District Court Does Not Require Broker Dealer Registration for Foreign Transactions

On March 28, 2013, in SEC v. Benger, the U.S. District Court for the Northern District of Illinois held that the registration requirements under Section 15(a) of the Exchange Act do not apply to foreign transactions. As a consequence of this holding, brokers and dealers based in the United States whose activities are limited solely to foreign sales of stock (and whose activities fall under the jurisdiction of the Northern District of Illinois) are not required to be registered with the SEC. There is a possibility that the SEC will appeal this decision in the near future.

In the case at issue, the SEC charged defendant brokers and dealers with, among other things, the failure to register pursuant to Section 15(a). In moving to dismiss, defendants argued that registration under the Exchange Act was not required because their activities were limited to the foreign sale of stock. The district court ruled in favor of defendants and dismissed the SEC's charge.

In its holding, the court first noted that Congress' intent in drafting Section 15(a) of the Exchange Act was to concern itself with the registration of brokers and dealers utilizing the facilities of domestic, not foreign, exchanges. The court held that this intent is apparent from the text of Section 15(a), which states in relevant part: "It shall be unlawful for any broker or dealer . . . (other than such a broker or dealer whose business is exclusively intrastate and who does not make use of any facility of a national securities

exchange) [. . .]" (emphasis supplied by court).

The court then addressed the purpose behind the Exchange Act. In this regard, the court held that registration is "merely a subordinate component" of the Exchange Act. The overarching purpose of the Exchange Act is much broader: to protect investors against manipulation of share prices through the regulation of transactions on national securities exchanges and in over-the-counter markets. It is against this broader purpose of regulating domestic exchange activities that Section 15(a) must be addressed.

Finally, and most importantly, the court cited to the 2010 Morrison v. National Australia Bank Ltd. U.S. Supreme Court decision, where the Court held that Section 10(b) of the Exchange Act, a key antifraud provision, does not provide a cause of action in federal courts for fraudulent conduct involved with the sale of foreign securities. In analogizing Section 10(b) to Section 15(a), the court noted that because the regulatory purpose of Section 15(a) is virtually identical to that of Section 10(b), the same rationale should apply, and registration should be required only where a broker is engaged in a domestic transaction (i.e., where the stock purchase occurs in the United States).

If other courts adopt a similar approach to the Northern District of Illinois, there may be a rise in the number of unregistered broker dealers conducting foreign transactions from the United States.

The district court's opinion and order can be found at <http://scholar.google.com/scholar_case?case=5333308497970790&hl=en&as_sdt=2&as_vis=1&oi=scholarr>.