Maryland Journal of International Law

Volume 11 | Issue 2 Article 3

Toward a Global Capital Market: the Emergence of Simultaneous Multinational Securities Offerings

Thomas R. Gira

TOWARD A GLOBAL CAPITAL MARKET: THE EMERGENCE OF SIMULTANEOUS MULTINATIONAL SECURITIES OFFERINGS

THOMAS R. GIRA*

* B.A., Wake Forest University; J.D., University of Maryland; Staff Attorney, Division of Market Regulation, Securities and Exchange Commission. The Securities and Exchange Commission, as a matter of policy, disclaims responsibility for any private publication or statement by any of its employees. The views expressed herein are those of the author and do not necessarily reflect the views of the Commission or of the author's colleagues on the staff of the Commission.

I. INTRODUCTION

No longer are capital markets circumscribed by national borders. Recently, the movement towards the harmonization of secondary trading markets has quickened.[1] For example, linkages now exist between the American and Toronto Stock Exchanges[2] and the Toronto and Midwest Stock Exchanges.[3] Future linkages among the three seasoned exchanges (New York, London and Tokyo) lie just beyond the horizon.[4] However, another vehicle for the internationalization of capital markets, simultaneous multinational stock offerings, has not developed as quickly.

In February, 1985, the Securities and Exchange Commission (SEC) took a step to expedite the development of multinational offerings, issuing a release to encourage the exploration of possible methods to harmonize disclosure and distribution practices by multinational issuers.[5] In the release, two conceptual approaches were proposed: the common prospectus approach and the reciprocal approach.[6] The SEC

1. The Securities and Exchange Commission (SEC) has given the following reasons for this trend: abandonment of U.S. investment controls, floating exchange rates, and new technology in the areas of communication and transportation. For a more complete list, *see Facilitation of Multinational Securities Offerings*, Securities Act Release No. 6568, [1984-85 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 83,743 (Feb. 28, 1985), also found at 32 SEC DOCKET 914 [hereinafter the Release](page references are to the SEC DOCKET).

2. *Amex, Toronto Exchanges Begin Trading Via Link*, Wall St. J., Sept. 25, 1985, at 56, col. 6.

3. *Exchanges in the Midwest, Toronto Start Trade Links*, Wall St. J., June 17, 1986, at 45, col. 1.

4. *See SEC Begins Securities Industry Talks On Global Trading Within 2 Years*, Wall St. J., Jan. 4, 1985, at 4, col. 2; *Big Board, London Stock Exchange Discuss Trading, Data-Reporting Joint Ventures*, Wall St. J., Jan. 7, 1985, at 3, col. 2; *Tokyo Stock Exchange Mulls Office in New York*, Wall St. J., Dec. 4, 1985, at 34, col. 1.

5. The Release, *supra* note 1.

6. *Id.* at 916; A discussion of the two approaches is provided *infra* notes 83-91 and accompanying text.

requested comments on these approaches or alternative approaches that were "feasible, practical and consistent with investor protection."[7]

This paper will discuss the advantages of internationalizing capital markets and will analyze the SEC's release and the responses which it elicited. An alternative approach, "a two-tiered reciprocal" approach, will then be discussed. Finally, the paper will examine potential trouble spots in the existing U.S. regulatory system that would have to be addressed under any approach.

II. Advantages and Disadvantages of Increased Multinational Securities Offerings

A. *Advantages to U.S. Investors*[8]

An increase in the number of multinational offerings would increase the investment opportunities available to individual U.S. investors.[9] Typically, under the existing regulatory system, individual U.S. investors purchase foreign securities in the form of American Depository Receipts (ADRs).[10] A major shortcoming of this system is that U.S. investors are unable to participate in rights offerings of foreign issuers. This would not be the case, however, if the foreign issuers were listed on an American exchange.[11] U.S. institutional investors, on the other hand, because of their ability to establish relationships with members of foreign exchanges and more advanced communication systems, have been able to trade directly in foreign securities markets.[12] Thus, an increase in investment opportunities would have a greater impact on individual investors.

---

7. *Id.* at 914.

8. For purposes of this discussion, I am assuming that a foreign issuer who makes a multinational offering will also be listed on a U.S. exchange. This assumption is made because some of the benefits discussed are premised on the existence of active secondary trading in the foreign security.

9. Thomas, *Internationalization of the Securities Markets: An Empirical Analysis*, 50 Geo. Wash. L. Rev. 155, 169-73 (1982).

10. ADRs are typically created and sold by U.S. banks that establish a foreign depository for a particular foreign security. The banks then sell beneficial interests in the foreign securities deposited abroad, ADRs. For a more thorough discussion of ADRs, *see id.* at 169 n.53.

11. *Id.* at 170 n.53. Although rights offerings are not available to U.S. investors holding ADRs, the investors do receive cash, since the banks will sell these rights in the foreign market. Letter from the law firm of Davis, Polk, & Wardwell to John Wheeler, Secretary of the SEC, at 5 (July 15, 1985) [hereinafter Davis Letter]. The Davis Letter and all other letters cited in this paper are found in File S7-9-85 in the SEC's Public Reference Room.

12. Thomas, *supra* note 9, at 167.

Following are benefits that may accrue to individual and institutional investors alike. First, the returns from foreign stocks have historically been higher than returns on American stocks.[13] The average annual yield of American stocks between 1970 and 1980 was 5.8%, whereas, for example, Japanese, Canadian and Swiss stocks had yields of 16.7%, 11.6%, and 11.7%, respectively.[14] Assuming this trend will continue, American investors should receive a higher rate of return by purchasing foreign stocks.

Second, American investors would decrease their investment risks through portfolio diversification.[15] Economists have found that changes in the stock index of a country explain between 20% and 50% of the change in the rate of return for a specific stock.[16] In addition, economists have found insignificant correlations between stock indices of the United States and stock indices of foreign countries.[17] Thus, investors can reduce portfolio risks by purchasing stocks from a variety of countries. The gains from securities purchased in one country would offset the losses from another.

Third, foreign issuers' compliance with U.S. securities laws, as opposed to those of foreign countries, would result in increased disclosure to U.S. investors.[18] This conclusion is based on the belief that "SEC disclosure requirements. . . [are] significantly more rigorous than those of other countries."[19] As will be discussed later, there may not be a

---

13. Analysts have developed the concept of a "holding period yield" to compare the rate of return of stocks from different countries. Basically, the computation involves measuring the gains or losses in the stock price, adding dividends, and subtracting taxes due on resale of the security. The analysis also takes changes in exchange rates into account. For a more complete analysis, *see* Abrams & Kimball, *U.S. Investment in Foreign Equity Markets*, ECON. REV., Apr. 1981, at 24; *see also*, *Foreign Stocks Outpace U.S. Blue Chips by Big Margin*, Wall St. J., Feb. 24, 1986, at 15, col. 1.

14. Abrams & Kimball, *supra* note 13, at 25.

15. *See* Solnik, *Why Not Diversify Internationally Rather than Domestically*? 33 FIN. ANALYST J., July-Aug. 1977, at 48; Agimon & Lessard, *Investor Recognition of Corporate International Diversification*, 32 J. FIN. 1049 (1977); Lessard, *World, Country, and Industry Relationships in Equity Returns*, FIN. ANALYST J., Jan.-Feb. 1976, at 33.

16. Lessard, *supra* note 15, at 32-38.

17. Bergstrom, *A New Route to Higher Return and Lower Risk*, 11 J. PORTFOLIO MGMT., Fall 1975, at 31.

18. As discussed *infra* at notes 120-21 and accompanying text, foreign issuers offering securities in the U.S. become subject to SEC periodic reporting requirements, absent an exemption. If issuers list on a U.S. exchange, they must also comply with the exchange's reporting requirements.

19. Thomas, *Internationalization of the World's Capital Markets: Can the SEC Help Shape the Future*? 15 N.Y.U. J. INT'L L. & POL. 55, 58 (1982).

dramatic increase in disclosure by foreign issuers if the reciprocal approach is adopted.[20]

Fourth, transaction costs associated with purchasing a foreign security would be reduced.[21] While this benefit may be more significant in relation to the globalization of secondary trading, savings would still be realized by U.S. investors participating in offerings (cable costs, currency conversion, commission fees).

Fifth, investors will do more research on foreign issuers.[22] Currently, there is little such American-based research. As a foreign issuer increases its visibility in the United States through an offering and a subsequent listing on a U.S. exchange, the securities industry will follow it more closely. American-based research, as opposed to foreign-based research, would inform U.S. investors of the risks associated with purchasing foreign securities, modify the foreign issuer's financial information so that comparisons could be made with comparable U.S. corporations, address the differences between U.S. accounting principles and standards and those of foreign countries, and provide information gleaned from the management of foreign issuers.[23]

Sixth, additional risks associated with owning foreign securities would be reduced.[24] For example, the effect of changes in the exchange rates between the dollar and foreign currencies on the rate of return of foreign securities, in dollars, may decrease. As one commentator has noted, "if . . . a foreign stock develops a larger market in the United States than in its home country, there may be some reduction in exchange risk to the extent that the price is no longer purely a derivative of the price denominated in a foreign currency."[25] Another risk that would be reduced is the risk that the value of a foreign stock may decrease due to the imposition of capital controls by a foreign government (prohibition on remittance of proceeds from sales or confiscation of the securities). It is postulated that, if a foreign issuer lists on a U.S. exchange, a foreign government will find it more difficult to impose such

20. *See infra* notes 89-90 and accompanying text for a discussion of the idea that increased disclosure may not result under either the reciprocal approach or the common prospectus approach.

21. Thomas, *supra* note 9, at 170-73.

22. U.S. financial analysts, unlike European and British analysts, are known for their complete scrutiny of issuers. *See The Perils of Multimarket Offerings*, INST. INVESTOR, Oct. 1974, at 73.

23. *See generally* Thomas, *supra* note 9, at 173-74.

24. *Id.* at 174.

25. *Id.*

controls.[26] Finally, the risk of an illiquid market upon resale of the security will be reduced.

B. *Advantages to Other Groups*

The emergence of multinational offerings and more widespread secondary trading will also have positive externalities for the following groups. First, there would be more work for the securities industry and its complementary industries. Second, American citizens would benefit from the increase in tax revenues. Presumably, multinational offerings would create more income for those employed in the securities industry and other related fields, and thus, more income taxes would be paid. Also, sales tax revenue from securities transactions would increase as the number of transactions increased. It has been estimated that the tax revenue from a public offering by a foreign issuer could range between $300,000 and $600,000.[27] Third, the SEC would have broader regulatory jurisdiction.[28] Finally, foreign investors and corporations would have increased access to U.S. capital markets.

C. *Overall Advantages vs. Potential Disadvantages to U.S. Corporations and Investors*

The globalization concept has not met with unanimous support. Taking a protectionist position, some argue that U.S. issuers will be harmed by opening the doors of U.S. capital markets to foreign issuers because much-needed capital will be diverted away from U.S. issuers: the "crowding-out" effect.[29] Some U.S. issuers also fear that they will be placed at an unfair disadvantage if foreign issuers are subject to less rigorous disclosure requirements than the ones with which they must comply.[30] Others have asserted that U.S. investors will also be harmed if foreign issuers are not subject to the same disclosure requirements.[31]

These concerns, however, appear to be unfounded, and in fact, U.S. corporations may even benefit from eliminating the roadblocks to

---

26. *Id.*

27. *Id.* at 177 n.86 (citing memorandum from Joel A. Ornstein and F. Scott Redding, Dean Witter Reynolds, Inc., to Commissioner Barbara S. Thomas (Dec. 11, 1981)).

28. Letter from Merrill Lynch Capital Markets to John Wheeler, Secretary of the SEC, at 2 (July 15, 1985) [hereinafter Merrill Lynch Letter]. *See also* Thomas, *supra* note 9, at 177.

29. Thomas, *supra* note 19, at 60.

30. Letter from CPC International, Inc., to John Wheeler, Secretary of the SEC, at 1 (Apr. 23, 1985).

31. *Id.*

multinational offerings. U.S. corporations, over the past few years, have been well received by foreign investors. In fact, between 1971 and 1980, there was a net inflow of $23, 250 million of capital into the United States.[32] Given the proclivity of foreign investors to invest in U.S. securities, it is very likely that U.S. issuers' opportunities to raise capital will be broadened more than foreign issuers' if multinational offerings are encouraged. It should be pointed out, however, that if foreign issuers are permitted to conduct U.S. offerings requiring less disclosure than is called for in a domestic U.S. offering, U.S. capital markets will be more appealing to foreign issuers than heretofore. One commentator has argued that adopting a protectionist position may even harm U.S. issuers, under the theory that they will be met with regulatory opposition when they seek to raise capital abroad.[33]

The proposition that foreign issuers will "crowd-out" capital that would have been raised by U.S. issuers is also subject to dispute. This conclusion is based on two observations. First, the percentage of the total capital raised in the United States by foreign issuers is minimal. From 1976 to 1980 this percentage ranged from .7% to 3.4%.[34] Even if the percentage of foreign involvement were to double, the impact on U.S. issuers would not be dramatic.[35] Second, "foreign investors purchase a significant proportion of foreign securities offered in the United States . . . ."[36]

In the end, the decision to pursue the facilitation of multinational offerings should be based on a cost-benefit analysis. If the benefits to U.S. investors and issuers are greater than the costs, or the harm, the SEC should accommodate them through its regulatory powers. Based on the foregoing analysis, it appears that the benefits outweigh the costs.

III. THE MULTINATIONAL EXPERIENCE: PROBLEMS AND PROMISES

To date, there have been few simultaneous multinational offerings. The offerings receiving the most attention have been by British Petro-

---

32. U.S. Dept. of Treasury, TREAS. BULL. 103 (July 1981). Net capital inflow means that purchases of U.S. securities by foreigners were greater than the purchases of foreign securities by U.S. investors. This figure, $23,250 million, includes both securities offerings and secondary trading; however, given the magnitude of inflow, it is likely that the same result would be reached if only securities offerings were included.

33. Thomas, *supra* note 19, at 61.

34. Thomas, *supra* note 9, at 181.

35. In addition, the increased availability of U.S. issuers to foreign capital markets would lessen further the impact of any crowding-out effect.

36. Thomas, *supra* note 9, at 179.

leum, PLC (1977),[37] Reuters Holdings, PLC (1984),[38] and British Telecommunications, PLC (1984).[39] Other issuers have engaged in multinational offerings, but they were neither of the same magnitude in volume nor as broad in terms of the number of countries involved.[40]

As background for analyzing the difficulties faced by multinational issuers, this paper will discuss briefly the security distribution methods of the United Kingdom and the United States. The scope of this discussion is limited to these two countries because the SEC release restricted participation in any experimental program to the United States, the United Kingdom and Canada. Canada's distribution system is not examined because of its similarity to that of the United States'.[41]

A. *Security Distribution Method in the United Kingdom*

The British use a "queue" system to distribute stocks. Under the queue system, the issuer applies in advance for a date on which it may offer its stock for sale.[42] The application is made to the Government Broker (a department of the Bank of England), who sets the day the securities can be sold, the "impact day."[43] The rationale for the queue method is that the government will be better able to avoid unanticipated demands on British capital.[44] Thus, under the British system, the

37. In June 1977, British Petroleum (BP) offered over one billion dollars of its stock in the United Kingdom, North America, and elsewhere. The offering price, world-wide, ranged from $14.53 to $16.12. Since 1977, BP has held other offerings (in 1979 and 1983). Letter from British Petroleum Company, PLC to John Wheeler, Secretary of the SEC, at 1 (July 25, 1985). For a description of the offering, *see* Appendix to Letter from the American Bar Association: Section of Corporation, Banking and Business Law to John Wheeler, Secretary of the SEC, at 1-3 (July 15, 1985) [hereinafter ABA Appendix].

38. In early June 1984, Reuters Holdings held a 1.7 billion dollar offering. For a description of the offering, *see* ABA Appendix, *supra* note 37, at 4-14.

39. For an analysis of this offering, see *infra* note 78 and accompanying text.

40. *See, e.g.*, Alcan Aluminum, 1983; Bell Canada Enterprises, 1983; Echo Bay Mines, Ltd., 1984 and 1985; Essette Business Systems, Inc., 1984; Louis Vuitton, S.A., 1984; and Ranger Oil, Ltd., 1979-83.

41. The Release, *supra* note 1, at 915, col. 3; *see also* 10A H. BLOOMENTHAL, INTERNATIONAL CAPITAL MARKETS AND SECURITIES REGULATION 4-3 (1986). In Canada, securities regulation is conducted at the province level, not the national level. However, there is generally uniformity among the securities laws of the provinces. *See id.* at Ch. 4 for a discussion of Canadian securities law in general and how unanimity is achieved in that country's securities law.

42. Letter from the American Bar Association: Section of Corporation, Banking and Business Law to John Wheeler, Secretary of the SEC, at 12-13 (July 15, 1985) [hereinafter ABA Letter].

43. *Id.*

44. Letter from the law firm of Weil, Gotshal & Manges to John Wheeler, Secre-

issuer knows well in advance when it will go to market. This is the inverse image of the United States' system, where the "impact day" is undetermined until the last minute because of the uncertain time of completion of SEC review and blue-sky clearance and because of changing market conditions.

Once the position in the queue is established, the securities are distributed in one of two ways: offer by subscription or offer by tender. In offer by subscription "the offering price is set and solicitations from the public are sought on the day the offering is publicly announced [the impact day] . . . ."[45] The prospectus establishing the offering price and providing disclosure is reprinted in national newspapers, along with subscription forms. Investors then have a short period in which to subscribe to the offering.[46] After all of the subscriptions are in, there is an "allotment day" on which announcements are made as to which brokers' and investors' subscriptions will be honored. Often the offerings are oversubscribed, which makes the allotment day extremely important to investors.

Offer by tender is slightly different. The issuer uses a "subscription" period, but the price is not inflexible, as in offer by subscription. Here, the underwriters establish a minimum tender price, below which no shares will be sold.[47] Investors then subscribe, paying a price that they determine. After the application period is over, the underwriters determine a "striking price" based on the tenders received. Applications that are below the striking price are returned with their payments. Applications above the striking price are accepted, and the excess of tender offers above the striking price is remitted.[48]

Regardless of the method used, a definitive prospectus establishing either the minimum tender price or the fixed price must be filed.[49] Although this is the first formal filing by the issuer, the London Stock Exchange conducts a review in advance of this filing.[50] Once a defini-

---

tary of the SEC, at 8 (July 12, 1985) [hereinafter Weil Letter].

45. The Release, *supra* note 1, at 915, col. 3.

46. The length of time allowed for solicitations is typically three to fourteen days. *Id.* at 915 n.20.

47. Issuers use an offer for sale by tender when they anticipate a strong demand for their security. They are better able to price the stock for what it is worth. ABA Appendix, *supra* note 37, at 6 n.11.

48. *Id.*

49. If the issuer is listed on the London Stock Exchange, or is going to list, it must file the definitive prospectus with the Exchange. 10A H. BLOOMENTHAL, *supra* note 41, at 6-27.

50. *Id.* at 6-29 n.9; *see also* ABA Letter, *supra* note 42, at 13.

tive prospectus is filed, it cannot thereafter be amended.[51]

Typically, the definitive prospectus is filed fourteen days before the impact day.[52] This has caused coordination and timing problems for issuers. As one issuer has noted, "there was considerable concern both among the underwriting group, and within BCE [Bell Canada Enterprises], that the international underwriters not benefit from a head start in the marketing of the issue . . . ."[53] Generally, therefore, the U.S. offering would not commence until a prospectus is filed in the United Kingdom, which leaves little time for a U.S. underwriting syndicate to obtain SEC clearance.[54]

Recently, however, the United Kingdom, with its adoption of the European Economic Community's Sixth Directive, has permitted the use of "pathfinder" prospectuses. These prospectuses are very similar to a U.S. preliminary prospectus.[55] They give the issuer the flexibility to amend the prospectus to accommodate to changing market conditions. They also give the issuer more time to obtain SEC clearance. As noted earlier, the issuer does not normally commence its U.S. offering until the U.K. definitive prospectus is filed. Now, with the use of a "pathfinder" prospectus, U.S. underwriters will be able to commence their offerings earlier, thus minimizing the risk that SEC and blue-sky clearances will not be completed before impact day.[56]

B. *Security Distribution Method in the United States*

The time constraints for distributing securities in the United States are considerably less rigid than in the United Kingdom. There is no queue; once the SEC finds that there has been full and fair disclosure by the issuer, the offering is ready to go immediately. Therefore, in the United States, as opposed to the United Kingdom, it is the issuer and not the regulatory body that determines when the offering will occur.[57]

---

51. ABA Appendix, *supra* note 37, at 11.

52. 10A H. BLOOMENTHAL, *supra* note 41, at 6-29.

53. Letter from Bell Canada Enterprises to John Wheeler, Secretary of the SEC, at 1 (July 4, 1985).

54. *See supra* note 52 and accompanying text.

55. ABA Appendix, *supra* note 37, at 18.

56. The British Telecommunications Offering, discussed *infra* at text accompanying note 78, illustrates how the pathfinder prospectus was used to ease time constraints.

57. Section 8(a) of the Securities Act of 1933 ("1933 Act") states that the offering will become effective twenty days after the registration statement is filed; however, section 8(b) gives the SEC the authority to suspend the running of the twenty days until it determines that the issuer has made adequate disclosure. While it is the SEC

The Securities Act of 1933 ("1933 Act") governs offerings of new securities in the United States.[58] Absent an exemption, all issuers of new securities must file a registration statement pursuant to section 6.[59] Sections 6 through 12 of the 1933 Act govern the processing of the registration statement until it becomes effective. Once the SEC's Division of Corporation Finance determines that adequate disclosure has been made, the registration statement becomes effective and the offering can commence. Typically, the offering price is not determined until the last minute when an amendment to the registration statement is filed. According to section 8(a) the offering becomes effective no later than twenty days after the amendment, but the SEC staff will often accelerate this date.[60]

The whole registration process is divided into three parts by section 5 of the 1933 Act. Section 5(c) establishes the "pre-filing" period. This section makes it unlawful to buy or sell securities before a registration statement is filed.[61] The rationale for this prohibition is that investors' decisions should not be determined by potentially misleading information not found in registration statements. Section 5(b) creates the "waiting" period, the time between the initial filing of the registration statement and its date of effectiveness. In the waiting period, oral offers are permitted and written offers are allowed if certain disclosure standards are satisfied. A written offer can be made if it is accompanied with either a "tombstone ad," a preliminary prospectus or a summary prospectus.[62] Finally, section 5(a) creates the "post-effective" pe-

---

that gives clearance, it is ultimately the issuer that determines when full disclosure is made, and thus when the offering will occur. Securities Act of 1933, §§ 8(a)-(b), 15 U.S.C. § 77h(a)-(b) (1982).

58. Securities Act of 1933, 15 U.S.C. §§ 77a-77aa (1982).

59. Section 3 of the 1933 Act, 15 U.S.C. § 77c (1982), exempts certain classes of securities from registration requirements, and section 4 exempts certain transactions. For a complete analysis of the exemptions pursuant to these sections, *see generally* T. Hazen, The Law of Securities Regulation, 85-160 (1985).

60. 17 C.F.R. § 230.461(b) (1986) sets forth the SEC's policy: "[I]t is the general policy of the Commission, upon request . . . to permit acceleration of the effective date of the registration statement as soon as possible after the filing of appropriate amendments, if any."

61. Preliminary negotiations between issuers and underwriters, however, are allowed at this stage. Securities Act of 1933 § 2(3), 15 U.S.C. § 77b(3) (1982). This allows the issuer to obtain a firm commitment from an underwriter before it spends a lot of money preparing the registration statement.

62. 17 C.F.R. § 230.134 (1986) lists twelve categories of information that can be included in an identifying statement, or tombstone ad, and not constitute an offer for sale in violation of section 5(b). 17 C.F.R. §§ 230.430-31 (1986) describe the content requirements for the preliminary and summary prospectuses.

riod. In this period the actual sales can be consummated.

The 1933 Act also contains several express liability provisions.[63] Section 11 imposes liability on certain designated categories of persons for material misstatements in a registration statement or for an omission of a required fact.[64] Section 12(1) establishes absolute liability for offering or selling a security in violation of section 5 of the 1933 Act.[65] Finally, section 12(2) prohibits fraud in connection with the offer or sale of securities.[66] Liability under this section is imposed if one makes an untrue statement of a material fact, or omits one, during the offer or sale of a security when such offer or sale is achieved through the use of interstate commerce. Section 12(2) is applicable whether or not the security is sold pursuant to section 5.

British securities law also contains various express liability provisions, including several that are similar to sections 11 and 12(2) of the 1933 Act and Rule 10b-5 of the Securities and Exchange Act of 1934.[67] However, there are some notable differences. In the United

---

63. Liability has also been implied under other statutes; for example, section 10, 15 U.S.C. § 78j (1982), and Rule 10b-5, 17 C.F.R. § 240.10b-5 (1986), of the Securities Exchange Act of 1934 and Rule 17(a), 15 U.S.C. § 77q(a) (1982), of the Securities Act of 1933. The circuits are not uniform in their application of these strictures. A discussion of the breadth of implied remedies is beyond the scope of this paper, but for a more complete analysis of the subject, *see* Hazen, *A Look Beyond the Pruning of Rule 10b-5: Implied Remedies and Section 17(a) of the Securities Act of 1933*, 64 VA. L. REV. 641 (1978); Maher, *Implied Private Rights of Action and the Federal Securities Laws: A Historical Perspective*, 37 WASH. & LEE L. REV. 783 (1980); and Steinberg, *Implied Private Rights of Action Under Federal Law*, 55 NOTRE DAME LAW. 33 (1979).

64. These categories are: the registrant, all directors of the issuer, all other persons who sign the registration statement, all underwriters, and any expert who certified a part of the registration statement. Securities Act of 1933 § 11(a), 15 U.S.C. § 77k (1982).

65. For an analysis of section 12(1), *see* T. HAZEN, *supra* note 59, at 182-85.

66. Section 12(2) and section 11 may appear to be similar and their applications often overlap. However, there are some important differences between them. Section 11, unlike section 12(2), is not applicable to oral misstatements. Privity is required for an action under 12(2), but not under section 11. And, the burden of proof that the plaintiff (purchaser) had no knowledge of the misstatement is placed on the plaintiff under section 12(2), whereas under section 11 it falls on the defendant. *See* R. JENNINGS AND H. MARSH, SECURITIES REGULATION: CASES AND MATERIALS 777 (5th ed. 1982).

67. In the United Kingdom, there are express remedies under the common law and the Companies Act of 1948. An action may be brought against the issuer or those persons responsible for any misstatement. First, under the common law, the investor can bring an action to rescind the contract (the solicitation application) or sue for damages under a theory of fraud or negligent misstatement. Under the Companies Act of 1948, there are two liability provisions. Section 43 holds one liable for compensation

States, anyone liable under section 11, other than the issuer, can raise a due diligence defense if a reasonable investigation has been made. In England, however, a defense can be established merely upon presenting a reasonable belief in the veracity and accuracy of the information. That belief need not be based on a reasonable investigation, *per se*.[68]

C. *Problems in Coordinating a Multinational Offering*

As mentioned earlier, the various underwriting syndicates involved in a simultaneous multinational offering desire that all underwriters be placed on equal footing, *i.e.*, exposed to the same risks.[69] This means that information about the offering should be disclosed simultaneously and that the ultimate ready-for-market date is the same for all participating countries. However, the dissimilarities in the U.S. and British regulatory systems noted above have, in the past, made it difficult to achieve the desired simultaneity of offering activity.

One of the major problems faced by multinational issuers is the risk that the U.S. offering will not be cleared before the British impact day. This problem stems from the lack of simultaneity in the establishment of U.S. and U.K. underwriters' risks. In Britain, the underwriters' risk begins upon the filing of the definitive prospectus. In the United States, the risk arises when the registration statement is declared effective. British underwriters, in order to minimize their risks, have a vested interest in filing the definitive prospectus as close to impact day as possible. The longer the British underwriters wait to file their prospectuses, the less time the U.S. underwriters have to obtain SEC clearance.[70]

Substantial efforts to alleviate these problems have been made by the regulatory bodies in the United States and the United Kingdom. In the United States, the SEC has been willing to hold pre-filing conferences to iron out complex disclosure issues.[71] Some commentators have suggested that the SEC be even more accommodating. The Securities Industry Association has "urge[d] the Commission to adopt 'pre-clearance' procedures and a willingness to agree on a timetable for effective-

---

to subscribers if a misrepresentation is made in a prospectus. The potential defendants are very similar to those liable under section 11 of the Securities Act of 1933. Section 38(4) establishes similar liability for an omission from a British prospectus. *See generally* 10A H. BLOOMENTHAL, *supra* note 41, at 6-40 - 6-44.

68. The Release, *supra* note 1, at 916, col. 2.

69. *See supra* note 53 and accompanying text.

70. As discussed *supra* at text accompanying notes 52-54.

71. ABA Appendix, *supra* note 37, at 12. *See also* Davis Letter, *supra* note 11, at 3.

ness of the registration statement."[72] The law firm of Weil, Gotshal & Manges, the firm which handled the Reuters offering, has even recommended that "consideration should be given to elimination of Commission staff review."[73] In the United Kingdom, the emergence of "pathfinder" prospectuses has lengthened the gap between the filing of a U.K. registration statement and the impact day without exposing U.K. underwriters to more risk.[74]

Another source of concern for multinational issuers is the divergence in permissible marketing activities between the two countries. In the United Kingdom, marketing efforts typically begin well before prospectuses are disseminated to the investing public. In the United States the opposite is true, since marketing activity cannot commence until the registration statement has been filed. This has been a great source of irritation to U.S. underwriters for two reasons: (1) U.S. underwriters think they are at a competitive disadvantage in marketing their part of the offering;[75] and (2) U.S. underwriters fear that the pre-marketing activities of foreign underwriters may result in allegations that they were pre-conditioning the market in violation of section 12(1) of the 1933 Act.[76] The use of "pathfinder" prospectuses and pre-filing conferences may help to lessen tensions between underwriting syndicates in regard to U.S. underwriters being left at the starting gate, but they will not decrease the potential liability of U.S. underwriters because of foreign marketing activity.

A final major problem faced by multinational issuers is the difference in the disclosure requirements and accounting standards among countries.[77]

---

72. Letter from the Securities Industry Association to John Wheeler, Secretary of the SEC, at 8 (Sept. 3, 1985). *See also* Davis Letter, *supra* note 11, at 3.

73. Weil Letter, *supra* note 44, at 9.

74. For a discussion of a "pathfinder" prospectus, *see supra* notes 55-56 and accompanying text.

75. The ABA noted that in "virtually all U.S.-U.K. dual offerings to date, the number of shares finally allocated to the U.S. has been less than that initially allocated at the commencement of the offering." ABA Letter, *supra* note 42, at 14.

76. Weil Letter, *supra* note 44, at 9. For a "real-life" example of the tensions between U.S. and U.K. underwriters, *see The Perils of Multimarket Offerings*, *supra* note 22, at 71.

77. For a complete description of the differences in the disclosure requirements, financial statement requirements and non-financial statement disclosure requirements among the United States, the United Kingdom and selected Canadian provinces, *see* the SEC Staff Survey Report found in file S7-9-85 in the SEC's Public Reference Room.

D. *British Telecommunications, PLC: An Example of a Recent Multinational Offering*

On December 3, 1984, British Telecommunications completed a simultaneous transnational offering totaling $4.5 billion, the largest equity offering in the world to date. The offering is unique because for the first time a British pathfinder prospectus was used in a multinational offering. On October 26, 1984, a U.S. registration statement was filed contemporaneously with a British pathfinder. The definitive prospectus was filed on November 16, the impact day. This illustrates how the pathfinder prospectus may serve to limit the British underwriters' risk, while at the same time U.S. underwriters are given more time to obtain SEC clearance. The pathfinder also allowed for the incorporation in the U.K. definitive prospectus of amendments that had to be made in the U.S. registration statement. Applications to purchase shares in the United Kingdom were accepted until November 24. On December 3 a final pricing amendment was made to the U.S. registration statement. Trading in the stock began on December 3 at 10:00 a.m. EST on the New York, London, and Toronto Stock Exchanges.[78] It seems likely that the structure of future multinational offerings will be modeled after the British Telecommunication's offering unless coordinated regulatory steps are taken by countries to facilitate such offerings.

IV. THE SEC RELEASE

In response to the increasing globalization of the world's capital markets and the difficulties confronted by recent transnational issuers, the SEC in February 1985 solicited comments on the facilitation of multinational offerings.[79] Comments were to be restricted to a facilitation program limited to the United States, the United Kingdom, and Canada. The rationale was that "issuers from these countries use the United States' capital markets frequently and their disclosure requirements are . . . similar to the United States' . . . ."[80] After providing a general factual background on growing internationalization,[81] the re-

78. ABA Appendix, *supra* note 37, at 14-19.

79. The Release, *supra* note 1, at 914, col. 1.

80. *Id.* at 914, col. 2.

81. The Release points out that "underwritten foreign debt and equity offerings in the United States have averaged over $5 billion per year since 1975." It also notes that secondary market trading in U.S. stocks by foreign investors has increased from 17.2 billion dollars in 1970 to 134 billion dollars in 1983. *Id.* at 915, col. 1. *See also supra* notes 1-4 and accompanying text for a discussion of some recent examples of the inter-

lease went on to compare the regulatory differences among the three countries.[82] Two approaches designed to facilitate more offerings were introduced: the reciprocal approach and the common prospectus approach. The following is an analysis of these approaches.

A. *The Reciprocal Approach*

This approach envisions an agreement "by each of the three countries to adopt a reciprocal system providing that an offering document used by the issuer in its own country would be accepted for offerings in each of the other countries . . . ."[83] The foreign issuers, however, would still be subject to the liability provisions of U.S. securities laws.[84]

B. *The Common Prospectus Approach*

The common prospectus approach calls for the countries "to agree on disclosure standards for an offering document that could be used in two or more of the three countries."[85] As with the reciprocal approach, the SEC would still require that U.S. liability provisions be applicable.

C. *Advantages and Disadvantages of Each Approach*

The drawbacks and attributes of the two approaches can best be examined by evaluating them in terms of the following three criteria: ease of implementation, cost to the issuer and information provided to investors.

1. *Ease of Implementation*

The reciprocal approach would be much easier and simpler to implement. If the common prospectus approach is pursued, it is likely to take many years for the countries to reach an agreement on what constitutes "standard disclosure." For example, it took the European Economic Community *eight years* to formulate a rule governing prospectuses filed within the Community.[86] The length of time needed to reach agreement on a common prospectus has led many commentators to

---

nationalization of capital markets.

82. *See supra* notes 42-62 and accompanying text for a discussion of some of the differences in distribution methods. *See supra* notes 63-68 and accompanying text for a discussion of the differences in liability provisions.

83. The Release, *supra* note 1, at 916, col. 3.

84. *Id.*

85. *Id.*

86. ABA Letter, *supra* note 42, at 3.

conclude that the reciprocal approach should be pursued instead.[87]

2. *Cost to the Issuer*

Under the reciprocal approach the offering would be reviewed only in the issuer's home country. This approach, presumably, would be less costly to issuers because they need to go through the review process only once. Also, issuers would be familiar with the laws with which they have to comply. The common prospectus approach, by contrast, would be more costly to issuers because of the multiplicity of review levels involved.[88]

3. *Information Provided to Investors*

A significant drawback to the reciprocal approach is that U.S. investors would not receive enough information about multinational issuers if the disclosure standards of a foreign country were less rigorous than those in the United States. For instance, a Canadian issuer would be able to satisfy SEC disclosure requirements if it were "cleared" in Canada, but it would provide less information to U.S. investors relative to the disclosures made by a U.S. firm. This disadvantage of the reciprocal approach exists only if U.S. securities laws require more rigorous disclosure.[89]

While the common prospectus approach could result in more information being supplied to U.S. investors about foreign multinational issuers, it is conceivable that U.S. investors would not receive the investment information they have grown accustomed to receiving. This situation would develop if the agreed upon "common standards" for disclosure were lower than the present U.S. standards. U.S. investors would have less information about a foreign multinational issuer than they would have about a U.S. domestic issuer.

This problem of varying degrees of disclosure to investors may not materialize under the common prospectus approach, however, for two reasons. First, U.S. liability provisions may coerce underwriters into providing as much disclosure as a domestic U.S. issuer. This coercive pressure would also cause more disclosure to be made by a foreign issuer under the reciprocal approach. Second, there is a feeling among

87. *See e.g.*, Letter from Seidman & Seidman to John Wheeler, Secretary of the SEC, at 2 (July 2, 1985) [hereinafter Seidman Letter]; ABA Letter, *supra* note 42, at 4; Merrill Lynch Letter, *supra* note 28, at 3; Weil Letter, *supra* note 44, at 3-4.

88. The Release, *supra* note 1, at 917, col. 1.

89. *See supra* note 19 and accompanying text for support that U.S. securities laws require more rigorous disclosure.

several commentators that, if countries attempted to develop a common prospectus, the disclosure standards agreed to would be very similar to U.S. standards.[90]

Another group affected by varying degrees of disclosure is domestic U.S. issuers. If a reciprocal approach were adopted, U.S. domestic and multinational issuers would be on equal footing in terms of disclosure; however, a foreign corporation would have access to U.S. investors without making the same costly disclosures. This would place domestic U.S. issuers at a competitive disadvantage to foreign issuers. If a common prospectus approach (with disclosure standards lower than in the United States) were adopted, domestic U.S. issuers would also be at a disadvantage relative to other U.S. multinational firms. As noted earlier, however, any harm to domestic U.S. issuers in the form of displaced capital-raising opportunities is likely to be negligible.[91]

In sum, if the common prospectus approach were adopted, there would be uniform disclosure by multinational issuers, and presumably more disclosure than with the reciprocal approach. However, it is conceivable that U.S. investors, under either approach, would not receive the disclosure they are accustomed to receiving.

V. Responses To The Release

The Release elicited comments from a wide variety of players in the field of international finance. In total, there were sixty responses from U.S., U.K. and Canadian corporations, law firms, and other interested organizations. The vast majority of these responses favored the reciprocal approach over the common prospectus approach. However, this preference for most commentators was not because of the overwhelming superiority of the reciprocal approach, but rather because the common prospectus approach would be too cumbersome to bring about. As one commentator stated, "[W]hile the common prospectus approach does represent an ideal goal and, in that sense, is preferable to the reciprocal approach, we believe attainment of that goal to be unrealistic or at least subject to such delays as to negate the benefits sought."[92] Although the majority of responses were very similar in their

90. *See* Letter from the Ontario Securities Commission to John Wheeler, Secretary of the SEC, at 1 (June 6, 1985) [hereinafter Ontario Letter]; Letter from the law firm of McCarthy & McCarthy to John Wheeler, Secretary of the SEC, at 1-2 (July 18, 1985) [hereinafter McCarthy Letter]; Letter from B.A.T. Industries to John Wheeler, Secretary of the SEC, at 2 (July 2, 1985); and Davis Letter, *supra* note 11, at 3.

91. *See supra* notes 32-36 and accompanying text.

92. Weil Letter, *supra* note 44, at 3-4.

support for the reciprocal approach, a few less common responses are worth noting.

Several commentators, while supporting the reciprocal approach, believed that the scope of the program should not be limited to the United States, the United Kingdom, and Canada. Nikko Securities Company stated that "no matter which method is chosen, Japan should definitely participate . . . ."[93] The company noted that, aside from the United States, Japan has the largest capital market in the world. There were also responses from several Dutch issuers and the Amsterdam Stock Exchange suggesting that the SEC broaden its scope.[94] Other commentators, including the New York Stock Exchange, supported the idea as well.[95]

Two groups, the Issuing Houses Association and the Ontario Securities Commission, did not think the facilitation of multinational offerings should be pursued at all. The Issuing Houses Association, the representative for several principal merchant banks in London and other issuing houses in Britain, believes that the disadvantages from harmonization outweigh the benefits. The Association listed the following four disadvantages: (1) the application of U.S. liability provisions to British companies; (2) the increased costs; (3) the imposition of foreign marketing procedures on Britain's domestic system; and (4) the imposition of disclosure standards higher than those prevailing in Britain.[96] The Ontario Securities Commission believes that neither approach should be pursued now because of the paucity of multinational offerings to date. The Commission states that issuers target specific offerings for specific markets, and thus if an issuer wants to proceed with a simultaneous offering it will. The differing requirements among the participating countries, according to the Commission, would not deter

---

93. Letter from the Nikko Securities Company to John Wheeler, Secretary of the SEC, at 2 (July 15, 1985).

94. Letter from Unilever, PLC to John Wheeler, Secretary of the SEC, at 1 (July 12, 1985); Letter from N.V. Koninklijke Nederlandsche Petroleum Maatschappij to John Wheeler, Secretary of the SEC, at 1 (July 11, 1985); Letter from the Amsterdam Stock Exchange to John Wheeler, Secretary of the SEC, at 1 (Sept. 26, 1985).

95. Letter from the New York Stock Exchange to John Wheeler, Secretary of the SEC, at 1 (Aug. 26, 1985); Letter from the law firm of Whitman & Ransom to John Wheeler, Secretary of the SEC, at 6-7 (July 12, 1985) [hereinafter Whitman & Ransom Letter]; Letter from G.B. Hackert, Cox & Co., Ltd. to John Wheeler, Secretary of the SEC, at 2 (May 13, 1985); Letter from the accounting firm of Clarkson Gordon to John Wheeler, Secretary of the SEC, at 3 (July 10, 1985).

96. Letter from the Issuing Houses Association to John Wheeler, Secretary of the SEC, at 1-2 (June 12, 1985).

such offerings.[97]

Only one group, the Bar Association of New York, favored the common prospectus approach over the reciprocal approach. The Bar Association supported the common prospectus approach because of four factors. One, the approach provides for uniform disclosure. Two, the approach is more capable of leading to harmonization of periodic reporting requirements. Three, the imposition of liability provisions on uniform disclosure is fairer and has less of a deterrent effect on multinational offerings than if the disclosure standards are varied. Four, the adoption of the reciprocal approach would eliminate incentives to harmonize disclosure standards.[98] The Bar Association recognized that the common prospectus approach would be difficult to implement; however, it raised the valid point that U.S. issuers have been juggling state Blue-Sky administrators for years.[99]

Two commentators, the Ontario Securities Commission and the Canadian law firm of McCarthy & McCarthy, were opposed to the two proposals because they viewed them as attempts by the SEC to expand the application of U.S. securities laws to other countries.[100] "Put bluntly, we are concerned that a multinational securities offering policy may be a back door way of imposing, over time, SEC style regulations to other countries' capital markets."[101]

Finally, several commentators suggested a modified approach.[102] The approaches typically call for standards that an issuer would have to meet in order to take advantage of a facilitation program. In addition, the proposals call for a supplement to foreign issuers' offering statements. This supplement would generally disclose the differences among the countries' regulatory systems and the risks involved in purchasing foreign securities. The next part of the paper, suggesting a modified approach, incorporates many of the suggestions made by these commentators.

---

97. *See generally* Ontario Letter, *supra* note 90.

98. Letter from the Association of the Bar of the City of New York: Committee on Securities Regulation to John Wheeler, Secretary of the SEC, at 1-3 (May 21, 1985).

99. *Id.* at 3.

100. Ontario Letter, *supra* note 90, at 1 and McCarthy Letter, *supra* note 90, at 1.

101. Ontario Letter, *supra* note 90, at 1.

102. Whitman & Ransom Letter, *supra* note 95, at 4-8; Weil Letter, *supra* note 44, at 4; ABA Letter, *supra* note 42, at 6-10; McCarthy Letter, *supra* note 90, at 2-3.

VI. A Two-Tiered Reciprocal Approach

Under a two-tiered reciprocal approach, foreign issuers would either qualify for complete reciprocity, the first tier, or they would be required to file a supplement with the offering documents cleared in their home country, the second tier. In the first tier the issuers would not be required to file any supplemental information. To qualify for first-tier treatment, the issuer would have to be of "world-class" calibre.[103]

A facilitation policy involving reciprocity is realistically the only viable alternative. As noted earlier, it took the European Economic Community eight years to arrive at an agreement on their Sixth Directive.[104] The overwhelming response from commentators that it would be difficult to arrive at common prospectus standards is further evidence that reciprocity is the best route to creating a global capital market. In sum, the time, expense and negotiations involved in developing a common prospectus, coupled with the possibility that an agreement might never be reached, argue strongly against pursuing the common prospectus approach.

However, an unrestricted policy of reciprocity could be harmful to investors if they were not fully informed of the risks involved in purchasing foreign securities. The two-tiered approach attempts to minimize the risk of uninformed investors by limiting participation in the program to qualified issuers. The following is a description of the suggested standards for each tier and the mechanics of an offering under each tier.[105]

A. *The First Tier*

1. *Standards*

The first tier would be limited to true world-class issuers. The SEC's treatment of domestic and foreign issuers is of some guidance as to how to define a world-class issuer. The Commission has developed an integrated disclosure system for domestic and foreign issuers whereby the amount of disclosure required in an offering statement is inversely related to the size of the issuer and/or the issuer's history of periodic reporting under the 1934 Act.[106] The rationale for this disclosure policy

103. *See infra* note 108 and accompanying text.

104. *See supra* note 87 and accompanying text.

105. This proposal is not attempting to establish particular standards for each tier, only general guidelines.

106. For domestic issuers this is accomplished through Forms S-1, S-2 and S-3,

is that presumably there is already considerable information disseminated throughout the investing community about the issuer due to its size and public presence and reporting history. The two-tiered approach, while adopting the SEC's general concept of varying disclosure according to the issuer's size and periodic reporting history, would not fully adopt the SEC standards. The concept of reciprocity would be defeated if issuers had to satisfy SEC standards first. Therefore, when reference is made to reporting requirements as a prerequisite for a particular tier, the reporting need only be pursuant to requirements similar to the SEC's, not to the SEC's *per se*.[107]

An issuer could qualify for first tier treatment in one of two ways. First, if it is of appropriate magnitude in terms of total assets, revenue and net income, it would qualify. One commentator has suggested the following requirements for equity offerings: total assets of $200,000,000; total revenues of $250,000,000 during each of the last three years; net income of not less than $40,000,000 over each of the past three years; and no history of default or lack of payment to shareholders within the past year.[108] The rationale for allowing an issuer to have full reciprocity based solely on its size is that the first tier should be available for initial public offerings. Without such a provision, issuers like British Telecommunications and Reuters would not have been

---

17 C.F.R. §§ 239.11-239.13 (1986). Form S-1 is for issuers who do not qualify for other expedited treatment. It is used primarily by first-time issuers or small public companies. Form S-2 can be used by issuers if they have been subject to the reporting requirements of the 1934 Act for at least three years. Form S-3 is available to issuers who have reported for three years and who have satisfied one of the following size requirements: 150 million dollars of voting stock held by nonaffiliates or 100 million dollars of voting stock held by nonaffiliates and a trading volume of at least 300 million shares in each of the past three years.

17 C.F.R. §§ 239.31-239.33 subjects foreign issuers to similar treatment. Form F-3 is available to world-class issuers who have reported pursuant to the 1934 Act for at least three years. The SEC's definition of a "world-class" issuer is found at 17 C.F.R. § 239.33(a)(4): when the "aggregate market value worldwide of the voting stock held by nonaffiliates of the registrant is equivalent to $300 million or more. . . ." An issuer can qualify to use Form F-2 several ways: (1) if the offering is made only to existing shareholders and the issuer has filed one prior annual disclosure statement; (2) if the issuer has reported for three years; or (3) if the issuer is world class under F-3 but has only filed one annual disclosure statement. Form F-1 is required for all issuers who do not qualify for Form F-2 or F-3. *See* Note, *Foreign Securities: Integration and Disclosure Under the Securities and Exchange Acts* 58 NOTRE DAME LAW. 911, 921-25 (1983).

107. Thus, if the countries agree, an issuer would qualify for the program if it has regularly filed periodic reports with Canadian provinces or the London Stock Exchange.

108. ABA Letter, *supra* note 42, at 8.

able to qualify because they had no history of periodic reporting or trading.[109]

Second, an issuer could qualify for the first tier if it satisfied established size requirements and had been subject to periodic reporting requirements for three years.[110]

2. *Mechanics of an Offering Under the First Tier*

If an issuer were in this tier, it would have to supply only the offering statement approved by its home country. This would satisfy all of the issuer's disclosure requirements for foreign countries. The issuer could supply additional information to a foreign jurisdiction if it were concerned about the liability provisions of a foreign country, but this would not be required.[111]

B. *The Second Tier*

1. *Standards*

To qualify for second tier treatment, the issuer would have to have a reporting history of at least two years and be of a specified size. Unlike the first tier, however, a second tier issuer would not be able to qualify solely because of size. The rationale for this is that, unless the issuer is gigantic, it is harmful to investors to invest in a foreign corporation with no history of disclosure or trading.

2. *Mechanics of an Offering Under the Second Tier*

If an issuer were under the second tier, its home country's offering statement could satisfy a foreign country's disclosure requirements if a satisfactory supplement were attached to it. The foreign country would have control over what is required in the supplement. Although this control by foreign countries may seem contrary to a reciprocity policy, it is appropriate, given the risks involved in purchasing foreign securities. Moreover, if the countries participating in the facilitation program tried to agree on a common supplement for all countries, the same political and time concerns that plague the common prospectus approach would be present.

---

109. *Id.* at 9.

110. The requirement of three years is suggested because of SEC statutes described *supra* note 106.

111. It is conceivable that U.S. underwriters may request that a foreign issuer provide disclosure equivalent to that made by a U.S. domestic issuer in order to avoid any possible section 11 liability.

The responses to the Release provide several suggestions as to what the SEC should require in a foreign issuer's supplement. The ABA's response made the following suggestions for the contents of a supplement:[112] (1) a description of the methodology of distribution of securities in the issuer's home country; (2) a reconciliation of the issuer's financial statements with the Generally Accepted Accounting Principles (GAAP) of the United States;[113] (3) a segment entitled "Management's Discussion and Results of Operations";[114] and (4) anything else that is found to be of fundamental importance by the regulators.

The North American Securities Administrators Association proposed that the securities laws of the issuer's home country be disclosed. In particular, they proposed a discussion of the laws in the area of directors' liability, shareholders' democracy, reorganization procedures, bankruptcy, tax, and common law matters such as the business judgment rule or piercing the corporate veil.[115] The Association also saw the need to reconcile the GAAPs between the issuer's home country and a foreign jurisdiction. Other commentators made similar suggestions as to the contents of the supplement.[116]

In sum, the two-tiered approach creates a sliding scale of reciprocity based on the issuer's size and trading history. The requirement of a supplement for second tier issuers ensures that investors will be making reasoned economic decisions. Also, the two-tiered approach, as with any reciprocal approach, can be expanded to accommodate new countries more easily than a common prospectus system.

---

112. ABA Letter, *supra* note 42, at 7.

113. The ABA suggests that this be done in accordance with Form 20-F, a disclosure form for foreign issuers. The accounting firm of Seidman & Seidman, however, dealt more specifically with this issue in their response. They suggested that issuers should comply with Item 17 of Form 20-F, rather than Item 18. Item 17, like Item 18, calls for a reconciliation of the GAAPs, however, not as extensively. Seidman Letter, *supra* note 87, at 5.

114. This section is not included in U.K. prospectuses. Letter from the North American Securities Administrators Association, Inc. to John Wheeler, Secretary of the SEC, at 2 (Aug. 16, 1985).

115. *Id.* at 4. The letter also contains excerpts from the Reuters' prospectus discussing U.K. securities laws.

116. Whitman & Ransom Letter, *supra* note 95, at 5; Securities Industry Association Letter, *supra* note 72, at 7.

VII. Trouble Spots For Any Program Designed To Facilitate Multinational Offerings

A. *Liability Provisions*

It is possible that sections 11 and 12(1) of the 1933 Act could be violated by foreign issuers or U.S. underwriters under either the reciprocal approach or the common prospectus approach, unless action is taken by the SEC.[117] These liability provisions could harm a facilitation program because of their deterrent effect.

If a facilitation program calls for less disclosure than is required of a domestic U.S. firm, for example, there is the possibility that section 11 liability may be triggered due to the omission of a material fact.[118] Section 11 also exposes foreign issuers to more liability than they are accustomed to in their home countries.[119] In other countries an issuer can raise a due diligence defense against allegations that it made material misstatements; however, this is not the case under section 11, which imposes absolute liability on issuers for any violations of the section. It is also conceivable that the issuer or its U.S. underwriter could be subject to liability under section 12(1) of the 1933 Act because of the issuer's marketing activities abroad. As noted earlier, more extensive marketing efforts are permitted in other countries than in the United States. It could be alleged that these activities amount to preconditioning the market.

The possibility of the imposition of liability by U.S. courts on foreign participants in a facilitation program would deter participation in the program and severely limit any gains to be recognized by the program. Therefore, if an approach is enacted, the SEC should promulgate clear, unambiguous "safe harbors" to guide the activities of foreign issuers and their underwriters.

B. *Periodic Reporting*

If a foreign corporation issues stock in the United States it becomes subject to the SEC's periodic reporting requirements under sections 12(g) or 15(d) of the 1934 Act.[120] As one commentator has noted,

---

117. ABA Letter, *supra* note 42, at 10-11; Weil Letter, *supra* note 44, at 5-6.

118. *See supra* note 64 and accompanying text.

119. *See supra* notes 67-68 and accompanying text.

120. Securities Exchange Act of 1934 §§ 12(g) and 15(d), 15 U.S.C. §§ 78*l*(1) and 78*o*(d) (1982). For discussion purposes it is assumed that the foreign issuer is not exempt from periodic reporting pursuant to Rule 12g3-2(b), 17 C.F.R. § 240.12g3-2(b) (1987), under the 1934 Act.

the disclosure required in the report may "substantially exceed . . . the reporting obligations imposed by the regulatory authorities of their home countries."[121] Thus, while the foreign issuer would not have to comply with the more rigorous SEC disclosure standards at the offering stage, it would have to later, through its periodic reporting. These reporting requirements would serve as a further deterrent to foreign issuers to participate in any facilitation program. Thus, it would be appropriate to provide reciprocity in periodic reporting as well.

C. *State Blue-Sky Review*

When the 1933 Act was created, it did not preempt the field of securities regulation. Section 18 of the 1933 Act states that "nothing in this title shall affect the jurisdiction of the securities commission . . . of any state . . . over any security . . . ."[122] Thus, an issuer must obtain clearance from the SEC and the states in which it plans to offer its securities. Unlike the SEC, however, which requires full and adequate disclosure, most states also require that the offering be fair, just and equitable.[123] This type of review by the states is termed "merit review." There has been a great deal of debate recently on whether or not the states should be allowed to engage in merit review.[124] However, the fact remains that they are still doing so.

Merit review by the states is, obviously, a serious roadblock to any facilitation program. As one commentator stated, "without statutory modification . . . the improvements made on the federal level will remain constrained at the state level."[125] One state, Massachusetts, has already expressed its intent to constrain any multinational offering program through its merit review policy. The Securities Division for the State of Massachusetts noted that it "has significant reservations regarding the Commission's proposals for the facilitation of multinational offerings."[126]

Unless appropriate action is taken at the state level, any program developed by the SEC and other countries could be rendered meaning-

---

121. ABA Letter, *supra* note 42, at 12.

122. Securities Act of 1933 § 18, 15 U.S.C. § 77r (1982).

123. Note, *State Securities Regulations: Merit Review of Foreign Equity Offerings*, 25 VA. J. INT'L L. 939, 947 (1985). *See also id.* at 947 n.57 for a list of merit review states.

124. *See id.* at 958-64 for an analysis of the arguments on either side.

125. *Id.* at 965.

126. Letter from the Commonwealth of Massachusetts: Office of the Secretary of State, Securities Division to John Wheeler, Secretary of the SEC, at 5-6 (July 18, 1985).

less if the states insist on merit review.

VIII. Conclusion

The SEC's Release is an indication that it is time to address the globalization of the world's capital markets through the use of more frequent simultaneous multinational securities offerings. This paper has analyzed the two approaches suggested by the SEC to facilitate more multinational offerings and has used this analysis in developing an alternative system, a two-tiered reciprocal approach. It is hoped that this approach will make some contribution to the debate as to what should be the optimal approach to internationalizing capital markets. In any event, it is clear that there are numerous obstacles facing any facilitation program and that these obstacles must be removed before any program can be effective.