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Offshore Distribution of Securities: The Impact of Regulation S

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Offshore Distribution of Securities: The Impact of Regulation S

Don Berger*

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I. INTRODUCTION

The "internationalization" or "globalization" of the securities markets has been the object of extensive comment in the last decade.¹ This literature has concerned itself with not only the complex legal issues raised but also with the technological and communication advances that have made the development of a "global" market a pragmatic possibility. Much of the literature to date has concerned what is perhaps the most vexing legal problem under the United States securities laws -- the scope of mandated information disclosure imposed upon foreign issuers who want to sell their securities in the United States capital markets.² The application of the United States securities laws to U.S. issuers who want to sell their securities exclusively in foreign markets to foreign buyers, however, has been examined only sporadically.³ With the adoption in April 1990 of Regulation S⁴ by the Securities

1. See, e.g., Symposium, *The International Securities Market: Issues of Regulation & Taxation*, 6 INT'L TAX & BUS. LAW. 229-445 (1988); Symposium, *Can the International Securities Markets Be Regulated?* 14 BROOKLYN J. INT'L L. 251-484 (1988); Symposium, *The Internationalization of the Securities Markets*, 4 B.U. INT'L L.J. 1-90 (1986); Comment, *International Financial Equities*, 19 CAL. W. INT'L L.J. 327 (1989); Note, *The Present and Future Role of the Electronic Trading Linkage in the Developing International Securities Markets*, 22 GEO. WASH. J. INT'L L. & ECON. 639 (1989).

2. See, e.g., Thomas, *Increased Access to United States Capital Markets: A Brief Look at the SEC's New Integrated Disclosure Rules for Foreign Issuers*, 5 J. COMP. BUS. & CAP. MARKET L. 129 (1983); Coles, *Foreign Companies Raising Capital in the United States*, 3 J. COMP. CORP. L. & SEC. REG. 300 (1981); Casper, *Transnational Offerings and the Problem of Integration*, 34 U. MIAMI L. REV. 47 (1979); Stephens, *Reevaluation of Disclosure Requirements for Foreign Issuers: Securities Act of 1933*, 45 GEO. WASH. L. REV. 135 (1977); 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); Note, *Foreign Securities: Integration and Disclosure under the Securities and Exchange Acts*, 58 NOTRE DAME L. REV. 911 (1983).

3. See Adams, *Registration Under Federal and State Laws of Foreign Offerings by Domestic Corporations*, 14 CAP. U.L. REV. 223 (1985) [hereinafter referred to as Adams]; Evans, *Offerings of Securities Solely to Foreign Investors*, 40 BUS. LAW. 69 (1984) [hereinafter referred to as Evans].

4. Regulation S, adopted by Sec. Act. Rel. 6863 (Apr. 23, 1990), consists of Rules 901-904 preceded by eight Preliminary Notes. 55 Fed. Reg. 18306 (to be codified at 17 C.F.R. § 230.903). These rules became effective May 2, 1990. See Appendix to this article for the text of Regulation S, reprinted in, Fed. Sec. L. Rep. (CCH) ¶ 80,689 (1989-90).

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Exchange Commission,⁵ however, a structured and systematic methodology has been promulgated for such transactions that will undoubtedly become the focus of extensive comment in the legal literature.

This article will briefly examine how offshore distributions⁶ of U.S. issuer securities were regulated under the Securities Act of 1933⁷ prior to the adoption of Regulation S. Its major focus, however, will be the rather complex regulatory system created by Regulation S.

Offshore Distributions Prior to Regulation S

The cornerstone of the regulatory edifice erected by the Securities Act of 1933⁸ is Section 5.⁹ Paraphrased here in

5. Hereafter referred to as the "Commission" or the "S.E.C."

6. "Distribution" is used in this article to refer to the original issuance and sale of a security by its issuer. The term does not include subsequent trading of such a security in the secondary market.

7. 15 U.S.C. §§ 77a-z (1988). State securities laws may also apply to offshore distributions by domestic issuers. See Adams, *supra* note 3, at 231-41 (discussing the law of various states). See also Evans, *supra* note 3, at 81-86 (discussing the impact of California securities law to such transactions).

8. 15 U.S.C. §§ 77a-z (1988).

9. *Id.* at § 77e (1988):

(a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

(b) It shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to carry or transmit any prospectus relating to any security with respect to which a registration statement has been filed under this subchapter, unless such prospectus meets the requirements of section 77j of this title; or

(2) to carry or cause to be carried through the mails or in interstate commerce any such security for the purpose of sale or for delivery after sale, unless accompanied or preceded by a prospectus that meets the requirements of subsection (a) of section 77j of this title.

(c) It shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any

simplified terms for present limited purposes, Section 5(c)¹⁰ prohibits the making of offers for the sale of securities until a registration statement has been filed with the S.E.C.; Section 5(b)¹¹ regulates the way offers for the sale of securities can be made after a registration statement has been filed but before it has become effective (i.e., during the so-called "waiting period") as well as after the date of effectiveness (i.e., during the so-called "post-effective period"); and Section 5(a)¹² prohibits the sale of securities until the filed registration statement has become effective.

The "registration" required by Section 5 consists of the preparation and filing with the Commission of extensive information about the business, financial history and condition, management structure, and background of the issuer. Requiring extensive and intensive efforts by management, lawyers, and accountants, the cost of preparing, printing and distributing the required information runs into hundreds of thousands of dollars. Consequently, being able to distribute securities without having to comply with the registration requirements of Section 5 is of great concern to issuers.

The regulatory impact of Section 5 described previously is triggered by the use of "any means or instruments of transportation or communication in interstate commerce or of the mails" in connection with such offers and sales. Since "interstate commerce" is defined in Section 2(7)¹³ as including "trade or commerce in securities . . . between any foreign country and any State, Territory or the District of Columbia," it is clear that the statutory language of Section 5 could be applied to offers and sales of securities by domestic issuers to foreign offerees and buyers in

security, unless a registration statement has been filed as to such security, or while the registration statement is the subject of a refusal order or stop order or (prior to the effective date of the registration statement) any public proceeding or examination under section 77h of this title.

10. 15 U.S.C. § 77e(c) (1988). *See supra* note 9.

11. 15 U.S.C. § 77e(b) (1988). *See supra* note 9.

12. 15 U.S.C. § 77e(a) (1988). *See supra* note 9.

13. 15 U.S.C. § 77b(7) (1988).

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foreign markets.¹⁴

Nevertheless, until the adoption in 1964 of Securities Act Release 4708, the S.E.C. as a matter of practice, but without taking an official public position, did not apply the provisions of Section 5 to offshore distributions that had no domestic impact. This practice was based on the Commission's policy conclusion, based on its interpretation of the private offering exemption under Section 4(2),¹⁵ that registration under Section 5 was only required for public offerings occurring in the United States.¹⁶ As further explained in the 1964 Release,

... the Commission has traditionally taken the position that the registration requirements of Section 5 of the Act are primarily intended to protect American investors. Accordingly, the Commission has not taken any action for failure to register securities of United States corporations distributed abroad to foreign nationals, even though the use of jurisdictional means may be involved in the offering.¹⁷

The official S.E.C. position regarding the exclusion of offshore distributions from the registration provisions of the 1933 Securities Act was made public in 1964 in Release 4708 which became the pragmatic guide for structuring offshore transactions so as to prevent the inadvertent transgression of its conceptual limits.

The central concept underlying Release 4708, which in effect created a functional exemption from the registration mandate of the 1933 Securities Act for offshore distributors, was that such

14. Sec. Act Rel. 5068 (Jun. 23, 1970) reprinted in Fed. Sec. L. Rep. (CCH) ¶¶ 48,782-77,828 (1989-90) states:

The registration requirements of the Securities Act apply, unless an exemption is available, to any offer or sale of a security involving interstate commerce or use of the mails. Since "interstate commerce" is defined in Section 2(7) of the Securities Act to include "trade or commerce in securities or any transportation or communication relating thereto . . . between any foreign country and any State, Territory, or the District of Columbia," this might be construed to encompass virtually any offering of securities made by a United States issuer outside the geographic territory of the United States.

15. 15 U.S.C. § 77d (1988): "The provisions of section 5 of this title shall not apply to --

(1) . . .

(2) transactions by an issuer not involving any public offering."

16. L. LOSS & J. SELIGMAN, 2 SECURITIES REGULATION §§ 785-792 (3d ed. 1989). See Adams, *supra* note 3, at 228.

17. Sec. Act Rel. 33-4708, 29 Fed. Reg. 9328 (July 9, 1964).

securities had to be "distributed abroad to foreign nationals."¹⁸ To the geographic limitation - distribution *abroad* - and the citizenship limitation - *foreign* nationals - was added a third requirement. In order to prevent the use of a Release 4708 unregistered distribution as a conduit for a domestic U.S. distribution through resales in the United States by the initial foreign purchasers, the S.E.C. expressly stated that such a foreign distribution had "to be effected in a manner which will result in the securities coming to rest abroad."¹⁹

Release 4708 cited two specific situations that would not be considered to meet its exemptive criteria:

. . . a distribution of securities by a United States corporation, through the facilities of Canadian Stock Exchanges may be expected to flow into the hands of American investors and may therefore be subject to registration. Similarly, a public offering specifically directed toward American nationals abroad, including servicemen, would be regarded as subject to registration.²⁰

In other situations, however, a perceived lack of clear guidelines as to when securities would be considered by the S.E.C. to have "come to rest abroad" resulted in the frequent submission to the Commission of requests for "no action" letters in individual proposed transactions.

In numerous "no-action" letters, the S.E.C. in subsequent years indicated what structural methodologies could be utilized by U.S. issuers to sell their securities abroad in compliance with the conceptual framework of Release 4708.²¹ The adoption of Regulation S has obviated the need to present here a summary analysis of such methodologies, since "reliance upon Securities Act Release No. 4708 . . . and the no-action and interpretive letters relating thereto is not appropriate for offerings of securities commencing after the ninetieth day following publication of this release in the Federal Register."²² Contemporary offshore

18. *Id.*

19. *Id.*

20. *Id.*

21. See generally H. BLOOMENTHAL, 10A INTERNATIONAL CAPITAL MARKETS AND SECURITIES REGULATION § 5.02 (1989); Adams, *supra* note 3, at 228-31; Evans, *supra* note 3, at 70-76.

22. Sec. Act Rel. 6863, (Apr. 23, 1990), *supra* note 4.

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distributions by U.S. issuers, therefore, must now be structured in accordance with the specific provisions of Regulation S.²³

II. REGULATION S: THE "SAFE HARBOR" APPROACH

A. General Introduction

Regulation S elevates to an express rule the concepts that underlay the policy of old Release 4708. Rule 901, adopting a definitional approach, states:

For the purposes only of Section 5 of the [1933 Securities] Act (15 U.S.C. § 77e), the terms "offer," "offer to sell," "sale," and "offer to buy" shall be deemed to include offers and sales that occur within the United States and shall be deemed not to include offers and sales that occur outside the United States.²⁴

The basic concept expressed in Rule 901 represents an important departure from the previously applicable standard under Release 4708. The latter, it will be recalled, was based on the Commission's perception that Congress' intent in requiring information disclosure under Section 5 of the statute was "to protect *American* investors."²⁵ Consequently, offshore offers and sales to American citizens, such as military personnel stationed abroad, did not qualify under Release 4708 and had to be registered with the Commission. Regulation S, on the other hand, takes a strictly geographic approach. As long as the offers and sales occur outside the United States they are excluded from the scope of Section 5 even if made to United States citizens.

The primary task in complying with Regulation S therefore is focused on the criteria that determine whether a particular distribution of securities occurs outside the United States.

The specific mechanism created by Regulation S consists of

23. Regulation S is not exclusive; i.e., otherwise available exemptions from the registration mandate of the 1933 Securities Act remain available and can be utilized. Regulation S, Preliminary Note 5.

24. 17 C.F.R. § 230.901 (1990).

25. Sec. Act Rel. 33-4708, 29 Fed. Reg. 9328 (July 9, 1964) (emphasis added).

making available two "safe harbors;" that is, if the specified conditions of a safe harbor are met, no Section 5 registration is necessary. The so-called "issuer safe harbor" created in Rule 903²⁶ applies to issuers, securities professionals involved in the distribution process of the issuer's securities, and their respective affiliates. The so-called "resale safe harbor" created in Rule 904²⁷ applies to offshore resales of securities.

Both safe harbors are only available if two criteria are met. The offer or sale must occur in an "offshore transaction," and no "directed selling efforts" may be made in the United States in connection with the distribution or resale.²⁸ Both concepts are specifically defined in Rule 902.²⁹ In addition to these two identical criteria applicable to both the issuer and the resale safe harbors, each of the latter imposes additional criteria as a prerequisite³⁰ to its availability.

What results is a highly structured, detailed exemption from the registration mandate of Section 5. While certainly much more complex in its detailed definitional approach than old Release 4708, Regulation S has the potential advantage of obviating or reducing the need to seek administrative clarification from the Commission by way of "no action" letters for particular transactions.

B. The "Issuer Safe Harbor" Under Rule 903

The availability of the issuer safe harbor under Rule 903 requires, as already mentioned, that the issuer³¹ engage in an "offshore transaction" without using "directed selling efforts" within the United States. Additionally imposed requirements depend upon the

26. 17 C.F.R. § 230.903 (1990).

27. *Id.* at § 230.904.

28. *Id.* at § 230.903(a), (b); *id.* at § 230.904(a), (b).

29. *Id.* at § 230.902(b), (i).

30. *Id.* at § 230.903(c); *id.* at § 230.904(c).

31. "Issuer," for purposes of discussing Rule 903, is here used and will be used hereafter as a collective term covering not only the issuer of the security but also the other persons or entities encompassed by Rule 903 -- the issuer's distributor, i.e., any "underwriter, dealer or other person who participates, pursuant to a contractual arrangement, in the distribution of the securities" (17 C.F.R. § 230.902(c)(1990)) and any affiliate, i.e. control person, of the issuer or a distributor.

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nature of the security being sold -- Rule 903 establishes three different categories each of which triggers its own specific prerequisites. Thus, pragmatically speaking, Rule 903 really creates three safe harbors rather than just one. The subsequent analysis will first explore the two common substantive criteria underlying all three categories and will then examine the specific categories separately.

1. "Offshore Transaction"

The requirement that the issuer must engage in an "offshore transaction" is defined in Rule 902(i),³² and consists of two basic requirements.

First, the offer to sell the securities cannot be made to a person in the United States.³³ Additionally, an order to buy the offered securities can only be accepted by the issuer if the buyer is in fact outside the United States at the time of placing the order or if the issuer reasonably believes that the buyer is outside the United States.³⁴ Alternatively, the second requirement is satisfied if the transaction is "executed in, on or through a physical trading floor of an established foreign securities exchange that is located outside the United States."³⁵

In a reversal of the previous approach under old Release 4708, the fact that an offeree or buyer, though physically located outside the United States, is a U.S. citizen does not keep the transaction from constituting an "offshore transaction."³⁶ Thus, offshore offers or sales to individuals, who are U.S. citizens, rather than to identifiable groups of citizens, are "offshore transactions" since the definition of the term "U.S. persons" is not based on mere

32. *Id.* at § 230.902(i).

33. *Id.* at § 230.902(i)(1)(i).

34. *Id.* at § 230.902(i)(1)(ii)(A).

35. *Id.* at § 230.902(i)(1)(ii)(B)(1). The reference to "physical trading floor" would seem to preclude a trading system based exclusively on computerized display terminals -- i.e., a foreign equivalent of the American NASDAQ system.

36. 17 C.F.R. § 230.902(i) (1990).

citizenship.³⁷

2. "Directed Selling Effort"

No "directed selling efforts" may be made in the United States in a Rule 903 transaction.³⁸ Rule 902(b)³⁹ defines this concept as follows:

"Directed selling efforts" means any activity undertaken for the purpose of, or that could reasonably be expected to have the effect of, conditioning the market in the United States for any of the securities being offered in reliance on this Regulation S. Such activity includes placement of an advertisement in a publication with a general circulation in the United States that refers to the offering of securities being made in reliance upon this Regulation S.

Subsequent sections of Rule 902, however, permit specified activities in the United States by the issuer even though technically and functionally they otherwise would be encompassed by the "directed selling efforts" definition. Thus, advertisements that are required to be made under either U.S. or foreign law can be made if the information contained therein is limited to what is legally required to be given.⁴⁰ Likewise, so-called "tombstone" advertisements that are regularly used in domestic transactions⁴¹ may be used in Rule 903 transactions provided they are placed in publications that have less than twenty percent of their total circulation in the United States.⁴²

Issuers are also permitted to allow prospective investors to visit and inspect their physical plants and facilities located in the United States.⁴³

37. *Id.* at § 230.902(o). *But see id.* at § 230.902(i)(2).

38. *Id.* at § 230.903(b).

39. *Id.* at § 230.902(b)(1).

40. *Id.* at § 230.902(b)(2).

41. *See* 17 C.F.R. § 230.134 (1990). Like domestic transaction tombstone ads, such ads under Rule 903 are limited as to the scope of information allowed to be included. *Id.* at § 230.902(b)(4).

42. *Id.* at § 230.902(b)(4)(1).

43. *Id.* at § 230.902(b)(5).

3. *The Categorization Approach to the Issuer Safe Harbor Under Rule 903*

Rule 903⁴⁴ creates three categories for securities that can be offered and sold without registration. The three categories differ from each other based on the nature of the securities being offered or sold and the nature of the issuer. Securities falling into the first category are within the safe harbor as long as only the two previously mentioned general criteria are met--i.e., they are offered and sold in an "offshore transaction" and no "directed selling efforts" occur within the United States. Securities falling into either of the remaining two categories must meet these two general criteria and are subjected to additional requirements.

a. *Category I Securities*

Securities which only need to meet the two basic requirements of Rule 903 include the following:

1. equity securities of a foreign issuer if there is no "substantial U.S. market interest" in the class of securities to be offered or sold;⁴⁵
2. debt securities of a foreign issuer if there is no "substantial U.S. market interest" in that issuer's debt securities;⁴⁶
3. warrants of a foreign issuer if there is no "substantial U.S. market interest" in the securities to be purchased upon exercise of the warrants;⁴⁷
4. convertible securities of a foreign issuer if there is no "substantial U.S. market interest" in either the convertible securities or the underlying securities.⁴⁸
5. securities offered and sold in an "overseas directed offering" regardless of the existence of a "substantial U.S. market interest;"⁴⁹
6. securities "backed by the full faith and credit of a foreign

44. *Id.* at §230.903.

45. *Id.* at § 230.903(c)(1)(A).

46. 17 C.F.R. § 230.903(c)(1)(B) (1990).

47. *Id.* at § 230.903(c)(1)(C).

48. *Id.* at § 230.903(c)(1)(D).

49. *Id.* at § 230.903(c)(1)(ii).

government;⁵⁰

7. securities offered and sold pursuant to an employee benefit plan regulated under the law and customary practices of a foreign country, provided specified criteria are met.⁵¹

The first four kinds of securities are in Category I provided there is no "substantial U.S. market interest" in those securities. That term is defined in detail in Rule 902⁵² and differentiates between equity securities and debt securities.

There is no "substantial U.S. market interest" in a foreign issuer's equity security if the United States stock exchanges and the inter-dealer quotation systems⁵³ together did not constitute the single largest market for that class of securities either in the issuer's prior fiscal year or in the period since the issuer was incorporated, whichever is shorter.⁵⁴ Alternatively, there is no "substantial U.S. market interest" in a foreign issuer's equity security if less than twenty percent of all trading in that class of security took place in the U.S. markets⁵⁵ and fifty-five percent or more of such trading occurred in the securities markets of a single foreign country during the shorter of the issuer's prior fiscal year or the period since the issuer's incorporation.⁵⁶

Whether or not there is a "substantial U.S. market interest" with respect to a foreign issuer's debt securities, is determined by an even more complex formula:

... if *all* the debt securities, nonconvertible preferred stock not entitled to participate in residual earnings or assets, and certain asset-backed securities of the issuer are held of record by 300 or more U.S. persons, AND \$1 billion or more in principal amount of all such debt securities is held of record by U.S. persons, AND 20 percent of the outstanding debt calculated in the same manner is held of record by U.S. persons,⁵⁷

50. *Id.* at § 230.903(c)(iii).

51. 17 C.F.R. § 230.903(c)(iv) (1990).

52. *Id.* at § 230.902(n).

53. This would include the "pink sheet" market as well as the NASDAQ market, since the definitional language is not confined to automated quotation systems.

54. 17 C.F.R. § 230.902(n)(1)(i) (1990).

55. This includes the U.S. stock exchanges and the inter-dealer quotation systems. *See supra* note 53.

56. 17 C.F.R. § 230.902(n)(1)(ii) (1990).

57. 12 Sec. & Fed. Corp. L. Rep. (Clark Boardman) 137, 138 (1990). *See* 17 C.F.R. § 230.902(n)(2) (1990).

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a “substantial U.S. market interest” exists.

Even if such a “substantial U.S. market interest” exists with respect to a foreign issuer’s debt or equity security, it can nevertheless be sold without registration under the Category I safe harbor if it is sold in an “overseas directed offering.”⁵⁸ Such an offering, in the case of a foreign issuer, requires that it be “directed into a single country other than the United States to the residents thereof . . . in accordance with the local laws and customary practices and documentation of such country . . .”⁵⁹

Within specified limits, the “overseas directed offering” concept is also available to U.S. issuers for offers and sales of certain securities “directed into a single country other than the United States to the residents thereof . . . made in accordance with the local laws and customary practices and documentation of such country . . .”⁶⁰ Securities that can be sold must be non-convertible debt securities, non-convertible and non-participating preferred stock, or certain asset-backed securities if the relevant principal and interest, or par value, are not denominated in U.S. dollars and “such securities are neither convertible into U.S. dollar-denominated securities nor linked to U.S. dollars (other than through related currency or interest rate swap transactions that are commercial in nature) in a manner that in effect converts the securities to U.S. dollar-denominated securities.”⁶¹

b. Category II Securities.

Securities that do not meet the requirements of Category I can be offered and sold without registration if they meet the requirements

58. 17 C.F.R. § 230.903(c)(1)(ii) (1990).

59. *Id.* at § 230.902(j)(1). Simultaneous offerings in more than one country are not within the Rule 903 safe harbor. Such so-called “multijurisdictional” offerings are the subject of a separate Commission proposal. See Sec. Act Rel. 6841 (July 26, 1989).

60. 17 C.F.R. § 230.902(j)(2) (1990).

61. *Id.* at § 230.902(j)(1). Simultaneous offerings in more than one country are not within the Rule 903 safe harbor. Such so-called “multijurisdictional” offerings are the subject of a separate Commission proposal. See Sec. Act Rel. 6841 (July 26, 1989).

of Category II.⁶²

The two basic requirements of Rule 903 -- i.e., the existence of an "offshore transaction" and the absence of "directed selling efforts" in the United States -- must be satisfied.⁶³ Requirements for this safe harbor pertain both to the nature of the security being offered or sold, and the nature of the issuer.

Included in the Category II safe harbor are equity and debt securities of U.S. and foreign issuers who are "reporting" issuers.⁶⁴ Reporting issuers⁶⁵ are issuers that are required to register securities under Section 12 of the 1934 Securities Exchange Act⁶⁶ and therefore become subject to the periodic reporting requirements of Section 13 of that statute,⁶⁷ as well as issuers who must file periodic reports under Section 15(d) of that statute.⁶⁸ Such reporting issuers must have filed the required reports for a period of at least twelve months immediately preceding the offer and sale in reliance on Regulation S, or for such shorter period that such reports were required to be filed.⁶⁹

Also included in Category II are debt securities, non-participating preferred stock and asset-backed securities of foreign issuers who are not "reporting" issuers.⁷⁰

These Category II securities must be offered and sold subject to the imposition of transactional restrictions which to a large extent mirror the kind of practices that used to be employed under old Release 4708, even though specific details may differ. Thus, no offers or sales can be made to "U.S. persons" for a period of 40 days commencing on the date the securities were first offered to non-distributors or the date of closing if offered to distributors.⁷¹

If the securities are offered through a distributor, the issuer must

62. 17 C.F.R. § 230.903(c)(2) (1990).

63. *Id.*

64. *Id.* at § 230.903(c)(2)(i).

65. *Id.* at § 230.902(l).

66. 15 U.S.C. § 78(l)(a)(1988).

67. *Id.* at § 78(m)(b)(1988).

68. 17 C.F.R. § 230.902(l)(1) (1990).

69. *Id.* at § 230.902(l)(2).

70. *Id.* at § 230.903(c)(2).

71. *Id.* at § 230.903(c)(2)(iii); *id.* at § 230.902(m).

obtain from such distributor a written agreement to the effect that all offers and sales of the securities prior to the expiration of the 40-day restricted period will only be made in compliance with Rule 903, or pursuant to the normal registration requirements of the 1933 Act or pursuant to an available exemption from such registration requirements.⁷² Offering materials and documents other than press releases used prior to the expiration of the 40-day restricted period must include statements to the effect that the securities have not been registered and may not be sold in the United States or to U.S. persons unless they are registered or such sale transaction is eligible for an exemption from registration.⁷³ These statements must appear on the cover or inside cover page of any prospectus or offering circular, the underwriting section of any prospectus or offering circular and in any advertisements used in connection with the offer and sale of the securities.⁷⁴

III. CATEGORY III SECURITIES

Securities that do not qualify for Category I or Category II can be sold without registration if they meet the requirements of Category III. Principally, this category encompasses debt and equity securities of non-reporting U.S. issuers; nonconvertible debt, nonconvertible and non-participating preferred stock, and asset-backed securities of U.S. issuers; and equity securities of non-reporting foreign issuers with a "substantial U.S. market interest."

The basic requirements applicable to Category III securities are once again that they must be offered and sold in an "offshore transaction" and without the use of "directed selling efforts" in the United States.⁷⁵ Additionally imposed transaction restrictions differ depending upon whether equity or debt securities are being

72. *Id.* at § 230.903(c)(2)(ii); *id.* at § 230.902(h)(1).

73. 17 C.F.R. § 230.903(c)(2)(ii) (1990); *id.* at § 230.902(h)(2).

74. *Id.* at § 230.902(h)(2).

75. *Id.* at § 230.903(c)(3).

offered.

In the case of debt securities, specified offering restrictions must be imposed.⁷⁶ No offers or sales can be made to "U.S. persons" for a period of 40 days commencing on the date the securities were first offered to non-distributors or the date of closing if offered to distributors.⁷⁷ If the securities are offered through a distributor, the issuer must obtain the same kind of written agreement as required for Category II securities, and offering materials and documents must contain the same warning legends as required for Category II materials and documents.⁷⁸

In addition, Category III debt securities must be represented by a "temporary global security which is not exchangeable for definitive securities until the expiration of the 40-day restricted period."⁷⁹ If sold to non-distributors, the "temporary global security" cannot be exchanged for the definitive debt security until the issuer receives "certification of beneficial ownership of the securities by a non-U.S. person or a U.S. person who purchased securities in a transaction that did not require registration under the Act."⁸⁰

Category III equity securities are subjected to even more complex requirements. No offers or sales can be made to "U.S. persons" for a period of one year commencing on the date the securities were first offered to non-distributors or the date of closing if offered to distributors.⁸¹ If the securities are offered through a distributor, the issuer must obtain from the distributor the same kind of written agreement as required for Category II securities, and offering materials and documents must contain the same warning legends as required for Category II materials and documents.⁸² If the purchaser of the Category III equity security is a non-distributor, such purchaser must certify that it is not a

76. *Id.* at § 230.903(c)(3)(ii).

77. *Id.*; *id.* at § 230.902(m).

78. *See supra* notes 72-74 and accompanying text.

79. 17 C.F.R. § 230.903(c)(3)(ii)(B) (1990).

80. *Id.*

81. *Id.* at § 230.903(c)(3)(iii)(A).

82. *See supra* notes 72-74 and accompanying text.

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“U.S. person” and is not acquiring the security for the account or benefit of any U.S. person or is a U.S. person who purchased the securities in a transaction that did not have to be registered under the Act.⁸³ Such non-distributor purchaser must also agree only to resell the purchased security in accordance with the resale provisions of Regulation S or to register such resale unless another exemption from registration is available.⁸⁴ If the issuer of the security is a domestic issuer, the security must contain a legend stating that its transfer is prohibited except in accordance with the provisions of Regulation S.⁸⁵ Lastly, the issuer is required to provide either by contract or a provision in its bylaws, articles, charter or comparable document, that it will refuse to register any transfer of the securities not made in accordance with the provisions of Regulation S.⁸⁶

IV. CONCLUSION

Experience with the mechanism of Regulation S over time will tell whether it achieves its dual objectives of creating a more flexible approach without undue hindrances to offshore distributions while eliminating the need to obtain clarifications from the Commission through “no action letters” in individual transactions. It is, however, clear that the complexity of Regulation S constitutes a challenge to the lawyer who has to assist the client in structuring a transaction that fits into one of the categories that obviate the need to register the securities to be sold.

In its adopting release,⁸⁷ the Commission included two charts designed to help in determining which of the specific provisions of Regulation S has relevance to a particular proposed transaction. With a reminder that these charts are intended as a guide rather

83. 17 C.F.R. § 230.903(c)(3)(iii)(B)(1) (1990).

84. *Id.* at § 230.903(c)(3)(iii)(B)(2).

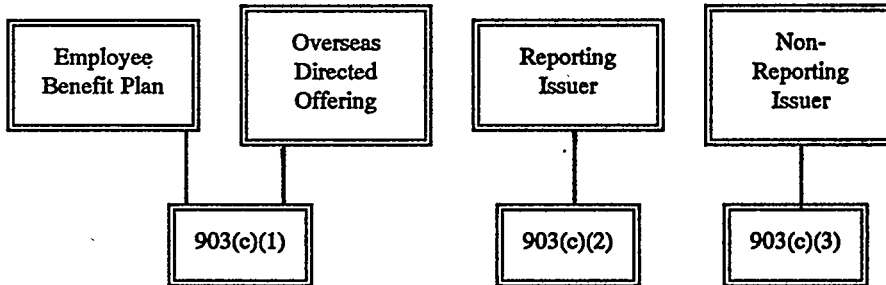
85. *Id.* at § 230.903(c)(3)(iii)(B)(3).

86. *Id.* at § 230.903(c)(3)(iii)(B)(4).

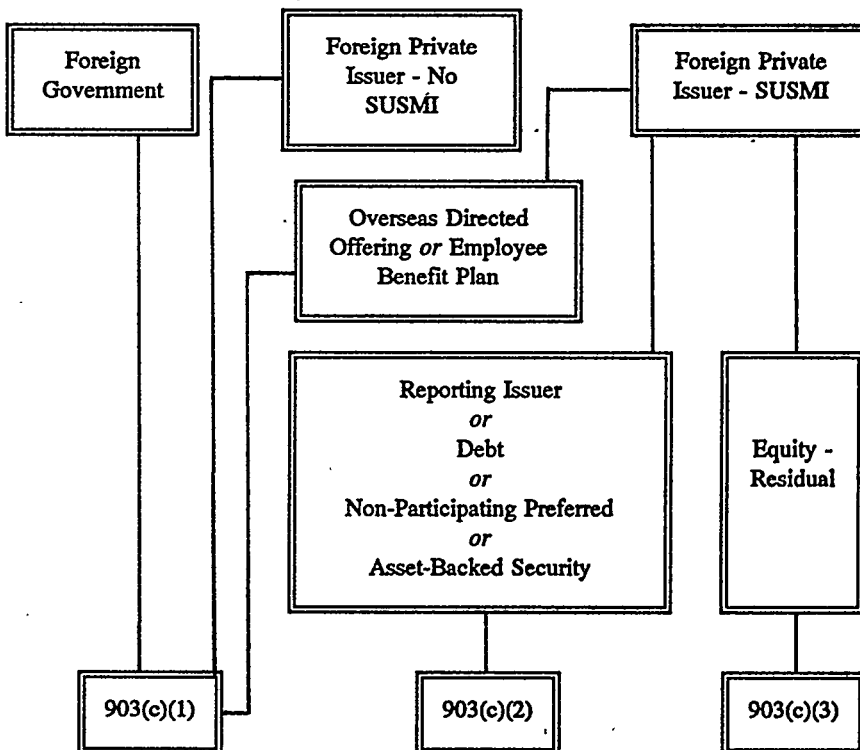
87. Sec. Act Rel. 6863, (Apr. 24, 1990). These charts are not part of Regulation S and thus are not reproduced in the Code of Federal Regulations. 55 Fed. Reg. 18328-329.

than as a substitute for analysis, they are reproduced here.

**903(c) CHART
DOMESTIC ISSUERS**



**903(c) CHART
FOREIGN ISSUERS**



APPENDIX

REGULATION S — RULES GOVERNING OFFERS AND SALES
MADE OUTSIDE THE UNITED STATES WITHOUT
REGISTRATION UNDER THE SECURITIES ACT OF 1933
(17 C.F.R. § 230.901-904).

PRELIMINARY NOTES

1. The following rules relate solely to the application of Section 5 of the Securities Act of 1933 (the “Act”) and not to antifraud or other provisions of the federal securities laws.

2. In view of the objective of these rules and the policies underlying the Act, Regulation S is not available with respect to any transaction or series of transactions that, although in technical compliance with these rules, is part of a plan or scheme to evade the registration provisions of the Act. In such cases, registration under the Act is required.

3. Nothing in these rules obviates the need for any issuer or any other person to comply with the securities registration or broker-dealer registration requirements of the Securities Exchange Act (the “Exchange Act”), whenever such requirements are applicable.

4. Nothing in these rules obviates the need to comply with any applicable state law relating to the offer and sale of securities.

5. Attempted compliance with any rule in Regulation S does not act as an exclusive election; a person making an offer or sale of securities may also claim the availability of any applicable exemption from the registration requirements of the Act.

6. Regulation S is available only for offers and sales of securities outside the United States. Securities acquired overseas, whether or not pursuant to Regulation S, may be resold in the United States only if they are registered under the Act or an exemption from registration is available.

7. Nothing in these rules preclude access by journalists for publications with a general circulation in the United States to offshore press conferences, press releases and meetings with company press spokespersons in which an offshore offering or

tender offer is discussed, provided that the information is made available to the foreign and United States press generally and is not intended to induce purchases of securities by persons in the United States or tenders of securities by United States holders in the case of exchange offers.

8. The provisions of this Regulation S shall not apply to offers and sales of securities issued by open-end investment companies or unit investment trusts registered and required to be registered or closed-end investment companies required to be registered, but not registered, under the Investment Company Act of 1940 (the "1940 Act").

RULE 901. GENERAL STATEMENT

For the purposes only of Section 5 of the Act, the terms "offer," "offer to sell," "sell," "sale," and "offer to buy" shall be deemed to include offers and sales that occur within the United States and shall be deemed not to include offers and sales that occur outside the United States.

RULE 902. DEFINITIONS

As used in Regulation S, the following terms shall have the meanings indicated.

(a) *Designated Offshore Securities Market*. "Designated offshore securities market" means:

(1) the Eurobond market, as regulated by the Association of International Bond Dealers; the Amsterdam Stock Exchange; the Australian Stock Exchange Limited; the Bourse de Bruxelles; the Frankfurt Stock Exchange; The Stock Exchange of Hong Kong Limited; The International Stock Exchange of the United Kingdom and the Republic of Ireland, Ltd.; The Johannesburg Stock Exchange; the Bourse de Luxembourg; the Borsa Valori di Milan; the Montreal Stock Exchange; the Bourse de Paris; the Stockholm Stock Exchange; the Tokyo Stock Exchange; the Toronto Stock Exchange; the Vancouver Stock Exchange; and the Zurich Stock Exchange; and

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(2) any foreign securities exchange or non-exchange market designated by the Commission. Attributes to be considered in determining whether to designate such a foreign securities market, among others, include:

- (i) organization under foreign law;
- (ii) association with a generally recognized community of brokers, dealers, banks, or other professional intermediaries with an established operating history;
- (iii) oversight by a governmental or self-regulatory body;
- (iv) oversight standards set by an existing body of law;
- (v) reporting of securities transactions on a regular basis to a governmental or self-regulatory body;
- (vi) a system for exchange of price quotations through common communications media; and
- (vii) an organized clearance and settlement system.

(b) *Directed Selling Efforts.*

(1) "Directed selling efforts" means any activity undertaken for the purpose of, or that could reasonably be expected to have the effect of, conditioning the market in the United States for any of the securities being offered in reliance on this Regulation S. Such activity includes placement of an advertisement in a publication with a general circulation in the United States that refers to the offering of securities being made in reliance upon this Regulation S.

(2) Notwithstanding paragraph (b)(1) of this rule, placement in an advertisement required to be published under United States or foreign law, or under rules or regulations of a United States of foreign regulatory or self-regulatory authority, shall not be deemed "directed selling efforts," provided the advertisement contains no more information than legally required and includes a statement to the effect that the securities have not been registered under the Act and may not be offered or sold in the United States (or to a U.S. person, if the advertisement relates to an offering under Rule 903(c)(2) or (3)) absent registration or an applicable exemption from the registration requirements.

(3) Notwithstanding paragraph (b)(1) of this rule, contact with persons excluded from the definition of "U.S. person" pursuant to paragraph (o)(7) of this rule or persons holding accounts excluded from the definition of "U.S. person" pursuant to paragraph (o)(2) of this rule, solely in their capacities as holders of such accounts, shall not be deemed, "directed selling efforts."

(4) Notwithstanding paragraph (b)(1) of this rule, a tombstone advertisement in a publication with a general circulation in the United States shall not be deemed "directed selling efforts," provided:

(i) the publication has less than 20% of its circulation, calculated by aggregating the circulation of its U.S. and comparable non-U.S. editions, in the United States;

(ii) such advertisement contains a legend to the effect that the securities have not been registered under the Act and may not be offered or sold in the United States (or to a U.S. person, if the advertisement relates to an offering under Rule 903(c)(2) or (3)) absent registration or an applicable exemption from the registration requirements; and

(iii) such advertisement contains no more information than:

(A) the issuer's name;

(B) the amount and title of the securities being sold;

(C) a brief indication of the issuer's general type of business;

(D) the price of the securities;

(E) the yield of the securities, if debt securities with a fixed (non-contingent) interest provision;

(F) the name and address of the person placing the advertisement, and whether such person is participating in the distribution;

(G) the names of the managing underwriters;

(H) the dates, if any, upon which the sales commenced and concluded;

(I) whether the securities are offered or were offered by rights issued to security holders and, if so, the class of securities that are entitled or were entitled to subscribe, the

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subscription ratio, the record date, the dates (if any) upon which the rights were issued and expired, and the subscription price; and

(J) any legend required by law or any foreign or U.S. regulatory or self-regulatory authority.

(5) Notwithstanding paragraph (b)(1) of this rule, bona fide visits to real estate, plants or other facilities located in the United States and tours thereof conducted for a prospective investor by an issuer, a distributor, any of their respective affiliates or a person acting on behalf of any of the foregoing shall not be deemed "directed selling efforts."

(6) Notwithstanding paragraph (b)(1) of this rule, distribution in the United States of a foreign broker-dealer's quotations by a third-party system that distributes such quotations primarily in foreign countries will not be deemed "directed selling efforts" if:

(i) securities transactions cannot be executed between foreign broker-dealers and persons in the United States through the system; and

(ii) the issuer, distributors, their respective affiliates, persons acting on behalf of any of the foregoing, foreign broker-dealers and other participants in the system do not initiate contacts with U.S. persons or persons within the United States, beyond those contacts exempted under Rule 15a-6 under the Exchange Act.

(c) *Distributor*. "Distributor" means any underwriter, dealer, or other person who participates, pursuant to a contractual arrangement, in the distribution of the securities offered or sold in reliance on this Regulation S.

(d) *Domestic Issuer*. "Domestic issuer" means any issuer other than a foreign issuer.

(e) *Foreign Government*. "Foreign government" means the government of any foreign country or of any political subdivision of a foreign country, provided that such person would qualify to register securities under the Act on Schedule B.

(f) *Foreign Issuer*.

(1) "Foreign issuer" means any issuer that is:

- (i) a foreign government;
- (ii) a national of any foreign country; or
- (iii) a corporation or other organization incorporated or organized under the laws of any foreign country.

(2) Notwithstanding paragraph (f)(1) of this rule, an issuer other than a foreign government shall not be deemed a "foreign issuer" if:

- (i) more than 50 percent of the outstanding voting securities of such issuer is held of record by persons for whom a U.S. address appears on the records of the issuer, its transfer agent, voting trustee, depositary, or person performing similar functions; and
- (ii) any of the following factors are present:

(A) the majority of the executive officers or directors of the issuer are U.S. citizens or residents;

(B) more than 50 percent of the assets of the issuer are located in the United States; or

(C) the business of the issuer is administered principally in the United States.

(g) *Held of Record*. "Held of record" has the meaning assigned to that term in Rule 12g5-1 under the Exchange Act.

(h) *Offering Restrictions*. "Offering restrictions" means:

(1) each distributor agrees in writing that all offers and sales of the securities prior to the expiration of the restricted period specified in Rule 903(c)(2) or (3), as applicable, shall be made only: in accordance with the provisions of Rule 903 or Rule 904; pursuant to registration of the securities under the Act; or pursuant to an available exemption from the registration requirements of the Act; and

(2) all offering materials and documents (other than press releases) used in connection with offers and sales of the securities prior to the expiration of the restricted period specified in Rule 903(c)(2) or (3), as applicable, shall include statements to the effect that the securities have not been registered under the Act and may not be offered or sold in the United States or to U.S. persons (other than distributors) unless the securities are

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registered under the Act, or an exemption from the registration requirements of the Act is available. Such statements shall appear:

(i) on the cover or inside cover page of any prospectus or offering circular used in connection with the offer or sale of the securities;

(ii) in the underwriting section of any prospectus or offering circular used in connection with the offer or sale of the securities; and

(iii) in any advertisement made or issued by the issuer, any distributor, any of their respective affiliates, or any person acting on behalf of any of the foregoing. Such statements may appear in summary form on prospectus cover pages and in advertisements.

(i) Offshore Transaction.

(1) An offer or sale of securities is made in an "offshore transaction" if:

(i) the offer is not made to a person in the United States; and

(ii) either:

(A) at the time the buy order is originated, the buyer is outside the United States, or the seller and any person acting on its behalf reasonably believe that the buyer is outside the United States; or

(B) for purposes of:

(1) Rule 903, the transaction is executed in, on or through a physical trading floor of an established foreign securities exchange that is located outside the United States; or

(2) Rule 904, the transaction is executed in, on or through the facilities of a designated offshore securities market described in paragraph (a) of this rule, and neither the seller nor any person acting on its behalf knows that the transaction has been pre-arranged with a buyer in the United States.

(2) Notwithstanding paragraph (i)(1) of this rule, offers and sales of securities specifically targeted at identifiable groups of U.S. citizens abroad, such as members of the U.S. armed forces serving overseas, shall not be deemed to be made in "offshore

transactions.”

(3) Notwithstanding paragraph (i)(1) of this rule, offers and sales of securities to persons excluded from the definition of “U.S. person” pursuant to paragraph (o)(7) of this rule or person holding accounts excluded from the definition of “U.S. person” pursuant to paragraph (o)(2) of this rule, solely in their capacities as holders of such accounts, shall be deemed to be made in “offshore transactions.”

(j) *Overseas Directed Offering.* “Overseas directed offering” means:

(1) an offering of securities of a foreign issuer that is directed into a single country other than the United States to the residents thereof and that is made in accordance with the local news and customary practices and documentation of such country; or

(2) an offering of non-convertible debt securities, or securities described in Rule 903(c)(4)(i) or (ii), of a domestic issuer that is directed into a single country other than the United States to the residents thereof and that is made in accordance with the local laws and customary practices and documentation of such country, provided that the principal and interest of the securities (or par value, as applicable) are denominated in a currency other than U.S. dollars and such securities are neither convertible into U.S. dollar-denominated securities nor linked to U.S. dollars (other than through related currency or interest rate swap transactions that are commercial in nature) in a manner that in effect converts the securities to U.S. dollar-denominated securities.

(k) *Publication with a General Circulation in the United States.*

(1) “Publication with a general circulation in the United States” means any publication that:

(i) is printed primarily for distribution in the United States; or

(ii) has had, during the preceding twelve months, an average circulation in the United States of 15,000 or more copies per issue.

(2) Notwithstanding paragraph (k)(1) of this rule, only the U.S. edition of any publication printing a separate U.S. edition will be deemed a publication with a general circulation in the United States if:

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(i) such publication, without consideration of its U.S. edition, would not meet the requirements of paragraph (k)(1)(i) or (ii) of this rule; and

(ii) the U.S. edition itself meets the requirements of paragraph (k)(1) of this rule.

(l) *Reporting Issuer*. “Reporting issuer” means an issuer other than an investment company registered or required to register under the 1940 Act that:

(1) has a class of securities registered pursuant to Section 12(b) or 12(g) of the Exchange Act or is required to file reports pursuant to Section 15(d) of the Exchange Act; and

(2) has filed all the material required to be filed pursuant to Section 13(a) or 15(d) of the Exchange Act for a period of at least twelve months immediately preceding the offer or sale of securities made in reliance upon this Regulation S (or for such shorter period that the issuer was required to file such material).

(m) *Restricted Period*. “Restricted period” means a period that commences on the later of the date upon which the securities were first offered to persons other than distributors in reliance upon this Regulation S or the date of closing of the offering, and expires a specified period of time thereafter; *Provided, however*, that all offers and sales by a distributor of an unsold allotment or subscription shall be deemed to be made during the restricted period; *provided, further*, that in a continuous offering, the restricted period shall commence upon completion of the distribution, as determined and certified by the managing underwriter or person performing similar functions; *provided further*, that in a continuous offering of non-convertible debt securities offered and sold in identifiable tranches, the restricted period for securities in a tranche shall commence upon completion of the distribution of such tranche, as determined and certified by the managing underwriter or person performing similar functions; *provided, further*, that in a continuous offering of securities to be acquired upon the exercise of warrants, the restricted period shall commence upon completion of the distribution of the warrants, as determined and certified by the managing underwriter or person

performing similar functions, if the following requirements are satisfied:

(1) each warrant bears a legend stating that the warrant and the securities to be issued upon its exercise have not been registered under the Act and that the warrant may not be exercised by or on behalf of any U.S. person unless registered under the Act or an exemption from such registration is available;

(2) each person exercising a warrant is required to give:

(i) written certification that it is not a U.S. person and the warrant is not being exercised on behalf of a U.S. person; or

(ii) a written opinion of counsel to the effect that the warrant and the securities delivered upon exercise thereof have been registered under the Act or are exempt from registration thereunder; and

(3) procedures are implemented to ensure that the warrant may not be exercised within the United States and that the securities may not be delivered within the United States upon exercise, other than in offerings deemed to meet the definition of "offshore transaction" pursuant to paragraph (i)(3) of this rule unless registered under the Act or an exemption from such registration is available.

(n) *Substantial U.S. Market Interest.*

(1) "Substantial U.S. market interest" with respect to a class of an insurer's equity securities means:

(i) the securities exchanges and inter-dealer quotation systems in the United States in the aggregate constituted the single largest market for such class of securities in the shorter of the issuer's prior fiscal year or the period since the issuer's incorporation; or

(ii) 20 percent or more of all trading in such class of securities took place in, on or through the facilities of securities exchanges and inter-dealer quotation systems in the United States and less than 55 percent of such trading took place in, on or through the facilities of securities markets of a single foreign country in the shorter of the issuer's prior fiscal year or the period since the issuer's incorporation.

(2) "Substantial U.S. market interest" with respect to an issuer's debt securities means:

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(i) its debt securities and the securities described in Rule 903(c)(4)(i) and (ii), in the aggregate, are held of record by 300 or more U.S. persons;

(ii) \$1 billion or more of: the principal amount outstanding of its debt securities, the greater of liquidation preference or par value of its securities described in Rule 903(c)(4)(i), and the principal amount or principal balance of its securities described in Rule 903(c)(4)(ii), in the aggregate, is held of record by U.S. persons; and

(iii) 20 percent or more of the principal amount outstanding of its debt securities, the greater of liquidation preference or par value of its securities described in Rule 903(c)(4)(i), and the principal amount or principal balance of its securities described in Rule 903(c)(4)(ii), in the aggregate, is held of record by U.S. persons.

(3) Notwithstanding paragraph (n)(2) of this rule, substantial U.S. market interest with respect to an issuer's debt securities is calculated without reference to securities that qualify for the exemption provided by Section 3(a)(3) of the Act.

(o) *U.S. person.*

(1) "U.S. person" means:

(i) any natural person resident in the United States;

(ii) any partnership or corporation organized or incorporated under the laws of the United States;

(iii) any estate of which any executor or administrator is a U.S. person;

(iv) any trust of which any trustee is a U.S. person;

(v) any agency or branch of a foreign entity located in the United States;

(vi) any non-discretionary account or similar account (other than an estate or trust) held by a dealer or other fiduciary for the benefit or account of a U.S. person;

(vii) any discretionary account or similar account (other than an estate or trust) held by a dealer or other fiduciary organized, incorporated, or (if an individual) resident in the United States; and

(viii) any partnership or corporation if:

(A) organized or incorporated under the laws of any foreign jurisdiction; and

(B) formed by a U.S. person principally for the purpose of investing in securities not registered under the Act, unless it is organized or incorporated, and owned, by accredited investors (as defined in Rule 501(a) under the Act) who are not natural persons, estates or trusts.

(2) Notwithstanding paragraph (o)(1) of this rule, any discretionary account or similar account (other than an estate or trust) held for the benefit or account of a non-U.S. person by a dealer or other professional fiduciary organized, incorporated, or (if an individual) resident in the United States shall not be deemed a "U.S. person."

(3) Notwithstanding paragraph (o)(1) of this rule, any estate of which any professional fiduciary acting as executor or administrator is a U.S. person shall not be deemed a U.S. person if:

(i) an executor or administrator of the estate who is not a U.S. person has sole or shared investment discretion with respect to the assets of the estate; and

(ii) the estate is governed by foreign law.

(4) Notwithstanding paragraph (o)(1) of this rule, any trust of which any professional fiduciary acting as trustee is a U.S. person shall not be deemed a U.S. person if a trustee who is not a U.S. person has sole or shared investment discretion with respect to the trust assets, and no beneficiary of the trust (and no settlor if the trust is revocable) is a U.S. person.

(5) Notwithstanding paragraph (o)(1) of this rule, an employee benefit plan established and administered in accordance with the law of a country other than the United States and customary practices and documentation of such country shall not be deemed a U.S. person.

(6) Notwithstanding paragraph (o)(1) of this rule, any agency or branch of a U.S. person located outside the United States shall not be deemed a "U.S. person" if:

(i) the agency or branch operates for valid business reasons;

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and

(ii) the agency or branch is engaged in the business of insurance or banking and is subject to substantive insurance or banking regulation, respectively, in the jurisdiction where located.

(7) The International Monetary Fund, the International Bank for Reconstruction and Development, the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, the United Nations, and their agencies, affiliates and pension plans, and any other similar international organizations, their agencies, affiliates and pension plans shall not be deemed "U.S. persons."

(p) *United States*. "United States means the United States of America, its territories and possessions, any State of the United States, and the District of Columbia.

**RULE 903. OFFERS OR SALES OF SECURITIES BY THE ISSUER, A DISTRIBUTOR, ANY OF THEIR RESPECTIVE AFFILIATES, OR ANY PERSON ACTING ON BEHALF OF ANY OF THE FOREGOING;
CONDITIONS RELATING TO SPECIFIC SECURITIES.**

An offer or sale of securities by the issuer, a distributor, any of their respective affiliates, or any person acting on behalf of any of the foregoing, shall be deemed to occur outside the United States within the meaning of Rule 901 if it satisfies the following requirements:

(a) *Requirement of Offshore Transaction*. The offer or sale shall be made in an offshore transaction.

(b) *Prohibition Against Directed Selling Efforts*. No directed selling efforts shall be made in the United States by the issuer, a distributor, any of their respective affiliates, or any person acting on behalf of any of the foregoing.

(c) *Additional Conditions*.

(1) *Securities of Certain Foreign Issuers; Overseas Directed Offerings; Securities Backed By the Full Faith and Credit of Foreign Government; Employee Benefit Plan Securities*. An offer or sale of securities may be made with no conditions other

than those set forth in Rules 903(a) and (b) if:

(i) the issuer is a foreign issuer that reasonably believes at the commencement of the offering that:

(A) there is no substantial U.S. market interest in the class of securities to be offered or sold (if equity securities are offered or sold);

(B) there is no substantial U.S. market interest in its debt securities (if debt securities are offered or sold);

(C) there is no substantial U.S. market interest in the securities to be purchased upon exercise (if warrants are offered or sold); and

(D) there is no substantial U.S. market interest in either the convertible securities or the underlying securities (if convertible securities are offered or sold);

(ii) the securities are offered and sold in an overseas directed offering;

(iii) the securities are backed by the full faith and credit of a foreign government; or

(iv) the securities are offered and sold to employees of the issuer or its affiliates pursuant to an employee benefit plan established and administered in accordance with the law of a country other than the United States, and customary practices and documentation of such country, provided that:

(A) the securities are issued in compensatory circumstances for bona fide services rendered to the issuer or its affiliates in connection with their business and such services are not rendered in connection with the offer and sale of securities in a capital-raising transaction;

(B) any interests in the plan are not transferable other than by will or the laws of descent or distribution;

(C) the issuer takes reasonable steps to preclude the offer and sale of interests in the plan or securities under the plan to U.S. residents other than employees on temporary assignment in the United States; and

(D) documentation used in connection with any offer pursuant to the plan contains a statement that the securities have not been registered under the Act and may not be offered

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or sold in the United States unless registered or an exemption from registration is available.

(2) *Securities of Any Reporting Issuers; Debt Securities of Non-Reporting Foreign Issuers; Non-Participating Preferred Stock and Asset-Backed Securities of Non-Reporting Foreign Issuers.* An offer or sale of securities may be made, provided that the conditions set forth in Rules 903(a) and (b) are met and provided that:

(i) the issuer is a reporting issuer or the securities are debt securities;

(ii) offering restrictions are implemented;

(iii) the offer or sale, if made prior to the expiration of a 40-day restricted period, is not made to a U.S. person or for the account or benefit of a U.S. person (other than a distributor); and

(iv) each distributor selling securities to a distributor, a dealer, as defined in Section 2(12) of the Act, or a person receiving a selling concession, fee or other remuneration in respect of the securities sold, prior to the expiration of a 40-day restricted period, sends a confirmation or other notice to the purchaser stating that the purchaser is subject to the same restrictions on offers and sales that apply to a distributor.

(3) *Securities of any Issuer.* An offer or sale of securities of any issuer may be made, provided that the conditions set forth in Rules 903(a) and (b) are met and provided that:

(i) offering restrictions are implemented;

(ii) in the case of debt securities:

(A) the offer or sale, if made prior to the expiration of a 40-day restricted period, is not made to a U.S. person or for the account or benefit of a U.S. person (other than a distributor); and

(B) the securities are represented upon issuance by a temporary global security which is not exchangeable for definitive securities until the expiration of the 40-day restricted period and, for persons other than distributors, until certification of beneficial ownership of the securities by a non-U.S. person or a U.S. person who purchased securities in a

transaction that did not require registration under the Act;

(iii) in the case of equity securities:

(A) the offer or sale, if made prior to the expiration of a one-year restricted period, is not made to a U.S. person or for the account or benefit of a U.S. person (other than a distributor); and

(B) the offer or sale is made pursuant to the following conditions:

(1) the purchaser of the securities (other than a distributor) certifies that it is not a U.S. person and is not acquiring the securities for the account or benefit of any U.S. person or is a U.S. person who purchased securities in a transaction that did not require registration under the Act;

(2) the purchaser of the securities (other than a distributor) agrees to resell such securities only in accordance with the provisions of this Regulation S, pursuant to registration under the Act, or pursuant to an available exemption from registration;

(3) the securities of a domestic issuer contain a legend to the effect that transfer is prohibited except in accordance with the provisions of this Regulation S; and

(4) the issuer is required, either by contract or a provision in its bylaws, articles, charter or comparable document, to refuse to register any transfer of the securities not made in accordance with the provisions of this Regulation S; *Provided, however*, that if the securities are in bearer form or foreign law prevents the issuer of the securities from refusing to register securities transfers, other reasonable procedures (such as a legend described in paragraph (c)(3)(iii)(B)(3) of this rule) are implemented to prevent any transfer of the securities not made in accordance with the provisions of this Regulation; and

(iv) each distributor selling securities to a distributor, a dealer (as defined in Section 2(12) of the Act), or a person receiving a selling concession, fee or other remuneration, prior to the expiration of a 40-day restricted period in the case of debt securities or a one-year restricted period in the case of equity securities, sends a confirmation or other notice to the purchaser

stating that the purchaser is subject to the same restrictions on offers and sales that apply to a distributor.

(4) *Non-Participating Preferred Stock and Asset-Backed Securities.* Notwithstanding paragraphs (c)(1) through (c)(3) of this rule, only the requirements of paragraph (c) of this rule applicable to the offer and sale of debt securities of an issuer need be satisfied with respect to the offer and sale by such issuer of the following securities;

(i) non-convertible capital stock, the holders of which are entitled to a preference in payment of dividends and in distribution of assets on liquidation, dissolution, or winding up of the issuer, but are not entitled to participate in residual earnings or assets of the issuer; or

(ii) securities of a type that either:

(A) represents an ownership interest in a pool of discrete assets, or certificates of interest or participation in such assets (including any rights designed to assure servicing, or the receipt or timeliness of receipt by holders of such assets, or certificates of interest or participation in such assets, of amounts payable thereunder), provided that the assets are not generated or originated between the issuer of the security and its affiliates; or

(B) is secured by one or more assets or certificates of interest or participation in such assets, and the securities, by their terms, provide for payments of principal and interest (if any) in relation to payments or reasonable projections of payments on assets meeting the requirements of paragraph (c)(4)(ii)(A) of this rule, or certificates of interest or participations in assets meetings such requirements.

For purposes of paragraph (c)(4)(ii) of this rule, the term "assets" means: securities, installment sales, accounts receivable, notes, leases or other contracts, or other assets that by their terms convert into cash over a finite period of time.

(5) *Guaranteed Securities.* Notwithstanding paragraphs (c)(1) through (c)(4) of this rule, in offerings of debt securities fully and unconditionally guaranteed as to principal and interest by the

parent of the issuer of the debt securities, only the requirements of paragraph (c) of this rule that are applicable to the offer and sale of the guarantee need be satisfied with respect to the offer and sale of the guaranteed debt securities.

RULE 904. RESALES

An offer or sale of securities by any person other than the issuer, a distributor, any of their respective affiliates (except any officer or director who is an affiliate solely by virtue of holding such position), or any person acting on behalf of any of the foregoing, shall be deemed to occur outside the United States within the meaning of Rule 901 if it satisfies the following requirements:

(a) *Requirement of Offshore Transaction.* The offer or sale shall be made in an offshore transaction.

(b) *Prohibition Against Directed Selling Efforts.* No directed selling efforts shall be made in the United States by the seller, an affiliate, or any person acting on their behalf.

(c) *Additional Conditions.* In addition to the conditions set forth in Rules 904(a) and (b) of this regulation, the following requirements are satisfied:

(1) *Resales by Dealers and Persons Receiving Selling Concessions.* In the case of an offer or sale of securities of any issuer prior to the expiration of the restricted period specified in Rule 903(c)(2) or (3), as applicable, by a dealer, as defined in Section 2(12) of the Act, or a person receiving a selling concession, fee or other remuneration in respect of the securities offered or sold:

(i) neither the seller nor any person acting on his behalf knows that the offeree or buyer of the securities is a U.S. person; and

(ii) if the seller or any person acting on the seller's behalf knows that the purchaser is a dealer, as defined in Section 2(12) of the Act, or is a person receiving a selling concession, fee or other remuneration in respect of the securities sold, the seller or a person acting on the seller's behalf sends to the purchaser a confirmation or other notice stating that the securities may be offered and sold during the restricted period only: in accordance

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with the provisions of this Regulation S; pursuant to registration of the securities under the Act; or pursuant to an available exemption from the registration requirements of the Act.

(2) *Resales by Certain Affiliates.* In the case of an offer or sale of securities of any issuer by an officer or director of the issuer or a distributor, who is an affiliate of the issuer or distributor solely by virtue of holding such position, no selling concession, fee or other remuneration is paid in connection with such offer or sale other than the usual and customary broker's commission that would be received by a person executing such transaction as agent.

