

International Dimensions of U.S. Securities Law

by J. William Hicks

2013 Edition

- Title III, §302 of The Jumpstart Our Business Startups Act of 2012, dated April 5, 2012, H.R. 3606, Pub. L. 112-106, 126 Stat. 306
- Discussion of revisions to Rule 506 of Regulation D.
- Discussion of valuation of global capital markets.
- Rankings of the major securities exchanges for the past 3 years.
- Updated charts and figures on U.S. Equity Markets and Global Markets.

Securities Law Handbook Series

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About the Author

J. William Hicks received his B.A. from the University of Notre Dame in 1962, his M.A. from New York University in 1968, and his J.D. from the University of Michigan in 1965. He was a member of the editorial staff of the Michigan Law Review. He is currently the C. Ben Dutton Professor Emeritus of Law at Indiana University—Maurer School of Law (Bloomington). Professor Hicks is a regular member of the faculty at the ALI-ABA/FBA Course of Study on Regulation D Private Offering Exemptions. He is the author of *Exempted Transactions Under the Securities Act of 1933* and *Civil Liabilities: Enforcement & Litigation Under the 1933 Act*, two treatises in the Securities Law Series, as well as the handbooks *Limited Offering Exemptions: Regulation D* and *International Dimensions of U.S. Securities Law*. Professor Hicks has also contributed to law reviews.

Preface

U.S. securities law has always had an impact on certain non-U.S. issuers, intermediaries and investors. However, beginning in the early 1990s, when the globalization of capital markets accelerated significantly, U.S. securities law has taken on even greater importance to the participants in those markets. The upward trajectory of activities in the international capital markets signals the need for vigilant attention by participants in the domestic capital markets to the retention and attraction of foreign entities in search of available capital. It also means that these domestic participants will be under increasing pressure in the competition globally for domestic and foreign investors to invest their capital in the U.S. primary and secondary markets. One of the critical factors at work in the marketing of U.S. capital and the U.S. primary and trading markets to foreign persons is the cost of compliance with securities regulation, both financial and otherwise, that is borne by foreign issuers, intermediaries and investors. One way to reduce that cost to foreign persons is for domestic regulators and policy makers to modify U.S. securities law with respect to its application to them or their transactions. But unless the proper balance is struck with respect to any such regulatory compromise, domestic issuers, intermediaries or investors might conclude that U.S. securities law, as applied to them, comes at too high a cost. At some point, the cost of regulation to domestic participants in the U.S. capital markets, as compared with a lower cost of regulation to foreign participants, might result in a shift in the flow of funds by those domestic participants from domestic capital markets to more favorable foreign capital markets. In other words, the international dimensions of U.S. securities law, which change in response to economic and regulatory competition, have now, and will continue to have in the future, significance for both domestic and foreign participants in the U.S. capital markets.

Before any judgment can be made about the wisdom of a particular regulatory policy that is reflected in U.S. securities law that applies to foreign issuers, intermediaries or investors, one must first understand that U.S. securities law. This is the primary purpose of this Handbook.

This Handbook seeks to engage the international dimensions of U.S. securities law on at least three levels. Those levels are concerned with the background and sophistication of any person who is interested in the international dimensions of U.S. securities law. The Chapters in this Handbook include information and analysis that are organized in terms of the following groups of readers: (1) persons who might benefit from basic information regarding the financial markets, the domestic and international capital markets, and the underlying policies of securities regulation; (2) persons who, prior to examining the international dimensions of the law, seek an overview of U.S. securities law as it applies to domestic issuers, intermediaries and investors in domestic transactions; and (3) persons who are searching for information and analysis, whether in general or in detail, on the implications and impact of U.S. securities law with respect to international transactions. Although the bulk of the Handbook is designed for those persons in group (3), *supra*, the Handbook will hopefully provide sufficient background information for persons who initially fall into either or both of groups (1) or (2), *supra*, so that they will feel more comfortable with the discussion of international dimensions of U.S. securities law. Each of these three levels of organization of the handbook merits further explanation.

The first four chapters of the Handbook provide readers with background information on capital markets and securities regulation, which constitute the financial, business and regulatory contexts for the topics of the remaining chapters. Chapter 1 examines basic terms and concepts of finance and it offers data and other information on domestic and cross-border activity in the financial markets, including cross-border equity capital flows and foreign equity trading. It ends with conclusions about certain trends in cross-border capital flows and the implications of those trends for securities regulation. Chapter 2 examines U.S. capital

markets, including data and other information on domestic capital flows in the primary and secondary markets. It also identifies the principal participants in the U.S. capital markets and discusses their roles in those markets. Chapter 3 shifts the focus to international capital markets. It includes data and other information about international bond and equity markets and the various relationships that exist between the international securities markets and those in the United States. Finally, Chapter 4 reviews the theories of securities regulation in domestic markets and identifies some of the challenges in the global markets that confront regulators and policy makers.

For those readers of the Handbook who are not specialists in U.S. securities law, group (2), *supra*, the “international dimensions” of U.S. securities law might not be fully comprehensible without some background information on particular aspects of U.S. securities law. For such readers, portions of the Handbook will serve as a primer on U.S. securities law. Chapters 5 and 8 are devoted entirely to domestic securities law. Chapter 5 provides an overview of the Securities Act of 1933 (A1933 Act@) in the context of both primary and secondary offerings in domestic transactions of securities issued by domestic issuers. It also contains a discussion of the Investment Company Act of 1940 as it relates to primary offerings in the United States by domestic investment companies and to resales in the U.S. by owners of such securities. Chapter 8 addresses generally the impact of the Securities Exchange Act of 1934 (“1934 Act”) on disclosures to trading markets and to the SEC by certain domestic issuers and by certain of their affiliates and shareholders. Certain topics in Chapters 5 and 8, such as the requirements of the Sarbanes-Oxley Act of 2002, are merely mentioned there and are left for more detailed discussion elsewhere in the context of foreign issuers. Chapters 7, 10 and 11, which are described in connection with the organization of topics for group (3), *infra*, include a discussion of U.S. securities law as applied to domestic persons or domestic transactions as an introduction to topics that are explored more fully in those chapters in the context of foreign persons or foreign transactions.

The third level of organization of U.S. law is for persons who are interested in a discussion and an analysis of that which the title of this Handbook promises: the international dimensions of U.S. securities law. Chapters 6, 7, 9, 10, and 11 discuss and analyze the international dimensions of the following areas of U.S. securities law: (i) the registration requirements of the 1933 Act as applied to offers and sales of securities of foreign issuers - foreign governments, foreign operating companies and foreign investment companies - in both domestic and foreign transactions (Chapters 6 and 7); (ii) the registration requirements of the 1933 Act as applied to the issuance of depositary receipts in the United States (Chapter 6); (iii) the registration requirements of the Investment Company Act of 1940 as applied to foreign investment companies in domestic transactions (Chapter 6); (iv) the registration requirements of the 1933 Act as applied to offers and sales of securities of domestic issuers in foreign transactions (Chapter 7); (v) the registration, reporting and other requirements of the 1934 Act as applied to foreign issuers, their affiliates and certain owners of their securities (Chapter 9); (vi) the consequences of regulation under the 1934 Act for certain foreign issuers and other persons associated with them, including the obligations imposed by the Sarbanes-Oxley Act of 2002 and the Foreign Corrupt Practices Act (Chapter 9); (vii) the disclosure obligations under the 1934 Act in connection with depositary programs (Chapter 9); (viii) the registration and other requirements under the 1934 Act as applied to foreign brokers or dealers (Chapter 10); (ix) the registration and other requirements under the Investment Advisers Act of 1940, as applied to foreign investment advisers (Chapter 10); (x) the scope of enforcement by the SEC and self regulatory organizations- remedies and sanctions - for violations by foreign persons of the registration, reporting, anti-fraud and other provisions of the 1933 and 1934 Act (Chapter 11); (xi) the issue of jurisdiction, both in personam jurisdiction and subject matter jurisdiction, for U.S. courts that are confronted with securities law claims where one or more of the parties in litigation is foreign or the securities transaction is foreign (Chapter 11); (xii) the enforcement in U.S. courts of pre-dispute contract provisions, in an agreement involving securities, that specify a non-U.S. forum for resolution of a dispute and provide for the application of non-U.S. law by the foreign forum (Chapter 11); and (xiii) the practical

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problems of multinational enforcement of U.S. securities laws (Chapter 11).

I would like to acknowledge the encouragement that I received in completing this Handbook from Alfred Aman, former Dean of Indiana University School of Law (Bloomington), my colleagues at the law school, the hundreds of former law students who were enrolled over the past thirteen years in my course on international securities regulation, and my good friend Carole Silver, Senior Lecturer at Northwestern University School of Law. I want to express my appreciation to my secretary, Marjorie Young, for her tireless attention to the details involved in helping me assemble the materials in this book. Also, I wish to thank my wife, Karen, for her constant love and support, as well as my entire family, for their patience and understanding, during the completion of this project. Finally, I would like to dedicate this book to the loving memory of my father, Justin Glenn Hicks, who instilled in me many important values, including the value of hard work.

August 2005

Table of Abbreviations

ADR	American Depositary Receipt
Board	Federal Reserve Board
CBOE	Chicago Board Options Exchange
CEA	Commodity Exchange Act
CFTC	Commodity Futures Trading Commission
COD	cash on delivery
Commission	Securities and Exchange Commission
DK	don't know
DTC	Depository Trust Company
DVP	delivery versus payment
ESOP	employee stock ownership plan
FINRA	Financial Industry Regulatory Authority
FRB	Federal Reserve Board
FRRS	Federal Reserve Regulatory Service
MSRB	Municipal Securities Rulemaking Board
NASD	National Association of Securities Dealers, Inc.
NCM	Nasdaq Capital Market (formerly Nasdaq SmallCap Market)
NMS	National Market System
NNM	Nasdaq National Market
NSMIA	National Securities Markets Improvement Act
NRSRO	nationally recognized statistical rating organization
NSRO	nationally recognized statistical rating organization
NYSE	New York Stock Exchange
OCC	Options Clearing Corporation
OTC	over the counter
SEC	Securities and Exchange Commission
SMA	special memorandum account
SRO	self-regulatory organization



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