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Registration and Regulation of Foreign Securities Businesses

A. Introduction

Over the past decade an international securities bazaar has set up its tents, sprawling into every trading city of the world. This international market is the wild frontier of securities regulation—featuring cut-throat pirates and fabulous galleons of gold.

Increasing utilization[1] of foreign financial institutions to effect transactions in securities demands clarification[2] of which of these exotic entities the Securities Exchange Commission (SEC) can regulate and which are exempt.

The cornerstone of the SEC's supervisory power is Section 15(a),[3] under which a broker-dealer must register if it (1) uses the facilities of interstate commerce, (2) to effect any transaction in or to induce or attempt to induce the purchase or sale of, any security.

An extreme interpretation of Section 15(a) might empower the SEC to compel the registration of every securities business in the world. Use of a national

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[1]Investment by foreigners in United States securities leaped from less than $1 million in 1963 to more than $2 billion in 1973. Exchange Act Release No. 10634 (February 8, 1974).

[2]Regulation of transnational broker-dealers gives rise to three types of Exchange issues: The Section 6 issue, which is the regulation of affiliates of members by exchanges issue; the Section 11(a) issue, which is the institutional membership—money manager type of issue; and the direct broker-dealer regulation issue under Sections 7 and 15, as modified by Section 30(b). The most immediate of these issues is the third. Section 6 of the 1934 Act, 15 U.S.C. § 78(f) (1970); Section 7 of the 1934 Act, 15 U.S.C. § 78(g) (1970); Section 15 of the 1934 Act, 15 U.S.C. § 78(o) (1970). All three of these issues are intertwined in three recent releases. Securities Exchange Act Releases No. 12055 (January 27, 1976), No. 12157 (March 10, 1976) and No. 12181 (March 11, 1976).

[3]Act of May 27, 1936, Pub. L. No. 621 Section 3, 49 Stat. 1337 *amending* Section 15 of the Securities Exchange Act of 1934, 15 U.S.C. § 78o(a) (1975). Exchange Act Section 15(a) provides:

REGISTRATION AND REGULATION OF BROKERS AND DEALERS

Sec. 15(a)(1). It shall be unlawful for any broker which is either a person other than a natural person or a natural person not associated with a broker or dealer which is a person other than a natural person (other than such a broker or dealer whose business is exclusively intrastate and who does not make use of any facility of a national securities exchange) to make use of the mails or any

securities exchange is now held to be the use of a facility of interstate commerce.[4] The United States nexus cannot be in doubt as to the transnational broker-dealer regularly using U.S. security markets, even such a broker-dealer with exclusively foreign customers.

The check upon application of Section 15(a) to foreign securities businesses is the little explored Section 30(b)[5] of the Exchange Act, which provides:

> The provisions of this title or of any rule or regulation thereunder shall not apply to any person insofar as he transacts a business in securities without the jurisdiction of the United States, unless he transacts such business in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate to prevent the evasion of this title.

Now that international transactions are important and rules must be made, the time has come for a clarification of what protection Section 30(b) offers to international securities businesses.

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means or instrumentality of interstate commerce to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) unless such broker or dealer is registered in accordance with subsection (b) of this section.

(2). The Commission, by rule or order, as it deems consistent with the public interest and the protection of investors, may conditionally or unconditionally exempt from paragraph (1) of this subsection any broker or dealer or class of broker(s) or dealer(s) specified in such rule or order.

Before 1975 the text of Section 15(a) read as follows:

OVER-THE-COUNTER MARKETS: REGISTRATION OF BROKERS; INFORMATION AND REPORTS

(a)(1). No broker or dealer (other than one whose business is exclusively intrastate) shall make use of the mails or of any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) otherwise than on a national securities exchange, unless such broker or dealer is registered in accordance with subsection (b) of this section.

(2). The Commission may by such rules and regulations or orders as it deems necessary or appropriate in the public interest or for the protection of investors, either unconditionally or upon specified terms and conditions or for specified periods, exempt from paragraph (1) of this subsection any broker or dealer or class of brokers or dealers specified in such rules, regulations, or orders.

[4]United States v. Re, 336 F.2d 306, 315-16 (2d Cir.), *cert. denied*, 379 U.S. 904 (1964); F.S. Johns & Company, Inc. Securities Exchange Act Release No. 7972, at 13 note 16 (Oct. 10, 1966). Nevertheless, in Bersch v. Drexel, 519 F.2d 974 (2d Cir. 1975) the Court of Appeals found it lacked personal jurisdiction over a foreign brokerage house:

> Crang's current business, so far as the United States is concerned, consists of buying and selling for Americans securities traded on Canadian markets and arranging with American brokers for its Canadian customers to buy or sell securities traded in American markets. This is not doing business within the United States; if it were, every securities business of any significant size anywhere in the world would be "doing business" here. Bersch v. Drexel Firestone, Inc., 519 F.2d 974, at 458.

[5]Section 30 of the Exchange Act of 1934, 15 U.S.C. § 78dd provides:

FOREIGN SECURITIES EXCHANGES

Sec. 30(a). It shall be unlawful for any broker or dealer, directly or indirectly, to make use of the mails or of any means or instrumentality of interstate commerce for the purpose of effecting on an exchange not within or subject to the jurisdiction of the United States, any transaction in any security the issuer of which is a resident of, or is organized under the laws of, or has its prin-

B. SEC's Theory

Under the Exchange Act, the SEC has attempted to interpret its supervisory role as broadly as possible. The clearest exposition of the SEC's theory of Section 30(b) appears in the SEC's brief as *amicus curiae* for *Schoenbaum v. Firstbrook,*[6] where the SEC argued that Section 30(b) exempts from SEC regulation only activities beyond the legal reach of the United States.

If there is sufficient nexus for a court to find subject matter jurisdiction, then the SEC concludes that an activity is "within" the jurisdiction of the United States and not exempted by Section 30(b). Thus if a foreign broker-dealer has U.S. customers in a foreign country, the SEC believes it could require the foreign broker-dealer to register.[7]

Essentially the SEC has given Section 30(b) no meaningful statutory role whatsoever. It would be completely redundant for Congress to exempt from regulation activities which the United States has no power to regulate.

The SEC's interpretation of Section 30(b) is illogical because the provision gives the SEC power to make rules concerning the same activities which the SEC contends are outside the legal reach of the United States. If the SEC has power to make rules concerning those activities, then they must not be outside the legal reach of the United States. Alternatively if the activities do stand outside the legal reach of the United States, then the SEC could make rules only in

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cipal place of business in, a place within or subject to the jurisdiction of the United States, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors or to prevent the evasion of this title.

The provisions of this title of any rule or regulation thereunder shall not apply to any person insofar as he transacts a business in securities without the jurisdiction of the United States, unless he transacts such business in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate to prevent the evasion of this title.

[6]Brief for SEC as *amicus curiae*, Schoenbaum v. Firstbrook, 405 F.2d 215 (2d Cir. 1968) at 17-24. Other SEC positions include: Securities Exchange Act Release No. 7366 (July 9, 1964) 2, following Report to the President of the United States from the Task Force on Promoting Increased Foreign Investments in United States Corporate Securities and Increasing Financing for United States Corporations Operating Abroad (1964) 7; Investment Company Act Release No. 6082 (June 23, 1970); Securities Exchange Act Release No. 6082 (June 23, 1970); SEC v. Siamerican Securities, Ltd. and Charles W. Kirkwood, Civil Action No. 75-0947 (D.C. Cir. 1975); *cf.* State Street Bank GmbH, Munich, Germany, [1973 Binder] CCH FED. L. REP. Par. 78,081 at 80,345.

[7]SEC v. Siamerican Securities, Ltd., and Kirkwood, Civil Action No. 75-0947 (D.D.C. 1975) was a consent injunction concerning the activities of Siamerican Securities, a Hong Kong and Thai corporation whose sole stockholder was Charles Kirkwood. Among numerous stipulations, the order enjoined Kirkwood and Siamerican from violating Section 15(a) of the 1934 Act.

The statement of obligation to register in this case proves nothing. Siamerican had been caught under Section 10. It already was going out of business. The fact that it consented to a registration obligation, applicable in the unlikely event it should resume business, proves only that somebody on the staff wanted to include this in the consent injunction for possible future bootstrapping opportunities. It is not the law. The record does not make clear what it was that Siamerican had done to which the SEC objected, nor is there even a particular reference to U.S. citizens in Thailand.

violation of international law. Such rules would subject the SEC and the Exchange Act to public contempt.

The Exchange Act mandates that the SEC must make policy by rules and regulations under Section 30(b). Instead the SEC has attempted to make policy by arguing that Section 30(b) has no scope, and by releases which avoid the rule-making process. Instead of questioning which types of foreign institutions should be taken into account in the regulatory structure, the thrust of recent releases has been how to extract customer information from foreign institutions affiliated with U.S. firms.[8]

Essentially the SEC's interpretation of Section 30(b) reflects a bureaucratic grasping for power rather than an exposition of the law.

C. Jurisdiction

No court has ever considered the registration issue.[9] Almost all of the twenty-seven cases[10] concerning the extraterritorial application of the Exchange Act have been subject matter jurisdiction cases involving fraud causes of action under Section 10(b).

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[8]Securities Exchange Act Release No. 12055 (January 27, 1976), No. 12157 (March 10, 1976), and No. 12181 (March 11, 1976).

New SEC Rule 17f-2, adopted in Exchange Act Release No. 12214 (March 16, 1976) presents in miniature the question of the jurisdiction of the Exchange Act insofar as it applies to brokers and dealers. The rule requires brokers and dealers to fingerprint all employees who have access to securities, money, or original accounts and records. SEC staff in Washington have asserted that the rule encompasses employees outside United States territory.

[9]In Fontaine and I.O.S. Ltd. v. S.E.C., 259 F. Supp. 880 (D.P.R. 1966), I.O.S., which was incorporated in Panama with its principal office in Switzerland brought an action to enjoin the SEC from conducting an administrative proceeding against I.O.S. and to seek a declaratory judgment that it is not required to continue its registration under Section 15. The case did not decide any Section 30(b) issues, deciding rather that the deregistration dispute was premature for judicial decision until after exhaustion of administrative procedures.

[10]Section 10 of the Securities Exchange Act of 1934, 15 U.S.C. § 78j (1970). The twenty-seven cases which deal to some extent with extraterritoriality are:

Sherk v. Alberto-Culver Co., 417 U.S. 506 (1974); IIT v. Vencap, Ltd., 519 F.2d 1001 (2d Cir. 1975); Bersch v. Drexel Firestone, Inc., 389 F. Supp. 446 (S.D.N.Y. 1974), *partially rev'd*, 519 F.2d 974 (2d Cir. 1975); S.E.C. v. United Financial Corp., 474 F.2d 354 (9th Cir. 1973); Leasco Data Processing Equipment Corp. v. Maxwell, 468 F.2d 1326 (2d Cir. 1975); Travis v. Anthes Imperial Ltd. et. al., 473 F.2d 515 (8th Cir. 1973); Roth v. Fund of Funds, 405 F.2d 421 (2d Cir. 1968); Schoenbaum v. Firstbrook, 405 F.2d 200 (2d Cir.) *rev'd*, 405 F.2d 215 (1968), *cert. denied*, 395 U.S. 906 (1960); S.E.C. v. Kasser, 391 F. Supp. 1176 (D.N.J. 1975); S.E.C. v. Capital Growth Co., S.A., 391 F. Supp. 593 (S.D.N.Y. 1974); S.E.C. v. OSEC Petroleum, CCH FED. SEC. L. REP. ¶ 97,131 (D.D.C. 1974); Selzer v. Bank of Bermuda, 335 F. Supp. 445 (S.D.N.Y. 1974); Wagman v. Astle, 380 F. Supp. 497 (S.D.N.Y. 1974); Garner v. Pearson, 374 F. Supp. 591 (M.D. Fla. 1974); Madonick v. Denison Mines Ltd., (1973-74 Transfer Binder) CCH FED. SEC. L. REP. ¶ 94,550 (S.D.N.Y. 1974); Selas of America (Nederland) N.Y. v. Selas Corporation of America 365 F. Supp. 1382, 1387 (E.D. Pa. 1973); United States v. Weisscredit Banca Commerciale E. D'Investimenti, 325 F. Supp. 1384 (S.D.N.Y. 1971); Investment Properties Int'l, Ltd. v. I.O.S. Ltd. (1970-71 Transfer Binder) CCH FED. SEC. L. REP. ¶ 93,011 (S.D.N.Y. 1971); Manus v. The Bank of Bermuda, CCH FED. SEC. L. REP. ¶ 93,299 (S.D.N.Y. 1971); Finch v. Marathon Securities Corp., 315 F. Supp. 1345 (S.D.N.Y. 1970); Metro-Goldwyn Mayer v. Transamerica,

What has confused the SEC, the commentators,[11] and many courts which have uttered dicta about Section 30(b) is the statute's use of the word "jurisdiction."[12] The jurisdiction to which Section 30(b) refers is not subject matter jurisdiction for purposes of Section 10(b).

Kook v. Crang[13] and *Metro-Goldwyn-Mayer Inc. v. Transamerica*[14] evidence that even if subject matter jurisdiction exists, the court must go on to consider Section 30(b)'s significance with respect to whether the Exchange Act's provisions apply to the foreign securities business.

In *Kook v. Crang*, the grandfather of Section 30(b) cases, the court conceded that it had subject matter jurisdiction over a Canadian business in securities. Nevertheless the court went on to say:

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303 F. Supp. 1355 (S.D.N.Y. 1969); Sinva Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 253 F. Supp. 359 (S.D.N.Y. 1966), *motion for new trial denied*, 48 F.R.D. 385 (S.D.N.Y. 1969); Ferraioli v. Cantor, 259 F. Supp. 842 (S.D.N.Y. 1966); Fontaine and I.O.S., Ltd. v. S.E.C., 259 F. Supp. 880 (D.P.R. 1966); S.E.C. v. Gulf Intercontinental Fin. Corp., 223 F. Supp. 987 (S.D. Fla. 1963); Kook v. Crang, 182 F. Supp. 388 (S.D.N.Y. 1960); Matter of I.O.S., Ltd. (S.A.), (1971-72 Transfer Binder) CCH FED. SEC. L REP. ¶ 78,637 (S.E.C. 1972).

Of the extraterritorial cases cited *supra*, the following primarily concerned antifraud violations or insider trading: Sherk v. Alberto Culver Co.; IIT v. Vencap, Ltd.; Bersch v. Drexel Firestone, Inc.; S.E.C. v. United Financial Corp.; Leasco Data Processing Equipment Corp. v. Maxwell; Travis v. Anthes Imperial Ltd.; Roth v. Fund of Funds; Schoenbaum v. Firstbrook; S.E.C. v. Kasser; S.E.C. v. Capital Growth Co., S.A.; S.E.C. v. OSEC Petroleum; Selzer v. Bank of Bermuda; Wagman v. Astle; Garner v. Pearson; Madonick v. Denison Mines Ltd.; Selas of America (Nederland) N.V. v. Selas Corporation of America; Investment Properties Int'l, Ltd. v. I.O.S. Ltd.; Manus v. The Bank of Bermuda; Finch v. Marathon Securities Corp.; Sinva v. Merrill Lynch, Pierce, Fenner & Smith Inc.; Ferraioli v. Cantor; S.E.C. v. Gulf Intercontinental Fin. Corp.; Matter of I.O.S. Ltd. (S.A.).

Excepting these antifraud cases leaves only a handful of cases concerning the professional regulation of a securities business:

United States v. Weisscredit, Metro-Goldwyn-Mayer v. Transamerica, Kook v. Crang, Fontaine and I.O.S. Ltd. v. S.E.C., and Matter of I.O.S. Ltd. all cited *supra*. The list can further be narrowed by omitting the two I.O.S. cases, which did not consider the application of the Exchange Act to a foreign securities business.

[11]Mizrack, *Recent Developments in the Extraterritorial Application of Section 10(b) of the Securities and Exchange Act of 1934*, 30 BUS. LAW. 367 (1975); Rice, *The Expanding Requirement for Registration as "Broker-Dealer" under the Securities Exchange Act of 1934* 50 NOTRE DAME LAW 199 (1974); Comment, *Offshore Mutual Funds: Extraterritorial Application of the Securities Exchange Act of 1934*, 13 B.C. IND. & COM. L. REV. 1225, 1227-32 (1972); *See* Casenotes, *Jurisdiction—Extraterritorial Application of United States Securities Laws—Section 30(b) of Securities Exchange Act of 1934—Liability of Foreign Insiders for Short-Swing Transactions in American Listed Securities*: Roth v. Fund of Funds (2d Cir. 1968), 10 COLUM. J. OF TRANSNAT'L L. 150 (1971) at 160-161; Cohen, *International Security Markets: Their Regulation*, 46 ST. JOHN'S L. REV. 264 (1971); Goldman and Magrino, *Some Foreign Aspects of Securities Regulation: Towards a Reevaluation of Section 30(b) of the Securities Exchange Act of 1934*, 55 VA. L. REV. 1015 (1969); *Extraterritorial Application of the Securities Exchange Act of 1934*, 69 COLUM. L. REV. 94, 104-109 (1969).

[12]Because "jurisdiction" has so many meanings, it is a prime source of confusion and ambiguity in the law. Consequently, it is essential to try to make clear the sense in which it is being used at any given time. R. LEFLAR, AMERICAN CONFLICTS LAW 4 (2d ed. 1968).

[13]Kook v. Crang, *supra* note 10, held the Federal Reserve margin rules under Section 7 of the Exchange Act inapplicable to credit extended by a Canadian broker registered under the Exchange Act to a New York customer for the purpose of buying securities on a Canadian exchange.

[14]Metro-Goldwyn-Mayer Inc. v. Transamerica, *supra* note 6.

> The question here is not whether there are contacts with the United States sufficient to give this court jurisdiction, no one questions that, but rather whether Congress intended to make the statute applicable to those transactions. We hold that such was not the intention of the legislature and that "jurisdiction" as used in Section 30(b) contemplates necessary and substantial acts within the United States.

The *Crang* decision exempted from the margin requirements of Section 7(c) of the Exchange Act sales to a U.S. citizen of Canadian stock in Canada by a Canadian broker, since the transactions were outside of U.S. territory and part of the Canadian firm's business in securities.

In *Metro-Goldwyn-Mayer Inc. v. Transamerica Corp.*, MGM brought suit to enjoin a tender offer by defendant Tracy Investment Company, a Nevada corporation, on the grounds that loans to Tracy from German and English banking institutions violated Regulations G and T promulgated under Section 7 of the Exchange Act. Had the foreign banks violated an antifraud provision of the Act, the court would have found no difficulty in taking jurisdiction over them. Nevertheless, the court followed *Crang* in holding that Section 30(b) exempted foreign banks.

The *Crang* and *MGM* decisions demonstrate a distinction between general issues of subject matter jurisdiction and specific issues of statutory coverage, such as registration, in the meaning of Section 30(b). Use of jurisdictional means has nothing to do with a proper reading of Section 30(b). Jurisdictional means is assumed, or there would be no application of the relevant parts of the Exchange Act in any event.

D. Territory

The clause "without the jurisdiction of the United States" is not a reference to jurisdiction at all, but to territory. No published comment on the proper meaning of this clause takes the one necessary and first step in interpreting its meaning—to read it in the context of other territorial references in the Exchange Act:[15]

Section 5:

> . . . an exchange within or subject to the jurisdiction of the United States. . . .

Section 21(b):

> . . . attendance of witnesses and the production of any such records may be required from any place in the United States or any State at any designated place of hearing.

Section 21(c):

> . . . the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on. . . .

Section 21(d):

> . . . the Commission . . . may in its discretion bring an action in the proper district

[15] 15 U.S.C. § 78e, § 77t(b), § 77t(c), § 77t(d), § 77t(e), § 77v, § 77dd (1971).

court of the United States, the United States District Court for the District of Columbia, or the United States courts of any territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices. . . .

Section 21(e):

Upon application of the Commission the district courts of the United States, the United States District Court for the District of Columbia, and the United States courts of any territory or other place subject to the jurisdiction of the United States, shall also have jurisdiction to issue writs. . . .

Section 27:

The district courts of the United States, the district court of the United States for the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations. . . .

Section 30(a):

. . . effecting on an exchange not within or subject to the jurisdiction of the United States, any transaction in any security the issuer of which is a resident of . . . or has its principal place of business in, a place within or subject to the jurisdiction of the United States. . . .

Section 30(a) reverses the language of Section 5 to distinguish between those exchanges within U.S. territory and those outside it. Section 30(b) employs the same territorial language. The slight change of wording in no way signals an intention in Section 30(b) to depart from the geographical references in Sections 5, 21(b), 21(d), 21(e), 27 and 30(a).

The phrase "the jurisdiction of the United States" really refers to U.S. territories and possessions such as the Philippines. The drafters had to employ this language to prevent unregulated stock exchanges in Manila and Honolulu.

The Manila Stock Exchange dates from 1927. Initially, in 1934 the Manila and Honolulu Stock Exchanges were granted extensions of time to register under Section 5 of the Securities Exchange Act because of the distances their statements would have to travel.[16] Later the Honolulu Stock Exchange was, subject to certain conditions, granted exemption from registration because of the limited volume of transactions effected on the exchange. The Manila Stock Exchange, however, was treated differently.[17] It was not required to register nor was it exempted from registration. Instead, the Philippines Independence Act, creating a Commonwealth under U.S. responsibility, rendered the Philippines "without the jurisdiction of the United States." Even after 1936 the Manila Stock Exchange continued to use the mails and the facilities of interstate commerce. This decision of the General Counsel of the SEC, not to require registration of the Manila Stock Exchange, does not accord with the theory of the brief of the SEC as *amicus curiae* in *Schoenbaum v. Firstbrook.*[18]

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[16]Securities Exchange Act Release No. 5 (September 12, 1934); Securities Exchange Act Release No. 410 (November 14, 1935).

[17]Securities Exchange Act Release No. 472 (February 3, 1936).

[18]Brief for SEC amicus curiae, Schoenbaum v. Firstbrook, *supra* note 9.

In the SEC's brief "jurisdiction" is based upon use of the facilities of interstate commerce. The registration treatment of the Manila Stock Exchange is only consistent with a territorial interpretation of what is without the jurisdiction of the United States.

There seems no way around this territorial interpretation of the scope of Section 30(b), because any attempt to diminish its application by substituting legal fictions for geography necessarily concurrently augments the scope of Section 5, with the ridiculous consequence that the London, Amsterdam, Toronto, Tokyo and other foreign stock exchanges must register as national securities exchanges, at least if they are to dual list American stocks or at least receive any orders from the United States.

E. "Person," "Broker," and "Dealer"

Some sections of the Exchange Act address themselves to any "person," that is, everyone over whom a U.S. court can find jurisdiction based upon minimum contacts. For example, the antifraud provisions in Sections 10 and 16 address themselves to any "person."

On the other hand, the margin regulations in Section 7 and the registration requirement of Section 15(a) apply only to a "broker" or a "dealer" defined in Sections 3(a)(4)[19] and 3(a)(5)[20] of the Exchange Act. Anyone who is not a "broker" or a "dealer" is not covered. Only professionals must register.

The rationale of the dichotomy between "persons" and "professionals" (i.e. "brokers" and "dealers") is compelling. In matters of fraud which may otherwise go uncorrected, the Exchange Act seeks to extend its jurisdiction as widely as possible. The most minimal U.S. contacts suffice to subject a "person" to antifraud jurisdiction. On the other hand, different considerations are brought to bear in imposing the standards of conduct of professionals, such as the registration provisions in Section 15(d) or the margin regulations of Section 7. These rules for professionals constitute a heavy burden which should not be imposed upon everyone. Registration with the SEC, with all the ensuing supervision and reporting obligations, presumes an intimate association with domestic American securities markets: the conduct of a business in securities within U.S. territory.

Section 30(b) does not employ the terms "broker" and "dealer" carefully defined and employed in forty-one other provisions of the Exchange Act. Instead, Section 30(b) introduces the concept of a *"person insofar as he transacts a business in securities without the jurisdiction of the United States. . . ."* (Emphasis added.)

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[19]Section 3(a)(3) of the 1934 Act, as amended by Act of June 4, 1975 (Securities Acts Amendments of 1975) Section 3(1), 89 Stat. 97.

[20]Section 3(a)(4) of the Exchange Act, 14 U.S.C. § 78c(a)(4) (1970).

Schoenbaum v. Firstbrook[21] supports a view that Section 30(b) applies to foreign professionals. In that case an American stockholder in a Canadian corporation brought a derivative suit claiming damages from a sale of treasury stock to foreigners in Canada at too low a price. The court held that Section 30(b) did not exempt from jurisdiction persons who engage in isolated foreign transactions, but only those who transact a "business in securities."

The proper interpretation of Section 30(b) is that a person who is only a broker or dealer by reason of his foreign securities business activities is not, absent contrary rules or regulations, a broker or dealer for purposes of the Exchange Act. He is, for the purposes of professional regulation by the SEC, a nonprofessional—a "person." Therefore, the registration requirement of Section 15(a) does not apply to him.

A broker is one who is engaged in (1) the business, (2) of effecting transactions in securities for the account of others. Furthermore, one must (3) make use of the mails or of any means or instrumentality of interstate commerce, (4) to effect any transaction in, or to induce the purchase or sale of, any security. To break down these requirements into their constituent elements reveals the difficulty of applying the registration requirement to a business in securities in a foreign country.

Section 30(b) prevents a court from investigating whether a foreign entity is conducting a "business" in securities in a foreign country. It would be no more correct to call a foreign securities business a "broker" than it would be to apply that term to an ordinary customer in the United States. Whether the foreign entity is "in the business" or not is a determination without the jurisdiction of the United States.

A definition of effecting appears in a discussion of Section 9's prohibition against manipulation of prices in the legislative history of the Exchange Act: "In this and other sections of the bill 'effect' refers to participation in a transaction whether as principal, agent, or both."[22] *United States v. Weisscredit*[23] cited this legislative history as authority that one "effects" on the customer end of a securities transaction rather than on the execution end.

A securities business in a foreign country does not "effect" within the meaning of the Exchange Act. It participates in a transaction whether as principal or agent without the jurisdiction of the United States. Insofar as a person transacts a business in securities without the jurisdiction of the United States, the provision of the Exchange Act which defines a broker does not apply to him.

When a foreign entity solicits customers in a foreign country to purchase

[21]Schoenbaum v. Firstbrook, *supra* note 6.
[22]S. REP. NO. 792, 73rd Cong. 2d Sess. 17 (1934).
[23]United States v. Weisscredit, *supra* note 10, at 1393.

securities, it does not make use of an American instrumentality of interstate commerce to induce or effect. Even if it employs an American firm to execute the transaction, the foreign entity need not make use of an instrumentality of interstate commerce to participate in the transaction whether as principal or agent.

In summary, none of the requirements for registration—"in the business," "effecting," and making use of the instrumentalities of interstate commerce to effect—clearly fit an entity soliciting and confirming securities purchases by customers in a foreign country.

United States v. Weisscredit[24] appears to say that a broker-dealer outside United States territory could violate professional aspects of the Exchange Act insofar as he conducts a business in securities. A Swiss bank pleaded guilty to an indictment charging: (1) a violation of Regulation T; and (2) aiding and abetting the violations of a United States broker. Nevertheless *Weisscredit's* prospects of being acquitted as to the charge of aiding the United States broker, Shearson, in arranging were poor. Therefore, the issue of whether *Weisscredit* violated the Exchange Act was never really litigated. *Weisscredit* simply found it cheaper to pay another $10,000 fine than to litigate the Section 30(b) question.

The *MGM* case[25] is stronger authority than *Weisscredit* because it was fully litigated. *MGM* holds that per se there is no reason to consider a foreign broker as a broker for Regulation T purposes, despite the fact that this foreign broker was lending on United States securities.

F. "Insofar"

Section 30(b) restricts each and every provision of the Exchange Act to the extent that the provision has some potential application to the foreign transaction of a business in securities. Section 30(b) does not grant Exchange Act immunity to foreign broker-dealers as to some nonprofessional matters such as fraud, if subject matter jurisdiction exists, nor as to any securities business deed within United States territory. Nevertheless the United States deeds stand apart from the foreign securities business activities to have their Exchange Act consequences assessed.

This interpretation is clear from the wording of Section 30(b). "Insofar" means "to such an extent." "Insofar" certainly does not mean "if," which is the meaning which forces the reading limiting Section 30(b) protection to an exclusively foreign securities business. Nothing in the Exchange Act will apply to a person if he is in the securities business and the relative part of it is

[24]United States v. Weisscredit, *supra* note 10, at 1393.
[25]Metro-Goldwyn-Mayer Inc. v. Transamerica, *supra* note 6; Kook v. Crang, *supra* note 10.

foreign, absent express rules or regulations. The business need not be exclusively foreign. It is exempt insofar as it is foreign.

Conclusion

Section 30(b) has no bearing upon most of the extraterritorial situations which have been litigated: antifraud cases under Section 10(b). Section 30(b) concerns only securities business professionals: the conduct of a business in securities by "brokers" and "dealers." Section 30(b) is a territorial restriction of the application of the Exchange Act, otherwise limited by subject matter jurisdiction. Section 30(b) means that the Exchange Act's definitions of "broker" and "dealer" do not apply to a foreign "person," who consequently cannot be required to register, absent the promulgation of rules and regulations under Section 30(b).