

December 2012

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Recommended Citation

Cohen, Manuel F. (2012) "International Securities Market: Their Regulation," *St. John's Law Review*: Vol. 46: Iss. 2, Article 3.
Available at: <http://scholarship.law.stjohns.edu/lawreview/vol46/iss2/3>

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INTERNATIONAL SECURITIES MARKETS: THEIR REGULATION*

MANUEL F. COHEN**

Our world grows smaller as our technological achievements improve the means of transportation and communication. A natural consequence is a growing interaction and interdependence among all the nations of the world.¹ An important contributing factor, which may be considered both cause and effect, is the growing internationalization of the world's money and capital markets. This has been accompanied by an increasing number of mergers, acquisitions and joint ventures across national boundaries among our business and financial institutions. American businesses no longer confine their activities to the United States; nor do they finance their growth solely by borrowing dollars at home; rather, their managers scour the earth from London to Zurich and other Continental markets, to the Bahamas and Panama, and more recently to Asia, to augment their business capability and competitive strength and to raise capital wherever interest rates are lowest or equity capital is reasonably available. The development and growth of the Euro-dollar market and, more recently, the beginnings of an Asia-dollar market attest to this healthy development. But this is not a one-way street. Our own shores have attracted business and financial enterprises from around the world.

Certain foreign issuers have always sought capital in the United States. The creation of the European Common Market, which illuminated opportunities and challenges closer to home, naturally led European entrepreneurs to direct their attention and their resources to Western Europe and its natural trading partners. Following an initial delay, however, European investment in America has proceeded at a greater rate of growth than United States investment in Europe.² More than ever, mixed underwriting syndicates of North American, South

* This is an edited and slightly modified version of an address delivered on November 17, 1970 in Rome, Italy, at the Second Annual Trans-World Investment Company Seminar sponsored by the Investment Dealers' Digest.

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¹ Recent dramatic illustrations may be found in the "attack" on the United States dollar, President Nixon's New Economic Policy and the resulting immediate reaction in the money and securities markets around the world. See BARRON's, Oct. 11, 1971, at 9; 23 INT'L FIN. NEWS SURVEY 269 (Sept. 1, 1971).

² For a description of this changing investment flow, see G.W. Ball, Remarks before Conference on Foreign Direct Investment in the United States, Washington, D.C., October 12, 1970.

American, European and Asian investment bankers are joining to market larger issues in international markets. Recent years have seen investment and commercial bankers from abroad becoming members of national securities exchanges in the United States, and otherwise assuming important roles in venture capital and other investment banking activities in North and South America. So, also, their American counterparts have achieved an importance and prominence abroad. And, as more foreign issuers are listing their securities on American stock exchanges, many American companies are considering registration of their securities for trading on European and Asian stock exchanges.

The net effect has been beneficial to all who have participated in these developments. There can be little question that much credit is due to the imaginative and enterprising bankers and businessmen who ventured into strange and sometimes inhospitable communities. But, no small measure of credit should be accorded those who recognized that these developments would not long survive without a wider acceptance of, and increased confidence in, the world's securities markets as relatively safe and attractive media for investment of household and business savings. There has been a greater acceptance of the view that quickened flow of investors' savings across national boundaries and the channeling of those savings to finance the growth of industry throughout the world could not be achieved without adequate disclosure of corporate and other business information, and that the absence of adequate controls and a free hand for the unscrupulous would inevitably lead to the scandals that destroy necessary investor confidence. Unfortunately, recent years have witnessed the collapse of certain international investment media which but a few years earlier had been hailed, even by the most sophisticated, as the greatest development of the century.³

Legislation, and other forms of regulation in most countries, is usually concerned primarily with domestic markets and the interests of citizens and residents. But all such legislation and regulation affects international markets and the flow of capital across international boundaries. It is appropriate, therefore, to examine such activity in developed and developing areas of the world.

The purpose of this article is to examine the present regulatory structure, with particular emphasis on the American experience. That experience has been, and is now, the subject of intense study by the agencies and institutions of the securities industry that provide the

³ See C. RAW, B. PAGE & G. HODGSON, *DO YOU SINCERELY WANT TO BE RICH?* (1971).

framework within which it operates.⁴ The Securities and Exchange Commission (SEC — the Federal agency responsible for the regulation of that industry)⁵, the Congress which exercises oversight of the Commission,⁶ the various state securities authorities⁷ (important, albeit sometimes overlooked, partners in the overall regulatory scheme), the stock exchanges and other formal and informal self-regulators, and other observers⁸ are examining and re-examining the current regulatory structure and proposals for change. This author does not intend to deal here with the problems which gave rise to this intense activity or to discuss all of the specific areas under study. However, an attempt will be made to highlight certain aspects of the activity on the American scene and, in a very limited way, to compare them with developments elsewhere.

Securities regulation in every country is, of course, a reflection of national experience and needs. The past two decades have witnessed the birth and dramatic development of new centers of industry, commerce and finance in the world and a real revolution in the world's securities and capital markets — a revolution which seems to be accelerating. In the United States, we saw a mammoth Special Study of the Securities Markets⁹ which led to comprehensive amendments to our federal securities laws in 1964 — amendments which affected not only our securities markets and those who operate within them, but also dealt with difficult problems relating to non-United States issuers in the securities of which a substantial interest is held by the American investing public.¹⁰

Studies of the growth of investment companies by the Wharton School of Finance of the University of Pennsylvania¹¹ and by the SEC¹² suggested the need to re-examine the goals and tools reflected in the

⁴ See WM. MCC. MARTIN, *THE SECURITIES MARKETS*, Aug. 5, 1971 (submitted to the Board of Governors of the New York Stock Exchange).

⁵ See Securities Exchange Act Release No. 9315 (Aug. 26, 1971).

⁶ See, e.g., *Hearings on the Securities Markets Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce*, 92d Cong., 1st Sess. (Aug. 2 & 3, and Sept. 14 & 16, 1971).

⁷ See, e.g., Central Securities Administrators Council (Indiana, Michigan, Minnesota, Missouri, Wisconsin), *Statements of Policy* (Aug. 31, 1971), reproduced in 1 CCH BLUE SKY L. REP. ¶¶ 4851-61 (1971).

⁸ See, e.g., H. BARUCH, *WALL STREET: SECURITY RISK* (1971); S. ROBBINS, *THE SECURITIES MARKETS* (1966).

⁹ SEC, *REPORT OF SPECIAL STUDY OF SECURITIES MARKETS*, H.R. DOC. NO. 95, 88th Cong., 1st Sess. (1963).

¹⁰ Act of Aug. 20, 1964, Pub. L. No. 88-467, 78 Stat. 565.

¹¹ WHARTON SCHOOL OF FINANCE AND COMMERCE, *A STUDY OF MUTUAL FUNDS*, H.R. REP. NO. 2274, 87th Cong., 2d Sess. (1962).

¹² SEC, *PUBLIC POLICY IMPLICATIONS OF INVESTMENT COMPANY GROWTH*, H.R. REP. NO. 2337, 89th Cong., 2d Sess. (1966).

regulatory framework enacted in 1940. They also pointed to the dramatic institutionalization of our securities markets and to consequent existing and potential problems. These studies led to additional legislative proposals relating to investment companies which were adopted after a four-year review and consideration by Congress.¹³ They also led to a specific Congressional mandate to the SEC to study the rapid institutionalization of investment and of the securities markets.¹⁴ A comprehensive study was submitted to the Congress by the Commission in the Spring of 1971.¹⁵ The Congress, our investment community and others are now studying that report and its implications.

These studies related in the main to developments flowing from the rapid growth of our markets and of the financial institutions and intermediaries that use them.¹⁶ On a somewhat narrower plane, it became clear a few years ago that the basic disclosure scheme with which we have been living since the mid-1930's needed review and updating — an activity which has been gaining considerable momentum in Canada, Europe and other areas of the world. In 1967 the SEC initiated a study which resulted in the publication of an excellent document known popularly as the Wheat Report, after my former colleague, Francis Wheat, who was responsible for implementing this initiative.¹⁷ Certain of its recommendations have already been adopted by the Commission. Others have been under active consideration. In the midst of these developments, the American Law Institute has appointed a committee — whose long range goal is to attempt a codification of the several federal securities statutes — a goal which, when achieved will, according to the prospectus, better protect investors and promote more efficient regulation of our securities and capital markets.

This wave of re-examination and reform, it must be emphasized, is not confined to the United States. Canada has faced up to many of the same problems with which we in the United States are struggling.¹⁸ Our northern neighbors have conducted a number of excellent studies and

¹³ Investment Company Act Amendments of 1970, Pub. L. 91-547, 84 Stat. 1413.

¹⁴ Act of July 29, 1968, Pub. L. 90-438, 82 Stat. 453.

¹⁵ SEC, INSTITUTIONAL INVESTOR STUDY REPORT, H.R. Doc. No. 92-64, 92d Cong., 1st Sess. (1971).

¹⁶ Another recent major legislative development is the Securities Investor Protection Act of 1970 (Pub. L. 91-598, 84 Stat. 1636), which created a quasi-governmental corporation to provide a measure of protection to investors faced with bankruptcy of their broker-dealers. This protection will, of course, supplement any other form which may be provided by the industry. It is believed to be the first such legislation in the free world.

¹⁷ Disclosure to Investors, A Reappraisal of Federal Administrative Policies Under the '33 and '34 Acts (1969). (Completion of this report announced in SEC Securities Act Release No. 4963 (1969)).

¹⁸ See, e.g., REPORT OF THE CANADIAN COMMITTEE ON MUTUAL FUNDS AND INVESTMENT CONTRACTS (1969).

enacted significant legislation in the corporate and securities areas in the past few years.¹⁹ They too are facing unresolved issues, and, on occasion, they arrive at different solutions. Thus, while we in the United States have been struggling with the issue whether, and under what circumstances, stock exchange member firms, as well as other broker-dealers, should offer their securities to the public (a question answered in the affirmative by the New York Stock Exchange),²⁰ the Moore Report, published by a committee representing the securities industry in Canada, unequivocally recommended that such public ownership be discouraged.²¹

We have seen broad new securities statutes and corporate laws adopted in consequence of other studies. In England, based upon the studies of the Jenkins Committee,²² The Companies Act has been revised and may be further amended.²³ An effective city panel administering a new Code relating to take-overs is in full operation in London.²⁴ South Africa, the Netherlands, Israel, France, Germany, Austria, Greece, and the Scandinavian countries (just to name a few) have overhauled or are studying their legislative controls over the securities markets and the distribution of securities. New systems of securities regulation and corporate law have, in fact, been enacted or are under study in the Near and Far East, in Africa, in North and South America, and in Europe.²⁵

Many in the United States think that we have the best system; in some areas, however, our system and our controls are not the most sophisticated, the most imaginative or, necessarily, the most useful. The

¹⁹ For an example of recent legislation, see The Securities Act, Statutes of Ontario C. 142 (1966).

²⁰ See, e.g., Securities Exchange Act Release Nos. 8717 & 8734 (Oct., 1969).

²¹ REPORT OF THE COMMITTEE TO STUDY THE REQUIREMENTS AND SOURCES OF CAPITAL AND THE IMPLICATION OF NON-RESIDENT CAPITAL FOR THE CANADIAN SECURITIES INDUSTRY, at 146 (1970). There is, however, an ongoing debate within Canada. Quebec welcomes and encourages public ownership. Ontario apparently opposes it. However, a special committee has been established in Ontario to study this matter.

²² COMPANY LAW COMMITTEE, CMND. No. 1749 (1962).

²³ Companies Act (1967).

²⁴ The City Code on Take-Overs and Mergers, *as revised*, (April, 1969).

²⁵ See, e.g., 1 Laws of Palestine c. 22 at 161 (Israel 1968); FINAL REPORT OF THE COMMISSION OF ENQUIRY INTO THE WORKING AND ADMINISTRATION OF THE PRESENT COMPANY LAW OF GHANA (1961); C. LEE, MOBILIZATION OF DOMESTIC CAPITAL (Korea); Legislative Decree 608/1970 (Greece 1970); Law of July 24, 1966, [1966] J.O. 6402 (France). Other formerly unregulated jurisdictions, such as Bermuda, have also adopted new laws and regulations.

In addition, a major revision of Japan's Securities and Exchange Laws became effective in March, 1971. It is also expected that, early in 1972, there will be published in Japan and the United States a volume reflecting the efforts of Japanese and American scholars, discussing in detail comparative securities regulation in Japan and in the United States.

United States has learned and borrowed creative solutions to existing and developing problems reached by other countries. We can learn much more. This sharing of experience is a most desirable form of international cooperation, an effort which has been encouraged, and in many instances stimulated, by international bodies such as the Organization for Economic Cooperation and Development (OECD), the European Economic Commission (EEC), and the International Federation of Stock Exchanges. As yet, however, an internationally unified system of regulation, while most desirable if not essential to continued growth, is not in sight.²⁶

THE FORMAT OF REGULATION

United States

There are certain basic differences between the regulatory scheme in the United States and those adopted in other countries. There is no codified Federal Corporation Law in the United States.²⁷ Conflicts of law questions still affect commerce and trade among the states. Each of the fifty states has its own "provincial" corporate law governing the corporations organized or domiciled within its boundaries.²⁸ State corporation statutes are, however, generally not concerned with problems associated with securities markets. Consequently, while practically every state has securities laws concerning the issuance, distribution and trading of securities within its borders, the *principal* regulatory statutes governing the securities field are the Federal statutes, which apply in every state when the jurisdictional means are used and supplement local law.²⁹

Another important characteristic of the regulation of capital and securities markets in the United States is the unique blend of direct regulation by the government and "self-regulation" by industry organizations specifically recognized by statute and vested with appropriate authority. These include the national stock exchanges and the National Association of Securities Dealers (NASD), which is concerned with securities trading away from the stock exchanges. The exchanges are

²⁶ This is probably most true in the area of financial reporting, which, of course, is the core of an effective disclosure scheme. See, e.g., PRICE WATERHOUSE & Co., *GUIDE FOR THE READER OF FOREIGN FINANCIAL STATEMENTS* (1971). See also however, a recent speech by the Chairman of the Securities and Exchange Commission in which he indicated the probable publication early in 1972 of a set of "Standard Rules" for the regulation of international mutual funds. William Casey, *Current Problems in the Mutual Fund Area*, before The Twenty-third Annual Mutual Fund Sales/Management Conference, Washington, D.C., Oct. 18, 1971.

²⁷ See R. BAKER & W. CARY, *CASES AND MATERIALS ON CORPORATIONS* 12 (3d ed. 1958).

²⁸ *Id.* 13.

²⁹ See Securities Act of 1933, § 5, as amended, 15 U.S.C. § 77e (1970).

authorized to promulgate and administer rules and regulations to govern the brokers and dealers who trade through the facilities of those exchanges.³⁰ They also have plenary power with respect to the listing of securities for trading on the exchanges.³¹ The SEC, nonetheless, oversees the activities of these "self-regulators" and is vested, in certain instances, with review authority and, in others, with authority to supplement or supplant such self-regulation.³²

In addition to the exchange markets and mechanisms, the securities industry has developed a vast, and, at least until fairly recently, an amorphous over-the-counter market (OTC) where more speculative unlisted securities (as well as seasoned and some listed) issues are traded by broker-dealers, some of whom may also be members of an organized stock exchange. In this OTC marketplace — essentially a vast electronic network tied together by the telephone and by new and developing computer systems — the NASD, a statutory (yet private) body, regulates the broker-dealer community in a manner analogous to that followed by a stock exchange.³³ However, the self-regulatory authority of the NASD does not include regulation of the issuers of listed or unlisted securities traded over the counter. It does, however, exert certain influence through rules relating to the public quotation of and member trading in, securities traded in the OTC market. The SEC has oversight responsibilities with respect to the activities of the NASD and assumes the principal regulatory role with respect to issuers of securities traded only in over-the-counter markets.³⁴

There is yet another class of broker-dealers in the United States who are neither stock exchange members nor NASD members; they are sometimes referred to as SECO members, who confine their activities largely to the OTC markets.³⁵ Since 1964, the SEC has been directed to subject them to regulation comparable to that which the NASD exercises over its membership.³⁶ This blend of governmental and quasi-governmental regulation has some parallels in other countries; it seems unique to the United States, however, in the depth of its development and the extent to which government powers are vested in privately managed and financed institutions.

³⁰ Securities Exchange Act of 1934, §§ 6, 19, *as amended*, 15 U.S.C. §§ 78f, 78s (1970).

³¹ *Id.*

³² 15 U.S.C. § 78s (1970).

³³ See NATIONAL ASSOCIATION OF SECURITIES DEALERS, RULES OF FAIR PRACTICE (CCH 1970).

³⁴ Securities Exchange Act of 1934, §§ 12, 13, 14, 15A, *as amended*, 15 U.S.C. §§ 78l, 78m, 78n, and 78o-3 (1970).

³⁵ SECO is an acronym for "SEC only" and refers to broker-dealers who have no membership in either a stock exchange or the NASD.

³⁶ Securities Exchange Act of 1934, § 15(b)(8)-(10), *as amended*, 15 U.S.C. § 78o(b)(8)-(10) (1970).

Elsewhere

The contrast between our regulatory approach and the approach of most countries, which, with certain notable and recently increasing exceptions,³⁷ is found largely in each country's corporation law, is of course a reflection of the legal system of each country and the somewhat different economic development experienced by each. Until fairly recent times, the history of European Continental corporate and securities law had been largely one of silence. Public shareholders were once a relatively minor factor in the European securities markets. Until the end of World War II, in fact, most industrial companies on the Continent were closely-held or family corporations which, when in need of capital, obtained necessary funds from private sources or certain financial institutions rather than from the public. Debt rather than equity financing was the common way of raising capital, and there was little public equity investment even in large enterprises. Further, those who did provide equity capital were usually in a position to obtain whatever information they needed for informed investment decisions. There was, therefore, little pressure to compel companies to make adequate public disclosure about their operations and their management. These conditions, together with other practices quaintly referred to as "fiscal" in origin, also delayed the development of meaningful accounting and auditing procedures by independent professionals and the creation of a skilled group of security and corporate analysts.

Since the end of World War II, however, a corporate revolution has been taking place throughout the western world, a revolution which has profound implications not only for those countries in which it is occurring, but also for countries like the United States which have traditionally advocated greater public disclosure of corporate information. The spread of the multinational corporation has contributed to the breakup of the traditional European family corporation and increased the need for such companies to raise substantial amounts of equity capital to grow and to compete effectively. More European issuers have turned to the public to raise needed capital. The experience and success of Anglo-Saxon countries in creating investor confidence, and thus attracting investor savings, have persuaded entrepreneurs and bankers in other areas of the world that adequate disclosure and fair dealing are prerequisites to successful tapping of public funds. This has led to widespread reform throughout the world to enhance disclosures to investors and otherwise to provide essential investor protection.

³⁷ See note 25 *supra*.

One of the most interesting developments — and perhaps one of the most promising from the point of view of international cooperation and integration — is the proposed European Company Law.³⁸ Since 1959 much effort has been expended on this project. Although its adoption in the near future is questionable, its realization now seems almost within reach. The current draft reflects a harmonization of differing political and social points of view. Its adoption should further encourage intra-European industrial and financial growth.

Change and improvement are by no means limited to Europe. Japan has recently put into effect substantial amendments to its securities controls in the areas of increased disclosure, improved financial presentation, regulation of take-overs and in other areas. Studies have also been completed or are under way in Korea, Taiwan, Brazil, Panama, Ghana, Sierra Leone, and other countries in Africa and in the Near East.

AN UBIQUITOUS PROBLEM: ADEQUATE DISCLOSURE

These activities and achievements are reflections of the fact that all countries have learned well the lesson that, if their capital markets are to compete effectively, developed secondary markets are essential. There is a growing recognition that adequate secondary markets are achieved only by encouraging wider participation by the general public in securities issues, directly or through financial intermediaries, a goal which can be attained by inspiring greater investor confidence through fuller disclosure and more effective regulation of the markets and those who operate within them. It seems that (at least in the view of governments, interested private persons and organizations around the world) investors do not yet enjoy adequate protection.³⁹

There is another basic reason for reform. Adequate disclosure promotes what the economists call "allocational efficiency." This means that the ultimate effect of providing investors with information sufficient to enable informed assessments of competing investment opportunities is to channel or attract available funds toward those firms that will use them most efficiently. For this reason, at least in part, securities

³⁸ For a pessimistic view of the prospects for such a law, see Rubin, *The International Firm and the National Jurisdiction*, in *THE INTERNATIONAL CORPORATION*, 199 *et seq.* (C. Kindleberger ed. 1970).

³⁹ In the United States, where it is generally considered that securities and market regulation is most sophisticated, studies, new legislation and similar efforts have been continuous since, at least, 1961. See, e.g., notes 9, 11, 12, 13, 15 and 17 *supra*.

If anything, the pace has quickened within the past year. Investigations or studies are under way in at least two committees of the Congress, by the SEC, and by certain of the self-regulatory bodies.

and market regulation throughout the world has moved from a concern limited to the prevention of fraud to include the discouragement of inefficiency and the promotion of a healthy world economy.

In the United States, the SEC has continually explored methods to improve disclosure to the investing public concerning securities of domestic and foreign issuers traded in the United States. The 1964 amendments to the Federal securities statutes extended disclosure requirements — theretofore limited to issues of securities traded on exchanges or distributed to the public within the United States — to other large companies whose securities are publicly traded by investors in the United States.⁴⁰ While these requirements in terms apply equally to foreign and domestic issuers, the Commission was given exemptive powers which enabled it to deal flexibly with foreign issues.⁴¹ The serious problems of balancing American investor interest and protection, on the one hand, against concerns expressed by the issuers of those securities and by their governments on the other, presented the Commission with great difficulties in delineating the scope of the exemptions which could or should be provided to foreign issuers. While the Commission had, since its inception, wrestled with the problem of securities originally issued outside the United States, the 1964 amendments created something of a minor international crisis, or so it seemed.⁴² The Commission quickly learned that the regulation of business enterprises with activities in more than one country is not easily reduced to general and uniform rules and that, as a practical matter, compromises must eventually be made between the regulatory interests of the issuer's home country and those of the investor's domicile.

Of course, the problems of applying in one state the law of another are not limited to the securities field. Similar difficulties arise, for example, in the enforcement of antitrust law, product safety law, and tax law. In each field, the critical challenge is how the host state can best promote its own system of regulation, and further the particular social and economic aims of its own people, while accommodating the interests of enterprises domiciled in other states and seeking access to markets and capital funds in the host country. This challenge must be met if the citizens of the host state are to be assured of an opportunity to invest in enterprises domiciled in other countries.

⁴⁰ Pub. L. No. 88-467, 78 Stat. 565, § 3(c) (1964), adding subsections (g)-(h) to section 12 of the Securities Exchange Act of 1934 and amending other disclosure provisions of the statute.

⁴¹ 15 U.S.C. § 78l(g)(3) (1971).

⁴² See, e.g., Warner, H.R. 6793—*A Threat to U.S. Holders of Foreign Securities*, FIN. ANALYSTS J. 148 (Sept.-Oct., 1964).

Historically, the Commission's approach to solving these related problems illustrates its willingness to reach reasonable compromises to accommodate the needs, rights and practices of foreign issuers. For approximately two years after the passage of the 1964 amendments, the SEC granted a complete exemption to foreign issuers to provide time for more extensive discussions with interested foreign parties and further consideration of the appropriate impact of the legislation on foreign issuers.⁴³ The compromise that was finally reached provided that registration of foreign securities would not be required if less than 300 shareholders of the foreign issuer resided in the United States (of a world-wide total of at least 500 shareholders).⁴⁴ In instances where the foreign securities are not directly owned but, instead, are evidenced by American Depositary Receipts (ADR), registration, other than for the public offering of the ADR, would not be required.⁴⁵ However, individual holdings of ADR are counted with holdings of share certificates of the foreign issuer to determine whether the 300 shareholder limitation applies in those cases where both direct shareholdings and ADR are outstanding.⁴⁶

As a further accommodation to foreign interests, foreign issuers and certain insiders are exempted from the proxy disclosure and insider trading restrictions applicable to the securities of domestic issuers.⁴⁷ Furthermore, a foreign issuer that must register pursuant to section 12(g) of the 1934 Act is not required to comply with the ordinary annual and periodic reporting provisions applicable to domestic companies.⁴⁸ A major accommodation has been made for foreign issuers in that they are required to supply to the Commission only information that: (1) is required to be made public by the issuer under the law of the issuer's domicile, or (2) is made public by the issuer by virtue of requirements of any foreign stock exchange on which its securities are traded, or (3) is voluntarily distributed abroad by the issuer to its foreign securities holders.⁴⁹ Furthermore, the more rigorous American accounting standards are not applied to documents filed by foreign issuers.⁵⁰

Obviously, as more of the world's securities markets are interna-

⁴³ 17 CFR § 240.12(g)3-1 (1971).

⁴⁴ 17 CFR § 240.12(g)3-2(a)(1) (1971).

⁴⁵ 17 CFR § 240.12(g)3-2(c) (1971).

⁴⁶ 17 CFR §§ 240.12(g)3-2(e), 240.12(g)5-1(a) (1971); *see also* SEC Release No. 34-8066, 32 Fed. Reg. 7845 *et seq.* (1967).

⁴⁷ 32 Fed. Reg. 7845, 7846 (1967).

⁴⁸ 17 CFR § 240.12(g)3-2(b) (1971).

⁴⁹ 17 CFR § 240.12(g)3-2(b)(1)(i) (1971).

⁵⁰ Securities Exchange Act Release No. 34-8068, 32 Fed. Reg. 7851 (1967).

tionalized, each host country must balance its desire to protect local interests against the burdens imposed upon foreign issuers. The solution fashioned by the Commission has worked reasonably well even though certain issuers, at least in one European country, have declined to meet these minimal disclosure requirements — which they do fulfill, however, in the country of their own domicile. Apart from legal arguments as to the extraterritoriality of the 1968 amendments, a policy argument advanced has been that foreign issuers have no market for their shares in the United States and should not, therefore, be subject to the burdens and possibility of liability which filing might create. Without attempting here to consider the validity of these arguments, it seems certain that the need to attract investor interest in the United States, and in the increasing number of countries, including the host states, with disclosure standards comparable to those in the United States, will eventually assure compliance with the substance of those requirements as a practical matter. The Commission's requirements for information to protect American shareholders have been tailored to meet the convenience of the foreign issuer, since only information released publicly abroad need be submitted for inclusion in the public files of the SEC. This is on the theory that the issuer has not sought a market for its securities within the United States. Foreign issuers seeking a listing on an exchange must meet the more rigorous requirements of the exchange, and of the Commission, applicable when securities are registered for trading on the particular exchange.

Protecting the Foreign Investor

The Commission has always felt that, when American securities are sold abroad to foreigners, companies subject to its jurisdiction should not discriminate against non-American investors by failing to provide them with the information and other protections available to American investors.⁵¹ Recently, important steps have been taken to emphasize this policy and to assure that foreign investors are provided with essentially the same protections accorded Americans.⁵² Thus, in June 1970, the Commission promulgated guidelines concerning the applicability of the United States securities laws to the offer and sale abroad of shares of United States open-end investment companies — commonly referred to as mutual funds.⁵³ Presumably, the Commission

⁵¹ See, e.g., SEC Securities Act Release No. 4708 (July 9, 1964), and Securities Exchange Act Release No. 8537 (Feb. 25, 1969).

⁵² SEC, 36TH ANNUAL REP. 138 *et seq.* (1970).

⁵³ SEC Securities Act Release No. 5068, Securities Exchange Act Release No. 8907, Investment Company Act Release No. 6082 (June 23, 1970) [hereinafter cited as Securities Act Release No. 5068].

was persuaded that this action would indirectly benefit the American securities market because the provision of adequate and timely information (as required by American law and regulation) would deter any loss of confidence in American companies in general, and investment companies in particular. Such a loss of confidence might well follow from the unavailability of adequate information which, in turn, could trigger widespread share redemptions resulting in substantial losses to both foreign and domestic investors.⁵⁴

In the policy statement which accompanied the announcement of this action, the Commission restated its consistent position of not insisting upon registration under the 1933 Act of securities offered exclusively abroad by United States issuers where reasonable steps were taken to assure (1) that the securities would not be sold to citizens or residents of the United States, but rather to foreigners in accordance with applicable local law, (2) that they would come to rest outside the United States, and (3) that they would not flow back within a short period of time.⁵⁵ This position is not, in my judgment, based upon a determination that the Commission does not have jurisdiction to go beyond these guidelines, but rather upon the view that in most situations the registration provisions were designed primarily for the protection of Americans, particularly where there is no attempt to distribute an issue to Americans or to invite them to create a substantial market in the United States for foreign securities.⁵⁶ It may be that the anti-fraud provisions would apply to such activities. This is not to minimize the difficult question whether courts in jurisdictions outside the United States would accept jurisdiction to enforce those statutory provisions. It is unlikely that the Commission would decline to accept jurisdiction should an American issuer wish to register in such circumstances.

However, with regard to a special class of issuer — open-end investment companies that are continually in registration and selling shares to United States investors — the Commission stated that the concurrent offering of such shares to foreign nationals abroad could not be isolated from the continuing domestic offering and, therefore, must be registered and comply with the disclosure requirements applicable to an offering in the United States.⁵⁷ This means that offerees

⁵⁴ SEC, 36TH ANNUAL REP. 139 (1970).

⁵⁵ SEC Securities Act Release No. 5068 at 3 (June 23, 1970).

⁵⁶ The Commission has also indicated, despite clear applicability of the statutory jurisdictional standards, that it will not raise any question when American investment bankers participate in (or, indeed, initiate and manage) offerings of securities abroad by other American issuers even where no registration has been effected.

⁵⁷ SEC Securities Act Release No. 5068 at 3 (June 23, 1970).

abroad must be provided with a prospectus which does not differ materially from the prospectus used in the United States. The Commission has recognized, moreover, that the foreign prospectus should be adapted to the customs and usages of the particular country in which the securities are to be offered. Thus, not only should the prospectus be printed in a language readily understood in that country but it should, for instance, include a discussion of material tax consequences in that country.

The SEC has not, however, required domestic investment companies to oversee their foreign distributors directly, but rather has suggested that such domestic companies should require their foreign distributors to comply with reasonable standards by embodying such standards in distribution contracts.⁵⁸ Thus, by way of illustration, distribution agreements with foreign dealers should provide for delivery of prospectuses to all purchasers outside the United States. Similarly, where there are serious deviations by foreign dealers from conventional practices followed by the issuer in the United States, the issuer or distributor should cancel his arrangements with such dealers.⁵⁹ Furthermore, to the extent possible, advertising and supplemental sales literature utilized abroad should comply generally with the relevant standards applied in the United States, allowing some flexibility in light of local practice.⁶⁰ Finally, the Commission has stated that it will not require a foreign broker-dealer engaged in distribution abroad to register with it as a broker-dealer when that foreign broker-dealer sells shares of American investment companies solely to persons who are not nationals or residents of the United States.⁶¹

CONCLUSION

The financial news each day offers additional support for the recommendations made a few years ago, by the OECD and by the EEC, that there be an international body to fix worldwide standards for disclosure and control of capital markets.⁶² The development of such an international supervisory organization to overlook and to harmonize the international securities markets, and to assure that they function for the best interest of all, would be a welcome addition to current regula-

⁵⁸ *Id.* at 2.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 6.

⁶² We have already noted that some progress has already been achieved and that we may anticipate further efforts directed to this objective. See, e.g., discussion of the proposed European Company Law at 272 *supra*; and the growth of cooperative international regulation in the mutual fund area. See note 26 *supra*.

tory efforts. As transportation and communication systems continue to be refined, cooperative development of existing or new regulation throughout the world, multiple international listings on stock exchanges, efforts to standardize the regulations of the various stock exchanges throughout the world and to permit central clearing and block trading all become more foreseeable. A good deal has already been accomplished in the development of an "informal international law," based, at least in part, on the use of standard forms of contract, international arbitration provisions and international conventions unrelated to the law of a particular country. Additionally, the International Federation of Stock Exchanges, which numbers among its membership stock exchanges around the world, has published excellent proposals for improved disclosure and encouraged their adoption by member stock exchanges. The elimination of local restrictions on domestic purchases of foreign securities as well as upon foreign purchases of domestic securities would be a giant step in the direction of a unified practice.

The changes already affected by national and multinational corporations, and others now underway in corporate affairs and securities markets here and abroad will, in coming years, have as great an impact on the world's capital markets as did the passage of our securities laws, and similar actions in other countries, more than thirty years ago.

ST. JOHN'S LAW REVIEW

VOLUME 46

DECEMBER 1971

NUMBER 2

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