

Introduction

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/mjil>

Recommended Citation

Introduction, 11 Md. J. Int'l L. (1987).

Available at: <http://digitalcommons.law.umaryland.edu/mjil/vol11/iss2/2>

This Front Matter is brought to you for free and open access by DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Journal of International Law by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

INTRODUCTION

MARC I. STEINBERG*

The Maryland Journal of International Law and Trade is to be congratulated for devoting this Symposium to addressing the issues posed by the development of the international securities marketplace. With this publication, the *Journal* merits attention as a respected scholarly review in the international law area. The subjects addressed in this Symposium are of critical importance to the world's capital markets.

The first article appearing in the Symposium is by Mr. Thomas R. Gira, an attorney with the Division of Market Regulation of the Securities and Exchange Commission. In his article, Mr. Gira asserts that simultaneous multinational securities offerings can be profitable and that investor interests would be promoted in this setting by a two-tiered reciprocal disclosure system.

Mr. Gira views the two-tiered reciprocal approach as the most feasible alternative: investors would not be subjected to limited disclosures based on a mere exchange of information mandated by each country's prospectus standards. On the other hand, issuers would be encouraged to engage in multinational offerings rather than being thwarted by the distinct probability that the countries where the securities are to be sold will be unable to agree on disclosure standards for an offering document (the "common prospectus" approach).

Mr. Gira illustrates the problem of today's international marketplace with analysis of the problems issuers and investors face in securities offerings that take place in both the United Kingdom and the United States. He uses the British Telecommunications, PLC multinational offering in 1984 as an example of the difficulties present when conflicting regulations in each country make coordination of marketing and sales impractical.

The two-tiered reciprocal approach, like SEC reporting requirements for U.S. issuers, would require more disclosure in the prospectus from less established foreign issuers. As to the first-tier, an issuer of "world-class" calibre could use a home country's standard prospectus alone to sell on the international markets. Mr. Gira suggests that the issuer's size (i.e., total assets, revenue and net income) should establish which issuers are world class. With respect to the second-tier, an issuer would be required to be of a minimum size and show two years of earnings history. A second-tier issuer would then supplement its prospectus in accordance

* Professor of Law, University of Maryland School of Law.

with requirements which would be promulgated by the foreign countries where the securities will be offered.

The proposed approach advocated by Mr. Gira for simultaneous multinational securities offerings may be viewed as having a dual objective: to provide investors with adequate information with regard to international offerings and to facilitate the emergence of global markets, despite inevitable discrepancies and conflicts. The position advocated by Mr. Gira is persuasive and should be given close attention.

The second article in the Symposium is derived from my Fellowship to Sweden during November 1986 to lecture and advise on Swedish and United States securities regulation. During the visit, I was requested to present my recommendations for reform of Swedish Stock Exchange and Corporation Law. Generally, the recommendations are grouped into seven categories: (1) stock exchange regulation, (2) fiduciary duties of directors, officers and controlling shareholders, (3) issuer periodic reporting obligations, (4) remedies for fraud committed by corporate fiduciaries, (5) insider trading, (6) corporate control transactions, including tender offer regulation, and (7) proposed limitations on monetary damages.

Unlike the United States, Sweden does not have a government securities regulator. Rather, enforcement authority is largely vested in The Stockholm Stock Exchange, a private body with limited powers. Some Swedish experts believe that the Exchange should be provided with greater powers. Interestingly, however, the creation of a "Swedish" SEC is almost universally opposed, being viewed as undue government intrusion in the private capital markets.

During my visit, the Boesky scandal broke, making front-page news. Both the Swedes and the Finns (when I lectured in Helsinki) were fascinated. Insider trading is legal in Finland and in Sweden is prohibited only as to insiders (and perhaps consultants and employees). Hence, it appears that Boesky's activities would have been legal in both countries. In light of the Boesky episode and questionable practices in their own countries, both Sweden and Finland are reexamining their insider trading policies.

Tender offers in both Sweden and Finland are largely unregulated and are receiving attention from experts. For guidance, the Swedes appear to be drawing on the London City Code on Takeovers and Mergers as well as United States law (namely, the Williams Act and SEC regulations thereunder).

My visit came at a time when The Stockholm Stock Exchange, which not so long ago was viewed as a "sleepy" market, was emerging as an integral player in the international securities marketplace. Today, the Exchange lists the stock of approximately 170 companies, having a total of two million shareholders. Trading

turnover on the Exchange is increasing at a rapid pace. With these developments, there may well be a need for Sweden to implement more extensive regulation.

The third article in the Symposium is based on an address presented by SEC Commissioner Charles C. Cox in July 1986 to the XI Annual Conference of the International Organization of Securities Commissions. Commissioner Cox's article focuses upon three areas of critical concern for the international securities marketplace: (1) uniform disclosure requirements for securities offered in more than one country, (2) international linkage for trading, information, clearing and settlement of securities transactions, and (3) market surveillance and investigatory procedures, including information-gathering problems. Commissioner Cox addresses these subjects in the context of three SEC releases and the public comment they generated. He then discusses possible SEC action.

Concerning disclosure requirements for securities offerings, the SEC currently has in place an integrated system for foreign issuers which is similar to the framework for domestic issuers, including the provision for incorporation by reference. Two additional approaches, as discussed by Commissioner Cox, are being discussed at the SEC. The first is a reciprocal approach to disclosure requirements, whereby a prospectus meeting certain standards in the issuer's domicile would be accepted by other participating countries. The second, the common prospectus approach, is based on international cooperation whereby agreed-upon disclosure standards for an offering document would be established, thereby permitting an issuer to employ the document in transnational offerings which take place in the participating countries.

The second part of Commissioner Cox's article focuses on international trading issues. As he describes, a number of stock exchanges in the United States are now using modern technology to link their markets to exchanges in other countries in order to accommodate international trading of equity securities and options. Along with these trade linkages is the development of a growing network of international clearing agencies. As Commissioner Cox aptly points out, international securities markets develop in response to international economic forces. Moreover, because the development of these markets enhances the liquidity and depth of the current capital markets, they should be encouraged, yet their growth should be consistent with maintaining market integrity and investor protection.

As Commissioner Cox addresses in the last part of his article, with the expansion of the international securities market comes an increased need for surveillance to detect and investigate violations of securities law. It is in this setting that the SEC runs into grave jurisdictional problems. While many countries have been coopera-

tive in the SEC's efforts to obtain information, the Commission has no authority or formal mechanism for compelling compliance. Nonetheless, the Commission on a number of occasions has been successful in procuring critical information outside of its jurisdiction. The preferred method of dealing with this problem, Commissioner Cox asserts, is to negotiate bilateral or multilateral understandings. The SEC, as described in a later article in the Symposium, has enjoyed some notable success in this undertaking.

In sum, Commissioner Cox's article indicates that the SEC wishes to facilitate a cooperative system of disclosure, trading links, and surveillance in its attempt to encourage the development of an efficient international securities marketplace that is protective of investor interests. While this goal may be attainable, there can be little question that much of the road remains to be traveled.

The next article in the Symposium, written by Mr. William B. Haseltine who is an attorney-advisor in the Division of Corporation Finance of the SEC, focuses on the effect of U.S. tax and securities laws interacting in Eurobond financings. The article begins with a general background of the Eurobond market. Part II discusses the U.S. securities laws with respect to an offering of unregistered securities by U.S. issuers to foreign persons in an Eurobond issue. Generally, the SEC's staff, relying on Securities Act Release No. 4708, will look to whether the distribution will be effected in a manner so that the securities "come to rest" abroad. If so, the staff will not recommend that enforcement action be taken based on the offering of unregistered securities. In the third section, Mr. Haseltine explores the relevant U.S. tax laws. He presents a detailed account of the Tax Equity and Fiscal Reform Act ("TEFRA") and "registration-required obligations." Eurobonds are excepted from this requirement, thereby allowing U.S. corporations to issue bearer bonds, provided certain specified conditions are satisfied. Mr. Haseltine concludes by identifying potential problems that may arise due to U.S. tax regulations which adopt and rely on U.S. securities laws.

The next article in the Symposium, a Comment by Mr. Mark S. Klock, analyzes recent international agreements which will aid the SEC in its investigations relating to transactions executed through foreign banks. Mr. Klock points out that the SEC frequently has difficulty determining the identity of suspect investors because of foreign secrecy and blocking laws. To overcome this problem, the United States has recently negotiated accords with several foreign nations.

By way of background, Mr. Klock describes the celebrated *Santa Fe* case which illustrates the difficulties the SEC faces when investigating insider trading abroad. In Part II of the Comment, he examines in detail the negotiated accords with Switzerland, the

United Kingdom, Japan, the Cayman Islands, Ontario, and Canada. The author describes the procedural steps the SEC must take to obtain the desired information and discusses the strengths and weaknesses of each accord.

Thereafter, in Part III, Mr. Klock presents his analysis. A key distinction between the accords, he points out, is whose law determines when assistance is available. For example, United States law plays no role in determining whether assistance is to be provided under the Swiss accord. In contrast, the agreements with the United Kingdom, the Cayman Islands, Canada and Ontario all provide assistance when there are reasonable grounds for believing that a violation of United States law has occurred, without regard to the laws of the domestic country. Also, the Japanese accord, which may be considered the least specific of the agreements, does not preclude consideration of U.S. law when evaluating an SEC request.

Mr. Klock concludes that enforcement of U.S. securities laws in this setting depends on the successful adoption and implementation of bilateral agreements. Therefore, he calls for the development of a model accord.

In the next contribution, Ms. Laura Greenstein argues that the benefits of international securities trading will be undermined unless an organized system of regulatory cooperation in enforcement is established along with international market links. In her Comment, Ms. Greenstein traces the development of trading links between United States exchanges and Canadian exchanges as well as between United States exchanges and those in the United Kingdom. These developments and others like them hold the promise of profit but may lead to corruption and market collapse, Ms. Greenstein argues.

Ms. Greenstein asserts that the development of international trading links between exchanges around the globe, although resulting in a 24-hour market in securities, may open the door to "market" shopping on a grand scale. She warns that blocking laws, which enable foreign countries to insulate suspect investors from unwelcome rigorous investigation, will encourage manipulation and fraud by making SEC and comparable regulations unenforceable. Surveillance is the primary means of enforcing securities laws, according to Ms. Greenstein, and the only viable means for ensuring that the system of market linkages is not corrupted. Market shopping will induce corruption in a global securities market where surveillance exists in some jurisdictions but not in others.

Existing enforcement mechanisms have failed to provide a satisfactory resolution. Specifically, Ms. Greenstein contends that the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters is insufficient, multilateral agreements are too

individualized to offer an international solution, and the Waiver by Conduct concept is unworkable.

Ms. Greenstein recommends development of a uniform global policy and a formalized system of coordinated surveillance by bilateral or multilateral agreements and treaties. These objectives will only be achieved through coordinated efforts by the regulatory agencies and the governments of the countries which seek to play a role in the international securities marketplace.

As the summaries to the above articles indicate, the contributions in this Symposium are of a most timely nature. The difficult issues that arise in connection with disclosure requirements in multinational securities offerings, the inevitable development of a 24-hour international securities market, and the effectiveness of market surveillance and enforcement in a global market are of great importance to the stability of the world's capital markets. The contributions to this Symposium explore these difficult questions and seek to provide viable solutions. The dilemmas are real and must be expeditiously faced.