REPORT # 587

TAX SECTION

New York State Bar Association

Report on Regulation S

by a subcommittee from

The Committee on Foreign Activities of U.S. Taxpayers,
The Committee on Financial Institutions and
The Committee on U.S. Activities of Foreign Taxpayers

August 11, 1988

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The Honorable O. Donaldson Chapoton
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for Tax Policy
U. S. Treasury Department
1500 Pennsylvania Avenue, N.W.
Washington, D. C. 20220

The Honorable Lawrence B. Gibbs
Commissioner of Internal Revenue
Internal Revenue Service
1111 Constitution Avenue, N.W.
Washington, D. C. 20224

Regulation S

Dear Sirs:

I enclose the report of a special, ad hoc subcommittee of the Tax Section of the New York State Bar Association concerning Regulation s, as recently proposed by the Securities and Exchange Commission ("SEC"). The principal draftsman of the report was Cynthia G. Beerbower.

Regulation S updates and revises registration requirements under the Securities Act of 1933 applicable to international capital market transactions. The SEC has invited comments on Regulation S. Because Regulation S will impact the Treasury regulations under Section 163(f)(2)(B)(1) of the Internal Revenue Code, we believe that the Treasury and Internal Revenue Service should comment on it, and our Report makes suggestions as to those comments.

The report recommends that the Treasury and Internal Revenue Service vigorously advocate to the SEC that it modify the definition of "U.S. person" in Regulation S as it relates to registration requirements for bearer obligations, so as to conform with the existing tax definition. Otherwise, the subcommittee recommends the adoption and use of the Regulation S procedures as the test for determining whether arrangements for the issuance of bearer obligations can be "reasonably designed" to prevent their sales to U.S. persons and the combination of the current, so-called "A Rules" and "B Rules" into a single set of rules based upon the Regulation S procedures.

The approach of the subcommittee has been premised upon recognition of significant advantages to be obtained from continued consistency between the securities laws and tax laws applicable to these transactions, as long as such consistency can be obtained without conflicting with tax policy.

We hope that this report will be of assistance to you.

Very truly yours,

Herbert L. Camp V

Encl.

Copy w/encl. to Dennis E. Ross, Esq.,
Deputy Assistant Secretary
for Tax Policy
Leonard B. Terr, Esq.,
International Tax Counsel
Peter Daub, Esq.,
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Office of International
Tax Counsel

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This Report, by an ad hoc subcommittee formed with representatives from the Committee on Foreign Activities of U.S. Taxpayers, the Committee on Financial Institutions and the Committee on U.S. Activities of Foreign Taxpayers,[1]/ comments on Regulation S[2]/ and its relationship to Internal Revenue Code Section 163(f)(2)(B)(1)[3]/ and the regulations promulgated thereunder.

Introduction

On June 14, 1988, the Securities and Exchange Commission ("SEC") published for comment Regulation S, a comprehensive

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1/ This subcommittee was composed of Cynthia G. Beerbower, who was the principal draftsman, S. Douglas Borisky, Paul M. Butler, John A. Corry, Anne A. Crovitz, Stephen L. Gordon, L. Anthony Joseph, Jr., Kenneth S. Kail, Emily S. McMahon, Robert J. McDermott, Mary Procida, Kevin Rowe, R.J. Ruble, Leslie B. Samuels, Esta Eiger Stecher, John M. Sykes, Suzanne Sykora and Willard B. Taylor. Helpful comments were received from William L. Burke

2/ Securities Act Release No. 6779 (June 10, 1988).

3/ All section references contained herein are to the Internal Revenue Code of 1986 and the Treasury regulations promulgated thereunder, unless specified otherwise.

proposal concerning the application of the registration requirements of the Securities Act of 1933 (the "193 3 Act") to international capital market transactions. Regulation S is intended to supersede the rules set forth in Securities Act Release No. 4708, issued in 1964 ("Release 4708"), and related SEC staff no-action letters. In making this proposal, the SEC reviewed its prior pronouncements and those of its staff regarding the application of the 1933 Act to international capital market transactions in light of the very significant increase in the volume of such transactions and the resulting developments in market practices and procedures during the 24-year period since Release 4708 was promulgated.

Certain of the changes proposed by Regulation S concerning the scope of the registration requirements and the procedures for registration-exempt offerings under the 1933 Act[4]/ affect the current regulations promulgated by the Internal Revenue Service (the "IRS") under Section 163(f). That Section, together with Sections 4701 and 312(m), imposes sanctions on issuers of otherwise "registration-required" obligations in bearer form unless such obligations are issued pursuant to "arrangements reasonably designed" to ensure sales

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[4]/ The SEC has invited comments on Regulation S, and it is anticipated that numerous comments by interested parties will be submitted. It is also likely that the SEC will modify Regulation S in light of these comments. We do not attempt in this Report to predict what modifications the SEC might adopt; we comment only on the proposal as published.

to persons who are not “U.S. persons”. The Treasury regulations prescribing procedures to be followed in the issuance, sale and delivery of such obligations in order to satisfy the “arrangements reasonably designed” test are based, in part, upon the securities laws applicable to those debt obligations. These regulations are the so-called “A Rules” and “B Rules”[5]/ (together, the “Bearer Obligation Rules”).

In this Report, we consider the relationship of the proposals set forth in Regulation S to the Bearer Obligation Rules and recommend a response by the Treasury and IRS to the SEC's proposal. We also attach as Appendix I draft regulations embodying our recommendations.

At the outset, we emphasize that, in our view, the linkage between the 1933 Act requirements and the Bearer Obligation Rules has been important to the efficient functioning of the international capital markets. The consistency between these rules has simplified and facilitated compliance with both the tax and the securities laws. In our experience, these rules are well understood by market participants and have fostered compliance with U.S. tax policy. By comparison, requiring issuers and distributors to comply with two disparate sets of procedures would create confusion, complicate compliance and disrupt or, at least, further burden the operations of the capital markets.

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[5] / Treas. Regs. § 1.163-5(c)(2)(1)(A) and (B). As noted below, this Report does not discuss the so-called “C Rules”, Treas. Regs. § 1.163-5(c)(2)(1)(C).

Accordingly, our recommendations have been formulated with a view to preserving this linkage, and to doing so through simple procedures that recognize current market practices. We believe that this approach is consistent with the policy of Section 163(f)(2)(B) relating to the "arrangements reasonably designed" standard and the related regulatory framework developed by the IRS since 1982.

Summary of Analysis and Recommendations

As discussed in detail in Exhibit I, certain of the Bearer Obligation Rules are expressly tied to and based upon certain definitions, procedures and requirements of the securities rules that have evolved under the 1933 Act following Release 4708. First, the term "U.S. person" is defined in the "A Rules" to have the same meaning that that term has under the 1933 Act. Second, qualification of an obligation under the "A Rules" depends upon the obligation being distributed in a manner that does not require registration under Release 4708 and related SEC staff no-action letters. Third, the issue will not be subject to sanctions if it has received an opinion of counsel that 193 3 Act registration is not required because the obligations are intended for distribution to persons who are not U.S. persons. Consequently, the "A Rules" have, in effect, incorporated the 193 3 Act rules into the tax law requirements for satisfaction of the "arrangements reasonably designed" standard of Section 163(f)(2)(B). In addition, the "B Rules" were originally modeled

on the procedures set forth in Release 4708, although they have lagged behind the changes in the securities laws implemented through subsequent staff no-action letters.

This linkage between the current tax and securities laws should be reviewed in light of the new proposed securities rules. Regulation S proposes a territorial approach to the 193 3 Act registration requirements. Under the proposal, an offer or sale of securities within the United States or to a U.S. resident will be subject to registration; an offer or sale outside the United States to a non-U.S. resident (and to non- U.S. branches and affiliates of U.S. entities) will not be so subject. Most significantly, the approach taken by Regulation S revises the definition of U.S. person for 1933 Act purposes to exclude U.S. citizens who are resident abroad. Thus, it would no longer be necessary for 1933 Act purposes to adopt procedures designed to avoid offers or sales of unregistered securities, including bearer obligations, to U.S. citizens who are resident outside the United States.

Regulation S would not require the use of certain procedures that are part of the arrangements now considered “reasonably designed” to assure that securities are sold outside of the United States and to non-U.S. persons as part of the initial distribution. In particular, in the case of reporting

issuers,[6]/ Regulation S would eliminate procedures that relate to the purchasers of securities, including the restriction on physical delivery of securities for a 90-day period after the offering is completed, the certification as to non-U.S. ownership at the end of the “lock-up* period and the delivery of confirmations to purchasers other than dealers regarding the restrictions on U.S. ownership. Regulation s would continue to rely on contractual restrictions imposed on the issuer and distributors of the securities and on disclosure provisions in offering materials. All of the procedures required of the issuers and distributors under Release 4708 and related SEC staff no-action letters would remain, and syndicate-wide prohibitions on directed sales to U.S. persons, as well as specific rules assuring that offers and sales occur outside the United States, would be added.

The proposed procedures appear to be reasonable, in light of current market practices, to assure that sales of bearer obligations will not take place in the United States.

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[6]/ A reporting issuer is an issuer that (a) is required to file reports under the Securities Exchange Act of 1934 (the “1934 Act”) as a result of listing on a national securities exchange, registration of equity securities under section 12(g) of the 1934 Act or registration of securities under the 1933 Act and (b) has filed all material required to be filed for 12 months (or such shorter period as the issuer was required to file such material). It does not include an issuer that has perfected an exemption from the registration requirements of section 12(g) by virtue of furnishing materials to the SEC on an informal basis in accordance with Rule 12g3-2(b).

We believe that the Treasury and IRS can and should in general defer to the judgment of the SEC with respect to these matters.

However, as stated above, Regulation S would exclude obligations sold to U.S. citizens resident outside the United States from the scope of the registration requirement. This change is directly contrary to tax policy. It would mean, for example, that a U.S. citizen resident in London could freely purchase bearer obligations, or a U.S. resident could buy bearer obligations through a foreign discretionary brokerage account. These results would clearly interfere with IRS efforts to insure the proper reporting of interest income and would be contrary to the directive of Section 163(f)(2)(B). In this matter, the Treasury and IRS should not defer to the SEC.

In light of the foregoing, we make the following recommendations:

1. The Treasury and IRS should propose to the SEC that the definition of “U.S. person” in Regulation S be modified solely with respect to bearer debt obligations so as to specifically include U.S. persons as defined under Section 7701(a)(30) other-than qualified financial institutions purchasing for their own account or persons who acquire through such financial institutions.

2. In all events, the IRS should adopt the procedures set forth in Regulation S for determining whether arrangements are “reasonably designed” to prevent

sales of bearer obligations into the United States and to U.S. persons.

3. The “A Rules” and the “B Rules” should be combined into a single set of rules. For transactions currently governed by the “A Rules” or “B Rules”, (1) the original issuance procedures of Regulation S should be required; (ii) a written opinion of counsel that the specific procedures required by Regulation S are contained in the documents governing the distribution should provide a safe harbor to issuers; and (iii) a requirement should be added that the issuer, underwriter or member of the selling group of bearer form obligations of the type currently covered by the “B Rules” must not have actual knowledge that its purchaser is a U.S. person.

4. If the SEC should decline to incorporate the tax definition of “U.S. person” into Regulation S (as contemplated in Recommendation 1), then the IRS should modify the rules set forth in Recommendation 3 to require that the rules of Regulation S be applied using the tax- law definition of U.S. person and that issuer sanctions be imposed on the issuer of any bearer form obligation currently covered by the “A Rules” or the “B Rules” where the issuer, underwriter or member of the selling group has actual knowledge that its purchaser is a U.S. person as defined for tax purposes.

We further recommend that the Treasury and IRS work with the SEC in promulgating regulations that achieve both tax and securities goals. It is important that neither the IRS nor the SEC promulgate regulations in final form without giving the other agency sufficient time to formulate an appropriate set of rules. Moreover, in order to avoid market disruption, neither the Treasury nor the IRS should unilaterally announce at this time that it will establish a separate set of tax rules.

We include below a brief description of the relevant current tax law. We also attach two Exhibits. Exhibit I describes in greater detail the tax law requirements as well as current marketing practices used for long and short-term debt offerings, private placements, bank offerings and other offerings that are exempt from registration by reason of section 3 or 4 of the 1933 Act or which are registered under the 1933 Act. Exhibit II outlines in greater detail Regulation S as proposed by the SEC.

In making our recommendations, we have focused in the first part of this Report on matters that we believe are necessary to coordinate the existing tax regulations with the proposals in Regulation S. In the second part of this Report, we urge the Treasury and IRS to consider at this time correcting other aspects of the Bearer Obligation Rules and set forth other changes that we consider important.

Current Tax Rules

Under existing tax laws, an obligation that otherwise would be "registration-required"[7]/ may be issued in bearer form if (1) there are "arrangements reasonably designed" to ensure that the obligation is sold (or resold in connection with its original issuance) only to non-U.S. persons[8]/ or certain financial institutions who purchase for their own account or for the account of a customer; (ii) interest on the obligation is payable only outside of the United States and its possessions; and (iii) the obligation bears a legend regarding tax limitations. A U.S. person (other than certain financial institutions who purchase for their own account or for the account of a customer) who holds a "registration-required" bearer obligation that does not meet the requirements of the preceding sentence may be ineligible to claim a loss on the sale, disposition or worthlessness of the obligation under Section 165(j), and may be required to treat gain on the sale

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[7]/ A "registration-required" obligation is any obligation other than an obligation which (1) is issued by a natural person, (ii) is not of a type offered to the public, (iii) has a maturity (at issue) of not more than one year or (iv) is issued under arrangements "reasonably designed to ensure that it is sold (or resold in connection with its original issuance) only to a person who is not a United States person". Section 163(f)(2).

[8]/ For this purpose, a non-U.S. person is a person other than a citizen or resident of the United States, a corporation, partnership or other entity created or organized in or under the laws of the United States or any political subdivision thereof, or an estate or trust the income of which is subject to U.S. federal income tax regardless of its source.

or exchange of the obligation as ordinary income under Section 1287. In addition, U.S. source interest paid on bearer obligations to non-U.S. persons will be exempt from a 30% withholding tax under the “portfolio interest” exemption under Section 871(h)(2) only if the requirements of the first sentence of this paragraph (and certain other requirements) are satisfied. These provisions were enacted to encourage the proper reporting of interest income by U.S. persons.

The relevant Treasury regulations provide that the “arrangements reasonably designed” requirement will be met if the requirements of Treas. Regs. § 1.163-5(c)(2)(1)(A),(B) or (C) are satisfied.

A bearer obligation will satisfy the requirements of Treas. Regs. § 1.163-5(c)(2)(1)(A) (the “A Rules”) if the obligation is (1) offered for sale or resale only outside of the United States and its possessions; (ii) is delivered only outside of the United States; and (iii) is not registered under the 1933 Act because it is intended for distribution to persons who are not U.S. persons. For purposes of the “A Rules”, an obligation will not be considered to be required to be registered under the 1933 Act if the issuer, in reliance on a written opinion of counsel received prior to the issuance of the obligation, determines that the obligation need not be registered under the 193 3 Act for the reason that it is intended for distribution to non-U.S. persons. The “A Rules” further provide that “U.S. person” has the meaning that it has for purposes of

determining whether an obligation is intended for distribution to persons under the 193 3 Act.

A bearer obligation will satisfy the requirements of Treas. Regs. § 1.163-5(c)(2)(1)(B) (the "B Rules") if five enumerated requirements are satisfied. These requirements were intended to prescribe procedures parallel to those required under Release 4708 on the basis of no-action letters that had been issued at the time and incorporated by reference into the "A Rules". However, the "B Rules" have not been modified in light of subsequent no-action letters. The "B Rules" generally apply to SEC-registered obligations or to obligations exempt from registration by reason of sections 3 or 4 of the 1933 Act.[9]/

Recommendations

RECOMMENDATION 1. The Treasury and IRS should propose to the SEC that the definition of "U.S. person" in Regulation S be modified solely with respect to bearer debt obligations so as to specifically include U.S. persons as defined under Section 7701(a)(30) other than Qualified financial institutions purchasing for their own account or persons who acquire through such financial institutions.

The SEC has requested comments from interested persons on the Regulation S proposal. We urge that the

[9]/ Treas. Regs. § 1.163-5(c)(2)(1)(C) (the "C Rules") provides for a third means for satisfying the "reasonably designed" requirements with respect to issuances that do not significantly engage in interstate commerce. As we do not believe that Regulation S affects the "C Rules", this Report does not discuss these rules, which we believe work well.

Treasury and IRS respond to this request by attempting to negotiate with the SEC a common, mutually acceptable definition of “U.S. person”.

In negotiations with the SEC, the Treasury and IRS should propose that the definition of “U.S. person” in Regulation S be modified solely for purposes of the sale of otherwise registration-required obligations in bearer form to include the categories of person included in the definition of “U.S. person” in Section 7701(a)(30), other than (1) financial institutions as defined in Treas. Regs. § 1.165-12(c)(1)(v) which are purchasing for their own account and (ii) persons who acquire through such financial institutions. This definition of “U.S. person” would be broader than the proposed securities law definition in that it will include U.S. citizens who are non-residents and U.S. citizens purchasing through discretionary custodial accounts.[10]/ We propose the exception

[10]/ Regulation S defines the term “U.S. person” to mean any natural person resident in the United States: any partnership or corporation organized or incorporated under the laws of the United States, its territories or possessions or any state or the District of Columbia? any partnership or corporation organized or incorporated under the laws of any foreign jurisdiction, if the partnership or corporation is formed by a U.S. person principally for the purpose of investing in securities not registered under the 1933 Act; any estate of which any executor or administrator is a U.S. person; any trust of which any trustee is a U.S. person? any agency or branch of a foreign entity located in the United States; any non- discretionary custodial account or similar account held by a dealer or other fiduciary for the account of any U.S. person; and any discretionary custodial account or similar account held by a dealer or other fiduciary located in the United States, regardless of whether the beneficial owner of such account is a “U.S. person”. Notwithstanding the foregoing, any agency or branch of a U.S. person located outside the United States shall not be deemed a “U.S. person” if: (1) the agency or branch operates for valid business reasons and not principally for the purpose of investing in securities not registered under the 1933 Act; and (ii) the agency or branch is engaged in the business of banking or insurance and is subject to substantive banking or insurance regulation, as the case may be, in the jurisdiction where located.

for financial institutions because Treas. Regs. § 1.165-12(c) specifically exempts these financial institutions from the holder sanctions prescribed in Sections 165(j) and 1287(a) and because the "B Rules" do not prohibit purchases by such institutions.[11]/

RECOMMENDATION 2. In all events, the IRS should adopt the procedures set forth in Regulation S for determining whether arrangements are "reasonably designed" to prevent sales of bearer obligations into the United States and to U.S. persons.

Under the existing "A Rules", the "arrangements reasonably designed" requirement is satisfied if the obligation

[11]/ We note that the "B Rules" currently require the financial institution to provide a certification to the effect that it will comply with the requirements of Section 165(j)(3)(A), (B) or (C) and the regulations thereunder and that it is not purchasing for offer to resell or for resale inside the United States. However, we do not propose to require this certification because our experience indicates that it is a burdensome and unnecessary formality. Furthermore, the absence of a certification has been effectively permitted by the IRS under the "A Rules" as a result of an SEC staff no-action letter entitled "Foreign Agencies and Branches of United States Banks and Insurance Companies" (Feb. 25, 1988), which permits sales of obligations not registered under the 1933 Act to foreign branches of U.S. banks and insurance companies.

(1) is offered for sale or resale only outside of the United States and its possessions; (ii) is delivered only outside of the United States and its possessions; and (iii) is not required to be registered under the 1933 Act because it is intended for distribution to persons who are not U.S. persons. This third requirement is expressed in terms of the obligation's status under the relevant securities laws. We recommend that the IRS continue to rely on the securities laws to prescribe procedures for preventing sales into the United States or to U.S. persons, regardless of the outcome of Recommendation 1, above.

Our principal policy recommendation is that the benefits of consistent regulations governing international capital market transactions be preserved to the extent possible so that confusion and uncertainty will be minimized.

The SEC has responsibility and expertise with respect to capital market regulation and special knowledge of changing market practices. In carrying out this responsibility, the SEC and its staff continually refine the securities laws through releases, no-action letters and other statements of SEC practice. This process is inevitable because no fixed set of rules can be expected to be adequate to deal with all future market developments. In this regard, it would seem unwise for the IRS to attempt to undertake to issue its own set of rules for international capital market transactions which would be subject to constant review and revision as market conditions change. Thus, we suggest that the Treasury and IRS defer to and rely upon the SEC and its staff with respect to distribution procedures.

Therefore, we recommend that regulations under Section 163(f)(2)(B)(1) incorporate the procedures of Regulation S, as amended from time to time. In this way, the tax law would continue to be immediately responsive to future securities law developments. The linkage of the tax and securities laws has worked well under the existing "A Rules" since 1982 and appears to be consistent with the tax policy governing sales of foreign-targeted, bearer issues.

In making this recommendation, we recognize that certain procedures currently in use would be eliminated by proposed Regulation S and have considered whether those procedures are necessary to the proper implemention of the tax policy underlying Section 163(f)(2)(B). We have concluded that they are not.

Regulation S eliminates lock-up requirements and certification procedures for reporting issuers and, reduces confirmation requirements for all issuers. With respect to confirmations, Regulation S would require that confirmations stating that the recipients will comply with restrictions on offers, sales and deliveries in the United States and to U.S. persons be sent in the case of sales to distributors or dealers purchasing obligations from a distributor. As under current

law, no confirmations would be required in the case of sales to retail purchasers.[12]/

The IRS has already recognized in the "B Rules" that no lock-up is necessary where other procedures exist that are adequate to ensure that bearer-form obligations are not sold to U.S. persons in connection with their original issuance. Regulation S reflects the same judgment.

In addition, in the case of reporting issuers, Regulation S apparently reflects the judgment of the SEC that certification of non-U.S. status is not needed to ensure that securities come to rest abroad.[13]/ For such issuers, Regulation S replaces the procedures of current practice with a requirement that transactions occur "offshore", a prohibition on directed selling efforts, selling restrictions, and new restrictions on resales that ensure that the securities will come to rest abroad.

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[12]/ This reduction in confirmation procedures affirms the position taken by the SEC staff with respect to confirmations in the Procter & Gamble Co. no-action letter (Feb. 1, 1985). The IRS has already effectively incorporated the rule of the Procter & Gamble Co. no-action letter into the "A Rules", thereby acknowledging in effect that it is not necessary to send confirmations to all purchasers in order to ensure that bearer-form obligations are not sold to U.S. persons.

[13]/ Commentators have criticized the certification now required by the "B Rules" as unduly burdensome, particularly in the context of Euro-commercial paper and other short-term obligations. See. Letter from Leslie Samuels to Leonard Terr (April 4, 1988), reprinted in Tax Notes April 15, 1988. We are concerned that U.S. issuers could be effectively excluded from the Euro-commercial paper market if the IRS were to eliminate the "A Rules" and adopt the current "B Rules" as a result of the promulgation of Regulation S.

The SEC presumably has concluded that these new resale restrictions provide sufficient assurance that the securities will not be purchased by U.S. persons and that certification is therefore unnecessary. See Preamble to Regulation S at 55-56.

It is also relevant that, under current law, certification of non-U.S. status is not required for compliance with Release 4708 or, therefore, with the "A Rules" in cases where the distribution of the obligations is made in reliance on the First Interstate Bancorp no-action letter.[14]/ Securities lawyers generally rely on this no-action letter in connection with the distribution of obligations that have an original maturity of one year or less. Thus, a short-term obligation can be issued in accordance with the existing "A Rules" even though no certification is required.[15]/

We have also considered whether additional tax requirements or safeguards should be added to the tax regulations if Regulation S is adopted as proposed. We have concluded that any such additions would be of limited effectiveness in preventing U.S. citizens from acquiring bearer debt and any benefits therefrom would be inadequate to justify the disadvantages from the resulting complications and burdens on the markets.

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[14]/ First Interstate Bancorp (Mar. 15, 1985).

[15]/ Although a short-term obligation having a maturity of less than one year is not a "registration-required obligation", compliance with the "A Rules" or the "B Rules" is necessary in order that original issue discount on a short-term obligation having an original maturity of between 184 days and one year will qualify as portfolio interest, and, assuming that the other requirements of Q and A - 6 of Treas. Reg. § 35a.9999-5 are satisfied, payments on a short-term obligation with an original maturity of six months or less will not be subject to information reporting or backup withholding.

In sum, we see no sufficient reason to implement tax rules that are stricter than and inconsistent with the procedures accepted in Regulation S.

RECOMMENDATION 3. The "A Rules" and the "B Rules" should be combined into a single set of rules. For transactions currently governed by the "A Rules" or the "B Rules", (1) the original issuance procedures of Regulation S should be required; (ii) a written opinion of counsel that the specific procedures required by Regulation S are contained in the documents governing the distribution should provide a safe harbor to issuers? and (iii) a requirement should be added that the issuer, underwriter or member of the selling group of bearer form obligations of the type currently covered by the "B Rules" must not have actual knowledge that its purchaser is a U.S. person.

We recommend that one set of tax procedures now be adopted to replace the current system whereby the "A Rules" apply to the overwhelming majority of issuances and the "B Rules" apply to a limited additional number.[16]/ The starting point for a unified set of rules should be the existing "B Rules".

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[16]/ The "B Rules" cover issuances of securities in transactions registered under the 1933 Act or exempt from registration in their own right under section 3 or 4 of that Act or because the obligations do not qualify as securities under that Act. Examples of offerings covered by the "B Rules" include medium-term note offerings and other simultaneous offerings in the United States and abroad, governmental obligations (including foreign, state and local governments), bank obligations, obligations that are backed by a bank letter of credit and privately-placed obligations.

However, we recommend that the third, fourth and fifth requirements of the "B Rules", which set out the certification and confirmation requirements (adopted from no-action letters under Release 4708), be replaced with a requirement that the obligations be distributed in accordance with the requirements of Regulation S, regardless of whether the obligation was otherwise subject to Regulation S.[17]/

The separate "B Rules" arose primarily because there were certain types of obligations with respect to which the form of legal opinion integral to the approach of the "A Rules" simply could not be given. Under the "A Rules", an opinion of counsel is required that an obligation is exempt from registration under the 1933 Act because it was intended for sale to non-U.S. persons, meaning that the procedures prescribed by the securities laws to obtain that exemption were to be followed. That opinion would be based, in part, upon a certification from the managing underwriter with respect to the procedures utilized. This opinion could not be rendered, however, with respect to obligations that are registered under the 1933 Act, or are exempt from registration for reasons other than being intended for distribution to non-U.S. persons.

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[17]/ With respect to obligations currently within the "B Rules", we recommend that the standard used be that applicable to reporting issuers. We believe that this standard is appropriate because we anticipate that most public offerings will be made by reporting issuers or other issuers that may not be reporting issuers because of specific exemptions (e.g., governments and U.S. agencies).

Thus, as a substitute for such an opinion, the “B Rules” set forth directly as part of the tax rules the procedures required to be followed. Those required procedures were modeled largely on procedures adopted under Release 4708.

As a result of the approach of Regulations S, securities lawyers would now be able to deliver an opinion that the procedures of Regulation S are contained in the documents governing the distribution of any obligation, regardless of whether the actual offering comes within the scope of Regulation S. As a result, if the procedures of Regulation S are adopted as the tax standard for “arrangements reasonably designed” to prevent sales of bearer obligations into the United States and to U.S. persons, then no compelling reason remains for the continuance of two separate sets of tax rules.

For a unified set of tax rules, we recommend that (1) the first two requirements of the “B Rules” be retained; (ii) bearer obligations be required to be distributed in accordance with the requirements of Regulation S; (iii) a modified opinion of counsel provision provide a safe harbor for issuers; and (iv) issues of obligations currently governed by the “B Rules” be subject to issuer sanctions if the issuer, underwriter or member of the selling group has actual knowledge that its purchaser is a U.S. person. We attach as Appendix I a set of draft regulations reflecting these proposals.

A requirement that offerings currently within the "B Rules" incorporate the Regulation S procedures will create additional safeguards restricting sales in the United States and to U.S. persons. Although the certification and confirmation requirements would be eliminated, we believe that elimination of those requirements is appropriate for the reasons set forth in Recommendation 2 above, including our view that if at all possible the tax rules ought not to deviate from the securities rules.

We recommend that the provision in the existing "A Rules" permitting reliance on an opinion of counsel in order to determine whether an offering is exempt from registration under the 1933 Act because it is intended for distribution to non- U.S. persons be retained in a unified set of rules, although in modified form.[18]/ We agree with the IRS that the opinion of counsel serves the purpose of "document[ing] the specific steps to be taken to place an obligation in the hands of non-United States persons". See T.D. 8110 (Dec. 19, 1986). We further

[18]/ In the case of an obligation exempt from registration under the 1933 Act pursuant to Regulation S, the opinion should state that "the documents governing the distribution of the obligations contain the restrictions on offers, sales and deliveries that are required to satisfy Regulation S". In the case of obligations registered under the 193 3 Act or exempt from registration under section 3 or 4 of such Act (other than in accordance with the requirements of Regulation S) or because it is not a security under such Act, the opinion should state that "the documents governing the distribution of the obligation contain the restrictions on offers, sales and deliveries that would be required to satisfy Regulation S if the issuer were a reporting issuer".

believe that the review of the documentary requirements by independent counsel is important regardless of whether the offering is actually subject to the requirements of Regulation S, or is not so subject, but is made in accordance with the Regulation S procedures.

The first requirement of both existing sets of rules provides that, in connection with the original issuance, the obligation is offered for sale or resale and delivered[19]/ only outside of the United States and its possessions. We recommend that this requirement be retained and, in the case of obligations currently governed by the "B Rules", strengthened, if Regulation S is adopted, by imposing an additional requirement that the issuer, underwriter or member of the selling group must not have actual knowledge at or prior to the time that an obligation in bearer form is sold to its purchaser that such purchaser is a U.S. person.[20]/ Because in this situation the securities law will not penalize issuers, underwriters or selling group members for sales to U.S. persons, it is important, under certain circumstances, to impose sanctions under the tax law. The "actual knowledge" standard is appropriate in this context and provides meaningful assurance that sales will not be made to U.S.

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[19]/ The existing restrictions on deliveries are contained in the "A Rules" and within the certification requirements of the "B Rules".

[20]/ The draft regulations in Appendix I provide that the issuer, underwriter or member of the selling group shall be deemed to have actual knowledge that its purchaser is a U.S. person if, for example, the issuer, underwriter or member of the selling group has a U.S. address for the purchaser (other than a financial institution as defined in Treas. Regs. § 1.165-12(c)(1)(v) purchasing for its own account or for the account of a customer) and does not have documentary evidence as described in subdivision (iii) of A - 5 of Treas. Regs. § 35a.9999-4T that its purchaser is not a U.S. person.

persons. It is derived from existing requirements of both the "B Rules" and A - 2 through A - 6 of Treas. Regs. § 35a.9999-5. We are concerned that a more absolute standard (e.g., "strict liability" on an issuer for any sale to a U.S. person) will be interpreted to impose on an issuer the impossible burden of proving that none of the purchasers of its bearer form obligations were U.S. persons.

Finally, we recommend that the second requirement of the existing "B Rules" should be made applicable to all offerings subject to the new rule. This requirement provides that "the issuer does not, and each underwriter and 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 any person inside the United States or a United States person" unless such person is a qualified financial institution purchasing for its own account or for the account of customers.

RECOMMENDATION 4. If the SEC should decline to incorporate the tax definition of "U.S. person" into Regulation S (as contemplated in Recommendation 1). then the IRS should modify the rules set forth in Recommendation 3 to require that the rules of Regulation S be applied using the tax-law definition of U.S. person and that issuer sanctions be imposed on the issuer of a bearer form obligation covered by the "A Rules" or the "B Rules" where the issuer, underwriter or member of the selling group has actual knowledge that its purchaser is a "U.S. person" as defined for tax purposes.

If the SEC declines to incorporate the tax-law definition of "U.S. person" into Regulation S, as we have recommended, then Treasury regulations should take additional steps to provide reasonable assurance of tax compliance. Therefore, although we would prefer to see a continuation of the consistent tax and securities approach to foreign-targeted bearer obligations, in the absence of such an approach, we recommend that our specific proposals, as set forth in Recommendation 3, above, be modified in two respects. First, the rules of Regulation S should be applied using the definition of "U.S. person" contained in the draft regulations, and any opinion of counsel should use the same definition. Second, issuer sanctions should be imposed on the issuer of a bearer form obligations currently covered by the "A Rules* or the "B Rules" if the issuer, underwriter or member of the selling group has actual knowledge that its purchaser is a "U.S. person" as defined in the draft regulations.

Other Recommendations

(a) The $500.000 Required Face Amount of Short-Term Obligations Should Be Eliminated.

Q and A - 6 of Treas. Regs. § 35a.9999-5 provides that original issue discount from U.S. sources on an obligation

payable six months or less from the date of issuance[21]/ is exempt from information reporting and backup withholding if the requirements of Q and A - 5 of Treas. Regs. § 35a.9999-5 are met. Among the conditions of Q and A - 5 is the requirement that the face amount of the obligation be not less than $500,000.

Presumably, this provision is intended to ensure that these short-term obligations are not purchased by U.S. individuals. However, because Q and A - 5 also requires that the obligation be issued in accordance with Section 163(f)(2)(B) (with the exception of the legend requirement of Section 163(f)(2)(B)(ii)(II)), and no restriction is placed on the denomination of bearer-form obligations with an original maturity of more than 183 days that are issued in accordance with that section, there is no apparent reason why a denomination requirement is necessary in order to ensure that original issue discount obligations described in Q and A - 6 are not sold to U.S. persons. Accordingly, we recommend the Q and A - 5 should be revised to delete the denomination requirement.

(b) Offers and Sales of Bearer Obligations Inside the United States to International Organizations and Foreign Central Banks Should Be Allowed.

We recommend that offers and sales of bearer-form obligations to international organizations and foreign central banks with offices in the United States be allowed.

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[21]/ Presumably, the IRS intended that this provision apply to those obligations described in section 871(g), i.e., those with an original maturity of 183 days or less.

Such international organizations and foreign central banks are major purchasers of debt obligations. Because of the importance of the United States as a financial center, a number of such organizations (including, for example, the World Bank, the Inter-American Development Bank, the United Nations and the IMF) have their sole offices or investment offices in the United States. Thus, as a practical matter, offers to such organizations to buy debt obligations can only be made in the United States.

International organizations and foreign central banks are not U.S. persons within the meaning of Section 7701(a)(30). Because the limited number of international organizations and foreign central banks are readily identifiable, there can be no confusion as to when an offer is or is not being made to such a purchaser. Under the circumstances, it is reasonable to conclude that offers for sale to international organizations and foreign central banks with offices in the United States satisfy the requirement of Section 163(f)(2)(B)(1) that bearer- form obligations be sold under arrangements reasonably designed to ensure sale to non-U.S. persons.

(c) Offers and Sales to Distributors who are U.S. Persons Should Be Permitted.

Offers and sales between distributors facilitate the distribution of bearer-form obligations to investors outside of the United States. The restrictions of Regulation S do not apply to these offers and sales. See. Preamble to Regulation S at 51, n.lll. We recommend that the regulations clarify that Section

163(f)(2)(B)(1) also does not apply to offers and sales between distributors in the United States.

(d) Offers for Sale or Resale or Delivery to U.S. Investment Advisers who are Acting on Behalf of Foreign Persons Should Be Permitted.

Under a current SEC staff no-action letter (Baer Securities Corporation. Oct. 12, 1979), offers of unregistered securities can be made in the United States to investment advisors who act on behalf of non-U.S. investors. We believe that offers in the United States for sale and delivery of bearer obligations outside the United States to non-U.S. persons do not raise a compliance problem for the IRS. Accordingly, regulations should specifically permit these offers in the United States.

It should be noted that Regulation S as proposed would not permit offers of unregistered securities in the United States. The suggestion set forth above should only be implemented if Regulation S is modified to permit this type of offer.

(e) The Requirement of Legending Short-Term Obligations Should Be Eliminated.

Section 871(h)(2)(A) provides that “the term 'portfolio interest' means any interest (including original issue discount) ... which is paid on an obligation which is not in registered form, and is described in Section 163(f)(2)(B)”. In order for a bearer-form obligation to be “described in Section 163(f)(2)(B)”, Section 163(f)(2)(B)

requires, among other things, that on the face of the obligation there be a statement that any U.S. person who holds the obligation will be subject to limitations under the U.S. income tax laws.

In the case of a bearer-form obligation, not issued by a natural person, that is of a type offered to the public and has a maturity at issue of more than one year, the bearer-form obligation will be issued in accordance with the requirements of Section 163(f)(2)(B) in order to avoid the issuer sanctions of Sections 163(f)(1), 312(m) and 4701. While there is no difficulty in complying with the provisions of Section 163(f)(2)(B) in connection with the original issuance of bearer-form obligations issued by a natural person, not of a type issued to the public or with a maturity at issue of one year or less, we believe that the IRS should consider eliminating the requirement that these obligations contain a statement that a U.S. person holding the obligation will be subject to limitations under the U.S. income tax law because the holder sanctions of Sections 165(j) and 1287(a) are not applicable to holders of these obligations.

APPENDIX I

DRAFT REGULATION[22]/

Delete Treas. Regs. § 1.163-5(c)(2)(1)(A), and replace Treas. Regs. § 1.163-5(c)(2)(1)(B) with the following:

(B) (1) In connection with the original issuance of an obligation in bearer form, the obligation is offered for sale or resale and delivered 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 in bearer form, offer to sell or resell the obligation in bearer form to any person inside the United States or to a United States person.

(3) In connection with the original issuance of the obligation in bearer form,

(a) the obligation, if registered under the Securities Act of 1933 or exempt from registration under section 3 or 4 of such Act (other than in accordance with the requirements of Regulation S) or because it is not a security under such Act, is distributed in accordance with the requirements of Regulation S that are applicable to reporting issuers, or, in all other cases,

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[22]/ Assumes that the IRS and SEC agree on one definition of U.S. person for purposes of the issuance of bearer-form debt obligations.

(b) the obligation is distributed in accordance with the requirements of Regulation S that are applicable to the issuer.

(4) If the obligation is registered under the Securities Act of 1933 or exempt from registration under section 3 or 4 of such Act (other than in accordance with the requirements of Regulation S) or because it does not qualify as a security, under such Act, the issuer, underwriter or member of the selling group does not have actual knowledge at or prior to the time that an obligation in bearer form is sold to its purchaser that such purchaser is a United States person. The issuer, underwriter or member of the selling group shall be deemed to have actual knowledge that its purchaser is a United States person if, for example, it has a United States address for the purchaser (other than a financial institution as defined in Treas. Regs. § 1.165-12(c)(1)(v) purchasing for its own account or for the account of a customer) and does not have documentary evidence as described in subdivision (iii) of A-5 of Treas. Regs. § 35a.9999-4T that the purchaser is not a United States person.

An obligation will be considered to satisfy clause (3), above, if the issuer receives a written opinion of counsel prior to or upon the issuance of the obligation to the effect that,

(a) in the case of an obligation described in clause 3(a), above, the documents governing the distribution of

the obligation contain the restrictions on offers, sales and deliveries that would be required to satisfy Regulation S if the issuer were a reporting issuer, or

(b) in the case of an obligation described in clause 3(b), above, the documents governing the distribution of the obligation contain the restrictions on offers, sales and deliveries that are required to satisfy Regulation S.

For purposes of this Draft Regulation, the term “United States person” has the meaning ascribed to it in Section 7701(a)(30), except that a United States person that is a financial institution as defined in Treas. Regs. § 1.165-12(c)(1)(v) purchasing for its own account or for the account of a customer (including a United States person) shall not be considered to be a United States person.

EXHIBIT I

CURRENT OFFERING PROCEDURES

This section describes the procedures currently used by issuers and underwriters, in cooperation with Euro-Clear and CEDEL (together referred to herein as the "Clearing Organizations"), to ensure that debt securities in bearer form "will be sold (or resold in connection with [their] original issuance) only to a person who is not a United States person or who is a United States person that is a financial institution (as defined in [Treas. Regs.] § 1.165-12(c)(1)(v)) purchasing for its own account or for the account of a customer and that agrees to comply with the requirements of section 165(j)(3)(A), (B) or (C) and the regulations thereunder", in compliance with the requirement of Treas. Regs. § 1.163- 5(c)(1)(1)[1]/

Three alternative means by which a security can satisfy this requirement are set forth in Treas. Regs. § 1.163-5(c)(2)(1)(A) (the "A Rules"), Treas. Regs. § 1.163-5(c)(2)(1)(B) (the "B Rules") and Treas. Regs. § 1.l63-5(2)(1)(C) (the "C Rules"). The procedures currently used for offerings of securities designed to comply with each of the' "A Rules" and the "B Rules" are described herein. The procedures used for offerings of long-term securities differ in each case from those used for offerings of short-term securities.

This section does not discuss procedures currently used to ensure compliance with the "C Rules", because these procedures are much less uniform than those adopted for purposes of the "A

[1]/ All section references contained herein are to the Internal Revenual Code of 1986, as amended, and the Treasury regulations promulgated thereunder unless specified otherwise.

Rules" and the "B Rules". Variations arise by virtue of the nature of the issuer and of the securities, the existing market for securities of the particular issuer in the United States, the size of the offering and the marketing effort planned. Moreover, as a practical matter, the requirements of the "C Rules" restrict their use to foreign issuers.

The description below is based upon discussions with securities counsel who are familiar with these procedures, with the underwriters who are our clients, and with officials of the Clearing Organizations.

I. Long-Term Securities

For purposes of this discussion, the term "long-term securities" is used to refer to all bearer-form debt securities offered in the Euromarket, other than Euro-commercial paper. Such securities have a maturity in excess of one year.

A. Long-Term Securities Issued under the "A Rules".

The "A Rules" provide that a security will satisfy the "arrangements reasonably designed" requirement of Treas. Regs. § l.163-5(c)(1)(1) if, among other things, it "is not registered under the Securities Act of 1933 because it is intended for distribution to persons who are not United States persons". The requirements for satisfaction of the "A Rules" are thus closely allied with the requirements for exemption of an offering of securities abroad from registration under the Securities Act of 1933 (the "1933 Act"). Accordingly, offerings

of long-term securities designed to comply with the "A Rules" are conducted pursuant to guidelines set forth by the Securities and Exchange Commission ("SEC") in Securities Act Release No. 33-4708 ("Release 4708"). In Release 4708, the SEC stated that securities offered and sold in a manner designed to "result in the securities coming to rest abroad" or, in other words, under "circumstances reasonably designed to preclude distribution or redistribution of the securities within, or to nationals of, the United States" need not be registered under the 1933 Act.[2]/ On the basis of these guidelines, the staff of the SEC has issued a series of no-action letters in which the staff has stated that it would not recommend that the SEC take enforcement action if securities offered and sold under procedures outlined in such no-action letters were not registered under the 1933 Act.[3]/ On the basis of these no-action letters, a relatively uniform set of procedures (the "4708 Procedures") has been developed for the offer and sale of long-term securities in the Euro-market.

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[2]/ Securities Act Release No. 33-4708 (July 9, 1964).

[3]/ E.g., Procter & Gamble Co. (Feb. 21, 1985); Fairchild Camera and Instrument International Financing N.V. (Dec. 15, 1976); Raymond International Inc. (June 28, 1976); The Singer Company (Sept. 3, 1974); Pan American World Airways. Inc. (June 30, 1975); Sperry Rand Corporation (Mar. 1, 1974); Vizcava International N.V. (April 4, 1973); Republic of Iceland (Mar. 19, 1971).

When an offering of long-term securities has been or will be conducted in compliance with the 4708 Procedures, securities counsel are able to render an opinion that the offered securities need not be registered under the 1933 Act. This

opinion does not state, however, that the securities need not be registered under the 1933 Act for the reason that they are, in the language of the "A Rules", "intended for distribution to persons who are not United States persons."[4]/ The reason for this discrepancy is that the "intent" standard of the "A Rules" is not the standard used in Release 4708. Nevertheless, in the belief that the intent of the "A Rules" is to incorporate the actual standard for exemption from registration under the 1933 Act, issuers routinely rely on such opinions in making the determination required by the "A Rules" that the securities need not be registered under the 193 3 Act because they are intended for distribution to foreign persons.

The "A Rules" state that, for purposes of the "A Rules" only, the term U.S. person has the same meaning that it has for purposes of the 1933 Act. The 1933 Act does not, however, contain a definition of U.S. person. Accordingly, definitions of U.S. person used in documentation for offerings designed to comply with the "A Rules" have evolved through the no-action letter process, and are not entirely uniform.

Generally speaking, the definitions most commonly used can be divided into two categories. The first category includes definitions based on the definition of U.S. person contained in Section 7701(a)(30). An example of a definition in the first category is: "a citizen or resident of the United States, a corporation, partnership or other entity created or organized in or under the laws of the United States or any political subdivision thereof and any estate or trust the income

[4]/ Treas. Regs. § 1.163-5(c)(2)(1)(A).

of which is subject to U.S. federal income taxation regardless of its source". This definition is used in several no-action letters promulgated by the SEC under Release 4708 and is often used in offering documentation in an effort to ensure that both securities and tax law requirements are met. The second category includes definitions based exclusively on characteristics deemed relevant for purposes of the 1933 Act. An example of a definition in the second category is:"a citizen or resident of the United States (including the estate of any such person) and any corporation, partnership or other entity organized under the laws thereof or any political subdivision thereof".

On February 25, 1988, the staff of the SEC issued a no-action letter in which the staff indicated that it would not recommend enforcement action under the 1933 Act if foreign agencies or branches of banks or insurance companies organized and regulated under U.S. federal or state law and operating for valid business reasons as locally regulated agencies or branches engaged in the banking or insurance business and not solely for purposes of investing in securities not registered under the 193 3 Act were treated as non-U.S. persons for purposes of an offering of securities pursuant to Release 4708. Since the issuance of this no-action letter, the definition of U.S. person contained in the documentation for many offerings designed to comply with the "A Rules" has contained a proviso excepting such

foreign agencies and branches of banks and insurance companies.[5]/ Securities counsel participating in offerings of securities under the "A Rules" have generally been willing to render unqualified opinions that such offerings need not be registered under the 1933 Act, even where sales of securities to such foreign agencies and branches are permitted. Tax counsel participating in such offerings have generally concluded that such offerings complied

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[5]/ This proviso has generally taken the following form:

"provided, however, that such term does not include any foreign agency or branch of a bank or insurance company organized and regulated under U.S. federal or state law and operating for valid business reasons as a locally regulated agency or branch engaged in the banking or insurance business and not solely for the purpose of investing in securities not registered under the Securities Act of 1933".

In its release proposing Regulation S, the SEC expressly adopted the position taken by the staff regarding the treatment of such foreign agencies and branches of U.S. banks and insurance companies as non-U.S. persons. However, the language of proposed Regulation S which describes these agencies and branches differs slightly from the description included in the February 25, 1988 no-action letter. In light of the fact that the release proposing Regulation S is promulgated by the SEC itself rather than by the SEC staff, the proviso to the definition of U.S. person included in the documentation of some recent transactions has followed the language used in proposed Regulation S:

"provided, however, that such term does not include any foreign agency or branch of a bank or insurance company organized and regulated under U.S. federal or state law and operating for valid business reasons as a locally regulated agency or branch engaged in the banking or insurance business and not principally for the purpose of investing in securities not registered under the Securities Act of 1933" (emphasis added).

with the “A Rules”, despite the fact that these branches and agencies constitute U.S. persons for general federal income tax purposes. Important factors in reaching this conclusion have been the explicit incorporation of the 1933 Act definition by the last sentence of the “A Rules” and the fact that the agencies and branches excluded from the definition of U.S. person constitute financial institutions (as defined in Treas. Regs. § 1.165-12(c)(1)(v)) who are eligible to purchase bearer-form securities under the “B Rules”.

The 4708 Procedures are as follows:

1. Invitation Telex.

Invitation telexes sent by the managing underwriter to prospective underwriters or selling group members include a statement that the securities to be offered are not being registered under the 193 3 Act and may not be offered, sold or delivered in the United States or to U.S. persons.[6]/

2. Offering Circular.

[6] / Many issues of long-term securities include a private placement of such securities with sophisticated institutional investors in the United States. Where such an option is available, the securities so privately placed are issued in registered form and may not be converted thereafter into bearer form.

The offering circular circulated to prospective purchasers of long-term securities describes the restrictions applicable to offers and sales of the securities, including a statement (both in summary form on the first or second page of the offering circular and in the section of the text describing the underwriting procedures) that the securities have not been registered under the 1933 Act and may not be offered, sold or delivered in connection with their original issuance in the United States or to or for the account of U.S. persons. The offering circular also describes in summary form the selling restrictions agreed to by the underwriters and the selling group members (described in Section I.A.3 below), the lock-up procedure (described in Section I.A.5 below) and the certification required for receipt of definitive securities (described in Section I.A.6 below). Offering circulars also generally set forth the legend required by Treas. Regs. § 1.l63-5(c)(1)(ii)(B) to be placed on securities in bearer form, stating that any U.S. person holding such securities will be subject to the limitations of Sections 165(j) and 1287(a).

3. Agreements of Underwriters and Selling Group.

The agreements signed by each underwriter and selling group member participating in the offering state that each underwriter and selling group member represents and agrees that (1) except for sales outside the United States to other underwriters, it will not offer, sell or deliver, directly or indirectly, securities in the United States or to or for the account of U.S. persons securities acquired in connection with the distribution of the securities and (ii) it will not, as principal or agent, offer, sell or deliver any securities, however acquired, in the United States or to or for the account of U.S. persons prior to the date which is 90 days after the

completion of the distribution of the securities as determined by the managing underwriter.

4. Confirmations.

Each underwriter and selling group member participating in an offering of long-term securities agrees pursuant to the underwriting agreement, to deliver to each dealer that purchases from it securities acquired by it in connection with the original distribution a confirmation imposing on such dealer the selling restrictions described in Section I.A.3 above. This confirmation includes a requirement that such dealer deliver a substantially similar confirmation to any dealer purchasing from it securities acquired in connection with the original distribution.

5. Temporary Global Note and 90-Day Lock-up.

Long-term securities offered under the “A Rules” are issued initially in the form of a temporary global note which is held by a depository for either or both of the Clearing Organizations for a period (the “lock-up period”) beginning on the issue date and ending on the date (the “Exchange Date”) which is 90 days after completion of the distribution of the securities, as determined by the managing underwriter. (Owing to Swiss and German stock exchange requirements, local currency offerings in these countries may not be subject to a lock-up.) The securities are originally sold to participants in the Clearing Organization as interests in the temporary global note, which interests are credited to the participants' accounts with the Clearing Organization. The temporary global note often bears a legend stating that the note has not been registered under the

1933 Act and may not be offered or sold, directly or indirectly, in the United States or to U.S. persons.

The managing underwriter generally determines the date upon which the distribution of the securities is complete, and hence the date on which the 90-day period begins, on the basis of "all-sold" telexes received from each of the underwriters and selling group members participating in the distribution.

During the lock-up period, participants in the Clearing Organizations may trade interests in the temporary global note. Trades are executed through the Clearing Organizations, which transfer interests in the temporary global note on their books. Generally interest is not payable on the temporary global note, but is payable only on definitive securities received in exchange for such temporary global notes as described in Section I.A.6 below. In some instances, interest is payable on the temporary global note prior to the Exchange Date, but only upon certification of non-U.S. beneficial ownership of those interests in the temporary global note on which interest is payable. Such certification generally takes the form described in Section I.A.6 below.

6. Certification.

On the Exchange Date, the depository holding the temporary global note on behalf of participants in a Clearing Organization may exchange interests in the temporary global note for definitive securities in bearer form with interest coupons. In order for the depository to receive definitive securities, the Clearing Organization must have received from each participant, prior to the Exchange Date, a certificate stating that the beneficial owners on whose behalf such participant holds

interests in the temporary global note are not U.S. persons. On the Exchange Date, the depository holding the temporary global note presents such global note (or a portion thereof) to the fiscal agent for exchange, together with certificates received from the Clearing Organizations stating that they have received certificates from their participants with respect to the portion of the temporary global note being presented for exchange. The fiscal agent thereupon exchanges that portion of the temporary global note for definitive securities in bearer form with interest coupons attached. We understand that approximately 90% of the definitive securities issued to Clearing Organizations on the Exchange Date continue to be held through the Clearing Organizations for the benefit of their participants until maturity.

B. Long-Term Securities Issued under the “B Rules”.

Long-term securities eligible for issuance under the “B Rules” are those which are registered under the 193 3 Act, exempt from registration by reason of a specific exemption in section 3 or 4 of the 1933 Act, or do not qualify as securities within the meaning of the 1933 Act. Securities of these types are not eligible for issuance under the “A Rules”. Consequently, the 4708 Procedures need not be followed in connection with the offering of such securities. Nevertheless, as described below, the procedures followed by issuers and underwriters in the context of offerings designed to comply with the “B Rules” (“B Procedures”) are similar in many ways to the 4708 Procedures.

For purposes of the “B Rules”, the term U.S. person has the meaning given it by the Internal Revenue Code. The definitions of U.S. person used in standard documentation pertaining to “B Rules” offerings (and used in the description of the B Procedures below) are substantially the same as those of the first category of definitions used for “A Rules” purposes, but without the proviso. Specifically, the term U.S. person is generally defined as “a citizen or resident of the United States, a corporation, partnership or other entity created or organized in or under the laws of the United States or any political subdivision thereof and any estate or trust the income of which is subject to U.S. federal income taxation regardless of its source”.

The B procedures are as follows:

1. Offering Circular.

The offering circular circulated to prospective investors in the securities describes the restrictions on offers and sales of the securities, including a description (both in the summary information set forth on the first two pages and in the section of the text describing the underwriting and selling procedures) of the underwriters' agreement discussed in Section I.B.2 below, the confirmation procedure described in Section I.B.3 below, and the certification procedure described in Section I.B.4. below.

2. Agreement of Underwriters and Selling Group Members.

In accordance with Treas. Regs. § 1.163-5(c)(2)(1)(B)(2), each underwriter participating in the offering

agrees that it will not, in connection with the original issuance of the securities, offer to sell or resell the securities in bearer form to any person inside the United States or to a U.S. person unless such U.S. person is a financial institution as defined in Treas. Regs. § 1.165- 12(c)(1)(v) purchasing for its own account or for the account of a customer, which financial institution, as a condition of the purchase, agrees to provide on delivery of the security the certificate required under Treas. Regs. § 1.163- 5(c)(2)(1)(B)(4) (and described in Section I.B.4 below).

3. Confirmations.

In accordance with Treas. Regs. § 1.163-5(c)(2)(1)(B)(3), each underwriter and each member of the selling group agrees to send a confirmation to each purchaser of a bearer-form security from it during the original distribution of the securities, stating that the purchaser represents, by its purchase, that it is not a U.S. person or, if it is a U.S. person, that it is a financial institution as defined in Treas. Regs. § 1.165-12(c)(1)(v) purchasing for its own account or for the account of a customer, and that the financial institution 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 bearer securities from it.

4. Certification.

In accordance with Treas. Regs. § 1.163-5(c)(2)(1)(B)(4), definitive bearer-form securities are issued to the persons entitled to physical delivery thereof only upon

receipt by the issuer, underwriter or selling group member (unless a lock-up procedure is used as described in Section I.B.5 below) of a certificate signed by such person (the "(B)(4) Certificate"), which certificate states that the securities are not being acquired by or on behalf of a U.S. person, or for offer to resell or for resale to a U.S. person or any person inside the United States, or, if a beneficial interest in the securities is being acquired by a U.S. person, that such person is a financial institution as defined in Treas. Regs. § 1.165-12(c)(1)(v) or is acquiring through a financial institution. In the latter circumstances, the certificate must also state that the securities are 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 and that is not purchasing for offer to resell or for resale inside the United States. When such a certificate is provided by a clearing organization, it must be based on similar certifications received from such organization's members.

5. Lock-up.

Although the "B Rules" do not require that a lock-up be used in connection with the original distribution of bearer-form securities, most offerings of long-term securities conducted pursuant to the "B Rules" do incorporate a short lock-up period. In most cases, this lock-up period is between 4 5 and 90 days, beginning on the issue date. The reason for use of a lock-up in this context is that, as a practical matter, it is impossible for the Clearing Organizations to collect and process the certificates in support of their (B)(4) Certificates on the issue date of the securities. The lock-up period thus provides time for collection and processing of the (B)(4) Certificates and facilitates the issuance of definitive securities to all purchasers in an orderly manner.

The procedure followed by the Clearing Organizations during the lock-up period is virtually identical in the context of the "B Rules" to that followed in the context of the 4 7 08 Procedures. During the lock-up period, the securities are held in the form of a temporary global note by a depository for one or both of the Clearing Organizations. During the lock-up period, interests in the temporary global note are traded through the Clearing Organizations, but no interest payments are made on the global note. Shortly before the end of the lock-up period, each Clearing Organization participant submits to the Clearing Organization (B)(4) Certificates pertaining to the aggregate principal amount of the interests in the global note held by such participant on behalf of its customers. At the end of the lock-up period, the Clearing Organizations submit certificates to the fiscal agent (based upon the certificates received from their participants) stating that the portion of the global note being presented for exchange is beneficially owned by non-U.S. persons. Such portion of the temporary global note is then exchanged for securities in definitive bearer form with interest coupons attached. As noted above in the context of the 4708 procedures, approximately 90% of the definitive bearer-form securities issued on the termination of the lock-up period continue to be held through the Clearing Organizations until maturity.

II. Short-Term Securities

A. Short-Term Securities Issued under the "A Rules".

As used in this discussion, the term "short-term

securities" refers to notes having a maturity of one year or less.[7] Unlike long-term securities, which are generally offered and sold as part of a single issue intended for distribution in its entirety at one time, short-term securities are generally offered and sold over a period of time under arrangements between an issuer and a small group of dealers regarding the manner in which such short-term securities will be offered, sold and issued. Dealers typically do not make any commitment to purchase short-term securities at the time that such arrangements are established. Instead, from time to time, dealers enter into individual agreements with an issuer to purchase and sell (either on a firm commitment or a best efforts basis) specified principal amounts of short-term securities on a piecemeal basis. A number of dealers may enter into separate agreements to purchase and sell short-term securities of a particular issuer on the same day, and it is not uncommon for a single dealer to enter into more than one such agreement with a particular issuer on consecutive days.

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[7] Short-term securities having maturities of less than one year are not "registration-required obligations" within the definition of Section 163(f)(2)(A). As a result, compliance with the "A Rules" or the "B Rules" is not necessary in order to avoid the issuer penalties of Sections 163(f), 312(m) and 4701. Compliance with either of these rules is necessary, however, in order to ensure that (1) original issue discount on short-term securities having maturities of between 184 days and one year will qualify as portfolio interest under Section 871(h)(2)(A) and (ii) payments on short-term securities having maturities of six months or less will not be subject to backup withholding or information reporting under Q and A - 6 of Treas. Reg. § 35a. 9999-5 (assuming in each case that other applicable requirements are also satisfied).

Short-term securities of U.S. issuers are generally issued pursuant to the “A Rules” because, as described below, the “B Rules” are impractical for use in this context other than for purposes of private placements to certain offshore branches of U.S. financial institutions. Short-term securities are thus offered pursuant to procedures (the “Modified 4708 procedures”) which are similar to the 4708 Procedures described in Section I.A above, but with modifications necessitated by the shorter possible maturities of the securities and by the fact that short-term securities are typically offered and sold on a continuous basis rather than as part of a single offering. These procedures are based on the First Interstate Bancorp (Mar. 15, 1985) no-action letter issued by the staff of the SEC. As in the case of offerings of long-term securities under the “A Rules”, the opinions rendered by securities counsel with respect to offerings of short-term securities do not state, in the language of the “A Rules”, that the securities need not be registered under the 1933 Act for the reason that they are “intended for distribution to persons who are not United States persons”. The securities counsel's opinion rendered in this context typically states that the short-term securities are not required to be registered under the 1933 Act for the reason that the circumstances of the offering and sale of the securities are reasonably designed to preclude distribution or redistribution of the securities at any time within the United States or to U.S. persons.[8]/ As in the context of offerings of

[8] This opinion is rendered in reliance on letters received by such counsel from dealers involved in the offering to the effect that, in the belief of such dealers, the procedures to be followed by the dealers in connection with the distribution of the securities are reasonably designed to preclude distribution or redistribution of the securities at any time within the United States or to U.S. persons.

long-term securities, issuers of short-term securities typically rely on such opinions in making the determination required by the “A Rules” that the securities need not be registered under the 1933 Act for the reason that they are intended for distribution to persons who are not U.S. persons, in the belief that the intent of the “A Rules” is to incorporate the actual standard for exemption from registration under the 1933 Act.

Although the “B Rules” are generally impractical for use in the context of an offering of short-term securities (for the reasons described in Section II.B below), the “B Rules” were frequently used, prior to the issuance by the SEC staff of the February 25, 1988 no-action letter described in Section I. A above, in connection with offers and sales of short-term securities to foreign branches of U.S. banks (“Offshore Bank Branches”). When a program for the issuance of short-term securities permitted offers and sales to such Offshore Bank Branches, the offering was treated, for purposes of complying with both the tax and securities laws, as two separate offerings: one an offering to foreign persons under Release 4708 and the “A Rules”, and the other a private placement under section 4(2) of the 1933 Act and the “B Rules”. As a result, the dealer agreement and confirmation described in paragraphs II.A.2 and 3 below, respectively, would permit sales to Offshore Bank Branches which agree to comply with the requirements of Section 165(j)(3)(A), (B) or (C) and the regulations thereunder, and such Offshore Bank Branches were required to provide the (B)(4) Certificate at or prior to the receipt of definitive short-term securities. Since the issuance of the February 25, 1988 no-action letter, however, Offshore Bank Branches (as well as offshore branches of U.S. insurance companies) are no longer considered to be U.S. persons for purposes of Release 4708, and offers and sales of short-term

securities to such entities are usually made entirely within the context of an “A Rules” offering.

In addition to offers and sales to Offshore Bank Branches, short-term securities are typically offered and sold to foreign branches of U.S. corporations which acquire such securities as agent, custodian or fiduciary for persons who are not U.S. persons (“Offshore Fiduciaries”) under the First Interstate Bancorp no-action letter (Mar. 15, 1985). Some programs restrict such offers and sales to Offshore Fiduciaries acting under specific instructions and without discretion, while other programs permit sales to Offshore Fiduciaries only if such Offshore Fiduciaries are registered as broker-dealers under the Securities Exchange Act of 1934.

The definitions of U.S. person used in the context of offerings of short-term securities under the “A Rules” are the same as those used for purposes of “A Rules” offerings of long-term securities, with the same variations described in Section I.A above.

The Modified 4708 procedures are as follows:

1. Information Memorandum.

The information memorandum circulated in connection with an offering of short-term securities describes the restrictions on sale of the securities in the United States or to U.S. persons. The information memorandum also typically includes a form of the confirmation referred to in Section II. A.3 below and the form of notes to be issued, including, in the case of notes issued by U.S. issuers (other than notes having maturities of 183 days or less), the legend required by Treas. Regs. § l.163-5(c)(1)(ii)(B)

in the case of securities having an original maturity of 184 days to one year, and, for information reporting and backup withholding exempt programs, the legend required by Q and A - 6 of Treas. Regs. § 3 5a.9999-5, in the case of securities with an original marutity of six months or less.

2. Agreement of Dealers.

Each dealer participating in an offering of short-term securities signs a dealer agreement in which the dealer agrees that:

a. it will be purchasing each security for resale and, except as set forth in c below, it has not and will not purchase any security for the account of any U.S. person;

b. except as set forth in c below, it has not offered or sold, and will not offer, sell or deliver at any time, directly or indirectly, in the United States or to or for the account of any U.S. person any securities no matter how acquired;

c. it may offer, sell and deliver securities to (1) an Offshore Fiduciary, (ii) an Offshore Bank Branch [9/] or (iii) another dealer participating in the offering;

d. it will deliver to each purchaser from it of any securities a confirmation in the form described in Section II.A.3 below; and

[9] This reference to Offshore Bank Branches is not included if the definition of U.S. person used in the offering documentation excludes such Offshore Bank Branches.

e. (for purposes of offerings by U.S. issuers only) it will not offer to sell or resell any of the offered securities to an Offshore Bank Branch unless such Offshore Bank Branch has agreed, as a condition of its purchase, to deliver the (B)(4) Certificate, and it will deliver such securities only upon receipt of such certificate.[10/]

3. Confirmations.

Each dealer also agrees to send to each purchaser of securities from it (other than another dealer participating in the offering) a confirmation stating that, by its purchase of such securities, such purchaser represents and agrees that:

a. (1) it is not a U.S. person and is not purchasing any security for the account of any U.S. person, or

(ii) it is an Offshore Bank Branch that agrees to comply with the requirements of Section 165(j)(3)(A), (B) or (C) and the regulations thereunder and that is acquiring each security for its own account for investment and not with a view to any distribution or disposition thereof, and that if it should decide to dispose of any security it will not offer, sell or deliver any security at any time, directly or indirectly, other than as provided in paragraph b below,[11/] or

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[10/] Paragraph e is not included if the definition of U.S. person used in the offering documentation excludes Offshore Bank Branches.

[11/] Clause (ii) is not included if the definition of U.S. person used in the offering documentation excludes Offshore Bank Branches.

(iii) it is an Offshore Fiduciary that has given its principal or beneficiary a copy of the selling restrictions and that will not offer, sell or deliver any security at any time other than as provided in paragraph b below;

b. it will not offer, sell or deliver securities at any time, directly or indirectly, in the United States or to or for the account of any U.S. person other than a dealer participating in the offering or a person who represents and agrees as set forth in paragraph (a)(ii) or (iii) above; and

c. it will deliver to any person (other than a dealer participating in the offering) that acquires from it any security a confirmation in substantially the same form.

4. Bank Branch Certification.[12/]

In order to obtain definitive bearer-form securities, Offshore Bank Branches that purchase short-term securities are required to provide the (B)(4) Certificate stating that they are financial institutions as defined in Treas. Regs. § 1.165-12(c)(1)(v) that agree to comply with the requirements of Section 165(j)(3)(A), (B) or (C) and the regulations thereunder and that are not purchasing such securities for offer to resell or for resale inside the United States.

[12/] Certification by Offshore Bank Branches is not required if the definition of U.S. person used in the offering documentation excludes such Offshore Bank Branches.

5. Issuance of securities.

Unlike the 4708 Procedures, the Modified 4708 Procedures do not require that short-term securities be held in the form of a temporary global note for a lock-up period. The absence of a lock-up period is attributable to the fact that, for purposes of the 1933 Act, short-term securities offered and sold on a continuous basis are viewed as being in continuous distribution. Thus there is no time at which the distribution of a particular issuance of short-term securities can be said to be complete, and no date on which a lock-up period (which, to fulfill its purpose, should follow completion of the distribution) can sensibly begin. Moreover, the short maturities of many short-term securities preclude a meaningful lock-up period, because many such securities would mature prior to the end of a lock-up period lasting more than a few days. As a result, many short-term securities are issued in definitive form on their issue date and are never held by a Clearing Organization, while others are held by the Clearing Organizations, for reasons of convenience, in either definitive or permanent global form.

Furthermore, the Modified 4708 procedures do not require certification by purchasers (other than by Offshore Bank Branches, as described in paragraph II.A.4 above) upon issuance of definitive short-term securities. The lack of a certification requirement is attributable to the continuous manner in -which short-term securities are typically offered.

B. The “B Rules”.

Certain types of short-term securities are eligible for exemption from registration under the 1933 Act by virtue of

section 3(a)(3) of such Act,[13]/ and thus could, as a legal matter, be offered pursuant to the “B Rules”. As a practical matter, however, the maturities of many short-term securities offered in the Euromarket and the continuous nature of the offerings of such securities preclude use of the “B Rules”. Although section 3(a)(3) of the 1933 Act covers short-term securities with maturities of up to 270 days, a significant portion of Euro-commercial paper is issued with maturities of not more than a few days.. There is simply not enough time to collect the (B)(4) Certificate from purchasers of these extremely short-term securities. Collection of the (B)(4) Certificates is particularly difficult when the purchaser is a Clearing Organization which must certify on behalf of its members, because the two-step certification process necessary in this instance requires at least several days. The difficulty of collecting the (B)(4) Certificates from purchasers of the very short-term securities within a “section 3(a)(3) program* effectively precludes the use of these programs by U.S. issuers to issue

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[13]/ Section 3(a)(3) of the 1933 Act exempts from registration short-term securities having terms not exceeding nine months, provided that (1) the short-term securities are of “prime” quality at the time of issuance (generally interpreted to mean that the securities have received one of the highest ratings by a recognized rating agency),(ii) the short-term securities are not of a type offered to the public (generally interpreted to mean that the securities are not advertised for sale to the public and are sold in large minimum denominations) and (iii) the proceeds from the sale of the short-term securities are used for current transactions, rather than to finance long-term investments or to purchase equity securities.

short-term securities with maturities in excess of 183 days.[14/] As a result, offerings of Euro-commercial paper are nearly always made pursuant to the "A Rules" and the Modified 4708 Procedures.

[14/] Occasionally, short-term securities are issued under section 3(a)(3) of the 1933 Act in programs which contemplate a maximum maturity for the securities of 183 days. Interest and original issue discount on such short-term securities is specifically exempt from the 30% withholding tax of Sections 871(a) and 881, so that neither the "A Rules" nor the "B Rules" need be complied with for this purpose. Moreover, such short-term securities are offered and sold only to persons (such as corporations or tax-exempt entities) which are specifically exempt from backup withholding and information reporting, so that compliance with the "A Rules" or the "B Rules" is not necessary for this purpose either. Moreover, Section 163(f) is inapplicable because short-term securities having maturities of less than one year are not registration-required obligations. Such programs are not common, however, because issuers find the rating and use of proceeds restrictions too burdensome.

EXHIBIT II

REGULATION S

On June 14, 1988, the Securities and Exchange Commission (the "SEC") published Securities Act Release No. 6779 (the "Release") in which it addressed, for the first time since 1964, the general extraterritorial application of the registration requirements of the Securities Act of 1933, as amended (the "1933 Act") and proposed for comment Regulation S, a series of rules establishing safe harbors for certain offers and sales outside the United States of both debt and equity securities. Proposed Regulation S sets forth a new territorial approach by the SEC to the reach of the registration requirements of the 1933 Act. Under Regulation S, the registration requirements of the 1933 Act would apply to any offer or sale that occurs within the United States and would not apply to any offer or sale that occurs outside the United States.

Regulation S proposes two safe harbors pursuant to which extraterritorial offers, sales and resales of securities may be made without registration under the 193 3 Act. The first safe harbor would apply to offers and sales by issuers, "distributors" (which is defined to include any underwriter, dealer or other person who is participating, pursuant to a contractual arrangement, in a distribution of securities) and their affiliates (the "Issuer Safe Harbor"), and the second safe harbor applies to resales by all other persons (the "Resale Safe

Harbor”). An offer, sale or resale of securities which satisfies all of the conditions of the relevant safe harbor would be deemed to be “outside the United States” and, accordingly, would not be subject to registration under the 1933 Act.

Two general conditions would apply to both the Issuer Safe Harbor and the Resale Safe Harbor. First, the offer or sale must be made in an “offshore transaction”. An offer or sale is an offshore transaction if:

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

(b) either (1) the buyer is outside the United States at the time the buy order is “originated” and execution and delivery take place outside the United States; or (ii) the transaction is executed on or through the facilities of an established foreign securities exchange and is “not prearranged by persons in the United States”.

The concept is that both the sale and the offer pursuant to which it was made must be outside the United States.

The second condition is that there be no “directed selling efforts” in the United States by the issuer or distributors. “Directed selling efforts” means any activity (e.g., contacts with investors by telephone, communications or investor meetings) for the purpose of inducing the purchase or sale of any of the securities. The Release indicates that this would not preclude activities in the United States otherwise exempt from registration pursuant to Section 3 or 4 of the 1933

Act, which would include a private placement of a portion of the securities.

Issuer Safe Harbor

The Issuer Safe Harbor prescribes specific conditions which must be satisfied in order for an offer or sale to be deemed to be "outside the United States". Regulation S distinguishes among three categories of securities by reference to the nationality and reporting status of the issuer under the Securities Exchange Act of 1934 (the "1934 Act") and the degree of U.S. market interest in the issuer's securities: (1) securities of non-reporting foreign issuers with no substantial U.S. market interest,* (ii) securities of 1934 Act reporting issuers and (iii) securities of all other issuers.

Non-Reporting Non-U.S. Issuer with No Substantial U.S. Market Interest in Its Securities

As part of a distribution of securities of a foreign (i.e., non-U.S.) non-reporting issuer with no "substantial U.S. market interest" in its securities, an offer or sale would be regarded as occurring outside the United States if it is made in an "offshore transaction" and no "directed selling efforts" in connection with the offering are made in the United States.

* A reporting issuer is an issuer that (a) is required to file reports under the 1934 Act as a result of listing on a national securities exchange, registration of equity securities under Section 12(g) of the 1934 Act or registration of securities under the 1933 Act and (b) has filed all material required to be filed for 12 months (or such shorter period as the issuer was required to file such material). It does not include an issuer that has perfected an exemption from the registration requirements of Section 12(g) by virtue of furnishing materials to the SEC on an informal basis in accordance with Rule 12g3-2(b)

In the case of such a distribution, Regulation S would not impose any requirements relating to contracts, confirmations or disclosure. This aspect of Regulation S represents no substantial modification of the rules currently applicable to the issuance of debt securities by a non-reporting foreign issuer with no substantial U.S. market interest in its securities and is consistent with the rules currently applicable to certain issuers who are not significantly engaged in interstate commerce with respect to the issuance of a debt obligation under Treas. Reg. § 1.163-5(c)(2)(1)(C).

Domestic and Foreign Reporting Issuers

Distributions of securities of reporting issuers, both domestic and foreign, would be deemed to occur outside the United States if made in an offshore transaction and without directed selling efforts in the United States, provided two additional requirements are satisfied.

First, “offering restrictions” must be utilized. Each distributor in privity of contract with the issuer, the seller or any managing underwriter must agree in writing that all offers and sales will be made in accordance with the applicable requirements of Regulation S or pursuant to registration under the 1933 Act or an exemption therefrom, and each distributor or dealer purchasing securities from another distributor must receive a confirmation or other notice the acceptance of which binds it to the same restrictions. In addition, offering materials, press releases and advertisements must contain specified disclosures. These requirements are basically consistent with present practice.

Second, the securities may not be offered or sold in the United States or to a "U.S. person"* (a) if the distributor holds an unsold allotment or subscription, at any time, or (b) otherwise, at any time prior to the expiration of 90 days from the later of the closing date or the date on which the securities were first offered to persons other than distributors. The latter would represent a relaxation from the current practice of restrictions that last until 90 days after completion of the distribution.** In the case of a continuous offering (e.g., medium-term notes), the 90-day period commences on completion of the distribution.

The proposal, insofar as it relates to reporting issuers, also reflects another relaxation. It does not require the use of lock-up procedures, i.e., use of a temporary global security exchangeable for definitive securities upon certification of non-U.S. beneficial ownership.

Other Issuers -- Principally Non-Reporting Foreign Issuers with Substantial U.S. Market Interest and Non-Reporting Domestic Issuers

Distributions of securities of other issuers, principally non-reporting foreign issuers with a substantial U.S. market interest and non-reporting U.S. issuers, would be

* The definition of "U.S. person" under Regulation S is outlined on pages 8-9, infra.

** The SEC has requested comments on whether a 40-day restricted period would be more appropriate in the case of government securities and large issuers with a worldwide market following.

deemed to occur outside the United States if the requirements described above are met and, in addition, the debt securities are represented upon issuance by a temporary global security that is exchangeable for definitive securities upon expiration of the 90-day period and certification of non-U.S. beneficial ownership. This is consistent with current practice where the issuer is a U.S. issuer or a foreign issuer with a substantial U.S. market for similar securities.*

Resale Safe Harbor

The Resale Safe Harbor would apply to resales of securities by persons other than issuers, distributors and their respective affiliates whose resales are not already exempt pursuant to Section 4(1) of the 1933 Act. Resales by such investors generally would be subject to the same two general conditions set forth above and could be made in reliance on the Resale Safe Harbor under either of two procedures.

First, they may sell the securities in accordance with the requirements applicable to a distribution, as

* In the case of equity securities, including convertible debt securities unless the securities are not convertible until after the expiration of any restricted period applicable to the equity securities of the issuer, (a) the restricted period is one year instead of 90 days, (b) retail purchasers are required to certify that they are not U.S. persons and are not acquiring the securities for any U.S. person and to agree to resell such securities only in accordance with the provisions of Regulation S to persons who agree to comply with the provisions of Regulation S or pursuant to registration under the 1933 Act or an exemption therefrom, and (c) the issuer is required, either by charter, by-law or contract, to refuse to register the transfer of any securities not made in accordance with Regulation S.

described above, except in lieu of “offering restrictions” the purchaser (whether a distributor or a retail purchaser) must receive a confirmation or other notice the acceptance of which binds him to offer or sell the securities in accordance with the provisions of Regulation S or pursuant to registration under the 193 3 Act or an exemption therefrom.

Second, in the case of securities of reporting issuers and non-reporting foreign issuers with no substantial U.S. market interest, the securities may be sold through the facilities of an established foreign securities exchange; provided that, if the securities are securities of a reporting issuer, neither the seller nor any person acting on the seller's behalf knows that, any counterparty is a U.S. person.

Offers and Sales Not Entitled to Safe Harbor Protection

Regulation S would not be the exclusive means of establishing that a distribution of debt securities is not subject to the registration requirements of the 193 3 Act by reason of the offer and sale occurring outside the United States. When the safe harbor provisions are not available, the Release sets forth proposed considerations to be used in determining whether an offer or sale occurs outside the United States. They are the locus of the constituent elements of the offer or sale, the absence of any directed selling efforts in the United States, the likelihood of the securities coming to rest outside the United States and the justified expectations of the parties to the transaction concerning the applicability of the registration provisions of the 1933 Act.

"U.S. Person"

Regulation S would change the scope of "U.S. person" significantly from the definition currently in common use. The definition currently in common use is a follows:

"U.S. person" means a citizen or resident of the United States, a corporation, partnership or other entity created or organized in or under the laws of the United States and an estate or trust the income of which is subject to United States federal income taxation regardless of its source; provided, however, that the term "U.S. person" shall not include a branch or agency of a U.S. bank or insurance company that is operating outside the United States for valid business reasons as a locally regulated branch or agency engaged in the banking or insurance business and not solely for the purpose of investing in securities not registered under the 1934 Act.

Under Regulation' S, a "U.S. person" is:

(a) Any natural person resident in the United States. Thus, a U.S. citizen resident abroad would not be a U.S. person under Regulation S.

(b) Any partnership or corporation organized or incorporated under the laws of the United States, its territories or possessions or any state or the District of Columbia.

(c) Any foreign corporation or partnership formed by

a U.S. person principally for the purpose of investing in securities not registered under the 1933 Act.*

(d) Any estate of which any executor or administrator is a U.S. person.

(e) Any trust of which any trustee is a U.S. person.

(f) Any branch or agency of a foreign entity located in the United States.

(g) Any non-discretionary custodial or similar account held by a dealer or fiduciary (wherever located) for the account of a U.S. person.

(h) Any discretionary custodial or similar account held by a dealer or fiduciary located in the United States, regardless of whether the beneficial owner of such account is a U.S. person.

Under Regulation S, an offshore branch or agency of a U.S. bank or insurance company would continue to be regarded as a non-U.S. person. In addition, Regulation S would exclude from "U.S. person" the IMF, the World Bank, the Inter-American Development Bank and the U.N., its subsidiaries and affiliates.

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* The SEC is considering eliminating or modifying this on the basis that institutional investors should be able to invest abroad through foreign affiliated entities.