

**Investment Company Act Status of Non-U.S. Issuers
– Updated Commentary on Book-Entry Deposit Procedures under Section
3(c)(7) of the Investment Company Act**

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This group's "2008 procedures" were designed to help certain non-U.S. issuers relying on the Section 3(c)(7) exception under the Investment Company Act to access the U.S. capital markets more efficiently, and were especially focused on issuers for which earlier versions of the group's published procedures were of limited applicability. This is particularly important for those non-U.S. funds and non-U.S. inadvertent investment companies² that have equity securities that are publicly traded and listed on securities exchanges outside the United States and that wish to include institutional U.S. investors when conducting offerings of equity securities. The updated commentary below takes into account market experience with the procedures since their publication and reflects our belief that any approach to these types of offerings should balance both the market benefits of a widely recognized procedural framework and commercial flexibility to tailor specific aspects of the framework to the higher or lower legal risks presented by the particular circumstances. For ease of reference, this article concludes with an annotated summary of the 2008 procedures.³

Legal Background

Section 7(d) of the Investment Company Act of 1940, as amended (the "Investment Company Act"), prohibits a U.S. public offering of securities issued by a non-U.S. investment company. The Securities and Exchange Commission ("SEC") takes the position that: "A non-U.S. fund may conduct a private U.S. offering in the United States without violating section 7(d) **only** if the

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² By "inadvertent investment company" we refer to a company that might not typically be viewed as an investment fund but that nonetheless fails certain tests for exemptions under the Investment Company Act that are designed to distinguish investment fund issuers from other issuers. Legal and commercial issues presented by inadvertent investment companies have been a topic of commentary for decades. See, e.g., Edmund H. Kerr, "The Inadvertent Investment Company: Section 3(a)(3) of the Investment Company Act," *Stanford Law Review* (Dec. 1959) (but note that Section 3(a)(3) as referenced in Kerr's article is now Section 3(a)(1)(C)).

³ See "Book-Entry Deposit Procedures for Certain Offerings by Non-U.S. Issuers under Section 3(c)(7) of the Investment Company Act," *The Investment Lawyer* (July 2008). See also "New Developments in Procedures for Book-Entry Deposit of Rule 144A Securities by 3(c)(7) Issuers," *The Investment Lawyer* (March 2003). Both the 2008 and the earlier 2003 articles are also available on each of the authoring law firm's websites.

fund complies with either section 3(c)(1) or 3(c)(7) with respect to its U.S. investors (or some other available exemption or exclusion).”⁴ (Emphasis added.)

To assess whether a particular offering by a non-U.S. investment company is public in the United States, and therefore prohibited for purposes of Section 7(d), the SEC and its staff look beyond Regulation S and the relevant exemption from the registration requirements under the Securities Act of 1933, as amended (the “Securities Act”), and overlay additional requirements to comply with the Investment Company Act. The SEC has made it clear that, if a non-U.S. fund has engaged in offering activities in the United States, the non-U.S. fund’s compliance with Regulation S is not sufficient to establish the fund’s compliance with Section 3(c)(7). The result is a body of law for non-U.S. investment companies that includes restrictions under the Investment Company Act in addition to those imposed by the Securities Act.

A widely relied upon Investment Company Act exception is Section 3(c)(7) of that Act.⁵ Under Section 3(c)(7), an issuer needs to establish a “reasonable belief” that its securities are owned exclusively by “qualified purchasers” or “QPs.”⁶ U.S. issuers must have a reasonable belief that both their U.S. and non-U.S. investors are QPs, while non-U.S. issuers only must have a reasonable belief that their U.S. investors (and certain transferees) are QPs.⁷ Accordingly, a non-U.S. investment company relying on Section 3(c)(7) with respect to its U.S. investors must have a reasonable belief that all U.S. persons purchasing securities directly from it, or from (or

⁴ The SEC reaffirmed this interpretation (which it has articulated in prior releases as discussed below) in its release accompanying rules recently adopted pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. *Exemptions for Advisers to Venture Capital Funds, Private Fund Advisers With Less Than \$150 Million in Assets Under Management, and Foreign Private Advisers*, Investment Advisers Act Release No. 3222 (June 22, 2011), note 294.

The SEC and its staff’s views in this regard have been set out on numerous occasions over the past quarter century, *see, e.g., Touche Remnant & Co.*, SEC no-action letter (Aug. 27, 1984) (“*Touche Remnant*”) (in the context of the interplay of Sections 7(d) and 3(c)(1), reading Congress’s intent as supporting the conclusion that sales to U.S. investors of securities issued by non-U.S. investment companies must be limited in the same way as would apply to unregistered U.S. funds); *Protecting Investors: A Half Century of Investment Company Regulation*, report of the SEC Division of Investment Management (May 1992), pages 200-202 (similarly discussing the staff’s view of Congress’s intent in the context of the interplay of Sections 7(d) and 3(c)(1)); *Resale of Restricted Securities; Changes to Method of Determining Holding Period of Restricted Securities under Rules 144 and 145*, Investment Company Act Release No. 17452 (Apr. 23, 1990) (Rule 144A adopting release), text accompanying notes 63-65 (expressing the Commission’s agreement with the *Touche Remnant* guidance as applied to Rule 144A securities issued by Section 3(c)(1) companies); *Goodwin Procter & Hoar*, SEC no-action letter (Feb. 28, 1997) (“*Goodwin Procter*”) (applying the *Touche Remnant* guidance to Section 3(c)(7), which Congress added to the Investment Company Act in 1996). The phrases “non-U.S. fund” and “non-U.S. investment company” as used in this article refer to an issuer formed under the laws of a non-U.S. jurisdiction that meets the Investment Company Act’s definition of an investment company.

⁵ Again, Section 3(c)(7) requires that any U.S. offering activity be private in nature. The other privately offered issuer exception is Section 3(c)(1) of the Investment Company Act. Section 3(c)(1) presents an investor-counting exercise instead of an investor-qualifying exercise.

⁶ Rule 2a51-1(h) under the Investment Company Act establishes the reasonable belief requirement. Section 2(a)(51)(A) of the Investment Company Act defines a “qualified purchaser”.

⁷ Offerings by non-U.S. investment companies to non-U.S. investors outside the United States generally do not raise the same concerns as offerings by U.S. investment companies. *See, e.g., Investment Funds Institute of Canada*, SEC no-action letter (Mar. 4, 1996) (“*IFIC*”); *Goodwin Procter*. Under the *IFIC/Goodwin Procter* letters, a non-U.S. investment company may carry on extensive non-U.S. offering activity, complete with almost unrestricted non-U.S. secondary market trading, without jeopardizing the company’s parallel U.S. private offering.

involving) its agents, affiliates or intermediaries, even if outside the United States and purchasing the securities in reliance on Regulation S, are QPs.⁸

The Section 3(c)(7) QP inquiry does not cease at the initial sale by the issuer to investors. The requirement also extends to certain subsequent transferees.⁹ Establishing a reasonable belief that transferees in the United States or that are U.S. persons are QPs becomes difficult as a practical matter for issuers when transfers of the securities are relatively unrestricted, such as in the case of certain securities issued in book-entry form. Non-U.S. issuers of transferable securities that wish to rely on Section 3(c)(7) therefore must implement additional procedures to ensure that they have the requisite reasonable belief regarding the QP status of their U.S. investors.¹⁰

First Principles for Section 3(c)(7) Offerings by Non-U.S. Issuers

The legal background set out above suggests the following as “first principles” that should characterize an appropriate approach to Section 3(c)(7) offerings by non-U.S. issuers:

- Reliance on Section 3(c)(7) requires that an issuer and its agents establish investor qualification procedures that will, in most cases, go beyond the corresponding procedures that would be required in the absence of the need to satisfy the requirements of Section 3(c)(7). But the type of procedures that are appropriate to a given Section 3(c)(7) issuer/offering will vary depending on the facts.
- For commercial expediency, the establishment of generally agreed benchmark Section 3(c)(7) procedures should be useful for a wide variety of offerings. But any such generally agreed procedures necessarily will be more stringent than the minimum procedures required for certain transactions.
- Flexibility in a given instance depends on the following factors, among others:

⁸ This requirement does not, however, apply when a non-U.S. investment company offers securities exclusively under Regulation S with no U.S. offering and does not rely on Section 3(c)(7).

⁹ The Section 3(c)(7) exception from the definition of investment company is dependent on the issuer's reasonable belief as to the status of U.S. persons who have purchased from the issuer, its affiliates and agents (and the status of their transferees). Transferees purchasing in secondary market transactions on a non-U.S. exchange generally need not be QPs, regardless of whether they are U.S. persons, as long as the transactions are bona fide secondary sales to those transferees and do not involve the issuer or its agents, affiliates or intermediaries in relation to such sales, and as long as a significant amount of the secondary trading on the exchange involves non-U.S. persons (see note (e) to the 2008 procedures, included at the end of this article). The SEC has pointed out in this context that Section 48(a) of the Investment Company Act prohibits doing indirectly what may not be done directly. Thus an offshore transfer by a U.S. person holder that is required to be a QP will not avoid the transferee QP requirement if it is a transfer by arrangement to a U.S. person.

¹⁰ Since the Section 3(c)(7) exception from the definition of an investment company is dependent on the issuer's reasonable belief as to the status of U.S. persons who have purchased from the issuer, its affiliates and agents (and the status of their transferees), the ability of an issuer to repurchase or force transfers of securities held by non-qualifying persons is a means to eliminate known non-qualifying holders, but it does not itself ensure compliance with the Investment Company Act in the absence of reasonable offering procedures and transfer restrictions.

- Inherent U.S. interest in an offering (less inherent interest = more flexibility)¹¹;
 - Presence of the issuer (or its investment adviser, if any) in the United States in terms of number and type of staff, number of offices, public profile, etc. (less presence = more flexibility);
 - Proportion of offering activity, which by definition would be private offering activity, directed at the United States (less U.S. offering activity = more flexibility);
 - Proportion of offering activity directed outside the United States (more non-U.S. offering activity = more flexibility);
 - Depth of trading market for the securities outside the United States (more non-U.S. trading = more flexibility);¹²
 - Structural or tax characteristics that are generally thought to be designed to encourage or discourage U.S. investor interest (characteristics unfavorable to U.S. investors = more flexibility);¹³
 - For securities having characteristics of both debt and equity for some purposes, the primary characteristic on balance (more debt-like, less mass/retail appeal, and/or if information is largely available only to financial intermediaries = more flexibility); and
 - How “fund-like” the issuer is (less fund-like = more flexibility).
- Flexibility also will vary over time. For example, changing market practice with regard to investor qualification in securities offerings more generally likewise can be expected to shape practice as to Section 3(c)(7) procedures.

How the 2008 Procedures Relate to these Principles

The law firms associated with this article jointly published prior articles that describe procedures to assist market participants seeking to rely on Section 3(c)(7) when structuring offerings by

¹¹ Inherent U.S. interest might be judged by past experience with similarly situated issuers. For example, if a similar issuer and a similarly structured offering in the recent past drew very little U.S. investor interest, either initially or in subsequent trading, then it may be reasonable to presume similarly limited inherent U.S. interest for the current prospective offering.

¹² In certain instances, it may also be appropriate to consider the offshore public float of the issuer’s securities as compared to the number of securities expected to be sold in the United States together with those sold in any prior offerings by the issuer to U.S. purchasers. *See also* note (b) to the table below. Other factors that may be relevant where an issuer is using a variation of the 2008 procedures are discussed in note (e) to the table below.

¹³ For example, an issuer may be deemed to have taken steps to encourage U.S. investment if it (i) is structured so as not to be a Passive Foreign Investment Company (“PFIC”) (as defined under Section 1297 of the U.S. Internal Revenue Code of 1986, as amended (the “Code”)), or (ii) provides information to allow for Qualified Electing Fund (“QEF”) treatment under Section 1295 of the Code.

certain types of issuers. The most recent iteration was published in June 2008 and is often referred to as the “2008 procedures”.¹⁴

Prior to the publication of the 2008 procedures, no widely agreed U.S. offering procedures existed for non-U.S. fund issuers or for equity offerings by inadvertent investment companies. A primary goal in crafting those procedures therefore was to recommend transfer procedures for the offered securities that would provide a non-U.S. fund issuer of securities in global form through an offshore book-entry system, and its underwriters and professional advisers, reasonable certainty that the issuer could make a U.S. offering under exemptions and exceptions under the Securities Act and Investment Company Act and nonetheless continue to satisfy the “reasonable belief” standard required by Section 3(c)(7) as to U.S. investor eligibility. To that end, and applying the factors set out in the bulleted list above, the 2008 procedures seek to identify offerings with respect to which greater flexibility appears to be appropriate, as follows:

- Lower concern – Offerings involving only a limited U.S. offering alongside a more significant non-U.S. offering, or existing non-U.S. float, are deemed under the procedures to be of lesser concern. This is because these offerings demonstrate inherent limits in U.S. interest and are unlikely to result, over time, in a U.S.-based market for the securities. Instead, the larger and more liquid non-U.S. market would tend to pull into that market the securities initially sold into the United States.
- Higher concern – By contrast, the 2008 procedures were most concerned with the prospect of a “true fund” for which a significant market exists or is likely to develop in the United States. It is foreseeable that such an offering into a significant or potentially significant U.S. market, without heightened restrictions on transferability, could, over time, introduce the risk of the fund’s securities being transferred to U.S. investors who are not QPs. The potential for that result naturally puts the greatest pressure on the issuer’s and the underwriter’s “reasonable basis” analysis.

Importantly, the 2008 procedures, like the earlier Section 3(c)(7) book-entry procedures¹⁵, are intended for use in U.S. offerings to investors that are both QPs and Qualified Institutional Buyers (“QIBs”) as defined in Rule 144A under the Securities Act.¹⁶

Specific Provisions of the 2008 Procedures

Aspects of the 2008 procedures that generated market comment over time include: (1) the required certification by the underwriters as to the expected U.S. versus non-U.S. nature of the

¹⁴ See, *supra*, note 3.

¹⁵ See, *supra*, note 3.

¹⁶ QIBs are, for the most part, large and well-resourced institutions and are viewed as the most sophisticated class of investors under the U.S. securities laws.

We also understand that there is evidence to suggest that many of the offerings of non-U.S. investment funds that sought to rely on earlier, individually developed variations to these procedures, although those funds were listed and traded on a securities exchange outside the United States, tended to draw participation only from institutional investors (whether in or outside the United States).

offering, (2) the custodial or “gatekeeper” requirement that applies in some instances, and (3) the required tracking of involvement by the underwriters in secondary market sales to U.S. persons within the 40-day period after the closing of the U.S. offering. Background as to each of the requirements follows:

- Underwriter’s certification/representation – Application of the 2008 procedures in practice places great emphasis on what is fundamentally a factual inquiry as to the expected U.S. versus non-U.S. nature of the offering. Certain issuers and their investment advisers (if any) may not have a significant degree of sophistication in assessing the nature of the offering and therefore may need to look to the underwriters’ expertise. In such cases, an underwriter’s certification or representation provides a means of evaluating a transaction according to where on that continuum the offering is likely to fall. Alternative approaches may, however, be considered. Many issuers, either alone or together with their investment advisers, will be sophisticated participants in the international capital markets, with a track record of securities issuances (whether by the issuer, investment adviser or their affiliates including any managed funds) and should, in consultation with the underwriter, be able to “self-certify” as to these matters.
- Gatekeeper – The custodial/gatekeeper requirement represents a highly reliable means of controlling secondary market transactions in cases when there is meaningful U.S. market solicitation and interest and, therefore, risk that the securities could, over time and absent such a control, be transferred party-to-party into the hands of non-qualified U.S. persons. As noted in the 2008 procedures, and borne out in our application of these procedures over time, a gatekeeper may not be required with respect to offerings that have characteristics that suggest greater flexibility is appropriate as outlined above. A gatekeeper has not been required by some issuers in connection with offerings that included very limited offers and sales to U.S. persons constituting less than, for example, 25% of the offering.¹⁷ Offerings without gatekeepers typically also require U.S. purchasers to represent that they will transfer their securities only in offshore transactions over the relevant exchange.
- Post-offering U.S. person secondary market activity – The *IFIC/Goodwin Procter* analysis cited above¹⁸ makes clear that secondary market trading presents a potential regulatory concern in the context of an offering that is being marketed both privately in the United States and publicly outside the United States. The 2008 procedures therefore provided for a 40-day restricted period as a means to support the underlying conclusion that offerees in the U.S. offering cannot purposefully or inadvertently avoid restrictions on sales to U.S. persons by submitting orders through an underwriter to buy on the exchange outside the United States as soon as the secondary non-U.S. market opens. We understand, however, that the evolution of practices in certain non-U.S. markets may mean that it is impracticable to effectively monitor secondary market transactions during

¹⁷ This is not to say that we cannot envision special circumstances in which such a 25% threshold might be exceeded to a degree, for example, when the number of U.S. offerees is very small and their take up of the U.S. tranche is highly concentrated.

¹⁸ See, *supra*, note 9.

the 40-day period. As a result, alternative approaches also should be considered. In some offerings, the parties have considered limiting the 40-day restricted period commencing after the offering is concluded only to the activities of an underwriter's U.S. affiliates, on the basis that it is these affiliates who have been responsible for U.S.-directed offering activities and sales orders and that – correspondingly – the non-U.S. affiliates have not been involved in U.S.-directed efforts and do not typically deal with U.S. persons.¹⁹ Other offerings incorporate a delay in the listing of the securities coupled with a black-out period for transfers (i.e., under which secondary market trading is prohibited for some period, such as a week) after the offering is concluded.

As the 2008 procedures themselves – and certainly this discussion – should make clear, the 2008 procedures are not intended to be exclusive. Alternative solutions may be appropriate to address each of the concerns that the various aspects of the procedures are intended to address.

Other U.S. Legal Considerations

These procedures must be understood to address only issues presented by the Investment Company Act. Other U.S. law considerations also may apply and require care when structuring an offering.

In addition, developments since publication of the procedures in 2008 – notably under two provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 – significantly affected the U.S. regulatory landscape for Section 3(c)(7) offerings. First, the Dodd-Frank Act and related SEC rulemaking extended the requirements for non-U.S. firms to register as investment advisers with the SEC and did so, at least in part, by reference to whether the firm advises one or more vehicles relying on the Section 3(c)(7) exception. Second, the Dodd-Frank Act's so-called "Volcker Rule" establishes various limitations on the activities of U.S. and non-U.S. banking organizations and did so again, at least in part, by reference to whether the organization invests in or maintains certain relationships with a vehicle relying on the Section 3(c)(7) exception. Collectively these developments could have the collateral effect of making the organization of vehicles that rely on Section 3(c)(7) less attractive over time, especially in the non-U.S. context.

Annotated Summary of the 2008 Procedures

For ease of reference, the table below outlines the 2008 procedures. As we noted when the 2008 procedures were originally published, they were designed for non-U.S. issuers in global offerings where securities are offered both outside the United States pursuant to Regulation S under the Securities Act and in the United States through private placements exclusively to QP/QIBs under Rule 144A under the Securities Act. Because the issuer is a non-U.S. entity and because a

¹⁹ Any post-offering arrangement would be predicated on the assumption that the various participants recognize the importance of limiting their involvement with U.S. persons after the offering has concluded. As obvious examples, (i) a U.S. person should not pre-arrange with the underwriters or the issuer that the U.S. person will participate in post-offering trading, and (ii) the issuer and the underwriters should not affirmatively target U.S. persons for participation in post-offering trading. These types of actions raise the specter of the Investment Company Act Section 48(a) prohibition on doing indirectly what one cannot do directly. See, *supra*, note 9.

significant portion of the global offering is sold outside the United States under Regulation S, these securities are normally issued in book-entry form and settled through non-U.S. book-entry facilities, such as Euroclear or Clearstream, or various national equivalents. A reader of this annotated summary also should review the original commentary that accompanied publication of the procedures in 2008.

Non-fund (non-U.S.) issuers of debt securities should look to the earlier 2003 procedures.²⁰ Items in bold in the table below are requirements that are not present in the 2003 procedures.

We reiterate that, in crafting actual procedures intended to establish the requisite reasonable belief for specific transactions, circumstances may permit variations from the 2008 procedures, and certain elements of the procedures may not be required in all cases. These variations, and particularly the removal of the gatekeeper requirement, might be based on a very limited number of investors in the United States, an active trading market outside the United States and/or the placement of only a limited portion of the offering within the United States as well as the other factors mentioned above. Other circumstances may require more strict limitations on placements in the United States and transfers by U.S. holders.²¹

	<i>The 2008 Procedures</i>
<i>Type of issuer</i>	The Issuer represents in the Purchase Agreement that it is a “foreign private issuer” (as defined in Rule 405 under the Securities Act). If the Issuer is a fund, it must also represent that its management team and principal operations are based outside the United States.
<i>Minimum amounts</i>	<p>The securities are either (i) denominated in amounts of at least US\$250,000 or (ii) sold to U.S. persons in minimum amounts of at least US\$250,000 per account.</p> <p><u>2012 Commentary:</u> We recognize that it is impracticable to apply the same minimum amount requirement to a rights offering made to a non-U.S. fund's current shareholders. References to this US\$250,000 minimum may be adjusted throughout these procedures in the case of such a rights offering. See also the commentary below on “Subsequent Transfers” for further details in respect of applying the US\$250,000 minimum amount after the initial allocation of the securities is completed.</p>

²⁰ See, *supra*, note 3.

²¹ A variation of the 2008 procedures was used, for example, in an offering of common units and restricted depositary units, where initial U.S. investors purchasing securities in the 144A tranche of the offering were issued certificated securities in the form of restricted depositary receipts. The offering imposed an additional requirement that no U.S. person other than a QP could acquire securities of the issuer at any time (including in secondary offshore transactions).

	<i>The 2008 Procedures</i>
<i>Mechanics of issuance</i>	<p>a. Securities issued in global form to a common depository for Euroclear / Clearstream and settled through Euroclear / Clearstream or national equivalents (DTC not permitted).</p> <p>b. A Custodian is appointed to act as gatekeeper with respect to the U.S. portion of the offering; the Custodian keeps the entire Euroclear / Clearstream position with regard to the U.S. purchasers in its name and will effect transfers of beneficial interests on its books only upon receipt of the requisite certifications.</p> <p>c. Custody Agreement:</p> <ul style="list-style-type: none"> (i) Entered into at the closing of the offering. (ii) Between the Issuer and the Custodian, for the benefit of U.S. purchasers of securities held in custody. (iii) The Custodian passes through all rights and benefits of ownership of the securities (subject to the limitations on transfers described below). <p><u>2012 Commentary:</u> There are circumstances in which the gatekeeper Custodian will not be necessary. The article above expands on the factors that might be considered when assessing the merits of requiring such a control mechanism for secondary trading. In cases when a Custodian is not used, references to the Custodian in the remainder of these procedures do not apply and should be adjusted as described below.</p>
<i>Initial distribution</i>	<p>a. Each initial U.S. purchaser signs a representation letter.</p> <p>b. Securities sold to U.S. purchasers are held by, and registered in the name, or credited to the account of, the Custodian.</p> <p><u>2012 Commentary:</u> In cases when a Custodian is not used, the securities may be held as directed by the purchasers.</p>

	<i>The 2008 Procedures</i>
<i>Representation letter</i>	<p>The U.S. purchaser representation letter contains:</p> <ul style="list-style-type: none"> a. Representation as to QIB/QP status; b. Agreement to resell only: <ul style="list-style-type: none"> (i) in an “offshore transaction”^(a) under Regulation S; or (ii) to a U.S. person who is a QIB/QP; c. Agreement to deliver to the Custodian prior to settlement of any transfer of securities, either: <ul style="list-style-type: none"> (i) if the resale is an offshore transaction, an exit letter signed by the transferor stating that the security was sold in an offshore transaction, or (ii) if the resale is not an offshore transaction, a representation letter signed by the transferee that is similar to the representation letter from the initial purchaser; d. Agreement to notify on any resale the executing broker (and any other agent of the transferor involved in selling the securities) of the restrictions that are applicable to securities being sold and to require the broker (and such other agent) to abide by such restrictions; e. Acknowledgement of Issuer’s right to force resale or redemption of the securities if a purchaser or transferee violates these representations; and f. Agreement to transfer in amounts of at least US\$250,000 when transferring to a known U.S. person (see “Subsequent transfers” below). <p><u>2012 Commentary:</u> In cases when there is no Custodian, references to the Custodian above should be read as references to the Issuer. We also recognize that the Issuer’s right to force resale or redemption of the securities may be subject to stock exchange or regulatory restrictions. If that is the case, the totality of the remaining facts and circumstances, including relevant control mechanisms, should be considered.</p>
<i>Percentage of offering in the United States</i>	Generally, less than 45% of the offering may be sold to U.S. purchasers (although a higher percentage may be feasible in certain circumstances^(b)).

	<i>The 2008 Procedures</i>
<i>Underwriters' certificate</i>	<p>The underwriters^(c) sign a certificate addressed to the Issuer (and authorizing Issuer's counsel and underwriters' counsel to rely) stating that:</p> <ul style="list-style-type: none"> a. With respect to any sales to U.S. persons in the initial placement (and for 40 days following the closing of the offering), the underwriters will: <ul style="list-style-type: none"> (i) sell only to QIB/QPs that sign a representation letter, and (ii) deliver such representation letters to the Issuer at completion of the offering (and at the expiration of the 40-day period); b. The principal trading market^(d) for the Issuer's securities will be offshore, the percentage limitation on sales to U.S. purchasers has been complied with, <u>and</u> the underwriters expect that a significant amount of the trading activity on the primary secondary market will involve non-U.S. persons (and the underwriters may base such expectation on the percentage of the offering in the United States discussed above).^(e) c. The underwriters have instituted, and have notified the dealers participating in the offering to institute, procedures to prevent themselves from being involved at the time of the initial placement and at any time during the 40-day period following the closing in purchases of the securities by U.S. persons that are not QPs (including purchases through the non-U.S. stock exchange); and d. Securities will be sold to U.S. purchasers in minimum amounts of at least US\$250,000. <p><u>2012 Commentary:</u> As the body of the article above notes, there are circumstances in which it may be appropriate to (i) rely as to certain representations of the Issuer instead of the underwriter and/or (ii) to impose alternative transfer restrictions in connection with, or sometimes in lieu of, the 40-day restricted period described here. The content of the certification may be varied to reflect the agreed procedures for the particular offering. In addition, the certification may instead be styled as a statement of belief or expectation as to clause (b) above and a representation as to the underwriter's conduct with respect to clauses (a), (c) and (d) (again, subject to variations that reflect the agreed procedures for the particular offering).</p>

	<i>The 2008 Procedures</i>
<i>Subsequent transfers</i>	<p>Subsequent transfer by a U.S. person:</p> <ul style="list-style-type: none"> a. <u>Sale to a known U.S. person</u> (through a non-U.S. stock exchange or elsewhere): <ul style="list-style-type: none"> (i) The transferee delivers a representation letter (similar to the representation letter from the initial purchaser) to the Custodian. (ii) The securities sold to the transferee continue to be held by the Custodian, who records the transfer on its books. (iii) Minimum sale amount of US\$250,000 per account. b. <u>Sale to a non-U.S. person or an “unknown person”</u>: <ul style="list-style-type: none"> (i) Sale must be an offshore transaction under Regulation S, not pre-arranged with a U.S. person (e.g., regular way sale through the non-U.S. stock exchange, not involving underwritten offering or block trade). (ii) The transferor delivers an exit letter to the Custodian that states that it is selling in an offshore transaction. (iii) The transfer of securities is settled through Euroclear/ Clearstream or a national equivalent.^(f) c. No other transfers permitted. <p><u>2012 Commentary:</u> In cases when there is no Custodian, references to the Custodian above should be read as references to the Issuer. The minimum sale amount does not apply to sales to non-U.S. persons or to “unknown persons.” We understand that sales through a non-U.S. stock exchange would not typically be pre-arranged, so can be expected to be to an unknown person, subject to the discussion in note (e) below.</p>
<i>Transfer restrictions</i>	The offering memorandum contains a description of the transfer restrictions.
<i>Information sources (Bloomberg, Reuters, Telekurs)</i>	<p>The Issuer and the underwriters have to ensure that the screens of <u>each</u> service that is expected to be an important information source for the securities contains all of the Section 3(c)(7) legends that are available for such service.</p> <p><u>2012 Commentary:</u> The obligation on the Issuer and the underwriter is to use reasonable efforts to ensure that legends are available when permitted by applicable law or regulation. We understand that it is generally more common for these services to agree to incorporate legends in the case of debt securities than equity securities.</p>
<i>Tax considerations</i>	Potential disadvantageous treatment for U.S. persons on the sale or disposition of equity securities of a non-U.S. issuer that is a PFIC for U.S. federal income tax purposes. U.S. persons should consult their tax advisors.

- (a) “Offshore transaction” is defined in Rule 902(h) under the Securities Act as an offer or sale of securities where the offer is not made to a person in the United States and either (i) at the time of the buy order the buyer is outside the United States (or the seller reasonably believes that the buyer is outside the United States) or (ii) the transaction is executed through either (a) for purposes of Rule 903, a physical trading floor of an established foreign securities exchange located outside the United States or (b) for purposes of Rule 904, the facilities of a designated offshore securities market (as defined in Rule 902(b) under the Securities Act) and neither the seller nor anyone acting on its behalf knows that the sale has been pre-arranged with a buyer in the United States.

- (b) This may be the case, for example, where the primary trading market is offshore, a significant amount of the secondary trading is expected to involve non-U.S. persons (*see* note (e) below) and, due to prior offerings, upon completion of the offering, the amount of the issuer's securities held by U.S. persons will be lower than 45% of the aggregate number of outstanding securities of the issuer.
- (c) The term generally used in private offerings under Rule 144A is "initial purchasers," however, in order to avoid any confusion, in this article we will refer to these parties as the "underwriters." References to QIB/QPs in this underwriter certificate are to persons that are both Qualified Purchasers ("QPs") for purposes of Section 3(7) and Qualified Institutional Buyers ("QIBs") for purposes of Rule 144A.
- (d) "Primary trading market" is defined in Rule 12h-6 under the Securities Exchange Act of 1934, as amended (the "Exchange Act"). For purposes of the 2008 procedures, this requirement is satisfied whether the "market" includes one or multiple non-U.S. jurisdictions.
- (e) The requirement that there be an expectation that a "significant" amount of secondary trading involving non-U.S. persons is intended to permit the issuer to conform its offering to the factual representations made in the *IFIC/Goodwin Procter* no-action letters cited above. (*See, supra*, note 7). Unless, at the time of issuance, an issuer reasonably expects that a "significant" amount of secondary trading will involve non-U.S. persons, we think it may be more difficult to conclude that (i) secondary market purchases by U.S. purchasers occurred without the direct or indirect involvement of the issuer, as described in those no-action letters, or (ii) in light of the substantial likelihood that a significant percentage of the purchasers in the secondary market would be U.S. persons, such sales would constitute legitimate offshore transactions of the type contemplated by *IFIC*. If facts similar to those set out in *IFIC/Goodwin Procter* are not present, the issuer will need to police every secondary transaction to ensure that unqualified U.S. persons are not acquiring its securities.

The definition of "significant" may depend on the particular transaction and issuer. Relevant factors may include, for example, prior offshore offerings by the same issuer listed offshore, where the size of such prior offerings in the aggregate, is substantially larger than the size of the current offering; the amount of U.S. ownership of the issuer that exists before the offering; the percentage of the issuer's securities that are part of the current offering; U.S. interest in the issuer generally; the number of U.S. purchasers and the percentage of the offering sold into the United States. Because Regulation S under the Securities Act, like the "significant" requirement described above, uses the locus of trading activity to determine the extent of U.S. regulation, it is worth noting that Rule 902(j)(1) of Regulation S states that "substantial U.S. market interest" in a security exists (and the offering of the security is then subject to heightened regulation) when 20% or more of the trading in such security takes place in the United States and less than 55% of the trading takes place in a single country other than the United States. For similar purposes, Rule 12h-6 under the Exchange Act describes the "primary trading market" of a security to be the jurisdiction in which 55% or more of the trading in such security takes place.

- (f) The Custodian delivers the securities through Euroclear/Clearstream or a national equivalent.