mar. 19, 1987).

221. *Id.* at 77,752.

222. 17 C.F.R. § 230.152 (1988). The only proviso to this rule is that funds from the exempt offerings and future offerings must be separate so that an "integrated" set of funds does not exist. Caspar, *Transnational Offerings and the Problem of Integration*, 34 U. MIAMI L. REV. 47, 49 (1979).

223. Securities experts believe six to twelve months is sufficient to meet the limits of rule 152. Caspar, *supra* note 222, at 49.

224. *See supra* note 45 and accompanying text.

ings, in the name of revenue enhancement, to coincide with the private placements. In such a situation, the SEC, in undertaking a securities fraud action arising from the privatization program, may find it difficult to sort out the sources of funding.

Integration itself is more of a procedural issue—the SEC wants to ensure that issuers do not attempt to attach unregistered offerings onto registered or exempt stock issues. Therefore, from one point of view, the use of Release 33-4708 to widen the exceptions to the integration doctrine is of little direct concern to individual investors. The use of Release 33-4708 in this area does provide a useful tool for foreign-based issuers since few other United States securities law provisions cover this question. Additionally, the Release's use in the CREF-France situation will enable foreign issuers to more effectively and less expensively market capital to the United States. On the other hand, given the complexity of international stock offerings, abuses by foreign issuers of SEC integration exemptions could easily occur. This should be of great concern because, unlike in a domestic violation, jurisdiction may be hard to obtain over a foreign issuer who disguises an unregistered offering as one that has met SEC approval. This last factor is what may make the SEC's decision in the CREF-France Letters potentially harmful for United States investors.

V. Resale Issues Posed by the SEC Approval

In reviewing requests for a registration exemption, one of the SEC's greatest concerns has been whether resales of the unregistered securities in question will occur in the United States. Issuers must structure stock placements so that initial purchasers cannot resell the securities to unsophisticated investors. The primary tool for allowing resales of domestic privately-held shares continues to be the section "4(1½)" exemption of the Securities Act.[225] This exemption contains elements of the section 4(1)[226] exemption allowing transactions by any person other than an issuer, underwriter or dealer, and parts of the section 4(2) private placement exemption.[227] In securities placements involving concurrent foreign and domestic offerings, however, the Commission has highlighted the im-

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225. *See The Section "4 (1½)" Phenomenon: Private Resales of "Restricted" Securities*, 34 Bus. Law. 1961 (1979), *reprinted in* L. Soderquist, *supra* note 9, at 333. The SEC has continually upheld these exemptions even though the Securities Act Rules do not explicitly state the exceptions—the "safe harbor" has evolved more as a matter of rule construction. *Id.*; *see also supra* note 9.

226. 15 U.S.C. § 77d(1) (1982).

227. *Id.* § 77d(2).

portance of Release 33-4708.[228]

Because of SEC emphasis on Release 33-4708 instead of on regular Securities Act exemptions, issuers must construct "anti-flowback" provisions: procedures designed to prevent the unregistered securities from being resold in the United States. The SEC has attempted to define an objective test for determining whether specific issuer measures satisfy the anti-flowback requirement, and whether a certain amount of time is necessary before the stocks have "come to rest" outside of the United States.[229] Most of the recent decisions, however, have been made on an ad hoc basis.

The SEC has indicated, though, that the combination of the following anti-flowback measures will suffice to qualify an issuer for an exemption:

> (a) No sales may be made to American nationals, which terms includes both American citizens and resident aliens.
> (b) Each foreign investor must represent that he is purchasing the securities for his own account and not for the account of an American national.
> (c) The underwriters and investors must represent that they will not resell the securities in the United States or to United States residents.
> (d) The subject securities may not be transferred for a period of ninety days after the conclusion of the foreign offering . . . .
> (e) The investor may not resell the securities after such 90-day period in the United States or to United States nationals . . . .
> (f) The prospectus must include a legend to the effect the securities being offered have not been registered with the Commission.
> (g) The issuer's transfer agents must be instructed to stop any transfer which violates or is not in compliance with anti-flowback transfer restrictions.[230]

The SEC granted a no-action letter to CREF and to the French Government because of the anti-flowback precautions planned for each issue.[231] Part of these safeguards, according to the French Government's letter, consisted of traditional Euromarket measures.[232] These Euro-

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228. *See supra* note 195.

229. *See* Cardiodynamics, Inc., SEC No-Action Letter (June 4, 1974). Rule 144(k) of the Securities Act provides, however, that if an investor not affiliated with the issuer holds the securities for three years, the investor may resell the securities in any manner. 17 C.F.R. § 230.144(k) (1988); *see also* Evans, *supra* note 168, at 79-81.

230. ABA Report, *supra* note 8, at 66-67.

231. CREF I, *supra* note 10, at 77,362-363; France Letter, *supra* note 10, at 77,435.

232. *Id.* The letter refers to: "anti-integration measures," but such measures focused on resale problems. *See id.*

market structures, though not codified in United States, French or European Economic Community (EEC) law, arguably still have a legal basis in EEC directives governing capital movements[233] and in the policies of the SEC as interpreted through no-action letters.

One no-action letter, *The Singer Co.*,[234] exemplifies the Euromarket procedures that meet SEC approval. The Singer Company proposed a foreign offering of $50 million of non-exchangeable guaranteed notes issued pursuant to an indenture with a United States trustee, the Chase Manhattan Bank, and payable at the trustee's New York City office and at designated European paying agencies. Formerly, under the United States Interest Equalization Tax (IET), foreign-issued bonds were unlikely to flow back into the United States since the bonds were subject to an additional tax once they reached United States bondholders.[235] After the IET's repeal, few constraints, outside of general economic conditions, existed to prevent flowbacks.

To counteract this problem, the managing underwriter for the offering, Goldman Sachs International Corp., proposed that underwriters and selling groups be sent notices regarding the unregistered nature of the notes in question.[236] The firm planned to place provisions in its contracts with underwriters stating that no resales to United States citizens could occur until ninety days after the completion of the offering.[237] Similar restrictions would be applied to selling group-dealers.[238] In addition, an offering circular akin to a prospectus, containing information as to the lack of Securities Act registration, was to be issued in Europe by Goldman Sachs. The underwriter promised delivery of notes bearing a legend about such resale restrictions.[239] Given this wealth of precaution-

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233. For a general overview of EEC laws on securities, see Lorenz, *supra* note 120, at 810-13; Oliver, *Free Movement of Capital Between Member States: Article 67(1) EEC and the Implementing Directives*, 9 EURO. L. REV. 401 (1984); Woolridge, *Some Recent Community Legislation in the Field of Securities Law*, 10 EURO. L. REV. 3 (1985).

234. The Singer Co., SEC No-Action Letter [1974-1975 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 79,979 (Aug. 2, 1974).

235. Interest Equalization Tax of 1953-64, I.R.C. §§ 4911-4922, 4931 (1976), *repealed by* Tax Reform Act of 1976, 94 Pub. L. No. 94-455, 90 Stat. 1520, 1814 (1976); *see also* Haseltine, *United States Tax and Securities Laws: Working "Together" Toward Different Goals in Eurobond Financings*, 11 MD. J. INT'L & L. & TRADE 221, 226-27 (1987).

236. The Singer Co., *supra* note 234, at 84,517-18; *see also* Haseltine, *supra* note 235, at 227 n.21.

237. The Singer Co., *supra* note 234, at 84,519.

238. *Id.*

239. *Id.* Other safeguards included managing underwriter requests to offerors that guidelines were followed, and the issuance of a press release highlighting the bond's

ary measures, the SEC approved Singer's application.[240] *Singer*'s importance in the area of resales, though, is manifested by the continued use by other no-action applicants of the anti-flowback provisions proposed by the Singer Company.[241]

Other no-action letters indicate that the Commission will continue to demand adequate flowback safeguards. In answering the first no-action request of Foote, Cone & Belding Communications, Inc.,[242] (FCB) the SEC refused to assure the firm that sales of stock to foreign employees would meet an exemption absent proper flowback principles. In its initial application, FCB proposed to conduct a public offering of over two million shares through the New York Stock Exchange.[243] In addition, the firm requested permission to offer and sell up to 25,000 shares of treasury stock to about ten individuals who managed FCB offices abroad.[244] Through this arrangement, FCB subsidiaries would loan the purchase price of the shares to the individuals, none of whom were United States citizens.[245] The firm constructed its anti-flowback provision around a ninety day resale prohibition.[246] The SEC replied that the active trading of the firm's shares on the New York Exchange rendered the short-term restriction on resales insufficient.[247] After this rejection, FCB amended its proposal so that transfers would be prohibited for ninety days, but with restrictions being extended until counsel for the firm decided that the public stock issue had come to rest.[248] Because of this change, the Commission determined that the resale provisions would

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unavailability in the United States. *Id.* at 84,519-520.

240. In comparison, CREF and the French Government proposed many of these same restrictions but with less emphasis on post-offer legending of shares. *See* CREF I, *supra* note 10, at 77,362-63; France Letter, *supra* note 10, at 77,435.

241. *See, e.g.*, InfraRed Assoc., Inc., *supra* note 175 (common stock offering); Goldman, Sachs & Co., SEC No-Action Letter [1985 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 78,164 at 76,711; Bank Leumi le-Israel, B.M, SEC No-Action Letter (July 7, 1983) (bond offering); Pioneer Ventures, Limited Partnership, *supra* note 208 (partnership rights); *see also Unregistered Foreign Bank Notes May Be Sold to Non-Resident Aliens*, 15 Sec. Reg. & L. Rep. (BNA) 1622 (Aug. 19, 1983).

242. Foote, Cone & Belding Communications, Inc., SEC No-Action Letters [1975-1976 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶80,523 at 86,360, 86,361-62 (Apr. 6, 1976).

243. *Id.* at 86,363.

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. Foote, Cone & Belding Communications, Inc., SEC No-Action Letter [1977-1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶81,275 at 88,416 (May 20, 1976).

not imperil any exemption.[249]

Recent no-action letters have tested the SEC's interpretation of whether certain distribution schemes qualify for a registration exemption. In *Wordplex Information Systems PLC*,[250] a British corporation proposed to issue option shares to company executives resident in California. Because Wordplex listed its stock on the London Exchange[251] the SEC could have speculated that, without restrictions, the stocks could be resold to United States citizens. To avoid any resale problems, Wordplex drew up a complicated arrangement by which California holders would assign their stocks to a trustee who would hold the shares until the executives left the firm.[252] Because of this trust arrangement, and because a viable public market for Wordplex's stock did not exist in the United States, the SEC granted approval.[253]

As opposed to its treatment of the integration doctrine, the Commission has maintained a conservative stance regarding resales, with the only deviation being the granting of no-action letters for unusual stock placement schemes such as *Wordplex*. Even in situations such as that of *Wordplex*, the SEC still has focused on the strength of the issuer's market in the United States—if an active market existed, the SEC required more flowback restrictions.[254] Also, the SEC seems to take into consideration the home country of the issuer and the market on which the is-

249. *Id.* at 88,416. The FCB letter may not be applicable today because the SEC definition of restricted securities has changed. If FCB made the same request today, the SEC would probably grant an exemption. *See* Evans, *supra* note 168, at 79-80.

250. Wordplex Information Systems PLC, SEC No-Action Letter (publicly available Dec. 5, 1985) (June 6, 1985 letter of applicant at 2); *see also* Lang, Gutowitz, Besen & Gardner, *Transnational Acquisitions and Takeovers: Certain Peculiar Problems* in 18TH ANNUAL INSTITUTE ON SECURITIES REGULATION, 542 PRAC. L. INST. (B4-6772) 247, 257-58 (1986) (discussion of Wordplex no-action request).

251. Wordplex Information Systems PLC (June 6, 1985 letter of applicant at 1).

252. *Id.* (July 25, 1985 letter of applicant).

253. *Id.* (SEC reply). Retirement or employee stock option plans have been a frequent subject of no-action requests in the area of international securities placement. *See, e.g.*, Robbins, Robert B., (Shaw, Pittman, Potts & Trowbridge), SEC No-Action Letter (Mar. 15, 1988) (German banks proposing stock option plan for United States branch employees); Alcan Aluminum, Ltd., SEC No-Action Letter (July 8, 1980) (Canadian metals firm proposing employee-vested retirement and stock option plans); *see also Foreign Banks' Stock Plans Accorded '33, '40 Act Relief*, 20 Sec. Reg. & L. Rep. (BNA) 757 (May 13, 1988).

254. *Compare* Wordplex Information Systems PLC, *supra* note 250 *with* Foote, Cone & Belding Communications, Inc., *supra* note 242. The SEC denied approval of FCB's initial no-action request because flowback procedures were not adequate in light of the heavy trading of FCB's stock in the United States.

suer's stocks are traded.[255] This may explain the SEC's approval of the CREF-France Letters: because the issuer was the French Government and since the companies were associated only with the Paris market, the likelihood of the stocks coming to rest in the United States was small. Yet it must be emphasized that the French privatization market had a major impact on Western stock markets simply because of the large number of shares available to the French public. If the Commission would have paid more careful attention to the volume of shares going into the French market as a result of the privatization,[256] it is possible that the Commission would not have granted approval. It seems unlikely that only a few Americans might possibly purchase the shares, especially since under the French program, foreign nationals, including Americans, resident in France could purchase the privatized shares.[257]

Another surprising aspect of the SEC's approval is that the French Government proposal allows resales by United States institutional investors on the Paris Bourse without investigation into the identity of the buyer.[258] While the specter of widespread fraud by the French Government will not come to pass, irregularities could ensue in secondary market sales. If such a situation occurs, United States citizens, even those residing in the United States, may be left without protection by the Commission or the courts.

VI. Evolution of Release 33-4708 in International Securities Placements

Aside from its impact on integration and resale questions, Release 33-4708 has served as a primary source for the approval of foreign-issued stock placements in the United States. An analysis of certain no-action letters provides clues as to the basis of the SEC's decision to grant the CREF-France no-action requests. However, the Commission did not have the consistent opportunity to issue no-action letters regarding foreign stock issues until the early 1970s, several years after the Release 33-4708.[259] This delay may not have been the result of mere inattention by

255. *Id.* The SEC placed particular emphasis on FCB's presence on the New York Exchange; issuers on less active exchanges are subjected to less SEC scrutiny.

256. *See supra* note 42 and accompanying text.

257. *See* 1 Doing Business, *supra* note 47, at § 3.02[1][b]; *see also supra* note 115.

258. *French Privatization*, *supra* note 10, at 1408; *see also* Chubb & Kelly, *supra* note 15 (contention that SEC resale requirements in CREF-France Letters were illusory).

259. Even now, with the expanded use of Release 33-4708, the SEC will only answer specific securities rules questions in "the most compelling circumstances." Buckeye

the financial community towards the possibilities offered by Release 33-4708. Rather, the dearth of approvals could probably be attributed to the relative conservatism of the international securities market that existed until only recently.[260]

A major no-action letter that opened the way for future approvals of concurrent domestic-foreign offerings combining private and public placement elements was *Wild Animal Kingdoms, Ltd.*[261] This no-action request concerned a British amusement park development company that proposed concurrent public offerings in the United States and in Great Britain. The SEC rejected initial exemption applications on the ground that a United States resales market could develop because of inadequate flowback precautions.[262] Additionly, the SEC feared that unissued stock warrants that were part of the applicant's plan could remain open over a long period of time, thus extending the offering time and leading to integration problems. To counteract these difficulties, Wild Animal Kingdoms proposed to enact a number of provisions. First, common stock transfers could begin only after three years,[263] thereby precluding the possibility that a market for the issuer's stock could develop in the United States. Second, its company promised to implement an agreement between itself and the underwriters guaranteeing that no concurrent offer of shares would be made to any existing shareholder, save one shareholder who already owned one-third of the stock of the issuer.[264] Many of Wild Animal Kingdoms' anti-flowback and integration measures have been implemented by other issuers,[265] but the no-action application was one of the first requests to utilize Release 33-4708 as a means of placing foreign issued stock in the United States. As a result of this Wild Animal Kingdom no-action grant, foreign firms have had little difficulty in obtaining exemptions from registration.

International, Inc., SEC No-Action Letter (publicly available Mar. 7, 1977) (SEC reply at 2).

260. *See generally* Thomas, *supra* note 121 (analysis of arguments against increased foreign capital in the United States).

261. Wild Animal Kingdoms, Ltd., SEC No-Action Letter (Jan. 4, 1974) [hereinafter WAK]. The SEC initially rejected the no-action request because it feared that unexercised underwriters' warrants could easily be utilized to effect a concurrent offering. Wild Animal Kingdoms, Ltd., SEC No-Action Letter (Dec. 14, 1973).

262. *Id.* (SEC reply letter at 2).

263. WAK, *supra* note 261 (letter of applicant Dec. 19, 1973, at 3). The three-year limit was codified in Rule 144. 17 C.F.R. § 230.144 (1988). Before the introduction of Rule 144, courts held that a two-year hold on controlled securities was sufficient. *See* United States v. Sherwood, 175 F. Supp. 480, 483-84 (S.D.N.Y. 1959).

264. WAK, *supra* note 261 (letter of applicant Dec. 19, 1973, at 3).

265. *See, e.g.,* InfraRed Assoc., Inc., *supra* note 175.

The application of Release 33-4708, though, has grown from its former role as a lure for foreign corporations to issue corporate stock shares in the United States.[266] The scope of the Release not only includes stock issues, but also housing interests,[267] partnerships[268] and commercial paper.[269] Bond markets have proved to be one of the most fertile grounds for Release 33-4708 based exemptions. Because of the Release's extensive use in this area, the SEC has perhaps become more comfortable with making exemptions for institutional investors, the major customers for bond underwriters.

In *Goldman, Sachs & Co.* for example, a lead manager of a concurrent United States-European offering sought exemption from registration under the Securities Act for an issue of fixed rate non-convertible debt securities.[270] The applicant noted that standard anti-flowback measures would be undertaken, such as notification in the offering invitations and in the offering itself that resale restrictions to United States citizens would be enforced.[271] In addition, Goldman Sachs planned contractual arrangements between the underwriters and sellers through which the prohibition on resales would be enforced.[272] Potential purchasers under the arrangement would also be reminded that unfavorable United States tax treatment could ensue to United States citizens who obtained the bonds.[273] Because of the applicability of Release 33-4708 to the situation and because of the significant flowback restrictions proposed the SEC did not require registration.[274]

Goldman Sachs may explain the SEC's decision on the CREF-France applications in that the ruling reflects the Commission's favorable attitude towards institutional investors. Because the CREF-France placements concerned institutional customers,[275] not private citizens, the Com-

266. *See supra* notes 167-74 and accompanying text.

267. *See* Williams Island Assoc., Ltd., SEC No-Action Letter (July 28, 1983).

268. *See supra* notes 206-10 and accompanying text.

269. AC Finance Co., SEC No-Action Letter (Apr. 17, 1987).

270. Goldman, Sachs & Co., *supra* note 241. *See also Eurobonds Need Not Be Registered Even if U.S. Bonds Sold Concurrently*, 17 Sec. Reg. & L. Rep. (BNA) 1862 (Oct. 18, 1985).

271. Goldman, Sachs & Co., *supra* note 241, at 76,712.

272. *Id.*

273. *Id.* at 76,713. Under the relevant Internal Revenue Service Code provisions at that time, losses on the sale of such bearer securities were not tax deductible and gains were taxed as ordinary income, not as capital gains. I.R.C. §§ 165(j), 1287(d) (1954).

274. Goldman, Sachs & Co., *supra* note 241, at 76,714.

275. Electrocomponents PLC, SEC No-Action Letter, [1982-1983 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶77,333, at 78,258 (Aug. 23, 1982), shows to what extent the Commission will bend SEC rules so that an issuer may avoid registration. A British

mission was less concerned about protection than it might have been if the securities had been marketed to individual investors. If this is the case, then Release 33-4708 may be reduced to the role of protecting only small private investors.[276]

Interestingly enough, one no-action request had several parallels with the CREF-France Letters and the SEC granted a no-action letter, but without obvious reliance on Release 33-4708. *Republic Resource and Development Corp.* concerned a Philippine company that planned a concurrent public offering in its home country along with a private stock offering in the United States.[277] A complication arose, however, because Republic issued stocks publicly in 1959 in the Philippines and American investors had been among the initial participants in the offering.[278] Furthermore, the issuer had not been able to actively monitor United States trading in the previously issued shares.[279] The applicant contended that despite the fact that these American shareholders had pre-emptory rights, registration would not be required since any concurrent private offering to Americans would not be integrated with the public offering.[280] The SEC granted an exemption, noting the small percentage of

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corporation publicly traded on the London Stock Exchange, sought to acquire the shares of an American company, MESA, through a "vendor placement." *Id.* at 78,259. Under this technique, Electrocomponents would swap the American company's stock from its shareholders, in exchange for Electrocomponents stock. In turn, institutional investors in the United Kingdom would purchase the Electrocomponents stock with cash. *Id.* The SEC accepted the applicant's contention that this arrangement contractually mandated that the American shareholders sell the Electrocomponents stock and that the institutional investors purchase it. *Id.* Therefore, despite the monetary purchase-and-sale between Electrocomponents and MESA shareholders, the Commission found that the securities did not have to be registered. *See also U.K. Firm May Issue Stock to United States Citizens Without Registration*, 13 Sec. Reg. & L. Rep. (BNA) 1731 (Oct. 8, 1982).

276. Regulation D does provide exemptions for offerings that encompass a limited number of sophisticated investors. In addition, foreign purchasers are not counted as investors for purposes of the regulation. *See supra* notes 189-96. Yet in situations in which a large number of United States institutional investors wish to purchase foreign securities, the limit still applies on the amount of investors rules 504 through 506 allow under a registration exemption. *See generally* 17 C.F.R. §§ 230.504-.506 (1988). By giving greater flexibility to institutional investors, as the Commission appears to have done with the CREF-France letters, the SEC can still provide protection to small investors while according greater latitude for more knowledgeable institutional investors.

277. Republic Resource and Development Corp., SEC No-Action Letter (Oct. 2, 1972) (letter of applicant Aug. 16, 1971).

278. *Id.* (letter of applicant Aug. 16, 1971 at 2).

279. *Id.*

280. *Id.* (letter of applicant Aug. 16, 1971 at 3-4).

American stockholders in the company and the time lapse between the request for the no-action letter and the original public offering.[281]

The SEC's decision in *Republic* bears interesting similarities to the no-action answer in *CREF*. Both applicants relied on Release 33-4708 as the basis for obtaining an exemption to registration. Republic argued that the Release did not directly apply to its situation since Release 33-4708 dealt with foreign offerings by domestic issuers. The firm did admit the Release was applicable by analogy.[282] CREF's request letters also stated that Release 33-4708 was not on point with CREF's situation.[283] Both the CREF-France and the Republic applications emphasized that resales of their stocks were unlikely and both applied principal anti-flowback procedures. Republic's anti-flowback measure was more direct: registration with the SEC.

Another surprising aspect of *Republic* that parallels *CREF* is that the SEC in both instances relied on measures that the Commission could not directly enforce against the applicants in case a violation occurred. In *CREF*, the SEC relied on French law and Euromarket procedures to stem resales.[284] In *Republic*, the Commission apparently believed that because American holders of the 1959 stock issue were few in number, and that because any previous resales occurred outside the United States,[285] the likelihood of fraudulent resales was nonexistent.

After reviewing the short history of the relationship between Release 33-4708 and SEC no-action letters on foreign offerings, one could conclude that the SEC has merely adopted a flexible position regarding international placements; and that in keeping with the liberalization of the times, the scope of Release 33-4708 should be more inclusive. The SEC could be basing its decisions on the facts of the individual cases before it. Yet a pattern behind such SEC decisions has been emerging. Future applicants for no-action letters may be successful in obtaining an exemption if the company submits to SEC registration on other aspects of the distribution,[286] or if a creative interpretation of Release 33-4708 can be found.[287]

281. *Id.* (SEC reply).

282. *Id.* (letter of applicant Aug. 16, 1971 at 3-4).

283. CREF I, *supra* note 10, at 77,363.

284. *See id.*

285. *See* Republic Resource and Development Corp., *supra* note 277 (letter of applicant Aug. 16, 1971 at 2-3).

286. *See, e.g., id.* (letter of applicant Aug. 16, 1971 at 2).

287. *See generally* CREF I, *supra* note 10, at 77,361; France Letter, *supra* note 10, at 77,434.

VII. EFFECT OF THE SEC APPROVAL ON EXTRATERRITORIAL SECURITIES LAW ENFORCEMENT

The SEC response in the CREF-France Letters could bring many benefits to American and foreign issuers by simplifying compliance with Commission rules. The decision could also allow more creative means of financing for companies with particular capital needs who still wish to take advantage of capital opportunities in American markets. Even with SEC approval of distribution plans that might not have met earlier Commission requirements, the market could remain unaffected despite a greater theoretical danger of fraudulent conduct by foreign issuers. Yet, the greatest impact the SEC decision will have on the common investor is in the area of enforcement. As a result of loosened SEC attitudes on integration and resales, American investors could be damaged by issuers who use recently approved financial schemes to an unfair advantage.

One important question remains: as a result of changes in the SEC's interpretation of the securities laws, will investors have protection or legal recourse if foreign distributions are fraudulently conducted? It could be that SEC approval will effectively estop prosecutions for international stock placement irregularities. The problem of jurisdiction, therefore, assumes greater importance. If the United States cannot establish jurisdiction over a defendant, potential fraud may go unpunished.[288] This jurisdictional problem has special relevance in the CREF-France Letters since the SEC, by granting a registration exemption, may have precluded itself from exercising jurisdiction. After allaying the French Government fears of SEC interference in the privatizations[289] and by relying on French assurances based on OPV procedures,[290] the SEC may find it difficult to prosecute a defendant in connection with a scheme for which the SEC gave prior approval.[291]

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288. A number of articles have analyzed the problems of extraterritorial jurisdiction in United States securities law enforcement. *E.g.*, Hacker & Rotunda, *The Extraterritorial Regulation of Foreign Business Under the United States Securities Laws*, 59 N.C.L. REV. 643 (1981); Larose, *supra* note 118; Moessle, *The Basic Structure of United States Securities Law Enforcement in International Cases*, 16 CAL. W. INT'L L.J. 1 (1986); Morgenstern, *Extraterritorial Application of United States Securities Laws: A Matrix Analysis*, 7 HASTINGS INT'L & COMP. L. REV. 1 (1983); Thomas, *supra* note 2.

289. *Cf.* CREF I, *supra* note 10, at 77,362.

290. France Letter, *supra* note 10, at 77,435.

291. Again it should be noted that no-action letters do not have the force of law and, although it rarely occurs, courts may disregard them in determining the validity of an issuer's act. *See* Lemke, *supra* note 85, at 1042-43; *see also supra* text accompanying note 85.

A few basic guidelines exist on the question of whether United States law does in fact apply to conduct which has as its basis issues of foreign securities, foreign issuers or foreign governmental responsibility. Under the Restatement (Third) of Foreign Relations Law, the state has jurisdiction to prescribe rules of law for acts that produce substantial effects within the territory, despite the fact that the main action occurred abroad.[292] Additional factors that determine whether United States jurisdiction applies in securities activities include the nationality and residence of the parties.[293] The residence and nationality factors may seem similar, but French law allows a resident of two years (though carrying other citizenship, even United States) to purchase French stocks.[294] Rules for foreign plaintiffs tend to be more stringent under United States laws: the direct cause of the loss must have occurred in the United States or had effects in the country.[295]

As examined earlier, the "conduct" and the "effects" tests comprise the two standards for determining whether United States jurisdiction exists over an international securities transaction.[296] Examination of the effect of the CREF-France Letters on the continued applicability of either test is important since jurisdictional barriers have served as the primary obstacle against a more stringent application of United States securities laws.

A recent application of the conduct test indicates that the CREF-France Letters may have no effect on jurisdictional barriers. In

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292. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402(1)(c) (1986) [hereinafter RESTATEMENT].

293. RESTATEMENT § 402 comment (e) (1986). Section 402 of the Restatement analyzes jurisdictional questions by focusing on territoriality or nationality. *Id.* at § 402. Any possible finding of jurisdiciton, however, is tempered by the "reasonableness" test of § 403: jurisdiction ensues only in situations in which reasonable factors exist to support the exercise of jurisdiction. *Id.* at § 403 (1986). *Cf.* Larose, *supra* note 118, at 108-12 (analysis of jurisdiction under proposed revisions to the former Restatement, RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW (1962)). Section 416 of the Restatement specifically governs jurisdictional questions on securities activities. RESTATEMENT § 416 (1986). The section generally prescribes jurisdiction over such activities if the securities transaction occurred in the United States, if a party to the activity is a United States citizen or if the conduct had, or was intended to have, a substantial effect in the United States. *Id.*

294. *See supra* note 115.

295. *See* Continental Grain (Australia) Pty. Ltd. v. Pacific Oilseeds, Inc., 592 F.2d 409, 420 (8th Cir. 1979).

296. *Supra* notes 126-130 and accompanying text. *See also* Hacker & Rotunda, *supra* note 288, at 648-56; *see generally* Larose, *supra* note 118.

Grunenthal GmbH v. Hotz,[297] a Swiss citizen fraudulently attempted to sell to a German corporation that a Mexican company held by a trust in the Bahamas. The Swiss defendant was a beneficiary of the trust. After several negotiation sessions in the United States, at which the defendants stated they had authority to sell the firm, the deal fell through when the Bahamian trustees rejected the sale. In reversing the district court's dismissal of the case on jurisdictional grounds,[298] the United States Court of Appeals for the Ninth Circuit adopted the test of *Continental Grain (Australia) Pty. Ltd. v. Pacific Oilseeds Inc.*,[299] holding that the misrepresentations by the defendants were "significant with respect to the alleged violation[s]"[300] of United States law. The important facet of *Grunenthal* is that the court focused on policy aspects in applying jurisdiction. Despite the nonexistence of United States investor participation in the underlying transaction, the court found the the United States properly served national interests by avoiding becoming a haven for questionable securities transactions that otherwise would be illegal if United States citizens were involved.

Courts applying the conduct test in an action involving an SEC exemption similar to the one CREF gained, could still find jurisdiction notwithstanding the SEC's earlier approval.[301] This could be done only by separating the fraudulent conduct from the actual grant of the exemption itself. As long as the conduct occurred in the United States, United States courts would have power to overrule the SEC decision and assert jurisdiction. The key, however, is that the conduct must have been in the United States—if the acts transpired outside the country, a court will not assert jurisdiction.[302]

Although the SEC decision on the CREF-France Letters would have no effect on the conduct test, courts rarely use this yardstick. Courts have applied more extensively the "effects" test which holds that fraudulent activity on international capital markets must have an effect on the

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297. 712 F.2d 421 (9th Cir. 1983).

298. 511 F. Supp. 582 (C.D. Cal. 1981).

299. 592 F.2d 409 (3d Cir. 1979).

300. *Grunenthal*, 712 F.2d at 424 (quoting *Continental Grain*, 592 F.2d at 420); *see also* Hacker & Rotunda, *supra* note 288, at 652-54 (despite limited presence of American parties to the transaction, courts find jurisdiction in order to prevent the United States from becoming a haven for illegal securities transactions solely involving foreign parties).

301. *See* Lemke, *supra* note 85, at 1042.

302. *Cf.* Leasco Data Processing Equipment Corp. v. Maxwell, 468 F.2d 1326, 1334 (2d Cir. 1972); *compare id. with* Mormels v. Girofinance, S.A., 544 F. Supp. 815, 817-18 (S.D.N.Y. 1982); *see also* Larose, *supra* note 118, at 127-29.

United States market of domestic investors. In *Bersch v. Drexel Firestone, Inc.*, plaintiffs filed a class action on behalf of American stockholders who were induced to purchase overvalued stocks of a Canadian company based on an inaccurate prospectus.[303] The court held that although no significant preparatory acts occurred in the United States, the effects on such a large group of stockholders could in theory, be the basis for jurisdiction.[304] Under the CREF proposal, the use of the resale provisions could be an effective bar against claims under an effects approach, especially if stock ownership changes were carried out through normal French transaction procedures. Since the SEC based its approval of the privatization requests on the belief that the stocks would come to rest abroad,[305] the SEC may be estopped from arguing that the "effects" of the transaction harmed the United States market.[306] Private causes of action also would face the obstacle of proving that the alleged violation constituted fraud given that the SEC gave prior approval to the issuer's proposed placement.[307]

VIII. Conclusion

The number and scope of exemptions to registration of foreign issued securities has grown since the SEC began reviewing requests for no-action letters on international securities offerings. With the Commission's decisions on the CREF-France Letters, the SEC has proceeded a step further in allowing major players in international capital markets to avoid unnecessary registration requirements. If the present trends in this area continue, both United States and foreign issuers will have greater access to capital, thus building up the strengths of national economies. Even if one assumes that the basic United States tenets of international securities regulation, such as Release 33-4708, have been twisted to meet the needs of issuers, such a result is just a technical aberration. The needs of the global financial community outweigh the need for a picayune interpretation of business laws.

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303. 519 F.2d 974 (2d Cir. 1975), *cert. denied* 423 U.S. 1018 (1975).

304. 519 F.2d at 987.

305. CREF I, *supra* note 10, at 77,363.

306. Some scholars have argued that federal courts do not exclusively apply either a conduct test or an effects test: courts usually determine jurisdiction by comparing the facts against facets of both tests, or by singling out a few salient facts of the case. Larose, *supra* note 118, at 131-35; *see, e.g.*, IIT v. Cornfeld, 619 F.2d 909 (2d Cir. 1980); IIT v. Vencap, Ltd., 519 F.2d 1001 (2d Cir. 1975); Tamari v. Bache & Co. (Lebanon) S.A.L., 547 F. Supp. 309 (N.D. Ill. 1982) *aff'd* 730 F.2d 1103 (7th Cir. 1984), *cert. denied*, 469 U.S. 871 (1984).

307. *See supra* notes 76, 291.

Valid arguments exist to support the loosening of the integration doctrine and of the resale restrictions. First, given the paucity of fraudulent conduct in international securities sales, no explicit need exists for strict regulation, at least until transnational securities fraud becomes a major problem.[308] Second, the SEC's attitude towards registration of foreign issued securities only reflects the realities of the marketplace: because international capital transfers have grown in importance, the SEC risks shutting the United States off from lucrative markets if the Commission does not adopt more flexible guidelines.[309] Third, United States business interests will be at a disadvantage in reaching foreign capital markets if the United States does not place trust in the ability of foreign governments to police securities fraud in their own nations.[310] The decision of the Commission regarding the CREF-France requests has helped expand the potential of international securities placements and will lead to innovative and efficient securities placement planning.

Mitigating factors against this reading of the SEC's decision center around the SEC's departure from maintaining a reliable and conservative interpretation of securities laws. By convoluting the meaning of Release 33-4708, and by adhering to a relaxed interpretation of what constitutes integration and impermissible resales, the Commission appears to be acting inconsistently. An important aspect of continued liberal interpretation of registration requirements is that securities planners are still uncertain as to what actions are acceptable to the Commission.[311] In addition, in the rush to please large, sophisticated investment groups, the Commission may be forgetting the needs of the average investor. By sanctioning the French Government's proposals on the offering of privatized stock, the SEC may be delegating too much power to groups over which the Commission has no control. This factor, in conjunction with the mixed judicial interpretation of the extraterritorial effect of United States securities laws,[312] may leave some investors unprotected if problems arise from loosely regulated international stock issues.

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308. This is evidenced by the declining number of resale and integration precautions proposed by no-action letter applicants in their clearance requests. *Compare* CREF I, *supra* note 10, at 77,363 *with* Goldman, Sachs & Co., *supra* note 241, at 76,712.

309. *See* CREF II, *supra* note 10, at 77,613. CREF claimed it sustained a loss of at least $10 million of potential revenue because United States restrictions made foreign issuers wary of including United States investors in stock warrant plans. *Id.*

310. *See generally*, Begin, *A Proposed Blueprint for Achieving Cooperation in Policing Transborder Securities Fraud*, 27 VA. J. INT'L L. 65 (1986) (urging United States cooperation within multilateral framework to solve fraud problems).

311. *See, e.g*, CREF II, *supra* note 10.

312. *See supra* notes 124-30, 296-306 and accompanying text.

A third interpretation of the SEC's response could be that the Commission is planning to eventually move to a two-tiered system of protection and regulation. Under this system issuers must meet strict requirements if the offerees are average investors; if the proposed purchasers are institutional investors less regulation is needed. Seen in this light, the Commission's decision reflects just a small but important step in achieving a two-tiered regulation system. A foundation for this system has already been established through regulation D, with its limits and exceptions based, in part, on the sophistication of the offerees.[313] Additionally, there are other proposals that would accord institutional investors less protection and less regulation in the area of international placements.[314] This two-tiered system perhaps will and should be the goal of the Commission,[315] but even if the SEC had this in mind when it granted the no-action letters to CREF and the French Government, the above rationale still does not explain why the Commission failed to focus on the potential problems in resales that the CREF-France proposals may foster.

The decision of the Commission in the CREF-France Letters reflects the continued liberalization of the international securities markets. The effects of the decision will not fully be felt on the market for some time, but for now the SEC's response will serve as a symbol and a cornerstone for further steps in the coordination of international capital offerings.

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313. *See supra* notes 189, 192-96.

314. *See, e.g. Amex Proposal Would Create Market for Institutional Foreign Stock Trading*, 20 Sec. Reg. & L. Rep. (BNA) 6 (Jan. 8, 1988). (American Stock Exchange seeks SEC approval for new market allowing trading in unregistered shares by institutional investors).

315. Some securities industry leaders have urged the SEC to adopt restrictive foreign registration guidelines, with differing protection accorded to issues depending on whether they are targeted to sophisticated or to average investors. *SEC Staff to Work on Developing Safe Harbor Rule for Foreign Offerings*, 19 Sec. Reg. & L. Rep. (BNA) 1444 (Sept. 25, 1987).