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## The Limited Public Offer in German and U.S. Securities Law: A Comparative Analysis of Prospectus Act Section 2(2) and Rule 505 of Regulation D

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## NOTE

# THE LIMITED PUBLIC OFFER IN GERMAN AND U.S. SECURITIES LAW: A COMPARATIVE ANALYSIS OF PROSPECTUS ACT SECTION 2(2) AND RULE 505 OF REGULATION D

*David B. Guenther\**

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## INTRODUCTION

German securities regulation has undergone fundamental reform in recent years. Mandated by a series of European Community ("EC") Directives aimed at harmonizing the securities laws of EC Member States, these reforms have gradually transformed the German financial landscape.<sup>1</sup> The German Sales Prospectus Act of December 13, 1990 (the "Prospectus Act" or the "Act"),<sup>2</sup> which was enacted to implement the EC Public Offer Prospectus Directive of 1989 (the "Prospectus Directive" or the "Directive"),<sup>3</sup> represents the final component of a comprehensive system of mandatory disclosure for public offers of securities under German law.

The Prospectus Act requires any person making an initial public offer in Germany of securities not listed on the Official Market or Regulated Market segments of a German stock exchange to publish a prospectus.<sup>4</sup> The prospectus must contain detailed information about an issuer and the nature of the securities offered.<sup>5</sup> Prior to commencement of the public offer, the prospectus must be deposited with the German Federal Securities Supervisory Office (the "Bundesaufsichtsamt für den Wertpapierhandel" or "BAWe") for completeness review.<sup>6</sup> After the sooner of approval by the BAWe or passage of ten business days without enforcement action, the prospectus must be published in certain print media or an announcement published and the prospectus made

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1. On EC Directives and reforms generally, see Manning Gilbert Warren III, *The Common Market Prospectus*, 26 COMMON MKT. L. REV. 687 (1989) [hereinafter Warren, *Common Market Prospectus*]; Manning Gilbert Warren III, *Global Harmonization of Securities Laws: The Achievements of the European Communities*, 31 HARV. INT'L L.J. 185 (1990) [hereinafter Warren, *Global Harmonization*]; Patrick Merloe, *Internationalization of Securities Markets: A Critical Survey of U.S. and EEC Disclosure Requirements*, 8 J. COMP. BUS. & CAP. MKT. L. 249 (1986).

2. Prospectus Act: Wertpapier-Verkaufsprospektgesetz (Verkaufsprospektgesetz) v. 13.12.1990 (BGBl. I S. 2749), in der Fassung der Bekanntmachung v. 17.7.1996 (BGBl. I S. 1047), zuletzt geändert durch Gesetz v. 24.3.1998 (BGBl. I S. 529), BGBl. III 4110-3 (visited Oct. 11, 1999) <<http://www.bawe.de./down/verkprg.doc>> [hereinafter Prospectus Act]. The Prospectus Act took effect on January 1, 1991. *Id.*

3. Council Directive 89/298 of 17 April 1989 Coordinating the Requirements for the Drawing-up, Scrutiny and Distribution of the Prospectus to Be Published When Transferable Securities Are Offered to the Public, 1989 O.J. (L 124) 8 [hereinafter Prospectus Directive]. In relation to German law, see *infra* Part I.

4. Prospectus Act, *supra* note 2, § 1; on the market segments of German stock exchanges, see *infra* note 30.

5. See Prospectus Act, *supra* note 2, § 7; Verordnung über Wertpapier-Verkaufsprospekte (Verkaufsprospekt-Verordnung) v. 17.12.1990 (BGBl. I S. 2869), BGBl. III 4110-3-1 (issued under the Prospectus Act on December 17, 1990) [hereinafter Sales Prospectus Regulation].

6. See Prospectus Act, *supra* note 2, §§ 8-8e.

available upon request and at no cost to prospective investors.<sup>7</sup> The Act excepts certain offers and sales based on the manner of the offering, the issuer, and the nature of the securities being offered.<sup>8</sup> Recent amendments authorize the BAWe to impose fines of up to DM 1,000,000 for violations of the Act and to prohibit any public offer that fails to comply with the Act's requirements.<sup>9</sup>

In theory, the Prospectus Act has closed an important gap in German securities regulation at a critical moment. Prior to passage of the Act in 1990, public offers of securities not listed on a German exchange were not directly subject to disclosure requirements.<sup>10</sup> Since 1990, in part as a result of the legislative reforms, activity on German securities markets has picked up dramatically.<sup>11</sup> Public offers in Germany of securities not listed on a German exchange may increase substantially in the single European market expected after full European Economic and Monetary Union on January 1, 2002. Imposition of an enforceable uniform prospectus requirement constitutes a major step toward protection of German investors, promotion of public trust in German securities markets, and the establishment of harmonized disclosure within the EC.

In practice, however, the Prospectus Act has proven to be the source of considerable difficulties. At the root of these difficulties is the Act's failure to define the term "public offer" as used in section 1.<sup>12</sup> In their various capacities, German legislators, the BAWe, and the majority of

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7. See *id.*, § 9 (for the 1 day provision); *id.*, § 8(a)(for the ten day provision).

8. *Id.*, §§ 2-4.

9. For fines, see *id.*, § 17, and for stop orders, see *id.*, § 8e.

10. Prior to 1990, some unlisted securities may have been subject to indirect regulation under German law. See, e.g., JENS HÜFFER, *DAS WERTPAPIER-VERKAUFSPROSPEKTGESETZ: PROSPEKTPFLICHT UND ANLEGERSCHUTZ 1* (Göetz Hueck, Marcus Lutter, Wolfgang Zöllner, eds., 1996).

11. See, e.g., the statistics at Finanzplatz Deutschland (Finanzplatz e.V.) (last visited at Oct. 11, 1999) <<http://www.ip.exchange.de/ip.nsf/HTMLSerienD/STATISTIKEN++Historical+Statistics?OpenDocument>>.

12. See HÜFFER, *supra* 10, at 13; Leonie Grimme & Corinna Ritz, *Die Novellierung verkaufsprospektrechtlicher Vorschriften durch das Dritte Finanzmarktförderungsgesetz*, 42 WERTPAPIERMITTEILUNGEN: ZEITSCHRIFT FÜR WIRTSCHAFTS-UND BANKRECHT (WM), 2091, 2094 (1998); Johannes J. Lucas, *Privatplazierungen als Vorstufe eines deutschen OTC-Aktienmarktes*, 6 DIE BANK 347, 351 (1994); Bernhard Meyding, *Zweifelsfragen bei Anwendung des Wertpapier-Verkaufsprospektgesetzes*, 8 DER BETRIEB 419 (1993); Frank A. Schäfer, *Emission und Vertrieb von Wertpapieren nach dem Wertpapierverkaufsprospektgesetz*, 23-24 ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT UND INSOLVENZ-PRACTIS (ZIP), 1557, 1559-60 (1991); Rainer Süßmann, *Wertpapier-Verkaufsprospektgesetz und Verkaufsprospekt-Verordnung*, 7 EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT (EuZW), 210, 211 (1991); Werner Michael Waldeck & Rainer Süßmann, *Die Anwendung des Wertpapier-Verkaufsprospektgesetzes*, 9 WERTPAPIERMITTEILUNGEN: ZEITSCHRIFT FÜR WIRTSCHAFTS-UND BANKRECHT (WM), 361-65 (1993); Kurt Peter Dittrich, *Die Privatplazierung im deutschen Kapitalmarktrecht* 68-70 (1998) (unpublished Ph.D. dissertation, Johann Wolfgang Goethe-Universität (Frankfurt-am-Main)) (on file with author).

German academic commentators have generally construed public offers under the Prospectus Act to involve the offer and sale of securities to investors who do not have personal relationships with the offeror.<sup>13</sup> This construction of the term “public offer,” while perhaps conforming to common sense, conflicts with the basic policies of the Prospectus Act and undermines the usefulness of the statute. German legislators appear to have adopted this construction from an early draft of the EC Prospectus Directive of 1989, the final text of which nonetheless notes that “it has proved impossible,” evidently for political reasons, “to furnish a common definition of the term ‘public offer’ and all its constituent parts.”<sup>14</sup>

A second major source of difficulty with the Prospectus Act has been the terminology of section 2(2), which provides an exception to the prospectus requirement of section 1 for securities offered only to a “begrenzter Personenkreis” or “limited circle of persons,” which the Act also leaves undefined.<sup>15</sup> In its Bekanntmachung or Interpretive Release of April 15, 1996 (the “Interpretive Release” or the “Release”), the BAWe has taken the position that securities offered only to a “limited circle of persons” in accordance with section 2(2) constitute a private placement rather than a public offer.<sup>16</sup> This position has been criticized by commentators, and a consensus has yet to emerge as to whether offers and sales made in reliance on section 2(2) are public offers or private placements.<sup>17</sup>

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13. On German legislators, see *infra* Part I.B; on the BAWe, see *infra*, Part I.C; on German commentators, see *infra* Part I.E.

14. Prospectus Directive, *supra* note 3, at 8 (Consideration 7); see Warren, *Common Market Prospectus*, *supra* note 1, at 707 (describing this as a “major failure” of the Prospectus Directive).

15. Prospectus Act, *supra* note 2, § 2(2).

16. Bekanntmachung des Bundesaufsichtsamtes für den Wertpapierhandel zum Wertpapier-Verkaufsprospektgesetz (VerkProspG) v. 13.12.1990 (BGBl. I S. 2749) in der Fassung, v. 26.7.1994 (BGBl. I S. 1749), reprinted in Bundesanzeiger Nr. 82/5069 v. 15.4.1996, v. 30.4.1996, II.1 [hereinafter BAWe Interpretive Release]. As this note was going to press, the BAWe issued an amended interpretive release (the “Amended Interpretive Release”) that no longer expressly identifies an offer to a “limited circle of persons” with a private placement. See Bekanntmachung des Bundesaufsichtsamtes für den Wertpapierhandel zum Wertpapier-Verkaufsprospektgesetz (VerkProspG) in der Fassung der Bekanntmachung v. 9.9.1998 (BGBl. I S.2701ff) und zur Verordnung über Wertpapier-Verkaufsprospekt (Verkaufsprospekt-Verordnung) in der Fassung der Bekanntmachung v. 9.9.1998 (BGBl. I S.2853 ff.) v. 6.9.1999, reprinted in Bundesanzeiger Nr. 177 v. 21.9.1999, Seite 16180, III.1 [hereinafter Amended Interpretive Release]. The identification of such an offer with a private placement remains implicit in the Amended Interpretive Release, however, and the Amended Interpretive Release will accordingly not be treated as a substantive alteration of the Interpretive Release for the purposes of this Note.

17. See *infra* Part I.E.

This Note examines the “limited circle of persons” exception in section 2(2) of the Prospectus Act in comparison to similar provisions of U.S. federal securities law, particularly Section 3(b) of the Securities Act of 1933 (the “Securities Act”) and Rule 505 of Regulation D (“Rule 505”).<sup>18</sup> Comparison of the Prospectus Act to U.S. securities law seems both warranted and useful. Certain aspects of German securities law are broadly modeled on U.S. precedents.<sup>19</sup> U.S. securities laws reflect more than sixty-five years of experience defining (and re-defining) public and limited public offers and private placements. U.S. securities regulators have also displayed in recent years an increasing concern, widely shared by their German counterparts, for the needs and difficulties of small businesses in capital formation.<sup>20</sup> The Prospectus Act and Regulation D are joined by common policies and provisions in this regard. A clear definition of the term “limited circle of persons” as used in Prospectus Act section 2(2) and a correspondingly clear and available small business exception to the requirements of the Prospectus Act would seem desirable.<sup>21</sup>

Part I of this Note examines section 2(2) of the Prospectus Act and its legislative history, the EC Prospectus Directive and its legislative history, the Interpretive Release of the BAWe, and the problems associated with section 2(2) as noted in the German literature. This Part contends that German legislators, regulators, and commentators have generally construed the term “public offer” to mean any offer of securities to investors who are not part of a “defined” or “limited circle of persons” having personal relationships with the offeror. In a nutshell, according to this construction, an offer is public when made to strangers. Review of the Prospectus Directive and its legislative history

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18. Securities Act of 1933, 15 U.S.C. § 77c(b) (1994); Securities Act Rule 505, 17 C.F.R. § 230.505 (1999).

19. See HEINZ-DIETER ASSMANN, PROSPEKTHAFTUNG ALS HAFTUNG FÜR DIE VERLETZUNG KAPITALMARKTBEZOGENER INFORMATIONSVERKEHRSPFLICHTEN NACH DEUTSCHEM UND US-AMERIKANISCHEM RECHT 87 (1985) [hereinafter PROSPEKTHAFTUNG] (citing the broad influence of U.S. investor protection philosophy on German corporate and civil law); Helmut Kohl et al., *Abschreibungsgesellschaften, Kapitalmarkteffizienz und Publizitätszwang—Plädoyer für ein Vermögensanlagegesetz*, 1/2 ZEITSCHRIFT FÜR DAS GESAMTE HANDELSRECHT UND WIRTSCHAFTSRECHT (ZHR) 1 (1974) (citing the reliance of the German Auslandsinvestment-Gesetz [Foreign Investment Interests Act] on the disclosure requirements of the Securities Act); Dittrich, *supra* note 12, at 53; see also Lucas, *supra* note 12, at 351 (calling for a definition of public offer based in U.S. law); Merloe, *supra* note 1, at 265 (discussing the similarity of U.S. and EEC disclosure requirements); Morton A. Pierce, *The Regulation of the Issuance and Trading of Securities in the United States and the European Economic Community: A Comparison*, 3 J. COMP. CORP. L. & SEC. REG. 129 (1981) (providing a comparative analysis of U.S. and EEC securities laws).

20. See *infra* Parts II.A, III.A.

21. See Lucas, *supra* note 12, at 347; Rüdiger von Rosen and Andreas Prechtel, *Zugang deutscher Unternehmen zum US-Kapitalmarkt (I)*, 7 DIE BANK 388, 388 (1996).

suggests that this construction derives ultimately from the practical exigencies of EC politics rather than any sound policy basis.<sup>22</sup> This construction is accordingly rejected.

Part II examines the disclosure policy and practice of the U.S. securities laws, particularly Sections 3(b) and 4(2) of the Securities Act, the Supreme Court's decision in *S.E.C. v. Ralston Purina Co.*,<sup>23</sup> and Rule 505 of the Security and Exchange Commission's (the "SEC"'s) Regulation D. This Part contends that U.S. law defines a public offer on policy grounds as an offer to persons who are unable to fend for themselves without the protections of the Securities Act. An economic analysis of the costs and benefits of registration justifies the exemption for limited public offers that is permitted by Section 3(b) and currently set forth in Rule 505.

Part III compares German and U.S. law and argues for a reconsideration of the Prospectus Act on a common policy basis. The term "public offer" should be defined under the Prospectus Act in the same fashion and for the same reasons as under the Securities Act, namely, as an offer of securities to investors who are unable to fend for themselves without the Prospectus Act's protections. Section 2(2) of the Prospectus Act should be understood to constitute an exception for limited public offers analogous to that of Rule 505 and justified by a similar cost-benefit analysis. The concept of the "accredited investor" should be made explicit under section 2(2), and a limit on the aggregate amount of securities that may be offered under section 2(2) should be adopted. The term "limited circle of persons" should be defined to include a numerical limit on unaccredited investors. Furthermore, integration, statutory underwriter, notice, and antifraud provisions should be considered in connection with securities resales on the model of the Securities Act.

This note concludes that these measures should be considered by German legislators in drafting a Fourth Financial Markets Promotion Act and by the BAWe in amending its Interpretive Release.<sup>24</sup>

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22. See *infra* Part I.D.

23. 346 U.S. 119 (1953).

24. The Fourth Financial Markets Promotion Act (Viertes Finanzmarktförderungsgesetz) describes a legislative package of financial reforms and amendments expected to be introduced in 1999 or 2000. See, e.g. Bundesaufsichtsamt für den Wertpapierhandel (BAWe), *Jahrespressekonferenz des BAWe, v.12.08.1999: Anlegerschutz verbessert, Wünsche für das 4. Finanzmarktförderungsgesetz* (last visited Oct. 12, 1999) <[http://www.bawe.de/pm11\\_99.htm](http://www.bawe.de/pm11_99.htm)>. On the Third Financial Markets Promotion Act (Drittes Finanzmarktförderungsgesetz), which took effect April 1, 1998, see, for example, BUNDESAUFSICHTSAMT FÜR DEN WERTPAPIERHANDEL, *JAHRESBERICHT 1997*, 42 (1997) [hereinafter *BAWE JAHRESBERICHT*]. On the BAWe's Interpretive Release, see *supra* note 16; see also Grimme and Ritz, *supra* note 12, at 2096.

## I. THE PROSPECTUS ACT

The Prospectus Act was enacted into German law on December 13, 1990, in the context of historic reforms in European financial regulation.<sup>25</sup> Pursuant to the Treaty of Rome of 1957, the EC has adopted a series of legislative mandates known as Directives, beginning with the First Company Law Directive of 1968.<sup>26</sup> EC Directives are model statutes that are legally binding on Member States as to the result to be achieved and must accordingly be implemented by Member States into their respective bodies of national law.<sup>27</sup> The choice of form and methods by which such result is to be achieved is left, however, to the legislature of each Member State.<sup>28</sup> The German Bundestag enacted the Prospectus Act in 1990 in order to implement the EC Prospectus Directive of 1989.<sup>29</sup>

As enacted, the Prospectus Act has closed a significant gap in the German system of mandatory disclosure. German law already imposed information requirements in connection with initial public offers of securities on the Official Market and Regulated Market segments of

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25. Prospectus Act, *supra* note 2. On the Prospectus Act generally, see HÜFFER, *supra* note 10; DIETER CARL & JÜRGEN MACHUNSKY, DER WERTPAPIER-VERKAUFSPROSPEKT, GESETZ—KOMMENTAR—ANHANG (1992); Schäfer, *supra* note 12. On EC reforms, see *supra* note 1; Manning Gilbert Warren III, *The European Union's Investment Services Directive*, 15 U. PA. J. INT'L BUS. L. 181, 181–85 (1984) [hereinafter *Investment Services Directive*].

26. On the treaty, see Treaty Establishing the European Economic Community, March 25, 1957, art. 189, 298 U.N.T.S. 3 [hereinafter Treaty of Rome]; on the First Company Law Directive, see Council Directive 68/151 of 9 March 1968 Coordinating Safeguards Required of Companies, 1968 O.J. (L 65) 1. See also Merloe, *supra* note 1, at 256, 268; Warren, *Common Market Prospectus*, *supra* note 1, at 688–89; Warren, *Global Harmonization*, *supra* note 1, at 197–209. Other Directives important in establishing a system of mandatory disclosure within the EC include Council Directive 79/279 of March 5, 1979 on Coordinating the Conditions for the Admissions of Securities to Official Stock Exchange Listing, 1979 O.J. (L66) 21 [hereinafter Admissions Directive], as amended by Council Directive 82/148, 1982 O.J. (L 62) 22; Council Directive 80/390 of March 17, 1980 on Coordinating the Requirements for the Drawing-up, Scrutiny and Distribution of the Listing Particulars to be Published for the Admission of Securities to Official Stock Exchange Listing, 1980 O.J. (L 100) 1 [hereinafter Listing Particulars Directive], as amended by Council Directive 87/345, art. 1, 1987 O.J. (L 185) 81 (discussing mutual recognition) [hereinafter First Mutual Recognition Directive]; Council Directive 82/121 of February 15, 1982 on Information to be Published on a Regular Basis by Companies the Shares of Which Have Been Admitted to Official Stock-Exchange Listing, 1982 O.J. (L 48) 26 [hereinafter Interim Reports Directive].

27. See Treaty of Rome, *supra* note 26, art. 189; Merloe, *supra* note 1, at 256; Warren, *Common Market Prospectus*, *supra* note 1, at 688 nn.5–6.

28. See Treaty of Rome, *supra* note 26, art. 189; Merloe, *supra* note 1, at 256; Warren, *Common Market Prospectus*, *supra* note 1, at 688 nn.5–6.

29. See, e.g., Meyding, *supra* note 12, at 419. See also *infra* Part I.D.

German securities markets.<sup>30</sup> The Prospectus Act, however, imposed such requirements on persons making an initial public offer of securities not listed on a German exchange.<sup>31</sup> Unlisted securities include those traded by German brokers, dealers and investors in the Freiverkehr or “free trading” market segment, and on all “over-the-counter” (“OTC”) markets.<sup>32</sup> With the entry into force of the Act on January 1, 1991, all initial public offers of securities in Germany became subject to disclosure obligations.<sup>33</sup>

### A. Provisions

The disclosure obligations of the Prospectus Act center on publication of a prospectus. No registration of securities is required under German law. The ground rule of the Prospectus Act is set forth in section 1: “For securities that are offered publicly for the first time in Germany and are not admitted to trading on a German stock exchange, the offeror must publish a sales prospectus, unless sections 2–4 provide otherwise.”<sup>34</sup> Aside from the requirement to provide copies of a prospectus upon request, no prospectus delivery requirement exists.<sup>35</sup>

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30. German law provides for three segments of securities trading activity: (1) the “Official Market” or “Official Quotation” segment [amtlicher Handel or amtliche Notierung] of German stock exchanges, for which the most stringent listing requirements are imposed on securities issuers; (2) the “Regulated Market” segment [geregelter Markt] of German stock exchanges, which is intended for start-up and smaller companies and includes the Neuer Markt of the Frankfurt Stock Exchange; and (3) the “free trading” segment [Freiverkehr] for securities not listed in either of the above segments, for which the only requirement is generally that stock exchange members approve a particular security for “free” trading between themselves and the investing public. Börsengesetz, in der Fassung der Bekanntmachung v. 17.7.1996 (BGBl. I S. 1030), geändert durch Gesetz v. 22.10.1997 (BGBl. I S. 2567), v. 24.3.1998 (BGBl. I S. 529), v. 9.6.1998 (BGBl. I S. 1242), and v. 22.6.1998 (BGBl. I S. 1474) (BGBl. III 4110–1), §§ 36–49 [Admission of Securities to Exchange Trading with Official Market], §§ 71–77 [Admission of Securities to Exchange Trading with Non-Official Market], § 78 [Non-admitted Securities], respectively.

31. See HÜFFER, *supra* note 10, at 1; Klaus Müller, *Prospektpflicht für öffentliche Wertpapier-Angebote ab 1991*, 6 Wertpapiermitteilungen: Zeitschrift für Wirtschafts- und Bankrecht (WM), 213, 213 (1991) [hereinafter *Prospektpflicht*]; Schäfer, *supra* note 12, at 1557–63; Süßmann, *supra* note 12, at 210–211; Waldeck & Süßmann, *supra* note 12, at 361. As to persons making an initial public offer of securities that are listed or for which an application for listing has been made on the Official Market or Regulated Market segments of a German exchange, the Prospectus Act provides that such persons remain subject to the existing prospectus requirements of the Stock Exchange Act. See Prospectus Act, *supra* note 2, §§ 5–6. See also CARL & MACHUNSKY, *supra* note 25, at 28–29; Waldeck & Süßmann, *supra* note 12, at 361.

32. On the effect of the Prospectus Act on the Freiverkehr, see Meyding, *supra* note 12, at 421–22.

33. See, e.g., CARL & MACHUNSKY, *supra* note 25, at 28–29; HÜFFER, *supra* note 10, at 1.

34. Prospectus Act, *supra* note 2, at § 1. Due to the absence of any official translation of the Prospectus Act or the Sales Prospectus Regulation, all translations in this essay of the Prospectus Act or the Sales Prospectus Regulation are those of the author. For a comprehen-

The information that must be included in the sales prospectus is described in section 7. The prospectus must generally contain "the items of information necessary to enable the public to make an accurate judgment of the issuer and the securities."<sup>36</sup> The Sales Prospectus Regulation issued in accordance with section 7(2) (the "Prospectus Regulation" or the "Regulation") describes these items of information in greater detail, including those pertaining to the issuer and its capital, business activities, assets, finances, revenues, most recent annual report, auditors, management, and business history and prospects.<sup>37</sup> Prospectus Regulation section 2(1) more broadly requires that the prospectus provide "information concerning factual and legal circumstances that are necessary to a judgment of the offered securities" and that the prospectus be "correct and complete."<sup>38</sup> The same section requires that the prospectus be written in German, although upon application, the BAWe may permit a foreign issuer to write a prospectus either partially or wholly in a language other than German so long as the language is "not uncommon in Germany in the area of the cross-border securities trade."<sup>39</sup> Regulation section 2(2) further requires that the prospectus be signed and dated by the offeror of the securities.<sup>40</sup>

Section 8 of the Prospectus Act requires that the prospectus be deposited at the BAWe prior to commencement of any public offer.<sup>41</sup> Section 8a provides that the prospectus may be published only when (i) the BAWe has formally approved such publication or (ii) ten business days have passed since the prospectus was deposited and the BAWe has not prohibited the public offer.<sup>42</sup> Section 8a(2) and section 8b empower the BAWe to prohibit any public offer of unlisted securities for which evidence exists that (i) the offeror has not published a prospectus or (ii) the prospectus does not contain the required information.<sup>43</sup> Section 8c authorizes the BAWe to demand production of certain information and documents in connection with its review of the prospectus for completeness, although the person upon whom such request is made may lawfully refuse to comply where such

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sive, unofficial translation of the Prospectus Act and the Prospectus Regulation, see *infra* Appendix A and Appendix B.

35. See Prospectus Act, *supra* note 2, at §§ 9–12; Dittrich, *supra* note 12, at 60.

36. Prospectus Act, *supra* note 2, at § 7.

37. Prospectus Regulation, *supra* note 5, at §§ 2–14.

38. *Id.* at § 2(1).

39. *Id.*; see Grimme & Ritz, *supra* note 12, at 2093–94.

40. Prospectus Regulation, *supra* note 5, at § 2(2).

41. Prospectus Act, *supra* note 2, at § 8.

42. *Id.* at § 8a.

43. *Id.* at § 8b.

information would be self-incriminating.<sup>44</sup> Section 8e authorizes the BAWe to prohibit particular forms of advertising.<sup>45</sup>

Section 9 of the Act provides that the prospectus is to be published in certain specified print media at least one business day before commencement of the public offer.<sup>46</sup> Section 10 permits publication of an incomplete prospectus lacking specific terms of an offering as long as the terms are published separately no later than the day of the public offer.<sup>47</sup> Section 11 requires an offeror for the duration of the public offer to publish an update to a prospectus if material changes to the information in the prospectus have occurred since the prospectus was first published.<sup>48</sup> Section 12 obliges an offeror who publishes the essential details of a planned public offer to include in any such publication a reference to the required prospectus and its publication.<sup>49</sup>

Liability under the Prospectus Act is addressed by section 13, which makes securities offerors liable for inaccurate or incomplete statements in the prospectus by reference to the relevant provisions of the Stock Exchange Act.<sup>50</sup> Offerors of unlisted securities are thus subjected to the same civil liability provisions as offerors of listed securities on a German stock exchange. Sections 14 and 15 of the Prospectus Act provide for submission of a single prospectus, mutual recognition of approval of the prospectus by the competent German authorities and those of other Member States of the EC, and cooperation and information-sharing between such authorities in the event of a cross-border initial public offer in EC Member States.<sup>51</sup> Section 16 provides for establishment of fees to be paid by offerors to the BAWe upon deposit of a prospectus, and section 17 authorizes the BAWe to impose fines of up to one million German marks for violations of the Act.<sup>52</sup>

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44. *Id.* at § 8c.

45. *Id.* at § 8e. The BAWe has not yet made use of this authority. On the addition of §§ 8a–8e to the Prospectus Act by the Third Financial Markets Promotion Act effective April 1, 1998, see Grimme & Ritz, *supra* note 12, at 2091–93.

46. Prospectus Act, *supra* note 2, at § 9(1).

47. *Id.* at § 10.

48. *Id.* at § 11.

49. *Id.* at § 12.

50. *Id.* at § 13; for discussion of liability under the Prospectus Act, see RAINER M. KOHLS, *BANKRECHT* (1997) 196–97; Heinz-Dieter Assmann, *Neues Recht für den Wertpapiervertrieb, die Förderung der Vermögensbildung durch Wertpapieranlage und die Geschäftstätigkeit von Hypothekenbanken*, 9 *Neue Juristische Wochenschrift* (NJW), 528, 531–32 (1991) [hereinafter *Neues Recht*].

51. Prospectus Act, *supra* note 2, at §§ 14–15.

52. On fees, see *id.* at § 16; see also BAWe Verordnung über Gebühren für die Hinterlegung von Verkaufsprospekten v. 7.5.1999 (BGBl. I S.874) (noting filing fees of DM 400, regardless of emission volume, for complete prospectuses and DM 300 for incomplete prospectuses, with each subsequent amendment an additional DM 100). On fines, see Prospectus Act, *supra* note 2, at § 17.

The BAWe has the authority to issue stop orders on initial public offers under sections 8a(2) and 8b.<sup>53</sup>

The exceptions to the Prospectus Act's basic prospectus requirement are set forth in sections 2–4. Section 3 exempts certain issuers, particularly governmental entities, international organizations, and so-called "Dauer-Emittenten," or ongoing issuers of debt securities, from the requirement to publish a prospectus.<sup>54</sup> Section 4 exempts certain securities, including, among others, Euro-securities, certain limited equity issues of companies listed on a German exchange, securities offered in a merger or acquisition, and debt securities with a maturity of less than one year.<sup>55</sup>

The exceptions in section 2 with respect to the manner of the offering, however, are the broadest and potentially most significant in the Prospectus Act. Section 2 provides that

[a] sales prospectus must not be published when the securities

1. are offered only to persons who professionally or commercially purchase or sell securities for their own account or the account of others;
2. are offered to a limited circle of persons;
3. are offered only to employees by their employer or an enterprise affiliated therewith;
4. can be purchased only in denominations of at least eighty thousand German marks or only at a purchase price of at least eighty thousand German marks per investor or when the sales price for all offered securities does not exceed eighty thousand German marks;
5. are part of an issue, for which a prospectus has already been published in Germany.<sup>56</sup>

To observers more familiar with U.S. securities law, section 2 may be troubling in several ways. The exceptions established in sections 2(1)–(4) seem impossibly broad, involving potentially thousands or even tens of thousands of offerees or purchasers. The policy basis for exempting such large offers of securities is unclear. Sections 2(1) and 2(4) appear to be based on the presumptive ability of offerees to obtain information on their own, for example, while sections 2(2) and 2(3) seem to require merely the presence of some personal relationship. Also uncertain is whether the section 2 exceptions constitute public offers excepted from

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53. Prospectus Act, *supra* note 2, at §§ 8a(2), 8b.

54. *Id.* at § 3.

55. *Id.* at § 4.

56. *Id.* at § 2.

the prospectus requirement of section 1, as the section heading—"Exceptions With Regard to the Manner of the Offering"—would suggest, or whether some or all of the exceptions describe private placements to which section 1 and the Act as a whole do not apply.<sup>57</sup>

Potentially most troubling is the "limited circle of persons" exception in section 2(2). The Prospectus Act does not define the term "limited circle of persons" or even indicate the type of limitation that the Act's drafters had in mind.<sup>58</sup> As some German commentators have noted, sections 2(1) and 2(3) appear to be subcategories of section 2(2) rather than conceptually independent exemptions.<sup>59</sup> Assigning substantive content to section 2(2) has consequently proven difficult.<sup>60</sup> This difficulty has been compounded by the Act's failure to define the term "public offer" as used in the ground rule of section 1.

German legislators, securities regulators and commentators have consequently disagreed as to the meaning of a "public offer" of securities under the Prospectus Act and particularly whether section 2(2) establishes a public offer exempted from the prospectus requirement of section 1 or a private placement to which section 1 does not properly apply.<sup>61</sup> Resolution of these questions calls for closer consideration of the Act, its legislative history, the Interpretive Release of the BAWe, and the views of German commentators.

### B. *The Legislative History of the Prospectus Act*

The official legislative history or *Gesetzesbegründung* (the "Gesetzesbegründung") of the Prospectus Act states in relation to section 2(2) of the Act only that "the regulation in [section 2(2)] implements the provision in Article 2 Number 1 letter b of the [Prospectus] Directive."<sup>62</sup> No further commentary is provided.

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57. See *infra* Parts I.B, I.C.

58. Prospectus Act, *supra* note 2, at § 2(2); see *infra* Part II.B-D.

59. See, e.g., Dittrich, *supra* note 12, at 82-83.

60. See *id.* at 93-94.

61. See *infra* Part I.E.

62. Entwurf eines Gesetzes über Wertpapier-Verkaufsprospekte und zur Änderung der Vorschriften über Wertpapiere, Bundestagsdrucksache 11/6340 at 11 (including the Draft Prospectus Act and *Gesetzesbegründung* [hereinafter *Gesetzesbegründung*]). On the meaning and role of the *Gesetzesbegründung* for the Prospectus Act generally, see the Letter from Helmut Kohl, Chancellor of the Federal Republic of Germany, to President of the German Bundestag 1 (Feb. 1, 1990) Bundestagsdrucksache 11/6340 (attached to the Draft Prospectus Act). As the letter explains, the Prospectus Act and the *Gesetzesbegründung*, the rationale for the Draft Prospectus Act, were drafted by the German federal government, the Bundesregierung, under the direction of the Ministry of Finance. See *id.* After issuance of an opinion on the Draft Prospectus Act by the Bundesrat and a counter-opinion by the Bundesregierung, the Draft Prospectus Act and the *Gesetzesbegründung* were submitted to the

In connection with the general policy and purpose of the Prospectus Act, the Gesetzesbegründung states:

The publication of a sales prospectus in public offers of securities is intended to improve the transparency of the securities markets for purposes of investor protection without impairing their functionality through new regulation. The applicability of the Act should therefore be restricted to the extent necessary for reasons of investor protection.<sup>63</sup>

The Gesetzesbegründung thus describes the policy goals of the Prospectus Act as investor protection and deregulation.<sup>64</sup> To the extent that investor protection actively requires regulation, these goals actively conflict. Aside from advocating a certain regulatory minimalism, however, the Gesetzesbegründung does not address this issue or otherwise offer guidance on the question of the "necessary extent" of investor protection.

In relation to section 2 as a whole, the Gesetzesbegründung provides:

The regulation makes use of the possibilities provided for by the Directive to exempt certain forms of public offer from the obligation to publish a prospectus. The circle of persons to which the offer is addressed in the cases enumerated here is, as a rule, sufficiently informed on the basis of other informational possibilities and therefore not in need of protection.<sup>65</sup>

Three points may be noted. First, the Bundestag evidently considered each of the section 2 exceptions to constitute a "public offer" of securities under German law, since section 2 is described as exempting "certain forms of public offer from the obligation to publish a

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Bundestag for approval. The Prospectus Act was enacted December 13, 1990. See *supra* note 2.

63. Gesetzesbegründung, *supra* note 62, at 11.

64. See Grimme & Ritz, *supra* note 12, at 2091; Meyding, *supra* note 12, at 419; Müller, *supra* note 31, at 213; cf. HÜFFER, *supra* note 10, at 2; Schäfer, *supra* note 12, at 1558 (describing the Act's policy goals as investor protection and access deregulation). On the "deregulatory" aspects of the Prospectus Act, see *Neues Recht*, *supra* note 50, at 530; Müller, *supra* note 31, at 213; Süßmann, *supra* note 12, at 210. For a useful distinction between access deregulation and prudential deregulation, see Warren, *Global Harmonization*, *supra* note 1, 187-88.

65. Gesetzesbegründung, *supra* note 62, at 11. The reference to the "possibilities provided by the Directive to exempt certain forms of public offer from the obligation to publish a prospectus" is puzzling. No such language occurs in the Directive, which simply states that its provisions "shall apply" or "shall not apply" in the enumerated circumstances. Prospectus Directive, *supra* note 3, at 9.

prospectus.”<sup>66</sup> Second, the Bundestag regarded the persons described in each of the section 2 exceptions as “sufficiently informed on the basis of other informational possibilities” than a prospectus and therefore not in need of the protections of the Act. Third, in the view advanced in the Gesetzesbegründung, an offer of securities to persons not in need of the protections of the Prospectus Act may (and sometimes does) constitute a “public offer” under German law.

How this is conceptually possible is suggested by the Gesetzesbegründung of section 1 of the Act:

When a personal relationship exists or comes into being between the person offering securities and the investor, and neither the person offering the securities nor an affiliate of such person turns to the public to sell the securities, there exists no need for a special protection of the investor. The applicability [of the Prospectus Act] should therefore be limited to public offers. The investor’s need for protection arises only when the offer of securities is directed to an undefined circle of persons, for example through mass mailings or media advertisements.<sup>67</sup>

In this construction, an offer of securities becomes public, and investors require statutory protection, only when the offeror offers the securities to an “undefined” circle of persons. The circle is “undefined” in the sense that the investors constituting it have no personal relationship with the offeror. In effect, the Gesetzesbegründung of section 1 defines a public offer as an offer of securities to a circle of investors whom the offeror does not personally know. Public means “not personal,” and a public offer is one made to strangers. This is underscored by the reference in the Gesetzesbegründung of section 1 to mass mailings and media advertisements, the chief features of which are anonymity and impersonality.

While this construction may accord with a common sense understanding of the word “public,” it has no basis in the language, context or underlying policy of the Prospectus Act. The Act itself, as already noted, does not define the term “public offer,” nor does the Act provide

66. Gesetzesbegründung, *supra* note 62, at 11. See CARL & MACHUNSKY, *supra* note 25, at 36; Süßmann, *supra* note 12, at 210; Dittrich, *supra* note 12, at 88.

67. Gesetzesbegründung, *supra* note 62, at 11. The term “undefined circle of persons” is a translation of “unbestimmter Personenkreis”, to be distinguished from the “begrenzter Personenkreis”—“limited” or “restricted circle of persons”—of Prospectus Act § 2(2). In this essay, the term “bestimmt” is translated as “defined” and “begrenzt” as “limited”. See THE OXFORD DUDEN GERMAN DICTIONARY 150 and 132, respectively (1990). See also Walburga Kullmann & Tobias Müller-Deku, *Die Bekanntmachung zum Wertpapier-Verkaufsprospektgesetz*, 44 WERTPAPIERMITTEILUNGEN: ZEITSCHRIFT FÜR WIRTSCHAFTS- UND BANKRECHT (WM) 1989, 1991–92 (1996).

any basis from which to infer that a public offer is necessarily one made to persons lacking a personal relationship with the offeror. The Act is simply silent on this point.<sup>68</sup>

The construction of public offer set forth in the *Gesetzesbegründung* of section 1 is also internally inconsistent. The *Gesetzesbegründung* of section 1, it will be recalled, defines an offer as public only when the circle of investors is “undefined.”<sup>69</sup> Section 2(2), and probably sections 2(1), 2(3) and 2(4) as well, establish exceptions for offers to a “limited” circle of persons.<sup>70</sup> A “limited” circle of persons is necessarily “defined” within the meaning of the *Gesetzesbegründung* of section 1.<sup>71</sup> On a purely linguistic level, if the *Gesetzesbegründung* of section 1 were correct, each of the section 2 exceptions would constitute a private placement.

The *Gesetzesbegründung* of section 1, however, considers a circle of investors to be “defined” only when the investors composing it have a personal relationship with the offeror. Only two of the section 2 exceptions—the limited circle of persons exception in section 2(2) and the stock offers to employees exception in section 2(3)—appear to require some sort of “personal relationship” between the offerees and the offeror. Under this aspect of the *Gesetzesbegründung* of section 1, securities offers under sections 2(2) and 2(3), but not under sections 2(1) or 2(4), would constitute private placements.

As this suggests, the *Gesetzesbegründung* of section 1 is logically flawed. All “limited” circles of investors are “defined,” but not all limited circles require a personal relationship. To the extent that a defined circle of investors may exist without being based on personal relationships, the *Gesetzesbegründung* of section 1 is insupportable.

The *Gesetzesbegründung* of section 1 also conflicts with the structure and the *Gesetzesbegründung* of section 2. As noted above, section 2 of the Prospectus Act sets forth “Exceptions With Regard to the Manner of the Offering” to the prospectus requirement of section 1.<sup>72</sup> Logically, each of the section 2 exceptions must constitute a public offer rather than a private placement, since there would otherwise be no need to provide an exception to section 1, which applies only to public offers in the first place.<sup>73</sup> An exception for private placements cannot exist in

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68. For discussion of similar terminology in other German statutes, see Dittrich, *supra* note 12, 88–92.

69. *Gesetzesbegründung*, *supra* note 62, at 11.

70. With respect to § 2(2), see Prospectus Act, *supra* note 2, § 2(2); see, e.g., Prospectus Act, *supra* note 2, §§ 2(1), 2(3), 2(4).

71. See *supra* note 67; see also Dittrich, *supra* note 12, 82–83.

72. Prospectus Act, *supra* note 2, § 2.

73. See, e.g., Kullmann & Müller-Deku, *supra* note 67, at 1991–92.

section 2. The Gesetzesbegründung of section 2 appears to confirm this point in referring to the section 2 exceptions as “forms of public offer.”<sup>74</sup> In characterizing certain section 2 exceptions as private placements, the Gesetzesbegründung of section 1 conflicts not only with itself, but with the language and logical structure of the Prospectus Act and the Gesetzesbegründung of section 2.

This conflict extends to matters of basic policy. In the Gesetzesbegründung of section 1, the applicability of the Act is seen to depend on the existence of personal relationships between investors and the offeror of the securities. Where such relationships exist, “there exists no need for a special protection of the investor,” and the Act does not apply.<sup>75</sup> In the Gesetzesbegründung of section 2, by contrast, the section 2 exemptions are explicitly based on the policy rationale that investors will have sufficient information without the protections of the Act. No mention is made of personal relationships.<sup>76</sup> Why the mere existence of personal relationships between investors and an offeror should remove an offer from the applicability of the Act, but the access to information of investors lacking such relationships should only free an offeror from the prospectus requirement in accordance with the Act’s applicable terms, is difficult to fathom. The Gesetzesbegründung leaves this question unresolved.

More importantly, under the common sense construction of the Gesetzesbegründung of section 1, the central concept of the Prospectus Act—the “public offer”—no longer has any necessary or certain relation to either of the Act’s stated policy goals. Whether investors need the protections of the Act, and whether imposition of a prospectus requirement constitutes the least possible regulation, are essentially irrelevant considerations. This construction of the Act would permit classification of an offer of securities to persons entirely able to fend for themselves—for example, a dozen Frankfurt investment bankers—as a public offer subject to the requirements of the Act merely because the issuer had not established personal relationships, however defined, with the particular investment bankers involved. This would impose costs on an issuer or offeror of securities where few or no benefits were to be gained, pointlessly inhibiting capital formation.

Worse yet, this construction of the Prospectus Act would permit an offer of securities to persons having a personal relationship with the offeror—the offeror’s part-time breakfast cook, for instance—to be classified as a private placement not subject to the Act’s requirements,

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74. Gesetzesbegründung, *supra* note 62, at 11.

75. *Id.*

76. *Id.*

even where such persons are clearly in need of the Act's protections. This might impose significant costs not only on the breakfast cook and other small investors, but eventually on public confidence in the German capital markets as a whole, with the comparatively small benefit of sparing a few offerors the cost of producing a prospectus. Nothing in the construction of the Act in the Gesetzesbegründung of section 1 prevents this scenario from occurring.

The assumption underlying this construction is evidently that investors having a personal relationship with an offeror will be able to obtain from the offeror on the basis of such relationship the information they need to make an appropriate investment decision.<sup>77</sup> This assumption is unwarranted. A personal relationship does not guarantee that investors will obtain information from an offeror. In some instances a personal relationship is likely to subject investors to increased manipulation.<sup>78</sup> This seems particularly true of relationships established only at the time of the securities offer or relationships between an offeror and its own employees.<sup>79</sup> Personal relationships are simply not a proxy for information, and the primary intent of a disclosure-based system of securities laws cannot have been to protect investors from strangers. The construction of the term "public offer" set forth in the Gesetzesbegründung of section 1 should be rejected.

### C. The BAWe's Interpretive Release

The BAWe's Interpretive Release of April 15, 1996, largely adopts the reasoning of the Gesetzesbegründung of section 1.<sup>80</sup> In connection with section 1 of the Prospectus Act, Part I.2 of the Interpretive Release states:

An offer is not public, when it is addressed to a limited circle of persons. A limited circle of persons is present when [1] the relevant persons are known individually to the offeror and [2] approached by the offeror on the basis of a purposive selection

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77. *See id.*

78. *See, e.g.*, *S.E.C. v. Ralston Purina Co.*, 346 U.S. 119, 127 (1953). Pursuant to a subsequent amendment to the Securities Act, the statutory language referred to as § 4(1) in *S.E.C. v. Ralston Purina Co.* is now § 4(2).

79. *See* Theresa A. Gabaldon, *Love and Money: An Affinity-Based Model for the Regulation of Capital Formation by Small Businesses*, 2 J. SMALL & EMERGING BUS. L. 259, 286-86, (1998) (arguing that "affinity investing" between investors with personal relationships constitutes a clear case of market failure and that denying protection of the U.S. securities laws to such investors is consequently inappropriate).

80. BAWe Interpretive Release, *supra* note 16. The legal status of the Interpretive Release is unclear. *See* Kullmann & Müller-Deku, *supra* note 67, at 1989; Dittrich, *supra* note 12, at 70 n.245.

of individual characteristics, and [3] the provision of information through a sales prospectus is not necessary in light of the informational needs of the investor.<sup>81</sup>

What is surprising is that the BAWe substitutes the term “limited” for the Gesetzesbegründung’s “defined,” and that in relation to section 2(2), the Release simply states, “See Part I.2.”<sup>82</sup> The BAWe thereby identifies the “limited circle of persons” exception in section 2(2) of the Act with a private placement not subject to the terms of section 1.

This identification brings the BAWe into conflict not only with the Gesetzesbegründung of section 2 and the structural logic of the Prospectus Act, but also with the language of the Gesetzesbegründung of section 1. The Gesetzesbegründung of section 1 associates a public offer with an “undefined” and not an “unlimited” circle of persons; the phrase “limited circle of persons” appears only in section 2(2).<sup>83</sup> The BAWe’s arbitrary substitution of “limited” for “defined” has baffled commentators.<sup>84</sup>

Logically, two explanations for this substitution are possible: either the substitution is meaningless, and the BAWe intended no distinction between “limited” and “defined” circles of investors, or the substitution is significant, and the BAWe intended to broaden the construction of public offer advanced in the Gesetzesbegründung of section 1. Since a limited circle of investors is a narrower category conceptually than a defined circle of investors, the second alternative would make it more difficult for securities offerors to demonstrate private placements.

In either case, the BAWe’s definition of the term “limited circle of persons” is difficult to support. In the first instance, if one assumes that “limited” means the same thing as “defined,” the BAWe definition is redundant. Of the three components of the definition, either component (1) or component (2), but not both, should be necessary to establish a “defined” and consequently private circle of investors within the meaning of the Gesetzesbegründung of section 1. Under component (1), a personal and thereby “defining” relationship between offeror and offeree would already exist. Under component (2), if a personal relationship did not already exist, it would necessarily come into being. Either possibility alone should be sufficient to establish a private placement. Component (3), in addition to being based on a different

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81. BAWe Interpretive Release, *supra* note 16, at Part I.2.

82. *See id.* at Part II.1.; Kullmann & Müller-Deku, *supra* note 67, at 1991; *see also supra* note 67, on “limited” and “defined.”

83. *See supra* note 67.

84. *See, e.g.*, Kullmann & Müller-Deku, *supra* note 67, at 1991–92.

policy rationale than the *Gesetzesbegründung* of section 1, would simply be superfluous.<sup>85</sup>

In the second possibility, in which “limited” may mean something different from “defined”, the outcome is no better. It is true that a “limited” circle of investors is implicitly narrower than a “defined” circle. For the BAWe to incorporate this distinction intentionally in its Release would require the BAWe, however, effectively to rewrite the text of the Prospectus Act. The term “limited circle of persons” appears in the Prospectus Act only in connection with section 2(2).<sup>86</sup> The BAWe has unilaterally imported this term into the ground rule of the Act in section 1. As a matter of statutory construction, this seems unwarranted. In any event, in this second scenario, component (3) of the BAWe definition now renders components (1) and (2) redundant.

The greater problem is, of course, that the *Gesetzesbegründung* of section 1 and any definition derived from it are insupportable. Whether the BAWe intended its definition of a “limited circle of persons” to be identical with or narrower than the “defined circle of persons” in the *Gesetzesbegründung* of section 1, it shares the same fundamental flaws. Under either alternative, the BAWe is obliged to consider Prospectus Act section 2(2) a private placement, since “limited” is a subset of “defined.” As noted above, the structure of the Prospectus Act as a whole and the terms of the *Gesetzesbegründung* of section 2 make clear that each of the section 2 exceptions, including section 2(2), is a “form of public offer.”<sup>87</sup> If offers to a “limited circle of persons” were indeed private placements, they would not need to be excepted from section 1 and could not possibly be included in section 2. The BAWe Release, like the *Gesetzesbegründung* of section 1, can be correct only if section 2(2) of the Prospectus Act is entirely redundant.<sup>88</sup> This assumption conflicts with basic principles of statutory construction.

Accordingly, the BAWe’s construction of the term “limited circle of persons” and its identification of the section 2(2) “limited circle of persons” exception with a private placement should be rejected together with the *Gesetzesbegründung* of section 1.

Ultimately, in issuing its Interpretive Release of the Prospectus Act, the BAWe appears to have been torn between the *Gesetzesbegründung* of section 1 and sound policy. The *Gesetzesbegründung* of section 1, in

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85. *Cf. id.*

86. Compare Prospectus Act, *supra* note 2, at § 2(2), where the phrase “begrenzter Personenkreis” is used, with *Gesetzesbegründung*, *supra* note 62, at 11, where the phrase simply does not appear.

87. *Gesetzesbegründung*, *supra* note 62, at 11; *see infra* text accompanying notes 73–74.

88. *See* Kullmann & Müller-Deku, *supra* note 67, at 1992.

turn, seems to have inherited its flaws fully developed from the Prospectus Directive.

#### D. The Prospectus Directive

The Prospectus Act was adopted to implement the EC Prospectus Directive.<sup>89</sup> Not surprisingly, the Prospectus Act's policy and structure are closely modeled on that of the Directive. The policy of the Directive is to promote investor protection through full disclosure of information to investors.<sup>90</sup> This should enable investors to make informed investment decisions, increase confidence in, and promote the proper functioning and development of European securities markets.<sup>91</sup>

Article 1(1) of the Directive, like section 1 of the Act, sets forth a ground rule:

This Directive shall apply to transferable securities which are offered to the public for the first time in a Member State provided that these securities are not already listed on a stock exchange situated or operating in that Member State.<sup>92</sup>

Like section 2 of the Act, Article 2 of the Directive provides a number of functional exceptions:<sup>93</sup>

The Directive shall not apply:

1. to the following types of offer:
  - (a) where transferable securities are offered to persons in the context of their trades, professions or occupations, and/or
  - (b) where transferable securities are offered to a restricted circle of persons, and/or

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89. See, e.g., HÜFFER, *supra* note 10, at 7-10. On the Prospectus Directive generally, see Warren, *Common Market Prospectus*, *supra* note 1, at 695-97; Warren, *Global Harmonization*, *supra* note 1, at 215; Klaus Müller, *Richtlinie für Verkaufsprospekte über Wertpapiere*, 7 *DIE BANK*, 375, 375 (1989) [hereinafter *Richtlinie*]; Pierce, *supra* note 19, at 133-37; Samuel Wolff, *Recent Developments in International Securities Regulation*, 23 *DENV. J. INT'L L. & POL'Y* 347, 347-77 (1995).

90. Prospectus Directive, *supra* note 3, at 8 (Consideration 2); see Warren, *Common Market Prospectus*, *supra* note 1, at 696; Warren, *Global Harmonization*, *supra* note 1, at 215.

91. See Prospectus Directive, *supra* note 3, at 8 (Considerations 1-3); Warren, *Common Market Prospectus*, *supra* note 1, at 696.

92. Prospectus Directive, *supra* note 3, at 9. The Directive's actual prospectus requirement is contained in art. 4. See *id.* at 10.

93. These exceptions are described as "functional" exceptions, because they are not actually termed "exceptions," either explicitly or implicitly, within the Directive. See *supra* note 65.

- (c) where the selling price of all the transferable securities offered does not exceed ECU 40.000, and/or
  - (d) where the transferable securities offered can be acquired only for a consideration of at least ECU 40.000 per investor;
2. to transferable securities of the following types:
- (a) to transferable securities offered in individual denominations of at least ECU 40.000;
  - ...
  - (h) to transferable securities offered by their employer or by an affiliated undertaking to or for the benefit of serving or former employees.<sup>94</sup>

The correspondences between these sections of the Directive and those of the Act are clear. Articles 2(1)(a), 2(1)(b) and 2(2)(h) of the Directive are implemented in sections 2(1), 2(2) and 2(3), respectively, of the Act. Articles 2(1)(c) and 2(1)(d) are combined in section 2(4), and Article 1(2) is essentially recast in section 2(5). Notably, with respect to the "limited circle of persons" exception, Prospectus Act section 2(2) implements Directive Article 2(1)(b) more or less verbatim.<sup>95</sup>

More importantly, the Act also follows the Directive in its treatment of public offers. The Directive openly disavows a definition of the term "public offer," stating that "so far, it has proved impossible to furnish a common definition of the term 'public offer' and all its constituent parts."<sup>96</sup> The Act simply omits a definition of this term.

As discussed above, the Gesetzesbegründung of section 1 of the Act construes the term "public offer" as used in Prospectus Act section 1 to be an offer of securities to persons with whom the offeror neither has nor creates a personal relationship.<sup>97</sup> This construction, which appears fundamentally to inform the drafters' view of the Act, is the conceptual fount of the Act's major problems. It de-couples the operation of the Act from the Act's own policy goals and implicitly removes the section 2(2) exception from the realm of the public offer.

This construction does not appear in the text of the Prospectus Act or that of the Prospectus Directive. The legislative history of the Prospectus Directive strongly suggests, however, that the Gesetzesbegründung's

94. Prospectus Directive, *supra* note 3, at 9.

95. Prospectus Directive, *supra* note 3, at art. 9: "where transferable securities are offered to a restricted circle of persons." See *supra* note 67.

96. Prospectus Directive, *supra* note 3, at 8 (Consideration 7). See Warren, *Common Market Prospectus*, *supra* note 1, at 707 n.86 (describing this disavowal as a "major failure" of the Directive); *Richtlinie*, *supra* note 89, at 376.

97. Gesetzesbegründung, *supra* note 62, at 11; *supra* note 67 and accompanying text.

drafters adopted this construction from an early version of the Directive.<sup>98</sup> The very first draft of the Directive, submitted to the EC Council of Ministers by the European Commission on January 13, 1981 (the "1981 Draft Directive"), provided in Article 1(2) that "for the application of this Directive, securities are the object of a public subscription or sales offer if the offer is not directed exclusively to a restricted circle of persons."<sup>99</sup> The body of Article 1 of the 1981 Draft Directive then expressly reserved to Member States the power to define the term "restricted circle of persons." In doing so, however, Member States were to take into account the number and characteristics of the offerees, the extent of the offer, and the public media used to carry out the offer.<sup>100</sup> The 1981 Draft Directive thus set up a basic dichotomy between public securities offers to which the Directive would apply and offers to a "restricted circle of persons" that would constitute a private placement.

In its subsequent *Stellungnahme* or "opinion" as to the 1981 Draft Directive (the "Committee Opinion" or the "Opinion"), the Council's Economic and Social Committee objected to the reservation of power to Member States in Article 1 to define the term "restricted circle of persons," on the ground that this ran counter to the goal of the Directive to harmonize EC capital market regulation.<sup>101</sup> The Committee suggested that public offers be affirmatively defined as those that employed advertising, flyers, or other means of publicity to offer securities to an unlimited number of persons.<sup>102</sup> In the Committee's view, an offer was not to be deemed public "if it is addressed to a limited number of persons or bodies known to the offerer and falling within a certain category, who are personally informed by the issuer or his appointed agent."<sup>103</sup> For reasons that are not entirely clear, the Committee pro-

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98. On the drafting process, see *supra* note 62.

99. Vorschlag für eine Richtlinie des Rates zur Koordinierung der Bedingungen für die Erstellung, die Kontrolle und die Verbreitung des Prospekts, der im Falle von öffentlichen Zeichnungs- oder Verkaufsangeboten zu veröffentlichen ist, v. 10.02.81, (Bundestagsdrucksache 68/81, Art. 1) [hereinafter 1981 Draft Directive]. See Dittrich, *supra* note 12, at 64. The relevant language of the 1981 Draft Directive describes a "beschränkter Personenkreis", which may be translated as a "confined" or "restricted circle of persons". Cf. *supra* note 67. On the procedure for issuance of EC Directives, see *Investment Services Directive*, *supra* note 25, at 183 n.8, 184 n.10, 185 n.20.

100. See 1981 Draft Directive, *supra* note 99, at art. 1(2); Dittrich, *supra* note 12, at 64-66.

101. Economic and Social Committee, Opinion on the Proposal for a Council Directive Coordinating the Requirements for the Drawing-up, Scrutiny and Distribution of the Prospectus to be Published When Securities are Offered for Subscription or Sale to the Public, 1981 O.J. (C310) 51 [hereinafter Committee Opinion]. See Dittrich, *supra* note 12, at 64-65.

102. See Committee Opinion, *supra* note 101, at 51-52; Dittrich, *supra* note 12, at 64-65.

103. See Committee Opinion, *supra* note 101, at 51; Dittrich, *supra* note 12, at 65.

ceeded to define a "limited circle of persons" (rather than a "defined group of persons") as those investors, regardless of their number, "who have personal connections with the financial institution and are approached individually by it."<sup>104</sup>

The Committee's suggestions were ultimately not incorporated into the Directive, and the Draft Directive of 1981 was, of course, subsequently redrafted. Consultations between Member States, the central effort of which was to arrive at a common definition of the term "public offer," continued for another eight years without success.<sup>105</sup>

The construction of "public offer" in the *Gesetzesbegründung* of section 1 of the Prospectus Act appears, however, to have been adopted directly from the Committee's Opinion. Like the Opinion, the *Gesetzesbegründung* of section 1 speaks of "defined" and "limited" circles of investors who have "personal relationships" with an offeror.<sup>106</sup> Like the Opinion, the *Gesetzesbegründung* of section 1 effectively defines a public offer as any offer of securities to investors who do not have such personal relationships.<sup>107</sup> Whether the *Gesetzesbegründung's* construction of "public offer" originated directly from the Committee Opinion is difficult to determine. At the very least, the Act's drafters appear to have used the Committee Opinion to confirm their construction of an ambiguity in the Directive. Given the Prospectus Directive's ultimate refusal to define the term "public offer," it should not be surprising that the drafters of the Prospectus Act, in attempting to implement the Directive, may have turned to the Opinion and other elements of the Directive's legislative history for constructive assistance.

The dichotomy set up in the Draft Directive between public offers and offers to restricted circles of persons also appears to underlie the BAWe's identification in its Interpretive Release of the "limited circle of persons" exception in section 2(2) of the Prospectus Act with a private placement not subject to section 1.<sup>108</sup> As surprising as this identification may be in the context of the Act, it is explicit in the Draft Directive, Article 1 of which, it will be recalled, provides a private placement exception for securities offers directed exclusively to a

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104. Committee Opinion, *supra* note 101, at 52. See Dittrich, *supra* note 12, at 65.

105. That is, until 1989. See Warren, *Common Market Prospectus*, *supra* note 1, at 695 (stating that the Directive "was adopted after almost a decade of controversial and secretive negotiations. The development of this directive ranks among the EC's more difficult journeys on the path to regulatory harmony."); Warren, *Global Harmonization*, *supra* note 1, at 215; Dittrich, *supra* note 12, at 64.

106. *Gesetzesbegründung*, *supra* note 62, at 11.

107. *Id.*

108. Whether the influence of the Committee Opinion on the BAWe Interpretive Release was (1) direct, (2) mediated by the published views of German commentators who had read the Committee Opinion, or (3) a combination of the foregoing, is difficult to determine.

restricted circle of persons.<sup>109</sup> The language of the BAWe's definition of a "limited circle of persons" in the Release is strongly reminiscent of that of the Opinion.<sup>110</sup> The Opinion sets down three criteria for a private placement, the first and third of which are very similar to those of the BAWe: an offer must be "[1] addressed to a limited number of persons or bodies known to the offeror, [2] known to the offerer and [3] falling within a certain category, who are personally informed by the issuer or his appointed agent."<sup>111</sup> The Committee Opinion also evinces a certain carelessness with the terms "defined" and "limited." Reasonable persons might infer that the BAWe, faced with the same difficulty as German legislators in construing the central concept of the Prospectus Act, turned to the same elements of the Prospectus Directive's legislative history.

Unfortunately, the influence of the Directive's legislative history may be a distortive one. That the views expressed in the 1981 Draft Directive and the Committee Opinion were ultimately rejected by EC legislators suggests that they should not even have been taken into account by the drafters of the Prospectus Act in construing the final Prospectus Directive of 1989. The final Directive, it will be recalled, flatly disavows any definition of the term "public offer" as impossible.<sup>112</sup>

Furthermore, the structure and substance of the Directive from its inception in 1981 to its final release in 1989 appear to owe more to the exigencies of EC politics than to the pursuit of any substantive policy goals of EC securities regulation.<sup>113</sup> In particular, the Draft Directive's "restricted circle of persons" exception appears to have been conceived as a compromise provision into which Member States could place whatever regulatory content they saw fit by means of their implementing statutes.<sup>114</sup> Rather than advancing any inherent purpose or policy of its

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109. 1981 Draft Directive, *supra* note 99, at art. 1.

110. Compare BAWe Interpretive Release, *supra* note 16, at Part I.2, with Committee Opinion, *supra* note 101, at 51-52.

111. Compare BAWe Interpretive Release, *supra* note 16, at Part I.2, with Committee Opinion, *supra* note 101, at 51.

112. Prospectus Directive, *supra* note 3, at 8 (Consideration 7). See *supra* note 96.

113. See Warren, *Common Market Prospectus*, *supra* note 1, at 695 n.37 ("The members of the working party generated numerous revised drafts, which were circulated or leaked on a confidential basis to various interested parties in each of the Member States. Neither the EC Commission nor the Council of Ministers or the Council's working party solicited input on the Prospectus Directive from consumer associations within the EC or from non-EC regulatory authorities." (citations omitted)), 701-702 ("The exemptions . . . come very close to swallowing the disclosure rule."); *Richtlinie*, *supra* note 89, at 376.

114. See Warren, *Common Market Prospectus*, *supra* note 1, at 702 (stating that "[t]he exigencies of any effort to harmoni[z]e the pre-existing regulatory policies of 12 sovereign states required considerable compromise."); Warren, *Global Harmonization*, *supra* note 1, at

own, the exception seems designed chiefly to solicit the political support of Member States otherwise unable to agree—whether because of different policy goals, disparate legal systems, warring constituencies, or otherwise—on the central concept of a binding Directive.<sup>115</sup> This inability continues to haunt regulators in Germany and other EC Member States now confronted with the task of interpreting, implementing, and enforcing an essentially hollow piece of legislation.

### E. *The German Literature*

Most German commentators on the Prospectus Act have supported the construction adopted by the Bundestag in the Gesetzesbegründung of section 1. The majority camp generally agrees that (i) a public offer is an offer of securities made to an undefined circle of persons and (ii) the circle is undefined in the sense that personal relationships between the offeror and the investors are lacking.<sup>116</sup>

No agreement exists among the majority camp, however, as to whether the limited circle of persons exception in section 2(2) in fact constitutes a public offer. Kullmann and Müller-Deku contend in a commentary on the BAWe Interpretive Release that the section 2 exceptions, including section 2(2), necessarily constitute public offers in light of the structure of the Prospectus Act.<sup>117</sup> The language of section 2(2) is said to suggest a quantitative limitation on the circle of investors, in contrast to the qualitative criteria employed to distinguish public offers and private placements under section 1.<sup>118</sup> In language recalling the Gesetzesbegründung of section 2, Müller describes

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231 (stating that “[c]ompromises critical to the success of the 1992 [EC] program have necessitated this multiplicity of exceptions and excisions. To a large extent, the EC chose ‘harmony now’ at the price of ‘discord later.’ The result of expediency, however, is a single market with numerous regulatory cracks.” (citation omitted)); *Richtlinie*, *supra* note 89, at 376.

115. See Warren, *Common Market Prospectus*, *supra* note 1, at 695. In its Opinion, the Committee objected to the 1981 Draft Directive’s “restricted circle of persons” exception on these very grounds; it conflicted with the policy goal of capital market harmonization. See Committee Opinion, *supra* note 101, at Part 2.2, 2.3. The final version of the Directive in 1989 concedes failure on this point: a harmonized definition of the term “public offer” “has proved impossible.” Prospectus Directive, *supra* note 3, at 8 (Consideration 7). See also *supra* note 114.

116. For a summary of commentators’ treatment of public offers, see Dittrich, *supra* note 12, at 68–81. See also CARL & MACHUNSKY, *supra* note 25, at 34; Kullmann & Müller-Deku, *supra* note 67, at 1992; *Prospektpflicht*, *supra* note 31, at 213; cf. CARSTEN PETER CLAUSSEN, *BANK-UND BÖRSENRECHT: HANDBUCH FÜR LEHRE UND PRAXIS* 135 (1996) (finding that introduction of securities onto an exchange is the true distinction between public and private offers); SIEGFRIED KÜMPEL, *BANK-UND KAPITALMARKTRECHT* 974 (1995); Meying, *supra* note 12, at 419.

117. Kullmann & Müller-Deku, *supra* note 67, at 1993.

118. See *id.*

section 2(2) as a form of public offer, even though the circle of persons involved does not require the protections of the Act.<sup>119</sup> Kohls compares section 2(2) to SEC Rule 506, which he understands to permit an unlimited number of “institutional investors” but to limit “private investors” to a total of 35; the source of this terminology is unclear.<sup>120</sup>

Numerous other commentators share the view of the BAWe that the section 2(2) exception qualifies as a private placement to which section 1 of the Act does not apply. Included in this group are Schäfer;<sup>121</sup> Süßmann and Waldeck;<sup>122</sup> Meyding;<sup>123</sup> Claussen;<sup>124</sup> Kumpel;<sup>125</sup> and Carl/Machunsky, who maintain that the intent of section 2(2) was primarily to accommodate offers by banks and investment managers to hand-picked customers.<sup>126</sup>

A few German commentators have recently rejected the majority view, however, in favor of a policy-based interpretation of the term “public offer” on the model of U.S. securities law. Perhaps the first representative of the new minority camp was Hüffer, who accepts the personal relationship construction of section 1 advanced by the Bundestag, the BAWe and the majority of commentators, but only on the condition that such relationships guarantee on a case-by-case basis that investors are provided with sufficient information.<sup>127</sup> To the extent that section 2(2) appears to be premised on personal relationships, it, too, is said to have “indicative” value that investors will be provided with sufficient information.<sup>128</sup> Nonetheless, in order to qualify for section 2(2), a circle of persons must be limited in ways that accord with the Prospectus Act’s goal of investor protection.<sup>129</sup>

The major advocate of the policy-based U.S. view is Dittrich.<sup>130</sup> In his view, public offers of securities under the Prospectus Act are to be distinguished from private placements on the basis of investors’ need for information. After citing Hüffer approvingly for this proposition, Dittrich adds that the experience of offerees must also be taken into account, and that Hüffer has apparently applied to the Prospectus Act the

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119. *Prospektpflicht*, *supra* note 31, at 214.

120. KOHLS, *supra* note 50, at 195; the quoted English terms are used by Kohls.

121. Schäfer, *supra* note 12, at 1561.

122. Waldeck & Süßmann, *supra* note 12, at 365; *see* Süßmann, *supra* note 12, at 211.

123. Meyding, *supra* note 12, at 419.

124. CLAUSSEN, *supra* note 116, at 134–35.

125. KÜMPEL, *supra* note 116, at 974.

126. CARL & MACHUNSKY, *supra* note 25, at 38–39.

127. HÜFFER, *supra* note 10, at 22–25.

128. *See id.* at 23.

129. *See id.* at 19, 21, 25.

130. Dittrich, *supra* note 12, at 68–81.

investor protection approach of U.S. securities law.<sup>131</sup> While Dittrich agrees with Hüffer that personal relationships have indicative value as to whether investors' informational needs have been met, Dittrich's view is fundamentally in agreement with U.S. policy.<sup>132</sup> Dittrich's view should be adopted.<sup>133</sup>

## II. THE SECURITIES ACT

Part II examines the policy, structure and practice of the Securities Act, particularly Sections 3(b) and 4(2), and the relevant judicial decisions and regulations issued thereunder, including the Supreme Court's decision in *S.E.C. v. Ralston Purina Co.* and Rule 505 of the SEC's Regulation D.<sup>134</sup>

### A. History and Purpose

Securities fraud was a serious problem in the United States in the years leading up to enactment of the Securities Act. Between 1911 and 1933, every state except Nevada enacted a securities statute or "blue sky" law.<sup>135</sup> These statutes could not be enforced across state lines, however, and consequently proved ineffective against fraudulent interstate transactions.<sup>136</sup>

A series of hearings between 1931 and 1934 before committees of the U.S. Senate focused on fraudulent interstate securities transactions, including a recent wave of fraudulent sales of foreign government bonds.<sup>137</sup> During the latter half of the 1920s, leading banks in the United States either sold to small U.S. investors, or persuaded such investors to exchange their U.S. government bonds for, large quantities of foreign sovereign debt, particularly Latin American government bonds.<sup>138</sup> The prospectuses and offering circulars used in connection with the foreign bonds routinely failed to disclose the significant material risks associated with investing in the bonds and the unusually high commissions

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131. *Id.* at 73.

132. For Dittrich on 2(2), see *id.* at 81.

133. See *infra* Part III.

134. See Securities Act of 1933, 15 U.S.C. §§ 77a-77aa (1994); *Ralston Purina*, 346 U.S. at 127; Securities Act Rule 505, 17 C.F.R. § 230.505 (1997).

135. See LOUIS LOSS AND JOSH SELIGMAN, *SECURITIES REGULATION* 194-199 (3d ed. 1989). The brief historical account that follows in this essay is based largely on Loss and Seligman. See also JAMES D. COX ET AL., *SECURITIES REGULATION: CASES AND MATERIALS* 3 (1997).

136. See LOSS & SELIGMAN, *supra* note 135, at 199-201.

137. See *id.* at 201-05.

138. See *id.* at 201-02.

charged by the banks selling them.<sup>139</sup> After the stock market crash of 1929 and the onset of the Depression, the bonds lost most of their value. Other Senate committee hearings focused on insider trading and the corrupt practices of banks, broker-dealers and stock exchanges.<sup>140</sup>

Following a debate concerning the appropriate regulatory philosophy,<sup>141</sup> the U.S. Congress set about imposing a system of mandatory disclosure on persons, both natural and legal, offering or selling securities in the United States. The philosophy underlying this system was borrowed by U.S. lawmakers from the English Company Act<sup>142</sup> but perhaps best summarized by U.S. Supreme Court Justice Louis D. Brandeis in *Other People's Money* in 1914: "Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."<sup>143</sup> Rather than prohibiting persons from selling the securities of risky or unwise ventures, the federal securities laws, like their English antecedents, would simply compel such persons to publicize and provide to investors all information necessary for a reasonable investment decision. The Act's preamble provides a fair summary of this policy goal, describing the new statute as "an Act to provide full and fair disclosure of the character of securities sold in interstate and foreign commerce and through the mails, and to prevent frauds in the sale thereof, and for other purposes."<sup>144</sup> The Securities Act was enacted into law on May 27, 1933.<sup>145</sup>

In recent decades, commentators have identified an opposed, deregulatory trend on the part of the SEC. This trend has tended to de-emphasize the original policy goal of investor protection in favor of promotion of small business capital formation, increased access of foreign issuers to U.S. securities markets, and protection of the integrity of the capital markets themselves.<sup>146</sup> Since 1982, for example, the SEC has

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139. *See id.*

140. *See id.* at 203-05.

141. *See id.* at 171-93.

142. *See* James M. Landis, *The Legislative History of the Securities Act of 1933*, 28 GEO. WASH. L. REV. 29, 34 (1959).

143. LOUIS D. BRANDEIS, *OTHER PEOPLE'S MONEY: AND HOW THE BANKERS USE IT* 92 (1914), *quoted in* LOSS & SELIGMAN, *supra* note 135, at 173.

144. Securities Act of 1933, 15 U.S.C. preamble (1994), *quoted in* *Ralston Purina*, 346 U.S. at 125 n.10. For a discussion of the principal arguments in favor of mandatory disclosure, see LOSS & SELIGMAN, *supra* note 135, at 173-94.

145. *See* Landis, *supra* note 142, at 49.

146. *See, e.g.*, Revision of Certain Exemptions from Registration for Transactions Involving Limited Offers and Sales, Securities Act Release No. 6389 [1981-1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 83,106 at 84,907-08 (Mar. 8, 1982) [hereinafter Regulation D Adopting Release]. For deregulation in favor of small business capital formation, see Mark F. Donahue, *Regulation D: A Primer for the Practitioner*, 8 DEL. J. CORP. L. 495, 495 (1984); Gabaldon, *supra* note 79, at 261; Donald C. Langevoort, *Angels on the Internet: The Elusive Promise of "Technological Disintermediation" for Unregistered Offerings of Securities*, 2 J. SMALL & EMERGING BUS. L. 1, 2 (1998); Joel Seligman, *Götterdämmerung for*

adopted Regulation D and Regulation S.<sup>147</sup> The SEC's 1998 Concept Release, known as the "Aircraft Carrier" in accordance with its comprehensive platform of reforms, at least purports to represent a long-term continuation of this trend.<sup>148</sup>

### B. Provisions

The cornerstone of the Securities Act is section 5, which imposes registration and prospectus requirements on persons selling securities in the United States. Section 5(a) prohibits any person from making use of the means and instruments of interstate commerce or the mails to sell a security, unless a registration statement has been filed with the SEC and is in effect as to that security.<sup>149</sup> This prohibition is universal and complete. Persons wishing to sell securities in the United States—whether publicly or privately, few or many, or in any way, shape, or form at all—must either register the securities with the SEC or qualify for an exemption to the requirements of section 5(a).<sup>150</sup>

Registration of securities is covered by section 6.<sup>151</sup> Section 7 establishes the information and documents that must be included in the registration statement.<sup>152</sup> These are described in detail in Securities Act Schedule A for issuers other than foreign governments and in Schedule B for foreign government issuers.<sup>153</sup> The SEC has also established a series of official forms of registration statement for various issuers, as

*the Securities Act? F. Hodge O'Neal Corporate and Securities Law Symposium*, 75 WASH. U. L.Q. 887 (1997); Manning Gilbert Warren III, *A Review of Regulation D: The Present Exemption Regime for Limited Offerings Under the Securities Act of 1933*, 33 AM. U. L. REV. 355, 355 (1984) [hereinafter *Regulation D*]. On deregulation in favor of foreign issuer access, see Uri Geiger, *The Case for Harmonization of Securities Disclosure Rules in the Global Market*, 1997 COLUM. BUS. L. REV. 241, 254–317 (1997); Merloe, *supra* note 1, at 266. On disclosure in relation to Regulation S and/or a capital market protection policy, see Merritt Fox, *The Political Economy of Statutory Reach: U.S. Disclosure Rules in a Globalizing Market for Securities*, 97 MICH. L. REV. 696, 700, 708 (1998); Merritt Fox, *Securities Disclosure in a Globalizing Market: Who Should Regulate Whom*, 95 MICH. L. REV. 2498, 2505–06, 2608–28 (1997).

147. Regulation D Adopting Release, *supra* note 146, at 84,907–08; Offshore Offers and Sales, Securities Act Release No. 6863[1989–1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,524, at 80,661–94 (Apr. 24, 1990) [hereinafter *Regulation S Adopting Release*].

148. The Regulation of Securities Offerings, Securities Act Release No. 33–7606A (proposed Nov. 13, 1998) (last visited on Oct. 14, 1999) <<http://www.sec.gov/rules/proposed/337606a1.txt>> [hereinafter *Aircraft Carrier*].

149. 15 U.S.C. § 77e (1994). For a definition of interstate commerce, see 15 U.S.C. § 77b(a)(7).

150. See generally LOSS & SELIGMAN, *supra* note 135, at 385–390.

151. 15 U.S.C. § 77f.

152. 15 U.S.C. § 77g.

153. Securities Act, Schedule of Information Required in Registration Statement, Schedule A and Schedule B, 2 Fed. Sec. L. Rep. (CCH) ¶ 5501.

well as regulations providing instructions for drafting and filing such forms with the SEC. Section 8 provides for the taking effect of registration statements and of subsequent amendments after the appropriate form of statement or amendment has been filed.<sup>154</sup>

Section 5(b) imposes a prospectus requirement on persons selling securities.<sup>155</sup> Section 5(b)(2) prohibits any person from carrying or causing to be carried through the mails or in interstate commerce any security for the purpose of sale or delivery after sale unless the security is accompanied or preceded by a prospectus that meets the requirements of section 10.<sup>156</sup> Section 10 specifies the information required to be included in the prospectus, which is generally the same as that which must be included in the registration statement under section 7.<sup>157</sup>

Sections 3 and 4 provide exemptions to the requirements of section 5.<sup>158</sup> Section 3 exempts certain securities, most notably certain government securities (§ 3(a)(2)), debt securities with a maturity of less than nine months known as commercial paper (§ 3(a)(3)), securities issued by certain non-profit organizations (§ 3(a)(4)), securities issued by entities already subject to other comprehensive forms of federal or state regulation (§ 3(a)(5),(8), & (10)), and securities that are part of an issue offered and sold only to persons residing within a single U.S. State or Territory (§ 3(a)(11)).<sup>159</sup>

Section 4 exempts certain transactions, most importantly “transactions by any person other than an issuer, underwriter, or dealer”<sup>160</sup> (§ 4(1)) and “transactions by an issuer not involving any public offering”<sup>161</sup> (§ 4(2)). Section 4(3) exempts certain dealer transactions,<sup>162</sup> and section 4(4) provides a transactional exemption for unsolicited orders executed by brokers.<sup>163</sup>

Several provisions impose liability on persons connected with securities offers. Section 11 imposes civil liabilities on certain persons involved in the production of the registration statement.<sup>164</sup> Section 11(b)

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154. 15 U.S.C. § 77h.

155. 15 U.S.C. § 77e(b).

156. 15 U.S.C. § 77e(b)(2). For a definition of the term “prospectus,” see 15 U.S.C. § 77b(a)(10).

157. 15 U.S.C. § 77j.

158. 15 U.S.C. §§ 77c-d.

159. 15 U.S.C. § 77c(a)(2)–(11). On § 3(b), see *infra* Part II.C.2.

160. 15 U.S.C. § 77d(1). See *infra* Part II.C.1.

161. 15 U.S.C. § 77d(2). See *infra* Part II.C.1.

162. 15 U.S.C. § 77d(3).

163. 15 U.S.C. § 77d(4).

164. 15 U.S.C. § 77k. These include, among others, all persons required to sign the registration statement including the issuer’s principal executive officers, the issuer’s directors, accountants and other professionals submitting certified statements, and underwriters of the securities being issued. On § 11 generally, see COX ET AL., *supra* note 135, at 589–621.

makes certain defenses against liability, including the "due diligence" defense, available to persons other than the issuer.<sup>165</sup> Section 12 imposes civil liabilities in connection with prospectuses and communications.<sup>166</sup> Section 17, which represents the central antifraud provision of the Securities Act, imposes broad liability on persons engaging in any fraudulent activities in connection with interstate offers and sales of securities.<sup>167</sup> Section 17(a) makes it unlawful for any person in the offer and sale of any securities by any use of the means or instruments of interstate commerce or the mails

- (1) to employ any device, scheme, or artifice to defraud, or
- (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
- (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.<sup>168</sup>

Section 17(c), like section 12(a)(2), provides that the exemptions in section 3 of the Securities Act do not apply, with the result that even securities offers exempt from the registration and prospectus requirements of section 5 remain subject to the basic antifraud provisions of the Act.<sup>169</sup>

Sections 19–21<sup>170</sup> and section 28<sup>171</sup> specify certain powers of the SEC, while section 27 sets forth certain provisions governing private securities litigation.<sup>172</sup> Section 24 establishes penalties, generally providing that any person who willfully violates any provision of the Act or the rules and regulations issued by the SEC thereunder shall be subject upon conviction to a fine of up to \$10,000 and/or imprisonment of up to five years.<sup>173</sup>

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165. 15 U.S.C. § 77k(b); 15 U.S.C. § 77k(b)(3)(containing due diligence defenses). On due diligence, see COX ET AL., *supra* note 135, at 592; MARC I. STEINBERG, UNDERSTANDING SECURITIES LAW 149–150 (1989).

166. 15 U.S.C. § 77l.

167. 15 U.S.C. § 77q.

168. 15 U.S.C. § 77q(a). See also 15 U.S.C. § 77q(b).

169. 15 U.S.C. § 77q(c). See also 15 U.S.C. § 77l(a)(2) (§ 12(a)(2), under which § 3(a)(2) continues to apply). On the applicability of § 12(a)(2) to non-public offers, see *Gustafson v. Alloyd Co.*, 115 S.Ct. 1061 (1995).

170. 15 U.S.C. §§ 77s–u.

171. 15 U.S.C. § 77z–3.

172. 15 U.S.C. § 77z–1.

173. 15 U.S.C. § 77x.

In addition, certain sections of the Securities Exchange Act of 1934 (the "Exchange Act") automatically subject issuers of securities, upon filing of a registration statement under the Securities Act, to the continuing reporting requirements of the Exchange Act.<sup>174</sup> Persons making a public offer of securities in the United States are thus subject as a general rule to both the Securities Act and the Exchange Act.

### C. Section 4(2) and Section 3(b) Exemptions

Sections 4(2) and 3(b) of the Securities Act represent perhaps the central exemptions from the requirements of section 5 for corporate securities issuers.

#### 1. Section 4(2)

##### a. the statute

Section 4(2) of the Securities Act provides that the provisions of section 5 shall not apply to "transactions by an issuer not involving any public offering."<sup>175</sup> Transactions qualifying under the section 4(2) exemption are accordingly known as "private placements." An exemption for private placements is needed as a result of the universality of section 5, which requires that all interstate offers and sales of securities—whether public or private—either be registered with the SEC or qualify for an exemption from registration.<sup>176</sup> Section 4(2) is the primary exemption for non-public offers and sales of securities.

Unfortunately for persons construing section 4(2), the Securities Act fails to define the term "public offering." Here, too, the legislative history is only marginally helpful.<sup>177</sup> As originally drafted, section 4(2) exempted "transactions by an issuer not with or through an underwriter."<sup>178</sup> The House Bill subsequently added the phrase, "and not involving any public offering."<sup>179</sup> Section 2(a)(11) of the Act defines the term "underwriter" to mean

any person who has purchased from an issuer with a view to, or offers and sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a

174. Securities Exchange Act of 1934, 15 U.S.C. §§ 78a et. seq., §§ 78l, 78m, 78o(d)(1994).

175. 15 U.S.C. § 77d(2).

176. See LOSS & SELIGMAN, *supra* note 135, at 385–90.

177. See, e.g., LOSS & SELIGMAN, *supra* note 135, at 171–93; Landis, *supra* note 142.

178. H.R. 73–5480, at 4 (1933); see also *supra* note 78.

179. H.R. REP. NO. 85, 1 (1933).

participation in the direct or indirect underwriting of any such undertaking.<sup>180</sup>

The operational term here is “distribution,” which the Act does not define, but which for practical purposes may be considered interchangeable with the term “public offer.”<sup>181</sup> Public offers necessarily involve a “distribution” of securities. Section 2(a)(11) classifies persons who assist an issuer in a distribution, or who purchase securities from an issuer with a view to making their own distribution, as statutory underwriters, whatever their actual profession or occupation from an everyday perspective. As statutory underwriters, such persons can no longer make use of the Act’s exemptions, particularly section 4(1) and section 4(2). The statutory underwriter definition thereby ensures that indirect and secondary distributions of securities, in addition to direct initial public offers by an issuer, remain subject to section 5.<sup>182</sup>

The phrase, “not with or through an underwriter and,” was subsequently deleted from section 4(2) as superfluous language by a section of the Securities Exchange Act of 1934 (the “Exchange Act”), giving section 4(2) its present form.<sup>183</sup> The statutory underwriter definition remains in place. Without a definition of “distribution” or “public offer,” however, the boundaries of the section 4(2) exemption were left unclear. Initially the House Committee explained that the exemption was intended to permit an issuer “to make a specific or isolated sale of its securities to a particular person.”<sup>184</sup> The number of purchasers may have figured significantly in congressional thinking. In one statement the House Managers indicated that “[s]ales of stock to stockholders become subject to the [A]ct unless the stockholders are so small in number that the sale to them does not constitute a public offering.”<sup>185</sup> As a general matter, an exemption was considered warranted “where there is no practical need for [the bill’s] application or where the public benefits are too remote.”<sup>186</sup> The legislative record offers nothing more.

The SEC’s General Counsel took the view in an advisory opinion as early as 1935 that “an offering to the members of a class who should

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180. 15 U.S.C. § 77b(a)(11).

181. See H.R. REP. NO. 1838, at 41 (1933); LOSS & SELIGMAN, *supra* note 135, at 1355–56.

182. See COX ET AL., *supra* note 135, 445–51; Steinberg, *supra* note 165, 120–21.

183. Securities Exchange Act of 1934 § 203(a), 48 Stat. 906 (1934) (codified as amended at 15 U.S.C. §§ 78a–78mm). See LOSS & SELIGMAN, *supra* note 135, at 1352 n.385.

184. H.R. REP. NO. 85, *supra* note 179, at 15–16. See LOSS & SELIGMAN, *supra* note 135, at 1351–52; on “isolated transaction” as a traditional Blue Sky concept, see *id.* at 1352 n.385.

185. H.R. REP. NO. 73–152, at 25 (1933).

186. H.R. REP. NO. 73–85, *supra* note 179, at 5. See LOSS & SELIGMAN, *supra* note 135, at 1352.

have special knowledge of the issuer is less likely to be a public offering than is an offering to the members of a class of the same size who do not have this advantage."<sup>187</sup> In assessing the offerees' knowledge of the issuer, all the circumstances surrounding the offer had to be taken into account, including the number of offerees, their relationship to each other and the issuer, the number of shares offered, and the manner of the offering.<sup>188</sup> As a rule of thumb, the General Counsel appeared to agree that an offering to fewer than 25 persons generally did not involve a public offer, while the number of offerees in an institutional offering might rise as high as 100.<sup>189</sup> The scope of section 4(2), however, was not decisively demarcated until the Supreme Court's landmark decision in 1953 in *S.E.C v. Ralston Purina Co.*<sup>190</sup>

#### b. Ralston Purina

*Ralston Purina* involved a plan by a privately owned feed and cereal manufacturer to encourage stock ownership among its roughly 7,000 employees.<sup>191</sup> The plan permitted certain "key" employees who inquired on their own initiative about the possibility of stock ownership to purchase company stock at market prices.<sup>192</sup> Between 1947 and 1951, the company sold nearly \$2,000,000 of stock to employees.<sup>193</sup> While no records were kept of the number of offerees, the number of purchasers totaled 243 in 1947, 20 in 1948, 414 in 1949, 411 in 1950, and 165 in 1950 before sales were interrupted by SEC legal action.<sup>194</sup> No registration statement was filed with the SEC. The company claimed an exemption under section 4(2) on the grounds that sales to key company employees did not constitute a public offer.<sup>195</sup>

The District Court agreed and dismissed the SEC's action, holding that the company's stock sales were exempt under section 4(2).<sup>196</sup> The U.S. Court of Appeals for the Eighth Circuit affirmed.<sup>197</sup> Having granted

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187. Securities Act Release No. 33-285, 1 Fed. Sec. L. Rep. (CCH) ¶ 2740, 2741 (1935). See Loss & SELIGMAN, *supra* note 135, at 1352-53 n.386.

188. See Securities Act Release No. 33-285, *supra* note 187, at ¶ 2740-44.

189. See *id.*; Loss & SELIGMAN, *supra* note 135, at 1354-56 nn.388-90.

190. 346 U.S. 119 (1953).

191. *Id.* at 121.

192. See *id.* at 121-22.

193. See *id.* at 121.

194. See *id.*

195. See *id.* at 121-22.

196. See *id.* at 124 (citing *S.E.C. v. Ralston Purina Co.*, 102 F. Supp. 964 (E.D. Mo. 1952)).

197. *Id.* at 124 (citing *S.E.C. v. Ralston Purina Co.*, 200 F.2d 85 (8th Cir. 1952)).

certiorari in order to define the scope of the private offering exemption, the Supreme Court reversed.<sup>198</sup>

The Court began its analysis with a consideration of the language of section 4(2), its legislative history, and its antecedents under the English Companies Act and state blue sky laws.<sup>199</sup> One thing, the Court determined, was clear: "to be public an offer need not be open to the whole world."<sup>200</sup> The Court cited an early decision of the Ninth Circuit in 1938:

In its broadest meaning the term "public" distinguishes the populace at large from groups of individual members of the public segregated because of some common interest or characteristic. Yet such a distinction is inadequate for practical purposes; manifestly, an offering of securities to all red-headed men, to all residents of Chicago or San Francisco, to all existing stockholders of the General Motors Corporation or the American Telephone and Telegraph Company, is no less "public," in every realistic sense of the word, than an unrestricted offering to the world at large.<sup>201</sup>

The District Court and the Eighth Circuit had held that the purpose of the company's securities sales—to encourage stock ownership among the company's operating personnel—bore a sensible relation to the particular individuals chosen for the offer, namely, key employees.<sup>202</sup> In their view, the presence of a sensible relation between the purpose of the offer and the offerees rendered the offer private, and the company's sales qualified for the section 4(2) exemption.<sup>203</sup>

The Supreme Court rejected this analysis, holding instead that the availability of the exemption turned on the need of the offerees for the protections afforded by registration.

Exemption from the registration requirements of the Securities Act is the question. The design of the statute is to protect investors by promoting full disclosure of information thought necessary to informed investment decisions. The natural way to interpret the private offering exemption is in light of the statutory purpose. Since exempt transactions are those as to which "there is no practical need for [the bill's] application," the

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198. *Id.* at 120.

199. *See id.* at 123.

200. *Id.* (citing *Nash v. Lynde*, [1929] App.Cas. 158).

201. *Id.* at 123–24 (citing *S.E.C. v. Sunbeam Gold Mines Co.*, 95 F.2d 699, 701 (9th Cir. 1938)).

202. *See id.* at 124.

203. On the "personal relationship" criterion, compare 1981 Draft Directive, *supra* note 99, at art. 1, with the Gesetzesbegründung of § 1, *supra* note 62, at 11.

applicability of section 4([2]) should turn on whether the particular class of persons affected need the protection of the Act. An offering to those who are shown to be able to fend for themselves is a transaction “not involving any public offering.”<sup>204</sup>

Following this line of reasoning, the Court concluded that the company’s employees were not, as a class, persons able to fend for themselves.<sup>205</sup> Purchasers of the company’s stock had included persons employed as artist, bakeshop foreman, clerical assistant, copywriter, electrician, stock clerk, mill office clerk, order credit trainee, production trainee, stenographer, and veterinarian.<sup>206</sup> Purchasers resided in more than fifty separate communities scattered across the United States.<sup>207</sup> Such persons had no special access to information, were subject to “obvious opportunities for pressure and imposition,” and “were not shown to have access to the kind of information which registration would disclose.”<sup>208</sup> “An offer of securities to certain executive or managerial employees might qualify for the section 4(2) exemption if such employees by virtue of their position ha[d] access to the same kind of information that the Act would make available in the form of a registration statement.”<sup>209</sup> Otherwise, the Court noted,

The exemption, as we construe it, does not deprive corporate employees, as a class, of the safeguards of the Act . . . . Absent such a showing of special circumstances, employees are just as much members of the investing “public” as any of their neighbors in the community.<sup>210</sup>

The Court accordingly held that the company had violated section 5 of the Securities Act.<sup>211</sup>

*Ralston Purina*’s definition of the term “public offer” and its delineation of the conceptual boundaries of the section 4(2) exemption have endured more than forty years of development in U.S. securities regulation and continue to be good law.<sup>212</sup> A “public offer” under the

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204. *Ralston Purina*, 346 U.S. at 124–25 (citation omitted in original).

205. *See id.*

206. *See id.* at 121.

207. *See id.*

208. *See id.* at 127.

209. *Id.* at 125–26.

210. *Id.* at 126–26.

211. For the current status of securities offers to employees under U.S. law, see Securities Act Rule 701, 17 C.F.R. § 230.701 (issued under Securities Act § 3(b) and treats employee offers as fundamentally public).

212. A line of cases, many of them in the Fifth Circuit, subsequently refined but did not alter the basic holding of *Ralston Purina*. *See, e.g.*, *S.E.C. v. Murphy*, 626 F.2d 633 (9th Cir. 1980); *Cook v. Avien*, 573 F.2d 685 (1st Cir. 1978); *Doran v. Petroleum Management Corp.*,

Securities Act may accordingly be defined as an offer of securities to persons who, in obtaining the information necessary to an informed investment decision, are not able to fend for themselves and are consequently in need of the protections of the Securities Act. This definition is manifestly policy-based; it says nothing as to the common sense meanings of the terms "public" or "private" or the number of offerees that might constitute a boundary between the two. The *Ralston Purina* Court expressly declined to rule on this question, citing dictum from a judicial decision that preceded the federal securities laws: "'The public' . . . is of course a general word. No particular numbers are prescribed. Anything from two to infinity may serve: perhaps even one, if he is intended to be the first of a series of subscribers, but makes further proceedings needless by himself subscribing the whole."<sup>213</sup> The Court conceded that offerings to a substantial number of persons might only rarely be exempt under section 4(2) and that nothing prevented the SEC from using a numerical test in deciding whether to investigate particular exemption claims.<sup>214</sup> Nothing in the Securities Act, however, warranted "superimposing a quantity limit on private offerings as a matter of statutory interpretation."<sup>215</sup>

## 2. Section 3(b)

In addition to the transactions exempted by section 4 and the securities exempted by the text of section 3 of the Securities Act, section 3(b) authorizes the SEC to exempt any other class of securities offered to the public in an aggregate amount of up to \$5,000,000 if the SEC "finds that the enforcement of [the Act] with respect to such securities is not necessary in the public interest and for the protection of investors by reason of the small amount involved or the limited character of the public offering."<sup>216</sup> Section 3(b) is accordingly known as the "small issue" exemption.<sup>217</sup>

Two initial points may be noted. First, as section 3(b) itself makes clear, sales of securities in accordance with any rule or regulation issued by the SEC under the authority of section 3(b) necessarily constitute a

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545 F.2d 893 (5th Cir. 1977); *S.E.C. v. Continental Tobacco Co.*, 463 F.2d 137 (5th Cir. 1972); *Hill York Corp. v. American Int'l Franchises, Inc.*, 448 F.2d 680 (5th Cir. 1971). See also LOSS & SELIGMAN, *supra* note 135, at 1352 n.386.

213. *Ralston Purina*, 346 U.S. at 125 n.11 (quoting Viscount Sumner in *Nash v. Lynde*, *supra* note 200, at 169).

214. See *id.* at 125.

215. *Id.* at 125. See also *Hill York*, 448 F.2d at 688-89.

216. Securities Act of 1933 § 3(b), 15 U.S.C. § 77c(b) (1994).

217. See LOSS & SELIGMAN, *supra* note 135, at 1307-19.

“public offering” of securities.<sup>218</sup> The section 3(b) exemption differs fundamentally from section 4(2) in this regard. Second, despite their status as public offers, securities issues may be exempted by the SEC under section 3(b) when they are small enough, either in respect of the aggregate dollar amount of securities offered or the “limited character” of the offering itself, so that neither the public interest nor the protection of investors requires subjecting such issues to the requirements of the Act.<sup>219</sup>

This aspect of section 3(b) raises significant policy questions in that it appears to conflict with the basic policy of the Securities Act. As understood in *Ralston Purina*, the public interest and investor protection would seem to require that every public offer, regardless of size or character, be subjected to the Act’s requirements. Investors in a public offer are by definition persons in need of the Act’s protections. This is particularly true of investors in the small issues exempted under section 3(b). Since the early years of the century, small issues have proven uniquely susceptible to fraud and in corresponding need of regulation.<sup>220</sup> As originally enacted, section 3(b) reflected Congress’ concern with small issues fraud, authorizing the SEC to exempt securities offers up to an aggregate amount of only \$100,000.<sup>221</sup> The House Committee made clear that the SEC was to use this exemptive authority “only in a sparing manner.”<sup>222</sup>

For small business issues, however, an increased incidence of securities fraud is only one side of the coin. Empirical research has consistently shown that small businesses bear a disproportionate economic burden in forming capital under the Securities Act.<sup>223</sup> The relative cost of issuing registered securities is significantly greater for small businesses than for large ones, while the benefits to investors are presumptively the same.<sup>224</sup> Favoring large businesses over small ones in

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218. 15 U.S.C. § 77c(b).

219. *Id.*

220. See LOSS & SELIGMAN, *supra* note 135, at 1308 n.234.

221. See *id.* at 1307–10.

222. H.R. REP. NO. 85, *supra* note 179, at 6–7; see LOSS & SELIGMAN, *supra* note 135, at 1310.

223. See LOSS & SELIGMAN, *supra* note 135, at 1308. See generally Proposed Revision of Certain Exemptions from the Registration Provisions of the Securities Act of 1933 for Transactions Involving Limited Offers and Sales, Securities Act Release No. 6339, [1981–1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 83,014 (Aug. 7, 1981) [hereinafter Regulation D Proposing Release]; C. Steven Bradford, *Transaction Exemptions in the Securities Act of 1933: An Economic Analysis*, 45 EMORY L.J. 591 (1996); Jill E. Fisch, *Can Internet Offerings Bridge the Small Business Capital Barrier?*, 2 J. SMALL & EMERGING BUS. L. 57 (1998); *supra*, note 146.

224. See LOSS & SELIGMAN, *supra* note 135, at 1308–9, 1313–14; Bradford, *supra* note 223, at 614–18.

capital formation does not appear to be economically efficient or among the policy goals of the Securities Act, particularly given the role of small businesses in job creation and national economic growth.<sup>225</sup>

Accordingly, in the years after 1933, U.S. lawmakers gradually came to recognize the promotion of small business capital formation as a policy goal to be balanced with the Securities Act's original and still primary goal of investor protection.<sup>226</sup> As early as 1941, attempts were made to raise the \$100,000 ceiling on the SEC's exemptive power under section 3(b).<sup>227</sup> These attempts remained generally unsuccessful until 1970, when the ceiling was raised to \$500,000.<sup>228</sup> The ceiling was again raised to \$1,500,000 in May of 1978, to \$2,000,000 in October of 1978, and finally to \$5,000,000 in 1980.<sup>229</sup> The policy issues and problems under section 3(b) were first comprehensively addressed in 1982 in the SEC's Regulation D.<sup>230</sup>

#### D. Regulation D

In the years prior to 1982, the SEC had taken a series of actions "designed to assist small business capital formation and reduce the burdens imposed by the federal securities laws as applied to small businesses."<sup>231</sup> The result was a patchwork regime of regulation that many market participants decried as needlessly technical and confused.<sup>232</sup> In 1982, following several years of evaluation, the SEC effectively rescinded this regime and adopted Regulation D.<sup>233</sup>

##### 1. Purpose

Regulation D was designed "to simplify existing rules and regulations, to eliminate any unnecessary restrictions that those rules and regulations place on issuers, particularly small businesses, and to

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225. See, e.g., Fisch, *supra* note 223, at 59.

226. See *supra* note 146.

227. See LOSS & SELIGMAN, *supra* note 135, at 1310.

228. See *id.* at 1313 n.253.

229. See *id.* at 1315 nn.260-263.

230. See Regulation D Adopting Release, *supra* note 146. See also Aircraft Carrier, *supra* note 148.

231. Regulation D Proposing Release, *supra* note 223, at 84,454. See also Regulation D Adopting Release, *supra* note 146, at 84,907-08.

232. See, e.g., Regulation D Proposing Release, *supra* note 223, at 84,454-55; LOSS & SELIGMAN, *supra* note 135, at 1389-1414; STEINBERG, *supra* note 165, at 48; Rutheford B. Campbell, Jr., *The Plight of Small Issuers (and Others) under Regulation D: Those Nagging Problems That Need Attention*, 74 KY. L.J. 127, 129-30 (1985) ("Rule 146 was an ill-conceived exemption and . . . was unnecessarily technical, cumbersome, out of balance and contained some requirements that were nearly bizarre.").

233. See Regulation D Adopting Release, *supra* note 146.

achieve uniformity between state and federal exemptions in order to facilitate capital formation consistent with the protection of investors.<sup>234</sup> While criticisms remain, Regulation D has in practice proven more successful than its predecessors.<sup>235</sup>

## 2. Structure

Regulation D consists of seven preliminary notes and a series of six rules.<sup>236</sup> Rules 501–503 set forth the definitions and terms, general conditions, and notice filing requirements of Regulation D.<sup>237</sup> Rule 504 establishes under the SEC's authority under section 3(b) an exemption for limited offers and sales of securities not exceeding \$1,000,000.<sup>238</sup> Rule 505 establishes under section 3(b) a somewhat narrower exemption for limited offers and sales of securities not exceeding \$5,000,000.<sup>239</sup> Rule 506 creates a safe harbor under section 4(2) for limited offers and sales without regard to the amount of the offering.<sup>240</sup>

The preliminary notes make clear, among other things, that (1) Regulation D is available only to issuers of securities and not to affiliates or resellers;<sup>241</sup> (2) Regulation D offerings, while exempt from section 5 of the Securities Act, remain subject to the basic antifraud and civil liabilities provisions of the Securities Act and other federal securities laws, with the result that Regulation D issuers remain obliged to furnish whatever material information may be needed to make any required disclosure not misleading;<sup>242</sup> and (3) that Regulation D is not available for use as "part of a plan or scheme to evade the registration requirements of the Securities Acts."<sup>243</sup>

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234. *Id.* at 84,908.

235. *See, e.g.*, Campbell, *supra* note 232, at 131.

236. Regulation D, 17 C.F.R. § 230.501–506. On Regulation D generally, see Regulation D Proposing Release, *supra* note 223; Regulation D Adopting Release, *supra* note 146; Interpretive Release on Regulation D, Securities Act Release No. 33–6455, 17 C.F.R. § 231 (1999); Regulation D, Securities Act Release No. 33–6835, 17 C.F.R. §§ 200, 230, 239 (1999); COX ET AL., *supra* note 135, at 391–421; LOSS & SELIGMAN, *supra* note 135, at 1389–1450; STEINBERG, *supra* note 165, at 48–54; Donahue, *supra* note 146; *Regulation D*, *supra* note 146. *See also* Rules 507 and 508 at 17 C.F.R. § 230.507–508 (1999).

237. *See* 17 C.F.R. § 230.501–503.

238. *See* 17 C.F.R. § 230.504.

239. *See* 17 C.F.R. § 230.505.

240. *See* 17 C.F.R. § 230.506.

241. *See* Regulation D Preliminary Note 4, 17 C.F.R. § 230.501; Regulation D Adopting Release, *supra* note 146, at 84,910.

242. *See* Regulation D Preliminary Note 1, 17 C.F.R. § 230.501; Regulation D Adopting Release, *supra* note 146, at 84,910.

243. Regulation D Preliminary Note 6, 17 C.F.R. § 230.501. *See* Regulation D Adopting Release, *supra* note 146, at 84,911.

## a. Rule 501

The most significant elements of Rule 501 for present purposes are the subsections on calculation of the number of purchasers and the term "accredited investor". Rules 505 and 506 contain numerical limits on purchasers.<sup>244</sup> Rule 501(e) provides that in calculating such numerical limits, certain purchasers are to be excluded, most notably accredited investors.<sup>245</sup> Whether a sufficient number of investors are accredited may consequently determine the availability of exemptions under Regulation D.<sup>246</sup>

Rule 501(a) generally defines "accredited investor" as any person who is, or whom the issuer reasonably believes to be, a financial institution;<sup>247</sup> a director, executive officer, or general partner of the issuer of the securities being offered or sold;<sup>248</sup> a natural person whose net worth, either individually or jointly with spouse, exceeds \$1,000,000;<sup>249</sup> a natural person who had individual income in excess of \$200,000 in each of the two most recent years and has a reasonable expectation of reaching the same income level in the present year; and certain other juridical entities.<sup>250</sup> Rule 501(f) in turn defines "executive officer" to mean "the president, any vice president in charge of a principal business unit, division or function (such as sales, administration or finance), any other officer who performs a policy making function, or any other person who performs similar policy making functions for the issuer."<sup>251</sup>

The policy consideration underlying this provision is that accredited investors are persons whose business experience, wealth, or both enables them to obtain sufficient information for themselves when investing in securities.<sup>252</sup>

## b. Rule 502

Rule 502 establishes general conditions relating to integration of securities offerings, information requirements, limitations on the manner of offering, and limitations on resale. Unless otherwise specified, these conditions are to be met by all offerings of securities under Regulation D.

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244. 17 C.F.R. § 230.505(b)(2)(ii); 17 C.F.R. § 230.506(b)(2)(i).

245. 17 C.F.R. § 230.501(e)(1)(iv).

246. See LOSS & SELIGMAN, *supra* note 135, at 1415-28.

247. See 17 C.F.R. § 230.501(a)(1).

248. See 17 C.F.R. § 230.501(a)(4).

249. See 17 C.F.R. § 230.501(a)(5).

250. See 17 C.F.R. § 230.501(a)(6).

251. 17 C.F.R. § 230.501(f).

252. See Regulation D Proposed Regulation, *supra* 223, at 84,459-65; see, e.g., Regulation D Adopting Release, *supra* note 146, at 84,911-14.

Rule 502(a) describes the factors to be considered in determining whether apparently separate sales of securities should be considered part of a single offering, or "integrated." Sales that are integrated by the SEC may thereby exceed the maximum dollar amounts set forth in Rules 504–506 and fail to qualify for an exemption, leaving an issuer unexpectedly in violation of section 5. Factors listed in Rule 502(a) include whether the supposedly separate sales (1) are part of a single plan of financing, (2) involve issuance of the same class of securities, (3) are made at or about the same time, (4) involve the same types of consideration, and (5) are made for the same general purposes.<sup>253</sup> Rule 502(a) establishes a safe harbor for purposes of Regulation D, providing generally that sales made more than six months before the start or after the completion of a Regulation D offer will not be integrated with that offer.<sup>254</sup>

Rule 502(b) establishes requirements for furnishing information to purchasers. An issuer is not required to provide any information to accredited investors or purchasers of securities offered under Rule 504.<sup>255</sup> If an issuer sells securities under Rule 505 or 506 to unaccredited investors, however, Rule 502(b)(2) requires the issuer to provide such investors before the sale with extensive financial and non-financial information.<sup>256</sup> Depending on the status of the issuer and the amount of the offering, the information required to be provided may approach that contained in a registration statement.<sup>257</sup>

Rule 502(c) imposes limitations on the manner of offerings and sales under Regulation D, including a prohibition of various media advertisements and of general solicitation of persons to attend seminars or meetings.<sup>258</sup>

Rule 502(d) imposes restrictions on resale of securities acquired in a Regulation D offering. Such securities are "restricted securities" and may not be resold without registration under the Securities Act or an exemption from the Act's requirements.<sup>259</sup> The rule obliges issuers to exercise reasonable care to ensure that purchasers of the securities are not underwriters within the meaning of section 2(a)(11), which would cause the issuer to forfeit the Regulation D exemption.<sup>260</sup>

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253. See 17 C.F.R. § 230.502(a); LOSS & SELIGMAN, *supra* note 135, at 1212.

254. See 17 C.F.R. § 230.502(a); LOSS & SELIGMAN, *supra* note 135, at 1221–22.

255. See 17 C.F.R. § 230.502(b)(1); LOSS & SELIGMAN, *supra* note 135, at 1431.

256. See 17 C.F.R. § 230.502(b)(2); LOSS & SELIGMAN, *supra* note 135, at 1431–37.

257. See, e.g., 17 C.F.R. § 230.502(b)(2)(A) (requiring the "same kind of information as [would be] required in Part I of a registration statement. . .").

258. See 17 C.F.R. § 230.502(c); LOSS & SELIGMAN, *supra* note 135, at 1437–45.

259. See 17 C.F.R. § 230.502(d).

260. See 17 C.F.R. § 230.502(d); LOSS & SELIGMAN, *supra* note 135, at 1445–46. See also Securities Act of 1933 § 2(1), 15 U.S.C. § 77b(a)(11) (1994) (giving a special definition of "issuer").

### c. Rule 503

Rule 503 requires issuers offering or selling securities in reliance on Regulation D to file copies of Form D with the SEC within 15 days of the first sale of such securities.<sup>261</sup>

### d. Rule 504

Rule 504 exempts qualifying offers and sales of up to \$1,000,000 of securities from the requirements of Securities Act section 5.<sup>262</sup> There is no maximum number of purchasers, nor is an issuer relying on Rule 504 required to provide any information to purchasers, although the anti-fraud requirements of the federal securities laws continue to apply.<sup>263</sup> Since the SEC adopted Rule 504 pursuant to its authority under section 3(b) of the Securities Act, offers and sales made in reliance on the Rule constitute public offers.<sup>264</sup> In adopting Rule 504, however, the SEC sought primarily to defer to state regulation of offers of a small amount of securities occurring in a limited geographic area.<sup>265</sup>

### e. Rule 505

Rule 505 exempts qualifying offers and sales of up to \$5,000,000 of securities.<sup>266</sup> To qualify, offers and sales must satisfy the terms and conditions of Rules 501 and 502, including the latter's information requirements and its restrictions on general advertising and resale.<sup>267</sup> The number of unaccredited purchasers is limited to 35,<sup>268</sup> while the number of accredited investors is unlimited. Like Rule 504, Rule 505 was adopted by the SEC pursuant to section 3(b).<sup>269</sup> Offers and sales made in reliance on Rule 505 constitute a public offer.<sup>270</sup> The SEC's purpose in adopting Rule 505 was to simplify and facilitate small business capital

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261. See 17 C.F.R. § 230.503(a).

262. In relation to offering price limits under Regulation D, see Rule 501(c), 17 C.F.R. § 230.501(c) (defining aggregate offering price).

263. See Preliminary Note 1 to Regulation D, *supra* note 242.

264. See *supra* notes 216–218 and accompanying text.

265. See Regulation D Proposing Release, *supra* note 223, at 84,458; Regulation D Adopting Release, *supra* note 146, at 84,909–10; Bradford, *supra* note 223, at 627 (discussing Rule 504 as a “deference” exemption).

266. See 17 C.F.R. § 230.505(b)(2)(i). Rule 505(a) disqualifies investment companies from using Rule 505. See 17 C.F.R. § 230.505(a). Rule 505(b)(2)(iii) imposes other disqualifiers. See 17 C.F.R. § 505(b)(2)(iii).

267. See 17 C.F.R. § 230.505(b)(1); see also 17 C.F.R. § 230.502.

268. See 17 C.F.R. § 230.505(b)(2)(ii).

269. See 17 C.F.R. § 230.505(a).

270. See *supra* Part III.D; 17 C.F.R. § 230.505; The Securities Act § 3(b), 15 U.S.C. § 77c(b).

formation and to establish the basis for a uniform exemption under state and federal securities law for limited public offers.<sup>271</sup>

#### f. Rule 506

Rule 506 does not establish a new exemption but merely carves out a safe harbor from the existing section 4(2) exemption. An issuer engaged in offers and sales of securities that satisfy the narrow requirements of Rule 506 can be certain that the offers and sales qualify under the broader but less certain standard of a “transaction[] not involving any public offering” under section 4(2).<sup>272</sup> Unlike offers and sales made under Rules 504 and 505, offers and sales that satisfy Rule 506 constitute private placements.<sup>273</sup>

Rule 506 permits qualifying offers and sales of securities in an unlimited dollar amount.<sup>274</sup> To qualify, offers and sales must meet all the requirements of Rules 501 and 502, including, as in Rule 505, their information requirements and restrictions on general advertising and resale.<sup>275</sup> The number of unaccredited purchasers is limited to 35,<sup>276</sup> while the number of accredited investors is unlimited. Unlike Rule 505, however, Rule 506 imposes additional sophistication requirements on purchasers. Under Rule 506(b)(2)(ii), each purchaser who is not an accredited investor is required to have, either alone or with a purchaser representative as defined in Rule 501(h), “such knowledge and experience in financial and business matters that he is capable of evaluating the merits and risks of the prospective investment.”<sup>277</sup> This aspect of Rule 506 generally accords with the Supreme Court’s requirement in *Ralston Purina* that the section 4(2) private placement exemption be available only where each offeree is able to fend for himself without the protections of the Act. Under Rule 502(b), an issuer must already provide unaccredited investors (and all others) with extensive information.<sup>278</sup> Rule 506(b)(2)(ii) ensures that unaccredited investors, in addition to receiving this information, will possess the minimum financial sophistication required to make effective use of it.<sup>279</sup> The presence

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271. See Regulation D Proposing Release, *supra* note 223, at 84,458; Regulation D Adopting Release, *supra* note 146, at 84,909–10.

272. 17 C.F.R. § 230.506(a).

273. See 17 C.F.R. § 230.506.

274. See 17 C.F.R. § 230.506(a).

275. See 17 C.F.R. § 230.506(b)(1); see also 17 C.F.R. § 230.502.

276. See 17 C.F.R. § 230.506(b)(2)(i).

277. 17 C.F.R. § 230.506(b)(2)(ii). This requirement is satisfied if the issuer reasonably believes prior to making any sale that a purchaser comes within this description. See *id.*

278. See 17 C.F.R. § 230.502(b).

279. See 17 C.F.R. § 230.506(b)(2)(ii).

of both factors—availability of information and financial sophistication of investors—distinguishes Rule 506 from Rule 505 and ultimately marks the conceptual boundary between public offers and private placements under the Securities Act.

### 3. Economic Analysis of Rule 505

The SEC adopted Rule 504 in deference to state regulators and Rule 506 as a safe harbor providing legal certainty under section 4(2).<sup>280</sup> The most compelling rationale for Rule 505 is economic.<sup>281</sup> Rule 505 provides an exemption to section 5 of the Securities Act because the net costs of registration for public securities offerings beneath a certain dollar amount are likely to exceed the net benefits.<sup>282</sup>

The benefits provided to investors by a registration statement and prospectus are presumably (i) reduced risk, to the extent that better informed investors are able to limit their investments to a narrower, more certain range of possible outcomes; (ii) increased returns, to the extent that investors are able to estimate more accurately the future returns and thus the present value or price of a security, avoiding losses due to mispricing; and (iii) the promotion of public trust, confidence, and activity in the securities markets.<sup>283</sup>

The costs of registration include (i) the direct expense of hiring attorneys and accountants to produce, file and distribute, as the case may be, the registration statement and prospectus;<sup>284</sup> (ii) underwriting fees and sales commissions;<sup>285</sup> (iii) costs associated with delay while awaiting SEC approval;<sup>286</sup> (iv) costs of maintaining the federal securities regulatory system;<sup>287</sup> and (v) miscellaneous costs such as those associated with continuous reporting under the Exchange Act, to which registration automatically subjects issuers, and those arising as a result of disclosure of information to competitors.<sup>288</sup>

Notably, a substantial portion of these costs are fixed, regardless of the size of the offering.<sup>289</sup> Economies of scale may consequently be

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280. See *supra* note 265; 17 C.F.R. § 230.506(a).

281. The economic analysis in this essay is based on Steven Bradford, *Transaction Exemptions in the Securities Act of 1933: An Economic Analysis*, 45 EMORY L.J. (1996).

282. See *supra*, notes 223–230 and accompanying text.

283. See Bradford, *supra* note 223, at 599–601.

284. In an initial public offer (“IPO”), these costs alone could total from US \$200,000 to \$500,000 or more for a larger company, accounting for as much as 10 percent of the costs of an offering. See Bradford, *supra* note 223, at 603.

285. See *id.* at 604.

286. See *id.* at 605.

287. See *id.* at 606–07.

288. See *id.* at 608–09.

289. See *id.* at 614.

achieved. As the dollar amount of an offering increases, the average cost per dollar of the securities offering to the issuer decreases. Even though the total cost of the offering grows, it does so at a declining marginal rate.<sup>290</sup> In contrast, the total benefits of registration appear to increase in direct proportion to the dollar amount of securities offered. The greater the amount offered, the greater the aggregate benefits of registration. The average benefit per dollar of the offering remains roughly constant. Consequently, at some particular dollar amount of securities offered, the net benefits of registration will necessarily exceed the net costs incurred.<sup>291</sup>

Graphically expressed, the slope of the average cost curve will be negative.<sup>292</sup> Because the slope of the average benefits curve is likely to be zero or perhaps even positive, the cost curve and the benefit curve will at some point intersect. At the dollar amount corresponding to this intersection, the net benefits of registration begin to exceed the net costs, as represented graphically by the growing positive space between the benefit curve and the cost curve. For securities offers equal to or greater than this dollar amount, registration is economically efficient.<sup>293</sup> The task of the securities regulator is, of course, to determine this dollar amount. Securities offerings of any lesser amount—graphically speaking, at any point to the left of the intersection of the cost and benefit curves—should be exempted from registration.

Rule 505, and the series of amendments raising the ceiling on the dollar amount of an offering that the SEC is empowered to exempt under section 3(b), appear to incorporate this analysis.<sup>294</sup> Despite the slightly diminished degree of protection afforded to the investing public under Rule 505, particularly in the context of small securities issues potentially prone to fraud, the Rule's exemption of offers and sales of securities below a certain dollar amount is justified on a coherent policy basis. Requiring registration of offers and sales of any lesser dollar amount would be economically inefficient.<sup>295</sup> Assuming that the current amount of \$5,000,000 is roughly correct, Rule 505 eliminates unnecessary regulation and capital markets waste.

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290. See *id.* at 614.

291. See *id.* at 617–18. If this does not occur, mandatory disclosure is not efficient. See *id.* at 618 n.106.

292. See *id.* at 617 fig.A.

293. See *id.* at 618.

294. See *id.* at 621.

295. See *id.* at 616 (citing George J. Benston, *The Effectiveness and Effects of the SEC's Accounting Disclosures Requirements*, in *ECONOMIC POLICY AND THE REGULATION OF CORPORATE SECURITIES* 61 (Henry G. Manne ed., 1969) for the proposition that the SEC registration system, due largely to economies of scale, effectively operates as regressive tax.)

### III. COMPARATIVE ANALYSIS OF THE PROSPECTUS ACT

Part III compares German and U.S. law and argues for a reinterpretation of section 2(2) of the Prospectus Act on the basis of common policy and practice with the Securities Act and in particular Rule 505 of Regulation D.

#### *A. Common Policy Goals*

The Prospectus Act and the Securities Act share the same fundamental policy goals of investor protection and deregulation.<sup>296</sup> These goals are themselves in tension, and U.S. and German regulators have not always balanced them in the same way. The Prospectus Act, while embodying new regulation of German capital markets, continues to emphasize deregulation over investor protection.<sup>297</sup> The Securities Act has only recently evidenced a shift in the opposite direction, from investor protection toward deregulation, as evidenced by Regulation D and Regulation S.<sup>298</sup> Nonetheless, the Prospectus Act and the Securities Act share a single broad policy framework within which German and U.S. lawmakers appear to be moving toward a middle ground. Not uncoincidentally, small businesses and foreign issuers—in Germany, the most likely issuers of unlisted securities—are the focus of both the Prospectus Act and recent deregulatory efforts in U.S. securities law.<sup>299</sup>

The similarities between section 2(2) of the Prospectus Act and Rule 505 of Regulation D may be said to highlight this convergence. Both provisions seek—within the context of harmonizing, as it were, federal and sub-federal securities laws—to facilitate small business capital formation by exempting limited public offers of securities from

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296. See *supra* notes 63, 146, and 234. The Prospectus Act and the Securities Act may also be said to play corresponding roles within the broader schemes of German and U.S. securities regulation. The Prospectus Act and those portions of the Stock Exchange Act relating to initial public offers, see *supra* note 30, correspond to the Securities Act, while the Wertpapierhandelsgesetz [the Securities Trading Act] and the remainder of the Stock Exchange Act perform largely the same regulatory function as the Securities Exchange Act. See Gesetz über den Wertpapierhandel (Wertpapierhandelsgesetz—WpHG) v. 26.7.1994 (BGBl. I S. 1749), BGBl. III 4110–14, verkündet als Art. I Zweites Finanzmarktförderungsgesetz v. 26.7.1994 (BGBl. I S. 1749), zuletzt geändert mWv 1.6.1998 durch Gesetz v. 18.6.1997 (BGBl. I S. 1430), v. 22.10.1997 (BGBl. I S. 2518), v. 24.3.1998 (BGBl. I S. 529), v. 27.4.1998 (BGBl. I S. 786) and v. 16.7.1998 (BGBl. I S. 1842) [hereinafter Securities Trading Act].

297. On the comparatively low value placed by German legislators on investor protection, see CARL & MACHUNSKY, *supra* note 25, at 36–37. See also *supra* note 65.

298. See *supra* note 146.

299. See *supra* notes 63–64, 146.

the requirement to publish or produce a prospectus.<sup>300</sup> Such offers are necessarily limited for reasons of investor protection, but exempt for reasons of cost. This convergence offers a reasonable basis on which to reapproach and reinterpret the basic terms of the Prospectus Act.

### B. *Prospectus Act Section 1*

The central concept of the Prospectus Act, the “public offer,” should be redefined on a coherent policy basis. Thus far, whether in the construction of the *Gesetzesbegründung* of section 1 of the Act, the BAWe’s Interpretive Release, or the majority of German commentators, the existence of a personal relationship between investors and an offeror has generally been held to remove an offer of securities from the public realm and the applicability of section 1 of the Act.<sup>301</sup> This view is at odds with the basic policy of the Act and should be rejected.

The Act’s basic policy goals are to promote investor protection while minimizing new regulation.<sup>302</sup> Premising applicability of the Act on the existence or absence of a personal relationship fails to accomplish and potentially even thwarts these goals. Investors who have personal relationships with an offeror of securities but are unable to obtain the information necessary to a reasonable investment decision will not receive the statutory protection they require, while investors who do not have personal relationships with an offeror but who have independent access to sufficient information will receive protections they do not need. The construction of the term “public offer” advanced in the *Gesetzesbegründung* and by the BAWe is both underinclusive and overinclusive and fails to advance the basic purposes of the Act.

This construction is also fundamentally derivative. The Prospectus Act does not seek primarily to protect German investors from strangers. Furthermore, German legislators, in associating a public offer with an “undefined” circle of persons, did not simply intend simply to regulate vagueness. To the contrary, personal relationships between an offeror and investors are significant only to the extent that they indicate or serve as a proxy for the ability of investors to obtain information from the offeror. The presence or absence of such relationships per se is irrelevant. What matters is only whether investors are able to obtain the information necessary to a reasonable investment decision. To the ex-

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300. See *supra* notes 64 and 234 and accompanying text. The “federal and sub-federal” harmonization sought is, of course, between federal and state regulation in the United States and between EC Directives and EC Member States’ national laws in Europe.

301. See *supra* Parts I.B–E.

302. See *supra* notes 63–64 and accompanying text.

tent the Gesetzesbegründung and the BAWe Interpretive Release indicate otherwise, they should be rejected.

The term "public offer" under the Prospectus Act should be redefined in accordance with the minority view among German commentators.<sup>303</sup> For the same reasons as set forth by the U.S. Supreme Court in *Ralston Purina*, a public offer under the Prospectus Act should be understood to mean an offer of securities to persons who are not able to fend for themselves without the Act's protections.<sup>304</sup> Such a policy-based definition would fully accord with and promote the dual policy goals of the Prospectus Act, in that it would limit the applicability of the Act to those situations in which investors actually required the Act's protections. Such a definition is also implicit in the BAWe's Interpretive Release and explicit in the terms of the Gesetzesbegründung; the intermediary concept of the "personal relationship" between investors and offerors should simply be removed. The Gesetzesbegründung and the BAWe Release in relation to Prospectus Act section 1 should read in relevant part: "An offer is not public, when the provision of information through a sales prospectus is not necessary in light of the ability of investors to fend for themselves in making an investment decision."<sup>305</sup>

### C. Prospectus Act Section 2

On the basis of this policy definition, the respective provisions of section 2 should be recognized to constitute public offers exempted for various reasons from the prospectus requirement of section 1. This view is strongly supported by the Gesetzesbegründung of section 2 and the structure of the Prospectus Act.<sup>306</sup> To the extent that the BAWe Release identifies section 2(2) or any other provision of section 2 with a private placement, the BAWe Release should be rejected. The Gesetzesbegründung and the BAWe Release in relation to section 2(2) should read:

An offer is public, but not subject to the prospectus requirement of section 1, when it is addressed to a limited circle of persons. A limited circle of persons is present when the provision of information through a sales prospectus is not necessary in light of the informational needs of the investors.<sup>307</sup>

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303. See *supra* Part I.E.

304. *Ralston Purina*, 346 U.S. at 124–25.

305. Cf. Gesetzesbegründung of § 1, *supra* note 62, at 11; BAWe Interpretive Release, *supra* note 16, at Part I.2.

306. See *supra* Part I.C.

307. Cf. Gesetzesbegründung of § 1, *supra* note 62, at 11; BAWe Interpretive Release, *supra* note 16, at Part II.1.

This view is not without implications for the section 2 exceptions. As public offers, the section 2 exceptions by definition involve offers of securities to investors who are unable without the protections of the Act to obtain sufficient information to make a reasonable investment decision. Given the extraordinary breadth of some of the exceptions, such as sections 2(1) and 2(3), this should not be surprising. What requires further consideration is the way in which each of the section 2 exceptions, in light of the nature and attributes of the particular class of persons it describes, can be considered a public offer.

The simplest case is perhaps section 2(3), which provides an exception for stock offerings to employees. For the same reasons set forth by the Supreme Court in *Ralston-Purina*, offerings made under section 2(3) should clearly be understood to constitute public offers.<sup>308</sup> Not all employees will be able to fend for themselves in such offers, and there can consequently be no reason why employees as a class should be deprived of the Prospectus Act's protections.<sup>309</sup> Prospectus Act section 2(3) may be directly analogized with SEC Rule 701, which provides, in accordance with Securities Act section 3(b), an exception for limited public offers to employees.<sup>310</sup>

The greatest difficulties are posed by Prospectus Act section 2(1), which excepts offers made to investors who are professionally or commercially engaged in the securities trade, and section 2(4), which excepts offers with a minimum denomination or purchase price of DM 80,000.<sup>311</sup> As a general rule, the investors described in sections 2(1) and 2(4) are not likely to require the Act's protections.<sup>312</sup> Section 2(1) might well be analogized to Securities Act section 4(2) and the Rule 506 safe harbor, and section 2(4) strongly recalls elements of the accredited investor definition of Rule 501.<sup>313</sup> Under this rubric, sections 2(1) and 2(4) might constitute private placements rather than public offers, disrupting the logical structure of section 2 and the Act as a whole.<sup>314</sup>

This conclusion is not inevitable. The breadth of the section 2(1) and section 2(4) exceptions is far greater than that of the comparable

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308. *Ralston Purina*, 346 U.S. at 124–25; cf. CARL & MACHUNSKY, *supra* note 25, at 39.

309. See *Ralston Purina*, 346 U.S. at 124–25.

310. See *supra* note 211.

311. Prospectus Act, *supra* note 2, at §§ 2(1), 2(4).

312. See CARL & MACHUNSKY, *supra* note 25, at 38–39. On § 2(4), see also Waldeck & Süßmann, *supra* note 12, at 364.

313. See *supra* Part II.D.2(a).

314. On § 2(1) as constituting a private placement, see CARL & MACHUNSKY, *supra* note 25, at 38.

private placement provisions of U.S. law.<sup>315</sup> Even on their own terms, sections 2(1) and 2(4) might accordingly constitute public offers. It is not impossible to conceive of investors engaged professionally or commercially in the securities trade or able to invest DM 80,000 who do not possess the requisite financial sophistication and access to information to enable them to fend entirely for themselves.<sup>316</sup> That securities professionals and wealthy individuals as a class should be stripped of the protections of the Prospectus Act may be questioned. Furthermore, even if securities professionals and wealthy individuals as a class were to be stripped of the Act's protections, this could be done within the context of a public offer. Where it is likely that relatively few members of either class would be left unprotected, an offer might be classified as public but exempted from the prospectus requirement of section 1. As a policy matter, a small degree of investor protection might be sacrificed in order to minimize new regulation. Nothing in the language of sections 2(1) or 2(4) prohibits this conclusion. Prospectus Act section 2(2) and Rule 505, in particular, appear to be based on this rationale, as discussed below.<sup>317</sup>

Ultimately, however, sections 2(1) and 2(4) may simply reflect a different view on the part of German regulators as to the optimal balance between the conflicting policies of the Prospectus Act. To the extent that these sections establish what would be impossibly broad exemptions and/or wholly unregulated public offers under U.S. law, they reflect the Prospectus Act's comparatively greater deregulatory preference. Sections 2(1) and 2(4) represent an area of significant divergence between German and U.S. securities law.

#### *D. Prospectus Act Section 2(2) and Rule 505*

The "limited circle of persons" exception in section 2(2) of the Prospectus Act should be reinterpreted in light of Securities Act section 3(b) and Rule 505 of Regulation D. As a policy matter, Prospectus Act section 2(2) should be understood to establish an exemption for public offers and sales of securities that "by reason of . . . the limited character of the public offering"<sup>318</sup> do not require enforcement of the

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315. The private placement provisions are the Securities Act of 1933 § 4(2), 15 U.S.C. § 77d(2) (1994), and Rule 506, 17 C.F.R. § 230.506.

316. If mandatory disclosure is efficient, it is likely that not all offerors or issuers of securities will make public all information necessary to an informed investment decision if not required to do so. This seems particularly true in relation to German GAAP and its tolerance of hidden reserves. In this scenario, even highly sophisticated investors would benefit from the protections of the Prospectus Act.

317. See *infra* Part III.D.

318. See The Securities Act § 3(b), 15 U.S.C. § 77c(b).

Prospectus Act. As a practical matter, for an offer to qualify under section 2(2), the circle of persons to whom the offer is made should be "limited" in its need for the protections of the Prospectus Act in ways similar to those set forth in Rule 505.

Rule 505 is the U.S. securities law counterpart to section 2(2) of the Prospectus Act. Of the various exceptions to Securities Act section 5, only those in Rules 504–506 of Regulation D bear a reasonable resemblance to Prospectus Act section 2(2). For the reasons discussed above, section 2(2) should not be paired with Rule 506, which establishes a safe harbor for private placements rather than public offers, and which in any event has more in common with Prospectus Act sections 2(1) and 2(4).<sup>319</sup> Nor should section 2(2) be compared to Rule 504, which was adopted primarily as a matter of federal deference to state regulation of small offers.<sup>320</sup> No such state regulation exists under German law.

Prospectus Act section 2(2) may reasonably be compared only to Rule 505, with which it shares basic structural and policy features. Just as Rule 505 establishes an exception under section 3(b) to the prospectus requirement of section 5 of the Securities Act, section 2(2) establishes an exception from the prospectus requirement of Prospectus Act section 1. Like Rule 505, the section 2(2) exception is intended fundamentally to constitute a "limited" public offer.<sup>321</sup> Under both section 2(2) and Rule 505, general advertising is prohibited and results in the loss of the exception.<sup>322</sup>

Further, to the extent that section 2(2) presumes that investors have access to information (through personal relationships or otherwise), and such access is a condition of the exception's availability, section 2(2) incorporates a version of the accredited investor concept so important to Rule 505.<sup>323</sup> An accredited investor in this version would be simply an investor who has independent access to information concerning an offeror. Investors would not need to meet the additional requirement of being sophisticated, in contrast to Rule 506.<sup>324</sup> While this is a far cry

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319. See Bradford, *supra* note 223, at 610, 622–23.

320. See *id.* at 610, 627–29.

321. Prospectus Act, *supra* note 2, at § 2(2) ("limited circle of persons"); Gesetzesbegründung of § 2, *supra* note 62, at 11 ("forms of public offer"). See also Bradford, *supra* note 223, at 609–613.

322. In relation to § 2(2), see BAWe Interpretive Release, *supra* note 16, at Part I.2. On Rule 505, see Rule 502(c), 17 C.F.R. § 230.502(c).

323. Rule 505 incorporates this concept by reference to Rule 501. See *supra* Part II.D.2(e).

324. See 17 C.F.R. § 230.506(b)(2)(ii). This conforms to the different statutory bases of Rules 505 and 506. Rule 505 establishes an exception for limited public offers in accordance with Securities Act § 3(b). Investors in securities sold in reliance on Rule 505 are by definition unable to fend for themselves. Even with access to the requisite information, such

from the detailed requirements of Rules 501 and 502, the underlying criterion—that investors have access to sufficient information—remains the same, as does the practical result: an offeror is not required to provide information in the form of a prospectus to accredited investors.

In its Interpretive Release, the BAWe has implicitly recognized that section 2(2) imposes a simple form of the accredited investor concept. The Release requires that investors have a personal relationship with—which is to say, independent access to information concerning—an offeror. This is supported by the Gesetzesbegründung of section 2, which justifies the exceptions on the ground that the “circle of persons to which the offer is addressed . . . is, as a rule, sufficiently informed on the basis of other informational possibilities.”<sup>325</sup> This recognition should be made explicit and the accredited investor concept adopted under section 2(2). An accredited investor might be defined as any person who is sufficiently informed, whether on the basis of a prospectus or other informational possibilities, to make a reasonable investment decision. Prospectus Act section 2(4) is of further assistance: persons able to purchase securities offered in a minimum denomination or minimum purchase amount of DM 80,000 as provided in the section 2(4) exception should also be considered accredited investors.

Independent limitations on the aggregate offering amount and the number of unaccredited investors under section 2(2) should also be considered.<sup>326</sup> This is true because the strongest policy justification for section 2(2) is the same cost-benefit analysis underlying Rule 505. In accordance with this analysis, below a certain aggregate dollar amount of securities offered in a section 2(2) transaction, the net cost of requiring provision of information to investors may exceed the net benefit of doing so. Below this aggregate dollar amount, the Act’s policy of deregulation is more seriously implicated than its policy of investor protection, and prospectus requirements may accordingly be dispensed with. Above this aggregate dollar amount, the net costs to investors and German capital markets as a whole due to lack of investor protection and damaged investor confidence may rapidly increase. The cost

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investors, as financially unsophisticated persons, may be unable to understand or make use of such information. Rule 506, in contrast, offers a safe harbor under the private placement exception in § 4(2). Investors in securities sold under Rule 506 are required, in addition to having access to information, to be financially sophisticated. Only the presence of both factors—access and sophistication—ensures that investors are truly able to fend for themselves and that a sale of securities accordingly qualifies as a private placement. *See, e.g., COX ET AL., supra note 135, at 397–400.*

325. Gesetzesbegründung of § 2, *supra* note 62, at 11. To the extent that unsophisticated investors are involved, the conclusion which follows in the Gesetzesbegründung of § 2 that such persons are “therefore not in need of protection” is false. *See supra* note 324.

326. *See Kullmann & Müller-Deku, supra* note 67, at 1992.

effectiveness and policy coherence of section 2(2) may depend on the establishment of an appropriate aggregate offering price limit. In the absence of such a limit, section 2(2) is difficult to justify.

An aggregate offering price limit for section 2(2) transactions should accordingly be established. This limit should logically be greater than DM 80,000 so as not to render section 2(4) redundant, but less than the \$5,000,000 maximum established for Rule 505 by Securities Act section 3(b). The fixed costs of a limited public offering of securities in Germany are likely to be significantly smaller than comparable costs in the United States.<sup>327</sup> The benefits of requiring provision of information are arguably the same or even greater in Germany's young capital markets. The cost and benefit curves will accordingly intersect at a point that corresponds graphically to a smaller aggregate offering amount. For the sake of argument, this amount might be set at DM 5,000,000 (or alternatively, Euro 2,500,000).

In conjunction with the maximum aggregate offering price of DM 5,000,000, a numerical limit on the number of unaccredited purchasers should be established. It will be recalled that section 2(2) establishes an exception for offers made to a "limited circle of persons."<sup>328</sup> To the extent that this circle is composed of persons who are by definition accredited investors, as suggested above, the numerical limit on unaccredited investors should be fairly strict. What this means in practical terms is less clear. If, by analogy with Rule 505, a maximum of 35 unaccredited investors were permitted in a section 2(2) transaction with an aggregate offering limit of DM 5,000,000, each of these unaccredited investors could purchase an average of up to DM 79,999 of securities without qualifying for the section 2(4) exception, for a total of nearly DM 2,800,000. Unaccredited investors would account for nearly 56 percent of all sales, a level of participation that seems excessive. If unaccredited investors were limited to 10 percent of all securities purchased in a section 2(2) transaction, this would result in a maximum number of 6 unaccredited investors. While the exact number will of course vary with the maximum aggregate offering price, some fairly strict numerical limit on unaccredited investors seems to be required.

Whether an offeror relying on section 2(2) should also be required to provide information to unaccredited purchasers—or to all purchasers in the event that unaccredited purchasers participate in an offering, as is required by Rule 506—is a question of costs and competing policy concerns.<sup>329</sup> The costs of producing and providing information are finite; the

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327. Compare *supra* note 52, with Securities Act Rule 457, 17 C.F.R. § 230.457(1999).

328. Prospectus Act, *supra* note 2, at § 2(2).

329. See 17 C.F.R. § 230.506(b)(1).

risks of creating investor mistrust in German capital markets as well as the size of the returns that securities issuers are required to pay out to skeptical investors may be far greater. The ultimate incidence of such costs seems difficult to determine. Providing information to unaccredited investors might at least enable securities offerors to subject such costs to more direct control. Offerees in possession of a statutory prospectus might also be considered accredited investors, as discussed above.

### *E. Resales*

The primary difference between Prospectus Act section 2(2) and Rule 505 of Regulation D involves the treatment of resales. Resales are strictly regulated under Rule 505 in ways not contemplated by the Prospectus Act. This creates difficulties under the Prospectus Act in connection with indirect and secondary distributions.

As an initial matter, the Prospectus Act applies to a far narrower range of offers and sales than the Securities Act. As noted above, Securities Act section 5 applies to the entire conceivable universe of securities offers.<sup>330</sup> Persons selling securities in the United States must comply with section 5 or affirmatively demonstrate the availability of an exception. The Prospectus Act, in contrast, applies by its terms only to public offers of securities.<sup>331</sup> Non-public offers, rather than requiring an offeror to demonstrate an exception, fall outside the purview of the Act and require nothing from an offeror. In addition to raising questions as to who would bear the burden of proof in litigation, the Prospectus Act appears to tolerate the existence of unregulated primary and secondary markets for privately placed securities.

Resales of securities acquired in reliance on one of the exceptions enumerated in Prospectus Act section 2 are also virtually unrestricted. Such securities are freely transferable, so long as the offer and sale of the securities does not independently constitute a "public offer" within the meaning of Prospectus Act section 1. In contrast, securities acquired in a transaction under Rule 505 are "restricted securities" as defined in Rule 144(a)(3) and cannot be resold without registration under section 5 of the Securities Act or an applicable exemption.<sup>332</sup>

Further, unlike Rule 505, which is available only to issuers and not to affiliates or resellers, the exceptions in section 2 of the Prospectus Act are available to any offeror of securities, including affiliates and

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330. *See supra* Part II.B.

331. Prospectus Act, *supra* note 2, at § 1.

332. *See* 17 C.F.R. § 230.144(a)(3); 17 C.F.R. § 230.502(d).

resellers.<sup>333</sup> This is true because section 1 of the Prospectus Act applies to all persons offering securities and not merely to issuers.<sup>334</sup> Affiliates and resellers may qualify as offerors in the same fashion as issuers. Consequently, a much broader range of offers may be excepted.

These features of the Prospectus Act appear to permit a wide range of indirect and secondary distributions of securities. Such distributions would constitute public offers of securities that evade and thereby frustrate the requirements of the Prospectus Act. To avoid this result, several enforcement tools might be borrowed from the Securities Act and in particular from Rule 505.

First, the integration principle of Rule 505 should be considered for application under Prospectus Act section 2. Under this principle, apparently separate offers and sales of securities that qualify for a section 2 exception (or exceptions) might be integrated into a single offer that no longer qualifies for the exception(s), depending on the presence of certain common characteristics as enumerated in Rule 502(a).<sup>335</sup> Application of the integration principle is arguably necessary to protect the section 2 exceptions against abuse. Although this might appear more likely to occur in conjunction with the aggregate offering price limits and numerical limits on unaccredited investors herein proposed, possibilities for abuse already exist. Under Prospectus Act section 2(4), for example, an offeror of securities could conceivably claim that an aggregate offering of DM 8,000,000 of securities over any length of time in fact consisted of 101 separate exempt offerings of DM 79,203 each. Such a claim would very likely be disallowed as an abuse of the exception.<sup>336</sup> This suggests, however, that an integration concept of some sort is already understood to be implicit in section 2 of the Prospectus Act. The BAWe should make this concept explicit.

Second, for similar reasons, the statutory underwriter concept of Securities Act section 2(a)(11) should be considered.<sup>337</sup> In its present form, the Prospectus Act does not clearly prohibit secondary or indirect public offers of securities, particularly if conducted by geometric progression.<sup>338</sup> Unscrupulous promoters could set up a pyramid scheme of

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333 See 17 C.F.R. § 230.505; *supra* note 2, § 2.

334. See *supra* Part I.A.

335. See 17 C.F.R. § 230.502(a). See, e.g., Cheryl L. Wade, *The Integration of Securities Offerings: A Proposed Formula that Fosters the Policies of Securities Regulation*, 25 Loy. U. Chi. L.J. 199 (1994).

336. For this suggestion I am indebted to Frau Dr. Corinna Ritz of the Sales Prospectus Department of the BAWe.

337. See *supra* Part II.C.1.

338. See CARL & MACHUNSKY, *supra* note 25, at 34–35 (regarding the “Strukturvertrieb” of securities). See also Warren, *Common Market Prospectus*, *supra* note

securities transactions, each of which might qualify individually as a private placement or a section 2 exception, but which as a group clearly constitute, and are clearly intended to constitute, a broad public offer of the securities.<sup>339</sup> In the absence of resale restrictions, German securities regulators would appear to be powerless against such a scheme. If the statutory underwriter concept were adopted, pyramid and other schemes could more easily be brought to a halt. Persons purchasing securities in any non-public transaction or under any section 2 exception with a view to distribution or to assisting an issuer in a distribution of the securities thereafter could be disqualified from the exception as statutory underwriters, causing the simultaneous loss of the exception for the primary offeror itself. The statutory underwriter concept would effectively break each separate link in the secondary distribution chain.

Third, German regulators should consider imposing a notice requirement comparable to that of Rule 503. Persons making private placements or offers and sales of securities in reliance on any of the statutory exceptions to Prospectus Act section 1 might be required to inform the BAWe of such sales, in such form as the BAWe considers appropriate, within a fixed period of time thereafter.<sup>340</sup>

Finally, German legislators should consider enacting broad anti-fraud provisions such as those set forth in Securities Act section 17 and applicable to offers and sales under Rule 505.<sup>341</sup> Enactment of antifraud provisions applicable not only to prospectuses used in public offers under Prospectus Act section 1 but also to communications in exempted public offers and private placements would enhance the quality of available information and provide a significant boost to investor confidence in the German capital markets.

## CONCLUSION

The Prospectus Act is a central component of the German system of mandatory disclosure and a major achievement of recent EC and German reforms. Although the Act's origins in the back rooms of Brussels have clouded its policy, structure and enforcement, a comparison with U.S. securities law suggests fundamental commonalities with the Securities Act and particularly Regulation D. Several of these commonalities might be enhanced, and other features introduced, to increase investor

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1, at 707 n.86 (concerning indirect and secondary offers in Europe and the absence of the statutory underwriter concept from European securities law).

339. See Warren, *Common Market Prospectus*, *supra* note 1, at 707 n.86.

340. See 17 C.F.R. § 230.503.

341. See *supra* Part II.B.

protection under the new German system. These steps might be considered by German officials in the Ministry of Finance and the Bundestag in drafting the upcoming Fourth Financial Markets Promotion Act or by the BAWe in a further amendment to its Interpretive Release.<sup>342</sup> In this way German regulators might free the Prospectus Act and the German capital markets from the political defects of the Prospectus Directive.<sup>343</sup> As U.S. capital markets continue to deregulate in favor of capital formation and as the structure of German securities regulation continues to develop, U.S. and German legislators, regulators and investors are likely to find themselves on increasingly common ground.

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342. See *supra* note 24.

343. See Warren, *Common Market Prospectus*, *supra* note 1, at 715 (stating in relation to Member State implementation of the Prospectus Directive that “[w]hether the [Directive’s] exclusions will be tightened by well-constructed definitions or deliberately left ambiguous is a critical issue.”).

APPENDIX A†

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† In publishing this piece of German legislation, the Michigan Journal of International Law has made no editorial changes.

**VerkProspG****WERTPAPIER-VERKAUFSPROSPEKTGESETZ  
(Verkaufsprospektgesetz - VerkProspG)**

vom 13. Dezember 1990

zuletzt geändert durch das Gesetz zur weiteren  
Fortentwicklung des Finanzplatzes Deutschland vom 24. März 1998  
(Drittes Finanzmarktförderungsgesetz) (BGBl. I S. 529)

**SECURITIES SELLING PROSPECTUS ACT** (*Translation*)‡

of December 13, 1990

as last amended by the Act on the Further Promotion of the  
Financial Market Germany of March 24, 1998

(Third Financial Market Promotion Act) (Federal Law Gazette I p. 529)

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‡ BRUCKHAUS WESTRICK HELLER LÖBER, VERKPROSPG (1998).

## **WERTPAPIER-VERKAUFSPROSPEKTGESETZ (Verkaufsprospektgesetz)**

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**TRANSLATION OF THE SECURITIES SELLING  
PROSPECTUS ACT  
(Selling Prospectus Act)**

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**I. ABSCHNITT  
ANWENDUNGSBEREICH**

§ 1  
**Grundregel**

Für Wertpapiere, die erstmals im Inland öffentlich angeboten werden und nicht zum Handel an einer inländischen Börse zugelassen sind, muß der Anbieter einen Prospekt (Verkaufsprospekt) veröffentlichen, sofern sich aus den §§ 2 bis 4 nichts anderes ergibt.

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**CHAPTER I  
APPLICABILITY**

§ 1  
**General Principle**

With respect to any securities which are domestically offered to the public for the first time and which have not been admitted for listing on a domestic exchange, the person making the offer has to publish a prospectus (“selling prospectus”), unless §§ 2 to 4 provide otherwise.

## § 2

**Ausnahmen im Hinblick auf die Art des Angebots**

Ein Verkaufsprospekt muß nicht veröffentlicht werden, wenn die Wertpapiere

1. nur Personen angeboten werden, die beruflich oder gewerblich für eigene oder fremde Rechnung Wertpapiere erwerben oder veräußern;
2. einem begrenzten Personenkreis angeboten werden;
3. nur den Arbeitnehmern von ihrem Arbeitgeber oder von einem mit seinem Unternehmen verbundenen Unternehmen angeboten werden;
4. nur in Stückelungen von mindestens achtzigtausend Deutsche Mark oder nur zu einem Kaufpreis von mindestens achtzigtausend Deutsche Mark je Anleger erworben werden können oder wenn der Verkaufspreis für alle angebotenen Wertpapiere achtzigtausend Deutsche Mark nicht übersteigt;
5. Teil einer Emission sind, für die bereits im Inland ein Verkaufsprospekt veröffentlicht worden ist.

## § 3

**Ausnahmen im Hinblick auf bestimmte Emittenten**

Ein Verkaufsprospekt muß nicht veröffentlicht werden, wenn die Wertpapiere

1. ausgegeben werden von
  - a) einem Mitgliedstaat der Europäischen Union, einem anderen Vertragsstaat des Abkommens über den Europäischen Wirtschaftsraum, einem Vollmitgliedstaat der Organisation für wirtschaftliche Entwicklung und Zusammenarbeit, sofern er nicht innerhalb der letzten fünf Jahre seine Auslandsschulden umgeschuldet oder vor vergleichbaren Zahlungsschwierigkeiten gestanden hat, oder einem Staat, der mit dem Internationalen Währungsfonds besondere Kreditabkommen im Zusammenhang mit dessen Allgemeinen Kreditvereinbarungen getroffen hat,

## § 2

**Exemptions with Regard to the Kind of the Offer**

A selling prospectus does not need to be published if the securities:

1. are only offered to persons who purchase and sell securities as part of their profession or business either for their own account or for the account of a third person;
2. are offered to a restricted circle of persons;
3. are only offered to employees by their employer or by a company affiliated with the company of the employer;
4. may only be acquired in denominations of at least DM 80,000 or for a purchase price of at least DM 80,000 per investor or if the selling price with respect to all securities offered does not exceed DM 80,000;
5. are part of an issue with respect to which a selling prospectus has already been published domestically.

## § 3

**Exemptions with Regard to Specific Issuers**

A selling prospectus does not need to be published if the securities:

1. are issued by
  - a) a Member State of the European Union, another Contracting State of the Agreement on the European Economic Area, a full Member State of the Organization for the Economic Development and Cooperation, unless within the last five years it has reorganized its foreign debt or has had similar payment difficulties, or a State having entered into particular credit agreements with the International Monetary Fund in connection with its general credit agreements,

- b) einer Gebietskörperschaft der in Buchstabe a) genannten Staaten oder
  - c) einer internationalen Organisation des öffentlichen Rechts, der mindestens ein Mitgliedstaat der Europäischen Union oder ein anderer Vertragsstaat des Abkommens über den Europäischen Wirtschaftsraum angehört;
2. Schuldverschreibungen sind, die dauernd oder wiederholt von
- a) einem Kreditinstitut im Sinne des § I Abs. 1 des Gesetzes über das Kreditwesen oder Finanzdienstleistungsinstitut, das Finanzdienstleistungen im Sinne des § 1 Abs. 1a Satz 2 Nr. 1 bis 4 des Gesetzes über das Kreditwesen erbringt, oder der Kreditanstalt für Wiederaufbau oder
  - b) einem nach § 53b Abs. 1 Satz 1 oder Abs. 7 des Gesetzes über das Kreditwesen tätigen Unternehmen, das regelmäßig seine Jahresabschlüsse veröffentlicht,
- ausgegeben werden, eine wiederholte Ausgabe liegt vor, wenn in den zwölf Kalendermonaten vor dem öffentlichen Angebot mindestens eine Emission von Schuldverschreibungen innerhalb der Europäischen Gemeinschaft oder innerhalb eines anderen Vertragsstaats des Abkommens über den Europäischen Wirtschaftsraum ausgegeben worden ist;
3. Anteilscheine sind, die von einer Kapitalanlagegesellschaft oder ausländischen Investmentgesellschaft ausgegeben werden und bei denen die Anteilhaber ein Recht auf Rückgabe der Anteilscheine haben;

- b) any of the subdivisions of any of the States mentioned in lit. a), or
  - c) an international public organization at least one member of which is a Member State of the European Union or another Contracting State of the Agreement on the European Economic Area;
2. are debt securities which are issued permanently or in a repeated manner by
- a) a credit institution within the meaning of § 1 para. 1 of the Banking Act (*Gesetz über das Kreditwesen*) or a financial services institution carrying out financial services within the meaning of § 1 para. 1a sentence 2 no. 1 to 4 of the Banking Act (*Gesetz über das Kreditwesen*) or the *Kreditanstalt für Wiederaufbau* or
  - b) an enterprise operating under § 53b para. 1 sentence 1 or para. 7 of the Banking Act (*Gesetz über das Kreditwesen*) which regularly publishes its financial statements;

a repeated offer is deemed to exist if at least one issue of debt securities was made within the European Community or within another Contracting State of the Agreement on the European Economic Area within the twelve calendar months prior to the public offer;

3. are participation units issued by a domestic investment company (*Kapitalanlagegesellschaft*) or a foreign investment company and which grant to the holders the right to request redemption thereof;

4. Schuldverschreibungen sind, die von einer Gesellschaft oder juristischen Person mit Sitz in einem Mitgliedstaat der Europäischen Union oder in einem anderen Vertragsstaat des Abkommens über den Europäischen Wirtschaftsraum ausgegeben werden, die ihre Tätigkeit unter einem Staatsmonopol ausübt und die durch ein besonderes Gesetz oder auf Grund eines besonderen Gesetzes geschaffen worden ist oder geregelt wird oder für deren Schuldverschreibungen ein Mitgliedstaat der Europäischen Union oder eines seiner Bundesländer oder ein anderer Vertragsstaat des Abkommens über den Europäischen Wirtschaftsraum oder eines seiner Bundesländer die unbedingte und unwiderrufliche Gewährleistung für ihre Verzinsung und Rückzahlung übernommen hat.

#### § 4

#### **Ausnahmen im Hinblick auf bestimmte Wertpapiere**

- (1) Ein Verkaufsprospekt muß nicht veröffentlicht werden, wenn die Wertpapiere
  1. Euro-Wertpapiere sind, für die nicht öffentlich geworben wird und die nicht im Wege von Geschäften im Sinne des Gesetzes über den Widerruf von Haustürgeschäften und ähnlichen Geschäften angeboten werden;
  2. Aktien sind, für die ein Antrag auf Zulassung zur amtlichen Notierung an einer inländischen Börse gestellt ist, deren Zahl, geschätzter Kurswert oder Nennwert, bei nennwertlosen Aktien deren rechnerischer Wert, niedriger ist als 10 vom Hundert des entsprechenden Wertes der Aktien derselben Gattung, die an derselben Börse amtlich notiert sind, und wenn der Emittent die mit der Zulassung verbundenen Veröffentlichungspflichten erfüllt; Aktien, die sich nur in bezug auf den Beginn der Dividendenberechtigung unterscheiden, gelten als Aktien derselben Gattung;

4. are debt securities issued by a company or a legal entity having its registered office in a Member State of the European Union or in another Contracting State of the Agreement on the European Economic Area, which carries out its business activities under a state monopoly, and which has been set up or is governed by a special law or whose obligations under the debt securities (payment of interest and redemption) are unconditionally and irrevocably guaranteed by a Member State of the European Union or any of its regional authorities or another Contracting State of the Agreement on the European Economic Area, or any of its regional authority.

#### § 4

#### **Exemptions with Regard to Specific Securities**

- (1) A selling prospectus does not need to be published if the securities:
  1. are “Euro-securities” which are not the subject of a public advertisement (*öffentliche Werbung*) and which are not offered through actions within the meaning of the Act on Cancellation of Canvassing and Similar Transactions (*Haustürwiderrufsgesetz*);
  2. are shares for which an application for admission to official quotation on a domestic exchange has been filed and the number, estimated market value or par value (in case of shares with no par value the computed value) of which is less than 10% of the respective value of shares of the same class which have been officially quoted on the same exchange, and the issuer complies with the publication requirements in connection with the admission; shares are deemed to be shares of the same class if they differ only with respect to the commencement of the entitlement to dividends;

3. Aktien sind, für die kein Antrag auf Zulassung zur amtlichen Notierung an einer inländischen Börse gestellt ist und deren Zahl, geschätzter Kurswert oder Nennwert, bei nennwertlosen Aktien deren rechnerischer Wert, niedriger ist als 10 vom Hundert des entsprechenden Wertes der Aktien derselben Gattung, die an einer inländischen Börse zum Handel zugelassen sind, sofern den Anlegern Informationen über den Emittenten zur Verfügung stehen, die den im III. Abschnitt vorgeschriebenen Angaben gleichwertig und auf dem neuesten Stand sind; Aktien, die sich nur in bezug auf den Beginn der Dividendenberechtigung unterscheiden, gelten als Aktien derselben Gattung;
  4. Aktien sind, die den Aktionären nach einer Kapitalerhöhung aus Gesellschaftsmitteln zugeteilt werden;
  5. Zertifikate sind, die anstelle von Aktien derselben Gesellschaft ausgegeben werden und mit deren Ausgabe keine Änderung des gezeichneten Kapitals verbunden ist;
  6. nach der Ausübung von Umtausch- oder Bezugsrechten aus anderen Wertpapieren als Aktien ausgegeben werden, sofern im Inland bei der Ausgabe dieser Wertpapiere ein Zulassungs- oder Verkaufsprospekt veröffentlicht worden ist;
  7. bei einer Verschmelzung von Unternehmen angeboten werden;
  8. Schuldverschreibungen mit einer vereinbarten Laufzeit von weniger als einem Jahr sind.
- (2) Euro-Wertpapiere im Sinne von Absatz 1 Nr. 1 sind Wertpapiere, die
1. ein Konsortium übernimmt oder zu übernehmen verspricht und vertreibt, dessen Mitglieder ihren Sitz nicht alle in demselben Staat haben,
  2. zu einem wesentlichen Teil nicht in dem Staat angeboten werden, in dem der Emittent seinen Sitz hat, und

3. are shares for which no application for admission to official quotation on a domestic exchange has been filed and the number, estimated market value or par value (in case of shares with no par value the computed value) is less than 10% of the respective value of shares of the same class which have been admitted for trading on a domestic exchange, provided that up-to-date information about the issuer equivalent to the information required in Chapter III is available to the investors; shares are deemed to be shares of the same class if they differ only with respect to the commencement of the entitlement to dividends;
  4. are shares allocated to the shareholders upon a capital increase out of retained earnings (*Kapitalerhöhung aus Gesellschaftsmitteln*);
  5. are certificates issued instead of shares of the same company, provided that the issue thereof does not change the subscribed capital;
  6. have been issued as a result of the exercise of conversion or subscription rights attached to other securities than shares, provided that a listing or selling prospectus was published domestically when such securities were issued;
  7. are offered in connection with a merger of enterprises;
  8. are debt securities with an agreed maturity of less than one year.
- (2) "Euro-securities" as referred to in paragraph 1 no. 1 are securities:
1. which are, or are promised to be, underwritten and distributed by a syndicate the registered offices of the members of which are not all in the same country,
  2. a substantial portion of which is offered outside the state of the issuer's registered office, and

3. nur über ein Kreditinstitut im Sinne des § 1 Abs. 1 des Gesetzes über das Kreditwesen, Finanzdienstleistungsinstitut, das Finanzdienstleistungen im Sinne des § 1 Abs. 1a Satz 2 Nr. 1 bis 4 des Gesetzes über das Kreditwesen erbringt, oder ein nach § 53b Abs. 1 Satz 1 oder Abs. 7 des Gesetzes über das Kreditwesen tätiges Unternehmen gezeichnet oder erstmals erworben werden dürfen.

## **II. ABSCHNITT**

### **ANGEBOT VON WERTPAPIEREN, FÜR DIE EINE ZULASSUNG ZUR AMTLICHEN NOTIERUNG ODER ZUM GEREGELTEN MARKT BEANTRAGT IST**

#### **§ 5**

##### **Prospektinhalt**

(1) Ist für die öffentlich angebotenen Wertpapiere ein Antrag auf Zulassung zur amtlichen Notierung an einer inländischen Börse gestellt, so sind auf die Sprache und den Inhalt des Verkaufsprospekts die Vorschriften des § 38 Abs. 1 Nr. 2, Abs. 2 des Börsengesetzes in Verbindung mit den §§ 13 bis 40 und 47 der Börsenzulassungsverordnung entsprechend anzuwenden.

(2) Ist für die öffentlich angebotenen Wertpapiere ein Antrag auf Zulassung zum geregelten Markt an einer inländischen Börse gestellt, so ist auf den Inhalt des Verkaufsprospekts § 73 Abs. 1 Nr. 2 des Börsengesetzes entsprechend anzuwenden.

#### **§ 6**

##### **Zulassungsstelle und Zulassungsausschuß**

(1) <sup>1</sup>Ist für die öffentlich angebotenen Wertpapiere ein Antrag auf Zulassung zur amtlichen Notierung an einer inländischen Börse gestellt, darf der Verkaufsprospekt erst veröffentlicht werden, wenn er von der Zulassungsstelle der Börse gebilligt wurde. <sup>2</sup>Wird der Zulassungsantrag gleichzeitig bei mehreren inländischen Börsen gestellt, so hat der Emittent die für die Billigung des Verkaufsprospekts zuständige Zulassungsstelle zu bestimmen. <sup>3</sup>Die Zulassungsstelle hat innerhalb von 15 Börsentagen nach Eingang des Verkaufsprospekts über den Antrag auf Billigung zu entscheiden.

3. which may be subscribed for or initially acquired only through a credit institution within the meaning of § 1 para. 1 of the Banking Act (*Gesetz über das Kreditwesen*), a financial services institution carrying out financial services within the meaning of § 1 para. 1 sentence 2 no. 1 to 4 of the Banking Act (*Gesetz über das Kreditwesen*) or an enterprise operating under § 53b para. 1 sentence 1 or para. 7 of the Banking Act (*Gesetz über das Kreditwesen*).

## **CHAPTER II**

### **OFFER OF SECURITIES FOR WHICH AN APPLICATION FOR ADMISSION TO OFFICIAL QUOTATION OR TO THE REGULATED MARKET HAS BEEN FILED**

#### **§ 5**

#### **Contents of the Prospectus**

(1) If an application for admission to official quotation on a domestic exchange has been filed with respect to publicly offered securities, the regulations of § 38 para. 1 no. 2, para. 2 of the Exchange Act (*Börsengesetz*) and §§ 13 to 40 and 47 of the Exchange Admission Regulation (*Börsenzulassungs-Verordnung*) shall apply to the language and the contents of the selling prospectus *mutatis mutandis*.

(2) If an application for admission to the regulated market on a domestic exchange has been filed with respect to publicly offered securities, § 73 para. 1 no. 2 of the Exchange Act (*Börsengesetz*) shall apply to the contents of the selling prospectus *mutatis mutandis*.

#### **§ 6**

#### **Admission Office and Admission Panel**

(1) <sup>1</sup>If an application for admission to official quotation on a domestic exchange has been filed with respect to publicly offered securities, the selling prospectus may be published only after it has been approved by the Admission Office (*Zulassungsstelle*) of the exchange. <sup>2</sup>If the application for admission is being filed at the same time with more than one domestic exchange, the Admission Office responsible for the approval of the selling prospectus shall be determined by the issuer. <sup>3</sup>Upon receipt of the selling prospectus, the Admission Office shall decide about the application for approval within 15 trading days.

- (2) Die Zulassungsstelle überwacht die Einhaltung der Pflichten, die sich aus dem öffentlichen Angebot für den Anbieter ergeben.
- (3) Die Zulassungsstelle hat dem Anbieter auf Verlangen eine Bescheinigung über die Billigung des Verkaufsprospekts auszustellen.
- (4) Ist für die öffentlich angebotenen Wertpapiere ein Antrag auf Zulassung zum geregelten Markt an einer inländischen Börse gestellt, gelten die Absätze 1 und 2 mit der Maßgabe entsprechend, daß an die Stelle der Zulassungsstelle der Zulassungsausschuß tritt. Wird der Verkaufsprospekt gebilligt, ist in dem Bescheid darauf hinzuweisen, daß hiermit keine Billigung nach Artikel 20 der Richtlinie 89/298/EWG vom 17. April 1989 zur Koordinierung der Bedingungen für die Erstellung, Kontrolle und Verbreitung des Prospekts, der im Falle öffentlicher Angebote von Wertpapieren zu veröffentlichen ist (Abl. EG Nr. L 124 S. 8), verbunden ist.
- (5) Wird gleichzeitig ein Antrag auf Zulassung zur amtlichen Notierung und zum geregelten Markt bei mehreren inländischen Börsen gestellt, so hat der Emittent für die Billigung des Verkaufsprospekts eine Zulassungsstelle zu bestimmen.

**III. ABSCHNITT**  
**ANGEBOT VON WERTPAPIEREN, FÜR DIE EINE**  
**ZULASSUNG ZUR AMTLICHEN NOTIERUNG ODER ZUM**  
**GEREGELTEN MARKT NICHT BEANTRAGT IST**

§ 7

**Prospektinhalt**

- (1) Ist für die öffentlich angebotenen Wertpapiere ein Antrag auf Zulassung zur amtlichen Notierung oder zum geregelten Markt an einer inländischen Börse nicht gestellt, so muß der Verkaufsprospekt die Angaben enthalten, die notwendig sind, um dem Publikum ein zutreffendes Urteil über den Emittenten und die Wertpapiere zu ermöglichen.

(2) The Admission Office shall monitor the fulfillment of the obligations resulting from the public offer by the person making the offer.

(3) Upon request by the person making the offer, the Admission Office shall issue a certificate of approval of the selling prospectus.

(4) If an application for admission to the regulated market on a domestic exchange has been filed with respect to publicly offered securities, paragraphs 1 and 2 shall apply *mutatis mutandis*, provided that the Admission Office shall be substituted by the Admission Panel. If the selling prospectus is approved, the approval document has to state that the approval does not constitute an approval pursuant to Article 20 of the Directive 89/298/EEC of April 17, 1989 coordinating the requirements for the drawing-up, scrutiny and distribution of the prospectus to be published when transferable securities are offered to the public (OJ EC no. L 124 p. 8).

(5) If an application for admission to official quotation and to the regulated market on various domestic exchanges is filed simultaneously, the issuer shall determine one Admission Office for the approval of the selling prospectus.

**CHAPTER III**  
**OFFER OF SECURITIES FOR WHICH AN APPLICATION FOR**  
**ADMISSION TO OFFICIAL QUOTATION OR TO THE**  
**REGULATED MARKET HAS NOT BEEN FILED**

§ 7

**Contents of the Prospectus**

(1) If an application for admission to official quotation or to the regulated market on a domestic exchange has not been filed with respect to publicly offered securities, the selling prospectus shall contain such information as is necessary to enable the public to make a correct assessment about the issuer and the securities.

(2) Die Bundesregierung wird ermächtigt, durch Rechtsverordnung mit Zustimmung des Bundesrates die zum Schutz des Publikums erforderlichen Vorschriften über die Sprache und den Inhalt des Verkaufsprospekts zu erlassen, insbesondere über

1. die Personen oder Gesellschaften, die für den Inhalt des Verkaufsprospekts die Verantwortung übernehmen,
2. die angebotenen Wertpapiere und
3. den Emittenten der Wertpapiere sowie sein Kapital und seine Geschäftstätigkeit, seine Vermögens-, Finanz- und Ertragslage, seine Geschäftsführungs- und Aufsichtsorgane und seine Geschäftsaussichten.

(3) In die Rechtsverordnung nach Absatz 2 können auch Vorschriften aufgenommen werden über Ausnahmen, in denen von der Aufnahme einzelner Angaben in den Verkaufsprospekt abgesehen werden kann,

1. wenn beim Emittenten, bei den angebotenen Wertpapieren, bei ihrer Ausgabe oder beim Kreis der mit der Wertpapierausgabe angesprochenen Anleger besondere Umstände vorliegen und den Interessen des Publikums durch eine anderweitige Unterrichtung ausreichend Rechnung getragen ist oder
2. mit Rücksicht auf die geringe Bedeutung einzelner Angaben oder einen beim Emittenten zu befürchtenden erheblichen Schaden.

## § 8

### **Hinterlegungsstelle**

Der Anbieter muß den Verkaufsprospekt vor seiner Veröffentlichung dem Bundesaufsichtsamt für den Wertpapierhandel (Bundesaufsichtsamt) übermitteln. Nach § 10 nachzutragende Angaben sind spätestens zum Zeitpunkt ihrer Veröffentlichung zu übermitteln. Das Bundesaufsichtsamt bestätigt dem Anbieter den Tag des Eingangs des Verkaufsprospekts.

(2) The Federal Government (*Bundesregierung*) shall be authorized to enact such rules by means of an ordinance (*Rechtsverordnung*) requiring the consent of the Federal Council (*Bundesrat*) concerning the language and the contents of the selling prospectus necessary in order to protect the public, especially relating to:

1. the persons or companies assuming responsibility for the contents of the selling prospectus,
2. the securities being offered, and
3. the issuer of the securities, its capital and its business activities, its assets and liabilities, financial situation and profits and losses, its management and supervisory bodies, and its business outlook.

(3) The regulation referred to in paragraph 2 may also contain rules concerning exemptions pursuant to which particular information may be omitted from the selling prospectus:

1. if special conditions exist with respect to the issuer, the securities being offered, their issuance or the investors addressed with the issue, and if the interests of the public are sufficiently taken into account by other means of information, or
2. if the information is of minor importance or a considerable damage for the issuer is to be anticipated.

## § 8

### **Depository Agent**

The person making the offer shall submit the selling prospectus prior to its publication to the Federal Securities Trading Supervisory Authority (Federal Supervisory Authority). Information to be added pursuant to § 10 shall be submitted at the time of its publication at the latest. The Federal Supervisory Authority confirms the date of receipt of the selling prospectus to the offerer.

## § 8a

**Gestattung und Untersagung der Veröffentlichung des Verkaufsprospekts**

(1) Der Verkaufsprospekt darf erst veröffentlicht werden, wenn das Bundesaufsichtsamt die Veröffentlichung gestattet hat oder wenn seit dem Eingang des Verkaufsprospekts zehn Werktage verstrichen sind, ohne daß das Bundesaufsichtsamt die Veröffentlichung untersagt hat.

(2) Das Bundesaufsichtsamt untersagt die Veröffentlichung, wenn der Verkaufsprospekt nicht die Angaben enthält, die nach § 7 Abs. 1 oder einer auf Grund des § 7 Abs. 2 und 3 erlassenen Rechtsverordnung erforderlich sind. § 10 bleibt unberührt.

## § 8b

**Untersagung des öffentlichen Angebots**

Das Bundesaufsichtsamt untersagt das öffentliche Angebot von Wertpapieren, für die eine Zulassung zur amtlichen Notierung oder zum geregelten Markt nicht beantragt ist, wenn es Anhaltspunkte dafür hat, daß der Anbieter entgegen § 1 keinen Verkaufsprospekt veröffentlicht hat oder der Verkaufsprospekt nicht die Angaben enthält, die nach § 7 Abs. 1 oder einer auf Grund des § 7 Abs. 2 und 3 erlassenen Rechtsverordnung erforderlich sind.

## § 8c

**Auskunfts- und Vorlagepflichten des Anbieters**

(1) Der Anbieter hat auf Verlangen das Bundesaufsichtsamt Auskünfte zu erteilen und Unterlagen vorzulegen, die das Bundesaufsichtsamt benötigt

1. zur Überwachung der Einhaltung der Pflichten nach §§ 1, 8, 8a Abs. 1, §§ 9 bis 11, 12 Satz 1, § 14 Abs. 1, § 15 Abs. 3 und 4, oder
2. zur Prüfung, ob der Verkaufsprospekt die Angaben enthält, die nach § 7 Abs. 1 oder einer auf Grund des § 7 Abs. 2 und 3 erlassenen Rechtsverordnung erforderlich sind.

## § 8a

**Permission and Prohibition of the Publication of the Selling Prospectus**

(1) The selling prospectus may be published only if either the Federal Supervisory Authority has permitted the publication or ten working days have passed since the receipt of the selling prospectus without the Federal Supervisory Authority having prohibited a publication.

(2) The Federal Supervisory Authority prohibits the publication if the selling prospectus does not contain the information required pursuant to § 7 para. 1 or an ordinance issued on the basis of § 7 para. 2 and 3. § 10 remains unaffected.

## § 8b

**Prohibition of the Public Offer**

The Federal Supervisory Authority prohibits the public offer of securities with respect to which an admission to official quotation or to the regulated market was not applied for if it has reasons to believe that the offerer has violated § 1 by not publishing a selling prospectus or the selling prospectus does not contain the information required pursuant to § 7 para. 1 or an ordinance issued on the basis of § 7 para. 2 and 3.

## § 8c

**Information and Documentation Obligations of the Offerer**

(1) Upon the request of the Federal Supervisory Authority the offerer has to provide information and documents required by the Federal Supervisory Authority

1. to supervise the compliance with the obligations pursuant to §§ 1, 8, 8a para. 1, §§ 9 to 11, 12 sentence 1, § 14 para. 1, § 15 para. 3 and 4, or
2. to examine whether the selling prospectus contains the information required pursuant to § 7 para. 1 or an ordinance issued on the basis of § 7 para. 2 and 3.

(2) Der zur Erteilung einer Auskunft Verpflichtete kann die Auskunft auf solche Fragen verweigern, deren Beantwortung ihn selbst oder einen der in § 383 Abs. 1 Nr. 1 bis 3 der Zivilprozeßordnung bezeichneten Angehörigen der Gefahr strafgerichtlicher Verfolgung oder eines Verfahrens nach dem Gesetz über Ordnungswidrigkeiten aussetzen würde. Der Verpflichtete ist über sein Recht zur Verweigerung der Auskunft zu belehren.

#### § 8d

### **Sofortige Vollziehung**

Widerspruch und Anfechtungsklage gegen Maßnahmen nach § 8a Abs. 2 Satz 1 und §§ 8b und 8c Abs. 1 haben keine aufschiebende Wirkung.

#### § 8e

### **Werbung**

(1) Das Bundesaufsichtsamt kann die Werbung mit Angaben untersagen, die geeignet sind, über den Umfang der Prüfung nach § 8a irrezuführen.

(2) Vor allgemeinen Maßnahmen nach Absatz 1 sind die Spitzenverbände der betroffenen Wirtschaftskreise und des Verbraucherschutzes zu hören.

## **IV. ABSCHNITT VERÖFFENTLICHUNG DES VERKAUFSPROSPEKTS; PROSPEKTHAFTUNG**

#### § 9

### **Frist und Form der Veröffentlichung**

(1) Der Verkaufsprospekt muß mindestens einen Werktag vor dem öffentlichen Angebot gemäß Absatz 2 oder 3 veröffentlicht werden.

(2) The person required to give the information may refuse to give the information to those questions the answering of which would expose himself or any of the relatives mentioned in § 383 para. 1 no. 1 to 3 of the Code of Civil Procedure (*Zivilprozeßordnung*) to the risk of a criminal prosecution or a proceeding pursuant to the Misdemeanor Act (*Gesetz über Ordnungswidrigkeiten*). The person concerned has to be informed about his right to refuse the information.

#### § 8d

#### **Immediate Enforcement**

A filing of an objection (*Widerspruch*) or a public law action for avoidance (*Anfechtungsklage*) against measures taken pursuant to § 8a para. 2 sentence 1 and §§ 8b and 8c para. 1 shall not result in a suspension of such measures (*aufschiebende Wirkung*).

#### § 8e

#### **Advertisement**

(1) The Federal Supervisory Authority may prohibit any advertisement containing information suited to mislead about the extent of the review pursuant to § 8a.

(2) Central associations of the relevant business circles and the consumer protection shall be heard prior to the taking of measures pursuant to paragraph 1.

### **CHAPTER IV PUBLICATION OF THE SELLING PROSPECTUS; PROSPECTUS LIABILITY**

#### §9

#### **Time Period and Form of Publication**

(1) The selling prospectus shall be published at least one working day prior to the public offer pursuant to paragraph 2 or 3.

(2) Ist die Zulassung zur amtlichen Notierung oder zum geregelten Markt beantragt, so ist der Verkaufsprospekt zu veröffentlichen

1. durch den Abdruck in den Börsenpflichtblättern, in denen der Zulassungsantrag veröffentlicht wurde oder veröffentlicht wird, oder
2. durch Bereithalten zur kostenlosen Ausgabe bei den im Verkaufsprospekt genannten Zahlstellen und bei den Zulassungsstellen oder Zulassungsausschüssen der Börsen, bei denen die Zulassung beantragt ist; in den Börsenpflichtblättern, in denen der Zulassungsantrag veröffentlicht wurde oder veröffentlicht wird, ist bekanntzumachen, bei welchen Stellen der Verkaufsprospekt bereitgehalten wird.

(3) Ist die Zulassung zur amtlichen Notierung oder zum geregelten Markt nicht beantragt, so ist der Verkaufsprospekt in der Form zu veröffentlichen, daß er entweder in einem überregionalen Börsenpflichtblatt bekanntgemacht oder bei den im Verkaufsprospekt benannten Zahlstellen zur kostenlosen Ausgabe bereitgehalten wird; im letzteren Fall ist in einem überregionalen Börsenpflichtblatt bekanntzumachen, daß der Verkaufsprospekt bei den Zahlstellen bereitgehalten wird.

## § 10

### **Veröffentlichung eines unvollständigen Verkaufsprospekts**

Werden einzelne Angebotsbedingungen erst kurz vor dem öffentlichen Angebot festgesetzt, so darf der Verkaufsprospekt ohne diese Angaben nur veröffentlicht werden, sofern er Auskunft darüber gibt, wie diese Angaben nachgetragen werden. Die nachzutragenden Angaben sind spätestens am Tag des öffentlichen Angebots gemäß § 9 Abs. 2 und 3 zu veröffentlichen.

(2) If an application for admission to official quotation or to the regulated market has been filed, the selling prospectus shall be published:

1. in the exchange-approved newspapers (*Börsenpflichtblätter*) in which the application for admission has been or will be published, or
2. by keeping it available for free distribution at the paying agents named in the selling prospectus and at the Admission Offices or Admission Panels of the exchanges with which the application for admission has been filed; in the exchange-approved newspapers in which the application for admission has been or will be published, a notice shall be published stating where the selling prospectus is available.

(3) If an application for admission to official quotation or to the regulated market has not been filed, the selling prospectus shall be published either by publication in an exchange-approved newspaper of nation-wide circulation or by keeping it available for free distribution with the paying agents designated in the selling prospectus; in the latter case a notice shall be published in an exchange-approved newspaper of nation-wide circulation stating that the selling prospectus is available at the paying agents.

## § 10

### **Publication of an Incomplete Selling Prospectus**

If certain conditions of the issue are determined only shortly before the public offer, the selling prospectus may be published without the respective information only if it indicates how such information will be delivered subsequently. The information to be added shall be published in accordance with § 9 para. 2 and 3 on the day of the public offer at the latest.

## § 11

**Veröffentlichung ergänzender Angaben**

<sup>1</sup>Sind seit der Veröffentlichung des Verkaufsprospekts Veränderungen eingetreten, die für die Beurteilung des Emittenten oder der Wertpapiere von wesentlicher Bedeutung sind, so sind die Veränderungen während der Dauer des öffentlichen Angebots unverzüglich in einem Nachtrag zum Verkaufsprospekt zu veröffentlichen. <sup>2</sup>Auf diesen Nachtrag sind die Vorschriften über den Verkaufsprospekt und dessen Veröffentlichung mit Ausnahme des § 8a entsprechend anzuwenden.

## § 12

**Hinweis auf Verkaufsprospekt**

<sup>1</sup>Veröffentlichungen, in denen das öffentliche Angebot von Wertpapieren angekündigt und auf die wesentlichen Merkmale der Wertpapiere hingewiesen wird, müssen einen Hinweis auf den Verkaufsprospekt und dessen Veröffentlichung enthalten. <sup>2</sup>Ist ein Antrag auf Zulassung zur amtlichen Notierung oder zum geregelten Markt an einer inländischen Börse gestellt, sind die Veröffentlichungen unverzüglich der Zulassungsstelle oder dem Zulassungsausschuß zu übermitteln, bei der oder bei dem der Zulassungsantrag gestellt ist.

## § 13

**Prospekthaftung**

(1) Sind für die Beurteilung der Wertpapiere wesentliche Angaben in einem Verkaufsprospekt unrichtig oder unvollständig, so sind die Vorschriften der §§ 45 bis 48 des Börsengesetzes mit folgender Maßgabe entsprechend anzuwenden:

1. bei der Anwendung des § 45 Abs. 1 Satz 1 des Börsengesetzes ist für die Bemessung des Zeitraums von sechs Monaten anstelle der Einführung der Wertpapiere der Zeitpunkt des ersten öffentlichen Angebots im Inland maßgeblich;

## § 11

**Publication of Supplementary Information**

<sup>1</sup> If after the publication of the selling prospectus any changes have occurred which are material for the assessment of the issuer or the securities, such changes shall be published in a supplement to the selling prospectus during the term of the public offer without delay. <sup>2</sup>The rules concerning the selling prospectus and its publication with the exception of § 8a shall be applied to the supplement *mutatis mutandis*.

## § 12

**Reference to the Selling Prospectus**

<sup>1</sup>Publications announcing the public offer of securities and giving their essential characteristics shall contain a reference to the selling prospectus and its publication. <sup>2</sup>If an application for admission to official quotation or to the regulated market on a domestic exchange has been filed, the publications have to be submitted to the Admission Office or the Admission Panel where the application has been filed without delay

## § 13

**Prospectus Liability**

(1) If any information essential for the assessment of the securities contained in a selling prospectus is incorrect or incomplete, the regulations of §§ 45 to 48 of the Exchange Act (*Börsengesetz*) shall be applied *mutatis mutandis* with the following modifications:

1. upon application of § 45 para. 1 sentence 1 of the Exchange Act (*Börsengesetz*) the period of six months shall be calculated from the time of the first domestic public offer instead of the introduction of the securities;

2. § 45 Abs. 3 des Börsengesetzes ist auf Emittenten mit Sitz im Ausland anzuwenden, deren Wertpapiere auch im Ausland öffentlich angeboten werden.

(2) Für die Entscheidung über Ansprüche nach Absatz 1 sowie über die in § 48 Abs. 2 des Börsengesetzes erwähnten Ansprüche ist ohne Rücksicht auf den Wert des Streitgegenstands das Landgericht ausschließlich zuständig,

1. in dessen Bezirk die Börse ihren Sitz hat, bei deren Zulassungsstelle oder Zulassungsausschuß die Billigung des Verkaufsprospekts beantragt worden ist, oder
2. in dessen Bezirk das Bundesaufsichtsamt seinen Sitz hat, falls eine Zulassung zur amtlichen Notierung oder zum geregelten Markt nicht beantragt worden ist.

Besteht an diesem Landgericht eine Kammer für Handelssachen, so gehört der Rechtsstreit vor diese.

## **V. ABSCHNITT VERFAHREN IN DER EUROPÄISCHEN GEMEINSCHAFT**

### **§ 14**

#### **Zusammenarbeit in der Europäischen Gemeinschaft**

(1) Sollen die Wertpapiere auch in anderen Mitgliedstaaten der Europäischen Union oder in anderen Vertragsstaaten des Abkommens über den Europäischen Wirtschaftsraum öffentlich angeboten werden, so hat derjenige, der zur Veröffentlichung des Verkaufsprospekts verpflichtet ist, den zuständigen Stellen dieser Staaten den Entwurf des Verkaufsprospekts, den er in diesen Staaten verwenden will, zu übermitteln.

2. § 45 para. 3 of the Exchange Act (*Börsengesetz*) shall be applied to issuers having their registered offices abroad, provided that their securities are offered publicly also abroad.

(2) With respect to the decision about claims pursuant to paragraph 1 as well as claims referred to in § 48 para. 2 of the Exchange Act (*Börsengesetz*) the District Court

1. in the area of which the exchange has its registered office at the Admission Office or Admission Panel of which the approval of the selling prospectus has been applied for, or
2. in the area of which the Federal Supervisory Authority has its registered office, provided that an admission to official quotation or to the regulated market has not been applied for

is exclusively competent regardless of the value of the issue.

If there is a Chamber for Commercial Matters at the District Court, the lawsuit shall be dealt with there.

## **CHAPTER V PROCEDURE IN THE EUROPEAN COMMUNITY**

### **§ 14**

#### **Cooperation within the European Community**

(1) If the securities are to be publicly offered also in other Member States of the European Union or in other Contracting States of the Agreement on the European Economic Area, the person obliged to publish the selling prospectus shall submit the draft of the selling prospectus to be used in these states to the competent authorities of these states.

(2) Die Zulassungsstellen, Zulassungsausschüsse und das Bundesaufsichtsamt arbeiten untereinander und mit den zuständigen Stellen in den anderen Mitgliedstaaten der Europäischen Union oder in den anderen Vertragsstaaten des Abkommens über den Europäischen Wirtschaftsraum im Rahmen ihrer Aufgaben und Befugnisse zusammen und übermitteln sich gegenseitig die hierfür erforderlichen Angaben, soweit die Amtsverschwiegenheit gewährleistet ist; insoweit unterliegen die Mitglieder der Zulassungsstelle, Zulassungsausschüsse und des Bundesaufsichtsamtes sowie die für diese Stellen tätigen Personen nicht der Pflicht zur Geheimhaltung.

(3) Sollen Wertpapiere eines Emittenten mit Sitz in einem anderen Mitgliedstaat der Europäischen Union oder in den anderen Vertragsstaaten des Abkommens über den Europäischen Wirtschaftsraum, mit denen Bezugsrechte für Aktien verbunden sind, im Inland öffentlich angeboten werden und ist die Zulassung zur amtlichen Notierung an einer inländischen Börse beantragt, so hat die Zulassungsstelle vor ihrer Entscheidung über den Antrag auf Billigung des Verkaufsprospekts eine Stellungnahme der zuständigen Stelle des anderen Staates einzuholen, sofern die Aktien des Emittenten in diesem Staat zur amtlichen Notierung zugelassen sind.

## § 15

### **Angebot in mehreren Mitgliedstaaten der Europäischen Union oder in anderen Vertragsstaaten des Abkommens über den Europäischen Wirtschaftsraum**

(1) Sollen Wertpapiere eines Emittenten mit Sitz in einem anderen Mitgliedstaat der Europäischen Union oder in einem anderen Vertragsstaat des Abkommens über den Europäischen Wirtschaftsraum gleichzeitig oder annähernd gleichzeitig in diesem Staat und im Inland öffentlich angeboten werden und ist die Zulassung zur amtlichen Notierung bei einer inländischen Börse beantragt, so hat die Zulassungsstelle vorbehaltlich des Absatzes 2 den von der zuständigen Stelle des anderen Staates gebilligten Verkaufsprospekt ohne weitere Prüfung zu billigen, sofern ihr eine Übersetzung des Verkaufsprospekts in die deutsche Sprache sowie eine Bescheinigung der zuständigen Stelle des anderen Staates über die Billigung des Verkaufsprospekts vorliegt.

(2) The Admission Offices, the Admission Panels and the Federal Supervisory Authority shall cooperate with each other and with the competent authorities of the other Member States of the European Union or of the other Contracting States of the Agreement on the European Economic Area within the scope of their functions and authorities, and, to the extent to which official secrecy is being guaranteed, submit to one another the necessary information; to that extent the members of, and the persons working for, the Admission Offices, the Admission Panels and the Federal Supervisory Authority are not subject to the obligation to maintain secrecy.

(3) If securities which are issued by an issuer having its registered office in another Member State of the European Union or in other Contracting States of the Agreement on the European Economic Area and which have rights to subscribe for shares attaching thereto are to be domestically offered to the public and an application for admission to official quotation on a domestic exchange has been filed, the Admission Office shall, if the shares of the issuer have been admitted for official quotation in such state, consult the competent authority of such state prior to its decision concerning the application for approval of the selling prospectus.

#### § 15

#### **Offer in More Than One Member State of the European Union or in Other Contracting States of the Agreement on the European Economic Area**

(1) If securities of an issuer having its registered office in another Member State of the European Union or in another Contracting State of the Agreement on the European Economic Area are to be publicly offered at, or nearly at, the same time in such state and domestically and an application for admission to official quotation on a domestic exchange has been filed, the Admission Office shall, subject to paragraph 2, approve without further examination the selling prospectus approved by the competent authority of the other state, provided that it has received a German translation of the selling prospectus and a certificate of approval of the selling prospectus by the competent authority of the other state.

Die Zulassungsstelle kann von dem Erfordernis einer Übersetzung des Verkaufsprospekts ganz oder zum Teil absehen, wenn der Verkaufsprospekt in einer Sprache abgefaßt ist, die im Inland auf dem Gebiet des grenzüberschreitenden Wertpapierhandels nicht unüblich ist. Ist die Zulassung zum geregelten Markt an einer inländischen Börse beantragt, gelten die Sätze 1 und 2 mit der Maßgabe entsprechend, daß an die Stelle der Zulassungsstelle der Zulassungsausschuß tritt.

(2) Hat die zuständige Stelle des anderen Mitgliedstaates oder des anderen Vertragsstaates des Abkommens über den Europäischen Wirtschaftsraum für einzelne Angaben im Verkaufsprospekt eine Befreiung erteilt oder Abweichungen von den im Regelfall vorgeschriebenen Angaben zugelassen, so billigt die Zulassungsstelle oder der Zulassungsausschuß den Verkaufsprospekt nach Absatz 1 Satz 1 nur, wenn

1. die Befreiung oder Abweichung nach diesem Gesetz oder auf Grund dieses Gesetzes zulässig ist,
2. im Inland dieselben Bedingungen bestehen, welche die Befreiung rechtfertigen, und
3. die Befreiung oder Abweichung an keine weitere Bedingung gebunden ist, welche die Zulassungsstelle oder den Zulassungsausschuß veranlassen würde, die Befreiung oder Abweichung abzulehnen.

(3) Sollen Wertpapiere eines Emittenten mit Sitz in einem anderen Mitgliedstaat oder in einem anderen Vertragsstaat des Abkommens über den Europäischen Wirtschaftsraum gleichzeitig oder annähernd gleichzeitig in diesem Staat und im Inland öffentlich angeboten werden und ist die Zulassung zur amtlichen Notierung oder zum geregelten Markt bei einer inländischen Börse nicht beantragt, so kann als Verkaufsprospekt eine Übersetzung des von der zuständigen Stelle des anderen Staates gebilligten Verkaufsprospekts in die deutsche Sprache veröffentlicht werden, sofern dem Bundesaufsichtsamt die Übersetzung des Verkaufsprospekts in die deutsche Sprache sowie eine Bescheinigung der zuständigen Stelle des anderen Staates über die Billigung des Verkaufsprospekts vorliegt.

The Admission Office may grant an exemption from the requirement to translate the selling prospectus in its entirety or in parts, provided that the selling prospectus is drafted in a language which is not unusual domestically in the area of cross-border securities trading. If an application for admission to the regulated market on a domestic exchange has been filed, sentences 1 and 2 shall apply *mutatis mutandis*, provided that the Admission Office shall be substituted by the Admission Panel.

(2) If, with regard to specific information in the selling prospectus, the competent authority of the other Member State or the other Contracting State of the Agreement on the European Economic Area has granted an exemption or admitted deviations from the regularly required information, the Admission Office or the Admission Panel shall only approve the selling prospectus pursuant to paragraph 1 sentence 1, if:

1. the exemption or deviation is permitted under, or on the basis of, this Act;
2. the same conditions justifying the exemption exist domestically; and
3. the exemption or deviation is not subject to any further condition which would cause the Admission Office or the Admission Panel to deny the exemption or deviation.

(3) If securities of an issuer having its registered office in another Member State or in another Contracting State of the Agreement on the European Economic Area are to be publicly offered at, or nearly at, the same time in this state and domestically and an application for admission to official quotation or to the regulated market on a domestic exchange has not been filed, a German translation of the selling prospectus approved by the competent authority of the other state may be published as the selling prospectus, provided that the German translation of the selling prospectus and a certificate of approval of the selling prospectus by the competent authority of the other state have been submitted to the Federal Supervisory Authority.

Das Bundesaufsichtsamt kann von dem Erfordernis einer Übersetzung des Verkaufsprospekts ganz oder zum Teil absehen, wenn der Verkaufsprospekt in einer Sprache abgefaßt ist, die im Inland auf dem Gebiet des grenzüberschreitenden Wertpapierhandels nicht unüblich ist.

(4) Sollen Wertpapiere eines Emittenten mit Sitz außerhalb des Geltungsbereichs dieses Gesetzes sowohl in einem anderen Mitgliedstaat oder in einem anderen Vertragsstaat des Abkommens über den Europäischen Wirtschaftsraum, der nicht der Sitzstaat ist, als auch im Inland öffentlich angeboten werden, so sind die Vorschriften der Absätze 1 bis 3 entsprechend anzuwenden, wenn der Emittent bestimmt, daß der Verkaufsprospekt von der zuständigen Stelle des anderen Staates gebilligt werden soll.

## **VI. ABSCHNITT GEBÜHREN; BUSSGELDVORSCHRIFTEN; ÜBERGANGSVORSCHRIFTEN**

### **§ 16 Gebühren**

(1) In der Gebührenordnung nach § 5 des Börsengesetzes sind die Gebühren zu regeln, die von der Zulassungsstelle oder dem Zulassungsausschuß für die Billigung des Verkaufsprospekts zu erheben sind.

(2) Das Bundesaufsichtsamt erhebt für die Hinterlegung des Verkaufsprospekts Gebühren. Das Bundesministerium der Finanzen bestimmt die Gebührentatbestände im einzelnen und die Höhe der Gebühren durch Rechtsverordnung, die nicht der Zustimmung des Bundesrates bedarf. Das Bundesministerium der Finanzen kann die Ermächtigung durch Rechtsverordnung auf das Bundesaufsichtsamt übertragen.

### **§ 17 Bußgeldvorschriften**

(1) Ordnungswidrig handelt, wer vorsätzlich oder leichtfertig

The Federal Supervisory Authority may grant an exemption from the requirement to translate the selling prospectus in its entirety or in parts, provided that the selling prospectus is drafted in a language which is not unusual domestically in the area of cross-border securities trading.

(4) If securities of an issuer having its registered office abroad are to be offered to the public in another Member State or in another Contracting State of the Agreement on the European Economic Area in which the issuer does not have its registered office as well as domestically, the regulations of paragraphs 1 to 3 shall apply *mutatis mutandis*, provided that the issuer decides that the selling prospectus is to be approved by the competent authority of the other state.

## **CHAPTER VI FEES; FINES; TRANSITIONAL PROVISIONS**

### **§ 16**

#### **Fees**

(1) The fees to be levied by the Admission Office or the Admission Panel for the approval of the selling prospectus shall be set forth in the Schedule of Fees (*Gebührenordnung*) pursuant to § 5 of the Exchange Act.

(2) The Federal Supervisory Authority shall levy fees for depositing the selling prospectus. The Federal Ministry of Finance shall be authorized to determine the events triggering a fee as well as the amount of the fees in an ordinance which does not need the approval of the Federal Council (*Bundesrat*). The Federal Ministry of Finance may transfer its authorization by way of an ordinance to the Federal Supervisory Authority.

### **§ 17**

#### **Fines**

(1) Any person who intentionally or recklessly:

1. entgegen § 1 einen Verkaufsprospekt nicht veröffentlicht,
2. entgegen § 6 Abs. 1 Satz 1, auch in Verbindung mit Abs. 4 Satz 1 oder § 8a Abs. 1 einen Verkaufsprospekt veröffentlicht,
3. einer vollziehbaren Anordnung nach § 8a Abs. 2 Satz 1 oder § 8b zuwiderhandelt,
4. einer vollziehbaren Anordnung nach § 8e Abs. 1 zuwiderhandelt oder
5. entgegen § 9 Abs. 1, § 10 Satz 2 oder § 11, jeweils auch in Verbindung mit § 9 Abs. 2 oder 3, eine Veröffentlichung oder Bekanntmachung nicht, nicht rechtzeitig oder nicht in der vorgeschriebenen Form vornimmt.

(2) Ordnungswidrig handelt, wer vorsätzlich oder fahrlässig entgegen § 8c Abs. 1 eine Auskunft nicht, nicht richtig, nicht vollständig oder nicht rechtzeitig erteilt oder eine Unterlage nicht, nicht richtig, nicht vollständig oder nicht rechtzeitig vorlegt.

(3) Die Ordnungswidrigkeit kann in den Fällen des Absatzes 1 Nr. 1 bis 3 mit einer Geldbuße bis zu einer Million Deutsche Mark, in den Fällen des Absatzes 1 Nr. 4 und 5 mit einer Geldbuße bis zu zweihunderttausend Deutsche Mark und im Falle des Absatzes 2 mit einer Geldbuße bis zu hunderttausend Deutsche Mark geahndet werden.

(4) Verwaltungsbehörde im Sinne des § 36 Abs. 1 Nr. 1 des Gesetzes über Ordnungswidrigkeiten ist in den Fällen des Absatzes 1, in denen für die öffentlich angebotenen Wertpapiere kein Antrag auf Zulassung zur amtlichen Notierung oder zum geregelten Markt an einer inländischen Börse gestellt wurde, und des Absatzes 2 das Bundesaufsichtsamt.

1. contrary to § 1 does not publish a selling prospectus,
2. contrary to § 6 para. 1 sentence 1, also in conjunction with para. 4 sentence 1, or § 8a para. 1 publishes a selling prospectus,
3. acts contrary to an enforceable order pursuant to § 8a para. 2 sentence 1 or § 8b,
4. acts contrary to an enforceable order pursuant to § 8e para. 1, or
5. contrary to § 9 para. 1, § 10 sentence 2 or § 11, in each case also in conjunction with § 9 para. 2 or 3, does not, or not in due time, or not in the prescribed form, carry out a publication or notice,

is committing a misdemeanor (*Ordnungswidrigkeit*).

(2) Any person who intentionally or negligently contrary to § 8c para. 1 does not, not correctly, not completely, or not in due time, give an information or provide a document is committing a misdemeanor.

(3) The misdemeanor may be punished by an administrative fine in the amount of up to, in the cases of paragraph 1 no. 1 to 3, DM 1,000,000, in the cases of paragraph 1 no. 4 and 5, DM 200,000 and in the case of paragraph 2, DM 100,000.

(4) Administrative authority within the meaning of § 36 paragraph 1 no. 1 of the Misdemeanor Act (*Gesetz über Ordnungswidrigkeiten*) shall be, in the cases of paragraph 1, if an application for admission to official quotation or to the regulated market on a domestic exchange has not been filed with respect to the securities publicly offered, and paragraph 2, the Federal Securities Authority.

## § 18

**Übergangsvorschriften**

(1) Für Wertpapiere, die vor dem 1. April 1998 im Inland bei einem öffentlichen Umtauschangebot angeboten worden sind und für die auf Grund der Vorschrift des § 4 Abs. 1 Nr. 7 in der Fassung der Bekanntmachung vom 17. Juli 1996 (BGBl. I S. 1047) kein Verkaufsprospekt veröffentlicht wurde, ist § 1 mit der Maßgabe anzuwenden, daß als erstmaliges öffentliches Angebot das erste öffentliche Angebot nach dem 1. April 1998 gilt.

(2) Auf Verkaufsprospekte, die vor dem 1. April 1998 im Inland veröffentlicht worden sind, sind § 13 in der Fassung der Bekanntmachung vom 17. Juli 1996 (BGBl. I S. 1047) und die Vorschriften der §§ 45 bis 49 des Börsengesetzes in der Fassung der Bekanntmachung vom 17. Juli 1996 (BGBl. I S. 1030) weiterhin anzuwenden.

(3) § 16 Abs. 2 in der Fassung der Bekanntmachung vom 17. Juli 1996 (BGBl. I S. 1047) über die Gebührenerhebung durch das Bundesaufsichtsamt ist bis zum Inkrafttreten einer Verordnung nach § 16 Abs. 2 Satz 2 anzuwenden.

## § 18

**Transitional Provisions**

(1) § 1 shall be applied to securities offered domestically in a public exchange offer prior to April 1, 1998 and with respect to which no selling prospectus was published on the basis of the provision of § 4 para. 1 no. 7 in the version of July 17, 1996 (Federal Law Gazette I p. 1047), whereby, however, the first public offer following April 1, 1998 shall be deemed to be the first public offer.

(2) § 13 in the version of July 17, 1996 (Federal Law Gazette I p. 1047) as well as the provisions of §§ 45 to 49 of the Exchange Act (*Börsengesetz*) in the version of July 17, 1996 (Federal Law Gazette I p. 1030) shall continue to apply to selling prospectuses published domestically prior to April 1, 1998.

(3) § 16 para. 2 in the version of July 17, 1996 (Federal Law Gazette I p. 1047) concerning the levying of fees by the Federal Supervisory Authority shall apply until the ordinance pursuant to § 16 para. 2 sentence 2 enters into force.



APPENDIX B†

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† In publishing this piece of German legislation, the Michigan Journal of International Law has made no editorial changes.

**VerkProspVO****VERORDNUNG ÜBER WERTPAPIER-VERKAUFSPROSPEKTE  
(Verkaufsprospekt-Verordnung — VerkProspVO)**

vom 17. Dezember 1990

zuletzt geändert durch das Gesetz zur weiteren  
Fortentwicklung des Finanzplatzes Deutschland vom 24. März 1998  
(Drittes Finanzmarktförderungsgesetz) (BGBl. I S. 529)

**SECURITIES SELLING PROSPECTUS REGULATION**  
*(Translation)*‡

of December 17, 1990  
as last amended by the Act on the Further Promotion of the  
Financial Market Germany of March 24, 1998  
(Third Financial Market Promotion Act) (Federal Law Gazette I p. 529)

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‡ BRUCKHAUS WESTRICK HELLER LÖBER, VERKPROSPG(1998).

**Verordnung über Wertpapier-Verkaufsprospekte  
(Verkaufsprospekt-Verordnung – VerkProspVO)  
vom 17. Dezember 1990 (BGBl. I S. 2869)**

Auf Grund des § 7 Abs. 2 und 3 des Wertpapier-Verkaufsprospektgesetzes vom 13. Dezember 1990 (BGBl. I S. 2749) verordnet die Bundesregierung:

§ 1

**Anwendungsbereich**

Diese Verordnung ist auf den Verkaufsprospekt für Wertpapiere anzuwenden, für die ein Antrag auf Zulassung zur amtlichen Notierung oder zum geregelten Markt an einer inländischen Börse nicht gestellt ist.

§ 2

**Allgemeine Grundsätze**

(1) <sup>1</sup>Der Verkaufsprospekt muß über die tatsächlichen und rechtlichen Verhältnisse, die für die Beurteilung der angebotenen Wertpapiere notwendig sind, Auskunft geben und richtig und vollständig sein. <sup>2</sup>Er muß mindestens die nach dieser Verordnung vorgeschriebenen Angaben enthalten. Er ist in deutscher Sprache und in einer Form abzufassen, die sein Verständnis und seine Auswertung erleichtert. Das Bundesaufsichtsamt für den Wertpapierhandel kann gestatten, daß der Verkaufsprospekt von Emittenten mit Sitz im Ausland ganz oder zum Teil in einer anderen Sprache abgefaßt wird, wenn diese Sprache im Inland auf dem Gebiet des grenzüberschreitenden Wertpapierhandels nicht unüblich ist.

(2) Der Verkaufsprospekt ist mit dem Datum seiner Aufstellung zu versehen und vom Anbieter zu unterzeichnen.

(3) Sind vorgeschriebene Angaben dem nach § 8 Abs. 1 und 2 in den Verkaufsprospekt aufgenommenen Jahresabschluß unmittelbar zu entnehmen, so brauchen sie im Verkaufsprospekt nicht wiederholt zu werden.

**Regulation Regarding Securities Selling Prospectuses  
(Selling Prospectus Regulation)  
of December 17, 1990**

Based on § 7 para. 2 and 3 of the Securities Selling Prospectus Act dated December 13, 1990 (Federal Law Gazette I p. 2749), the Federal Government adopts the following Regulation:

**§ 1  
Scope of Application**

This Regulation shall apply to the selling prospectus for securities for which an application for admission to official quotation or to the regulated market on a domestic exchange has not been filed.

**§ 2  
General Principles**

(1) <sup>1</sup>The selling prospectus shall disclose the factual and legal circumstances necessary for the assessment of the securities being offered and shall be correct and complete. <sup>2</sup>It shall contain at least such information as required by this Regulation. It shall be in the German language and in a form supporting its understanding and evaluation. The Federal Supervisory Authority may grant a permission that issuers having their registered offices abroad draft the selling prospectus in its entirety or in parts in another language, provided that the language is not unusual domestically in the area of cross-border securities trading.

(2) The selling prospectus shall bear the date of its completion and shall be signed by the person making the offer.

(3) If information required hereby can directly be taken from the annual financial statements included in the selling prospectus pursuant to § 8 para. 1 and 2, it need not be repeated in the selling prospectus.

## § 3

**Angaben über Personen oder Gesellschaften, die für den Inhalt des Verkaufsprospekts die Verantwortung übernehmen**

Der Verkaufsprospekt muß Namen und Stellung, bei juristischen Personen oder Gesellschaften Firma und Sitz, der Personen oder Gesellschaften angeben, die für seinen Inhalt die Verantwortung übernehmen; er muß eine Erklärung dieser Personen oder Gesellschaften enthalten, daß ihres Wissens die Angaben richtig und keine wesentlichen Umstände ausgelassen sind.

## § 4

**Angaben über die Wertpapiere**

Der Verkaufsprospekt muß über die Wertpapiere angeben

1. Art, Stückzahl und Gesamtnennbetrag der angebotenen Wertpapiere oder einen Hinweis darauf, daß der Gesamtnennbetrag nicht festgesetzt ist, sowie die mit den Wertpapieren verbundenen Rechte;
2. die Steuern, die in dem Staat, in dem der Emittent seinen Sitz hat oder in dem die Wertpapiere angeboten werden, auf die Einkünfte aus den Wertpapieren im Wege des Quellenabzugs erhoben werden; übernimmt der Anbieter die Zahlung dieser Steuern, so ist dies anzugeben;
3. wie die Wertpapiere übertragen werden können und gegebenenfalls in welcher Weise ihre freie Handelbarkeit eingeschränkt ist;
4. die organisierten Märkte, an denen die Wertpapiere gehandelt werden sollen;
5. die Zahl- und Hinterlegungsstellen;
6. die Einzelheiten der Zahlung des Zeichnungs- oder Verkaufspreises;
7. das Verfahren für die Ausübung von Bezugsrechten, ihre Handelbarkeit und die Behandlung der nicht ausgeübten Bezugsrechte;

## § 3

**Information about Persons or Companies Assuming Responsibility  
for the Contents of the Selling Prospectus**

The selling prospectus shall state the name and position, in case of legal entities or companies their name and registered office, of the persons or companies assuming responsibility for the contents of the selling prospectus; it shall contain a statement of such persons or companies to the effect that to their knowledge the information given is correct and no material information has been omitted.

## § 4

**Information about the Securities**

The selling prospectus shall contain the following information about the securities:

1. the kind, total number and aggregate nominal amount of the securities being offered or a statement to the effect that such amount has not been fixed, as well as the rights attaching to the securities;
2. the taxes to be withheld at source from the income derived from the securities in the state of the issuer's registered office or in which the securities are being offered; if the person making the offer undertakes to pay such taxes, it shall be so stated;
3. the manner of transfer of the securities and the restrictions, if any, on their free transferability;
4. the organized markets on which the securities are to be traded;
5. the paying and depository agents;
6. the details of the payment of the subscription or selling price;
7. the procedure for the exercise of subscription rights, their transferability, and the treatment of unexercised subscription rights;

8. die Stellen, die Zeichnungen des Publikums entgegennehmen, sowie die für die Zeichnung oder den Verkauf der Wertpapiere vorgesehene Frist und die Möglichkeiten, die Zeichnung vorzeitig zu schließen oder Zeichnungen zu kürzen;
9. die einzelnen Teilbeträge, falls das Angebot gleichzeitig in verschiedenen Staaten mit bestimmten Teilbeträgen erfolgt;
10. die Ausstattung ausgedruckter Stücke sowie die Einzelheiten und Fristen für deren Auslieferung;
11. die Personen oder Gesellschaften, welche die Wertpapiere übernehmen oder übernommen oder gegenüber dem Emittenten oder Anbieter ihre Unterbringung garantiert haben; erstreckt sich die Übernahme oder die Garantie nicht auf das gesamte Angebot, so ist der nicht erfaßte Teil des Angebots anzugeben;
12. den Ausgabepreis für die Wertpapiere oder, sofern er noch nicht bekannt ist, die Einzelheiten und den Zeitplan für seine Festsetzung.

## § 5

### **Angaben über den Emittenten**

Der Verkaufsprospekt muß über den Emittenten angeben

1. die Firma und den Sitz;
2. das Datum der Gründung und, wenn er für eine bestimmte Zeit gegründet ist, die Dauer;
3. die für den Emittenten maßgebliche Rechtsordnung und die Rechtsform; soweit der Emittent eine Kommanditgesellschaft auf Aktien ist, sind zusätzlich Angaben über die Struktur des persönlich haftenden Gesellschafters und die von der gesetzlichen Regelung abweichenden Bestimmungen der Satzung oder des Gesellschaftsvertrags aufzunehmen;
4. den in der Satzung oder im Gesellschaftsvertrag bestimmten Gegenstand des Unternehmens;

8. the places where subscriptions by the public are accepted, and the intended time period for subscription or sale of the securities, as well as the possibilities to prematurely terminate the subscription period or to reduce subscriptions;
9. the amounts of individual tranches, if the offer is made simultaneously in several states in tranches with specified amounts;
10. the features of printed certificates, as well as particulars and time periods regarding their delivery;
11. the persons who, or companies which, will subscribe or have subscribed for the securities or have guaranteed their placement vis-à-vis the issuer or the person making the offer; if the subscription or guarantee does not extend to the entire offer, the portion of the offer not comprised shall be stated;
12. the issue price of the securities or, in case such price is not yet known, the timetable for its determination.

## § 5

### **Information about the Issuer**

The selling prospectus shall contain the following information about the issuer:

1. the company name and the registered office;
2. the date of incorporation and, in case the issuer is incorporated for a specific period of time, such time period;
3. the law and the legal form applicable to the issuer; to the extent that the issuer is a *Kommanditgesellschaft auf Aktien* (partnership limited by shares), additional information has to be inserted concerning the structure of the personally liable partner and the provisions of the articles of incorporation or the articles of association deviating from the statutory rules;
4. the purpose of the enterprise as stated in the articles of incorporation or in the agreement of association;

5. das Registergericht des Sitzes des Emittenten und die Nummer, unter der der Emittent in das Register eingetragen ist;
6. eine kurze Beschreibung des Konzerns und der Stellung des Emittenten in ihm, falls der Emittent ein Konzernunternehmen ist.

## § 6

### **Angaben über das Kapital des Emittenten**

- (1) Der Verkaufsprospekt muß über das Kapital des Emittenten angeben
  1. die Höhe des gezeichneten Kapitals, die Zahl und die Gattungen der Anteile, in die das Kapital zerlegt ist, unter Angabe ihrer Hauptmerkmale und die Höhe der ausstehenden Einlagen auf das gezeichnete Kapital;
  2. den Nennbetrag der umlaufenden Wertpapiere, die den Gläubigern ein Umtausch- oder Bezugsrecht auf Aktien einräumen, unter Angabe der Bedingungen und des Verfahrens für den Umtausch oder Bezug.
- (2) Für das Angebot von Aktien ist zusätzlich anzugeben
  1. der Nennbetrag eines genehmigten oder bedingten Kapitals und die Dauer der Ermächtigung für die Kapitalerhöhung, der Kreis der Personen, die ein Umtausch- oder Bezugsrecht haben, sowie die Bedingungen und das Verfahren für die Ausgabe der neuen Aktien;
  2. die Zahl und die Hauptmerkmale von Anteilen, die keinen Anteil am Kapital gewähren;
  3. soweit sie dem Anbieter bekannt sind, die Aktionäre, die auf den Emittenten unmittelbar oder mittelbar einen beherrschenden Einfluß ausüben können.

5. the court of registry at the place where the issuer has its registered office and the registration number under which the issuer is entered into the register;
6. a brief description of the group (*Konzern*) and of the position of the issuer therein, if the issuer is part of a group (*Konzernunternehmen*).

## § 6

### **Information about the Capital of the Issuer**

(1) The selling prospectus shall contain the following information about the capital of the issuer:

1. the amount of subscribed capital, the number and classes of shares into which the capital is divided, stating their main characteristics and the amount of unpaid capital in relation to the subscribed capital;
2. the nominal value of outstanding securities granting the holders a right to exchange for, or subscribe, shares, together with information about the conditions and the procedure for such exchange or subscription.

(2) In addition, in case of an offer of shares, the following information shall be given:

1. the nominal amount of approved (*genehmigt*) or conditional (*bedingt*) capital and the duration of the authorization for the capital increase, the persons having an exchange or subscription right, and the conditions and the procedure for the issue of the new shares;
2. the number and main characteristics of shares not constituting part of the capital;
3. the shareholders being in a position to directly or indirectly exercise a controlling influence over the issuer, insofar as they are known to the person making the offer.

## § 7

**Angaben über die Geschäftstätigkeit des Emittenten**

(1) Der Verkaufsprospekt muß über die Geschäftstätigkeit des Emittenten folgende Angaben enthalten:

1. die wichtigsten Tätigkeitsbereiche;
2. Angaben über die Abhängigkeit des Emittenten von Patenten, Lizenzen, Verträgen oder neuen Herstellungsverfahren, wenn sie von wesentlicher Bedeutung für die Geschäftstätigkeit oder Ertragslage des Emittenten sind;
3. Gerichts- oder Schiedsverfahren, die einen erheblichen Einfluß auf die wirtschaftliche Lage des Emittenten haben können;
4. Angaben über die wichtigsten laufenden Investitionen mit Ausnahme der Finanzanlagen.

(2) Ist die Tätigkeit des Emittenten durch außergewöhnliche Ereignisse beeinflußt worden, so ist darauf hinzuweisen.

## § 8

**Angaben über die Vermögens-, Finanz- und Ertragslage des Emittenten**

(1) Der Verkaufsprospekt muß über die Vermögens-, Finanz- und Ertragslage des Emittenten enthalten

1. den letzten offengelegten Jahresabschluß, dessen Stichtag höchstens achtzehn Monate vor der Aufstellung des Verkaufsprospekts liegen darf;
2. eine zwischenzeitlich veröffentlichte Zwischenübersicht.

**§ 7****Information about the Business of the Issuer**

(1) The selling prospectus shall contain the following information about the business of the issuer:

1. the primary fields of activity;
2. information about the dependence of the issuer on patents, licenses, agreements or new manufacturing processes, if they are of significant importance for the business or the profitability of the issuer;
3. litigation or arbitration proceedings which could have a material effect on the financial situation of the issuer;
4. information about the most important current investments, except financial investments.

(2) If the business of the issuer has been influenced by extraordinary events, it shall be so stated.

**§ 8****Information about the Assets, Finances and Profits of the Issuer**

(1) The selling prospectus shall contain the following information about the status of the assets, finances and profits of the issuer:

1. the most recently disclosed annual financial statements, the relevant date of which may date back no longer than eighteen months prior to the completion date of the selling prospectus;
2. interim accounts published in the meantime.

(2) <sup>1</sup>Ist der Emittent nur zur Aufstellung eines Konzernabschlusses verpflichtet, so ist dieser in den Verkaufsprospekt aufzunehmen; ist er auch zur Aufstellung eines Einzelabschlusses verpflichtet, so sind beide Arten von Jahresabschlüssen aufzunehmen. <sup>2</sup>Die Aufnahme nur des Jahresabschlusses der einen Art ist ausreichend, wenn der Jahresabschluß der anderen Art keine wesentlichen zusätzlichen Aussagen enthält.

(3) Jede wesentliche Änderung nach dem Stichtag des letzten offengelegten Jahresabschlusses oder der Zwischenübersicht muß im Verkaufsprospekt beschrieben werden.

### § 9

#### **Angaben über die Prüfung des Jahresabschlusses des Emittenten**

<sup>1</sup>Der Verkaufsprospekt muß den Namen, die Anschrift und die Berufsbezeichnung der Abschlußprüfer, die den Jahresabschluß des Emittenten nach Maßgabe der gesetzlichen Vorschriften geprüft haben, angeben. <sup>2</sup>Ferner ist der Bestätigungsvermerk einschließlich zusätzlicher Bemerkungen aufzunehmen; wurde die Bestätigung des Jahresabschlusses eingeschränkt oder versagt, so müssen der volle Wortlaut der Einschränkungen oder der Versagung und deren Begründung wiedergegeben werden.

### § 10

#### **Angaben über Geschäftsführungs- und Aufsichtsorgane des Emittenten**

(1) Der Verkaufsprospekt muß den Namen und die Anschrift der Mitglieder der Geschäftsführungs- und Aufsichtsorgane und ihre Stellung beim Emittenten angeben.

(2) Für das Angebot von Aktien sind zusätzlich die den Mitgliedern der Geschäftsführungs- und Aufsichtsorgane für das letzte abgeschlossene Geschäftsjahr gewährten Gesamtbezüge (Gehälter, Gewinnbeteiligungen, Aufwandsentschädigungen, Versicherungsentgelte, Provisionen und Nebenleistungen jeder Art), für jedes Organ getrennt, anzugeben.

(2) <sup>1</sup> If the issuer is required only to prepare consolidated financial statements, these shall be included in the selling prospectus; if the issuer is also required to prepare non-consolidated financial statements, both kinds of financial statements shall be included. <sup>2</sup>It is sufficient to only include the annual financial statements of the one kind, if the annual financial statements of the other kind do not contain significant additional information.

(3) Any material change which occurred since the relevant date of the most recently disclosed annual financial statements or of the interim accounts shall be described in the selling prospectus.

### § 9

#### **Information about the Audit of the Annual Financial Statements of the Issuer**

<sup>1</sup>The selling prospectus shall state the names, addresses and professional titles of the auditors who have audited the annual financial statements of the issuer in accordance with the statutory provisions. <sup>2</sup>Furthermore, the auditor's report including additional notes shall be included; if the auditor's report on the annual financial statements contains a qualification or has been denied, the qualification or the denial and the reasons therefor shall be included in full.

### § 10

#### **Information about Management and Supervisory Bodies of the Issuer**

- (1) The selling prospectus shall state the names and addresses of the members of the management and supervisory bodies as well as their position held with the issuer.
- (2) In addition, in the case of an offer of shares, the selling prospectus shall state, separately for each body, the aggregate remuneration (salaries, participations in profits, expense allowances, insurance payments, commissions and fringe benefits of any kind) paid to the members of the management and supervisory bodies for the last completed fiscal year.

## § 11

**Angaben über den jüngsten Geschäftsgang  
und die Geschäftsaussichten des Emittenten**

Der Verkaufsprospekt muß allgemeine Ausführungen über die Geschäftsentwicklung des Emittenten nach dem Schluß des Geschäftsjahres, auf das sich der letzte offengelegte Jahresabschluß bezieht, sowie Angaben über die Geschäftsaussichten des Emittenten mindestens für das laufende Geschäftsjahr enthalten.

## § 12

**Wertpapiere mit Umtausch- oder Bezugsrecht, Optionen**

(1) Für das Angebot von anderen Wertpapieren als Aktien, die den Gläubigern ein Umtausch oder Bezugsrecht auf Wertpapiere einräumen, hat der Verkaufsprospekt zusätzlich folgende Angaben zu enthalten:

1. die Art der zum Umtausch oder Bezug angebotenen Wertpapiere und der mit ihnen verbundenen Rechte;
2. die Bedingungen und das Verfahren für den Umtausch und den Bezug sowie die Fälle, in denen die Bedingungen für das Verfahren geändert werden können.

(2) <sup>1</sup>Ist der Emittent nicht zugleich der Emittent der zum Umtausch oder Bezug angebotenen Wertpapiere, so sind die Angaben nach den §§ 5 bis 11 auch über den Emittenten der zum Umtausch oder Bezug angebotenen Wertpapiere aufzunehmen. <sup>2</sup>Diese Angaben können entfallen, sofern die Wertpapiere an einer inländischen Börse zur amtlichen Notierung zugelassen sind. Ist der Anbieter nicht zugleich der Emittent der zum Umtausch oder Bezug angebotenen Wertpapiere, so können diese Angaben entfallen, wenn der Anbieter über die Angaben regelmäßig nicht verfügt.

(3) Für das Angebot von Wertpapieren, die das Recht auf Zahlung eines Betrags einräumen, der durch den Wert eines anderen Wertpapiers oder Rechts oder durch eine sonstige Bezugsgröße bestimmt wird, sind in den Verkaufsprospekt zusätzlich Angaben über die Ermittlung des Betrags aufzunehmen.

## § 11

**Information about the Recent Business Development  
and the Business Outlook of the Issuer**

The selling prospectus shall contain general information about the business development of the issuer after the close of the fiscal year to which the most recently disclosed annual financial statements relate, as well as information about the business outlook of the issuer for at least the current fiscal year.

## § 12

**Securities with Conversion or Subscription Rights; Warrants**

(1) In the case of an offer of securities other than shares granting the holders thereof a conversion or subscription right in respect of securities, the selling prospectus shall, in addition, contain the following information:

1. the type of securities offered for conversion or subscription and the rights arising thereunder;
2. the conditions and the procedure for the conversion and subscription as well as the circumstances in which the conditions or the procedure may be amended.

(2) <sup>1</sup>If the issuer is not also at the same time the issuer of the securities being offered for conversion or subscription, the information required pursuant to §§ 5 to 11 shall also be included with regard to the issuer of the securities being offered for conversion or subscription. <sup>2</sup>This information may be omitted, if the latter securities have been admitted for official quotation on a domestic exchange. If the offerer is not identical with the issuer of the securities to be exchanged into or to be subscribed, this information may be omitted, provided that the offerer does not dispose of this information regularly.

(3) In the case of an offer of securities which grant a right to payment of an amount to be determined on the basis of the value of another security or right or any other factor, the selling prospectus shall additionally contain information as to the determination of such amount.

## § 13

**Gewährleistete Wertpapiere**

Für das Angebot von anderen Wertpapieren als Aktien, für deren Verzinsung oder Rückzahlung eine juristische Person oder Gesellschaft die Gewährleistung übernommen hat, sind die Angaben nach den §§ 5 bis 11 auch über die Person oder Gesellschaft, welche die Gewährleistung übernommen hat, aufzunehmen.

## § 14

**Verringerte Prospektanforderungen**

(1) Für das Angebot von Aktien, die den Aktionären des Emittenten auf Grund ihres Bezugsrechts zugeteilt werden, kann auf die in den §§ 7 bis 10 vorgeschriebenen Angaben verzichtet werden, wenn die Aktionäre auf andere Weise ausreichend unterrichtet sind.

(2) Für den Fall, daß der Emittent vor weniger als achtzehn Monaten gegründet worden ist und noch keinen Jahresabschluß offengelegt hat, muß der Verkaufsprospekt abweichend von den Anforderungen nach den §§ 8, 9, 10 Abs. 2 und § 11 folgende Angaben enthalten:

1. die Eröffnungsbilanz;
2. eine Zwischenübersicht, deren Stichtag nicht länger als zwei Monate zurückliegt;
3. voraussichtliche Vermögens-, Finanz- und Ertragslage mindestens für das laufende und das folgende Geschäftsjahr;
4. Planzahlen des Emittenten (Investitionen, Produktion, Umsatz und Ergebnis) mindestens für die folgenden drei Geschäftsjahre.

## § 13

**Guaranteed Securities**

In the case of an offer of securities other than shares for which a legal entity or a company has guaranteed the payment of interest or principal, the information required pursuant to §§ 5 to 11 shall also be included with regard to the entity or company which has assumed such guarantee.

## § 14

**Reduced Requirements for the Prospectus**

(1) In the case of an offer of shares which are allotted to the shareholders of the issuer by virtue of their subscription rights, the information required according to §§ 7 to 10 may be omitted, if the shareholders are informed sufficiently by other means.

(2) If the issuer has been incorporated for less than eighteen months and has not yet disclosed annual financial statements, the selling prospectus shall, notwithstanding the requirements of §§ 8, 9, 10 para. 2 and § 11, contain the following information:

1. the opening balance sheet;
2. interim accounts the relevant date of which may date back no longer than two months;
3. the prospective status of the assets, finances and profits of the issuer for at least the current and the following fiscal year;
4. the projected figures of the issuer (investments, production, turnover, profits and losses) for at least the following three fiscal years.

(3) <sup>1</sup>Wurde vor weniger als zwölf Monaten im Inland ein vom selben Anbieter unterzeichneter vollständiger Verkaufsprospekt, Börsenzulassungsprospekt (§ 36 Abs. 3 Nr. 2 des Börsengesetzes) oder Unternehmensbericht (§ 73 Abs. 1 Nr. 2 des Börsengesetzes) veröffentlicht, so sind in den Verkaufsprospekt nur die seit der Veröffentlichung des vollständigen Prospekts oder Unternehmensberichts eingetretenen Änderungen aufzunehmen, die für die Beurteilung des Emittenten oder der angebotenen Wertpapiere von Bedeutung sein können. <sup>2</sup>Der Verkaufsprospekt darf nur zusammen mit dem vollständigen Prospekt oder Unternehmensbericht oder mit einem Hinweis darauf, wo dieser einzusehen ist, veröffentlicht werden.

(4) Von der Aufnahme einzelner Angaben in den Verkaufsprospekt kann abgesehen werden, wenn

1. diese Angaben nur von geringer Bedeutung und nicht geeignet sind, die Beurteilung der Vermögens-, Finanz- und Ertragslage und der Entwicklungsaussichten des Emittenten zu beeinflussen, oder
2. die Verbreitung dieser Angaben dem Emittenten erheblichen Schaden zufügt, sofern die Nichtveröffentlichung das Publikum nicht über die für die Beurteilung der Wertpapiere wesentlichen Tatsachen und Umstände täuscht.

## § 15

### **Inkrafttreten**

Diese Verordnung tritt am 1. Januar 1991 in Kraft.

(3) <sup>1</sup>If a complete selling prospectus, listing prospectus (§ 36 para. 3 no. 2 of the Stock Exchange Act) or business report (§ 73 para. 1 no. 2 of the Stock Exchange Act) signed by the same person making the offer has been published domestically less than twelve months ago, the selling prospectus shall merely set forth the changes which have occurred since the publication of the complete prospectus or business report and which may be of importance for the assessment of the issuer or the securities being offered. <sup>2</sup>The selling prospectus shall only be published together with the complete prospectus or the business report, or with a notice indicating where such prospectus or report can be inspected.

(4) Specific information may be omitted from the selling prospectus, if

1. such information is of minor importance only and is not suitable to affect the assessment of the status of the assets, finances and profits and the outlook for future development of the issuer; or
2. the dissemination of such information would cause considerable damage to the issuer, provided that the non-publication does not mislead the public about the facts and circumstances essential for the assessment of the securities.

§ 15  
**Effective Date**

This regulation shall enter into force on January 1, 1991.