An Overview of the Eurobond Market

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I. Introduction

A. Development of the Eurobond Market

Throughout the 1950s and early 1960s the U.S. capital market was the primary source of funds for international borrowers. The reasons for the United States' financial leadership at this time included the fact that the U.S. economy was the only major economy that had survived World War II not only in good condition but in stronger condition than it had been in at the beginning of the war; the U.S. dollar, at the time, was the only major freely convertible currency and the U.S. financial markets were the only financial markets that had the needed financial resources.

However, these uncontrolled capital exports from the United States quickly put the United States in an unfavorable balance of payments position. To alleviate the balance of payments deficit Congress adopted a three-part balance of payments program designed to stem the outflow of capital from the United States. The restraints upon capital outflows, maintained from 1963 to 1974, forced borrowers into the foreign markets and provided the catalyst for development of the London-based Eurobond market. By the mid-1960s, Europe had undergone a sufficient period of postwar reconstruction so that enough capital existed abroad to enable U.S. companies to borrow substantial funds overseas.

The first part of the balance of payments program involved the 1964 enactment of the Interest Equalization Tax (IET), which taxed...
U.S. persons on purchases of foreign securities. The IET, which was designed to restrict portfolio investment by U.S. persons in long-term debt obligations of foreign issuers, affected foreign companies, foreign affiliates of U.S. companies, and U.S. companies raising funds for foreign affiliates. The tax on purchasers of foreign securities thus precluded U.S. multinational companies from moving capital outside the United States for their European operations and effectively cut off the access of foreign governments and issuers to U.S. capital markets. To avoid paying the IET, U.S. companies resorted to issuing dollar-denominated bonds in the European markets.

The second part of the balance of payments program consisted of voluntary restraints in the form of a "request" by the Federal Reserve System to U.S. banks and other financial institutions, such as insurance companies, to restrict their loans to foreign borrowers and U.S. companies for foreign purposes. Established in 1965, these voluntary restraints required that the financial institutions' foreign loans and other assets remain under the predetermined ceiling level set by the Federal Reserve at all times. Once an institution had reached this ceiling level, it could not make a new foreign loan until an equivalent amount was paid off under an outstanding foreign loan.

In 1968, the program of voluntary restraints was converted by executive order into a program of mandatory controls embodied in the Foreign Direct Investment regulations (FDI regulations) promulgated by the Department of Commerce, Office of Foreign Direct Investments. The FDI regulations required a U.S. company's long-term foreign borrowing to offset the amount of its foreign direct investment, and imposed two substantial restrictions upon direct investors: (1) the regulations severely limited the amounts that the direct investor was allowed to hold as "liquid foreign balances" (foreign bank deposits); and (2) the regulations effectively forced U.S. companies to finance their overseas operations abroad, thereby limiting the outflow of dollars and helping the U.S. balance of pay-

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4 See infra text accompanying notes 89-93.
7 Gehlins, Tax Considerations for U.S. Corporations Using Finance Subsidiaries to Borrow Funds Abroad, 7 J. CORP. TAX’N 230, 231 n.2 (1980).
9 See Comment, supra note 6, at 381.
11 See A LAWYER'S GUIDE TO INTERNATIONAL BUSINESS TRANSACTIONS, supra note 2, § IV-2.1, at 76.
12 Id.
ments position. The FDI regulations caused a boom in largely dollar-denominated Eurobond financing, evidenced by the fact that between 1965 and 1973, U.S. companies were responsible for an average of thirty percent of total new issue volume in the Eurobond market. European companies also accounted for a substantial share of the Eurobond market.

When the U.S. balance of payments returned to a favorable position in 1973, the capital outflow controls under the FDI regulations were eased and the IET expired on June 30, 1974. Because the Eurobond market had become financially attractive to U.S. companies in certain circumstances, however, U.S. companies continued to raise capital abroad.

The Eurobond market, which was a relatively small and esoteric market for some financing needs of U.S. companies, became a discrete market competitive with the U.S. domestic bond market by the end of the 1970s. By the early 1980s, the Eurobond market, in terms of total issuance, had exceeded the U.S. corporate bond market by fifty percent. In the past three years, funds raised in the Eurobond market have grown from 80 billion dollars in 1984 to 133 billion dollars in 1985 to 183.6 billion dollars in 1986. Today, U.S. corporations play a major role in the continued growth of the Eurobond market.

B. Characteristics of the Eurobond Market

Certain characteristics have become associated with the Eurobond market as it has developed over the past twenty or so years. Eurobonds typically are in bearer, rather than registered, form. Interest is paid free of withholding taxes imposed at the source in the issuer's country of origin. While Eurobond issues, as a general practice, have annual, rather than semiannual interest payments, some issues in the Eurobond market in recent years have had

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13 Id.
15 Id.
17 Comment, supra note 6, at 382.
18 Grand-Jean, supra note 3, at 22.
19 Id. at 23.
21 The identity of the beneficial owner of the security is not known and the bond is transferable at delivery. See Beller and Berney, Eurobonds, 19 Sec. & Commodities Reg. 99, 40 (Feb. 19, 1986).
22 The identity of the beneficial owner is known and the bond may be transferred only through the filing of an instrument of transfer together with the bond certificate and the registration authority.
23 Beller and Berney, supra note 21, at 40.
semiannual interest payments.\textsuperscript{24}

Although the Eurobond market is still dominated by the U.S. dollar, gains have been made by other currencies such as the Japanese yen, Deutschemark, Australian dollar, New Zealand dollar, British pound sterling, Canadian dollar, and French franc.\textsuperscript{25} Borrowers and investors are taking advantage of the opportunities which other currencies can offer, such as cheaper sources of funds, higher yields, and swap opportunities.\textsuperscript{26} The U.S. dollar's share of the Eurobond market in 1986 dropped from seventy to sixty-three percent while the market share of the Japanese yen doubled from five to ten percent.\textsuperscript{27} The Japanese yen and the Deutschemark currently hold the second and third positions, respectively, while the British pound sterling, the European Currency Unit (ECU), and the Canadian dollar occupy fourth, fifth and sixth positions, respectively.\textsuperscript{28}

Issuers in the Eurobond market include U.S. corporations, foreign governments, government agencies, international and multinational organizations (such as the World Bank), and foreign private corporations.\textsuperscript{29} While investors in the Eurobond market have included individuals and institutions, the market is increasingly becoming institutional.\textsuperscript{30} Although there are no official rating requirements for Eurobonds, ratings by the two leading United States' rating agencies (Moody's Investors Service and Standard & Poor's Corporation) are sometimes utilized by investors.\textsuperscript{31} Euro Ratings, established in the early part of 1987, is the first credit rating agency set up exclusively to serve the Euromarkets.\textsuperscript{32} However, when pricing and buying issues, dealers and investors tend to rely more on "gut feelings" about the borrowers' creditworthiness than on formal independent assessments.\textsuperscript{33}

Most Eurobonds are listed on one or more major stock exchanges, usually the Luxembourg or London Stock Exchange.\textsuperscript{34} Payments on Eurobonds are made through banks located in the financial centers of Europe and the country of the currency in which the

\textsuperscript{24} See Grand-Jean, supra note 3, at 21.


\textsuperscript{26} Id. at 58-59.

\textsuperscript{27} Duffy, supra note 20, at 1.

\textsuperscript{28} See Chew, supra note 25, at 58. See also Appendix A, “Eurobond Offerings by Currency.”

\textsuperscript{29} See Comment, supra note 6, at 383.

\textsuperscript{30} Montagnon, Pragmatic Approach to City Rules, Financial Times, Oct. 27, 1986, § 3, at XXVI, col. 5.

\textsuperscript{31} Corporate Financing Week, Mar. 2, 1987, at 3, col. 2.

\textsuperscript{32} Id.

\textsuperscript{33} Nicoll, Europe Turns to Rating Agencies, Financial Times, Apr. 22, 1986, § 1, at 34.

\textsuperscript{34} Bloomenthal, Introduction, in 10 INTERNATIONAL CAPITAL MARKETS AND SECURITIES REGULATION § 1.02[5] (H. Bloomenthal ed. 1986).
bonds are denominated. A paying agent must be maintained in Luxembourg if the Eurobonds are listed on the Luxembourg Stock Exchange. There is also a liquid and well capitalized secondary market for Eurobonds. Some three-quarters of the annual 2.22 billion dollars secondary market turnover of Eurobonds passes through London.

By definition, the Eurobond market is an international market and thus beyond the regulatory domain of any one country. However, the rules and recommendations of the Association of International Bond Dealers (AIBD) and the International Primary Market Association (IPMA) provide a framework for self-regulation in the Eurobond market.

As the Eurobond market has matured, it has emerged as an outlet for innovation. The flexibility afforded by fewer regulatory restraints has allowed the market to move beyond its “plain vanilla” days toward the creation of various novel instruments. Importantly, the Eurobond market is developing additional practices as new issuers and investors access the market and as the internationalization of the world’s securities markets continues to evolve.

C. Eurobond Market Attractions

The various characteristics of the Eurobond market make it attractive to both investors and borrowers. Because the Eurobond market is an international market beyond the regulatory domain of any one country, it offers freedom from stringent and time-consuming preoffering registration requirements and other governmental regulation. As the identity of the beneficial owner of securities in bearer form or targeted registered form is not listed with a registration authority, issuance of such securities preserves the anonymity of the investor.

Interest payments on securities are made free of withholding taxes, and at certain times, the Eurobond market may provide lower overall costs for an issuer than are available in the domestic market because the issuer is able to raise funds quickly, flexibly, and with a minimum of noninterest expenses. In addition, the Eurobond

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35 Newman, Security Underwriting and Syndicated Loans, in International Banking Handbook, supra note 1, 204, at 211.
37 See Montagnon, supra note 30.
39 Beller and Berney, supra note 21, at 40 (for example, floating-rate notes, currency convertibles and commodity-linked bonds).
40 Id.
market may offer terms (both as to rates and maturity) preferable to terms available in the domestic market. Besides providing an additional source of funds, a borrower is able to establish an international reputation — important in a market where investors place primary importance on the reputation of the borrower.

D. International Bonds: Foreign Bonds and Eurobonds

International bonds are those issued by a borrower who is of a nationality different than the country of the capital market in which the bonds are issued. There are two types of international bonds: (1) foreign bonds; and (2) Eurobonds. A foreign bond is a bond issued in a single national market on behalf of a foreign borrower, usually underwritten and sold by a syndicate composed of financial institutions of the market country and denominated in the currency of the market country. The most important foreign bond markets are in the United States (Yankee bonds), Switzerland, Japan (Samurai and Shogun bonds) and Great Britain (Bulldog bonds). Since foreign bonds are denominated in the currency of the market country, they are subject to its national regulatory scheme, including registration and exchange control requirements.

A Eurobond is a bond underwritten by a multinational syndicate composed of financial institutions and is sold simultaneously in various national markets other than that of the country in whose currency it is denominated. A Eurobond may be denominated in the currency of the country of the issuer or in another major currency. Since the Eurobond market is an international market, Eurobonds are not subject to the national regulatory schemes of any one country. In other words, Eurobonds are insulated from the securities regulation of any one country and are not subject to any one country’s exchange controls.

II. Securities Law Issues Affecting the Eurobond Market

A. Securities and Exchange Commission Release No. 33-4708

The Securities Act of 1933 (the 1933 Act) is broadly written to require registration of any offering or sale of a security which involves the use of any means of interstate commerce, including commerce between the United States and any foreign country, and for

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42 Id.
43 Id.
44 Id. at 77.
45 Id. at 73.
46 Id. at 73-74.
47 Id. at 77.
which no exemption is specified in the 1933 Act.48 The issue of the applicability of the registration requirements of the 1933 Act to securities offered by domestic issuers to foreign purchasers was addressed in the early 1960s.

In 1963, as part of the program to reduce the U.S. balance of payments deficit and protect U.S. gold reserves, a Presidential Task Force on Promoting Increased Foreign Investment in United States Corporate Securities and Increased Financing for United States Corporations Operating Abroad (the Task Force) was appointed.49 In 1964 the Task Force produced the Fowler Report, which contained recommendations for actions by both the private sector and the government.50 Included in the Fowler Report was a recommendation that the Securities and Exchange Commission (the SEC) issue a release setting forth its position regarding the applicability of the 1933 Act to securities offered by domestic issuers to foreign purchasers, including dealers, and the application of the Securities Exchange Act of 1934 (the 1934 Act) to foreign underwriters participating in distributions of securities exclusively to nonresidents of the United States.51

On July 9, 1964, the SEC issued Release No. 33-4708 (Foreign Offering Release)52 to implement the recommendations of the Task Force detailed in the Fowler Report. The Foreign Offering Release stated that while the 1933 Act was broadly written to require registration of securities distributed with some nexus to the United States, the “registration requirements of Section 5 of the 1933 Act were primarily intended to protect American investors” and that the SEC would decline to take action:

for failure to register securities of United States corporations distributed abroad to foreign nationals, even though use of jurisdictional means may be involved in the offering . . . [as long as] the distribution is . . . effected in a manner which will result in the securities coming to rest abroad. . . . [I]t is immaterial whether the offering originates from within or without the United States, whether domestic or foreign broker dealers are involved and whether the actual mechanics of the distribution are effected within the United States, so long as the offering is made under circumstances reasonably designed to preclude distribution or redistribution of the se-

50 Report to the President From the Task Force on Promoting Increased Foreign Investment in United States Corporate Securities and Increased Foreign Financing for United States Corporations Operating Abroad (April 27, 1964).
51 Id.
52 Registration of Foreign Offerings by Domestic Issuers; Registration of Underwriters of Foreign Offerings as Broker-Dealers, SEC Act Release No. 33-4708, 17 C.F.R. § 231.4708 (July 9, 1964).
The Foreign Offering Release further provided that a foreign broker-dealer is exempt from the broker-dealer registration requirements of section 15(a) of the 1934 Act if the foreign broker-dealer: limits his activities to (1) taking down securities which he sells outside the jurisdiction of the United States to persons other than American nationals, and (2) participating solely through his membership in the underwriting syndicate in activities of the syndicate in the United States such as sales to selling group members, stabilizing, over allotment, and group sales, which activities are carried out for the syndicate by a managing underwriter or underwriters who are registered with the [SEC]... 

B. SEC No-Action Letters

The Foreign Offering Release did not define those "circumstances reasonably designed" to ensure that the securities would "come to rest abroad." Therefore, investment bankers and lawyers developed distribution procedures reasonably designed to preclude distribution or redistribution within, or to nationals or residents of, the United States of securities offered abroad by U.S. issuers without compliance with the registration requirements of the 1933 Act. 

Prior to 1974, the IET was a strong economic disincentive to purchases by U.S. investors of securities issued outside the United States. Securities offered by U.S. issuers to foreign purchasers carried a prominent legend warning purchasers of the applicability of the IET to purchases by U.S. persons. In addition to obtaining U.S. counsel's opinion and an SEC no-action letter that registration under the 1933 Act was not required since the securities would come to rest abroad, there was a contractual undertaking by underwriters and selling group members not to offer or sell any securities, offered by U.S. issuers to foreign purchasers, in the United States or to nationals or residents of the United States.

The importance of the IET to the SEC's no-action policy prior to 1974 was made clear when the procedures which had evolved to ensure that the securities would come to rest abroad were reassessed upon repeal of the IET effective June 30, 1974, thereby eliminating the economic disincentive to purchases by U.S. investors of securities issued outside the United States.

After the repeal of the IET, U.S. issuers put into effect a new pattern of distribution procedures designed to satisfy the standards of the Foreign Offering Release by ensuring that securities offered by U.S. investors to foreign purchasers... 

53 Id.
54 Id.
55 Pergam, supra note 49, at § 9.02[1](a), at 9-4.
56 Id.
57 Id. at 9-9.
58 Id.
 issuers to purchasers abroad would come to rest abroad and would not be distributed or redistributed within, or to nationals or residents of, the United States. 59

These distribution procedures were granted no-action treatment in a series of no-action letters first issued by the SEC in 1974. 60 The no-action letters detailed contractual provisions and related distribution procedures designed to ensure that the securities would be offered and sold only outside the United States to persons other than U.S. nationals or residents, thus satisfying the requirements for non-registration set forth in the Foreign Offering Release. 61

1. No-Action Letters Issued by the SEC in 1974

Two no-action letters issued in 1974, after the repeal of the IET, illustrate the specific restrictions placed on distributions of securities abroad to ensure that such securities offered without compliance with the 1933 Act would come to rest abroad. In Pacific Lighting Corporation, 62 the SEC took a no-action position regarding the proposed issuance of debentures in the Eurobond market without compliance with the registration requirements of the 1933 Act and without the qualification of the indenture under the Trust Indenture Act of 1939 (the 1939 Act), provided eight distribution procedures were followed. 63 The eight procedures, proposed by Pacific Lighting Corporation and designed to provide reasonable assurance that the securities would come to rest abroad in compliance with the Foreign Offering Release, included the following:

(a) The telex invitation to prospective underwriters or dealers

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59 Id. at 9-5, -9, -11. In particular, the following distribution procedures were adopted:

(a) The contractual undertakings by underwriters and selling group members barring offers and sales in the United States and to U.S. nationals or residents were strengthened to prohibit such sales, not only during the distribution period, but for a period of 90 days after completion of the distribution (the "90-day lock-up period"). Each retail purchaser received a written confirmation stating that it represented that it would not offer or sell the securities directly or indirectly within, or to nationals or residents of, the United States until the end of the 90-day lock-up period. Each dealer received a similar confirmation with additional language concerning use of a similar confirmation in connection with sales to retail purchasers.

(b) Underwriters and selling group members were required to confirm by telex to the managing underwriter that all securities allotted to them had been sold outside the United States and to persons other than nationals or residents of the United States.

(c) The securities would be issued in temporary form without interest coupons. The temporary securities could not be exchanged for definitive securities with interest coupons until 90 days after the managing underwriter advised in writing that the distribution was completed. In addition, the definitive securities would only be issued on receipt of a certificate to the effect that the beneficial owner was not a national or resident of the United States.

60 Id. § 9.02[1], at 9-8.

61 Id. at 9-6, -8.


63 Id.
was to state that the debentures were unregistered and were not to be offered or sold in the United States or to United States persons until [the end of the 90-day lock-up period].

(b) A memorandum of procedures was to be mailed to prospective underwriters responding to the invitation restating the warning in (a) and imposing contractual obligations "to include and confirm similar representations as to their own sales to purchasers." Purchaser-dealers were to be directed to make and confirm similar representations to their purchasers.

(c) There was to be an underwriting agreement provision requiring observation of the restrictions noted in (a).

(d) The lead underwriter was to require in its written confirmations of sale a written representation and agreement from dealers that they had not and would not offer or sell the securities in the United States or to United States persons during the distribution or during the 90-day lock-up period. Underwriters were additionally to agree to require such confirmations from dealers not in the selling group to which they sold, including a statement that such dealers should "make similar statements in their written confirmations to other dealers to whom they make sales."

(e) There was to be a "prominent legend in the offering statement to be used in Europe indicating" the restrictions noted in (a).

(f) The request for an all-sold telex to the lead underwriter was to contain a statement requiring each underwriter and each dealer in the selling group to confirm "that all debentures allotted" had been "sold outside the United States to persons other than United States persons."

(g) At closing, a temporary form of the debenture bearer certificates without interest coupons was to be delivered. This temporary certificate could be exchanged at the trustee's offices in Europe "for definitive coupons only (i) more than 90 days after the date when the lead underwriter advises the trustee the distribution has been completed and (ii) upon presentation of a certificate of non-United States beneficial ownership. Receipt of interest was to be contingent upon such representations having been received.

(h) Any public announcement of the offering by the underwriters or issues appearing in the United States would state that the debentures were unregistered and that "offers and sales in the United States or to United States persons prior to the completion of the distribution or the 90-day lock-up period, whichever is longer, may be in violation of United States law."

The SEC took a similar no-action position in The Singer Company, regarding Singer Company's proposed issuance (through a wholly-owned subsidiary) of guaranteed notes in the Eurobond market without compliance with the registration requirements of the 1933 Act and without the qualification of the indenture under the 1939 Act. The eight distribution procedures proposed by the Singer Company were similar in many respects to those summarized in the

64 Id.
Pacific Lighting Corporation no-action letter and were reasonably designed under the circumstances to preclude distribution or redistribution of the notes within or to nationals of the United States. 66

2. U.S. Sales Restrictions Today

The restrictions placed on the distribution of securities offered abroad by U.S. issuers without compliance with the registration requirements of the 1933 Act which exist today have changed little since those first granted no-action treatment by the SEC in 1974.67 The restrictions as they now exist can be summarized as follows: 68

(1) Each member of the underwriting or dealer syndicate of the offering signs an agreement contractually obligating it not to offer and sell securities it is acquiring as part of the distribution in the United States or to U.S. citizens, nationals or residents. Generally, the contractual restrictions further preclude such offers and sales of any of the securities being distributed, however they may be acquired (including through ordinary secondary market trading), during the ninety-day lock-up period;

(2) Once each member of the underwriting or dealer syndicate has sold its allotment, it is required to send the lead manager an "all-sold" telex advising that its allotment has been fully sold outside the United States and to non-U.S. persons;

(3) Each member of the underwriting or dealer syndicate agrees in writing to send to each purchaser to which it sells securities a confirmation in connection with such sale. If the purchaser is not a dealer, the confirmation will in effect state that, by purchasing the securities, the purchaser represents that it is not a U.S. person, that it is not purchasing for the account of any U.S. person, and that it will not sell the securities being so acquired to any U.S. person prior to the completion of the 90-day lock-up period. If the purchaser is a dealer, the confirmation is somewhat more elaborate and will state that, by purchasing the securities, the dealer represents (i) that it is not purchasing for the account of, or for resale to, any U.S. person, (ii) that it will not sell the securities so acquired prior to the completion of the 90-day lock-up period, (iii) that it will not sell any other such security, however acquired (including, again, through normal secondary market transactions), prior to the completion of the 90-day lock-up period, and (iv) that it will send to each purchaser to which it sells any of the securities the confirmation described in this sentence or the previous sentence, as appropriate;

(4) All marketing documents for the issue, particularly the offering circular or prospectus and the initial "invitation telex" to potential syndicate and selling group members, must refer to the restrictions on offers and sales in the United States and to U.S. persons;

(5) Generally, to ensure further that the ban on sales to U.S. persons is observed and that the securities have "come to rest" abroad, no definitive securities are issued initially. A single tempo-

66 Id. at ¶ 79,979.
67 Beller and Berney, supra note 21, at 43.
68 Id.
ratory global certificate representing the entire issue is delivered to a depository for Euro-clear and CEDEL, S.A. (CEDEL), the two European clearing systems for Eurobonds. Interests in the certificate are recorded on Euro-clear's and CEDEL's books in favor of their account holders and all trades in the securities prior to the end of the 90-day lock-up period are carried out through CEDEL and Euro-clear. Certification of nonbeneficial U.S. ownership is given by the record owners of interests in the temporary global certificate as shown in the records of Euro-clear and CEDEL.69

3. Completion of the Distribution

Every letter in which the SEC took a no-action position regarding the issuance of securities abroad without compliance with the registration requirements of the 1933 Act contemplated the use of the ninety-day lock-up period.70 The SEC, however, has never defined nor set forth guidelines for determining when a distribution may be deemed completed for purposes of commencing the ninety-day lock-up period.

Receipt by the lead manager of an "all-sold" telex from each member of the underwriting or dealer syndicate is only one factor to be considered by the lead manager in making a determination that the distribution is completed. The lead manager may want to conduct a further in-depth analysis of the trading in the securities to assure itself that the primary distribution has been completed.71

One type of security offered in the Eurobond market which has presented a complex question regarding completion of the distribution is a Eurobond with detachable warrants for another debt security of the same issuer. While the sales restrictions on the initial debt securities generally extend throughout the ninety-day lock-up period, the distribution of the securities underlying the warrants is generally deemed to continue until the exercise or expiration of all the warrants.72 As a result, the warrants remain in "locked-up" global form for the entire term and the underlying securities remain in "locked-up" global form until the exercise or expiration of all warrants.73 Prior to the exercise of the warrants, a certification must be given that neither the warrants nor the underlying securities will be beneficially owned by U.S. persons.74

The SEC, however, took a no-action position in Sears Overseas Finance N.V.,75 on the proposed issuance, without compliance with

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69 Id.
70 Id.
71 Id. at 43-44.
72 Id. at 44.
73 Id.
74 Id. at 44. See, e.g., Offering Circulars for Beatrice Companies, Inc. U.S. $100,000,000 12% Notes Due December 1, 1989 and 100,000 Warrants to Purchase U.S. $100,000,000 12-1/2% Notes Due December 1, 1991 (Nov. 19, 1984).
75 SEC No-Action Letter (May 12, 1982) (LEXIS, Fedsec library, Noact file).
the registration requirements of the 1933 Act, of guaranteed notes due in 1988 with attached warrants to purchase guaranteed notes due in 1990 even though all definitive securities (such as definitive securities for the 1988 notes and the 1990 notes) would be issued not earlier than the end of the ninety-day lock-up period for the 1988 notes and even though the warrant exercise period would extend beyond such period.

The SEC's no-action position was based upon two factors. First, the Commission adopted significant procedures designed to ensure that the 1988 notes and attached warrants would come to rest abroad and to minimize the chances that warrants issued in definitive form or securities obtained on the exercise of the warrants would be issued to U.S. persons. The distribution procedures given no-action treatment in the Singer Company no-action letter were adopted to ensure that the 1988 notes would come to rest abroad. Second, in order to issue definitive 1990 notes upon the exercise of the warrants and following the ninety-day lock-up period for the distribution of the 1988 notes, Sears Overseas Finance proposed certain additional procedures to prevent the 1990 notes from coming to rest in the United States or being sold to U.S. persons.

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76 Id.
77 Id. The additional procedures proposed were as follows:

(a) The warrants were to be issued in definitive form only to holders confirming nonbeneficial United States ownership under procedures identical to those set forth for the 1988 notes (i.e., delivery at the closing of temporary forms of bearer). Notes without coupons and of Warrants, exchangeable for definitive securities only (a) at least 90 days after the date the lead manager advised the Fiscal Agent that the distribution has been completed, and (b) upon presentation of certification of non-U.S. beneficial ownership.

(b) The warrants were to bear a legend stating that they were not registered under the Securities Act of 1933, were not to be offered to United States persons and were not to "be exercised by any such United States national or resident." Further, the warrants were to provide that they could be exercised only upon presentation of a Warrant Exercise Letter (see (c) below) through the office of Euro-Clear in Brussels or at the warrant agent's office in London.

(c) The Warrant Exercise Letter was to provide:

(i) that "none of the Warrants . . . exercised hereby is beneficially owned by" a United States person;

(ii) that the exerciser, if a dealer, agreed, if not a dealer, not to offer, sell or deliver in the United States or to United States persons prior to 90 days after distribution of the 1988 notes; and

(iii) that the exerciser, if a dealer, agreed and represented that it had not and would not offer, sell or deliver in the United States or to United States persons prior to 90 days after distribution of the 1988 notes, and agreed to deliver to purchasers upon exercise of the warrants a written confirmation stating that the notes had not been registered under the 1933 Act and that accordingly dealers and non-dealers agreed to comply with their respective duties as set forth in this paragraph.

(d) The 1990 notes were to be credited to holders' accounts or issued in definitive form only upon receipt of signed Warrant Exercise Letters.
A matter related to the issue of completion of the distribution concerns secondary trading in Eurobonds. Neither the Foreign Offering Release nor the SEC no-action letters issued since 1974 define when and under what circumstances reoffers and resales of securities initially offered abroad without compliance with the registration requirements of the 1933 Act may take place in the United States or to citizens, residents, or nationals of the United States. The SEC has declined to issue any “safe harbor” standards under which secondary trading may be conducted in the United States. In fact, in nearly every letter in which it has granted no-action treatment regarding such securities, the SEC has explicitly stated that such reoffers and resales must be made in compliance with the registration requirements of the 1933 Act or pursuant to an exemption therefrom.

The issuance of Eurobonds convertible into equity securities of U.S. issuers focuses attention on the issue of the applicability of the registration requirements of the 1933 Act to reoffers and resales of the securities obtained on conversion into the United States. Section 3(a)(9) of the 1933 Act, by its terms, appears to exempt the issuance of the equity instruments by a U.S. issuer on conversion of the debt instruments in cases where there is no solicitation or other unusual arrangements. Section 3(a)(9), however, exempts only the conversion transaction.

In addressing the issue of whether the securities obtained on conversion of the Eurobonds must be registered under the 1933 Act before they may be reoffered or resold into the United States or to U.S. persons, the SEC has applied a “seasoning” analysis. Under a seasoning analysis, reoffers or resales into the United States of the securities obtained on conversion would be subject to the same restrictions, or lack thereof, as applicable to the securities surrendered for conversion. Thus, the ability to offer and sell the securities obtained on conversion of the Eurobonds into the United States depends, in a large part, upon whether the originally offered securities surrendered for conversion (the convertible securities) could, at the time in question, be offered and sold in secondary trading in the

78 Beller and Berney, supra note 21, at 44.
79 Id. at 44-45. For example, such reoffers and resales may be exempt from registration pursuant to sections 4(1) or 4(3) of the 1933 Act if it can be demonstrated that the distribution is completed and the securities have in fact “come to rest” abroad.
80 Id. at 45.
81 Id.
82 Id.
In the American Motors Corporation no-action letter, the SEC took a no-action position on American Motors' plan to resell into the United States stock of American Motors Corporation obtained on conversion of Eurobonds without registration of the stock. In issuing its no-action position, the SEC noted American Motors' reliance on section 3(a)(9) of the 1933 Act and that the convertible bonds had been issued over 10 years earlier, that none of the holders of the bonds or shares were affiliates, and that "the amount of [s]hares involved [was] relatively small insofar as individual holders [were] concerned."

In K Mart (Australia) Properties Finance Limited, the SEC took a no-action position on the plan of K Mart to issue, without compliance with the registration requirements of the 1933 Act and in reliance on section 3(a)(9) of the 1933 Act, extended term debentures in exchange for unregistered trust debentures that had been offered and sold only outside the United States to non-U.S. persons. The SEC, however, declined to take a position "as to when or under what circumstances the securities may be reoffered and resold in the [United States]" or to United States persons, stating that the availability of an exemption "depends upon the facts and circumstances existing at the time of such reoffers or resales."

6. *Sales to U.S. Persons*

The restrictions on offers and sales of securities abroad made by U.S. issuers without compliance with the registration requirements of the 1933 Act prohibit offers or sales to "U.S. persons." "U.S. persons" is defined to include not only citizens, nationals and residents of the United States but also corporations, partnerships or other entities created or organized in or under the laws of the United States and estates or trusts the income of which is subject to U.S. federal income taxation, regardless of its source.

The SEC has recognized the following exception to this ban on sales to U.S. persons:

With regard to simultaneous private placements in the United States of a security being offered abroad, the Foreign Offering Release states that an issuer could privately place its securities in the United States concurrently with an offering of similar securities

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84 SEC No-Action Letter (June 8, 1982) (LEXIS, Fedsec library, Noact file).
85 Id.
87 Id.
88 Id.
89 Beller and Berney, supra note 21, at 46.
90 Id. at 43 n.15.
abroad without integrating the two offerings and thus without under-
cutting its ability to rely on the exemption from registration pro-
vided by Section 4(2) of the 1933 Act for "transactions by an issuer
not involving any public offering." 91 This principle has since been
reaffirmed by Preliminary Note 7 to Regulation D of the 1933 Act. 92
"It is now widely accepted that the Foreign Offering Release permits
the private offering in the United States (in registered form and with
appropriate restrictions) of a portion of a Eurobond offering." 93

In the simultaneous offering context, the most recent no-action
letter is Goldman, Sachs & Co. 94 The SEC took a no-action position
with respect to the plan of Goldman, Sachs and its London affiliate to
serve as lead managers of simultaneous offerings of unregistered,
fixed-rate, nonconvertible debt securities outside the United States
and to non-U.S. persons. Registered, publicly offered substantially
similar securities from the same issuers were to be offered in the
United States. 95

In reaching its no-action position, the SEC particularly noted (a)
that the Eurodollar offering procedures to be utilized to help ensure
that the distribution would come to rest abroad were consistent with
those procedures addressed in prior SEC no-action letters 96; (b) that
the documents and agreements did not permit the private placement
of a portion of the Eurodollar offering in the United States market;
(c) that the Eurodollar securities would be unavailable in registered
form until one year after completion of the distribution; (d) that the
"all-in" interest cost to the issuer in the Eurodollar market would not
exceed the "all-in" cost in the United States market; (e) that the in-
terest payments would be annual in the Eurodollar market but semi-
annual in the U.S. market; and (f) that separate underwriting
syndicates would be utilized for the transactions. 97

The SEC, however, expressed no opinion on "when or under
what circumstances the 'Eurodollar' notes [could] be otherwise reof-
fered and resold in the United States," 98 stating that such reoffers or
resales would require either registration under the 1933 Act or an
applicable exemption dependent "upon facts and circumstances ex-

91 Report, supra note 50.
92 Beller and Berney, supra note 21, at 46.
93 Id.
¶ 78,164 (June 5, 1985).
95 Id.
96 Id. These procedures include notification in the invitation telexes and offering cir-
culars of the restrictions on offers or sales within, or to nationals or residents in the United
States, contractual undertakings by managers, underwriters and selling group members to
observe such restrictions and deliver confirmations imposing similar restrictions on deal-
ers to whom they sell, and delivery at closing of a temporary global security in bearer form
without interest coupons exchangeable only ninety days after completion of the distribu-
tion as certified by the lead manager and upon certification as to non-U.S. beneficial
ownership.
97 Id.
98 Id.
isting at the time of such reoffers and resales.\textsuperscript{99}

The procedures utilized in the Goldman, Sachs no-action letter to ensure that the distribution would come to rest abroad and particularly noted by the SEC in issuing this no-action letter prevent the construction of a simultaneous offering of identical securities. The Goldman, Sachs securities had terms and offering procedures conventional for their respective markets and contained transfer restrictions in the invitation telexes, offering circulars and contractual undertakings by managers, underwriters and selling group members. In addition, the Eurodollar securities, unlike the U.S. securities, were to be available in registered form only one year after the completion of the distribution. Prior to that time, they were to be available only in bearer form containing a legend stating that any U.S. person holding such a bearer security would be subject to the limitations under the U.S. income tax laws, specifically the limitations provided for in section 165(j) and 1287(A) of the Internal Revenue Code.

In Intron, Ltd. Request for Interpretive Advice,\textsuperscript{100} the SEC discussed the issue of a simultaneous offering of securities in the United States and in the Euromarket. Intron wished to offer 125,000 dollars of its common stock in Utah and to offer another 125,000 dollars "to citizens and residents of Western Europe."\textsuperscript{101} Intron proposed to use the same disclosure document in Utah and in Europe. The subscription agreements for the foreign purchasers, however, were to provide representations that the purchasers were not citizens or residents of the United States and that they would not sell or transfer the shares until the end of the ninety-day lock-up period. The certificates for the shares sold to foreign persons were to bear legends prohibiting transfer for the ninety-day lock-up period and the transfer agent was to lodge stop-transfer instructions in the issuer's record.\textsuperscript{102} The SEC noted that Regulation D did not exempt any part of the offering from Rules 502(c) and 502(d) under the 1933 Act because "the proposed offering will not be made exclusively within states, each of which provides for registration and delivery of a disclosure document."\textsuperscript{103} However, the SEC noted that:

\begin{quote}
if the offers and sales in Utah are made in accordance with the state requirements for registration and delivery of a disclosure document, and if the offers and sales made to foreign investors are made in accordance with Release No. 33-4708, Rules 502(c) and 502(d) would not apply to the offering in Utah.\textsuperscript{104}
\end{quote}

The SEC took a no-action position in Scientific Manufacturing,

\textsuperscript{99} Id.
\textsuperscript{100} SEC No-Action Letter (Nov. 8, 1984) (LEXIS, Fedsec library, Noact file).
\textsuperscript{101} Id.
\textsuperscript{102} Id.
\textsuperscript{103} Id.
\textsuperscript{104} Id.
Inc. with respect to the plan of Scientific Manufacturing (SMI) to rely on the intrastate exemption under section 3(a)(11) of the 1933 Act and Rule 147 for a California offering while simultaneously offering the securities to investors in Hong Kong. SMI had stated in its no-action request that it intended, as to the offshore sales, to "require full compliance with Rule 147(e) and (f)," which pertain, respectively, to "Limitations of Resales" and "Precautions Against Interstate Offers and Sales." In taking its no-action position, the SEC stated that it "deem[ed] essential to [its] position" that SMI would "require full compliance with paragraphs (e) and (f) of Rule 147." The SEC, however, expressed no opinion "as to when and under what circumstances the securities sold in the foreign offering [could] be reoffered and resold in the U.S." or to U.S. persons. The SEC noted that such reoffers and resales would have to be registered or made pursuant to an exemption under the 1933 Act, the availability of which "would depend on the facts and circumstances" of the reoffers or resale.

The SEC has also taken no-action positions in the simultaneous offering context in the Williams Island Associates, Ltd. no-action letter, which involved a registered public offering of condominium securities made contemporaneously with an offering of condominium securities made outside the United States to non-U.S. persons, under circumstances where the securities in both offerings would be nontransferable until ninety days after the sale of all securities to the public, and in the Forrest Oil Corp. no-action letter, which involved a registered public offering of oil and gas limited partnership interests made contemporaneously with an offering of similar interests (although in a separate partnership participating to some extent in different oil and gas properties) made outside the United States to non-U.S. persons, where there was a 12-month prohibition on transfers of the limited partnership interests of the non-U.S. persons to U.S. persons.

(a) Sales to foreign branches of U.S. entities. The SEC has issued no-action letters regarding exemptions from the registration requirements of the 1933 Act and qualification of an indenture under the 1939 Act where securities were to be issued to foreign branches of

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106 Id.
107 Id.
108 Id.
109 Id.
110 Id.
112 SEC No-Action Letter (not dated) (LEXIS, Fedsec library, Noact file).
113 Id.
U.S. entities. In First Interstate Bancorp, the SEC took a no-action position with respect to First Interstate Bancorp's plan to offer and sell unregistered bearer notes to non-U.S. person banks, subject to certain procedures designed to preclude reoffer or resale of the notes in the United States or to U.S. persons. The procedures included the following: (1) limitations on the initial offer and sale of the notes and on delivery of and payment on the notes; (2) safeguards on subsequent transfer of the notes, including restrictions on transferability, a Form of Notice and Agreement to purchasers certifying that the purchaser belongs to one of the classes permitted by the limitations, restrictions on publication, a limitation on the offer or sale of participations to persons to whom the notes could be offered or sold, and payment of fees outside the United States; (3) a legend on the notes that the holder represents that it is not a U.S. person or acting for one and that any U.S. person holding the note is subject to certain tax limitations; and (4) limitations on assignment.

In Ford Motor Credit Company, the SEC took a no-action position with respect to Ford's proposed offering of debentures and medium-term notes in Canada without compliance with the registration requirements of the 1933 Act and the qualification of the indenture under the 1939 Act. Among the Canadian institutional investors expected to purchase the debentures were Canadian branches of insurance companies organized under the laws of the United States. With regard to sales of debentures to Canadian branches of U.S. insurance companies, the SEC particularly noted that:

"The investments by such entities would be made in Canada with Canadian dollars received from Canadian insurance policyholders by premium payments. You advise that pursuant to Canadian insurance laws, the Canadian branches of foreign insurance companies are required to deposit in Canada, in trust, securities payable in Canadian dollars in an amount at least equal to their actuarially determined liabilities to Canadian policyholders, and in all probability, Debentures or Notes purchased by the branches also would be so deposited . . . . [B]ranches and subsidiaries of foreign insurance companies invariably hold debt instruments to maturity, and, in any such event, resales would in all probability be made in a transaction..."

114 Beller and Berney, supra note 21, at 46-47.
117 SEC No-Action Letter (June 16, 1975) (LEXIS, Fedsec library, Noact file). Ford Motor Credit Company of Canada was a wholly owned Canadian subsidiary of Ford Motor Credit Company, a Delaware corporation, and the guarantor for the proposed offering.
118 Id.
with a Canadian investment dealer in Toronto or Montreal.\textsuperscript{119}

(b) Sales to U.S. fiduciaries, custodians or investment advisers. The SEC has taken a no-action position with respect to sales made nominally to U.S. entities under circumstances in which the beneficial owner of the securities issued abroad, without compliance with the registration requirements of the 1933 Act, would not be a U.S. person.\textsuperscript{120} U.S. entities (such as fiduciaries, custodians or investment advisers) acting without discretion and subject to the direction of their non-U.S. clients, are permitted to purchase Eurobonds in primary offerings on behalf of such clients.\textsuperscript{121}

In Baer Securities Corporation,\textsuperscript{122} the SEC took a no-action position with respect to the plan of Baer Securities Corporation (BSC), a registered broker-dealer and investment adviser, to acquire and maintain custody of securities offered and sold outside the United States without compliance with the registration requirements of the 1933 Act.\textsuperscript{123} The SEC based its no-action position on BSC's representation that adequate precautions would be taken to ensure that such unregistered securities would come to rest abroad.\textsuperscript{124}

7. Restrictions on Sales of Securities Offered by Non-U.S. Issuers and on Sales of Non-Dollar-Denominated Securities Issued in the Eurobond Market

Because of the growing internationalization of the securities markets, it may be necessary and appropriate to adopt some or all of the sales restrictions discussed above in certain circumstances in which securities are offered in the Eurobond market by non-U.S. issuers or in non-dollar-denominated currency.\textsuperscript{125}

The existence of a market in the United States for securities of a foreign issuer or for non-dollar-denominated securities would be a relevant factor in determining whether the sales and distribution procedures adopted for the foreign offering are reasonably designed to preclude the distribution or redistribution of such securities in the United States or to residents or nationals of the United States.\textsuperscript{126} A case-by-case analysis is appropriate in making a determination regarding the necessity and extent of such sales restrictions.

In Bank Leumi Le-Israel B.M.,\textsuperscript{127} the SEC declined to take a no-action position with respect to the plan of the Bank Leumi Le-Israel

\begin{footnotes}
\item[120] Beller and Berney, \textit{supra} note 21, at 46-47.
\item[121] Id. at 47.
\item[122] SEC No-Action Letter (not dated) (LEXIS, Fedsec library, Noact file).
\item[123] Id.
\item[124] Id.
\item[125] Beller and Berney, \textit{supra} note 21, at 48.
\item[126] Id. at 47.
\end{footnotes}
B.M. (the Bank) to offer unregistered securities of the Bank to non-U.S. financial institutions and non-U.S. customers of the Bank. The Bank intended to offer the securities to customers who were "present in the United States for purposes unrelated to the purchase of Bank securities" by providing such individuals with a copy of the offering circular. The certificates or instruments were to bear a legend stating that they could not be purchased or acquired by, or transferred to, citizens or residents of the United States. Each purchaser and subsequent transferee was to be required to state in writing that he or she was not a U.S. citizen or resident. In refusing to take a no-action position, the SEC stated that it considered the safeguards, designed to prevent an offering or distribution in the United States, inadequate. Because a market for some of the securities to be offered already existed in the United States, the possibility of widespread advertising of the offering abroad might attract large numbers of investors, and the absence of a minimum purchase restriction would limit the number of potential investors.

A case-by-case analysis would also be appropriate in determining the necessity of imposing sales restrictions on a U.S. issuer's offering of non-dollar-denominated securities in the Eurobond market. As with the offer of securities in the Eurobond market by a non-U.S. issuer without compliance with the registration requirements of the 1933 Act, a case-by-case analysis would be appropriate in determining the necessity and extent of sales restrictions on offers abroad by a U.S. issuer of non-dollar-denominated securities.

C. Internationalization of the Securities Markets and the Foreign Offering Release

In December 1986 the Williams Outline was submitted to the SEC. The Williams Outline, which sets forth proposals for a SEC release on the internationalization of securities markets, discusses significant developments in the securities markets since the Foreign Offering Release was issued over twenty years ago, identifies key elements of the Foreign Offering Release which remain valid, and makes specific proposals to update the Foreign Offering Release and SEC no-action letters issued since 1974 in order to deal with intervening developments in the international securities markets.

In February 1987, the SEC held a roundtable discussion on the internationalization of the securities markets. The SEC met with representatives from the United States and foreign markets, broker-
dealers, investment firms, and the securities bar as part of its ongoing study of the internationalization of the securities markets. On August 5, 1987, the SEC released to Congress its report on the internationalization of the securities markets.

### III. Tax Issues Affecting the Eurobond Market

To be marketable in the Eurobond market, securities should conform to the basic requirements of that market. For example, the securities should permit interest payments to be made free of withholding taxes and should afford investors anonymity through issuance of either bearer securities or targeted registered securities.

To satisfy these Eurobond market requirements, a United States issuer must comply with (1) the requirements imposed under the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA) on the issuance and ownership of "bearer obligations," (2) the requirements imposed under the Deficit Reduction Act of 1984 (DEFRA) for avoiding the thirty percent withholding tax on interest on most obligations, and (3) any applicable domestic information reporting and "backup withholding" tax requirements imposed by the Interest and Dividend Tax Compliance Act of 1983 (IDTCA).

#### A. TEFRA

The sections of the Internal Revenue Code of 1986 (the Code), as amended, that were created by section 310 of TEFRA are section 163(f) (denial of a deduction for interest on certain obligations not in registered form), and section 165(j) (denial of a deduction for losses on certain obligations not in registered form). These provisions and regulations thereunder impose certain requirements on the issuance of bearer securities to ensure that bearer securities were not sold to U.S. persons in connection with the initial distribution of securities.

TEFRA provides that securities may be issued in bearer form only if the securities are exempt from the category of "registration-
required obligations" as defined in section 163(f)(2)(A) of the Code. Section 163(f) of the Code and regulations thereunder disallow a deduction for interest paid on any registration-required obligation held after September 21, 1984, unless such obligation is in registered form.

Four types of obligations are exempt from the category of registration-required obligations. These include:

1. obligations "issued by a natural person";
2. obligations "not of a type offered to the public";
3. obligations with "a maturity (at issue) of not more than one year"; and
4. obligations which conform to the "Eurobond exception" to TEFRA described in section 163(f)(2)(B) of the Code.

The Eurobond exception to TEFRA's prohibition against the issuance of bearer securities provides that an obligation is exempt from the category of registration-required obligations if it satisfies the following conditions:

1. the securities are sold under arrangements reasonably designed to ensure that the securities will not be sold (or resold in connection with the original issue) to any U.S. person (other than qualified financial institutions);
2. the interest on the obligation is payable only outside the United States and its possessions;


The final Treasury regulations, issued in December, 1986, deleted the "Conversion Rule"; in other words, an obligation cannot be considered to be issued pursuant to "arrangements reasonably designed" to ensure sales to non-United States persons if, once the obligation is made payable to a named payee, the obligation may be made payable to bearer. See Treas. Reg. § 1.163-5(c)(1).

An exchange of one obligation for another is considered an original issuance if and only if the exchange constitutes a disposition of property for purposes of § 1001 of the Code. Treas. Reg. § 1.163-5(c)(2)(i).


(V) Interest payable outside of the United States. Interest will be considered payable only outside the United States and its possessions if payment of such interest can be made only upon presentation of a coupon, or upon making of any other demand for payment, outside the United States and its possessions to the issuer or a paying agent. The fact that payment is made by a draft drawn on a United States bank account or by a wire or other electronic transfer from a United States account does not affect this result. Interest payments will be considered to be made within the United States if the payments are made by a transfer of funds into an account maintained by the payee in the United States or mailed to an address in the United States, if—

(A) The interest is paid on an obligation issued by either a United States person, a controlled foreign corporation as defined in section 957(a) or a foreign corporation if 50% or more of the gross income of the foreign corporation from all sources in the three-year period ending with the close of its taxable year preceding the original issuance of the obligation (or for such part of the period that the foreign corporation has been in existence) was
(3) The following statement in English either appears on the face of the obligation and on any detachable coupon, or if the obligation is evidenced by a book entry, appears in the book or record in which the book entry is made: "Any United States person who holds this obligation will be subject to limitations under the United States income tax laws, including the limitations provided in Sections 165(j) and 1287(a) of the . . . Code."146

To satisfy the "arrangements reasonably designed" requirement under the Eurobond exception, the original issuance of an obligation must satisfy at least one of the three conditions described in Treasury Regulation section 1.163-5(c)(2)(i).147 These three conditions, set forth below, all require that the obligation be issued, sold, and delivered only outside the United States.148

One way to satisfy the arrangements reasonably designed requirement specifically links the U.S. tax laws with the U.S. securities laws by providing that the requirement will be satisfied if the issuer receives and relies in good faith on a written opinion of counsel that registration under the 1933 Act is not required because of the intended distribution of the obligation to foreign persons.149 In addi-

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147 Treas. Reg. § 1.163-5(c)(2)(i).
148 Id.
149 Id. § 1.163-5(c)(2)(i)(A).
tion, an issuer that is a controlled foreign corporation within the

(A) In connection with the original issuance of an obligation, the obligation is offered for sale or resale only outside of the United States and its possessions, is delivered only outside the United States and its possessions and is not registered under the Securities Act of 1933 because it is intended for distribution to persons who are not United States persons. An obligation will not be considered to be required to be registered under the Securities Act of 1933 if the issuer, in reliance on the written opinion of counsel received prior to the issuance thereof, determines in good faith that the obligation need not be registered under the Securities Act of 1933 for the reason that it is intended for distribution to persons who are not United States persons. Solely for purposes of this subdivision (i)(A), the term "United States person" has the same meaning as it has for purposes of determining whether an obligation is intended for distribution to persons under the Securities Act of 1933.

(B) The obligation is registered under the Securities Act of 1933, the obligation is exempt from registration by reason of section 3 or section 4 of such Act, or the obligation does not qualify as a security under the 1933 Act, and all the conditions set forth in paragraph (c)(2)(i)(B)(1), (2), (3), (4) and (5) are met with respect to such obligation.

(1) In connection with the original issuance of an obligation in bearer form, the obligation is offered for sale or resale only outside the United States and its possessions.

(2) The issuer does not, and each underwriter and each member of the selling group, if any, covenants that it will not, in connection with the original issuance of the obligation, offer to sell or resell the obligation in bearer form to United States persons other than financial institutions that provide a written statement that they will comply with section 165(j)(3)(A), (B), or (C) or the regulations thereunder.

(3) In connection with its sale or resale during the original issuance of the obligation, each underwriter and each member of the selling group, if any, or the issuer, if there is no underwriter or selling group, sends a confirmation to the purchaser of the bearer obligation stating that the purchaser represents that it is not a United States person or, if it is a United States person, it is a financial institution that will comply with the requirements of section 165(j)(3)(A), (B) or (C) and the regulations thereunder. The confirmation must also state that, if the purchaser is a dealer, it will send similar confirmations to whomever purchases from it.

(4) In connection with the original issuance of the obligation in bearer form, it is delivered in definitive form to the person entitled to physical delivery thereof only upon presentation of a certificate signed by such person to the issuer, underwriter or member of the selling group, which certificate states that the obligation is not being acquired by or on behalf of a United States person, or for offer to resell or for resale to a United States person or any person inside the United States, or, if a beneficial interest in the obligation is being acquired by a United States person, that such person is a financial institution or is acquiring through a financial institution and that the obligation is held by a financial institution that has agreed to comply with the requirements of section 165(j)(3)(A), (B) or (C) and the regulations thereunder. When a certificate is provided by a clearing organization, it must be based on statements provided to it by its member organizations. A clearing organization is an entity which is in the business of holding obligations for member organizations and transferring obligations among such members by credit or debit to the account of a member without the necessity of physical delivery of the obligation.

(5) The issuer, underwriter or member of the selling group does not have actual knowledge that the certificate described in paragraph (c)(2)(i)(B)(4) of this section is false. The issuer, underwriter or member of the selling group shall be deemed to have actual knowledge that the beneficial owner (other than a financial institution that represents that it will comply with the requirements of § 165(j)(3)(A), (B) or (C) and the regulations thereunder) is a United States person if the issuer, underwriter, or member of the selling group has a United States address for the beneficial owner and
meaning of section 957(a) engaged in the active conduct of a banking business outside the United States within the meaning of section 954(c)(3)(B) as in effect before the Tax Reform Act of 1986, and the regulations thereunder, can only satisfy the provisions of paragraph (c)(2)(i)(C) if it meets the requirements of paragraph (c)(2)(i)(C)(2), (3), and (4).\footnote{Id. § 1.163-5(c)(3)(i).}

Compliance with the arrangements reasonably designed requirement is determined on an obligation-by-obligation basis.\footnote{Id. § 1.163-5(c)(1).} A temporary global security is not required to satisfy the conditions set forth in the “Eurobond exception.”\footnote{Id. § 1.163-5(c)(1)(ii)(B).}

Section 165(j) of the Code and regulations thereunder disallows a deduction for any loss sustained on any registration-required obligation held after December 31, 1982, unless such an obligation is in registered form (or the issuance of such obligation was subject to tax under section 4701).\footnote{I.R.C. § 165(j) (1986).}

\section*{B. DEFRA}

As stated above, to be marketable in the Euromarket, securities must not only afford investors anonymity but also must permit interest payments to be made free of withholding taxes. Prior to DEFRA, U.S. income tax laws imposed a tax at the rate of thirty percent on interest from U.S. sources received by a nonresident alien individual or a foreign corporation, to the extent that such interest was not “effectively connected” with the conduct of a U.S. trade or business.\footnote{Comment, supra note 6, at 375, 379.} Exceptions to the thirty percent withholding tax included: (1) does not have clear and convincing documentary evidence that the beneficial owner is not a United States person OR

\(\text{(C)}\) The obligation is issued only outside the United States and its possessions by an issuer that does not significantly engage in interstate commerce with respect to the issuance of such obligation, either directly or through its agent, an underwriter or a member of the selling group. In the case of an issuer that is a United States person, such issuer may only satisfy the test set forth in this paragraph (c)(2)(i)(C) if:

\(\text{(1) It is engaged through a branch in the active conduct of a banking business, within the meaning of § 954(c)(3)(B) as in effect before the Tax Reform Act of 1986, and the regulations thereunder, outside the United States;}

\(\text{(2) The obligation is issued outside of the United States by the branch in connection with that trade or business;}

\(\text{(3) The obligation that is so issued is sold directly to the public and is not issued as a part of a larger issuance made by means of a public offering; and}

\(\text{(4) The issuer either maintains documentary evidence that demonstrates that the purchaser is not a United States person or that if it is other than an individual who is either a citizen or resident of the United States, that it will comply with section 165(j)(3)(A), (B) or (C) and the regulations thereunder.}\)
count on obligations with a term not exceeding six months, such as commercial paper, (2) all interest on bank deposits, including certificates of deposit, and (3) interest paid to a resident of a country having a tax treaty with the United States that reduced or eliminated the thirty percent withholding tax. These exceptions remain available today.

Section 127 of DEFRA added a new category of interest exempt from the thirty percent withholding tax, referred to as "portfolio interest." "Portfolio interest" is defined under sections 871(h) and 881(c) of the Code as interest paid (including original issue discount) on two types of obligations. The first is any obligation issued after July 18, 1984 (the effective date of DEFRA), in bearer form issued in compliance with the TEFRA "Eurobond exception" under section 163(f)(2)(B) of the Code. The second is any obligation in registered form with respect to which the person who would otherwise be the U.S. withholding agent has received a statement (the Certificate) that the beneficial owner of the obligation is not a U.S. person. The Certificate must be provided by the beneficial owner of the obligation or by a securities clearing organization (Euro-clear or CEDEL), a bank, or other financial institution that holds customers' securities in the ordinary course of its trade or business. Because of investor preference for anonymity in the Eurobond market, the alternative of issuing the obligation in bearer form is the most attractive in the context of Eurobond offerings.

An obligation is in registered form for purposes of sections 871(h)(2)(B) and 881(c)(2)(B) if:

1. the obligation is registered as to both principal and stated interest with the issuer (or its agent) and may be transferred only by surrender of the old instrument and either the reissuance by the issuer of the old instrument to the new holder or the issuance by the issuer of a new instrument to the new holder,
2. the right to the principal of and stated interest on the obligation may be transferred only through the book entry system maintained by the issuer (or its agent), or
3. the obligation is registered with the issuer (or its agent) as to both principal and any stated interest and may be transferred through the methods described in (1) and (2) above.

An obligation is not in registered form (bearer form) if the obligation may be transferred by any means other than a book entry, the

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155 Id. at 375, 376 & n.9.
157 I.R.C. §§ 871(h), 881(c). Section 127 of DEFRA added §§ 871(h) and 881(c) of the Code.
159 Id. §§ 871(h)(2)(B), 881(c)(2)(B).
160 Id.
surrender and reissuance of the obligation to the new holder, or the issuance of a new obligation to the new holder.\footnote{Id. § 5f.103-1(c)(2).} An obligation that is not considered to be in registered form at one point in time, however, is considered to be in registered form at a later time when it can be transferred only by one or more of the required methods.\footnote{Id. § 5f.103-1(c)(3).}

Temporary regulations under DEFRA provided that interest on an obligation did not qualify as "portfolio interest" for purposes of the repeal of the thirty percent withholding tax unless it was a "registration-required obligation" within the meaning of section 163(f)(2)(A) of the Code.\footnote{Qand A-1 of Temp. Treas. Reg. § 35a.9999-5(a), Qand A-1 (1984).} The latest temporary Treasury regulations delete this "registration-required obligation" requirement.\footnote{Temp. Treas. Reg. § 35a.9999-5.}

\section{C. IDTCA}


1. The payee fails to furnish a correct taxpayer identification number;
2. The Service notifies the payee that the taxpayer identification number is incorrect;
3. The Service notifies the payee that backup withholding should be commenced because the payee has failed to properly report interest, dividends or patronage dividends; or
4. When required to do so, the payee fails to certify, under penalties of perjury, that he is not subject to backup withholding.\footnote{I.R.C. § 3406(a)(1).}

Specifically, IDTCA requires issuers, paying agents and brokers to report tax identification numbers of payees of interest or dividends. If the tax identification numbers are not obtained and reported, "then the payor shall deduct and withhold from such payment a tax equal to twenty percent of such payment."\footnote{Id.}

The requirements in IDTCA are designed to improve compli-
ance with U.S. tax laws, and in particular, to ensure payment of taxes on interest and dividends without the need to impose an automatic ten percent withholding tax.

D. Treasury Regulation Section 35a.9999-5

Treasury regulation section 35a.9999-5, as amended, sets forth questions and answers relating to the repeal of the thirty percent withholding tax by section 127 of DEFRA and to the application of information reporting and backup withholding under IDTCA in light of such repeal.\textsuperscript{170}

A-9 of section 35a.9999-5 describes the form of the certificate which must be provided to a U.S. withholding agent in order for interest on a registered obligation to qualify as "portfolio interest" within the meaning of section 871(h)(2)(B) or section 881(c)(2)(B) of the Code.\textsuperscript{171}

An obligation that would otherwise be in registered form, except for the fact that it is convertible into bearer form, is considered to be in bearer form. Accordingly, the obligation must satisfy the conditions set forth in section 871(h)(i), section 881(c)(i) of the Code, and A-1 of section 35a.9999-5 in order for interest with respect to such bearer obligation to qualify as "portfolio interest."\textsuperscript{172}

A bearer obligation may be converted into a registered obligation that is subject to the A-9 certification requirements of section 35a.9999-5 or, if an interest payment meets the requirements of A-12 and the obligation is a "foreign-targeted registered obligation" under A-13 of section 35a.9999-5, that is subject to the certification requirements of A-14 of section 35a.9999-5.\textsuperscript{173}

An obligation that is sold (or resold in connection with its original issuance) only to foreign persons or foreign branches of U.S. financial institutions under procedures similar to those followed by U.S. issuers to comply with the arrangements reasonably designed requirement of TEFRA is known as a targeted registered obligation.\textsuperscript{174} If a registered obligation is known as targeted, interest may be paid without the twenty or thirty percent withholding tax so long as the withholding agent receives a statement of non-U.S. beneficial ownership and the obligation is registered to a foreign address in the

\textsuperscript{170} Temp. Treas. Reg. § 35a.9999-5.
\textsuperscript{171} Id. Q and A-1, Q and A-9.
\textsuperscript{172} Id. Q and A-18.
\textsuperscript{173} Id.
\textsuperscript{174} Temp. Treas. Reg. § 35a.9999-5(b), Q and A-12. Obligations issued by the U.S. government and U.S. government-owned or sponsored enterprises such as the Federal National Mortgage Association and the Student Loan Marketing Association and government-backed obligations may not be issued in bearer form. However, these obligations may be issued in the Eurobond market in "targeted registered" form. Treas. Reg. § 1.163-5(c)(1).
name of a holder that is a financial institution, such as a securities clearing organization, a bank, or any other financial institution that holds customer securities in the ordinary course of its business.\textsuperscript{175} The statement of nonbeneficial ownership only requires a notice, which must be signed by the financial institution and must provide its address. This notice must also state that the beneficial owner on any interest payment date is not a U.S. person (identification of the beneficial owner’s name, nationality, or address is not required).\textsuperscript{176} What this means in effect is that a targeted registered obligation can be registered in the name of a securities clearing organization, such as Euro-clear or CEDEL, and held anonymously.

The first temporary regulations under DEFRA provided that interest on an obligation did not qualify as “portfolio interest” for purposes of the repeal of the thirty percent withholding tax unless the obligation was a “registration-required obligation” within the meaning of section 163(f)(2)(A) of the Code.\textsuperscript{177} This excluded interest on obligations “issued by a natural person” (an individual).\textsuperscript{178}

The principal impact of this exclusion was on pass-through certificates.\textsuperscript{179} For example, the holder of a mortgage pass-through certificate was for tax purposes treated as acquiring an interest in the underlying obligations of the individual mortgagors. The interest on the pass-through certificate, therefore, did not qualify as “portfolio interest” for purposes of the repeal of the thirty percent withholding tax under DEFRA.\textsuperscript{180}

These temporary regulations were amended in 1985 to provide that pass-through or participation certificates (or evidence of interest in a similar pooled fund or trust) would be treated as “registration-required obligations,” regardless of whether any obligation held by the fund or trust (such as a mortgage) was a “registration-required obligation.”\textsuperscript{181}

Question and Answer 21 of section 35a.9999-5(e) provides that interest paid to a holder of a pass-through certificate will qualify as “portfolio interest” under section 871(h)(2) or section 881(c)(2) of the Code for purposes of the exemption from the thirty percent withholding tax if the interest is either paid on an obligation in bearer form that is issued in compliance with the TEFRA “Eurobond exemption” or on an obligation in registered form with respect to which the U.S.

\textsuperscript{176} Taylor, \textit{Eurodollar Offerings Since Repeal of the 30-Percent Withholding Tax}, 44 \textit{Inst. on Fed. Tax.} § 44.06[2], at 44-17.
\textsuperscript{179} Taylor, \textit{supra} note 176, § 44.03[2], at 44-7.
\textsuperscript{180} See id.
withholding agent has received a Certificate of nonbeneficial U.S. ownership.\textsuperscript{182}

For purposes of the repeal of the thirty percent withholding tax under DEFRA, a pass-through certificate will be considered as issued after July 18, 1984, only to the extent that the obligations held by the fund or trust to which the pass-through certificate relates are issued after July 18, 1984.\textsuperscript{183}

A mortgage pass-through certificate will be considered to have been issued after July 18, 1984, if all of the mortgages held by the fund or trust were issued after that date.\textsuperscript{184} Subject to certain specific exceptions discussed in A-22 of section 35a.9999-5(e),\textsuperscript{185} if some of the mortgages held by the fund or trust were issued after July 18, 1984, then the portion of any interest payment which represents interest on those mortgages will not be considered "portfolio interest."\textsuperscript{186}

\section*{E. Gross-Up and Tax Call Provisions}

Prior to the repeal of the thirty percent withholding tax, it was a practice in the Eurobond market for issuers of Eurobonds to agree to "gross-up," or make good any deficiencies as to payments of stated interest or principal resulting from the imposition of withholding taxes so that every payment on the obligations was made net of withholding tax.\textsuperscript{187} To protect itself against the possible increased cost of borrowing in the Eurobond market where such tax was imposed and the gross-up covenant invoked, the issuer would insist on having the right to call the issue, ordinarily with no premium.\textsuperscript{188}

Since the repeal of the thirty percent withholding tax, U.S. corporate issuers in the Eurobond market have continued to include a gross-up and tax call clause in the offering documents to deal with the backup withholding tax under IDTCA.\textsuperscript{189} Any backup withholding tax that is due because the holder failed to identify himself as a foreign person, however, is excluded from the gross-up clause.\textsuperscript{180} Thus, the issuers' gross-up obligation will not apply to a twenty percent backup withholding tax if the tax regulations are changed to require a foreign person to identify himself in order to avoid backup withholding. In this event, however, the issuer is required to call the issue at par.\textsuperscript{191}

\textsuperscript{183} \textit{Id}.
\textsuperscript{184} \textit{Id. Q and A-22.}
\textsuperscript{185} \textit{Id.}
\textsuperscript{186} \textit{Id.}
\textsuperscript{187} Taylor, supra note 176, §§ 44.01, 44.06[1][b], at 44-14.
\textsuperscript{188} \textit{Id.} at 44-15.
\textsuperscript{189} \textit{Id.}
\textsuperscript{190} \textit{Id.}
\textsuperscript{191} \textit{Id.}
Generally, with floating rate notes there is no mandatory call for a change in the backup withholding tax rules since such obligations are normally sold to institutional purchasers who would be prepared to identify themselves as foreign persons to avoid the twenty percent backup withholding.\textsuperscript{192} Similarly, there is no mandatory call for a change in the backup withholding tax rules in the case of non-interest-bearing (such as zero coupons) obligations.\textsuperscript{193} However, in the case of non-interest-bearing obligations, the holder may put the obligations to the issuer at an accredited redemption price in the event the backup withholding tax rules are changed to require the identification of the holder to avoid the twenty percent backup withholding tax.\textsuperscript{194}

IV. Marketing and Distribution of a Eurobond

A. Underwriting a Eurobond Issue

The underwriting of a Eurobond issue is usually accomplished through a traditional three-tier structure involving managers, underwriters, and a selling group.\textsuperscript{195} Two important features, however, distinguish the underwriting syndicates that market Eurobond issues: (1) the international character of the underwriting syndicates, and (2) the large size of the underwriting group relative both to the size of the issue and to the number of investors.\textsuperscript{196}

B. Principal Documentation for a Eurobond

The principal documentation in a Eurobond offering includes the offering circular, the underwriting agreement/subscription agreement (the underwriting agreement), the agreement among managers, the selling group agreement, the trust indenture (trust deed under English law) or fiscal agency agreement, the paying agency agreement, global bonds/notes, and definitive bonds/notes.\textsuperscript{197}

If the Eurobond issue is to be listed on a stock exchange (such as Luxembourg or London), the contents of the offering circular will be dictated by the specific requirements of the stock exchange.\textsuperscript{198} The underwriting agreement contains certain "market out" clauses tai-
lored to the Eurobond market. The selling group agreement should detail the restrictions on offers or sales of the bonds in the United States or to U.S. persons in order to ensure compliance with U.S. securities laws.

Securities may be issued in the Eurobond market pursuant to a trust indenture or a fiscal agency agreement. The trustee appointed in a trust indenture represents and protects the interest of the bondholders as a class, while a fiscal agent performs limited functions as agent for the issuer and has no duties vis-a-vis the bondholders. The paying agency agreement should provide for at least one paying agent in the country where the bonds are listed on a stock exchange and should state that no payment with respect to the bonds will be made in the United States, or by transfer to an account or by mail to an address in the United States, except as may be permitted by U.S. tax laws and regulations in effect at the time of such payment.

Generally, during the ninety-day lock-up period, the bonds /notes will be represented by a single temporary global bond/note in bearer form without interest coupons. The global bond/note will be deposited with a common depository for Euro-clear and CEDEL. All trade in the bonds/notes prior to the end of the ninety-day lock-up period is carried out through Euro-clear and CEDEL.

The definitive bond/note should bear the following legend: "Any United States person who holds this obligation will be subject to limitations under the United States income tax laws, including the limitations provided in sections 165(j) and 1287(a) of the Internal Revenue Code." If the bonds/notes are listed on the Luxembourg Stock Exchange, bearer securities must be printed in accordance with the requirements of the Luxembourg Monetary

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199 INTERNATIONAL FINANCIAL LAW, supra note 197, at 58 n.27. For example, the underwriting agreement may contain the following clause: "The Managing Underwriters may at any time before the Closing Date terminate this Agreement by notice to the Issuer if in the opinion of the Managing Underwriters there shall have been a change in national or international financial, political or economic conditions or currency exchange rates or exchange controls which would be likely to prejudice materially the success of the placement of the Bonds, and upon such notice being given the parties hereto shall be released and discharged from their obligations hereunder." Id.

200 Id. at 58.

201 See Pergam, Choosing Between the Trustee and the Fiscal Agent, INT'L FIN. L. REV. 8 (Sept. 1985).

202 Id.

203 See supra note 199, at 58.

204 Beller and Berney, supra note 21, at 43 n.18.

205 Id.

206 Id.

C. Stock Exchange Listing of Eurobonds

Most Eurobonds are listed on one or more major stock exchanges, usually the Luxembourg or London Stock Exchange. While there is no requirement that Eurobonds be listed on a stock exchange, listing is undertaken for a number of reasons. If the issuer wants the bonds to reach a large number of investors, it is advantageous to list the bonds on a stock exchange. Listing Eurobonds on a stock exchange also enlarges the number of investors to whom the bonds can be sold. Some institutional investors (such as pension funds and insurance companies) are not permitted to buy, or are restricted on the amounts they may buy, of unlisted bond issues. Since a stock exchange listing guarantees investors that certain minimum reporting and financial standards will be met by the borrower throughout the life of the bond issue, marketability of the bonds may be greatly improved.

There are some disadvantages associated with a listing on a stock exchange. The issuer must comply with the stock exchange disclosure requirements and is subject to continuing stock exchange obligations (for example, to provide new and relevant information regarding the issuer). Since most stock exchanges require listing information to be submitted in advance of the issue or may impose a waiting period prior to issuing the securities, listing on a stock exchange may impede the issuer's ability to time an issue to coincide with the most favorable market conditions. Another disadvantage with listing is that most stock exchanges require a paying agent to be located within their jurisdictions.

The listing application for the London Stock Exchange is filed by a London broker, while the listing application for the Luxembourg Stock Exchange is filed by a Luxembourg agent bank. The cost of listing on the Luxembourg Stock Exchange is generally lower, and the listing requirements and procedures generally less cumbersome than on the London Stock Exchange. At times, nearly seventy percent of all Eurobond issues are listed on the Luxembourg Stock Exchange.

209 Bloomenthal, supra note 34, § 1.02[5], at 1-18.
210 P. Wood, supra note 36, § 9.03[1]. In addition, exchange controls may limit investment in unlisted securities.
211 Id.
212 Id.
213 Id.
214 Id. § 9.03[2].
215 See Pergam, supra note 49, at § 9.02[7](a), (b).
216 Id.
The documents generally required to accompany a listing application may include some or all of the following: (1) the preliminary and final offering circular; (2) the prescribed number of previous annual reports; (3) the underwriting agreements, the trust indenture, the financial and paying agency agreement, and the issuer's authorizing resolutions; (4) exchange control consents; (5) legal opinions, auditors' report, auditors' comfort letter and consents; (6) the form of security; (7) newspaper advertisements; and (8) a listing undertaking if required.\(^{217}\)

V. Eurobond Market Regulation

The Eurobond market, an international market beyond the regulatory domain of any one country, has flourished for twenty years without any direct regulation.\(^{218}\) When new issue and secondary market volume reached all-time highs in the mid-1960s, however, it became clear that the market would benefit from self-regulation.\(^{219}\) The Eurobond market developed—and is still developing—its own disciplines in underwriting, market-making, and brokering.\(^{220}\)

Self-regulation in the Eurobond market is provided by AIBD,\(^{221}\) which today represents 800 members comprising all the important European banks and financial institutions active in the international capital markets in both the primary and secondary sectors, as well as a significant number of member firms from North America, the Middle and Far East, and the Pacific Basin, and by IPMA, which represents Eurobond issuing houses.\(^{222}\)

AIBD was founded in 1969 as a trade association to provide self-regulation and cooperation among its members in all matters affecting transactions in international securities.\(^{223}\) The statutes, bylaws, rules, and recommendations of AIBD are designed to introduce greater stability and order in the Eurobond market. AIBD is governed by a board which delegates its day to day activities to an executive committee. A permanent secretariat for AIBD was established in 1976.\(^{224}\) Today, AIBD has offices in both Zurich and in London.\(^{225}\)


\(^{219}\) Perry, supra note 38, at 2.


\(^{221}\) See ASSOCIATION OF INTERNATIONAL BOND DEALERS, RULES AND RECOMMENDATIONS (1986).

\(^{222}\) ASSOCIATION OF INTERNATIONAL BOND DEALERS, AN INTRODUCTION 4 (1986).

\(^{223}\) Id. at 3.

\(^{224}\) Id. at 5.

\(^{225}\) Id. The main secretariat is located in Zurich and London houses AIBD's computer center.
The basic aims of AIBD are as follows: (1) to study and resolve technical problems affecting the market; (2) to implement and enforce rules governing the orderly functioning of the market; (3) to encourage improvements in international capital markets; and (4) to enhance relations between its members and with related national and international markets.\(^{226}\)

AIBD also provides information and guidance to governments and international authorities concerned with international capital market activity, represents the interests of its members with respect to fiscal and regulatory problems affecting the market, and informs and advises its members on the implications of new regulations or taxes.\(^{227}\) AIBD maintains close contact with the two international clearing systems (Euro-clear and CEDEL) which are responsible for handling the bulk of the settlements of international bond transactions.\(^{228}\)

IPMA, a self-regulatory association\(^{229}\) based in London and founded under the laws of the United Kingdom, is governed by a sixteen-member board. IPMA split off from AIBD in 1985 to set its own code of conduct for underwriters.\(^{230}\)

VI. Regulation, “Big Bang” and the Financial Services Bill

The City of London (the City) has been the center of the Eurobond market since its inception in the early 1960s.\(^{231}\) The original attraction of the City to the Eurobond market was that it imposed only very limited regulatory constraints. Recent reforms and regulatory developments affecting the City’s financial services markets, however, are placing some of the Eurobond market’s cherished freedoms under fire.\(^{232}\)

On October 27, 1986, “Big Bang Day” (Big Bang), the London stock market took its biggest step to date toward redesigning its financial markets to make the City more attractive as a global capital market.\(^{233}\) Big Bang ended the longstanding scale of fixed minimum broker commissions dating from 1912, opened membership on the London Stock Exchange, deregulated the lucrative gilts market (U.K. government fixed-interest stock), and introduced “dual capacity.”\(^{234}\) Prior to Big Bang, the City operated under the “single ca-

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\(^{226}\) Id. at 6.

\(^{227}\) See id.

\(^{228}\) See supra notes 160, 205-06 and accompanying text.

\(^{229}\) See supra notes 160, 205-06 and accompanying text.

\(^{230}\) See supra notes 160, 205-06 and accompanying text.

\(^{231}\) See supra notes 160, 205-06 and accompanying text.

\(^{232}\) See supra notes 160, 205-06 and accompanying text.

\(^{233}\) See supra notes 160, 205-06 and accompanying text.

\(^{234}\) See supra notes 160, 205-06 and accompanying text.

\(^{235}\) See supra notes 160, 205-06 and accompanying text.
pacity rule," which separated brokers who bought and sold shares for investors from the jobbers (market makers who bought and sold a particular company's securities continuously). 235

To provide a comprehensive regulatory structure for the City's financial services markets after the deregulation and reform brought about by Big Bang, the British Parliament passed the Financial Services Act in 1986 (the Act). 236 The Act provides that no person may carry on, or purport to carry on, an investment business in the United Kingdom unless such person is authorized by an officially designated self-regulatory organization (SRO). This prohibition includes the international firms carrying on an investment business in the United Kingdom which heretofore had no reason to submit themselves to domestic regulation. 237

Under the Act, the Securities and Investment Board (the SIB), the umbrella regulatory body, is empowered to supervise and approve methods and rule books of the five officially designated SROs. 238 Each SRO controls a particular facet of the City's financial services markets and is responsible for authorizing firms to carry on investment business. 239

One major SRO, known as the Securities Association, resulted from a merger in 1986 of the International Securities Regulatory Association (ISRO) and the London Stock Exchange. 240 At the time of the merger, ISRO had nearly 200 members, largely composed of AIBD and IPMA members. 241 The Securities Association is responsible for authorizing any firm—and subsequently monitoring its capital adequacy—wishing to act in the United Kingdom's securities markets, whether domestic or international. 242 While the Securities Association is responsible for authorization, a new Recognized Investment Exchange (RIE), known as the International Stock Exchange of the United Kingdom and Republic of Ireland (the International Stock Exchange), will set rules for trading in London of gilt-edged securities and domestic and international equities, as well as the London Stock Exchange's traded options market. 243 While the rules of the International Stock Exchange will not regulate trading in Eurobonds, the Securities Association will authorize its

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235 Id.
237 Id. at 24.
239 See McCormick, supra note 239, at 25.
241 See McCormick, supra note 236.
242 Id.
243 Id.
members to trade in the Eurobond market in London.\textsuperscript{244} The AIBD expected to be recognized as the RIE which would set rules for and oversee trading in Eurobonds.\textsuperscript{245} Because of opposition from many Eurobond firms, the SIB has agreed that the AIBD should become a "designated investment exchange" on a par with the New York Stock Exchange. As an international organization with some members who conduct business in London, many feared being subjected to United Kingdom law. As a RIE the AIBD would have had to open a head office in Britain.\textsuperscript{246} As a "designated investment exchange," AIBD's rules, for example, will regulate the reporting of prices and establish minimum requirements for being labeled a market maker (traders who buy and sell a particular company's securities continuously).\textsuperscript{247} As the outgoing Chairman of AIBD stated, "self-regulation is all the more important if we want to avoid the heavy hand of the authorities themselves."\textsuperscript{248} Assuming AIBD is recognized as a Designated Investment Exchange, investment firms authorized by the Securities Association which trade in Eurobonds will be subject to AIBD's rules.\textsuperscript{249}

In addition to drafting rules for trading in Eurobonds which satisfy the investor protection requirements of the Act, AIBD, if it wishes to become a Designated Investment Exchange, will have to satisfy the requirements for public accessibility to price information and increase the transparency of the Eurobond market.\textsuperscript{250} As a step toward this end, the AIBD drafted secondary market rules which took effect January 2, 1987.\textsuperscript{251} Under these secondary market rules, reporting dealers must report closing bid and offer prices on all bond issues in which they are making markets.\textsuperscript{252} In March of 1987, AIBD rules required dealers to disclose each day the highest and lowest prices at which they dealt during that day.\textsuperscript{253} In addition, the AIBD proposed a computerized, screen-based trading support system dubbed Association of International Bond Dealers Automatic Quotation System (AIBDQ), which would provide for bond negotiations from reporting dealers making markets in Eurobonds.\textsuperscript{254} The AIBDQ is similar to the Stock Exchange Automatic Quotation System (SEAQ), which was initiated with Big Bang on the London Stock

\textsuperscript{244} See Tying Down the Euromarkets, \textit{The Economist}, Apr. 25, 1987, at 73.
\textsuperscript{245} Nicoll, \textit{supra} note 240, at 33, col. 4.
\textsuperscript{246} \textit{Euromarket Regulation}, \textit{The Economist}, May 16, 1987, at 86.
\textsuperscript{247} See Perry, supra note 38, at 2.
\textsuperscript{251} \textit{Id.} at col. 2.
\textsuperscript{252} \textit{Id.}
\textsuperscript{253} \textit{Id.}
\textsuperscript{254} Duffy, \textit{supra} note 218, at 1.
Exchange and draws heavily on the United States over-the-counter model, National Association of Securities Dealers Automatic Quotation System (NASDAQ), operated by the National Association of Securities Dealers. The proposal for AIBDQ was to be voted on by AIBD members at the group's annual meeting in Oslo, Norway on May 22, 1987. However, it was tabled by the AIBD even before its annual meeting due to strong opposition from AIBD members. AIBD members, however, approved plans for a computer-based trade confirmation system dubbed "TRAX" (an on-line transaction exchange) which will monitor thousands of Eurobond deals a day. TRAX, which is intended to be complimentary to a computerized trade matching system being developed by Euro-clear and CEDEL, is expected to begin operations in late 1988.

VII. Conclusion

The expansion of the Eurobond market in recent years has occurred at a rate that few of its participants could have imagined twenty years ago.

As this prototype for the global capital marketplace continues to develop, new and unique instruments will be created and conventional Eurobond practices will be reviewed and reconsidered in light of the changing landscape of the marketplace. The market, which has been so successful in attracting nations, multinational corporations, and international agencies wishing to raise funds outside their own boundaries, is moving toward greater centralization in London under Britain's new Financial Services Act. As a result, lawyers, international trade associations, and self-regulatory organizations are expressing a need for SEC clarification of the Foreign Offering Release, which is over twenty years old.

The Eurobond market should continue to be an effective capital raising mechanism and should continue to be one of the world's major sources of funds.

\[255\] *Id.*

\[256\] *Id.*


\[259\] *Id.*
## Appendix A

### Eurobond Offerings By Currency

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## Appendix B

### TOP 20 EUROBOND LEAD MANAGERS

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<td>$bn</td>
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<tr>
<td>Merrill Lynch</td>
<td>5.971</td>
<td>9 3.3</td>
<td>7.925</td>
<td>2 5.9</td>
</tr>
<tr>
<td>Nikko Securities</td>
<td>5.141</td>
<td>10 2.8</td>
<td>1.817</td>
<td>25 1.4</td>
</tr>
<tr>
<td>Union Bank of Switzerland</td>
<td>4.874</td>
<td>11 2.7</td>
<td>3.377</td>
<td>9 2.9</td>
</tr>
<tr>
<td>Yamaichi Securities</td>
<td>4.440</td>
<td>12 2.4</td>
<td>2.243</td>
<td>20 1.7</td>
</tr>
<tr>
<td>Shearson Lehman Brothers</td>
<td>4.137</td>
<td>13 2.3</td>
<td>2.493</td>
<td>15 1.9</td>
</tr>
<tr>
<td>Goldman Sachs</td>
<td>3.621</td>
<td>14 2.0</td>
<td>5.410</td>
<td>7 4.0</td>
</tr>
<tr>
<td>Societe Generale</td>
<td>3.109</td>
<td>15 1.7</td>
<td>2.090</td>
<td>21 1.6</td>
</tr>
<tr>
<td>Industrial Bank of Japan</td>
<td>3.034</td>
<td>16 1.7</td>
<td>0.870</td>
<td>34 0.6</td>
</tr>
<tr>
<td>Swiss Bank Corp.</td>
<td>2.886</td>
<td>17 1.6</td>
<td>2.547</td>
<td>14 1.9</td>
</tr>
<tr>
<td>S.G. Warburg</td>
<td>2.788</td>
<td>18 1.5</td>
<td>2.399</td>
<td>17 1.8</td>
</tr>
<tr>
<td>Commerzbank</td>
<td>2.713</td>
<td>19 1.5</td>
<td>2.548</td>
<td>13 1.9</td>
</tr>
<tr>
<td>LTCS of Japan</td>
<td>2.553</td>
<td>20 1.4</td>
<td>0.825</td>
<td>36 0.6</td>
</tr>
</tbody>
</table>

| Industry Totals         | 182.651 | 1,623 | 134.512 | 1,366 |

### APPENDIX C

Sample Timetable for a Listed Eurobond Issue.

<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>“D” Day − 14</td>
<td>— Initial meeting to discuss documentation and terms.</td>
</tr>
<tr>
<td></td>
<td>— Begin preparation of draft offering circular, underwriting agreement, selling group agreement, trust indenture/fiscal agency agreement and other documentation.</td>
</tr>
<tr>
<td>“D” Day − 7</td>
<td>— Check availability of: (a) issuer’s authorizations; (b) any exchange control consents; (c) any official timing consent (e.g., Bank of England consent for British pound sterling issues); and (d) any tax clearances.</td>
</tr>
<tr>
<td></td>
<td>— Deliver listing application to stock exchange (through broker or other appointed agent) plus required draft documentation.</td>
</tr>
<tr>
<td></td>
<td>— Lead manager/issuer obtains agreement of co-managers, trustee (or fiscal agent) and paying agents to act as such.</td>
</tr>
<tr>
<td></td>
<td>— Lead manager obtains clearing system reference numbers from Euro-clear and CEDEL.</td>
</tr>
<tr>
<td></td>
<td>— Lead manager sends invitational telex to prospective underwriters and selling group members setting out brief terms of issue (except subscription price and coupon) and summary of issuer’s business and accounts.</td>
</tr>
<tr>
<td></td>
<td>— Lead manager dispatches to underwriters and selling group:</td>
</tr>
<tr>
<td></td>
<td>(a) preliminary offering circular;</td>
</tr>
<tr>
<td></td>
<td>(b) form of underwriting agreement and selling group agreement; and</td>
</tr>
<tr>
<td></td>
<td>(c) delivery instruction forms for delivery of definitive bonds.</td>
</tr>
</tbody>
</table>
"D" Day +4  — Underwriters telex acceptance to lead manager; selling group telexes indications of interest.

"D" Day +8  — Executed underwriting and selling group agreements returned to manager.
              — Stock exchange grants listing (usually conditionally). Grant is sometimes effective immediately before the closing.

"D" Day +9  — Pricing meeting.
              — After pricing, managers telex terms to underwriters.

"D" Day +11  — Lead manager receives telex acceptances from underwriters.
               — Agreement among managers signed.
               — Underwriting agreement signed by issuer and managers.
               — Final offering circular distributed.
                 Any material changes from preliminary offering circular should have been notified by telex to underwriters before they contract.
               — Managers send allotment telex to selling group.

"D" Day +26  — Selling group members telex acceptance of allotments.
              — Selling group returns delivery instruction form.
              — Trust indenture/fiscal agency and paying agency agreements signed.
              — Confirmation of listing.

"D" Day +27  — Closing payment by selling group into lead manager’s subscription account in New York or through Euro-clear or CEDEL.
               — Delivery of conditions precedent documentation.
               — Delivery of temporary global bond by issuer to custodian to be recorded on Euro-clear’s and CEDEL’s books.
               — Lead manager transfers proceeds of subscription to issuer and cross-receipt signed.

After "D" Day +27  — Publication of tombstone.
               — Security printing of bonds.
If there is a 90-day lock-up period, then after the issue has "come to rest," managers request "all sold" telexes from the selling group.

Definitive bonds are issued. If there is a 90-day lock-up period, then the definitive bonds are issued not earlier than 90 days after completion of the primary distribution against certificates of non-U.S. beneficial ownership.