MEMORANDUM

MAR 26 1965

To : Abraham Zweriing, Assistant Director
Division of Corporation Finance

From : Edmund P. Shevlin, Attorney

Subject : The legislative and administrative history of the status of foreign securities under the reporting, registration, proxy and insider trading provisions of the Securities Exchange Act.

I Introduction

As part of the general study of this Division presently being conducted to implement the Securities Act Amendments of 1964 with respect to the status of foreign issuers under Section 12(g) of the Securities Exchange Act and the promulgation of rules and forms governing the securities of such issuers and the general review of Rule 3a12-3 and the rules and forms governing foreign issuers under Section 12(b) of the Act, this memorandum is intended to trace in detail the legislative history and commission action undertaken with respect to the securities of foreign governments and private foreign corporations listed and traded on the stock exchanges

The legislative history has been traced by a review of the basic studies which were the preamble to the passage of the Securities Exchange Act (i.e. the Roper Committee report, the Pecora investigation, and the Twentieth Century Fund study) as well as a detailed study of

the entire Congressional record available, including the Senate and House hearings and reports, the floor debates, the various bills introduced, the committee prints and drafts, and the drafts and papers of some of the individuals working with Mr. Landis who at the request of Senator Fletcher (Chairman of the Senate Banking and Currency Committee) prepared initial and interim drafts of this legislation.

The major portion of the memorandum concerns the history of Commission action taken and the reasoning behind the various rules and forms affecting foreign listed securities as presently in effect. For purposes of clarity, this part has been divided into separate parts covering (1) registration, (2) Rule 3a12-3, (3) Annual Reports and periodic reports. The sources checked include all commission minutes and supporting papers; all commission files available concerned with the rules and forms adopted or prepared in connection with foreign securities; the general files covering the two major stock exchanges; the general files covering foreign securities; miscellaneous other files suggested by the records and service personnel; legal periodicals and texts; speeches of commission officials; internal memorandum of the divisions and offices of the Commission; and newspaper comments concerning the discussions and promulgation by the Commission of the rules and forms governing foreign securities.

There are many gaps in the material, the most significant of which is the lack of material or memorandum of the Commission personnel who drafted the rules and forms. These have either been lost or are otherwise misplaced. In any event, the sources available do provide a fairly clear picture of the basic reasons, facts and practical considerations given in connection with the rules and forms adopted.

In connection with the various forms adopted, an item by item evaluation has not been made because of the time factor (which has already presented some problem); however, there is available enough source material upon which to make such a study if it is considered important. The more important items and controversial points are covered in this memorandum.

It should be noted that the sources are almost entirely dated within the first three years of the Commission's history. The lapse of time with the intendant changes in market conditions, customs of financial public relations, the identity and types of investors and issuers, and political and economic conditions, laws and financial practices render some or all of the premises for these rules and forms subject to review at this time. In addition, the application of much of the reasoning employed as a basis for these rules and forms have questionable utility when applied to securities traded over-the-counter. While the major purpose of this memorandum is factual and historical rather than analytical in the sense of recommending present action, it does include at the end some comments, conclusions and suggestions concerning the present view of the Commission as regards this general problem.

II Legislative History

A. Background

The Securities Exchange Act of 1934 resulted from several studies conducted more or less simultaneously during 1933 and the beginning of 1934.

One of these studies was instigated at the request of President Roosevelt and was conducted by a committee appointed by Secretary of Commerce Daniel C. Roper under the Chairmanship of John Dickerson and included in its membership J. M Landis. The report of this committee, called the "Dickerson report" was transmitted to Congress in January 1934. Although the fundamental recommendations of the report were adopted in the Exchange Act, it did not study the area of foreign securities. However, since the report recommended that the form and content of stock exchange rules governing matters such as listing requirements and corporate reports should not be set forth in detail but should be left to be prescribed by an administrative agency in accordance with bored standards of the statute, it is of some probative value in view of the limited extent of congressional expression in the area of foreign securities.

The most extensive investigation was conducted by the Senate Committee on Banking and Currency pursuant to S. Res 84, 72d Congress and S. Res 56 and S. Res 97, 73d Congress (See Senate Report No. 1455, 73d Cong, 2d Sess, (1934). Public hearings began in April 1932 and were conducted on and

> The Commission may make such exemptions to the regulations promulgated pursuant to this Section as it may deem necessary in order to avoid an unreasonable burden upon any class of issuers which are not incorporated under the laws of the United States or of any State or Territory thereof and have their principal places of business in a foreign country.

> The Commission may make such exemptions to the regulations promulgated pursuant to this Section as it may deem necessary in order to avoid, upon any class of issuers which are not incorporated under the laws of the United States or of any State or Territory thereof and have their principal places of business in a foreign country, any burdens which in the opinion of the Commission or unreasonable in view of the condition in such foreign country.

The legislative files do not indicate why this provision was omitted from the bill as initially introduced. However, it is evident that the staff drafing the bill was aware of the possible necessity that some procedure be made available to foreign issuers of listed securities to lessen the impact of the pending legislation.

A subsequent draft dated March 3, 1934, by Benjamin V. Cohen, one of the persons working on this legislation at the request of Mr. Landis, included the definition of "exempt securities" in the following manner:

> The term "exempted security or exempted securities" shall include securities which are direct obligation of or obligation guaranteed as to principal or interest by the United States and such other securities as the Commission may by such rules and regulations as it deems necessary or appropriate in the public interest or for the protection of investor exempt from the operation of this Act or any part thereof either unconditionally or upon specified terms and conditions.

On March 19, 1934, Mr. Rayburn introduced a substitute bill (H.R. 8720) containing a similar provision:

> ". . . the term "exempted security" or "exempted securities" should include securities which are direct obligations of or obligations guaranteed as to principal or interest by the United States,

> such securities issued or guaranteed by corporations in which the United States has a direct or indirect interest as shall be designated for exemption by the Secretary of the Treasury, and such other securities and instruments as the Commission may by rules and regulations as it deems necessary or appropriate in the public interest or for the protection of investors, either unconditionally or upon specified terms and conditions or for stated periods, exempt from the operation of any one or more provisions of this Act which by their terms are inapplicable to an "exempted security" or to "exempted securities".

On March 20, 1934, in the hearings on the exchange act bill which had been in process for three weeks before the House Interstate and Commerce Committee, Mr. Thomas B. Corcoran, who with Mr. Benjamin V. Cohen and others had drafted the substitute bill, was asked to explain the differences between the original bill and the new bill. With respect to the definition of "exempted securities" the following statements were made:

> Mr. Mapes, Mr. Corcoran, I did not have an opportunity to look at this bill until we convened this morning, that is the new draft I notice throughout this section it speaks of listed securities, and also "other than exempted securities".
>
> Mr. Corcoran. I know what you are thinking, sir. If you will turn over to _____
>
> Mr. Mapes. That seems to say that an exempted security is a present obligation of the United States Government and some of the agencies of the government, "and such other securities and instruments as the Commission may by such rules and regulations as it deems necessary or appropriate in the public interest or for the protection of investors".
>
> Mr Corcoran. And for specific sections of the Act, or for the whole act, as the Commission thereby insist.
>
> Mr. Mapes. I was wondering what you and the others responsible for the draft had in mind that would include How general in the class of exempted securities to be, or how limited is it to be?

Mr. Corcoran. It is not possible at this time, sir, to tell just what classes of securities and what grades within those classes the Commission would find wise to exempt. The difficulty of exempting securities by classes, sir, is that at the present time there is so tremendous a variety of gradations within securities of different classes.

* * * * *

Mr. Mapes. Do you think that the Commission would exclude all securities of all private corporations from this exemption clause?

Mr. Corcoran. I cannot answer that question, sir. The purpose of leaving the exemption provision as broad as it has been left, is to leave the matter to the Commission to handle it as needs develop in a very flexible way, without tying the Commission's hands by too many specifications in the bill. I cannot answer the question you have put to me, sir, as to what the action of the Commission would be in a particular case, because the action would be determined by the specific circumstances under which the case came to the Commission in good time.

Mr. Mapes. I am wondering if the drafters of the bill thought that those all ought to be excluded.

Mr. Corcoran. No. We had no feeling one way or the other upon it sir. We simply felt that the only safe complete exemption you could make at the present time was United States Government. Then as necessities arose and the flexibility and the workibility of the act required, the Commission could make such other exemption as it chose.

Mr. Mapes. You would leave the matter entirely with the discretion of the Commission without any yard stick to guide it?

Mr. Corcoran. We have given it one yard stick, sir, in Government securities.

Mr. Mapes. But outside of that?

Mr. Corcoran. Outside of that, sir, the securities situation at the present time is so jumbled up that it is not advisable to give specific directions as to exemption. The municipal situation is one indication of that.

Mr. Mapes. But you have no idea of restricting the Commission in its judgment to Government or [illegible]

Mr Corcoran (interposing). No

Mr. Mapes(continuing) on municipal bonds?

Mr. Corcoran. No. This is a loop hole to let the Commission give the act such lubrication as it needs to avoid its application to situations where its application is unnecessary in the public interest. (House Committee on Interstate and Foreign Commerce, Stock Exchange Regulation, Hearings on H.R. 7852 and H.R. 8720, 73d Cong. 2d Sess (1934) pp 684-686)

Specific mention of foreign securities was made only in a few places during the course of the Senate and House hearings on the Stock exchange bills and in all cases the subject was brought forth by representatives of the New York Stock and Curb exchanges. Generally, the observation was made that foreign issuers would be unwilling to register their securities under the act and thereby cause American investors to lose the facilities of the exchange markets.

In the Senate hearings, Mr. Frank Altschul, Chairman of the Committee on Stock List, New York Stock Exchange, testified:

> ... I should point out that many types of Securities are now listed for which it would appear that under no circumstances is it likely that a registration statement would be filed. The removal from the list of these securities already outstanding in the hands of investors under such a retroactive law would, in many instances, affect the interests of investors most unfavorably . . . it is difficult to see why foreign governments or foreign corporations which have issued bonds so many years ago and which have no present need of the American Capitol market should apply for registration.
>
> The amount of such securities that might be forced off the list through the operation of the provision of this bill as now drawn is, as you know, very considerable (Senate Banking and Currency Committee, Stock Exchange Practices, Hearings, 73d Cong. 2d Sess (1934) Part 15 pp 6683-84)

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Mr. Pettengill Do you think the American public is entitled to a little better information for its protection than it has had with reference to dealing in foreign bonds and stock?

Mr. Grubb(President Curb Exchange). Well, we have gone into this very thoroughly, and I think you will see at the bottom of these unlisted, our requirements for unlisted trading, the points that you bring up with reference to the foreign bonds and securities these stocks, I believe, are all formally listed on all foreign exchanges.

Mr. Pettengill Well, I do not want to interupt you further except that your argument is that you should do nothing with reference to foreign stocks or bonds. But my observation is that the American public has taken a sufficient burning in those matters, and ought not to have to again, and are entitled to a certain amount of honest information and protection which ought to be given them. I cannot yield to you on the point that they are not entitled to any protection. (House Hearings, p 371)

On April 25, 1934, Mr. Rayburn introduced another substitute bill (H.R. 9323) and on April 27 submitted the committees report recommending passage of the bill (H R. Rept 1383, 73d Cong 2d Sess). Section 3(a)(12) of this bill was identical to Section 3(a)(12) as eventually passed by both houses and signed into law. The committee report in commenting on this section stated:

A large number of the provisions in the act expressly exclude "exempted securities." Thus the Commission is able to remove from the operation of one or more of these provisions any securities as to which it deems them inappropriate. It may attach such conditions as it deems desirable. The Commission may therefore make appropriate exemption for the protection of the holders of defaulted securities and foreign securities if the issuers refuse to register. (p.17)

In commenting generally on the discretion left to the Commission, the report stated:

> ... a field where practices constantly vary and where practices ... for some purposes may well be turned to illegal ... equivalent means, broad discretionary powers in the administrative agency have been found practically essential, despite the desire of the Committee to limit the discretion of the administrative agencies so far as compatible with workable legislation. (p 6-7)

On April 17, Senator Fletcher introduced a substitute bill (S 3420) and on April 20 submitted the committee report recommending passage of the bill (Sen Rept No. 792, 73d Cong. 2d Sess). This bill as reported contained Section 3(a)(12) in form identical to H.R. 9323. The report contains language similar to the house report indicating the Commission's broad discretionary authority to exempt securities from one or more provisions of the act and to require in reports only such information as is necessary or appropriate in the public interest or to protect investors, but makes no mention specifically of foreign securities (p. 5,10)

The bill was debated by the House and amended in certain respects but no references or changes were made in connection with foreign securities. The House passed the bill on May 4.

In the Senate, an amendment to Section 3(a)(12) was introduced by Senator Fletcher and the bill as passed by the Senate on May 12 contained an addition to Section 3(a)(12) which would have included in the definition of "exempted securities" the following category:

> Securities which are direct obligations of a foreign government and which on the date of the enactment of this act are listed on any exchange within or subject to the jurisdiction of the United States.

The following exerpt from the congressional record describes the reasoning for such amendment and a description of Senator Fletcher's idea of Commission latitude under Section 3(a)(12):

> Mr. Fletcher. Mr. President, the amendment simply includes, in the list of exempted securities, on page 7, obligations of foreign governments which are now listed on the exchanges of the United States. I think that the amendment is in the interest of American bond holders. It does not apply to new issues at all, but to issues now listed and held by American bond holders. There is no way of getting the information required as to these securities if they are not exempted except by application to a foreign government. That may bring on some feeling and misunderstanding. There is no way of compelling them to furnish the information, and therefore we would not get it anyway. So I think the adoption of the amendment would be in the interest of American bond holders. They will not be obliged to go through all this machinery in connection with the disposition of such securities which they already hold, but may sell and distribute them without giving information required of other security holders.
>
> I may add that this amendment is suggested by the State Department, which has recommended its adoption. So I offer the amendment.
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> * * * * *
>
> Mr. Hastings. I should like to inquire whether, in addition to the group which the Senator, as I understand his amendment, desires to exempt, another group should not be exempted? My understanding is that there are other securities that have been listed on the stock exchanges for many years, as to which - I do not know whether the corporation have gone out of existance or just what has happened - in many instances there are no persons left who can possibly make the reports that are necessary under this proposed act. I wonder if it has been brought to the Senator's attention or whether he has given any consideration to it?
>
> Mr. Fletcher. That is a matter the Commission will have discretion to deal with as circumstances may require. That is a matter entirely with the Commission, and I do not think there will be any difficulty about it at all.

Mr Hastings. Is the Senator sure that under this bill the Commission has that right?

Mr Fletcher. Absolutely, there is no question about it. (Congressional Record, 73d Cong, 2d Sess., Vol 78p 8571)

In conference, this foreign government exemption was deleted but neither conference report sheds any light on the reason for excluding it. (H.R. Rept 1838, 73d Cong. 2d Sess; Senate Document No. 185, 73d Cong, 2d Sess.) Section 3(a)(12) as recommended by the House and Senate Committee was enacted into the Exchange Act (Public Law No. 291, 73d Cong, 2d Sess) and has remained intact to the present date(except for minor revisions contained in the Breton Woods Act and Inter-American Development Act).

B. Conclusions

From the detailed examination made of the studies which formed the basis of the Exchange Act, the congressional hearings conducted and the other legislative history available, it is evident that the framers of the Act were aware of the problems and conflicts involved in the regulation of foreign securities listed or traded on the stock exchanges. The enforcement problems, the political implications, and the effect of loss of the exchange market on holders of foreign securities were considered in the various hearings and reports. However, the Congress did not attempt to make any definite or concise study of these problems and it is clear that the legislators made no decisions concerning the status of these securities under the Act but rather left the responsibility for study of the problems involved and the action to be taken up to the complete discretion of the Commission.

It is ... that the status of foreign securities was left ... due of the ... This is emphasized by the fact that the conference committee ... provision exempting securities of foreign government ... with the other areas of proposed exempt classes of securities ... certs and municipal bonds, it is evident that the ... intended to have broad authority to decide which course ... best solve the conflicts involved in the foreign area.

The Commission's handling of the problem will be the topic of the ... of this memorandum. It is apparent that Congress has not been ... with the solutions of the Commission since there has been no ... to revise the statute or to over rule the Commission regulations ... this area.

Several letters of comment received in response to the proposed amendment of Rule 3e12-3 announced in Release 34-6912 contended that it was not the intent of Congress in enacting the exchange act to subject foreign registrants to the proxy or insider trading regulation and that the administrative exclusion of foreign countries from such provision was in fact contemplated by Congress (Association of the Bar of the City of New York; Baker, Botts, Shepherd & Coates (Houston); Sullivan & Cromwell). The basis of these arguments appear to be the assumption that the legislators recognize the differences in corporate organizations and practices between this country and others as well as the inability of this country to enforce such provisions and the undesireability of extending the concepts of U S corporate practices to companies whose business operations and owners are essentially foreign. These letters did not cite any citation of authority for such contention. Although there is some validity to the fact that Congress did recognize these problems, it is also clear that it was intended to protect American investors in foreign securities to the greatest extent practicable and that the Commission was ...

III - Registration of Foreign Securities

In its first action formulating rules under the Securities Exchange Act, the newly organized Commission indicated that foreign governments and private foreign issuers would not be exempted from all the regulatory provisions of the Act. However, the Commission did recognize the enforcement problems involved and in an effort intended not to disrupt the market for the time being provided that foreign securities could be temporarily registered under the Act on application of the Exchange on which the securities were traded. Rule JE-2, adopted August 13, 1934 in Securities Exchange Act Release No. 1, permitted foreign governments and political subdivision thereof and foreign corporations the securities of which were listed on an exchange at the time the Act became effective (generally October 1, 1934) to have their securities temporarily registered, not on application of the issuer as in the case of most other listed securities, but on application of the exchange. The release stated that "this provision . . . is intended for the protection of investors in such securities the market for which might be seriously affected unless registration facilities were afforded these classes of securities". The New York Times of August 14, 1934 (R30-8) in reporting the adoption of this rule quoted Chairman Kennedy:

> Regarding foreign securities, Mr. Kennedy said that the Commission was disinclined to apply strict regulations to Securities which "have no father or mother". There might be, he said, cases where foreign corporations did not wish to regard all the new rules, and under a strict interpretation those would have to be stricken from the lists.
>
> "But most of these are held by Americans and they would suffer", he added, "So we have provided a rule whereby the exchanges can permit them to register".

Even though this rule indicated that the policy of the Commission would be to obtain permanent registration by the foreign issuers involved in the course of time, the rule was well received. The New York Times (August 19, Part II, p 7-2), in praising the rules allowing the exchange to register stated that "In the case of foreign governments, however, it is not generally expected that many registration statements will be forthcoming, and that the initiative of the exchanges will be required".

Temporary registration was to be adequate until June 30, 1935 (Rule JE-5) and the issuers and officers, directors and 10% owners were exempt from the reporting and insider trading rules during the period of temporary exemption (Rule JE3). By September 22, 1934, the cut-off date for applications under the rules (Rule JE4), the New York Stock Exchange filed on behalf of 99 foreign governments and 50 foreign private issuers and the Curb exchange filed on behalf of nine foreign private issuers. These constituted the bulk of foreign securities listed. (New York Times, September 22, 1934, p 21-1).

In respect to American Depositary Receipts (ADR), the Commission permitted registration when filed by the issuer(that is, the depositor) or by the exchange (Minute Book I p 80, September 25, 1934).

With the decision that foreign issuers should be required to comply with the provision of the Act to some practical extent apperently firm, some consideration of the nature and amount of information desired was given but not until the early part of 1935 was any serious effort made to resolve these questions (See memo, Kline to Burns, November 28, 1934

discussing foreign government bonds; and Commission Minutes of December 18, 1934, Bk I, p 327, where the registration of foreign securities was discussed but action postponed).

The New York Stock Exchange urged that permanent registration for foreign securities be permitted without any action on the part of the issuers. In a letter dated January 28, 1935 (File No. 128-4) Mr. J.B.M. Hoxsey, Executive Assistant to the Committee on Stock List expressed the opinion that a great number of companies for which temporary registration had been secured would permit their securities to become delisted rather than to file an application which would subject them to additional obligation. In the example cited in his letter, Mr. Hoxsey felt that the company, which was in the process of repurchasing some of the bonds, was desirous of having the bonds delisted since such action would probably lower the market price and enable them to repurchase at lower cost. Mr. Hoxsey conceded that any exceptions which were made to issuers of Securities temporarily registered need not be made to new issues which would in the future seek to be listed and registered.

On February 7, 1934, Harold Neff, Assistant General Counsel of the Commission (later Director of the Division of Rules and Forms) and the individual primarily responsible for developing the rules and forms for foreign issuers, was instructed by the Commission to discuss foreign registration with the State Department and the New York Stock Exchange (Minute Bk I p 430). Apparently the first major decision in the foreign

area concerned the different treatment to be accorded the securities of North American and Caribbean private corporations as opposed to government bonds and securities of other than North American & Caribbean companies. The reasons for this distinction is set forth in several places in the files. In a proposed memorandum to the State Department dated March 29, 1935, Staff Attorney Ganson Purcell stated:

> It is felt that the distinction is justified owing to the wide dissimilarity between the laws of incorporation, corporate financial structures, corporate management and general financial and accounting practices adopted and followed on the North American continent and in the neighboring Caribbean countries and those followed in other countries of the world, principally European and South American countries and the Japanese Empire.
>
> It is felt that this division will impose very slight hardship on North American and Caribbean Corporations, in as much as the only distinction made in result would be that seventeen Canadian, four Mexican and three Cuban corporations would be required to file application for registration of their bond issuers on the Commission's Form 10, while ninety seven other companies, principally European, South American and Japanese, would have the initial choice between Forms 7 and 10, and would ultimately be provided with a separate form for registration, the requirements of which it is contemplated will be less comprehensive than those of Form 10, though perhaps more so than those of Form 7.

In a letter to the State Department dated March 29, 1935 (File No. 135-1) Harold Neff cited the following reasons supporting the particular treatment of North American and Caribbean corporations:

> . . . proximity to this country and the greater facility therefore in the point of time of furnishing the required information, the fact that these corporations in general have corporate and accounting practices that more nearly accord with American practices than those of other countries, and particularly as to Canada the fact that the basic law governing corporations is identical with our own. As to Canada also, there is the further consideration of the continental inter-flow of capital and other business relations, so that it is hardly possible to treat Canadian corporations different from our own.

explanation of the basis for this distinction was
ad- in a letter from Chairman Douglas to a Canadian
of , 1938, file No. 135-4, drafted by N. Naffi. The
of this letter follow:

suggested that the Commission reconsider the determina-
made, to the end that Canadian private issuers be
in the same manner as the issuers of non-North American
The Commission has carefully considered your request
that the relations should remain as they presently stand.
reaching this determination, the Commission has taken into
consideration not only the factors which originally operated but
also the experience which it has had with the rules in question.
These have now been in operation for approximately four years and
the experience gained during that period of time appears to justify
the original treatment.

It occurred to me that perhaps you would like to have stated the considerations which have led the Commission to the conclusion above mentioned. I shall try to summarize them in a brief and informal manner.

Upon the adoption of the Securities Exchange Act the Commission was confronted with the task of fixing/by rule and regulation the information to be furnished concerning the various issues on the several securities exchanges. The Act specified that the Commission should have power to classify the issuers and within the several classifications to determine the respective information to be furnished. The aim of the legislation and the regulations accepted was to obtain such information as would aid the investor to determine whether to buy or to sell a security, and, at the same time, would be within the reasonable possibility of the issuer to furnish.

A classification of issuers was requisite due to the diversity of underlying investment facts concerning the several categories. Indeed, this classification was carried as to domestic issuers, to the point of having twelve distinct regulations, each with varying provisions. For example, railroad companies, insurance companies, investment companies, and companies recently reorganized had special regulations made applicable to them in view of the disparity existing between those classes and the general category of commercial companies.

At the time of the entry into effect of the statute there was listed on the several exchanges a large amount of securities of foreign private issuers. These issuers were of countries in all parts of the world; for example, China, Japan, Argentina and Germany. They comprised mortgage companies, railroad companies, public utility companies - indeed, the whole gamut of private enterprise. The Commission came to the conclusion that the general category of foreign issuers should be in principle divided into two classes, those in North America and Cuba and those in the rest of the world. As to the first category there were made applicable the same requirements and classifications as in the case of domestic issuers, while as to the rest special forms were adopted. The considerations leading to this treatment were as set forth below.

In the first place, the distinction was based upon what were conceived to be very important differences in fundamental economic relationships. I need not discuss in detail the nature and extent of the commercial relationships among the countries on the North American continent, except to note that they are of course, more extensive and more important than the relationships of the United States to the other foreign countries. One significant consequence is a very substantial commingling and interchange of trade and capital among these countries. Again, the United Stated capital market for the securities of North American issuers was found to be of a different nature from the market for securities of other foreign private issuers as a class. Our survey indicates in that regard, for example, that as to the listed stock of foreign North American issuers the United States market tends to be a more active and primary one, while as to those of other foreign issuers, a secondary one. This is supported by the fact that the relative volume of trading on United States exchanges in the stock of North American issuers is very much greater than the trading in the stock of issuers of other foreign companies.

Of great significance also is the degree of similarity in accounting methods and business practices and techniques which has developed over the long period of commercial intercourse between the United States and the other North American countries and Cuba. In view of this similarity, the requirements applicable to domestic issuers have proved almost equally appropriate for the North American issuers and no practical difficulties of any consequence have resulted from the application of a single act of requirements for all North American companies. Moreover, to the extent that business practices differ, the territorial juxtaposition of the countries and the consequent familiarity of the various issuers with our language and practices have enabled them to present financial statements and other data in a form similar to that required of domestic issuers.

[illegible] it was felt that the application of these [illegible] to non-North American issuers could create [illegible] difficulties of very considerable magnitude. Notwithstanding [illegible] very substantial differences among the members of the group they present, as a class, certain common problems. In contrast to the North American issuers, most of the other foreign [illegible] as a group, differ in considerable degree from domestic [illegible] in their business practices and accounting procedures [illegible] that the use of the forms appropriate for domestic and [illegible] North American companies would present serious difficulties of application and interpretation. Furthermore, as to issuers organized in other than North American countries, the economic position of the country in which the issuer does its business has played a very much more important role, generally speaking, than in the case of North American issuers. Indeed, most if not practically all of the defaults which have occurred as to the former class have been due to transfer difficulties resulting in exchange restrictions; for example, the millions of bonds issued by German private issuers. In consequence, it was felt that this class of issuers should be treated in a manner distinct from that of the issuers as to which, as a class, the particular problem of transfer did not seem to be present in such an acute degree. For this reason special items relating to the transfer problem were introduced in the forms for non-North American issuers, and the conversion into dollars of the amounts shown in the financial statements was prohibited.

Experience has demonstrated that the classification in question is reasonably justified. As to North American issuers there has been no difficulty in meeting the requirements and the information furnished has been pertinent and necessary for investment analysis. It would seem since the issuers of Canada, Mexico, Cuba and the other North American countries are placed in the same position as our own domestic issuers, that there is no discrimination against them, even though because of the transfer problem and other such factors leaders of countries more remote are asked to meet other requirements drawn in view of the particular circumstances of the category involved. There must be likewise taken into consideration that failure to have the same requirements for foreign North American issuers as for our own domestic ones might cause our nationals to incorporate in those countries for the purpose of evasion. This consideration of course does not play in like degree for other countries because of the difficulties of such incorporation arising from the distance and other factors of a similar nature.

> I hope you will agree that the above considerations show that the Commission, in its requirements, is seeking solely to perform its duty of obtaining for the American investor the information requisite for the several categories of issuers in the light of their respective circumstances.

On April 4, 1935, the Commission amended Form 10 (Rel 34-158) to provide that corporate bonds as well as stocks of North American and Cuban issuers were required to use this form. In its Class B Release, it was stated.

> It is the opinion of the Commission that the registration requirements for Cuban and other North American corporations who seek registration on American exchanges ought to be similar to those governing domestic corporations. The large and continued interflow of business between the United States and its neighboring countries makes uniformity of registration requirements desireable. There is sufficient similarity between the corporate and accounting practices of the United States and those of other North American countries to make uniform registration requirements practicable. Furthermore, corporations in these neighboring countries are close enough to the United States to make the filing of the required information feasible within the required time.

The release also stated that forms for the registration of the corporate banks of issuers in other parts of the world were in preparation and that ample time would be granted for the filing of statements.

A draft of Form 18 for permanent registration of foreign government bonds was prepared and on April 23, 1935 it was sent to the exchanges and other interested parties. With several exceptions which will be discussed below, this draft was substantially the same as Form 18 as in effect today. The New York Stock Exchange, on receipt of the proposed form, again insisted that anything but the most simple form would drive the listed foreign government bonds off the exchange and suggested that any detailed registration form should be reserved for future listings. The pertinent part of a letter from Mr. Hoxsey to Judge Burns dated April 25, 1935 follows:

Considered as a form for the registration of future issues not now temporarily registered, I think that this is admirable, although I am making a few minor suggestions which it appears to me will improve it somewhat. Considered as a form for the permanent registration of securities of foreign governments and political subdivisions, I fear that it would go far toward preventing the registration of such securities, and that the information desired is not necessary and can be supplied as of a comparatively recent date almost in its entirety from statistical manuals by the exchanges

I therefore urge Mr. Neff to confine the requirements for permanent registration of existing registered securities to the name of the registrant, the title of each issue registered, and a statement for each issue, outlining briefly the provisions of any law, decree or other administrative acts by virtue of which the security is not being serviced according to its original terms, together with two Exhibits "B" and "D", of the draft sent me.

While I am sending this to Mr. Neff as a draftsman of the form, whose duty, I assume, is to follow instructions as to getting out some Form for this purpose, I feel that to you, as General Counsel of the Commission, I may raise a query as to whether any registration application or registration statement is really essential for securities of this class which are already listed and registered. No new issues of such securities have, to the best of my knowledge and belief, been listed in a long time. The securities which are out are seasoned and may be assumed to have found their level for the time being in relation ot other securities. Foreign governments, states and municipalities move very slowly, and it would seem to me that unless there be some intent in the law which I have not apprehended, nothing will be lost by considering these as exempt.

If there is some reason why this should not be done, then I urge the acceptance of the suggestion that the form of the registration application be as simple as is consistent with the language of registration as set forth in the opening sentence of Section 12(b).

I presume the Commission has in mind that, in any event, it will be necessary to give exemption for a number of months to securities of this type, to avoid having go off the board simply because the issuers can not act fast enough.

Although Mr. Neff in response indicated that a form for new listings would be considered, this was never done (letter April 26, 1935, File No. 135-1). Mr. Hoxsey's suggestion for a form for new listings was substantially the same as the Exchanges requirement for listing applications, and it is interesting to note that Form 18 as drafted and adopted did not require as much information as the New York Stock Exchange listing application as then in effect:

COMMITTEE ON STOCK LIST
NEW YORK STOCK EXCHANGE

February 2, 1925.

FOREIGN GOVERNMENT BONDS

Data required in addition to Regular Requirements in connection with proposed Listings.

1 (a) Statement of debt, internal and external, and currency in which it is to be paid; statement of external debt to be computed in dollars.
(b) Contingent and actual liabilities, and priority.
(c) Revenue or assets pledged, if any, under present and other loans, and nature of administration.
(d) Summary of such revenue receipts and income from such assets for preceding five years, stated in dollars, if available.
(e) Status of the law under which said revenue or assets are pledged.

2 Past debt record with respect to:
(a) Defaults;
(b) Scaling down interest payments;
(c) Suspending, sinking fund payments.

3 Where listed.

4 Currency in which interest and principal are to be paid.

5 Tax liability and exemption.

6 Statement of governmental income and expenditure for whatever account in the preceding five years.

7 Statement of the sums required, in dollars, to meet foreign interest charges in each of the five preceding years.

8 Statement in terms of weight and dollars (converted) of merchandise imports and exports in each of the preceding five years.

9 Statement of covenants, if any, with respect to payment of principal and interest of bonds dependent upon state of Peace or War and nationality of holder.

As a result of comments received on the draft of Form 18, certain changes were made as follows:

1. Instruction 4 was added to permit consolidated financial information where several obligors exist.

2. Instruction 5 was added permitting information as of the latest fiscal year available rather than a strict requirement for information as to the last fiscal year.

3. Item 3(b) was added requiring the basis for determination of currency conversion where the bonds could be paid in optional currencies.

4. Item 3(f) was added requiring a statement of defaults other than by law, decree or administrative action.

5. Item 3(g) was added requiring a brief outline of the terms of any guarantee.

6. Item 11 was modified to require the weight of imports and exports only when available.

Form 18 was adopted on July 5, 1935 in Release 34-305 but the release did not contain any discussion of the form, only a brief description. The Form has been amended on two occasions. On September 28, 1935, after it became evident that a governmental body or political subdivision was sometimes very difficult to distinguish from other public corporations,

the form was amended to permit those registrants whose status was not clear the option to file on Form 19 or Form 21. The release (34-379, Class B) stated:

> The amendment was found to be necessary because of the complex situations presented under various foreign laws. In certain instances it is difficult to determine whether a particular issuer is or is not a political subdivision. To obviate that difficulty such issuers are given the option to file on Form 21.

It was amended in 1940 to permit the incorporation of a Securities Act prospectus in lieu of the regularly required items (Release 34-3558, Instruction 7).

The requirement for permanent registration for all foreign securities temporarily registered (except those of North American or Cuban private corporations) was delayed until December 31, 1935 in view of the delays anticipated in promulgating the forms and the time required to prepare registration statements (Release 34-222, May 9, 1935).

A detailed analysis of the items of Forms 19, 20 and 21 appears to be impossible because of the absence of information in the files. Drafts of these forms were made in April and again in June of 1935, and it is indicated that substantial changes from the drafts are contained in the forms as adopted. However, copies of these early drafts cannot be located. A number of letters of comment are contained in File No. 120-31 but they are difficult to decipher. These forms were adopted on July 15, 1935 in Releases 34-323, 34-324 and 34-325, respectively. The combined Class B release in describing the important features of the forms stated:

> An endeavor has been made to adapt the requirements for domestic issuers to the peculiar circumstances of foreign issuers. In view of the disparity between the laws and

practices existing in the several countries it was necessary to introduce great flexibility in the requirements.

In order to obtain greater simplicity, separate forms have been established for bonds and shares.

In the form for bonds, the issuer is asked to give, among other matters: a break-down of funded debt; a description of the security to be registered similar to that required by Form 10; a statement as to whether any exchange control has been established in the issuer's country, and a brief outline of any law or decree determining the extent to which the security may be serviced. As to financial statements, the issuer is asked to furnish, in addition to its own statements those for significant subsidiaries.

The form for American Certificates is similar in certain respects to the form for Voting Trust Certificates. It is divided into two parts: one, concerning the American Certificates; the other, the underlying securities.

The forms as originally adopted are still in effect. (Form 21 was amended as noted previously to make it optional for certain public corporations, and Form 19 was amended in 1939 to refer to the non-disclosure provisions of Section 24(b)).

With respect to the general problem of registration forms for foreign issuers, Mr. Neff made the following comments in a later law review article (See 51 Harvard Law Review 1354, 1366):

The general class of foreign issuers having securities listed stood apart from the domestic issuers. These securities comprised the bonds of foreign governments and political subdivisions, the bonds of private corporate issuers, and, to a very much more limited degree, shares of certain foreign corporations. A great number of the bonds were in default, in part because of the break-down of foreign trade and the inability of obtaining foreign exchange. As a result a form was created for foreign governments and political subdivisions directed essentially to obtaining a statement of the internal and external funded and floating indebtedness of the registrant; a description of the terms of the security registered, and a statement concerning any default thereon and the terms

> of any subsequent arrangement; the receipts and expenditures of the registrant; the note issue and gold reserves of its central bank of issue; the imports and exports of the registrant; and the balance of international payments. Two forms were adopted for the securities of private issuers of countries other than Cuba and those on the North American continent. Because of the overriding effect of the transfer problem, numerous special provisions were made and, in particular, a statement was required as to any exchange control in the issuer's country and as to any law determining the extent to which the security might be serviced. Further, the financial statements were required to be stated in the opposite foreign currency, thus preventing the illusion of dollar translation.

After the publication of the forms, the Commission set about to convince the foreign issuers that filing was necessary and that the forms were not too onerous. This was done through the Department of State (with respect to government bonds), the Stock Exchanges (through fiscal agents) and statements in the press that the SEC would insist upon registration.

On July 17, 1935, Chairman Kennedy wrote to the Secretary of State (in part) as follows:

> ... It is believed that in view of the instructions contained in the form no difficulties will be encountered in the use of the form.
>
> Form 13 was published July 5, 1935. Such publication has resulted, without doubt, in bringing the form to the attention of the respective issuers. However, the Commission requests that the Department of State transmit through diplomatic channels to foreign governments which are issuers of securities now so listed, information as to the issuance and purpose of the form, and inform them that the Securities and Exchange Commission would be very happy to give any further explanations which might be desired in regard to any question that may arise concerning the registering of the classes of securities covered by the form, or to discuss such questions with any representatives of the interested government.

In response, the State Department forwarded the forms and copies of Kennedy's letter to the diplomatic representatives of the countries involved and instructed State Department representatives to mention the matter with

a view to offering assistance in clarifying procedures and refer to the Commission's offer to discuss any particulars with the countries involved. (See letter August 9, 1935, Stats to Kennedy, File No. 135-1)

The New York Stock Exchange, as the principal exchange for foreign securities, continued to insist that foreign issuers would permit their securities to go off the list rather than file a registration statement and suggested that the forms be rescinded. The Exchange also expressed its view that, particularly as to foreign governments, the State Department, rather than the Exchange, was the proper authority to transmit the requirements to the foreign issuers (see letter dated July 16, 1935, File No. 135-1). The General Counsel responded to those suggestions in a letter dated July 23, 1935 as follows:

> In accordance with my promise, I laid before the Commission the points emphasized by you, Mr. Jackson and Mr. Altschul regarding a possible exemption of those securities, or, if an exemption should be deemed unwise the possibility of the Commission dealing with the foreign governments through the State Department.
>
> After a careful consideration, it was the opinion of the Commission that Form 18, as presently drafted, be retained and that the question of registration be handled in the usual way, viz., through the stock exchanges and the fiscal agents.
>
> As I indicated in my conversation, the Commission feels that there is no great likelihood of a substantial number of foreign issuers failing to file. Consequently, it becomes unnecessary to express any opinion on the three courses of procedure outlined in your communication.
>
> In view of this, I assume that the stock exchanges will take appropriate steps to urge upon the foreign governments directly and through their fiscal agents the desirability of registering on Form 18.

The Exchange persisted (see letter August 2, 1935 to Chairman Kennedy) but to no avail.

The press, in reporting the promulgation of the forms for foreign issuers, apparently aided the Commission's position. On July 21, 1935, the New York Times (Part III, p. 3-4) printed a lengthy column:

> Foreign Issue Data Demanded by SEC. Commission Refuses to Alter Exhaustive New Form 18 for Permanent Registration. Investor Protection Aim. Trading Privileges will be forfeited unless Requirements met by December.
>
> A firm attitude has been taken by the SEC against modification of Form 18 .....
> The new form ... calls for information considered more far reaching than that which has been obtained by the requirements of the New York Stock Exchange under which the securities originally were permitted listing. But it was the SEC's judgment, after hearing argument, that the information sought could and should be furnished by these types of issuers in the best interests of the American investors.
>
> It is apparent now that very sound reasons must be given if any changes are made. Up to this time, so far as can be learned, there has been no protest by a foreign government through the State Department ....
>
> The question asked in the form about which interest chiefly centers is that requiring an accounting of expenses and receipts .... By some it is argued that this question calls for details that some governments would willingly submit, but to the detailing of which others might object. For instance, should the SEC so interpret the meaning ... it might call for disclosure as to expenditures for naval construction, purchases of arms and ammunition and military outlays of all kinds.

The press again affords some indication of the solution to this problem which the Commission's files leave blank. On September 1, 1935, after announcing that the time for filing foreign registration statements had been further extended to March 31, 1936 (see Release No. 34-363, August 30, 1935), the New York Times stated (p. 3-7):

> While comment is being withheld, the belief in government and diplomatic circles now is said to be that after a period of negotiation which will fully inform foreign interests of the requirements, most of the $4,500,000,000 in bonds of foreign governments and the political subdivisions which are listed on the stock exchange will obtain permanent registration.
>
> There are several aspects to the situation from the point of view of the foreign interests, one of them to the effect that refusal to meet the conditions and thus bring about delisting of the bonds would have upon the reception of new issues which, eventually, it is believed, will be marketed in this country by some of the foreign nations.
>
> Stock exchange members ... are anxious that every opportunity be given to the issuers to negotiate and eventually seek registration.
>
> The more general belief in investment circles, it is said, is that a forced delisting of any appreciable amount of the bonds, which would then be thrown into the over-the-counter market, would result in considerable confusion in trading of the securities, and possibly a fall in the quoted prices for some of them, which would be adverse to the interests of U. S. holders.

The files indicate that several South American countries did hold discussions with the Commission and had decided to register. In addition, the New York Stock Exchange changed its approach and began to cooperate, first by sending to fiscal agents of foreign governments and subdivisions a notice pertaining to the registration requirements and then by acting as a clearing house of problem areas encountered in response to inquiries by prospective registrants. Its activities in this area resulted in the modification of Forms 18 and 21 to accomodate certain public corporations whose status as political subdivisions was uncertain, and later, on October 23, 1935, to send a further notice to fiscal agents detailing

certain problem areas encountered by prospective registrants in answering certain items of Form 18. The Commission published this letter as a release (No. 34-401). It was based upon several specific questions presented by the exchange over the period of a month or so and reflects a large amount of concession on the part of the Commission, even though termed as "interpretations of the requirements" given solely for guidance. The release is set forth here in its entirety.

SECURITIES EXCHANGE ACT OF 1934
Release No. 401

The Securities and Exchange Commission announced today that it has authorized the New York Stock Exchange to draw upon certain opinions of the General Counsel to frame a letter of guidance to be sent to Fiscal Agents of foreign governments concerning registration of their securities under the Securities Exchange Act on Form 18. The purpose of the letter was to clarify certain items in the registration form as to which questions had been raised.

The opinions, on which the letter is based, constitute no change in the requirements for registration of these securities. They were given by the General Counsel solely as guidance in the interpretation of the requirements.

The text of the letter sent out by the New York Stock Exchange is attached.

---ooo---

To Fiscal Agents of Foreign Governments
and Political Subdivisions thereof.

Gentlemen:

On September 13, 1935 we advised you of the requirements under the Securities Exchange Act of 1934 for the permanent registration of the presently listed securities of the foreign governments and political subdivisions for whom you act as Fiscal or Paying Agent.

Since this date certain detailed questions with respect to the Form 18 registration statement have been raised by representatives of foreign governments and Fiscal Agents, and have been taken up by the Committee on Stock List with the Securities and Exchange Commission. The Committee feels that it will be

helpful to foreign governments and their Fiscal Agents to be informed of the views of the Commission and its counsel with respect to these matters and transmits to you the following:

(1) The Securities and Exchange Commission has ruled that in replying to Items 5(b) and 6 of Form 18 it will not be necessary for the registrant to include its intergovernmental indebtedness in the Statement of External Funded Debt of a foreign government.

(2) We have been asked whether by filing its application for permanent registration, a foreign government subjects itself to Section 13 of the Act, and if so, to what extent. This section is the one which empowers the Securities and Exchange Commission to require periodical and other reports from the issuers of securities registered on a national securities exchange. No rules have as yet been issued by the Commission as to the information to be so required from issuers of any class, and counsel to the Securities and Exchange Commission refers us, in this connection, to the applicability of Rule JD2(c), which was adopted by the Commission on February 12, 1935, and which reads as follows:

> "If within 30 days after the publication of any rule or regulation which substantially alters or adds to the obligations, or detracts from the rights, of an issuer of a security registered pursuant to application under section 12(b) or (c), or of its officers, directors or security holders or of persons soliciting or giving any proxy or consent or authorization with respect to such security, the issuer shall file with the Commission a request that such registration shall expire and shall accompany such request with a written explanation of the reasons why the publication of such rule or regulation leads the issuer to make such request, such registration shall expire immediately upon receipt of such request or immediately before such rule or regulation becomes effective, whichever date is later. The absence of an express reservation, in an application for registration, of the rights herein granted shall not be deemed a waiver thereof."

(3) Attention is called to Instruction 5 of Form 18 which states that where information is asked as of the close of the last fiscal year and such information is not yet available for such date, it may be furnished as of the close of the latest fiscal year for which it is available. In this connection the

Committee on Stock List is advised by counsel to the Securities and Exchange Commission if, in regard to any item, the statistics of the registrant are prepared on the calendar year rather than on the fiscal year, the information may properly be given as of such calendar year, inasmuch as the Commission has no intention to call for statistics on a time basis different from that previously employed.

(4) The Committee on Stock List is advised by counsel to the Securities and Exchange Commission that in reply to Item 6, the description "United States Dollars" is satisfactory where the text of the bond itself states that they are payable in United States gold dollars.

(5) In connection with Item 8 of Form 18, the Committee on Stock List is advised by counsel to the Securities and Exchange Commission that there are no requirements as to the methods in which the statement of Receipts and Expenditures is to be set up, except that it is asked that they be reasonably itemized and that the Receipts be classified by source and the Expenditures by purpose. All that is asked is that a reasonable statement be given as to the Income and Outgo of the particular registrant, the method to be followed in the presentation of this information to be determined by the method which the registrant has pursued in keeping its accounts. If there is an item of expense or income which the government has not revealed at home for reasons of policy, the detail of such item need not be made in the statement filed. In other words, the amount of breakdown required is not such as to ask for, or penetrate, matters of confidential State policy. If the statement in broad outline makes a reasonable presentation of Income and Outgo of the particular government, and gives the general heads of such Income and Outgo, it would be sufficient to meet the requirements of the form.

Yours very truly,

Executive Assistant.

Although these activities were concentrated only with respect to foreign government and subdivision issues, which were the larger percentage of foreign listed securities, the effect apparently carried over to private securities. The New York Times reported the reaction as follows (October 24, 1935, p. 35-5):

> Wall Street Drops Fear of Wholesale Delisting of Foreign Bonds.
>
> The willingness of the SEC to modify its position concerning permanent registration ... was made known yesterday ... The new and less onerous stand of the SEC is regarded in Wall Street as removing the threat of wholesale delisting ...
>
> It was believed that some might let registration lapse in the hope of repurchasing their obligations at lower prices once they were dropped from the stock list.

The background of Rule AN 18 (Rule 3a12-3), published November 5, 1935, exempting foreign issuers from the proxy and insider trading rules, will be the subject of a separate part of this memorandum. While only slight evidence is contained in the files to substantiate the fact that this rule had a direct or significant effect on the eventual registration of foreign securities, it can be presumed that its promulgation was part of the overall bargaining and give and take procedure in the process of obtaining a desirable result in the foreign registration problem.

Chairman Kennedy, after resigning from the Commission, and while on a vacation trip to Europe, discussed the registration requirements with officials of two countries (France and England) and stated that he was assured they would act favorably (New York Times, September 21, 1935, p. 4-4; November 13, p. 33-4). It is difficult to assess the effect this type of meeting had on the eventual registration of securities of those countries.

Although the registration statements were slow in being filed (New York Times, January 31, 1936, p. 27-4) and the time for filing was further extended to May 15 to accomodate issuers who indicated they were preparing registration statements (Release 34-539, March 20, 1936), a

large percentage of foreign issuers did complete registration. As of June 30, 1936, the following table indicates the securities and issuers registered (2d Annual Report, p. 26-27):

	Securities Registered	Issuers Involved
Form 18	182	86
Form 19	13	11
Form 20	5	3
Form 21	92	55

Thirty-three of 36 foreign governments and 53 of 64 political subdivisions had filed (86%). The percentage of private foreign issues is not clear. However, the New York Times reported (May 16, 1936, p. 24-1; May 17, 1936, XII p. 6-8) that 43 issues of 30 countries and companies were delisted by the New York Stock Exchange and 6 issuers by the Curb. This would indicate that 22 foreign private corporations failed to list their securities. Since 58 issuers did register, this would bring the private company percentage to 58 of 80, or approximately 70%.

IV Exemption from Sections 14 and 16

Foreign securities temporarily registered on applications of the exchanges were exempt from the provisions of Section 16 of the Act so long as their temporary registration was in effect (Rule JE 3). While no provision was made exempting foreign issuers from Section 14, the proxy rules when initially adopted, were not applicable generally until after solicitations for meetings held/January 1, 1936 and by that time Rule AN 18, the forerunner of Rule 3a12-3 had been adopted (See Release No. 34-378).

The suggestion to exempt foreign securities from Sections 14 and 16 was expressed by the New York Stock Exchange on April 25, 1935 in a letter commenting generally on the registration and other provisions of the Exchange Act. In stating that foreign issuers would be reluctant to register, Mr. Hoxsey stated: "It would appear to me well at the time of issuing any form for the registration of the presently registered foreign corporate bonds specifically to exempt them from the provisions of Sections 13, 14 and 16 of the Act, excepting, under Section 13, to require the filing with the Commission of duplicate copies of any statements filed by agreement with the Exchange or submitted to American security holders."

A further suggestion was made in May 1935 and then again in July. While the former letter cannot be located in the files, the later to Chairman Kennedy from Mr. Hoxsey recites the basic arguments presented (File No. 135-1, July 20, 1935):

> On May 20th, I wrote you a letter primarily about Noranda Mines, Ltd., and calling attention to the fact that there seemed to be a certain degree of merit in the contention that there is a disadvantage involved to the corporations of a foreign country in placing these under the operation of the laws of two countries. In this letter, I suggested certain exemptions, or modifications of information to be required under Section 12(b), and I note, in Forms 20 and 21

for foreign corporations, that the suggestions made in regard to these items have substantially been adopted, although it is, of course, quite likely that the Commission had these matters in mind before my letter was written.

In this letter, I suggested that the question might be considered of granting exemptions to all foreign corporations from Section 14 and from Section 16 of the Act, and that any rulings made in the future under Section 13 might give consideration to the differences in practice in foreign countries.

Rule AN 10, released July 15, 1935, exempted securities issued by a national of a foreign North American country or Cuba from the operation of Section 12(a) of the Act until September 13th, and it occurs to me that this may have been done for the purpose of permitting further consideration of the matter of granting permanent exemptions to foreign nationals from Sections 14 and 16 of the Act.

We have today framed the letters to foreign corporations, their Fiscal Agents, Paying Agents, Depositors, and Depositaries, transmitting forms 19, 20 and 21. It occurs to me that if it is, in fact, the intention of the Commission to grant exemptions to foreign nationals from the provisions of Section 14 and 16 of the Act, it would be very helpful if that action could be taken in time to transmit it to our foreign listed corporations prior to their consideration of the act of registration.

This is because it seems likely that any regulations which may be issued under Section 14 may conflict with the laws of one or more foreign countries relevant thereto, thus placing registrants in an impossible position, and it is scarcely conceivable that foreign directors of foreign corporations would file reports required by the rules made under Section 16 because of the apparent lack of any effective enforcement machinary. If this be true, the only report so filed would be from such directors of foreign countries as might be American citizens, and partial reports of this sort would be misleading and harmful, rather than helpful.

I am, however, writing this letter primarily for the purpose of suggesting the advisability of quick action on this matter, if any action at all is to be taken by the Commission, rather than for the purpose of urging any more strongly than may be fitting any particular course of action. The Commission is, of course, fully advised as to all of the conditions recited, and I am simply calling them to attention for consideration, rather than urging a particular policy.

Judge Burns replied on July 29 (File No. 135-3):

> Your letter of July 25, 1935. (sic) with reference to the application of Sections 13, 14 and 16 of the Securities Exchange Act to foreign corporations, which was addressed to Mr. Kennedy, has been referred to me for consideration.
>
> This question is now under advisement, but, because of the legal complexities involved in determining the extra-territorial extent to which certain sections of the Exchange Act should be applied, further delay is necessary before I can give you any definite information. I am well aware of the practical considerations which are here present and shall write you more fully in a few days giving my own views on the problem.

This correspondence occurred shortly after Forms 18 through 21 were adopted and at the time the Commission was concerned whether or not the foreign issuers would eventually register. Judge Burns apparently never wrote his full views on the problem, as promised.

A further and more explicit argument and plea was presented by Mr. Hoxsey on October 17, 1935 in a letter addressed to Chairman Landis (File No. 135-4):

> On May 20th I wrote to Mr. Kennedy a letter enclosing a copy of a letter from NORANDA MINES LIMITED. This letter suggested consideration of exempting foreign corporations in regard to certain sub-paragraphs of Section 12(b)(1) as to their registration applications, of exempting such corporations from Sections 14 and 16, and the consideration of any rulings to be made pursuant to Section 13 as affecting such corporations.
>
> The receipt of this letter was acknowledged by Mr. Kennedy on May 27th, and on May 29th Judge Burns wrote that the general question of filings by foreign corporations was under consideration and that there would be considered in that regard the question as to whether or not foreign corporations, including Canadian ones, should be exempted from certain Sections of the Act.
>
> When Forms 19, 20, and 21 came out, certain other suggestions which were made in my letter first above referred to appeared to have been adopted, but neither in the Forms nor, unless in some way I have missed it, in the Rules has the question of exemption of foreign corporations from Sections 14 and 16 been dealt with.

On July 25, 1935 I wrote again to Mr. Kennedy and called his attention to the suggestion in regard to exemption of foreign corporations from Section 14 and Section 16 of the Act, and asked him, in case it was in fact the intention of the Commission to grant exemptions to foreign corporate securities from the provisions of Sections 14 and 16, to advise us as soon as might be convenient, as it would be helpful in such case to transmit knowledge of such exemption to foreign listed corporations prior to their consideration of the act of registration.

In these letters it was suggested that any regulations which might be issued under Section 14 might conflict with the proxy laws of one or more foreign countries, thus placing registrants in an impossible position, and that it was scarcely conceivable that foreign officers, directors, and large equity stockholders of foreign corporations would file reports required by Rules made under Section 16, because of the apparent lack of any effective enforcement machinery.

Attention was further called to the fact that if the above assumption as to Section 16 was correct, the only reports relating to foreign companies which would be filed under the rules made pursuant to that section would be from such officers, directors or stockholders as might be American citizens, and that partial reports of this sort would be misleading and harmful rather than helpful.

Our records do not show that we have had any reply as to the question of exemption of foreign corporations from Section 14 and 16.

On July 23rd we addressed letters:

to Depositors under Deposit Agreements under which American Certificates against Foreign Issues are listed on the New York Stock Exchange;

to American Depositaries having outstanding American Certificates issued against securities of Foreign Issuers;

to Foreign Corporate Issuers having Bonds listed on the New York Stock Exchange; and

to American Fiscal and Paying Agents for Foreign Corporate Bond Issues listed on the New York Stock Exchange.

In these letters we explained the situation fully and advised the persons addressed that it was important, to insure the continuation of the listing of the securities, that the application should be filed with the Exchange and with the Commission by November 15, 1935. We ended each of these letters with the request that in order to arrange our own procedure we would appreciate being advised at their earliest convenience of the approximate date upon which we might expect to receive an application.

In spite of the fact that we are now within less than one month of what was originally fixed as the latest date, we have had no application from foreign corporate issuers filed (excepting from North American issuers), and no answer to our request for advice as to the date upon which we might expect to receive the application excepting that in three cases, one of them very important, we have been advised that no application would be made, and except that in one case we have been advised that application will be made.

On September 4th, 1935, the Royal Dutch Company wrote Messrs. Kuhn, Loeb & Company, regretting "that the present American legislation with regard to listing of securities entails so many difficulties for us that we have decided not to apply for such permanent registration."

Messrs. Kuhn, Loeb & Company evidently made further representations to the Royal Dutch Company, and on October 15th transmitted to us a letter dated October 1st, 1935, from The Hague. I have the permission of Kuhn, Loeb & Company to quote this letter full, with the reservation that it is not to be published:

"Dear Sirs,

"We have carefully considered your letter of the 16th ultimo, but it has not induced us to change our minds. In the reprint which you enclosed therewith we have read that the Commission is prepared to give further explanations or clarifications, but such fuller information does not assist us.

"It is quite clear to us what is asked of us and, as you are aware, it is not any ambiguity of the stipulations but the great objections connected with them which keep us from applying for the permanent registration.

"We must leave it to you to decide whether you will notify the New York Stock Exchange of this decision, but it appears to us that it would be somewhat premature to do so now already, as we have till 31st March 1936 to file an application or not."

While we have no definite knowledge of the particular "stipulations" to which such objection is made, I assume that it is likely to apply to one or more of the following:

1. The provisions of Section 12(b)(1)(D), (E), (F), (G), and (H). These have been waived as to detailed information in the registration application, but the Company may not be sure that they will be so waived as a result of the application of Section 13.

2. Section 14.

3. Section 16.

4. Fear as to Section 13, which it would seem could be removed as hereinafter indicated.

The delays in replying may be due to the fact that foreign corporate issuers may have noted that the date of exemption has been extended until March 31st, 1936, but it seems likely as to many of them that this would not have come to their attention.

I am wondering whether the burdens imposed by Sections 14 and 16 may not have something to do with this state of affairs. It seems to me that Sections 14 and 16 will be practically dead letters as regards foreign corporations even if no exemption should be granted. Nevertheless, of course, most corporations are reluctant to undertake obligations which they have no intention of observing.

As I see it, there may be a good deal to be gained by exempting foreign corporations, including North American corporations, from these two Sections of the Act as an inducement to registration, and I think that the practical loss of information by so doing will be almost nothing.

In addition to this, taking into account the difficulties of language and distance, I think that uncertainty as to the effect of rules to be made pursuant to Section 13 of the Act may be still more important as a deterrent. I am, of course, perfectly familiar with Rule JD2(c), but it is improbable that many foreign corporations would fully understand its applicability to this situation even if they were familiar with it, which latter is not likely.

If, therefore, in addition to granting exemptions to Section 14 and Section 16, the Commission could issue a statement to the effect that it was not its intention to require from foreign corporate issuers under Section 13 any information other than that prescribed in Section 13(a)(1), I think that such action would remove another bar. Attention might also be called to the applicability of Rule JD2(c), in case the Commission should subsequently change its policy in this respect.

As of September 1, 1935 the market value of the listings of foreign corporate securities other than North American and West Indian companies was as follows:

European Companies (stocks)	$ 34,784,669.
Asiatic Companies (bonds)	133,774,068.
Australasian Companies (bonds)	7,154,850.
European Companies (bonds)	365,445,673.
South and Central American Co's (Bonds)	12,202,642.
Total	$553,361,102.

> This is an important group of securities, and among them are many where it would be to the advantage of the issuers to repatriate the obligations at as low a rate as possible.
>
> We have withheld action advising foreign corporate issuers of the extension of the exemption until March 31st until this time in the hope that doing so would expedite, to some extent, the receipt of applications. It is necessary, however, that we should now advise such issuers of the extended exemption, and if the Commission can see its way clear to adopt the suggestions heretin contained it would be helpful to be able to include information to that effect in the letter which we shall have to write anyway.

It will be remembered that during this time the Commission had given a series of interpretations on Form 18 which were published by the Exchange and the Commission and which were regarded as concessions by the Commission and that in late October the New York Times had announced that Wall Street had dropped its fear of wholesale delistings by foreign issuers. Mr. Neff replied to the October 17 letter by enclosing a copy of Rule AN18. (November 5, 1935, File No. 135-1)

Rule AN18 was adopted on November 6, 1935 in the identical form (except for the number) as it is in effect at the present time. In announcing the adoption the Commission issued the following statement (Release No. 34-412 - Class B):

> "The new rule, AN18, applies to foreign issuers whose securities have been exempted from registration until March 31, 1936.
>
> "Section 16 deals with trading by officers and directors in securities of their companies, and reports as to their holdings. Reports by officers and directors have not been required as to such securities since the Act went into effect, and the form for the registration of foreign securities does not require information as to their holdings. The purpose of the present rule is to provide that, after registration, the exemption as to the necessity of filing reports and meeting the other provisions of this section shall continue.

"The provisions of Section 16 could have but a very limited field of application to the securities of foreign issuers inasmuch as the section applies principally to stock, and comparatively few foreign corporations have stock listed on American exchanges, and even in such cases the principal market is rarely in this country.

"The fact that there are relatively few stock issuers of foreign issuers listed on American exchanges also influenced the exemption with respect to the solicitation of proxies. So far as the solicitation of consents and authorizations in respect of listed foreign securities is concerned, registration under the Securities Act of 1933 is required if the consent or authorization makes any important change in the security and if remuneration is paid in connection with the solicitation of such consent.

"In the light of the circumstances noted above, a realistic approach has led to the conclusion that the interests of American investors will be best served by the continuance of these exemptions."

While this release emphasizes the limited number of issuers and securities to which the proxy and insider trading provision would apply, the files indicate that the Commission was also strongly influenced by both the enforcement problem and the desire to have as many foreign securities as possible registet. In a memorandum dated October 10, 1935 within the General Counsel's Office concerning a Section 16 problem involving ADRs it was stated:

Analytically and practically, the former result is the sounder. Dean does raise one serious objection: The extension of Section 16 to transactions abroad in the unlisted undeposited "ordinary shares" by foreign officers and directors will presumably cause them to refuse cooperation in permanent registration of the American Shares on the New York Stock Exchange. This can be met along the lines of Rule NA4 and Rule NA5 by stretching the power to exempt securities granted us in Section 3(a)(12) of the Exchange Act.

Accordingly, I recommend:

1. That Section 16 be held applicable to transactions by officers, directors and principal stockholders of the foreign corporation in all shares of such corporation as well as in the American Shares.

2. That a new Rule NA6 be promulgated to the following effect:

"Rule NA6. Exemption from Section 16 of certain securities of foreign issuers purchased or sold by foreign officers, directors and principal stockholders of such foreign issuers.

In any case where securities of a foreign issuer have been deposited with an American depositary (whether physically held by such depositary in America or abroad) as a basis for the issuance of American certificates (for example, so-called American Depositary Receipts for or American participation certificates in foreign shares) against such deposited securities, the undeposited securities of such issuer, if not registered on a national securities exchange, shall be exempt from the provisions of Section 16 with respect to purchases or sales thereof abroad by officers, directors or principal stockholders of said foreign issuer who are aliens resident abroad."

This memorandum is interesting because of the suggestion not to exempt officers, directors and 10 percent owners who were residents of this country. Earlier, a suggestion had been made by the Department of Commerce to differentiate between foreign companies and American controlled corporations organized and operating in foreign countries (Letter & Memo June 27, 1935, File No. 102-31). This is somewhat the basic theory which led to the proposed revision to Rule 3a12-3 in 1958. It was also proposed, as will be seen from a document set forth below, that solicitation of proxies from American holders of foreign securities be subject to the proxy rules. Apparently these proposals were not made the subject of any extended study probably due to the pressure of time and the desire to settle the issue at least for the time being.

On October 31, 1935, a proposed Rule AN18 was submitted to the Commission in the following form:

RULE AN18. (a) Securities for which the filing of applications on Form 18, 19, 20 or 21 is authorized shall be exempt from the operation of Section 14(a) and any rules or regulations heretofore or hereafter prescribed thereunder except as to any solicitation, wholly or partly within the United States, of a proxy or consent or authorization in respect of any such security.

(b) Securities for which the filing of applications on Form 18, 19, 20 or 21 is authorized shall be exempt from the operation of Section 16.

The proposed lay release read as follows:

> The Securities and Exchange Commission announced today the adoption of a rule exempting from the operation of Section 16 of the Securities Exchange Act of 1934 foreign securities as to which registration must be effected by March 31, 1936. Section 16 relates to reports of holdings of equity securities by directors and officers and principal holders of registered equity securities and to purchases and sales of equity securities by such persons. The new rule also makes clear that, in the case of such foreign securities, the provisions of Section 14(a) relating to the solicitation of proxies, consents or authorizations apply only to solicitation of American holders.

A memorandum dated October 30, 1935 from Mr. Burke to Mr. Neff is included in the supporting papers for this Commission meeting and contains an extensive discussion of the problems about which the staff were concerned and the basic rationale of the rule:

> It has been suggested that a reluctence to subject themselves to the provisions of Sections 14(a) and 16, and a fear as to what the Commission may require of them under Section 13, are having a deterrent effect upon registrations of securities of foreign corporate issuers.
>
> It is believed that such securities may consistently be exempted from Section 16; that they should be exempted from Section 14(a), except as to solicitations wholly or partly within the United States; that it is impracticable at this time to issue any general statement as to the probable scope of the rules to be promulgated by the Commission under Section 13, and that Rule JD2(c), giving the right to delist, is a sufficient safeguard against too drastic requirements under that section.
>
> Section 16.
>
> This section applies only to directors and officers of issuers having equity securities registered, and to beneficial owners of more than 10 percent of any class of registered equity security. It does not apply to securities of issuers which do not have equity securities registered. Since Mr. Hoxsey estimates that of the $500,000,000 of foreign corporate issues listed on the New York Stock Exchange only $35,000,000 are shares, it is apparent that exemption or non-exemption of foreign corporate issues from Section 16 should be of no importance whatsoever in the case of the great majority of such issues. However, if applications for registration of foreign corporate bonds are in fact being retarded by a fear (however groundless) of the effect of Section 16, it must be admitted that we would not be giving up very much in exempting foreign issues from that section.

1. As to paragraph (a), which requires such directors, officers, and principal owners to file initial reports of ownership and monthly reports of changes of ownership of equity securities of such issuers, it should be observed that the forms for registration of foreign corporate issues require no information as to the names of and security holdings of directors, officers, and principal security holders, although Section 12(b) authorizes us to require such information and most of our other forms contain such requirement. An exemption from Section 16(a) would be in accordance with the policy indicated.

Further, if no exemption were granted there would be no way of compelling non-resident directors, officers, and principal owners to file such reports--and they would be in the vast majority. They could not be subjected to criminal liability under Section 32, and their failure to file would not be a ground for withdrawal of registration under Section 19(a)(2) for that section applies only in the case of violations by the "issuer". There therefore seems little objection to exempting foreign corporate issues from Section 16(a).

2. Sections 16(b) and 16(c) also apply only to directors, officers, and principal owners. Section 16(b) requires an accounting of profits realized upon purchases and sales of equity securities of such issuers, where offsetting sales or purchases are made within six months. Section 16(c) prohibits short sales and delayed deliveries of equity securities of such issuers.

These paragraphs are concerned with the standard of conduct to be observed by persons occupying a certain relationship to the issuer. On principle, such standards should be determined by the law of the place of incorporation. It would appear, therefore, that these sections should not be applied to foreign issuers. Further, the criminal liability resulting from a violation of paragraph (c), and probably the civil liability imposed by paragraph (b), could be predicated only upon a transaction some part of which took place in the United States. In any event, to enforce any such liability the defendant (or, in the case of civil liability, his property) must be found within the United States. Therefore, even if no exemption is granted, enforcement of these sections would be of very limited scope. Broadly speaking, only resident directors, officers, and security holders would be affected, and they would constitute a small minority.

In view of the foregoing facts, there seems no objection to exempting foreign issues from the operation of Sections 16(b) and 16(c).

Section 14(a).

This section makes it unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of any national securities exchange "or otherwise" to solicit any proxy or consent or authorization in respect of any registered security in contravention of the rules of the Commission. The Commission has adopted rules prohibiting the solicitation of any such proxy, consent or authorization by any person, unless the first solicitation is preceded or accompanied by information as to the matters covered thereby, the persons initiating the solicitation, and whether they are to receive any compensation therefor, and a statement as to whether the solicitation is opposed by any director. Solicitation by means of false or misleading statements is also prohibited, as is solicitation by an issuer (or its management) which has failed to comply with the request of any record holder to mail out proxies, etc., supplied by him. These rules are not limited in their application to solicitations of equity security holders. They apply to registered securities generally.

Only criminal sanctions are imposed for violations of Section 14(a). Under recognized principles of private international law, criminal liability cannot be predicated upon solicitations wholly without the United States. So far as foreign securities are concerned, this section and the rules prescribed thereunder have no application except as to solicitations within the United States, and can only have been intended for the protection of American security holders. Therefore it cannot be said that enforcement would be only partial in the case of foreign issues, for there are no legal or practical obstacles to preventing solicitations of American security holders in violation of the rules prescribed thereunder.

Unlike Sections 16(b) and 16(c), the rules under Section 14(a) are not concerned with the relation between directors, officers and principal stockholders and the corporation itself, which, as we have said, seems a strictly internal matter, to be governed by the law of the place of incorporation. We are establishing certain minimum requirements to be observed in dealings with individual security holders, and we are clearly entitled to extend this protection to American holders of foreign securities.

Therefore neither the theoretical nor the practical considerations which suggested an unqualified exemption from Sections 16(b) and 16(c) are applicable in the case of Section 14(a).

It might be well, however, to make clear that Section 14(a) does not apply to solicitations wholly without the United States. That is true, anyhow, as a matter of private international law, but an express exemption of foreign solicitations would remove any possible misconception.

Consideration should also be given to the desirability of exempting foreign issues from the operation of Rule LA6, which imposes upon the issuer a duty to mail proxies upon the request of any security holder. Great practical objections are seen to applying Rule LA6 to foreign issuers, and a failure to exempt foreign issues from that Rule might have the effect of discouraging registrations.

Scope of Exemption from Section 16.

Since the temporary exemption from registration accorded to securities of Canadian and Cuban issuers by Rule AN13 expired on September 13, 1935, such securities must have been either registered or delisted by this time, and a failure to exempt them from Sections 14(a) and 16 will have no effect, one way or the other. It is therefore suggested that such issuers be excluded from the exemptions recommended above, although it might be a little difficult to justify such exclusion, on principle. The exclusion of North American and Cuban issuers can be accomplished in a very unobtrusive way by restricting the exemption to securities for which the filing of applications on Form 20 is authorized. North American and Cuban issuers may not use that form, unless they are owned or controlled by a foreign government.

The Commission minutes do not contain any futher description of the discussion held or the reasons underlying the rule as adopted other than as set forth in the Class B release announcing the rule.

The New York Stock Exchange lost no time in forwarding the following letter in an effort to convince issuers to continue their listing with that Exchange:

November 7, 1935

To Foreign Corporate Issuers Having Bonds Listed on the New York Stock Exchange,

To American Fiscal and Paying Agents for Such Bonds,

To Depositors under Deposit Agreements under which American Certificates Against Foreign Issues Are Listed on the New York Stock Exchange, and

To American Depositaries Having Outstanding American Certificates Issued Against Securities of Foreign Issues.

Gentlemen:

On July 23, 1935, a circular letter was sent to you, enclosing copy of the appropriate registration statements under the Securities Exchange Act of 1934 for permanent registration of certain classes of securities upon this Exchange. In the letter referred to or enclosures therewith we advised you that the Securities and Exchange Commission had exempted from registration to and including December 31, 1935, among others, securities of the classes referred to in the address of this letter.

It has doubtless heretofore been called to your attention that upon August 30, 1935, the Securities and Exchange Commission extended the date of the foregoing exemption from December 31, 1935, until March 31, 1936. Accordingly, in order to permit time for examination by the New York Stock Exchange of applications covering such issues and to allow the thirty days for making registration effective as provided in Section 12(d) of the Act, applications for registration of such securities should be in the hands of this Exchange and of the Securities and Exchange Commission not later than February 13, 1936, instead of not later than November 15, 1935, as at first provided.

In this connection, we call attention to a rule released by the Commission on November 6, 1935, reading:

> "RULE AN18. Securities for which the filing of application on Form 18, 19, 20 or 21 is authorized shall be exempt from the operation of Sections 14(a) and 16."

This Rule, as it effects:

> Foreign Governments and Political Subdivisions Thereof
> American Certificates against Foreign Issues
> Securities Underlying American Certificates against Foreign Issues
> Securities Other than Bonds of Foreign Private Issuers (not North American or Cuban) and
> Bonds of Foreign Private Issuers (not North American or Cuban)

may be explained as to the exemption from Section 14(a), by saying that it exempts such issuers and persons acting in relation to such issues from the necessity of observing any rules or regulations which have been laid down or which may be laid down by the Commission in regard to the solicitation of proxies, consents or authorizations in respect of such securities.

If, however, the consent or authorization solicited in respect of listed foreign securities is of a nature making any important change in the security and if remuneration is paid in connection with the solicitation of such consent, then registration under the Securities Act of 1933 is required, although exemption will remain in force as to registration under the Securities Exchange Act of 1934. It is probably understood that the Securities Act of 1933 has to do with the sale or distribution of securities in this country, irrespective of whether or not such securities are to be traded in upon any organized exchange, while the Securities Exchange Act of 1934 has to do with the registration of securities for the purpose of permitting trading upon an authorized national securities exchange such as the New York Stock Exchange, whether or not such securities require registration under the Act of 1933.

The exemption provided by the above-quoted RULE AN18 from the operation of Section 16 of the Act relieves directors, officers and principal stockholders of issuers of the foregoing classifications from all of the duties and liabilities arising out of the Act from ownership of or transactions in any of the securities of the issuer, excepting such liability as might arise from violation of the Sections prohibiting manipulation of security prices and the use of manipulative and deceptive devices. No reports of ownership or transactions will be required from such directors, officers or principal stockholders.

Section 13 of the Act gives to the Securities and Exchange Commission power to require in respect of any security registered on a national securities exchange such information and documents as the Commission may require to keep reasonably current the information and documents filed with the registration statement and such Annual Reports and such Quarterly Reports as the Commission may prescribe. In addition to this, the Commission may under this Section prescribe the form or forms in which the required information shall be set forth, and other matters pertinent thereto.

As the Commission has not yet issued any rule under this Section 13, it may be well to call the attention of foreign issuers to Rule JD2(c) which provides that if within thirty days after the publication of any rule or regulation which substantially alters or adds to the obligations or detracts from the rights of the issuer of a registered security or of its directors, security-holders or persons soliciting or giving any proxy or consent or authorization with respect to such security, the issuer may file with the Commission a request that the registration shall expire, together with the reasons for making such request, whereupon such registration shall expire immediately upon receipt of such request or immediately before such rule or regulation becomes effective, whichever date is later.

We have written direct to the foreign issuers of securities underlying American Certificates which have been issued against them, urging an early filing of a registration statement.

At the time of our letter of July 23rd, appropriate forms for registration were sent directly to foreign corporate issuers of bonds and were sent to American fiscal and paying agents, depositors and depositaries for transmission to the foreign issuers. We ask the American agents, depositors and depositaries to cooperate in impressing upon foreign issuers the advisability of early registration, and to call upon us for any further forms or information which they may think necessary for this purpose.

Yours very truly,
COMMITTEE ON STOCK LIST,

/s/ J. M. B. Roxsey

Executive Assistant

Why 14 + 16 exclusions

While it seems that the Commission's apparent inability to enforce the provisions of the proxy and insider trading provisions of the Act with respect to foreign issuers is commonly regarded as the principle basis for adoption of Rule AN18 (see Loss, Securities Regulation, 2d Ed. pp. 366, 820, 874, 1110; Loomis, 28 Geo. Wash. L. Rev. 216; File No. S-7, comments on Rel. 34-6912), it is clear that other considerations and circumstances were given equal and perhaps greater weight. The most significant was the desire on the part of the Commission to retain these securities on the exchange markets and the fear that failure to provide the exemption would result in many delistings. In addition, it was apparently the conclusion that, in view of the very limited number of stock registered, little would be gained in the way of investor protections by subjecting these issuers to these provisions.

As to the proxy rules, the provisions would generally be at variance with the laws and customs of the particular country and would be unenforceable except for solicitations in the U.S. There were few equity securities

involved and major changes in debt securities would subject solicitations of U.S. holders to the provisions of the Securities Act. The Commission on rejecting the staff proposal apparently felt that the attempt to cover solicitations in this country was not worth the risk of precipitating the delisting of these securities.

As to the insider trading rules, the requirement to file ownership reports would be inconsistent with the registration forms which, because of foreign law and custom, did not require detailed information as to insider holdings. There were few listed equity securities which would be effected and the only enforcement would be delisting procedures. The application of the rules to U. S. residents would be discriminatory to a certain extent and could be misleading because of the small percentage of reports filed by American insiders.

All these factors combined amounted to the "realistic approach" cited in the lay release announcing the rule. The timing of the adoption of the rule and the failure to make any exceptions from full exemptions indicated the strong underlying desire of the Commission not to discourage registration or removal of foreign securities from the exchanges.

The form of the rule, specifying Forms 20 and 21 which were not applicable to North American and Cuban companies, was a smooth method of denying the exemptions to those issuers while retaining the policy adopted which put Canadian, Mexican and Cuban issuers on a par with U. S. Issuers.

It is also clear that the Commission did not consider any argument or feeling that any congressional intent to exempt foreign issuers or insiders from these provisions existed and that the Commission felt that it had

the power to subject them to these restrictions if it felt such a course necessary, desirable or practical. In this respect, it must be concluded from the legislative and administrative history of this rule that the comments with respect to congressional intent contained in certain responses to Release 34-6912 are without foundation.

While the possibility of adopting special rules for American owned and operated companies organized abroad, such as the Buckly companies, Syntex and Schlumberger which were the object of the 1958 proposed amendment, was suggested, it would appear that no such situations came to the attention of the Commission or received any special study at the time of the adoption of Rule AN18.

Rule AN18 has never been amended (except for the redesignation as Rule 3a12-3). While no great necessity for changes to the rule has been indicated (with the possible exception of the Buckly companies and a few others), there has been a feeling that an extended study should be made. The following excerpt from a speech by Commissioner Manrahan before the First Hemispheric Stock Exchange Conference (Sept 18, 1947) expresses this idea clearly:

> Secondly, it is apparent that the Acts administered by the Commission penetrate into many details of financial recording and financial presentation by companies and into important aspects of the conduct of their managements and large security holders. To what extent these provisions can be enforced in respect of various kinds of foreign securities cannot be determined without a wholesale survey of the problem. Only a detailed analysis of particular problems, in the light of the purposes of the law, can help us reach informed judgments.
>
> The free international movement of credit is a worthwhile ideal. It is not, however, an end in itself. To be a genuine basis for international cooperation it must justify itself as a paying proposition. Our government has made many decisions to facilitate such cooperation. However, we should not ask our investors to place their savings in foreign enterprises while relaxing

> or waiving any of the standards of our Acts which are their fortress of protection. The standards which I have outlined are not, and have not been, barriers to the conduct of honest business -- national or international. Quite to the contrary, they are essential predicates to what every securities market needs in order to survive -- public confidence.

V. Annual and Periodic Reports

Rule KA3 provided an exemption for foreign issuers (other than private North American & Cuban) from the filing of annual reports until such time as the proper report forms could be issued. The New York Stock Exchange strongly urged that no reports be required for foreign issuers, and argued on similar premises as those presented against the application of Sections 14 and 16 with the additional fear expressed that these issuers would not register until they were certain that the reporting forms would not go beyond the information required in the registration form (see letter from Mr. Hoxsey, October 17, 1935, the text of which appears above). However, the Commission indicated that no such exemption would be forthcoming. Mr. Neff responded to Mr. Hoxsey by stating (November 5, 1935):

> I do not believe that it will be practicable, in the immediate future, to make a general statement as to what requirements the Commission will prescribe with respect to periodic reports from foreign issuers. For the time being, I think foreign issuers will have to rely upon Rule JD2(c) as a safeguard against what they might consider too drastic requirements under Section 13.

Proposed forms were sent out for comment to interested parties. However, because of the absence from the files of the forms as drafted, it is difficult to make any conclusions concerning the reasons for particular items except in the few instances cited below and except for

the general context of the forms as adopted which followed closely the items of the appropriate registration form by updating the previously filed information. The public release adopting the forms states the same theme (Release No. 34-1058, February 10, 1937):

> These forms are designed to keep current for investors the information and documents previously furnished in connection with filing of applications for registration on Forms 18, 19, 20 and 21, respectively. Each of these annual report forms follows closely in scope and arrangement of material the related form of application for registration. The requirements are based upon the principle of obtaining the changes that have occurred during the period of the report.

In Form 18-K, the only item which goes beyond Form 18 is Item 4 which calls for the amount of bonds reacquired by the issuer, an estimate (if practicable) of the amount of the issue held by nationals of the registrant and the method by which the registrant reacquired any substantial amount of the issue. This item was strongly objected to by several commentators (See File 102-67) and although modified to some extent, was insisted upon by the Commission.

Form 18-K, as in the case of Form 18, was criticized because the tone thereof was too mandatory and suggestions were made to make the items and instructions more tactful and polite because they were directed to sovereign nations. The proposed forms were retained.

In Forms 20-K and 21-K, the item requiring changes in control of the registrant was changed by substituting "persons or government" exercising control for "owned or controlled by another corporation or foreign government." Over objection that private individuals controlling such registrants would resist such disclosure the Commission retained the word "person" in the annual report forms.

As in the case of Forms 20 and 21, certified financials were not required in Forms 20-K and 21-K, although several suggestions were made along this line. Presumably, the Commission did not wish to make an issue of this point because of the recognized difference in accounting practices andcustoms of the several countries involved.

Forms 18-K and 19-K are presently in effect in the identical form as originally published. A minor change in the exhibit instructions was made to Forms 20-K and 21-K on April 14, 1938 (Releases 34-1652 and 34-1653), and otherwise these forms as initially adopted are still in effect.

In 1962, Mr. Sheppe drafted revisions of these annual report forms but no action was taken. No attempt will be made herein to detail these proposed changes.

While no concentrated effort has been made in this area, it appears that a sizable number of issuers have been delinquent in the filing of annual reports and consideration has been given from time to time to bring delisting proceedings against delinquent issues. However, for the most part it seems that informal efforts toward compliance in the form of letters requesting the filing of such reports have been the only method of attempting to seek compliance.

Foreign issuers registered on Forms 18, 19, 20 and 21 were exempt from the requirement to file current reports on Form 8-K from the initial adoption of that form but no reason was cited in the promulgating release and no comments can be found in the files (Rule KA7, Release No. 34-925, November 11, 1936). Rule 13a-11 presently continues this exemption. Similarly, the reports of quarterly earnings established in 1945 and 1946 (later designated Form 9-K) and the present Form 9-K provide exemptions for foreign issuers (other than private North American and Cuban issues) (Rule 13a-13).

Foreign issuers required to report under Section 15(d) of the Exchange Act by virtue of a Securities Act registration are required to file annual reports and while no special form has been adopted for this purpose, the practice appears to be to permit such reports on Forms 18-K through 21-K even though Form 10-K is applicable. If such is the case, this practice, if retained, should be made a part of the rules. As pointed out in a memorandum dated August 29, 1963 by Kenneth Vaughan, this situation is somewhat reversed since listing of its securities by a foreign 15(d) issuer reduces the technical burden of the annual reporting requirements because of the certification and other differences in the forms. Rules 15d-11 and 15d-13 provide exemption from the 8-K and 9-K filings by foreign issuers (other than North American and Cuban, and in the case of Form 8-K Philippine, issuers).

The differences in the phrasing of these reporting exemptions also create one other curious situation, that of issuers of ADRs. Rule 13a-11 exempts issuers which have registered securities on Form 19; and Rule 15d-11 specifies an exemption for issuers of ADRs. However, Rule 13a-13 and 15d-13 would appear to require 9-K reports from American issuers of ADRs since the exemption does not specify or incorporate these persons. While I have not checked the practice, I doubt that any 9-K reports are filed for these persons. In any event the rules should be revised to clarify this situation.

No explanation or rationale for the treatment of foreign issuers with respect to these current reports could be located in the public releases or private files of the Commission.

VI Conclusions and Recommendations

The individual parts of this memorandum contain the basic conclusions with respect to the results of my research and study in the respective topics as well as certain recommendations concerning particular phases of this area. Other recommendations can be made by the use of the material contained herein in conjunction with the factual analyses which make up the whole study of foreign securities of which this is a part. The history of the legislative and administrative handling of listed foreign securities and the rationale for such actions can serve in part as a guide in formulating the Commission's present policy. It must be recognized that the Commission's basic policies in respect to the regulation of foreign listed securities were set in the first years of the existence of the agency and that since such time there have been few changes in the rules and forms and few attempts to make any detailed study or analysis of the situation. During this time, the problems arising were either settled informally or forgotten on an ad hoc basis. The relatively small number of foreign issuers with securities listed on our stock exchanges is undoubtedly the practical reason for the inactivity in this area. One major attempt to change the rules and forms, initiated seriously in 1948 by Mr. Louchheim and then later in 1953 by the proposal to amend Rule 3a12-3, because of the handful of issuers concerned, was side tracked in favor of more pressing matters. Another large study involving foreign securities was that concerning ADR's in 1954 but this was primarily a problem under the Securities Act of 1933 which I have not attempted to go into to any extent.

Since 1935 the economic structures, and political strength and motivation, of this country and the European, Asiatic and South American countries whose securities are listed on the registered stock exchanges and traded over the counter at the present time have gone through drastic changes and it is quite likely that the policies set in 1935 and adhered to until the present time may have small application to our present problem.

The Commission's mission in 1935 to set these policies was an off-hand incident of the desire of the federal government to regulate the stock exchanges and the securities listed thereon for an effective method of increasing the protection afforded to American investors. The events which precipitated the enactment of the Exchange Act and the basic studies which formulated the provision of the Act had very little to do with foreign securities. The interest in regulating the over-the-counter markets and the Special Study which finally led to the over-the-counter regulation provision of the Securities Acts Amendments of 1964 likewise had little to do with foreign securities. So, as in 1935, the Commission has few guide lines or directives from the Congress upon which to base the ultimate policies to be formulated in the regulation of foreign securities traded over-the-counter and the revision of the regulations and forms for listed foreign securities.

The Commission at present has the same basic mandate as it did in 1935; namely, to use its best discretion after a study of the practical problems, except that its jurisdiction has increased to a more numerous group of foreign issuers. Some of the policies considered in 1935 are

not valid today. Many are still valid. Some of the policies applicable to listed issuers are not valid when applied to over-the-counter issuers. From my limited knowledge of the matter, a great deal of the forces, including the business practices, corporation laws and regulations, stock exchange securities trading practices, and methods and sources of obtaining and refunding capital have changed to a very fundamental degree in countries whose governments, corporations and other citizens have issued securities which are distributed or traded in the American securities markets. The political and social policies of these countries have also changed significantly. Nevertheless, the actions and considerations, both practical and theoretical, which formulated the rules and forms in 1935 are worth reviewing at the present time because many of them are valid to a certain degree and because those policies have withstood to a large degree the test of time.

To generalize, the most significant and successful policy adopted and adhered to by the first Commissioners was that of insisting upon getting the largest amount of disclosure concerning foreign issues and securities practicable under the circumstances. They ignored the dismal predictions of the exchanges and other persons who, perhaps because of self-interest wished to maintain the status quo while arguing for the lowest interest, that foreign issuers would not bow to any form of regulation. The Commission relied on the premise that foreign issuers, when put to the test of losing the exchange market and the easier access to American capital markets, would furnish additional disclosures to the public in this country. In this respect, the application of the Securities Act to foreign issuers was consistent in policy. The Commission created

limited exemption from the regulations applicable to most listed securities only when as a practical matter such provisions were impossible or difficult to enforce or placed an undue burden on issuers because of the different laws and customs of the foreign country, and such consideration outweighed the advantages to be gained by American investors. There is no doubt that the interests of American investors were gambled (and lost in a few instances where issuers repurchased securities at lower prices after delisting) or that the Commission made practical concessions to south more imagined or real fears on the part of foreign issuers. However, the initial insistence on substantial compliance with the Exchange Act proved successful in taxing the foreign reluctance and re-directing the efforts of the stock exchanges and securities industry. Whether or not the investing public would lose in the current round if the Commission taken a strong approach is open to question.

The remaining discussion, sub-divided for purposes of an attempt at clarity, concerns the applicability of the past policies to the present problem and some additional recommendations and comments.

A. Legislative History and Statutory Provisions

Generally, the Commission has the same degree of authority to use its discretion in regulating or exempting foreign securities, whether listed or traded over the counter, from the regulatory provisions of the Exchange Act. The statutory pattern is different, however, and care must be taken to distinguish the source of this authority in formulating changes in the rules or forms for listed securities and the promulgation of rules or forms for over-the-counter companies.

Section 3(a)(12) defines an "exempted security" to include any security which the Commission, by rule as it deems necessary or appropriate in the public interest or for the protection of investors either unconditionally or upon specific terms and conditions or for stated periods, desires to include as an exempted security. Congress contemplated that foreign securities be given consideration within this exemption. The term "other than an exempted security" appears in several places in the Act, including Sections 7, 8, 9, 11, 12, 14, 15 and 16. However, to date, the Commission has exempted foreign securities as a class only from the provisions of Sections 14(a) and 16 (but not Section 14(c) as will be commented on below).

The authority for exempting foreign issuers in Section 12(g)(3) is set up in a much different fashion. Section 12(g)(1) requires certain over-the-counter issuers to register. Once registered, these issuers become subject only to Section 13, 14, 15(c) and 16. Section 12(g)(3) allows the Commission to exempt any foreign issuer from the Section 12(g) registration requirements if it finds that the public interest is served and it is consistent with the protection of investors. This is an all or nothing authority and exemption from this section results in the total inapplicability of Sections 13, 14, 15(c) and 16. The Commission cannot under Section 12(g)(3) make a partial exemption from some of the other sections or specify terms and conditions on the exemption once allowed. It could, of course, remove the exemption at any time. However, Section 12(h) provides that the Commission can grant a partial or whole exemptions from Sections 13, 14, 15(d) and 16 under certain specified conditions, or otherwise. This section is applicable to all securities required

to register under Section 12(g) and does not make any particular mention of foreign securities. However, it must be under this section that foreign issuers could be given partial relief from the pertinent portions of the act.

The procedural differences may not be of any importance except that the Commission has to be precise in citing the proper section if and when any partial or full exemption is adopted. However, since the argument could be made that Congress, by specific sub section named foreign issuers as candidates for full exemption, while not specifying foreign securities as candidates for partial exemption in Section 12(h), that the Commission must make the exemption complete or not at all, this point is briefly discussed herein. The report of the House Committee in explaining the provision on foreign securities handled such an argument in fairly clear terms (p 11, H.R.Rept. No. 1418, 88 Cong. 2d Sess.):

> By giving the Commission broad exemptive authority and empowering it to deal flexibly with the problem, the Commission will be able to weigh the various considerations and to exempt, partially or completely, foreign securities and certificates of deposit therefor by classes of such securities and certificates)

In addition, the Senate Report, although commenting on a prior version of the foreign securities exemption, which would have exempted all foreign issues unless the Commission after notice and opportunity for hearing revoked the exemption for a Class or Classes of foreign issuers, indicated that the Commission should have flexible power (Senate Rept. No. 354, 88th Cong, 1st Sess.):

> Should the Commission deem that a total exemption is unwarranted for a class or classes of foreign securities, it could still exempt any such security from one or more or the provisions of the bill and make appropriate modifications of other disclosure requirements as it has done with respect to foreign securities listed on (a) national securities exchange.

Although generally the power of the Commission to regulate foreign securities under Section 12(g) appears to be as broad as that delegated with respect to listed foreign securities, there are several indications in the legislative history of Section 12(g) which might cause something of a hurdle should the Commission desire to expand the scope of regulation as presently in effect as to listed securities or to provide for fuller regulation of over the counter securities. The Congress gave tacit approval of the status quo on foreign listed securities and said (in so many words) that over-the-counter securities should be treated similarly. In addition, the Congress indorsed the policies of the Commission and the basic principles and practical factors which were considered in setting up the listed requirements. Thus, the Senate Committee stated (p 29-30, Senate Rept No. 379, 88 Cong., 1st Sess):

> Your Committee recognized that, in principle, United States investors in foreign securities ought to be afforded the same protections as are provided for investors in domestic securities. As a practical matter, however, enforcement of the registration and reporting requirements of S. 1642 against foreign issuers outside the jurisdiction of the United States who do not voluntarily seek funds in the American capital markets or listing on an exchange would present serious difficulties. To prevent the securities of such issuers from being traded in the United States markets would seriously affect American holders of millions of dollars of such foreign securities. Indeed, even in the case of listed securities, the Commission has found it necessary to provide an exemption from the proxy and insider provisions of Section 14 and 16 for foreign issuers, other than North America and Cuban companies. . . .
>
> As already noted, the Commission has administered the Exchange Act so as to avoid undue interference with the trading markets for foreign securities in the United States. It is assumed that the Commission will treat over the counter foreign issuers in essentially the same way. . . . (emphasis added)

This legislative comment infers the expectation of Congress that (1) over the counter securities should be treated more favorably perhaps than listed securities (2) extention of the full registration and reporting forms or the proxy and insider trading rules beyond North American or Cuban issuers should not be made. Unlike the comments received on the amendment of Rule

3a12-3 on congressional intent which I have concluded are unfounded, any attempt of the Commission to extend the present listed requirements or application of more than the listed requirements to OTC issuers of foreign securities which met criticisms of extension of congressional intent would have to be taken very seriously and such actions would necessitate strong substantiation of the need for such action.

Other recent policies of the Congress and United States government, such as the tax on foreign investment, should also be considered as part of the legislative intent for both listed and OTC regulations, and as in the case of the 1935 problem, the State Department and other agencies of the government should be consulted in connection with the policies to be adopted or changed in respect to foreign securities.

B. Registration

In principle, the Congress and the Commission recognize that United States investors ought to be afforded the same protections as are provided for investors in domestic securities but realize that as a practical matter the enforcement of these provisions would be extremely difficult. The exemptive authority has been granted so as to permit the Commission to deal flexibly with this problem. However, the House report pointed out that failure of a foreign issuer to register (if required) would not mean that trading of the securities would be illegal or give use to civil liabilities against broker-dealers. The Commission, in effect, is fighting with its strongest arm tied.

The foreign registration problems in general are two-fold: First, which foreign issuers should be completely exempt; and second, what should be the scope and mechanics of the regulatory provisions. As to the later, the contents of the forms and reports and the applicability of proxy and insider trading provisions will be discussed in separate parts below. As to both problems, there must be a differentiation made among listed securities, over the counter securities, and securities the issuer of which are subject to

Section 15(d), and it is proposed to discuss such classes herein in that order.

Initially, it might be conceded that the policy to classify private foreign issuers of the North American sphere so as to require identical disclosures and procedures as domestic issuers should be continued since this classification affords maximum protection to U. S. investors and there has been no apparent effort to change the policy. I do not know the situation with respect to Cuban securities but some special rules might be applicable in view of the political events there. The reasons which gave rise to the North American exception to the foreign general rules may well be applicable at the present time to additional countries or areas. Certainly the factor of proximity to this country and the facility in the point of time of furnishing required information has diminished because of the advances in transportation and communication. However, the more basic factors such as differences in organic corporate structures, accounting and business customs, and the inter-flow of capital markets will have to be studied in connection with each country or area.

Another preliminary decision which affects all portions of the regulatory scheme concerns the American (U.S.) based issuers which were the principal objects of the proposal to amend Rule 3a-12-3. There is little reason to exempt companies which, although they happen to be incorporated or organized under foreign law, are predominantly owned and/or operated in this country from the full registration and reporting provisions or proxy and insider trading rules. In these cases, the enforcement problem is less onerous because some of the personnel and property are located here, usually business and accounting practices are more in conformity with standard U. S. practices, and the desire to maintain a U. S. trading market for their securities is much stronger and essential than in the case of the

average foreign issuer. While it is difficult to generalize and formulate specific criteria, the stated conditions can be tempered by the opportunity for exemption for individual companies on their application.

1. Listed companies

Undoubtedly, the scope of Commission regulation of foreign over the counter securities will have some effect on foreign listed securities. According to the latest count available to me, there were 103 issuers which had securities listed on the exchanges: 57 governments on Form 18, 16 on Form 19, 10 on Form 20 and 20 on Form 21 (of which 7 were public issuers electing this form in lieu of Form 18). Presumably, these issuers would continue their listings unless the Commission's requirements became more burdensome. Also, if the OTC requirements as adopted are the same as the present requirements for listed issuers, the number of listings might possibly increase since issuers could obtain the advantage of the exchange market without additional obligations. From the Commission's vantage point, the listing of securities adds a very real tool for enforcement. It was shown in 1935 that the exchanges could be very persuasive in maintaining listings and cooperative with Commission efforts to enforce the securities laws when threat of loss of listings was anticipated. It is noted that the listed foreign issuers have been quite delinquent in filing the required annual reports (Mr. Kenneth Vaughn in 1963 counted a 50% delinquency ratio, even higher for foreign governments). The threat of delisting these securities might move the exchanges to use their best efforts to cause these reports to be filed.

If OTC and listed requirements are to be basically the same, perhaps some procedure for more effective enforcement could be employed where issuers seek the privilege of exchange trading. One suggestion is that of requiring the inclusion of consent of service of process in the listing application so that the '34 Act provisions could be judicially enforced in the issuer's country of incorporation.

2. Over the Counter companies

Foreign issuers whose securities are traded over the counter are distinguishable from issuers with listed securities in one very important respect, that is they are interested enough in an American trading market for their securities to voluntarily apply for listing and submit to the contractual requirements of the exchange and the securities regulation of this country. The desire to maintain a trading market will undoubtedly be the only force which can make foreign issuers submit to any form of OTC regulation. However, the experience under the listing provision is of limited application because the influence of the stock exchanges will not be present. The Congress has determined that the trading in unregistered foreign securities must not be abolished. These factors indicate that whatever disclosures are made by foreign issuers will have to be obtained because of their willingness to do so and such willingness will be based upon their own desire to maintain good relations with American investors. As in the case of listed securities, the enforcement of the OTC regulation must be indirect, either through the State Department or the securities industry. The Commission's only direct step would appear to be through the promulgation of rules requiring broker dealers making markets in or

trading in such securities to make disclosures with respect to foreign unregistered securities which would discourage activity by American investors and thereby attempt to coerce foreign issuers into seeking registration.

I am not able to render any conclusion as to which classes of foreign issuers should be totally exempt from the OTC regulations except that it would seem desirable to have North American and American owned or based foreign issuers subject to the full registration and reporting requirements. The statutory criteria of trading interest, size and activity are similar to the self imposed regulation of the stock exchanges with respect to the securities traded on their markets. Voluntariness is not a prerequisite for OTC regulation as in the case of listing, but it is a factor in forecasting the difficulty of enforcing the requirements if imposed. Prior activities of the Commission is not pertinent because the category of issuers subject to the listing requirements was not determined by the Commission but by the exchanges and issuers themselves.

Whatever classes of foreign issuers are ultimately made subject to the registration provisions, it would appear that the means taken to enforce the regulation will have to be based upon requirements imposed upon registered broker dealers who either make markets in such stock or trade in these securities. As suggested in the House Report, this might be done by requiring disclosures as appropriate. This could be in the form of a negative statement to prospective buyers that the securities are not registered as required and that information comparable to that on file with respect to domestic or foreign registered issuers is not available;

or broker-dealers could be required to furnish such information as is available, i.e. annual reports etc., to prospective investors or to cause the publication thereof in investment services. Another and perhaps additional procedure would be to allow market makers to file the registration statement on behalf of the issuer provided that such registration statement included some degree of information appropriate under the circumstances. This procedure was accepted for temporary registration under Section 12(b) in 1935, but was rejected by the Commission for permanent registration. These methods would at least serve to inform investors of the lack of available information and put them on notice that the market price was not based on reliable information as in the case of fully registered issuers. The argument that only sophisticated investors deal in foreign securities should not be relied upon too heavily. Nor should the warning that foreign countries might enact requirements on American financing abroad as a reprisal to our action. The basic tool of compliance is to put the foreign issuers in a position whereby, if they will want in the future to use American capital markets, they will make available, directly or indirectly (through market makers), the same type of disclosures required of domestic concerns.

The problem of bearer shares is significant because of the difficulty of determining the volume of securities, number of American holders as well as certain other difficulties, such as notice of meeting, mailing of annual reports, etc. It was suggested at one time that all foreign securities be traded in the country in the form of ADRs. This procedure may have some merit for the bearer share problem.

3. Section 15(d) companies

Issuers subject to the reporting requirements of Section 15(d) have demonstrated their desire to seek American capital and the willingness to submit, at least at the time of the '33 Act Regulation to the Commission's full disclosure requirements. Because of these factors and the assumption that they would again seek capital in this country, these issuers should probably be the object of requirements to keep such original information up to date. Of course the actual Section 15(d) obligation is suspended as long as these issuers are registered under Section 12, but if the proxy and insider trading provisions are not intended to be applicable to foreign issuers, this would make little difference on the disclosure requirements. It should be expected that voluntary compliance for most in these categories would be made, however, some type of abreviated form for registration under Section 12(g) (and perhaps Section 12b) should be provided for these issuers, but no exemption is considered appropriate, and the same type of enforcement provisions, that is through broker-dealer disclosures, should be applicable even though not subject to Section 12(g). It is noted that the reporting delinquency ratio for 15(d) companies is fairly low: as of September 1963, of 23 issuers required to file, only five were delinquent (4 from Israel and one Bahamian).

C. Forms for Registration and Reporting

There is no doubt that the exact scope of information required in the registration and reporting forms, as indicated by the 1935 experience, will have a strong influence in the determination of foreign issuers to comply or not to comply with the regulation requirements. If the forms

are limited to information usually released by such issuers and reasonable in terms of the time required to comply, then a stronger likelihood of voluntary compliance will result. What is reasonable depends, of course, upon the present accounting and financial practices and organic laws and customs of each of the subject nations. Certain issuers would go further if their interest in maintaining a market for its securities in this country is strong or new capital financing here is anticipated. Separate type forms would have to be promulgated if some or all were permitted registration by a broker-dealer market maker on their behalf. This memorandum cannot offer any concrete suggestion since no detailed analysis of the forms were made. However, it is probably accurate to state that annual reports should be designed merely to up date the information in the original registration and that current reports would probably be inappropriate.

A main problem indicated is whether the forms should be identical for listed, 15(d) and 12(g) issuers, or whether some differences should be made based on the assumption that listed and 15(d) companies would be willing to furnish more information. The history of foreign issuers and Section 12(b) indicates that the policy determination in these respects should be announced prior to or at the time it is decided which companies will be required to register. As before, a stronger stand than the issuers would be willing to comply with may cause the Commission to have to temper its requirements. However, the Commission is charged with the duty to obtain as much disclosure as possible, and was successful before by not fully believing the strong criticism and dire predictions of wholesale non-compliance.

One minor correction should be made in the present reporting requirements. Technically, Section 15(d) issuers must file annual reports on Form 10-K, while listed issuers can file on Form 18-K thru 21-K, with the result that listing actually reduces the scope of disclosure. It would seem that listed issuers should have the most complete requirements.

D. Proxy Rules

Although Section 14(a) and 14(c) cover all securities registered under Section 12, the primary application of the proxy rules is in connection with equity securities only. It was considered that in view of the very small number of foreign equity securities listed and the obvious enforcement problems, and perhaps undue burden on the issuers, it would have been futile to risk delisting by subjecting these issuers to the proxy rules. In the case of debt securities, it was noted that more often than not, where solicitation were necessary, the subject matter involved changes in the security amounting to a "new" security and '33 Act registration was necessary. I do not know the volume of OTC issuers of foreign equity securities. However, it would not be consistent to subject 12(g) companies to the proxy rules unless the listed issuers were also treated the same, and the congressional reports infer that neither listed or OTC issuers are strong candidates for this type of disclosure.

There are several methods of obtaining some investor protection in the proxy area. One is to subject "American based" issuers to the proxy rules as was suggested for listed issuers under the proposal to amend Rule 3a12-3. Another is to follow the original draft of Rule AN18 and require full compliance where American stockholders are solicited by the

issuer. A third would be to require filing with the Commission of any material sent to U. S. holders and a general "false and misleading" requirement but no detailed schedule, permitting the Commission to enjoin serious misrepresentation. Any of these procedures would require a study of the current practices of foreign issuers and perhaps the confinement of the rules to specific countries or areas. In addition, an evaluation of the danger of total non-compliance would be necessary. Some procedure might also enlist the aid of market makers or other broker-dealers in Commission surveillance of the proxy procedures even though an exemption is granted.

Section 14(c) has created a problem which must be cured. This new section requires the sending of an information statement by issuers not soliciting proxies and by its terms applies to all securities registered under Section 12. However, it does not specify that "exempted securities" are not covered, so presumably the Commission cannot classify foreign securities as "exempted" and thereby relieve them of this obligation. (It should be noted that Rule 3a12-3 exempts such issuers from subsection (a) of Section 14 only). The proposed Regulation 14C will therefore have to specifically exclude foreign issuers for which Forms 18 thru 21 have been filed. A change in Rule 3a12-3 is not authorized in this case. As to OTC issuers, the Commission's authority is clear under Section 12(h) to exempt issuers from both Sections 14(a) and 14(c).

I have informed Mr. Sheppe of this situation and he stated that it was an apparent oversight in proposed Regulation C.

B. Insider Trading Rules

Section 16 by its terms only applies to equity securities. The consideration of few issuers, difficult enforcement, threat of delisting and different customs were responsible for the exemption of foreign listed securities from those requirements and the same reasoning must be applied in connection with OTC issuers. In addition, it would appear necessary to be consistent in setting up the registration and reporting forms with the action taken with respect to Section 16(a) reports. At present the forms do not require detailed holdings of officers and directors.

Again, American based issuers should be considered for coverage under Section 16 for the same reasons as set forth for the proxy rules. In addition, some consideration could be given to requiring reports from U. S. residents although an objection that such procedure is discriminatory might appear valid.

Final Remarks

Since this memorandum is intended only to trace the legislation and administration actions with respect to listed foreign securities, I am somewhat limited by lack of knowledge of the scope and results of the whole study of foreign securities being conducted, to present any comprehensive conclusion or recommendation. However, I shall be pleased to clarify the material presented herein or to discuss or expand, if possible, this material at any time.