

being considered by the Commission and comment is requested on each of the proposals that follow. Commentators' proposals have generally focused on common stock placements by domestic issuers. Is there a comparable need for such restrictions in the case of foreign issuers' equity for which the United States is the sole or principal market, or for any other class of securities?

**1. Extend the Restricted Period.**

Currently, the restricted period under the category 2 safe harbor<sup>20</sup> for offerings of securities of domestic companies that are reporting under the Securities Exchange Act of 1934 (the "Exchange Act")<sup>21</sup> is 40 days. Some have suggested extending the restricted period, for example, to one year in the case of equity securities of domestic issuers. One commentator has suggested that such offerings should be subject to the more restrictive conditions of the category 3 safe harbor,<sup>22</sup> which are currently generally applicable to offshore offerings by non-reporting domestic issuers. This would not only extend the restricted period to one year but also require legending of share certificates and an express agreement by the purchaser to resell the securities only in accordance with an available exemption from registration.

**2. Exclude certain discounted offers from the safe harbor.** Another possible revision would be to limit use of the category 2 safe harbor by domestic issuers offering common stock to those offerings sold at the market price or with a specified minimal discount. Those selling at a disqualifying discount could proceed under Rule 901 if the facts and circumstances established that the placement was truly an offshore offer and sale and not part of a plan or scheme to evade the registration requirements of the Securities Act. Alternatively, rather than exclude some or all discounted offerings from the issuer safe harbors, should instead a longer restricted period or all of the category 3 procedures apply to discounted offers?

**3. Restrict risk shifting transactions during the restricted period.** Should the safe harbor require selling restrictions that limit purchasers' ability during the restricted period to sell short or otherwise take a short position with respect to, or otherwise hedge the risk of holding common equity securities?

**4. Prohibit payment with certain types of non-recourse or other types of promissory notes where the expectation of repayment derives solely from the resale of securities.** Should the category 2 or 3 safe harbor be amended to prohibit (or limit through tolling of the restricted period) payment for common equity securities with certain types of non-recourse or other types of promissory notes where the expectation of repayment derives solely (or primarily) from the proceeds of resale of the securities?

#### IV. The Role of Regulation S in Companies' Capital Raising Plans

The Commission, when it adopted Regulation S, understood and intended that legitimate offshore transactions whereby the issuer intended that its securities would be sold and placed offshore would be covered by Regulation S. Regulation S clarified and simplified procedures for offshore placement of securities and was intended to provide U.S. issuers with an efficient capital raising alternative. The Commission understands, in part due to its participation in the Government-Business Forum on Small Business Capital Formation, that there are issuers, particularly those ineligible to use shelf registration, that view offshore offerings as an important financing alternative. The Commission is soliciting comments as to the types of companies that are using Regulation S, how are they using it, and what mechanisms can be used to prevent abuse without unduly deterring legitimate offshore capital raising activities.

Reportedly, many small business issuers consider Regulation S offerings an important financing tool. Is this due to the increased pool of potential investors, or to the process involved in accomplishing a Regulation S offering versus a registered offering, or both? The Commission also recognizes that issuers may be compelled to sell securities offshore, rather than in registered transactions, because of registration disclosure requirements relating to significant acquisitions. As noted above, in a companion release, the Commission is addressing this concern through rule proposals to streamline these disclosure requirements. The Commission is seeking comments as to what other impediments in the current system may lead to problematic Regulation S offerings, and what commenters suggest should be done to alleviate these problems so that resorting to

problematic Regulation S practices can be eliminated.<sup>23</sup>

Further, the Commission requests that commenters address the benefits and costs and other burdens to investors, issuers, and other market participants that would result from any of the suggested changes to Regulation S noted in Section III above.

#### V. Cost-Benefit Analysis

The Commission requests views and data relating to the costs and benefits associated with the proposals relating to additional restrictions for offerings under Regulation S. It is expected that such restrictions would not directly impose additional burdens on companies, although there may be indirect costs incurred by companies.

#### VI. Request for Comments

Any interested person wishing to submit written comments on any aspect of the amendments to forms and rules that are subject to this release are requested to do so. Comments should be submitted in triplicate to Jonathan G. Katz, Secretary, U.S. Securities and Exchange Commission, 450 5th Street, NW., Washington, DC 20549 and should refer to file number S7-20-95.

#### List of Subjects in 17 CFR Part 231

Securities.

#### Amendment of the Code of Federal Regulations

For the reasons set out in the preamble, Title 17 Chapter II of the Code of Federal Regulations is amended as set forth below:

<sup>23</sup> The Commission has established the Advisory Committee on the Capital Formation and Regulatory Processes (the "Advisory Committee"), chaired by Commissioner Steven M.H. Wallman. The Advisory Committee is considering fundamental issues relating to the regulatory framework governing the capital formation process, including whether the current system of registering securities offerings should be replaced with a company registration system. The recommendations of the Advisory Committee may result in rule proposals or legislative recommendations that, if endorsed by the Commission, ultimately may address the matters discussed in this release. Under some of the company registration models being considered by the Advisory Committee, the need to draw legal distinctions between securities issued by registered companies in public offerings conducted domestically and offshore would be significantly reduced. All securities issued by companies registered with the Commission would be freely tradable in this country, regardless of the public or private, or domestic or offshore, nature of that offering.

(August 1994); "Rule Permitting Offshore Stock Sales Yields Deals that Spark SEC Concerns", Wall Street Journal, at C1, April 26, 1994.

<sup>20</sup> Rule 903(c)(2).

<sup>21</sup> 15 U.S.C. 78a *et seq.*

<sup>22</sup> Rule 903(c)(3).