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Regulation S

Rules Governing Offers and Sales Made Outside the United States Without Registration Under the Securities Act of 1933

A *Red Box*® Service Publication

Wolters Kluwer
Law & Business

Print Date: March 15, 2012

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— From a *Declaration of Principles* jointly adopted by a Committee of the American Bar Association and a Committee of Publishers and Associations

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Published by Wolters Kluwer Law & Business in New York.

Wolters Kluwer Law & Business serves customers worldwide with CCH, Aspen Publishers and Kluwer Law International products.

Printed in the United States of America

9111140547 (starter set)

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Regulation S appears in Part 230 of Title 17 of the Code of Federal Regulations. Cite as 17 CFR § 230.901, *et seq*.

REGULATION S

RULES GOVERNING OFFERS AND SALES MADE OUTSIDE THE UNITED STATES WITHOUT REGISTRATION UNDER THE SECURITIES ACT OF 1933

Preliminary Notes

1. The following rules relate solely to the application of Section 5 of the Securities Act of 1933 (the *Act*) [15 U.S.C. 77e] and not to antifraud or other provisions of the federal securities laws.

2. In view of the objective of these rules and the policies underlying the Act, Regulation S is not available with respect to any transaction or series of transactions that, although in technical compliance with these rules, is part of a plan or scheme to evade the registration provisions of the Act. In such cases, registration under the Act is required.

3. Nothing in these rules obviates the need for any issuer or any other person to comply with the securities registration or broker-dealer registration requirements of the Securities Exchange Act (the *Exchange Act*), whenever such requirements are applicable.

4. Nothing in these rules obviates the need to comply with any applicable state law relating to the offer and sale of securities.

5. Attempted compliance with any rule in Regulation S does not act as an exclusive election; a person making an offer or sale of securities may also claim the availability of any other applicable exemption from the registration requirements of the Act. The availability of the Regulation S safe harbor to offers and sales that occur outside of the United States will not be affected by the subsequent offer and sale of these securities into the United States or to U.S. persons during the distribution compliance period, as long as the subsequent offer and sale are made pursuant to registration or an exemption therefrom under the Act.

6. Regulation S is available only for offers and sales of securities outside the United States. Securities acquired overseas, whether or not pursuant to Regulation S, may be resold in the United States only if they are registered under the Act or an exemption from registration is available.

7. Nothing in these rules precludes access by journalists for publications with a general circulation in the United States to offshore press conferences, press releases and meetings with company press spokespersons in which an offshore offering or tender offer is discussed, provided that the information is made available to the foreign and United States press generally and is not intended to induce purchases of securities by persons in the United States or tenders of securities by United States holders in the case of exchange offers. Where applicable, issuers and bidders may also look to § 230.135e and § 240.14d-1(c) of this chapter.

8. The provisions of this Regulation S shall not apply to offers and sales of securities issued by open-end investment companies or unit investment trusts registered or required to be registered or closed-end investment companies required

to be registered, but not registered, under the Investment Company Act of 1940 [15 U.S.C. 80a-1 *et seq.*] (the *1940 Act*).

Rule 901. General Statement.

For the purposes only of Section 5 of the Act [15 U.S.C. § 77e], the terms ''offer,'' ''offer to sell,'' ''sell,'' ''sale,'' and ''offer to buy'' shall be deemed to include offers and sales that occur within the United States and shall be deemed not to include offers and sales that occur outside the United States.

Rule 902. Definitions.

As used in Regulation S, the following terms shall have the meanings indicated.

(a) *Debt Securities.* ''Debt securities'' of an issuer is defined to mean any security other than an equity security as defined in § 230.405, as well as the following:

(1) Non-participatory preferred stock, which is defined as non-convertible capital stock, the holders of which are entitled to a preference in payment of dividends and in distribution of assets on liquidation, dissolution, or winding up of the issuer, but are not entitled to participate in residual earnings or assets of the issuer; and

(2) Asset-backed securities, which are securities of a type that either:

(i) Represent an ownership interest in a pool of discrete assets, or certificates of interest or participation in such assets (including any rights designed to assure servicing, or the receipt or timeliness of receipt by holders of such assets, or certificates of interest or participation in such assets, of amounts payable thereunder), provided that the assets are not generated or originated between the issuer of the security and its affiliates; or

(ii) Are secured by one or more assets or certificates of interest or participation in such assets, and the securities, by their terms, provide for payments of principal and interest (if any) in relation to payments or reasonable projections of payments on assets meeting the requirements of paragraph (a)(2)(i) of this section, or certificates of interest or participations in assets meeting such requirements.

(iii) For purposes of paragraph (a)(2) of this section, the term ''assets'' means securities, installment sales, accounts receivable, notes, leases or other contracts, or other assets that by their terms convert into cash over a finite period of time.

(b) *Designated Offshore Securities Market.* ''Designated offshore securities market'' means:

(1) The Eurobond market, as regulated by the International Securities Market Association; the Alberta Stock Exchange; the Amsterdam Stock Exchange; the Australian Stock Exchange Limited; the Bermuda Stock Exchange; the Bourse de Bruxelles; the Copenhagen Stock Exchange; the European Association of Securities Dealers Automated Quotation; the Frankfurt Stock Exchange; the Helsinki Stock Exchange; The Stock Exchange of Hong Kong Limited; the Irish Stock Exchange; the Istanbul Stock Exchange; the Johannesburg Stock Exchange; the London Stock Exchange; the Bourse de Luxembourg; the Mexico Stock Exchange; the Borsa Valori di Milan; the Montreal Stock Exchange; the Oslo Stock Exchange; the Bourse de Paris; the Stock Exchange of Singapore Ltd.; the Stockholm Stock Exchange; the Tokyo Stock Exchange; the Toronto Stock Exchange; the Vancouver Stock Exchange; the Warsaw Stock Exchange and the Zurich Stock Exchange; and

(2) Any foreign securities exchange or non-exchange market designated by the Commission. Attributes to be considered in determining whether to designate an offshore securities market, among others, include:

(i) Organization under foreign law;

(ii) Association with a generally recognized community of brokers, dealers, banks, or other professional intermediaries with an established operating history;

(iii) Oversight by a governmental or self-regulatory body;

(iv) Oversight standards set by an existing body of law;

(v) Reporting of securities transactions on a regular basis to a governmental or self-regulatory body;

(vi) A system for exchange of price quotations through common communications media; and

(vii) An organized clearance and settlement system.

(c) *Directed Selling Efforts.*

(1) "Directed selling efforts" means any activity undertaken for the purpose of, or that could reasonably be expected to have the effect of, conditioning the market in the United States for any of the securities being offered in reliance on this Regulation S (§ 230.901 through § 230.905, and Preliminary Notes). Such activity includes placing an advertisement in a publication "with a general circulation in the United States" that refers to the offering of securities being made in reliance upon this Regulation S.

(2) Publication "with a general circulation in the United States":

(i) Is defined as any publication that is printed primarily for distribution in the United States, or has had, during the preceding twelve months, an average circulation in the United States of 15,000 or more copies per issue; and

(ii) Will encompass only the U.S. edition of any publication printing a separate U.S. edition if the publication, without considering its U.S. edition, would not constitute a publication with a general circulation in the United States.

(3) The following are not "directed selling efforts":

(i) Placing an advertisement required to be published under U.S. or foreign law, or under rules or regulations of a U.S. or foreign regulatory or self-regulatory authority, provided the advertisement contains no more information than legally required and includes a statement to the effect that the securities have not been registered under the Act and may not be offered or sold in the United States (or to a U.S. person, if the advertisement relates to an offering under Category 2 or 3 (paragraph (b)(2) or (b)(3)) in § 230.903) absent registration or an applicable exemption from the registration requirements;

(ii) Contact with persons excluded from the definition of "U.S. person" pursuant to paragraph (k)(2)(vi) of this section or persons holding accounts excluded from the definition of "U.S. person" pursuant to paragraph (k)(2)(i) of this section, solely in their capacities as holders of such accounts;

(iii) A tombstone advertisement in any publication with a general circulation in the United States, *provided*:

(A) The publication has less than 20% of its circulation, calculated by aggregating the circulation of its U.S. and comparable non-U.S. editions, in the United States;

(B) Such advertisement contains a legend to the effect that the securities have not been registered under the Act and may not be offered or sold in the United States (or to a U.S. person, if the advertisement relates to an offering under Category 2 or 3 (paragraph (b)(2) or (b)(3)) in § 230.903) absent registration or an applicable exemption from the registration requirements; and

(C) Such advertisement contains no more information than:

(*1*) The issuer's name;

(*2*) The amount and title of the securities being sold;

(*3*) A brief indication of the issuer's general type of business;

(*4*) The price of the securities;

(*5*) The yield of the securities, if debt securities with a fixed (non-contingent) interest provision;

(*6*) The name and address of the person placing the advertisement, and whether such person is participating in the distribution;

(*7*) The names of the managing underwriters;

(*8*) The dates, if any, upon which the sales commenced and concluded;

(*9*) Whether the securities are offered or were offered by rights issued to security holders and, if so, the class of securities that are entitled or were entitled to subscribe, the subscription ratio, the record date, the dates (if any) upon which the rights were issued and expired, and the subscription price; and

(*10*) Any legend required by law or any foreign or U.S. regulatory or self-regulatory authority;

(iv) Bona fide visits to real estate, plants or other facilities located in the United States and tours thereof conducted for a prospective investor by an issuer, a distributor, any of their respective affiliates or a person acting on behalf of any of the foregoing;

(v) Distribution in the United States of a foreign broker-dealer's quotations by a third-party system that distributes such quotations primarily in foreign countries if:

(A) Securities transactions cannot be executed between foreign broker-dealers and persons in the United States through the system; and

(B) The issuer, distributors, their respective affiliates, persons acting on behalf of any of the foregoing, foreign broker-dealers and other participants in the system do not initiate contacts with U.S. persons or persons within the United States, beyond those contacts exempted under § 240.15a-6 of this chapter;

(vi) Publication by an issuer of a notice in accordance with § 230.135 or § 230.135c;

(vii) Providing any journalist with access to press conferences held outside of the United States, to meetings with the issuer or selling security holder representatives conducted outside the United States, or to written press-related materials released outside the United States, at or in which a present or proposed offering of securities is discussed, if the requirements of § 230.135e are satisfied; and

(viii) Publication or distribution of a research report by a broker or dealer in accordance with Rule 138(c) (§ 230.138(c)) or Rule 139(b) (§ 230.139(b)).

(d) *Distributor.* "Distributor" means any underwriter, dealer, or other person who participates, pursuant to a contractual arrangement, in the distribution of the securities offered or sold in reliance on this Regulation S (§ 230.901 through § 230.905, and Preliminary Notes).

(e) *Domestic Issuer/Foreign Issuer.* "Domestic issuer" means any issuer other than a "foreign government" or "foreign private issuer" (both as defined in § 230.405). "Foreign issuer" means any issuer other than a "domestic issuer."

(f) *Distribution Compliance Period.* ''Distribution compliance period'' means a period that begins when the securities were first offered to persons other than distributors in reliance upon this Regulation S (§ 230.901 through § 230.905, and Preliminary Notes) or the date of closing of the offering, whichever is later, and continues until the end of the period of time specified in the relevant provision of § 230.903, except that:

(1) All offers and sales by a distributor of an unsold allotment or subscription shall be deemed to be made during the distribution compliance period;

(2) In a continuous offering, the distribution compliance period shall commence upon completion of the distribution, as determined and certified by the managing underwriter or person performing similar functions;

(3) In a continuous offering of non-convertible debt securities offered and sold in identifiable tranches, the distribution compliance period for securities in a tranche shall commence upon completion of the distribution of such tranche, as determined and certified by the managing underwriter or person performing similar functions; and

(4) That in a continuous offering of securities to be acquired upon the exercise of warrants, the distribution compliance period shall commence upon completion of the distribution of the warrants, as determined and certified by the managing underwriter or person performing similar functions, if requirements of § 230.903(b)(5) are satisfied.

(g) *Offering Restrictions.* ''Offering restrictions'' means:

(1) Each distributor agrees in writing:

(i) That all offers and sales of the securities prior to the expiration of the distribution compliance period specified in Category 2 or 3 (paragraph (b)(2) or (b)(3)) in § 230.903, as applicable, shall be made only in accordance with the provisions of § 230.903 or § 230.904; pursuant to registration of the securities under the Act; or pursuant to an available exemption from the registration requirements of the Act; and

(ii) For offers and sales of equity securities of domestic issuers, not to engage in hedging transactions with regard to such securities prior to the expiration of the distribution compliance period specified in Category 2 or 3 (paragraph (b)(2) or (b)(3)) in § 230.903, as applicable, unless in compliance with the Act; and

(2) All offering materials and documents (other than press releases) used in connection with offers and sales of the securities prior to the expiration of the distribution compliance period specified in Category 2 or 3 (paragraph (b)(2) or (b)(3)) in § 230.903, as applicable, shall include statements to the effect that the securities have not been registered under the Act and may not be offered or sold in the United States or to U.S. persons (other than distributors) unless the securities are registered under the Act, or an exemption from the registration requirements of the Act is available. For offers and sales of equity securities of domestic issuers, such offering materials and documents also must state that hedging transactions involving those securities may not be conducted unless in compliance with the Act. Such statements shall appear:

(i) On the cover or inside cover page of any prospectus or offering circular used in connection with the offer or sale of the securities;

(ii) In the underwriting section of any prospectus or offering circular used in connection with the offer or sale of the securities; and

(iii) In any advertisement made or issued by the issuer, any distributor, any of their respective affiliates, or any person acting on behalf of any of the foregoing. Such statements may appear in summary form on prospectus cover pages and in advertisements.

(h) *Offshore Transaction.*

(1) An offer or sale of securities is made in an ''offshore transaction'' if:

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

(ii) Either:

(A) At the time the buy order is originated, the buyer is outside the United States, or the seller and any person acting on its behalf reasonably believe that the buyer is outside the United States; or

(B) For purposes of:

(*1*) Section 230.903, the transaction is executed in, on or through a physical trading floor of an established foreign securities exchange that is located outside the United States; or

(*2*) Section 203.904, the transaction is executed in, on or through the facilities of a designated offshore securities market described in paragraph (b) of this section, and neither the seller nor any person acting on its behalf knows that the transaction has been pre-arranged with a buyer in the United States.

(2) Notwithstanding paragraph (h)(1) of this section, offers and sales of securities specifically targeted at identifiable groups of U.S. citizens abroad, such as members of the U.S. armed forces serving overseas, shall not be deemed to be made in ''offshore transactions.''

(3) Notwithstanding paragraph (h)(1) of this section, offers and sales of securities to persons excluded from the definition of ''U.S. person'' pursuant to paragraph (k)(2)(vi) of this section or persons holding accounts excluded from the definition of ''U.S. person'' pursuant to paragraph (k)(2)(i) of this section, solely in their capacities as holders of such accounts, shall be deemed to be made in ''offshore transactions.''

(4) Notwithstanding paragraph (h)(1) of this section, publication or distribution of a research report in accordance with Rule 138(c) (§ 230.138(c)) or Rule 139(b) (§ 230.139(b)) by a broker or dealer at or around the time of an offering in reliance on Regulation S (§§ 230.901 through 230.905) will not cause the transaction to fail to be an offshore transaction as defined in this section.

(i) *Reporting Issuer.* ''Reporting issuer'' means an issuer other than an investment company registered or required to register under the 1940 Act that:

(1) Has a class of securities registered pursuant to Section 12(b) or 12(g) of the Exchange Act (15 U.S.C. 78*l*(b) or 78*l*(g)) or is required to file reports pursuant to Section 15(d) of the Exchange Act (15 U.S.C. 78*o*(d)); and

(2) Has filed all the material required to be filed pursuant to Section 13(a) or 15(d) of the Exchange Act (15 U.S.C. 78m(a) or 78*o*(d)) for a period of at least twelve months immediately preceding the offer or sale of securities made in reliance upon this Regulation S (§ 230.901 through § 230.905, and Preliminary Notes) (or for such shorter period that the issuer was required to file such material).

(j) *Substantial U.S. Market Interest.*

(1) ''Substantial U.S. market interest'' with respect to a class of an issuer's equity securities means:

(i) The securities exchanges and inter-dealer quotation systems in the United States in the aggregate constituted the single largest market for such class of securities in the shorter of the issuer's prior fiscal year or the period since the issuer's incorporation; or

(ii) 20 percent or more of all trading in such class of securities took place in, on or through the facilities of securities exchanges and inter-dealer quotation systems in the United States and less than 55 percent of such trading took place in, on or through the facilities of securities markets of a single foreign country in the shorter of the issuer's prior fiscal year or the period since the issuer's incorporation.

(2) "Substantial U.S. market interest" with respect to an issuer's debt securities means:

(i) Its debt securities, in the aggregate, are held of record (as that term is defined in § 240.12g5-1 of this chapter and used for purposes of paragraph (j)(2) of this section) by 300 or more U.S. persons;

(ii) $1 billion or more of: the principal amount outstanding of its debt securities, the greater of liquidation preference or par value of its securities described in § 230.902(a)(1), and the principal amount or principal balance of its securities described in § 230.902(a)(2), in the aggregate, is held of record by U.S. persons; and

(iii) 20 percent or more of: the principal amount outstanding of its debt securities, the greater of liquidation preference or par value of its securities described in § 230.902(a)(1), and the principal amount or principal balance of its securities described in § 230.902(a)(2), in the aggregate, is held of record by U.S. persons.

(3) Notwithstanding paragraph (j)(2) of this section, substantial U.S. market interest with respect to an issuer's debt securities is calculated without reference to securities that qualify for the exemption provided by Section 3(a)(3) of the Securities Act (15 U.S.C. 77c(a)(3)).

(k) *U.S. Person.*

(1) "U.S. person" means:

(i) Any natural person resident in the United States;

(ii) Any partnership or corporation organized or incorporated under the laws of the United States;

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

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

(v) Any agency or branch of a foreign entity located in the United States;

(vi) Any non-discretionary account or similar account (other than an estate or trust) held by a dealer or other fiduciary for the benefit or account of a U.S. person;

(vii) Any discretionary account or similar account (other than an estate or trust) held by a dealer or other fiduciary organized, incorporated, or (if an individual) resident in the United States; and

(viii) Any partnership or corporation if:

(A) Organized or incorporated under the laws of any foreign jurisdiction; and

(B) Formed by a U.S. person principally for the purpose of investing in securities not registered under the Act, unless it is organized or incorporated, and owned, by accredited investors (as defined in § 230.501(a)) who are not natural persons, estates or trusts.

(2) The following are not "U.S. persons":

(i) Any discretionary account or similar account (other than an estate or trust) held for the benefit or account of a non-U.S. person by a dealer or other professional fiduciary organized, incorporated, or (if an individual) resident in the United States;

(ii) Any estate of which any professional fiduciary acting as executor or administrator is a U.S. person if:

(A) An executor or administrator of the estate who is not a U.S. person has sole or shared investment discretion with respect to the assets of the estate; and

(B) The estate is governed by foreign law;

(iii) Any trust of which any professional fiduciary acting as trustee is a U.S. person, if a trustee who is not a U.S. person has sole or shared investment discretion with respect to the trust assets, and no beneficiary of the trust (and no settlor if the trust is revocable) is a U.S. person;

(iv) An employee benefit plan established and administered in accordance with the law of a country other than the United States and customary practices and documentation of such country;

(v) Any agency or branch of a U.S. person located outside the United States if:

(A) The agency or branch operates for valid business reasons; and

(B) The agency or branch is engaged in the business of insurance or banking and is subject to substantive insurance or banking regulation, respectively, in the jurisdiction where located; and

(vi) The International Monetary Fund, the International Bank for Reconstruction and Development, the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, the United Nations, and their agencies, affiliates and pension plans, and any other similar international organizations, their agencies, affiliates and pension plans.

(l) *United States.* "United States" means the United States of America, its territories and possessions, any State of the United States, and the District of Columbia.

Rule 903. Offers or Sales of Securities By the Issuer, a Distributor, Any of Their Respective Affiliates, or Any Person Acting on Behalf of Any of the Foregoing; Conditions Relating to Specific Securities.

(a) An offer or sale of securities by the issuer, a distributor, any of their respective affiliates, or any person acting on behalf of any of the foregoing, shall be deemed to occur outside the United States within the meaning of § 230.901 if:

(1) The offer or sale is made in an offshore transaction;

(2) No directed selling efforts are made in the United States by the issuer, a distributor, any of their respective affiliates, or any person acting on behalf of any of the foregoing; and

(3) The conditions of paragraph (b) of this section, as applicable, are satisfied.

(b) *Additional Conditions.*

(1) *Category 1.* No conditions other than those set forth in § 230.903(a) apply to securities in this category. Securities are eligible for this category if:

(i) The securities are issued by a foreign issuer that reasonably believes at the commencement of the offering that:

(A) There is no substantial U.S. market interest in the class of securities to be offered or sold (if equity securities are offered or sold);

(B) There is no substantial U.S. market interest in its debt securities (if debt securities are offered or sold);

(C) There is no substantial U.S. market interest in the securities to be purchased upon exercise (if warrants are offered or sold); and

(D) There is no substantial U.S. market interest in either the convertible securities or the underlying securities (if convertible securities are offered or sold);

(ii) The securities are offered and sold in an overseas directed offering, which means:

(A) An offering of securities of a foreign issuer that is directed into a single country other than the United States to the residents thereof and that is made in accordance with the local laws and customary practices and documentation of such country; or

(B) An offering of non-convertible debt securities of a domestic issuer that is directed into a single country other than the United States to the residents thereof and that is made in accordance with the local laws and customary practices and documentation of such country, provided that the principal and interest of the securities (or par value, as applicable) are denominated in a currency other than U.S. dollars and such securities are neither convertible into U.S. dollar-denominated securities nor linked to U.S. dollars (other than through related currency or interest rate swap transactions that are commercial in nature) in a manner that in effect converts the securities to U.S. dollar-denominated securities.

(iii) The securities are backed by the full faith and credit of a foreign government; or

(iv) The securities are offered and sold to employees of the issuer or its affiliates pursuant to an employee benefit plan established and administered in accordance with the law of a country other than the United States, and customary practices and documentation of such country, provided that:

(A) The securities are issued in compensatory circumstances for bona fide services rendered to the issuer or its affiliates in connection with their businesses and such services are not rendered in connection with the offer or sale of securities in a capital-raising transaction;

(B) Any interests in the plan are not transferable other than by will or the laws of descent or distribution;

(C) The issuer takes reasonable steps to preclude the offer and sale of interests in the plan or securities under the plan to U.S. residents other than employees on temporary assignment in the United States; and

(D) Documentation used in connection with any offer pursuant to the plan contains a statement that the securities have not been registered under the Act and may not be offered or sold in the United States unless registered or an exemption from registration is available.

(2) *Category 2.* The following conditions apply to securities that are not eligible for Category 1 (paragraph (b)(1)) of this section and that are equity securities of a reporting foreign issuer, or debt securities of a reporting issuer or of a non-reporting foreign issuer.

(i) Offering restrictions are implemented;

(ii) The offer or sale, if made prior to the expiration of a 40-day distribution compliance period, is not made to a U.S. person or for the account or benefit of a U.S. person (other than a distributor); and

(iii) Each distributor selling securities to a distributor, a dealer, as defined in Section 2(a)(12) of the Act (15 U.S.C. § 77b(a)(12)), or a person receiving a selling concession, fee or other remuneration in respect of the securities sold, prior to the expiration of a 40-day distribution compliance period, sends a confirmation or other notice to the purchaser stating that the purchaser is subject to the same restrictions on offers and sales that apply to a distributor.

(3) *Category 3.* The following conditions apply to securities that are not eligible for Category 1 or 2 (paragraph (b)(1) or (b)(2)) of this section:

(i) Offering restrictions are implemented;

(ii) In the case of debt securities:

(A) The offer or sale, if made prior to the expiration of a 40-day distribution compliance period, is not made to a U.S. person or for the account or benefit of a U.S. person (other than a distributor); and

(B) The securities are represented upon issuance by a temporary global security which is not exchangeable for definitive securities until the expiration of the 40-day distribution compliance period and, for persons other than distributors, until certification of beneficial ownership of the securities by a non-U.S. person or a U.S. person who purchased securities in a transaction that did not require registration under the Act;

(iii) In the case of equity securities:

(A) The offer or sale, if made prior to the expiration of a one-year distribution compliance period (or six-month distribution compliance period if the issuer is a reporting issuer), is not made to a U.S. person or for the account or benefit of a U.S. person (other than a distributor); and

(B) The offer or sale, if made prior to the expiration of a one-year distribution compliance period (or six-month distribution compliance period if the issuer is a reporting issuer), is made pursuant to the following conditions:

(*1*) The purchaser of the securities (other than a distributor) certifies that it is not a U.S. person and is not acquiring the securities for the account or benefit of any U.S. person or is a U.S. person who purchased securities in a transaction that did not require registration under the Act;

(*2*) The purchaser of the securities agrees to resell such securities only in accordance with the provisions of this Regulation S (§ 230.901 through § 230.905, and Preliminary Notes), pursuant to registration under the Act, or pursuant to an available exemption from registration; and agrees not to engage in hedging transactions with regard to such securities unless in compliance with the Act;

(*3*) The securities of a domestic issuer contain a legend to the effect that transfer is prohibited except in accordance with the provisions of this Regulation S (§ 230.901 through § 230.905, and Preliminary Notes), pursuant to registration under the Act, or pursuant to an available exemption from registration; and that hedging transactions involving those securities may not be conducted unless in compliance with the Act;

(*4*) The issuer is required, either by contract or a provision in its bylaws, articles, charter or comparable document, to refuse to register any transfer of the securities not made in accordance with the provisions of this Regulation S (§ 230.901 through

§ 230.905, and Preliminary Notes), pursuant to registration under the Act, or pursuant to an available exemption from registration; *provided, however,* that if the securities are in bearer form or foreign law prevents the issuer of the securities from refusing to register securities transfers, other reasonable procedures (such as a legend described in paragraph (b)(3)(iii)(B)(*3*) of this section) are implemented to prevent any transfer of the securities not made in accordance with the provisions of this Regulation S; and

(iv) Each distributor selling securities to a distributor, a dealer (as defined in section 2(a)(12) of the Act (15 U.S.C. 77b(a)(12)), or a person receiving a selling concession, fee or other remuneration, prior to the expiration of a 40-day distribution compliance period in the case of debt securities, or a one-year distribution compliance period (or six-month distribution compliance period if the issuer is a reporting issuer) in the case of equity securities, sends a confirmation or other notice to the purchaser stating that the purchaser is subject to the same restrictions on offers and sales that apply to a distributor.

(4) *Guaranteed Securities.* Notwithstanding paragraphs (b)(1) through (b)(3) of this section, in offerings of debt securities fully and unconditionally guaranteed as to principal and interest by the parent of the issuer of the debt securities, only the requirements of paragraph (b) of this section that are applicable to the offer and sale of the guarantee must be satisfied with respect to the offer and sale of the guaranteed debt securities.

(5) *Warrants.* An offer or sale of warrants under Category 2 or 3 (paragraph (b)(2) or (b)(3)) of this section also must comply with the following requirements:

(i) Each warrant must bear a legend stating that the warrant and the securities to be issued upon its exercise have not been registered under the Act and that the warrant may not be exercised by or on behalf of any U.S. person unless registered under the Act or an exemption from such registration is available;

(ii) Each person exercising a warrant is required to give:

(A) Written certification that it is not a U.S. person and the warrant is not being exercised on behalf of a U.S. person; or

(B) A written opinion of counsel to the effect that the warrant and the securities delivered upon exercise thereof have been registered under the Act or are exempt from registration thereunder; and

(iii) Procedures are implemented to ensure that the warrant may not be exercised within the United States, and that the securities may not be delivered within the United States upon exercise, other than in offerings deemed to meet the definition of ''offshore transaction'' pursuant to § 230.902(h), unless registered under the Act or an exemption from such registration is available.

Rule 904. Offshore Resales.

(a) An offer or sale of securities by any person other than the issuer, a distributor, any of their respective affiliates (except any officer or director who is an affiliate solely by virtue of holding such position), or any person acting on behalf of any of the foregoing, shall be deemed to occur outside the United States within the meaning of § 230.901 if:

(1) The offer or sale are made in an offshore transaction;

(2) No directed selling efforts are made in the United States by the seller, an affiliate, or any person acting on their behalf; and

(3) The conditions of paragraph (b) of this section, if applicable, are satisfied.

(b) *Additional Conditions.*

(1) *Resales by Dealers and Persons Receiving Selling Concessions.* In the case of an offer or sale of securities prior to the expiration of the distribution compliance period specified in Category 2 or 3 (paragraph (b)(2) or (b)(3)) of § 230.903, as applicable, by a dealer, as defined in Section 2(a)(12) of the Act (15 U.S.C. 77b(a)(12)), or a person receiving a selling concession, fee or other remuneration in respect of the securities offered or sold:

(i) Neither the seller nor any person acting on its behalf knows that the offeree or buyer of the securities is a U.S. person; and

(ii) If the seller or any person acting on the seller's behalf knows that the purchaser is a dealer, as defined in Section 2(a)(12) of the Act (15 U.S.C. 77b(a)(12)), or is a person receiving a selling concession, fee or other remuneration in respect of the securities sold, the seller or a person acting on the seller's behalf sends to the purchaser a confirmation or other notice stating that the securities may be offered and sold during the distribution compliance period only in accordance with the provisions of this Regulation S (§ 230.901 through § 230.905, and Preliminary Notes); pursuant to registration of the securities under the Act; or pursuant to an available exemption from the registration requirements of the Act.

(2) *Resales by Certain Affiliates.* In the case of an offer or sale of securities by an officer or director of the issuer or a distributor, who is an affiliate of the issuer or distributor solely by virtue of holding such position, no selling concession, fee or other remuneration is paid in connection with such offer or sale other than the usual and customary broker's commission that would be received by a person executing such transaction as agent.

Rule 905. Resale Limitations.

Equity securities of domestic issuers acquired from the issuer, a distributor, or any of their respective affiliates in a transaction subject to the conditions of § 230.901 or § 230.903 are deemed to be "restricted securities" as defined in § 230.144. Resales of any of such restricted securities by the offshore purchaser must be made in accordance with this Regulation S (§ 230.901 through § 230.905, and Preliminary Notes), the registration requirements of the Act or an exemption therefrom. Any "restricted securities," as defined in § 230.144, that are equity securities of a domestic issuer will continue to be deemed to be restricted securities, notwithstanding that they were acquired in a resale transaction made pursuant to § 230.901 or § 230.904.

RULE 904

An offer or sale of securities by a non-affiliate or an officer or director who is an affiliate ***solely*** by virtue of holding such position is exempt from the registration requirements of the Securities Act, if ***all*** three of the following conditions are met:

- The offer or sale is made in an ***offshore transaction***.
- No ***directed selling efforts*** are made in the United States by the seller ***or*** an affiliate ***or*** any person acting on their behalf.
- No selling concession, fee or other remuneration is paid in connection with such offer or sale other than the usual and customary broker's commission that would be received by a person executing such transaction as agent.

In addition, the year-long restricted period of Rule 905 must have terminated.

Offshore transaction

An offer or sale of securities is made in an ***offshore transaction*** if the offer is ***not*** made to a person in the United States.

In addition, ***one*** of the following conditions must be met:

- At the time the buy order is originated, the buyer is outside the United States, or the seller and any person acting on its behalf reasonably believe that the buyer is outside the United States.
- The transaction is executed in, on or through the facilities of a designated offshore securities market, and neither the seller nor any person acting on its behalf knows that the transaction has been pre-arranged with a buyer in the United States.

AIM is a designated offshore securities market.

Offers and sales of securities specifically targeted at identifiable groups of U.S. citizens outside the United States, such as members of the U.S. armed forces serving overseas are ***not*** made in ***offshore transactions***.

Offers and sales of securities to persons excluded from the definition of ***U.S. person*** pursuant to Rule 902(k)(2)(vi) or persons holding accounts excluded from the definition of ***U.S. person*** pursuant to Rule 902(k)(2)(i), solely in their capacities as holders of such accounts, are made in offshore transactions.

Publication or distribution of a research report in accordance with Rule 138(c) or Rule 139(b) by a broker or dealer at or around the time of an offering in reliance on Rule 904 will ***not*** cause the transaction to fail to be an offshore transaction.

Directed selling efforts

Directed selling efforts means any activity undertaken for the purpose of, or that could reasonably be expected to have the effect of, conditioning the market in the United States for

any of the securities being offered in reliance on Rule 904. Such activity includes placing an advertisement in a publication ***with a general circulation in the United States*** that refers to the offering of securities being made in reliance upon this Regulation S.

A publication ***with a general circulation in the United States*** includes any publication that is printed primarily for distribution in the United States, or has had, during the preceding twelve months, an average circulation in the United States of 15,000 or more copies per issue. The definition includes ***only*** the U.S. edition of any publication printing a separate U.S. edition if the publication, without considering its U.S. edition, would not constitute a publication with a general circulation in the United States.

The following are ***not*** directed selling efforts:

- placing an advertisement required to be published under U.S. or non-U.S. law, or under rules or regulations of a U.S. or non-U.S. regulatory or self-regulatory authority, ***provided*** the advertisement contains no more information than legally required and contains required legends

- contact with persons excluded from the definition of ***U.S. person*** pursuant to Rule 902 (k)(2)(vi) or persons holding accounts excluded from the definition of ***U.S. person*** pursuant to Rule 902 (k)(2)(i), solely in their capacities as holders of such accounts

- a tombstone advertisement in any publication with a general circulation in the United States, ***provided*** certain conditions on content are satisfied

- bona fide visits to real estate, plants or other facilities located in the United States and tours thereof conducted for a prospective investor by an issuer or a distributor or any of their respective affiliates or a person acting on behalf of any of the foregoing

- distribution in the United States of a non-U.S. broker-dealer's quotations by a third-party system that distributes such quotations primarily outside the United States if certain conditions are met

- publication by an issuer of a notice in accordance with Rule 135 or Rule 135c

- providing any journalist with access to press conferences held outside of the United States, to meetings with the issuer or selling security holder representatives conducted outside the United States, or to written press-related materials released outside the United States, at or in which a present or proposed offering of securities is discussed, if the requirements of Rule 135e are satisfied

- publication or distribution of a research report by a broker or dealer in accordance with Rule 138(c) or Rule 139(b).

Rule 902(k)(2)(i) refers to any discretionary account or similar account (other than an estate or trust) held for the benefit or account of a non-U.S. person by a dealer or other professional fiduciary organized, incorporated, or (if an individual) resident in the United States.

Rule 902(k)(2)(vi) refers to the International Monetary Fund, the International Bank for Reconstruction and Development, the Inter-American Development Bank, the Asian

Development Bank, the African Development Bank, the United Nations, and their agencies, affiliates and pension plans, and any other similar international organizations, their agencies, affiliates and pension plans.

Rule 135e legend

Rule 135e provides a safe harbor for announcements, press releases and other press-related materials in connection with an offering structured pursuant to Regulation S. Inserting the legends below will have the effect of the press release ***not*** constituting general solicitation, general advertising or directed selling efforts.

The following legend should be inserted at the top of the press release in all-capital letters:

> NOT FOR RELEASE, PUBLICATION OR DISTRIBUTION IN WHOLE OR IN PART IN OR INTO THE UNITED STATES, CANADA OR JAPAN.

The following legend should be inserted at the end of the press release in addition to any legends or rubrics that might be required by local law or practice:

> This announcement is not for publication or distribution, directly or indirectly, in or into the United States of America. This announcement is not an offer of securities for sale into the United States. The securities referred to herein have not been and will not be registered under the U.S. Securities Act of 1933, as amended, and may not be offered or sold in the United States, except pursuant to an applicable exemption from registration. No public offering of securities is being made in the United States.

The first legend should always include Canada, ***unless*** a Canadian lawyer has been consulted. There is a practice developing of including further jurisdictions, such as Australia, South Africa and New Zealand. There is ***no*** need to include New Zealand. There is also practice of including a sweep-up clause (such as "and any other jurisdiction where such activity would be unlawful"). You should ***not*** use a sweep-up clause: it is of ***no*** help to the person distributing the press release.

The second legend should be inserted in announcements or press releases as its own, stand-alone paragraph. It should ***not*** be combined with other legends.

In the case of an advertisement in a non-U.S. publication, such as the Financial Times, the first legend can be omitted.

HOW TO USE RULE 135e

Many jurisdictions outside the United States allow securities issuers and their representatives to conduct press activities in connection with an offering of securities. In many cases issuers hold press conferences and issue press releases, and the officers of the issuer or a selling shareholder have one-on-one interviews with journalists. In some countries, paid advertising can be used to promote the offering – ads in newspapers and even television commercials. But the United States does not allow many of these activities, and as a result a practice of excluding U.S. journalists from non-U.S. press activity has developed.

Ten years ago, on October 10, 1997, the SEC brought in Rule 135e to provide a safe harbor from the registration requirements of the U.S. Securities Act of 1933, as amended. The rule permits non-U.S. issuers, and those selling securities of non-U.S. issuers and their representatives, to include U.S. journalists in press activities under certain conditions. Any subsequent publication of the information in the United States in accordance with the rule will ***not*** violate the registration requirements of the Securities Act. Still, complaints about overreaching U.S. securities laws (or overreaching U.S. securities lawyers) persist.

Investors at a disadvantage

For many years, U.S. journalists complained bitterly (and, being journalists, often in print) that non-U.S. issuers excluded them from press conferences at which they discussed their capital-raising plans, even though the SEC never required such conduct. Issuers feared that talking about such plans when the information would appear in the U.S. press could result in "offers" of securities, a term broadly interpreted under U.S. law, which includes any conditioning of the market. Making such offers other than through a prospectus filed with the SEC could be seen as gun jumping in SEC-registered offerings. It could violate the rules against "general solicitation" in private offerings made in reliance on Rule 144A, and "directed selling efforts" in offerings outside the U.S. made in reliance on Regulation S. So it was routine to exclude U.S. journalists and journalists from publications with large U.S. readerships. Both U.S. publications and U.S. investors suffered. U.S. publications complained that they could not provide information about the press conferences from which they were excluded, and that U.S. investors learned about financing plans later than other investors. The information could not be kept out of the United States in any case. Information tends to flow to wherever it is valued, and the rise of the internet in the mid and late nineties reinforced this trend.

Intensive lobbying of both the SEC and Congress led Congress to include a provision in the National Securities Markets Improvements Act of 1996 requiring that the SEC, within one year, would "adopt rules under the Securities Act of 1933 concerning the status under the registration provisions of the Securities Act of 1933 of foreign press conferences and foreign press releases by persons engaged in the offer and sale of securities". In October 1996, the SEC proposed Rule 135e, and in October 1997 it adopted the rule. The original proposal would have applied to both U.S. and non-U.S. issuers, but the rule as adopted applies only to non-U.S. issuers. The SEC explained that relief for U.S. issuers was unnecessary, and that it would be better to address publicity regarding U.S. issuers in a "more comprehensive fashion". That more comprehensive solution was reached in a series of reforms relating to publicity, culminating in the SEC Securities Offering Reform process, effective from December 2005.

Not in the United States

The rule contains four conditions for compliance with the safe harbor.

Press activity must occur outside the United States. To comply with the safe harbor, press releases may only be sent to locations outside the United States, and press conferences must also take place outside the United States. When a conference call or video conference occurs no journalist dialling into the call may be physically in the country. In all cases, U.S. journalists may participate, as long as they are physically outside the United States.

The offering in question must not occur solely within the United States. It may be conducted outside the country, or both inside and outside it. But there must be intent to make a genuine offering outside the United States – the offering of a token amount outside the United States is ***not*** sufficient.

Both U.S. and non-U.S. journalists must be given access. The safe harbor would ***not*** be available if only U.S. journalists were able to participate in press activity. If a non-U.S. issuer grants a one-to-one interview to a U.S. journalist outside the United States, it must also give an interview to a non-U.S. journalist, or it must organize a press conference to which it invites them.

Press releases and other written materials provided in accord with the rule must contain an appropriate legend. They should not include a coupon or a form that could be used to indicate an interest in the offering. This fourth condition does ***not*** apply to offerings conducted exclusively outside the United States, although non-U.S. issuers frequently comply with it even then. Other than this requirement, the rule does not mandate or prohibit any particular content.

All contact with U.S. journalists must take place outside the United States. The safe harbor does ***not*** cover a follow-up telephone call with a journalist who attended a press conference or one-to-one interview outside the United States but is physically in the United States at the time of the follow-up call. Moreover, the safe harbor only applies to the registration requirements of the Securities Act. It does ***not*** cover U.S. anti-fraud provisions relating to misstatements and omissions in the offer and sale of securities.

The safe harbor does ***not*** protect paid advertisements. Many jurisdictions outside the United States allow paid advertising (including paid interviews or infomercials) of securities offerings. Issuers should ensure that the ads do not appear in U.S. publications or in publications with a "general U.S. circulation" (a defined term based on circulation volumes). If the publication has separate U.S. and non-U.S. editions, the ad should ***not*** run in the U.S edition. Some non-U.S. jurisdictions require notice of an offering to be published in a newspaper. When this is the case, the SEC should ***not*** regard it as gun jumping, solicitation or directed selling efforts. Nevertheless, a practice of including a Rule 135e legend in those notices has developed.

So what should you be saying?

Rule 135e does ***not*** regulate the content of communications, nor does it alter liabilities for that content. It merely protects communications from violating the registration provisions of the Securities Act. If the content of those communications is misleading, liability for that

statement may exist. Just because what you say does not violate the registration provisions of the Securities Act does not mean that you can say anything you like.

In some ways, the articles published today do not differ from the articles of a decade ago. The general theme is those lawyers will not let us say anything. A *Financial Times* article last year included the familiar bankers' complaint that lawyers' hocus pocus prevents issuers from making statements about the issuer or the offering.

Most content-related issues fall into two categories: statements about the nature of the U.S. portion of the offering those about the issuer and its business. Technically, the Rule permits a CEO at a press conference to say: "We are planning to extend this offering to the United States. We will offer only to Qualified Institutional Buyers as defined in Rule 144A, and will post our offering document on our website. Banks X and Y will be the underwriters. The roadshow starts Friday." But permitted does not mean advisable. This would make it harder to control publicity in the United States. Mistakes are more likely to happen. Release of such information is more likely to lead to inquiries from the U.S. press. Although it is permissible to give this information to a *Wall Street Journal* reporter at the Paris press conference, for the issuer to discuss it with her New York colleagues (or even the same journalist on her return to New York) may result in publicity rules being breached, and a violation of the Securities Act registration provisions could occur. Only the most disciplined issuers can cope with the dissemination of unrestricted information about an offering.

Statements about the issuer and its business present different problems. Although press communications outside the United States do not trigger Securities Act registration requirements, the SEC has never recognized geographic limitations on liability for misleading statements if a connection with the United States can be shown. If a CEO refers to projected earnings in glowing (and incorrect) terms at a press conference or interview, and U.S. investors use that information, the basis for a lawsuit or regulatory action may have formed. With registered offerings, the SEC could ask the issuer not to give more than the offering document information, because that has already been vetted.

Lawyers have debated whether Rule 135e means that an offering document can be supplied to journalists as part of the press package. It is unlikely that this is what the SEC had in mind, but because the rule is content-neutral, it is technically allowed. In some cases, the offering document is available in the issuer's jurisdiction, so its inclusion in the press package is irrelevant. But in others journalists receive a copy before the general public in the issuer's jurisdiction. Elsewhere, the offering is limited to institutions, so journalists would not otherwise be able to obtain the offering document. The inclusion of the offering document in the press package presents practical difficulties – the issuer's officers need additional coaching to respond to more probing questions from journalists.

Rule 135e½

Rule 135e does not apply to the press activities of domestic U.S. issuers, only those of non-U.S. issuers. Accordingly, domestic U.S. issuers conducting registered offerings cannot take advantage of it, but must comply with more limited safe harbors – Rules 134, 135 and 135c (not Rule 135e). Similarly, a domestic issuer conducting an offshore offering pursuant to Category III of Regulation S ***cannot*** use the rule. In that case, press-related activities

resemble those of non-U.S. issuers before the introduction of Rule 135e. The procedures are sometimes referred to as Rule 135e½.

In accord with pre-Rule 135e practice, U.S. journalists may ***not*** attend press conferences, nor are they allowed one-on-one meetings. The press release can ***only*** be sent to non-U.S. publications and news services. Furthermore, consistent with the requirements of Rule 135c (not Rule 135e), the underwriters are ***not*** usually mentioned in the press release.

Because no safe harbor is available, U.S. issuers conducting a Category III offering must exclude both U.S. journalists and those from publications with a U.S. general circulation. Under Regulation S, this includes publications distributed in the United States, or those that have had an average circulation there of at least 15,000 per issue in the preceding twelve months. If the publication does not have a general circulation in the United States apart from its U.S. edition, the definition covers only the U.S. edition. An issuer may seek written assurances from a non-U.S. publication that articles resulting from interviews will not be published in the U.S. edition. Journalists often resist giving that assurance.

Practical implications

The SEC has provided separate guidance on the use of an issuer's website. To avoid gun jumping, general solicitation or directed selling efforts, issuers that place offering-related material on their websites must also create a gatepost to discourage potential U.S. investors. The SEC guidance preceded the SEC Securities Offering Reform process, which liberalized restrictions on publicity. Some U.S. lawyers advise that if an issuer has a practice of placing all is press releases on its website, it may also include a legended offering-related press release, without a screen or gatepost.

The rule applies to press activities regarding ***both*** registered and unregistered offerings by non-U.S. issuers. Rule 135 (not Rule 135e) is a safe harbor for press releases issued in connection with registered offerings. It regulates the content of the release tightly and does ***not*** allow the name of the underwriter to be mentioned. Many issuers will prepare a release compliant with Rule 135 for worldwide use. But they may prepare two releases – one that complies with Rule 135 for use in the United States and one that complies with Rule 135e for use outside the country. Similarly, Rule 135c (not Rule 135e) is a safe harbor for some press releases that issuers registered under the U.S. Securities Exchange Act if 1934, as amended, publish in connection with unregistered offerings. Non-U.S. issuers conducting unregistered offerings often rely on a Rule 135e press release only, and will not issue a release in the United States at all. But again they may issue two press releases – one that complies with Rule 135c for use in the United States and one that complies with Rule 135e for use outside the United States.

By Peter Castellon of Citigroup and Sara Hanks of Clifford Chance

Legends for written materials

The written materials requirement of Rule 135e outlines appropriate legends for press releases and other written material given to journalists.

If the offering is ***not*** registered in the United States the following legend is typically included at the bottom of the press release:

This announcement is not for publication or distribution, directly or indirectly, in or into the United States of America. This announcement is not an offer of securities for sale into the United States. The securities referred to herein have not been and will not be registered under the U.S. Securities Act of 1933, as amended, and may not be offered or sold in the United States, except pursuant to an applicable exemption from registration. No public offering of securities is being made in the United States.

If the offering is registered in the United States, the following legend may be used:

This announcement is not for publication or distribution, directly or indirectly, in or into the United States of America. This announcement is not an offer of securities for sale into the United States. The securities referred to herein may not be offered or sold in the United States unless they are registered under the U.S. Securities Act of 1933, as amended, or exempt from registration. Any public offering of securities to be made in the United States will be made by means of a prospectus that will contain detailed information about the company and management, as well as financial statements.

A practice of placing the following legend in capital letters at the top has developed:

NOT FOR RELEASE, PUBLICATION OR DISTRIBUTION IN WHOLE OR IN PART IN OR INTO THE UNITED STATES.

The legend often includes other jurisdictions:

NOT FOR RELEASE, PUBLICATION OR DISTRIBUTION IN WHOLE OR IN PART IN OR INTO THE UNITED STATES, AUSTRALIA, CANADA OR JAPAN.

This is an updated version of an article that originally appeared in the March 2008 edition of the INTERNATIONAL FINANCIAL LAW REVIEW by Peter Castellon and Sara Hanks.