Securities Industry Association

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Jonathan G. Katz
SecretarySecurities and Exchange Commission
450 Fifth Street, NW
Washington, D.C. 20549

File S7-20-95: "Problematic Practices Under Regulation S"

Dear Mr. Katz:

The Federal Regulation Committee and Capital Markets Committee ("Committees") of the Securities Industry Association ("SIA")[1] appreciate the opportunity to provide comments to the Securities and Exchange Commission ("Commission" or "SEC") regarding the above-referenced Commission release.[2] In the Release, the Commission: (1) provides interpretive guidance describing certain "problematic practices" it believes are involved in some offers, sales, and resales of securities made in offshore transactions purportedly in reliance on Regulation S ("Regulation S transactions") under the Securities Act of 1933 ("Securities Act"); and (2) seeks comments as to whether the Commission should propose additional restrictions to Regulation S in order to help reduce the perceived and/or actual incidences in which Regulation S transaction participants rely on the Regulation in an attempt to evade the Securities Act's registration requirements. [3]

I. Introduction

The Committees commend the Commission's motivation to try to eradicate any perceived or actual abuses that could influence investor confidence in the Regulation S market-place adversely. We appreciate efforts to provide more clarity regarding the scope of Regulation S, insofar as uncertainty about its breadth may have caused some firms and issuers to refrain from legitimate financing activity. In addition, we support the Commission and its staff's efforts, as described in the Release, to: (a) ensure that persons do not seek to evade the Securities Act registration requirements "under the color of compliance with Regulation S"[4]; and (b) investigate and initiate enforcement actions, when warranted, against persons or entities that do not comply with the provisions of Regulation S.

Nonetheless, for the reasons described below in Sections V and VI, we do not believe that Regulation S should be, or needs to be, amended in any of the ways in which the Commission proposes, or otherwise. We believe that Regulation S is used routinely and effectively by most market participants without the abuses discussed in the Release.

II. Brief Summary of Regulation S

Effective May 2, 1990, the SEC adopted Regulation S, which codified the SEC's prior guidelines governing the applicability of the Securities Act registration requirements to offers, sales, and resales of debt and equity securities made outside the United States ("offshore") by U.S. and non-U.S. issuers. [5] Regulation S clarifies the circumstances in which securities issued offshore need not comply with the Securities Act's registration requirements, and articulates a territorial approach to the application of these requirements. [6] Regulation S consists of a General Statement regarding the applicability of Section 5 of the Securities Act ("Section 5") and two non-exclusive safe harbors. According to the Release, the safe harbors include conditions to protect against indirect, unregistered, non-exempt offerings' flowback into the U.S. capital markets. [7]

General Statement -- The General Statement (Rule 901) provides that an offer, sale[8], or resale of securities that satisfies all the conditions of one of the two safe harbors is deemed to have been made outside the United States within the meaning of the General Statement and thus not subject to Section 5.[9]

Safe Harbor Provisions -- The following two conditions apply to both safe harbors: (1) an offer or sale of securities must be made in an "offshore transaction" [10]; and (2) no "directed selling efforts"[11] may be made in the U.S. in connection with an offer or sale of securities. The "*Issuer Safe Harbor*" (Rule 903) applies to offers and sales by issuers, distributors, any of their re-spective affiliates, and any person(s) acting on behalf of any of these persons. The "*Resale Safe Harbor*" (Rule 904) applies to resales of any securities, whether acquired in a Regulation S off-shore transaction or otherwise, by all persons other than those to whom the issuer safe harbor applies, including sellers, any of their affiliates, or any person(s) acting on their behalf. [12]

III. Summary of Commission's Stated "Problematic Practices" Regarding Regulation S Transactions and Request for Comments

A. Interpretive Guidance on Certain Regulation S Practices

The Commission appears mainly to be concerned about offers and sales of equity securities of U.S. issuers traded principally in the United States and subject to the 40-day restricted period of Category 2 of Regulation S in connection with the safe harbor for resales under Rule 904.[13] The Release states that Rule 904 cannot be used for the purpose of "washing off" resale restrictions, such as the holding period for restricted securities in Rule 144 under the Securities Act.[14] In particular, the Release states that (1) if a person holding such restricted securities sold them in an offshore transaction purportedly under Rule 904, and "replaced" them with a repurchase of fungible unrestricted securities, the replacement securities would be subject to the same restrictions as those replaced; and (2) restrictions are not affected by a "pre-arranged transaction" conducted offshore -- apparently a reference to a sale by or on behalf of a seller holding restricted securities "prearranged" with, or on behalf of, a U.S. purchaser.

Especially in connection with primary and affiliate offerings, the SEC cites three factors it believes may indicate that a substantial amount of the economic or investment risk never shifted to the offshore purchaser, the securities may have been placed offshore temporarily to evade Securities Act registration requirements, and/or there never may have been any reasonable expectation the securi-ties actually would come to rest abroad.[15] The Release states that such factors include:

1.the use of: (a) non-recourse promissory notes for all or nearly all of the purchase price of Regulation S securities; or (b) recourse notes in which the seller of the se-curities is unaware of the identity of the entity providing the notes or that the entity has no or insubstantial assets -- in which the expectancy of repayment results from the sale of the securities in the U.S. market;

2.fees paid to buyers to hold securities for the restricted period, including discounts, indicating a transaction was meant to devise a scheme in which the securities were being held offshore merely to elude Securities Act registration requirements; and

3.short selling and other hedging transactions in which buyers shift the benefits and burdens of ownership back to the United States during the restricted period.

B. Commission's Request for Comments

The Commission requests comment on whether it should amend Regulation S to impose additional restrictions in order to curtail attempts to use Regulation S to evade the Securities Act registration requirements. The Release describes possible revisions that the Commission believes may curtail these attempts, including:

1.extending the restricted period applicable to U.S. reporting companies' equity securities offerings under Category 2 of Rule 903 [16] from 40 days to one year. Alter-natively, subjecting such offerings to the selling and offering restrictions imposed under Category 3 (applying to any issuer unable to meet the conditions of Category 1 or 2), including a one-year restricted period, legending of share certificates, and the buyer's express agreement to resell the securities only in exempt transactions;

2.limiting the use of Rule 903 by Category 2 U.S. issuers offering common stock to offerings sold at market price or with a specified minimal discount. Alternatively, applying additional or Category 3 procedures to discounted offerings;

3.restricting risk-shifting transactions during the restricted period (*e.g.*, limiting short selling or transactions that otherwise hedge the risk of holding common equity securities during the restricted period); and

4.amending Rule 903 for Category 2 and 3 issuers to forbid (or limit through tolling the restricted period) payment for common equity securities with certain types of non-recourse or other types of promissory notes where the expectancy of repayment arises only (or principally) from the proceeds of the sale of securities.

(See Committees' discussion of these four proposed revisions to Regulation S in Section VI, below.)

IV. Beneficial Effects of Regulation S

The goals of Regulation S, articulated by the Commission when it adopted the Regulation, were to clarify and simplify procedures for the offshore placement of securities.[17] The Commission also intended that Regulation S would provide U.S. issuers with an efficient capital raising alternative.[18] By clarifying the SEC's prior guidelines in offshore financing activities, Regulation S has proved beneficial for various market participants and marketplaces.[19]

The efficiencies of Regulation S allow offerings to be consummated at a lower net cost to an issuer than would be the case if domestic issue registration procedures were to apply. As a result, Regulation S provides a desirable vehicle with which to provide expeditious and cost-effective financing for small issuers, and particularly start-up operations, for which an alternative to a costly and cumbersome securities registration process may be very important for early survival.

Also, offshore persons' purchases of securities -- often in sizable blocks of stock -- create liquidity for the seller without disrupting or dampening the public trading market for the se-curities in the United States. If an offshore purchaser determines to resell Regulation S shares not subject to a Rule 144 holding period, the resales can be effected more gradually, resulting in a less depressive effect on the price of the stock than may occur with numerous large Rule 144 sales. Resales under Regulation S also may help increase the public float for the company's securities before the end of the Rule 144 holding period, which can result in a more liquid and orderly market for the company's securities when sales under Rule 144 are permitted.

By making it easier to resell abroad securities of non-U.S. issuers initially placed in the United States, Regulation S encourages unregistered U.S. private placements as part of private issuer's offshore offerings. Many U.S. securities firms that participate frequently in Regulation S transactions undertaken by non-U.S. issuers, their underwriters, and offshore affiliates credit the Regulation's success with motivating non-U.S. issuers that might otherwise undertake a global securities offering without making a U.S. offering to include a U.S. tranche of privately placed or registered securities.

Some U.S. securities firms involved in global securities business have indicated that they believe that Regulation S, as well as Rule 144A, have enhanced further the reputation of, and interest in, the U.S. capital markets. Some U.S. issuers have found that Regulation S placements have increased the overall demand for their securities and/or broadened their shareholder bases. One of the consequences of Regulation S has been some degree of leveling of the offshore financial playing field among U.S. issuers of various sizes by, among other things, encouraging the more frequent inclusion of smaller U.S. issuers' securities as viable elements of overseas investment portfolios.

When the issuer is foreign, debt securities -- and even more so, equity securities -- offered in an international offering more likely will flow into the issuer's home market rather than the United States, either as a result of the primary distribution or secondary trading. Non-reporting foreign issuers that have made efforts to access the U.S. equity markets will be subject to the requirements of Rule 12g3-2(b) under the Exchange Act, providing home country information to market participants to provide an adequate basis for any secondary trading that develops. Thus, home-country information will be available to market participants to provide an adequate basis for any secondary trading that develops.

V. SEC Should Continue Warranted Enforcement Efforts with Respect to Practices that Violate Regulation S Instead of Amending the Regulation

The Committees do not believe that the SEC should adopt any of the four proposed amendments to Regulation S. We believe that sufficient restrictions already apply under Regulation S to prevent the Commission's perceived abuses. The categories of abuses to which the Release refers never have been, and are not, sanctioned by Regulation S. As the Release states, "neither of the safe harbors nor the general statement [of Regulation S] is available for a transaction or series of transactions that, although in technical compliance with the regulation, is part of a plan or scheme to evade the registration requirements of the Securities Act."[20] We also believe that the vast majority of market participants engaging in Regulation S transactions do so in full compliance with the strictures and spirit of the Regulation, without the abusive practices the Commission describes in the Release.

Rather than amending Regulation S to ban each of the practices set out in the Release, we urge that the SEC continue to pursue appropriate enforcement action to deter any instances of abuses involved in connection with Regulation S transactions.[21] At a minimum, prior to determining to propose any revisions to Regulation S, we recommend that the Commission permit an interval for Regulation S market participants to assimilate the guidance concerning the Regulation in the Release's interpretive section, as well as recent related enforcement actions, which provide more certainty than existed previously concerning impermissible Regulation S transactions. This will be particularly important for those Regulation S market participants who, in the past, may have misunderstood or been confused about the Regulation's proper parameters.

VI. Comments on the Commission's Proposed Revisions to Regulation S

A. Extension of Restricted Period

As noted in Section III.B. above, the SEC has proposed extending the restricted period[22] for Category 2 securities from 40 days to one year. The Committees do not believe it is necessary or appropriate to extend this restricted period for securities offerings of U.S. issuers that are reporting companies under the Exchange Act.

The proposed modifications to Regulation S could reduce or eliminate entirely the desirability of purchasing securities in reliance on Regulation S and thus make such offerings more expensive to issuers of such offerings. Further, the number of non-U.S. institutional investors prepared to buy U.S. issuers' unregistered securities may be reduced significantly. To the extent that the remaining non-U.S. institutional investors are willing to participate in offerings of unregistered securities of U.S. companies, they will commit far less funds to such investments.

Extending the restricted period for Regulation S securities may restrict the overall amount of funds that *bona fide* non-U.S. institutional investors will commit to offshore issues by U.S. companies. For example, European insurance funds, pension funds, and publicly quoted investment funds and trusts demand the potential for liquidity in their investments. The majority of such institutional investors have internal regulations, based on their own respective business needs, which provide that only a certain, typically small, part of their funds are available for investment may be put into illiquid investments or securities that have special handling requirements.

When Congress adopted a restriction on dealers' securities sales after unregistered public offerings, now the 40-day period in Section 4(3) of the Securities Act, it made a judgment that subsequently, a dealer could be presumed to be acting as a secondary market participant, and not as taking part in a direct or indirect distribution of securities. [23] This decision, made in the context of unregistered domestic distributions, provides strong support for the view that a 40-day period is the appropriate Regulation S restricted period. If a domestic distribution based on an unregistered, U.S. public offering may be presumed to have ended after 40 days, then surely no domestic distribution resulting from a lawful offshore public offering should be presumed to exist after 40 days have expired. In the former case, efforts to condition the domestic market are likely to exist and to lengthen the period of the effects of the domestic primary distribution. In the latter case, in which U.S. direct selling efforts are forbidden, the general danger of a domestic distribution or conditioning at any time during the 40-day period is greatly reduced.

According to current market practice, many dealers, relying on statutory interpretation like that set out above, refrain from public secondary trading of foreign securities in the United States during 40 days following an overseas offering. In particular, 40-day restrictions, excluding primary allotments, are followed in instances of overseas offerings of foreign government bonds issued in the government's domestic market, overseas offerings of other foreign debt securities issued in domestic markets or otherwise not subject to contractual restrictions, and overseas offerings of foreign equity securities not subject to contractual restrictions. The factors that support these practices -- namely the view that a 40-day restricted period is warranted by statute and is sufficient to ensure that securities have come to rest abroad -- reinforces the need to preserve the 40-day restricted period in Regulation S.[24] Moreover, it would be preferable not to discriminate against U.S. issuers by permitting the securities of certain foreign issuers to trade earlier (after 40 days rather than a longer period) in an international secondary market that includes the United States.

Although we do not recommend extending the Category 2 40-day restricted period, we believe there would be merit in requiring that certificates representing equity securities issued by Exchange Act reporting companies in Category 2 Regulation S securities placements during the restricted period contain a legend indicating that the securities were issued pursuant to Regulation S, referring to the expiration date or other means of calculating the restricted period for securities issued in a Regulation S transaction, and stating that the sale and transferability of the securities prior to the end of the restricted period is limited to resales that themselves qualify as Regulation S transactions or otherwise exempt from registration requirements.

B. Exclusion of Certain Discounted Offerings from the Safe Harbor

As noted above, the Commission has suggested limiting the use of the Category 2 safe harbor by domestic issuers offering common stock to offerings sold at market price or with a specified minimal discount. We believe it is inappropriate to impose limitations on the ability of purchasers of securities in Regulation S offerings of domestic issuers to negotiate for a discount to the market price, as long as the discount is related to the transaction's economics. We agree with the acknowledgment, in Footnote 14 of the Release, that in Regulation S transactions:

some discounts may well be warranted in order to compensate for the length of the restricted period, historic volatility of the stock, financial condition of the issuer, the dilution represented by newly issued shares, current market conditions, availability of current information as to the issuer, information the issuer may have had that was disclosed to the purchaser but not otherwise disclosed to the market, or other factors.[25]Many factors account for the discount present in any transaction, including the prevailing market conditions, the terms of the securities sale, and the issuer's business outlook. It is not unreasonable for Regulation S offering investors to require some level of discount from the market price levels prevailing before the securities placement in recognition of the lack of liquidity during the restricted period and the fluctuation in the market price levels that often occurs upon announcement to the market of any issue of new securities.some discounts may well be warranted in order to compensate for the length of the restricted period, historic volatility of the stock, financial condition of the issuer, the dilution represented by newly issued shares, current market conditions, availability of current information as to the issuer, information the issuer may have had that was disclosed to the purchaser but not otherwise disclosed to the market, or other factors.[26] The buyers and sellers most often are sophisticated market participants able to negotiate on their own behalf. The transactions occur outside the public market -- in fact, outside the United States. Finally, we do not believe there could be one single formula for an acceptable discount level that would anticipate the unique circumstances of each transaction. As a result, it is far more appropriate to treat instances of perceived abusive discounts with enforcement actions than an overly inclusive rule amendment.

C. Restriction of Risk-Shifting Transactions During the Restricted Period

We do not believe that the Commission should restrict short selling and other hedging transactions effected by a purchaser of Regulation S securities during the 40-day restricted period. As Footnote 16 to the Release states, if a hedging transaction "occurred solely by or among parties offshore, and the purchaser engaged in the transaction could reasonably expect that the economic risk of ownership would remain abroad, then the transaction could satisfy the requirements of the rule if the other provisions of Regulation S were satisfied."[27] We believe it is possible to structure transactions in this manner to meet the safe harbor conditions and the Commission's concerns as voiced in the Release. We believe the Release already has identi-fied the parameters of permissible and impermissible offshore hedging activity. Thus, any amendment in this area is unnecessary and potentially would constrain legitimate offshore hedging transactions.

D. Prohibit Payment with Certain Types of Promissory Notes When The Expectation of

Repayment Derives Solely From the Resale of Securities

We do not believe the Commission should amend Category 2 or 3 of Regulation S to re-strict the method of payment for Regulation S transactions to certain types of promissory notes. As discussed above, if such transactions are engaged in to evade the Securities Act registration requirements, they already do not fall within the safe harbor provided by Regulation S.

VII. Cost-Benefit Analysis

In the Release's cost-benefit analysis section, the Commission states that "[i]t is expected that [the proposed additional] restrictions [to Regulation S] would not directly impose additional burdens on companies, although there may be indirect costs incurred by companies."[28] We disagree. We believe that the proposed revisions to Regulation S would increase the cost of capital raising for certain companies for which Regulation S provides an efficient and cost-effective way to access foreign capital markets -- particularly important when the costs of accessing financing in the domestic market would be prohibitive.

VIII. Conclusion

Please feel free to call Sheree F. Levine, Staff Adviser to the Federal Regulation Committee, at (212) 618-0509, if you have any questions regarding this letter or would like any additional information from the Committees on this matter.

Sincerely,

Robert F. Price, ChairmanFederal Regulation Committee

Perry Taylor, ChairmanCapital Markets Committee

Footnotes

1 The Securities Industry Association is the trade association representing the business interests of over 750 securities firms in North America. Its members include securities organizations of virtually all types -- investment banks, brokers, dealers and mutual fund companies, as well as other firms functioning on the floors of the exchange. SIA members are active in all exchange markets, in the over-the-counter markets and in all phases of corporate and public finance. Collectively, they provide investors with a full spectrum of securities and investment services and account for about 90% of securities firm revenue in the United States.

2 SEC Release No. 33-7190, Intl. Series. No. 821 (June 27, 1995), 60 FR 35663 (July 10, 1995) ("Release"). We understand the Commission will consider all comments and decide whether rulemaking or some other type of action, or no action at all, is appropriate at this point.

3 The Release was one of several the SEC issued simultaneously in an effort to reduce unnecessary regulatory burdens, including proposed: (1) rule changes to reduce the motivation to sell securities offshore in order to avoid the Securities Act's registration and disclosure requirements relating to significant acquisitions, including streamlining disclosure requirements for financial statements of significant acquired (or to be acquired) businesses; requiring registrants to report quarterly recent sales of equity securities offerings and unregistered private placements; and providing automatic waivers of certain financial statements not readily available. See SEC Release No. 33-7189 (June 27, 1995), 60 FR 35663 (July 10, 1995), and September 19, 1995 letter from Robert F. Price, Chairman, SIA Federal Regulation Committee, and Perry Taylor, Chairman, SIA Capital Markets Committee, to Jonathan G. Katz, Secretary, SEC; and (2) changes to Rule 144 to, *inter alia*, shorten the two-year holding period to one year for limited resales of "restricted securities." See SEC Release No. 33-7187 (June 27, 1995), 60 FR 35645 (July 10, 1995), and September 19, 1995 letter from Robert Price, Chairman, SIA Federal Regulation Committee; Perry Taylor, Chairman, SIA Capital Markets Committee; and William F. Greenwood, Jr., Chairman, SIA Direct Investment Committee, to Jonathan G. Katz, Secretary, SEC.

4 Release, p. 35664.

5 These guidelines, including SEC Release 33-4078 (1964), and a series of no-action letters, permitted a wide range of offshore securities activities while preventing distributions of unregistered securities in the U.S. by providing procedures by which securities could be sold by either U.S. or non-U.S. issuers outside the United States without Securities Act registration while ensuring that the offered securities "came to rest abroad."

6 The territorial approach recognizes the primacy of the laws in which a market is located. See SEC Release Nos. 33-6853; 34-27942; IC-17456 (April 24, 1990), 55 FR 18306 (May 2, 1990) ("Regulation S Adopting Release").

7 *Id*.

8 For a transaction to fall within the General Statement, both the sale and related offer must be made outside the United States. *Id*., p. 35663.

9 Section 5 prohibits any person, directly or indirectly, from using instrumentalities of interstate commerce or the mails to offer or sell a security unless a registration statement has been filed or is in effect as to such security. Sections 3 and 4 of the Securities Act and related rules set out exemptions from this Act's registration requirements. Section 5 does not apply to any offer, offer to sell, sale, or offer to purchase securities occurring outside the United States.

10 The term "offshore transaction" is defined generally in Rule 902(i) as a transaction: "(a) where the buyer is outside the United States when the buy order is entered; (b) executed in, on or through the facilities of designated offshore securities markets [defined in Rule 902(a)]; or (c) executed in, on or through the physical trading floor of an established foreign securities exchange located outside the United States."

11 The term "directed selling efforts" is defined as "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...Regulation S." Rule 902(b).

12 Neither the General Statement nor the two safe harbors are exclusive or intended to create the presumption that any transaction failing to meet their terms is subject to Section 5.

13 Category 2 of Regulation S applies to securities offerings by issuers subject to the reporting requirements of the Securities Exchange Act of 1934 ("Exchange Act") and debt offerings by non-U.S. issuers with substantial U.S. market interest in their debt securities.

14 The statement that "Rule 904 cannot be used for the purpose of 'washing off'" resale restrictions, *e.g.*, the Rule 144 restricted securities holding period, appears to imply that a non-U.S. person who buys unregistered securities from a selling shareholder pursuant to Rule 904 will be able to rely on the Section 4(1) exemption for resales into the U.S. only if he/she relies upon, and conforms with, the Rule 144 safe harbor. This is somewhat inconsistent with both Rule 144 and the concept of a safe harbor. Rule 144 is a non-exclusive safe harbor; as such, it imposes conditions on its use, but does not impose restrictions on unregistered securities as, *e.g.*, Rule 502(d)(1) of Regulation D imposes resale limitations on all subsequent resales. Rule 144(j) provides that a buyer may resell unregistered securities publicly without using Rule 144 if he/she otherwise may rely on Section 4(1). We do not believe there is a legal or policy basis for distinguishing between an issuer making a Regulation S private placement and a holder of privately placed securities effecting a resale under Regulation S.

15 See E. Greene, "*Recent Problems Arising Under Regulation S*", INSIGHTS (August 1994) and Release, p. 9, n.19.

[16] In order to come within the Rule 903 safe harbor, offers and sales of Category 2 securities must comply not only with the offshore transaction requirement and the prohibition on directed selling efforts but also with additional conditions including "offering restrictions" and "transactions restrictions." Rules 903(c)(ii).

[17] Release, p. 35665.

[18] *Id*.

[19] Issuers may utilize Regulation S to meet their need for liquidity when, among other circumstances, there is inadequate demand in the U.S. private market for its unregistered securities or its shares cannot be sold in the public market because of Rule 144 volume and holding period limitations.

[20] See Regulation S, Preliminary Note 2. Further, the Release states that the territorial approach embodied in Regu-lation S is not intended to affect the:

scope or extra-territorial application of the anti-fraud or other provisions of the federal securities laws. The anti-fraud provisions have been broadly applied by the courts to protect U.S. investors and investors in U.S. markets where either significant conduct occurs within the United States...or the conduct occurs outside the United States but has a significant impact within the United States or on the interests of U.S. investors. Release, p. 35663[21] SEC Chairman Levitt, Commissioner Roberts, and Corporation Finance Division Director Linda Quinn indicated that one main aim of providing interpretive guidance on Regulation S was to emphasize that, when the SEC learns of such abuses, it will pursue prompt enforcement action. (The other goal was to identify specific practices the SEC views as plans to evade Securities Act registration requirements.) Notably, Ms. Quinn expressed a general preference for enforcement actions over the amendment of Regulation S.

[22] The term "restricted period" is defined in Rule 902(m) as "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...Regulation S or the date of closing of the offerings, and expires a specified period of time thereafter...."

[23] H.R. Rep. No. 85, 73rd Cong., 1st Sess. 16 (1933). When the dealer exemption was adopted in 1933, the restricted period for dealer sales was one year. Congress reduced it to 40 days in 1954, but the amendment was "not designed to affect the nature or extent of the dealer's exemption." *See* H.R. Rep. 1542, 83 Cong., 2d Sess. (1954).

[24] Because it has been used as a prophylactic benchmark in many Euro-market offerings, a 90-day restricted period may have formed part of the basis for SEC staff guidance on offshore offerings. *See*, *e.g.*, *The Singer Company* (September 3, 1974). However, the terms of Section 4(3) of the Securities Act do not require or favor a 90-day restricted period. Further, though Section 4(3) contains a 90-day restricted period for registered initial public offerings ("IPOs"), this period is inapposite to the selection of the proper restricted period for Regulation S provisions. In response to the 1960's "hot issue" phenomenon, Congress adopted the 90-day restricted period in order to protract the registered IPO prospectus delivery period, thus prolonging the time period in which investors could receive prospectus information. Congress wished to address the perceived primary and secondary market concerns, and did so by the

means of the prospectus delivery requirement. See S. Rep. 379, 88th Cong., 1st Sess. 28 (1963). This prophylactic period, however, does not bear upon the question of when an unregistered primary distribution or, more specifically, a lawful offshore primary distribution, has been completed. As noted, it is the determination that dealers may be presumed not to be participating in an unregistered primary distribution after 40 days that should govern.

25 To the best of our knowledge, the Securities Act contains no analogous precedent for placing substantive constraints on the price of an offering.

26 The filing of a registration statement containing a preliminary prospectus for the sale of securities often results in a drop in market price levels from those prevailing prior to the filing as the market adjusts to an increase in the supply of the participant securities and, in some instances, a perceived overhang of unsold securities.

27 Release, p. 35665.

28 *Id*.