1. INTRODUCTION

Under French law, there is no legal definition of a private placement. In practice, however, a private placement refers to a sale of securities which is not part of a public offering.

Recently, the concept of a public offering has been clarified by a new regulation of the Commission des Opérations de Bourse (the "COB"), the French equivalent of the U.S. Securities and Exchange Commission. Regulation No. 92-02 of March 3, 1992 provides that a public offering of securities not listed on a French stock exchange may, under certain circumstances, be exempted from the prospectus requirement. The recent regulation implemented into French law most of the European Economic Community Directive of April 17, 1989, requiring that prospecti be issued in connection with public offerings of securities.

The focus of this Article is private placements in France of non-French securities that are not listed in France. Accordingly, the recent regulation is particularly relevant inasmuch as it deals with offers in France of securities not listed on a French stock exchange. The regulation, for example, expressly exempts an offer of "Euro-securities" from the requirement of issuing a "French" prospectus.

Section 2 of this Article presents an overview of the regulatory scheme of private placements in France. Section 3 examines the concept of a public offering from which the definition of a private placement is derived. A discussion of

---

* Olivier d'Ormesson is a member of the Paris Bar and a member of the French firm Gide Loyrette Nouel.

** Astrid Baumgardner is New York counsel to the New York office of Gide Loyrette Nouel.

1 Regulation No. 92-02 approved by Arrêté of March 3, 1992; J.O. Mar. 15, 1992, 3745; 1992 D.S.L. 14 [hereinafter Regulation No. 92-02]. In May 1992, the COB issued its commentary on how Regulation No. 92-02 is to be interpreted and applied [hereinafter Instruction].


3 1992 D.S.L. 14, supra note 1, art. 4.
the COB's treatment of private placements and the practical aspect of such placements in France appears in Section 4. Finally, Section 5 examines provisions of the French exchange control regulation applicable to the placement or sale of certain securities in France.

2. REGULATORY SCHEME

2.1. Applicable Statutes and Regulations

Two basic French texts address the regulation of private placements in France of non-French securities not listed in France.\(^4\)

The first is COB Regulation No. 92-02 approved on March 3, 1992 (the "COB Regulation").\(^5\) The COB Regulation applies to the offer in France of securities by both French and foreign issuers that are not listed on a French stock exchange. The Regulation sets forth (i) the criteria which define a public offering in France; (ii) the requirements of a prospectus and other information to be provided in a public offering; and (iii) public offerings that are exempt from the prospectus requirement.

The second relevant text is Law No. 72-6 of January 3, 1972, on the solicitation of investors in securities offerings (the "Solicitation Law"). This law defines the concept of solicitation (démarchage) and provides criminal sanctions for unauthorized solicitation.\(^6\)

---

\(^4\) Article 72 of the Law of July 24, 1966, on commercial companies which defines when a company publicly solicits funds, applies only to French companies, and therefore is not relevant to securities issued by foreign companies. See Gide Loyrette Nouel, Dictionnaire Joly, Bourse et Produits Financiers, "Appel Public à l'Epargne," No. 13; MERCADAL & JANIN, SOCIETES COMMERCIALES No. 1104 (1992); see also the discussion infra section 3.

\(^5\) Regulation No. 92-02, supra note 1. The legislative authorities for the COB Regulation derive from Articles 4-1, 6, 7, and 7-1 of Ordinance No. 67-833 of September 28, 1967; J.O. Sept. 29, 1967; 1967 D.S.L. 36, which provide that any company that issues or places securities to the public must publish a prospectus.

2.2. Regulatory and Judicial Enforcement Authorities

The private placement of securities in France by a foreign issuer (whether authorized or unauthorized) may bring the issuer or its financial advisers, in contact with several branches of the French government.

One branch, the COB, is entrusted with the dual mandate of protecting the rights of securities holders and of supervising the orderly operation of financial markets. The COB has jurisdiction over all companies which publicly solicit funds. The COB must review and grant clearance (visa) to all prospecti. COB regulations specify which share offerings in France require the issuance of a prospectus.

Another branch is the criminal court system which has exclusive jurisdiction over the enforcement of the penal provisions of the Solicitation Law. This grant of authority is particularly significant because the potential for conflict exists between the criminal courts and the COB over what constitutes a private placement.

Finally, if a prior exchange control authorization for a private placement is necessary (primarily for non-OECD issuers), the Ministry of Finance may become involved in the private placement.

2.3. Regulatory Requirements for a Public Offering and Sanctions for Non-Compliance

2.3.1. Regulatory Requirements

The COB Regulation requires the filing of a prospectus and disclosure of other information in the connection with the public offering of securities that are not listed on a French stock exchange. The prospectus and information requirements for the public offering of securities that are listed on a French stock exchange are the subject of additional COB Regulations.\(^7\)

Pursuant to Article 3 of the COB Regulation, a prospectus in French (prospectus simplifié) must be issued for any public offering of non-listed securities in France. A public offering is defined as either an issue to the public of new securities or a sale to the public of existing securities. Certain public offerings are exempt from this prospectus requirement.

It should be noted that pursuant to Articles 16 and 18 of the COB Regulation, the prospectus used by an EEC issuer in another EEC Member State can be used in France provided that it has been (1) translated into French, (2) approved by the EEC Member State within three months preceding its use in France, and (3) prepared in accordance with EEC Directive No. 80-390.

In addition to the prospectus, companies that publicly solicit funds have other public notice obligations. However, this Article will only address the information requirements applicable to foreign companies seeking to publicly solicit funds in France.

Pursuant to Article 3 of the Law of January 30, 1907, the issuer or the seller of foreign securities offered to the public in France must publish a notice in the official French legal bulletin (B.A.L.O.). The notice must set forth information regarding its corporate structure including its name and address, place of incorporation, corporate purpose, amount of capital, and most recent financial statement.

Pursuant to Article 57 of Décret No. 84-406 of May 30, 1984, a foreign company that issues securities to the public in France must also, prior to such offering, file with the clerk of the Commercial Court of Paris corporate information and documents including a translation of its by-laws.

---

8 These articles of the COB Regulation refer to chapter 3 of the COB Regulation No. 91-02, supra note 7.
It appears that these notice requirements also apply to the types of public offerings that the COB Regulation exempts from the prospectus requirement. Indeed, the COB Regulation does not supersede the provisions of the Law of January 30, 1907, or the provisions of the Décret of May 30, 1984. It is a well-established principle of French law that the terms of a law or a décret must prevail over the terms of a regulation.

2.3.2. Sanctions for Non-Compliance

Companies may be subject to sanctions both for non-compliance with the regulations on public offerings and for non-compliance with the Solicitation Law.

a. Sanctions for Non-Compliance with Rules on Public Offerings

As a result of the Law of August 2, 1989, a company that violates the rules governing public offerings (e.g., the offering of securities without a prospectus or clearance by the COB) is no longer subject to penal sanctions.\textsuperscript{12} Instead, this Law provides for the following sanctions:

- Injunction by the COB: The COB can issue an injunction against any activity that violates the COB Regulation. The COB may, for example, suspend or prohibit the public offering and may even order that investors be reimbursed.\textsuperscript{13}
- Administrative fines: The COB can impose fines in an amount up to 10 million French Francs or up to ten times the profit made by the person who violated the COB's rules.\textsuperscript{14}
- Other Sanctions: The COB can also request that the court order (1) the sequestration of funds of the relevant securities and (2) the temporary suspension of


\textsuperscript{13} 1967 D.S.L. 36 art. 9-1, \textit{amended by} Law No. 89-531 of August 2, 1989 art. 5.

\textsuperscript{14} 1967 D.S.L. 36 art. 9-2, \textit{amended by} Law No. 89-531 of August 2, 1989 art. 5.
operations of the financial institution involved.\textsuperscript{15} Moreover, the COB can request that the court order any person who has infringed investors’ rights to cease from such activity and remedy any adverse effects that may have resulted from infringement.\textsuperscript{16}

b. Sanctions for Non-Compliance with the Solicitation Law

Persons who violate the Solicitation Law are subject to penal sanctions identical to those applicable to criminal fraud or swindling ("escroquerie"): imprisonment of up to five years and a fine of up to 2,500,000 French francs.\textsuperscript{17} Moreover, if convicted, a person may be precluded from holding certain corporate positions, such as manager of a French company or an intermediary in banking transactions. In addition to those sanctions, any agreements violating the Solicitation Law may be declared unenforceable.

3. Public Offerings

In order to derive a definition of a private placement it is critical to understand what constitutes a public offering under French law, because a securities offering that fails to satisfy any of the criteria defining a public offering will be considered to be a private placement.

Under French law, four criteria determine whether an offering of securities not listed in France constitutes a public offering.\textsuperscript{18} If any one of the four criteria is met the offering is considered public.

The criteria are set forth in Article 2 of the COB Regulation. Essentially, securities are deemed to be offered to the public if they are (i) disseminated beyond a circle of 300 persons; (ii) placed through financial institutions; (iii) advers-
3.1. Dissemination Beyond a Circle of 300 Persons

The first criterion of a public offering under Article 2 of the COB Regulation is whether the offering of new or existing securities is made to more than three hundred persons. The COB has interpreted the "300 persons" rule in several specific contexts.

In applying this rule, only investors who reside in France are taken into account. The COB Regulation just refers to the term "persons" without making any distinction between the quality of such persons. Therefore, for the purpose of determining whether the 300 person limit has been reached no distinction is to be made between institutional investors and other investors.

Furthermore, the COB Regulation expressly provides that in applying the "300 persons" rule, employees of the issuer are treated no differently than other investors. This provision contrasts with the EEC Directive of April 17, 1989, which permits Member States to exempt employers from the prospectus requirement when they are offering securities to their employees.

Similarly, the COB Regulation does not provide an

---

19 The last three criteria derive from Article 72 of the French Company Law. Article 72 provides that:

Companies are deemed to raise funds from the public if their securities are listed on the cote officielle or the second marché of the stock exchanges, as of the date of such listing, or which, for the purpose of placing securities of any kind, resort to credit institutions, or to institutions mentioned in Article 99 of the Banking Law No. 84-86 of January 24, 1984.

Such institutions include, for example, security houses and financial institutions. The law is also triggered by the use of stock-brokers, all forms of advertising, and solicitation of customers in the attempt to place securities. Law No. 66-537 of July 24, 1966, supra note 4, art. 72.

20 See COB Annual Report 1986, at 114, which was published prior to the adoption of the COB Regulation. Moreover, when the offer of securities is reserved exclusively for the employees, the 300-person threshold is increased to 500 persons, and the prospectus is replaced by a simplified notice of information and subscription (bulletin d'information et de souscription); see also COB Instruction of July 19, 1988; Article 208-9 et seq. of the French Company Law.

exception to the "300 persons" rule for securities offered to a closely-knit circle of persons, such as potential members of a golf club.\textsuperscript{22}

Finally, with respect to mutual funds, the COB Regulation represents a total reversal of the COB's earlier position. Prior to this Regulation, the COB considered a mutual fund not as a single investor, but rather as many investors who were unit holders of such a fund. Article 2 of the COB Regulation, however, now states that a mutual fund (\textit{fonds commun de placement}) is considered to be a single investor.\textsuperscript{23}

3.2. Placement through Financial Institutions

Article 2 of the COB Regulation also includes as a criterion for a public offering the placement of securities by a financial institution, whether French or foreign. On its face, this requirement appears to negate the practice of private placements in France given that such placements typically are handled by financial institutions. However, as discussed below, certain exemptions exist which mitigate the severity of this rule.

3.3. Advertising

Any public disclosure in the French press concerning a securities offering constitutes advertising under French law.\textsuperscript{24} Moreover, the dissemination of brochures and solicitation by mail to persons having no personal ties to the authors of such letters also constitutes advertising which would render such offerings public.\textsuperscript{25}

The question of whether the publication of an advertisement in a foreign newspaper concerning the placement of securities constitutes a public offering in France has not, to our knowledge, been officially considered by the COB. Howev-

\textsuperscript{22} COB Annual Report 1985, at 92; \textit{see also} COB Annual Report 1984, at 29-30.

\textsuperscript{23} Presumably, this rule also applies to another French collective investment vehicle known as a SICAV ("société d'investissement à capital variable"—variable capital companies).


\textsuperscript{25} \textit{See supra} note 24 and COB Annual Report 1975, at 39.
er, if the newspaper is circulated in France, there is a risk that such publicity would be sufficient to constitute a public offering in France.

3.4. Public Solicitation of Purchasers

The Solicitation Law, which regulates the solicitation of customers for the purpose of placing securities in France, broadly defines the meaning of public solicitation. A person is deemed to engage in the act of solicitation whenever he goes, "on a regular basis, to the domicile or to the residence, or to the place of work or to public places, in view of advising the subscription, the purchase, the exchange or the sale of securities," or offers to take part in operations related thereto. The offering of such services or transactions by telephone, telex or mail also falls within the scope of this statute. The Law has been applied so broadly that two solicitous acts were held sufficient to constitute solicitation "on a regular basis."

Under the Solicitation Law, financial institutions licensed in France are authorized, under certain circumstances, to solicit customers for the purchase of securities listed on a French stock exchange. These institutions must obtain the COB's clearance before issuing a short prospectus describing the securities concerned. Additionally, offering institutions must obtain special permits known as "cartes professionnelles" for employees who will engage in public solicitation. However, it should be noted that non-listed securities are not included within the scope of this authorization. Even financial institutions licensed in France may be subject to sanctions under the Solicitation Law if they solicit customers in France for the purchase of securities which are not listed on a French stock exchange.

However, if the offeror had a prior relationship with the

---

26 Solicitation Law, supra note 6, art. 2.
28 Solicitation Law, supra note 6, arts. 3, 5.
29 Id. art. 6.
30 Id. art. 7.
solicited person (e.g., had rendered investment advice), then the dissemination of information regarding the existence of a new security would not constitute solicitation.\textsuperscript{32}

The concept of solicitation is thus extremely broad. However, in practice, the COB has interpreted solicitation in such a way that certain private placements can be made in France.

4. THE COB'S REGULATION OF PRIVATE PLACEMENTS AND PRACTICAL ASPECTS OF PRIVATE PLACEMENTS IN FRANCE

Notwithstanding the harshness of the Solicitation Law, numerous private placements take place in France every year. As mentioned above, an offer is exempt from the prospectus requirement either because (1) it is considered a private placement by the COB because it meets certain defined criteria, or (2) it is a public offering which is expressly exempt from the prospectus requirement under the COB Regulation.

4.1. The COB's Tolerance of Private Placements

A private placement, exempt from the prospectus and other regulatory requirements, is an offering of securities which does not meet any of the listed criteria. Ordinarily, a typical private placement is always made with the assistance of a financial institution. Typically, such assistance would deem the offering public. However, in a non-binding opinion contained in its 1985 Annual Report,\textsuperscript{33} the COB has expressed a tolerant position, whereby a "typical private placement" would not, under certain circumstances, be considered solicitation of the public, or a public offering. The COB's position continues to be relevant, even after the publication of the COB Regulation, because the limited construction of the COB's Regulation concerning exemption of offerings "in the context of one's professional activities" would not have authorized "typical private placements" in France.

In its 1985 Annual Report, the COB published an answer

\textsuperscript{32} See COB Instruction of November 1972, concerning the implementation of Article 6 of the Solicitation Law.

\textsuperscript{33} See COB Annual Report 1985, at 92.
to the question posed by a British financial institution which asked whether a financial institution could inform, in writing, a number of its clients, all of them French institutional investors, of the sale by the British government of shares in a privatized company.

The answer given by the COB stated that furnishing such advice in writing would not amount to a public offering nor would it constitute a prohibited solicitation provided that:

- any telex and prospectus are to be sent only at the investors’ request and must state that the information is not to be divulged to the public and that the sale of the securities to the French public is unauthorized;
- the institutional investors solicited are to be limited to pension funds, insurance companies, the *Caisse des Dépôts et Consignations*, or credit institutions acting for their own account to the exclusion of mutual funds and SICAV's;
- the total number of investors contacted must remain below 300; and
- no subscription form may be attached to the prospectus.\(^{34}\)

It appears that, even after the issuance of the COB Regulation, the COB still subscribes to the position it adopted in its 1985 response. Moreover, pursuant to the COB Regulation, it may now be considered that as long as the number of investors does not exceed 300 and the conditions listed above are satisfied, securities may be offered to mutual funds and SICAV's.

Nevertheless, it is curious, and of little comfort to practitioners, that the only legal basis for typical “private placements” in France derives from a non-binding opinion of the COB contained in its 1985 Annual Report and not from the recent COB Regulation.

\(^{34}\) Consequently, application forms should not be attached to the offering circular unless requested by the investors.
4.2. Public Offerings Exempt from the Prospectus Requirement under the COB Regulation

The COB Regulation integrates into French law most of the EEC Directive of April 17, 1989 which establishes the requirements of prospecti issued in connection with a public offering of securities.\(^{35}\)

Article 4 of the COB Regulation exempts certain public offerings (e.g., offerings to more than 300 persons in France) from the prospectus requirement in particular instances. Whether or not a prospectus is required depends upon (i) the nature of the investor, (ii) the size of the offer and the nature of the product and (iii) the nature of the underlying transaction.

It should be noted, however, that the publicity requirements previously mentioned are applicable even if the public offering is exempt from the prospectus requirement.

4.2.1. The Exemption Based on the Nature of the Investor

a. Professionals

Article 4(a) of the COB Regulation exempts from the prospectus requirement an offer made to persons "in the context of their professional activities."\(^{36}\) The COB's "Instruction"\(^{37}\) specifies that this includes securities offers made to members of the same profession for the creation of a common venture. This exemption would apply, for example, to an offer of shares made to medical professionals to finance the purchase of medical equipment. However, under the COB's "Instruction," this exemption would not apply to securities offerings directed, for commercial reasons, to a given profession (e.g., soliciting a group of wealthy professionals for a securities offering not related to their professional activities).

Unfortunately, the COB's "Instruction" does not extend the prospectus exemption to offers made to institutional investors. Therefore, the COB does not currently consider that the phrase, "in the context of their professional activities," covers

\(^{36}\) See Regulation No. 92-02, supra note 1, at 232.
\(^{37}\) See Instruction, supra note 1.
securities offered to institutional investors, even though this exact phrase is used in the EEC Directive and has been construed differently in other EEC Member States. Consequently, any private placements directed to institutional investors must comply with the conditions provided for in the COB 1985 Annual Report.

b. Euro-Securities

Under Article 4(k) of the COB Regulation, the offering of Euro-Securities does not require a prospectus. The COB Regulation itself does not define "Euro-Securities." The COB "Instruction," however, states that Euro-Securities are securities issued outside France, and not offered to the public in France at the time of their issuance. Because the COB Regulation is derived from the EEC directive, one may refer to the EEC Directive to find a more detailed definition of Euro-Securities. The EEC Directive defines Euro-Securities as:

Transferable securities which: (1) are to be underwritten and distributed by a syndicate at least two of the members of which have their registered offices in different States; and (2) are offered on a significant scale in one or more States other than that of the issuer's registered office; and (3) may be subscribed for or initially acquired only through a credit institution or other financial institution.  

4.2.2. The Exemption Based on the Size of the Offer and the Nature of the Product

Under Article 4 of the COB Regulation, a prospectus is not required if:

- the global amount of the offer is less than 250,000 FF (or its equivalent in other currencies);  
- the offered securities can be acquired or subscribed only for a consideration of at least 1 million FF (or its equivalent in other currencies).

---

39 Regulation No. 92-02, supra note 1, art. 4(b).
40 Id. art. 4(c).
- the unit price of the offered securities is at least 1 million FF (or its equivalent in other currencies);\(^{41}\) or
- the offer concerns units of collective investment undertakings ("UCITS")\(^{42}\) other than those of the closed-end type, which are subject to different regulations.\(^{43}\)

4.2.3. The Exemption Based on the Nature of the Underlying Transaction

A prospectus is not required under Article 4 of the COB Regulation if:

- the securities are offered as consideration for a takeover bid, merger, or contribution of assets;\(^ {44}\)
- the offer involves shares or equity securities which are allotted, free of charge, as payment of dividends, or upon the increase of capital through capitalization of reserves;\(^ {45}\)
- the offered securities are created through the exercise of rights attached to securities for which a prospectus was previously issued;\(^ {46}\)
- the securities are offered in exchange for shares in the same company, and issuance of such securities does not involve an increase of the company's issued share capital;\(^ {47}\) or
- the subscription or acquisition of securities is a condition which entitles the holder to avail himself of the services rendered by mutual benefit societies (organismes de caractère mutualiste).\(^ {48}\)

\(^{41}\) Id. art. 4(d).

\(^{42}\) Offerings of UCITS in France are regulated by COB Regulation No. 89-02.

\(^{43}\) Regulation No. 92-02, supra note 1, art. 4(e).

\(^{44}\) Id. art. 4(f).

\(^{45}\) Id. art. 4(g).

\(^{46}\) Id. art. 4(h).

\(^{47}\) Id. art. 4(i).

\(^{48}\) Id. art. 4(i).
4.3. Risks under the French Solicitation Law

The COB Regulation sets forth those instances where a public offering of non-listed securities may be exempt from the prospectus requirement. Strangely enough, however, under the Solicitation Law, solicitation in connection with such offerings remains prohibited. In theory, the criminal courts, in interpreting the Solicitation Law could enforce the provisions of this law even in cases where a prospectus is not required under the COB Regulation. However, in practice, we are unaware of any case of in the French courts where sanctions of the Solicitation Law were applied in situations where issuers had complied with the criteria set forth in the COB Annual Report for 1985. Consequently, it would be surprising if an offer made in compliance with the COB Regulation, would give rise to prosecution under the Solicitation Law.

Moreover, it should be noted that by reason of Article 18 of the Law of March 28, 1885, as amended by the Law of August 2, 1989, French investors may be solicited to purchase futures, options, or listed securities, on certain approved foreign stock exchanges. However, to date, no regulation (arrêté) has been

---

49 One could argue that the criminal courts would not be obligated to apply the Solicitation Law on the grounds that it conflicts with the EEC Directive of April 17, 1989. However, it is doubtful that Article 2 of the Directive has a "direct effect," binding on the Member States, inasmuch as Article 2 merely lists the types of offers which could be considered as not constituting public offerings. The Directive does not require Member States to consider such offerings "private placements."


Pursuant to Decree No. 90-948 of October 25, 1990, with respect to foreign securities listed abroad but not listed on French markets, French investors may be solicited by persons residing outside France, provided that these persons comply with the requirements of "expertise, solvency and honor" that are imposed upon French persons under French law. It is questionable whether a mere decree may permit institutions which are not licensed in France to solicit French investors when the Solicitation Law provides that only specific licensed financial institutions may do so. Inasmuch as a regulation (arrêté) approving foreign securities markets has not yet been promulgated, the problem would not arise. Nevertheless, should such an arrêté be implemented, we would advise foreign issuers to solicit the public only through the financial institutions licensed in France.
promulgated by the Ministry of Economy and Finance which would impose this law upon securities markets. Thus, despite the recent law of August 1989, the Solicitation Law continues to prohibit public solicitation in connection with the offering of foreign securities that are only listed abroad. As far as foreign futures and options markets are concerned, pursuant to Arrêté of September 20, 1991, implementing the new Article 18 of the law of March 28, 1885, licensed U.S. dealers dealing in futures and options listed and traded on certain approved markets, are now permitted, either personally or through French agents, to offer these particular instruments for sale to French investors.

4.4. Disclosure Requirements for Private Placements

There are no specific French statutes or regulations which dictate the form and content of the information to be disclosed to potential investors in a French private placement.

The mere distribution of an information memorandum to potential investors would not transform a private offering into a public offering. Therefore, such a memorandum could be

---

61 Pursuant to Arrêté of September 20, 1991, supra note 50, the futures and options offered must be listed or traded on one of the following approved markets:
- Amex Commodities Corporation, New York;
- Chicago Board of Trade, Chicago;
- Chicago Mercantile Exchange, Chicago;
- Chicago Rice and Cotton Exchange, Chicago;
- Coffee, Sugar and Cocoa Exchange Inc., New York;
- Commodity Exchange Inc., New York;
- Kansas City Board of Trade, Kansas City;
- MidAmerica Commodity Exchange, Chicago;
- Minneapolis Grain Exchange, Minneapolis;
- New York Cotton Exchange, New York;
- New York Futures Exchange, New York;
- New York Mercantile Exchange, New York;
- Philadelphia Board of Trade Inc., Philadelphia; or
- Twin Cities Board of Trade, Minneapolis.

62 See Jacques de Taisne & Diane Sinagra, Paris Paves the Way for U.S. Dealers, INT'L FIN. L. REV., Feb. 1992, at 8. It is debatable, however, whether U.S. dealers can offer financial futures and options without acting through a French agent, insofar as the Law of March 28, 1885, only allows solicitation of such instruments through French financial institutions.
transmitted to potential investors as long as the other criteria for private placements (or public offerings exempted from prospectus requirements) are satisfied.

However, an information memorandum should clearly indicate that any recipient thereof is prohibited from distributing the document to the French public. Moreover, the memorandum, and any invitation letter, should include a legend explaining either that the offer does not comply with the legal requirements for public offerings in France or that it is exempt from the prospectus requirement.

4.5. Resale of Privately-Placed Securities and Obligation to Update Information

French law does not impose any obligations on an issuer in the event its securities are resold by their current holders. However, upon resale, securities holders may not “solicit” any potential purchaser, except within the restrictive scope of the Solicitation Law. Furthermore, holders of such securities may not offer their securities without a prospectus if one of the conditions characterizing a public offering is present.

To the extent that a public offering of foreign issued securities has not taken place in France, there are no specific information obligations imposed by French Law on foreign issuers, their directors, or their financial intermediaries.

However, continuing obligations to French securities holders may result if the issuers commit to such an obligation in their offering materials or by-laws. Such continuing obligations may also result from other regulations applicable to the foreign issuer.

4.6. Offerings Outside France

A “French” prospectus is not required when a French company, without soliciting the French public, issues debt securities to be sold exclusively outside of France. A French prospectus must be submitted for the COB’s approval only if debt securities are to be listed on a French stock exchange.\(^{55}\)

If debt securities are not listed in France, the “international

\(^{55}\) Regulation No. 88-04, supra note 7, art. 17.
prospectus" must simply be forwarded to the COB. If the securities to be offered outside France are securities giving rights to the share capital of a French company, the COB typically requires that the offer be made to the French public, simultaneously with the international offering, in order to preserve the rights of French shareholders. In such an instance, the French prospectus must be approved by the COB and a copy of the prospectus for the "international offering" must be sent to the COB as well.

5. EXCHANGE CONTROL REGULATIONS

5.1. Prior Authorization for the Placement of Certain Foreign Securities

Under the French Exchange Control rules, most offerings of foreign securities in France are exempt from the obligation of obtaining prior approval from the Ministry of Economy and Finance. Pursuant to Article 9 of Décret No. 89-938 of December 29, 1989, the offering, in France, of the following securities may occur without prior approval of the Ministry of Economy and Finance: (1) securities of issuers incorporated in one of the OECD Member States (with the exception of shares in non-EEC "undertakings for collective investment in transferable securities"); (2) securities issued by international organizations of which France is a member; and (3) securities already listed in France or whose introduction in France has already been authorized.

Thus, it is ordinarily the case that securities issued by companies of most of the industrialized countries (OECD countries), with the exception of securities issued by non-EEC

---

54 COB Bulletin 1979 No. 119.
56 Regulation No. 88-04, supra note 7, art. 18.
57 The principal Organization for Economic Cooperation and Development ("OECD") Member States include Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States.
"undertakings for collective investment in transferable securities" ("UCITS"), can be sold in France without any prior authorization by the Ministry of Economy and Finance. This exemption applies to public offerings (where a prospectus is required) as well as to private offering of such securities.

The limitation on the exemption provided by Article 9 of the December 1989 Décret, pertaining to securities issued by non-EEC UCITS, merely reaffirms the substance of Article 14 of Décret No. 89-624 of September 6, 1989, which provides that any UCITS whose shares are issued by a national of a non-EEC member State, must, prior to its introduction in France, be approved by the Ministry of Finance.69

Although French law does not define a UCITS, the equivalent term in French ("OPCVM") is exclusively used by French regulators to refer to both mutual funds (fonds commun de placement) and open-ended investment companies ("SICAV").

Furthermore, French law on UCITS has been recently overhauled to conform to the EEC Council Directive No. 85/611 of December 20, 1985, which addresses UCITS.60 The Directive provides, inter alia, that the term "UCITS" does not include closed-end mutual funds and mutual funds which raise capital without promoting the sale of their units to the public. Accordingly, we would assume that units of such mutual funds incorporated in an OECD Member State do not require prior authorization from the Ministry of Economy and Finance in order to be privately placed in France.

---

60 Council Directive 85/611, 1985 O.J. (L 375) 3. Article 1, paragraph 2 of this Directive provides:
For the purposes of this Directive, and subject to Article 2, UCITS shall be undertakings:
- the sole object of which is the collective investment in transferable securities of capital raised from the public and which operate on the principle of risk-spreading, and
- the units of which are, at the request of holders, repurchased or redeemed, directly or indirectly, out of those undertakings' assets. Action taken by a UCITS to ensure that the stock exchange value of its units does not significantly vary from their net asset value shall be regarded as equivalent to such re-purchase or redemption.
Id. art. 1, para. 2 (emphasis added).

Article 2 confirms this definition by excluding from the scope of the Directive UCITS of the close-ended type and UCITS which raise capital without promoting the sale of their units to the public.
5.2. Sanctions

Two types of sanctions may be imposed for violations of the Exchange Control Regulations. First, the Exchange Control Regulations expressly provide sanctions for violations. These sanctions include imprisonment from 1 to 5 years, confiscation of securities, and a fine equal to at least the amount of the sum involved in the offering, up to a maximum of double that amount.\(^1\) The second type of sanction results from violations of the Solicitation Law insofar as the law expressly prohibits the solicitation of customers for the purchase of certain securities without the prior authorization of the Ministry of Economy and Finance.\(^2\)

6. CONCLUSION

As a result of the COB Regulation the law of private placements in France has been somewhat clarified. The concept of a public offering has been more precisely defined, and the COB has clearly specified those public offerings which do not require a prospectus.

Nevertheless, the COB Regulation does not supersede the broad-ranging provisions of the Solicitation Law. And, until the Solicitation Law is amended, the French rules on private placement will continue to lack clarity, and will fail to provide sufficient legal certainty. The amendments to the Solicitation Law are not expected to occur until some future date. It appears that the government is awaiting the implementation into French law of the yet-to-be-adopted EEC Investment Services Directive before it will consider the possibility of amending the Solicitation Law.\(^3\) Consequently, any institution wishing to engage in private placements in France will have to tolerate the uncertainty inherent in the Solicitation Law for at least another year.

---

\(^1\) Article 459 of the Customs Code.
\(^2\) Solicitation Law, supra note 6, art. 5, § 3.
\(^3\) See, e.g., FIN. TIMES (London), Nov. 24, 1992, at 2.