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FOREIGN ISSUER ACCESS TO U.S. CAPITAL MARKETS—AN ILLUSTRATION OF THE REGULATORY DILEMMA AND AN EXAMINATION OF THE SECURITIES AND EXCHANGE COMMISSION'S RESPONSE

*Emmanuel U. Obi**

I. INTRODUCTION

THE world is increasingly international, and many facets of society have undergone a global metamorphosis.[1] Particularly noteworthy is the internalization of business. The globalization of the world economy is attributable, in part, to the increased demand for capital.[2] Consequently, the process of capital formation no longer takes place solely within the sovereign confines of any nation.[3] Rather, globalization has radically increased the level of capital formation is that is conducted internationally.[4] The shift of capital formation to an international process has enabled the United States and other major players to benefit from the infusion of capital from international market participants.[5] But while countries with broader capital markets are able to reap the handsome rewards derived from global capital formation, countries with emerging markets are often excluded from this economically invigorating process.[6]

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1. Irina Shirinyan, *The Perspective of U.S. Securities Disclosure and The Process of Globalization*, 2 DEPAUL BUS. & COM. L.J. 515 (2004).
2. *Id.*
3. *See* Lee E. Michaels & Marc I. Steinberg, *Disclosure in Global Securities Offerings: Analysis of Jurisdictional Approaches, Commonality and Reciprocity*, 20 MICH. J. INT'L L. 207 (1999).
4. *Id.*
5. *Id.*
6. *See* Kun Young Chang, *Reforming U.S. Disclosure Rules in Global Securities Markets*, 22 ANN. REV. BANKING & FIN. L. 237, 241 (2003).

Analysis of the regulatory measures that have contributed to the exclusion of foreign issuers from U.S. markets, the Securities and Exchange Commission's (SEC) response to this dilemma, and the merits of and risks associated with increased accommodation of foreign issuers makes apparent that this is a complex issue that deserves attention that this article seeks to provide. First, Part II will assess the regulatory disparity, particularly in the area of disclosure requirements that prevent foreign issuers from accessing U.S. capital markets by a comparative analysis of the disclosure frameworks in the United States and in Mexico, a quintessential emerging market. Thereafter, Part III will chronicle the SEC's regulatory response to the disclosure burden that has hindered foreign issuer access to U.S. capital markets. Lastly, Part IV examines the SEC's response and evaluates whether the benefits derivable from increasing the accommodation of foreign issuers outweigh the attendant risks and other critical considerations.

II. THE REGULATORY DILEMMA ILLUSTRATED

An ideal starting point on the issue of increasing foreign access to the U.S. capital markets is the identification of the current problems that serve to impede such access. The issue becomes: what is the major impediment that often precludes foreign emerging markets, such as those found in Latin American, from optimally participating in the world's capital markets, principally those found in the United States? Some have argued that "[g]overnment regulation along the lines of the United States' Securities and Exchange Commission (SEC) may evoke fear of stringent government regulation that impedes capital formation and entrepreneurial creativity."[7] But in order to better understand and test the veracity of this proposition, an illustration of the regulatory disparity that often promotes the isolation of emerging markets is warranted. In this regard, the next section of this article consists of a comparative analysis of security regulation frameworks in place in the United States and Mexico.

A. SECURITIES REGULATION IN THE UNITED STATES

The U.S. securities regulation paradigm is predicated primarily on the promotion of fair disclosure and the registration requirement.[8] Thus, contrary to the rationale underlying state securities regulation, commonly referred to as blue-sky laws, the disclosure obligations on the federal level are not predicated on merit regulation, which essentially means that federal regulators will not concern themselves with the substantive fairness of public offerings or other transactions subject to its disclosure requirements.[9] In order to maintain the level of fair disclosure requisite to the functioning of a healthy market, the U.S. securities regulation system

7. Marc I. Steinberg, *Emerging Capital Markets: Proposals and Recommendations for Implementation,* 30 INT'L LAW. 715, 719 (1996).
8. *See* Shirinyan, *supra* note 1, at 520.
9. *Id.*

imposes several prerequisites to market participation.[10] First, the Securities Act of 1933 (1933 Act) expressly provides that barring the applicability of a relevant exemption, the legality of every offer or sale of a security is contingent on the effective registration of that security with the SEC, which is achieved through the filing of a registration statement.[11] In addition to the registration requirement imposed by the 1933 Act, the Securities Exchange Act of 1934 (1934 Act) also mandates that all companies wishing to list securities on a national exchange or to effectuate a private offering must register with the SEC and comply with periodic disclosure requirements.[12]

Further, a public offering or similar capital formation transaction also subjects the issuer to several additional disclosure and reporting obligations.[13] First, although not applicable to special instruments known as covered securities that have been expressly exempted by the operation of the National Securities Markets Improvement Act of 1996, applicable state registration and filing requirements must also be satisfied in most instances involving a securities offering.[14] In addition, a successful public offering subjects an issuer to the reporting requirements contained in sections 12 and 15(d) of the 1934 Act.[15] Similarly, companies that have successfully registered their securities under the provisions set forth in the 1934 Act are also subject to a litany of rules that regulate internal issues, such as the proxy solicitation process, in several key respects.[16] In sum, the foregoing overview illustrates the complexity of the U.S. securities regulation framework and the formidable barriers it presents to foreign issuers and confirms that compliance with its mandates "is a burden that emerging and even more-developed securities markets can ill afford."[17] Consequently, this framework serves to constrict the extent foreign issuers are able to access U.S. markets.[18]

B. Securities Regulation in Mexico

Securities regulation in Mexico is achieved primarily by the Securities Market Law, a comprehensive regulatory framework that is administered by the Comision Nacional Bancaria y de Valores (Comision Nacional).[19] The Securities Market Law is the primary regulatory vehicle in Mexico that regulates the public offerings of securities, provides oversight for

10. *See* 15 U.S.C. § 77e(a) (2000).
11. *Id.*
12. 15 U.S.C. §§ 78a-78ll (1988 & Supp. IV. 1992).
13. *See* Michaels & Steinberg, *supra* note 3, at 247-50.
14. *See generally* National Securities Markets Improvement Act of 1996, Pub. L. No. 104-290, 110 Stat. 3416 (1996).
15. 17 C.F.R. §§ 240.13a-1, 240.15d-1 (1998).
16. *See generally*, 10 International Capital Markets and Securities Regulation 3-70 (Harold S. Bloomenthal & Samuel Wolff, eds., 1996). *See also* 17 C.F.R. §§ 240.13a-1, 240.15d-1.
17. *See* Steinberg, *supra* note 7, at 719 (discussing how certain aspects of U.S. market regulation serves as an impediment to foreign issuers).
18. *See* Chang, *supra* note 6, at 240-44.
19. *See* Michaels & Steinberg, *supra* note 3, at 230.

brokerage operations, and monitors the activities of the Comision Nacional.[20] Supplementing the Securities Market Law is an expansive body of administrative law and rules and regulations promulgated by the Comision Nacional.[21] In Mexico, the principal infrastructure for the securities transactions is La Bolsa Mexicana de Valores, S.A. de C.V. (Bolsa).[22] Additionally, pursuant to the Securities Market Law, a public offering is defined as one "which is made through some means of mass communication or to an unspecified person in order to subscribe, sell or acquire securities."[23]

Further, articles 2 and 11 of the Securities Market Law specifies particular registration requirements that issuers must comply with.[24] Specifically, issuers must file a registration application with the Comision Nacional.[25] The disclosure requirements contained in the registration application requires that the issuer supply comprehensive information regarding the company, including relevant financial data and detailed information about the securities that are the subject of the offering.[26] Similarly, the Securities Market Law imposes key substantive requirements on issuers in the transactional context of a public offering.[27] Particularly, issuers must execute the offering in a manner that ensures that the "characteristics of the securities and the terms of their placement permit significant circulation that will not prejudice or disrupt the market."[28] In addition, issuers must fully comply with listing requirements mandated by the Bolsa rules and quickly respond to requests from the Comision Nacional for additional information regarding the securities, which are generally done through the issuance of regular releases known as circulars.[29]

For example, in 1993, the Mexican Commission promulgated and issued Circular 11-29, which delineates the requirements that a Mexican company issuing debt or equity securities must meet in order to be eligible for registration with the Mexican Commission and the Mexican Stock Exchange.[30] Circular 11-29, specifically requires the disclosure of detailed information concerning the company and the particular debt or equity security in question.[31] In addition, Circular 11-29 also mandates the use of comfort letters.[32] Essentially, "[t]he majority of the board of directors of a public company, the statutory auditors or comisarios, the officers

20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.* (defining what constitutes a public offering under Mexican securities law).
24. *Id.*
25. *Id.*
26. *Id.* at 230-31.
27. *Id.*
28. *Id.*
29. *Id.*
30. *See* James E. Ritch, *Public Offerings of Securities: Mexican Law Issues*, 9 U.S.-Mex. L.J. 133 (2001).
31. *Id.* at 134.
32. *Id.*

of the company, the Mexican underwriter, and the Mexican counsel to the issuer, are all required to provide responsive letters."[33] These mandated disclosures are intended to elevate the responsibility level of those involved in the offering process by requiring key participants to affirm that there is no material omission, misstatement, or any misleading statement in the offering documents.[34] In addition to Circular 11-29, the Mexican Commission has also issued Circular 11-28, which mandates the disclosure of relevant corporate information by Mexican public companies.[35] Pursuant to Circular 11-28, Mexican listed issuers must publish relevant information promptly.[36] In this context, relevant and material are afforded broad definitions and generally refer to "any act, fact, or occurrence that may influence the price of a publicly traded security."[37]

C. Summary

Understanding of the differences between the Mexican and U.S. securities disclosure infrastructures—and why these differences incentivize Mexican issuers to seek the U.S. market—can only be accomplished by first evaluating the primary reasons why Mexican issuers come to the United States in the first place. Mexican-based companies and other issuers seek to enter the U.S. market and consequently subject themselves to a strictly regulated market for several reasons.[38] First, these companies seek to benefit from the liquidity that is generally lacking in the Mexican markets.[39] Second, these issuers know that the U.S. securities market, while stringent, does effectively provide a level of transparency that creates and sustains a robust market structure.[40] Third, unlike the U.S. market system that has a well developed corporate governance aspect, the Mexican regulatory structure, despite recent initiatives, is still quite limited in this regard.[41] Therefore, the bottom-line is that most Mexican based issuers know that the foregoing elements create a market dynamic in the United States that will ultimately enable them to earn more on their investment.

The impact of the U.S. securities disclosure system on Mexican companies seeking to access the U.S. markets can only be conceptualized when disclosure is seen as just one part of the comprehensive public offering process that these Mexican issuers must undergo. The first step in this offering process involves the proper structuring of the transaction. In particular, most Mexican companies that issue shares of their equity or debt securities in the U.S. market do so in the form of an American De-

33. *Id.* at 134.
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *See* David Huntington, *Public Offerings of Securities in the United States by Mexican Companies: U.S. Securities Law*, 9 U.S.-Mex. L.J. 127, 128 (2001).
39. *Id.*
40. *Id.*
41. *Id.*

pository Receipts (ADR).[42] These ADR instruments are essentially just negotiable securities that are issued by U.S. banks.[43] In the typical offering scenario, a U.S. bank will construct an ADR facility and hold shares through a custodian based in Mexico.[44] The bank will then normally issue depository receipts that are denominated in dollars, and then these depository receipts will become the shares that are traded on the U.S. exchanges.[45]

In addition to the structural transaction issues that arise, Mexican issuers must also conform to substantive requirements inherent in this arduous process. First, these Mexican issuers must comply with the 1933 Act registration requirement.[46] Particularly, the ADR instrument discussed above must be registered with the SEC.[47] This registration process consists of filing a registration statement that includes a prospectus and the requisite disclosure relating to the company.[48] One example of this disclosure is evidenced by the financial statement requirement.[49] In particular, not only must a Mexican issuer provide the financial statements as part of the registration requirements, but they must also ensure that these financial statements are reconciled with the accounting standards generally imposed by U.S. laws.[50] This reconciliation requirement hinders the process of cross-border market participation by foreign companies and presents a regulatory hurdle that is particularly significant for Mexican issuers.[51] Thus, while at first blush there does not seem to be a major substantive difference between the disclosure requirements in Mexico and in the United States, as a practical matter, disclosure is just one facet of the complicated U.S. securities regulatory infrastructure that does, to a large extent, present a formidable hurdle for Mexican companies seeking to conduct capital formation activities within the United States.

The above analysis reveals the disparity that exists between the regulatory infrastructure in operation in the United States and that in Mexico and is also illustrative of the dilemma faced by similar emerging capital markets in Latin America and other portions of the world. This regulatory disharmony is exacerbated by the fact that emerging markets like Mexico and other Latin American countries are often plagued by other domestic issues that serve as further strictures on the critical economic process of capital formation.[52] Thus, "[d]ifferences in economic development, culture, legal and social environments, and the fact that different legal markets and their corresponding regimes develop at different rates

42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.* at 129.
50. *Id.*
51. *Id.*
52. *See* Shirinyan, *supra* note 1, at 516-17.

of speed and over different periods of time have impeded the development of a more universal approach to disclosure rules and requirements."[53]

Consequently, given the foregoing elements, it is not strange that many issuers in Mexico and other countries considered emerging markets see the United States as an ideal source for capital.[54] Particularly, as discussed above, these countries seek liquidity, transparency, and the commercial certainty associated with an enhanced regulatory oversight.[55] Although beneficial, there is little doubt that the sheer complexity of the regulatory framework found in the United States and the heightened level of disclosure that it mandates renders the United States' securities markets less accessible and thus less attractive to foreign issuers.[56] But should more accommodations that would facilitate greater participation by Mexican and other foreign issuers be made? And, if such accommodations are truly needed, what are the factors—particularly risks—that should be considered?

III. REGULATORY RESPONSE TO EMERGING MARKETS

A. Commonality and Reciprocity—Two Competing Ideologies

Generally, there are two distinct approaches applicable to the resolution of the regulation disharmony that constrains the optimization of internationalized securities markets.[57] The first approach is referred to as commonality and is principally focused on "the development of a common set of regulations, including a standardized disclosure document, to be used by all participants involved in international offerings."[58] This approach provides an attractive alternative response to the need for regulatory uniformity because "[a] regulatory structure based on a theme of commonality would have many benefits including the use of uniform information in making global investment decisions, the lowering of transaction costs, the facilitation or cross-border offerings, and the ability to establish an international database."[59]

Alternatively, the second approach, known as reciprocity, is primarily focused on the promotion of mutual recognition by one country of the regulatory framework of another country, provided that the applicable minimum standards are satisfied.[60] Reciprocity has generally been con-

53. *Id.* (examining how several elements combined to uniquely impact the evolution of disclosure jurisprudence in differing socio-economic environments).
54. Marc I. Steinberg, *Curtailing Investor Protection Under the Securities Laws: Good for the Economy?*, 55 SMU L. Rev. 347 (2002).
55. *Id.*
56. *See* Michaels & Steinberg, *supra* note 3, at 247.
57. *Id.* at 236.
58. *Id.*
59. *See id.* at n. 199 (citing Manning Gilbert Warren, III, *Global Harmonization of Securities Laws: The Achievements of European Communities*, 31 Harv. Int'l L.J. 185, 186 (1990)).
60. *See id.* at 251.

sidered a more viable alternative to resolving the market problems contributed to the current regulatory disparity preventing effective market harmonization for a couple of reasons.[61] First, there is no "single international regulator charged with overseeing global offerings."[62] Additionally, there are several other problems associated with the harmonization of the international regulatory systems, including, inter alia, historical and cultural differences, differences in market structure, and differences in the goals and objectives of the regulatory system.[63] A firm understanding of the U.S. response to the current regulatory disparity preventing greater access to U.S. markets by foreign issuers is contingent upon identifying the foregoing regulatory regimes the SEC currently employs and determining to what extent this approach should be retained or modified.

B. The SEC—Inclination Toward Commonality

Although the United States has applied the reciprocity approach with the adoption of the Multijurisdictional Disclosure System, this action was a rare and difficult undertaking that will not likely be repeated.[64] Rather, the SEC's history of regulatory action—or lack thereof—with respect to the treatment of emerging markets is illustrative of the commission's resistance to the wholesale adoption of a reciprocity-centered approach and an adherence to a commonality approach.[65] While the SEC has not demonstrably advocated the cultivation of a comprehensive and common securities regulatory framework, "the SEC evidently is acquiescing in the notion that the disclosure requirements must be relaxed somewhat in order to increase foreign investment in the United States,"[66] an occurrence that is indirectly corroborative of their inclination toward commonality.

Specifically, the SEC has always maintained an acknowledgment that in order to promote and sustain greater participation by foreign issuers in U.S. markets, accommodations that afford foreign issuers a higher level of flexibility in meeting disclosure requirements must be made.[67] To this end, the SEC has continuously endeavored to reduce the regulatory barriers that have been imposed on issuers from emerging foreign markets.[68] First, in 1935, the SEC chose to exempt foreign issuers from the proxy rules and the liability rules associated with the short-swing profits provisions, two of the primary requirements imposed by the Securities and the 1934 Act.[69] Second, in 1979, the SEC expressly adopted an integrated

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61. *Id.* at 236.
62. *Id.*
63. *See* Jane C. Kang, *The Regulation of Global Futures Markets: Is Harmonization Possible or Even Desirable,* 17 NW. J. INT'L. L. & BUS. 242, 244-45 (1996).
64. *See* Michaels & Steinberg, *supra* note 3, at 251.
65. *See* Bevis Longstreth, *A Look At the SEC's Adaptation to Global Market Pressures*, 33 COLUM. J. TRANSNAT'L L. 319, 329-30 (1995) (citing Exchange Act Release No. 34-412 (Nov. 6, 1935)).
66. Michaels & Steinberg, *supra* note 3, at 247.
67. *Id.*
68. *See id.* at 246-51.
69. *See* Longstreth, *supra* note 65, at 330.

registration and annual reporting requirement embodied in Form 20-F, which was aimed at reducing the informational disclosure requirements imposed upon foreign issuers in certain key areas.[70] Subsequent to the adoption of Form 20-F, the SEC also adopted Forms F-1, F-2, and F-3, which collectively, alleviated the disclosure impositions on foreign issuers, to a large extent.[71]

Additionally, in 1986 the SEC adopted rule 15a-6, which served to facilitate trading in foreign markets by U.S. investors by exempting foreign brokers and dealers from the registration requirements of sections 15(a)(1) and 15B(a)(1) of the act, if certain prerequisites are satisfied.[72] Similarly, in 1994, the SEC continued on with its mission to make U.S. capital markets more hospitable to foreign investors by promulgating several additional provisions intended to effectuate a further reduction of the registration and reporting requirements imposed on foreign issuers.[73] Particularly, these amendments led to

> a reduction in the historical reconciliation to U.S. Generally Accepted Accounting Procedures. . . from five to two years; acceptance of a foreign issuer's cash flow statement without reconciliation if prepared in accordance with International Accounting Standard No. 7; and the widened use of both the short-form registration statement and the shelf rule.[74]

The SEC characterized these actions as "part of [its] ongoing efforts . . . to ease the transition of foreign companies into the U.S. disclosure system, enhance the efficiencies of the registration and reporting processes and lower costs of compliance, where consistent with investor protection."[75]

Furthermore, the SEC's accommodation of foreign investors is also evidenced by its relaxation of requirements related to the preparation of the financial statements for disclosure purposes.[76] Expressly, the SEC adopted rules that allowed foreign investors listed and traded on the U.S. exchanges to file annual reports based on the generally accepted accounting procedures (GAAP) followed in their respective countries.[77] The adoption of regulation S and rule 144A, which have the combined effect of facilitating the foreign offering of securities, is also indicative of the SEC's recognition of the necessity inherent in modifying the U.S. regula-

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70. *See* Michaels & Steinberg, *supra* note 3, at 248 (citing Exchange Act Release No. 16371, [1979-1980 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,363 at 82,548 (Nov. 29, 1979)).
71. Exchange Act Release No. 6437 ¶ 72407, 1982 SEC LEXIS 355 (Nov. 19, 1982).
72. 17 C.F.R. §§ 240.15a-6(a)(1)-(a)(3).
73. *See* Exchange Act Release No. 7053, [1993-1994 Transfer Binder], Fed. Sec. L. Rep. (CCH) ¶ 85,203-04 (Apr. 19, 1994).
74. *See* Longstreth, *supra* note 65, at 327 (citing Exchange Act Release No. 7053).
75. *See generally* Exchange Act Release No. 7053.
76. *See* Michaels & Steinberg, *supra* note 3, at 250 (citing David S. Ruder, *Reconciling U.S. Disclosure Policy with International Accounting and Disclosure Standards*, 17 NW. J. INT'L L. & BUS. 1, 1 & n.1 (1996).
77. *Id.*

tory framework in a manner that renders it more welcoming of foreign participation and investment.[78] Some would argue that the foregoing actions illustrate the SEC's longstanding commitment to the enhanced facilitation of foreign capital formation. Yet, the questions that remain are whether the SEC has taken any actions that threaten any of the previous accommodations afforded to foreign issuers, whether the commission should do more to further redress the regulatory burdens that block access to U.S. markets, and whether any such attempts to expand the accommodation of foreign issuers would engender adverse consequences.

IV. A CRITIQUE OF THE SEC'S REGULATORY RESPONSE

While the SEC has demonstrated its cognizance of the regulatory problem that serves to impede the realization of capital formation by foreign issuers, especially those located in emerging markets like Latin America, the question remains: has the SEC done enough and should it do more? Some commentators argue that despite the steps the SEC has taken to facilitate enhanced access to the U.S. markets, "the current foreign disclosure system does not provide standards that are significantly less demanding than the domestic standards, which prevents effective competition with the regulatory policies of foreign countries."[79] One argument along these lines is that the SEC's current stance, with respect to the disclosure requirements to be applied to foreign issuers, has not effectively provided foreign issuers with the regulatory relief needed to enter and successfully participate in U.S. markets and thus "fails to address the competitive advantage of certain foreign markets, the result of lower regulatory costs."[80]

For example, the SEC's adoption of Form 20-F and similar forms afford foreign issuers the option of either preparing the requisite financial statements in compliance with GAAP requirements or to go through the process of preparing an audited reconciliation.[81] But the expense and time required to meet this obligation "can deter foreign companies from listing in the United States and force them to seek other, less regulated markets."[82] Moreover, the SEC's 1998 adoption of the core set of non-financial disclosure standards for foreign issuers that was developed by the International Organization of Securities Commissions similarly signifies a retrenchment of the Commission's traditionally accommodative stance, with respect to foreign issuers.[83] Specifically, the SEC's adoption of these standards had an appreciable impact on the traditional requirements of

78. *See id.* at 249-50.
79. *See* Chang, *supra* note 6, at 243-44 (critically examining U.S. securities regulation with respect to international capital formation).
80. *Id.* at 244 (providing an example of the sort of regulatory hurdles faced by foreign issuers).
81. *Id.*
82. *Id.* at 242 (describing and critiquing one SEC initiative aimed at promoting foreign capital investments in the United States).
83. *See* Shirinyan, *supra* note 1, at 522.

Form 20-F and the registration prerequisites found in Forms F-1, F-2, F-3, and F-4.[84] Essentially, "[i]n some cases, the new Form 20-F requires more disclosure than the old rule."[85]

Additionally, the recent enactment of the Sarbanes-Oxley Act (Sarbanes) will undoubtedly further eviscerate the accommodations that have traditionally been afforded to foreign issuers.[86] Sarbanes, which was enacted largely in response to the Enron and other recent notable corporate debacles, is primarily aimed at enhancing "the accuracy and reliability of corporate disclosure."[87] To this end, the scope of Sarbanes' reach is notably expansive and its provisions are applicable to both U.S. and foreign issuers.[88] Particularly, Sarbanes' provisions impact the operation of internal corporate governance systems of foreign companies subject to U.S. regulation, and impact the relationships that these issuers have with their outside auditors.[89] Therefore, it is unquestionable that "[t]he extraterritorial effects of [Sarbanes] burden foreign issuers with unjustified requirements and hinder the process of reciprocity and harmonization of international capital markets."[90] Whether the SEC will recognize this potential added burden on foreign issuers and endeavor to rectify the situation by the strategic employment of its rulemaking and interpretive authority remains uncertain.[91] But one thing that remains unequivocally clear is that "[f]ailure to do so, will likely result in foreign companies' diminished willingness to look to U.S. markets as an avenue for raising capital."[92]

While the forgoing arguments seemingly indicate the need for a heightened SEC response to the issue of increasing foreign investor access into the U.S. markets, there are additional considerations that must be weighed and risks inherent in this proposed elevated accommodation.[93] First, as the comparative analysis in Part II illustrates, Mexico and the United States really do not differ that much with respect to the disclosure requirements imposed upon issuers. Additionally, although the offering process in the United States and its inherent disclosure requirements may seem overly burdensome for Mexican issuers, this alone may not support the argument for greater accommodation. One reason for this is that there have been recent transformations in the Mexican regulatory framework which indicate an elevation in the disclosure requirements imposed upon issuers.[94] Thus, it is conceivable that the Mexican securities regula-

84. *Id.*
85. *Id.* at 523 (citing Sandra Folsom Kinsey, *New Rules for Foreign Private Issuers*, 14 INSIGHTS 9 (2000) for a summary of the changes to Form 20-F).
86. *Id.* at 524.
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.* at 525.
91. *Id.*
92. *Id.*
93. *Id.*
94. *See* Huntington, *supra* note 38, at 130-31.

tory system may soon be equally as onerous as the U.S. system. Therefore, regulatory initiatives aimed at further accommodating Mexican issuers may have the unfortunate consequence of allowing these issuers to escape the heighten requirements that may likely be in place in Mexico in the near future for more flexible rules here in the United States.

Another significant consideration that must be weighed in this context is that there is a risk that further reducing the regulatory burden facing foreign issuers will severely impede the realization of the crucial goal of investor protection.[95] For example, in the context of financial disclosures related to the use of certain foreign forms, there is a risk that "multiple versions of financial statements could create investor confusion regarding which version accurately represents the issuer's financial position."[96] Further, "if the relaxation of U.S. securities laws means less information for domestic investors concerning foreign issuers, [U.S.] investors not only face greater risks with foreign investments but might also have problems comparing domestic investments with foreign investments."[97]

In addition, any elevated accommodation of foreign issuers may also adversely impact domestic market participants. Specifically, "by relaxing disclosure requirements for foreign companies, there may be a possibility that U.S. policymakers create an inequity for domestic issuers—putting domestic issuers at a disadvantage that results in relatively higher disclosure costs."[98] The cumulative effect of the disparity in regulation that would occur with heightened foreign investor accommodation would lead to a situation where foreign issuers "have fewer hoops to jump through" and would consequently function as an impetus that would drive U.S. capital to other more welcoming markets.[99] This unfortunate consequence of the SEC's attempt to accommodate foreign issuers is attributable to the regulatory inequality that would arise from a dual system of disclosure: one that imposes stricter disclosure standards on domestic issuers, while at the same time affording foreign investors a transactional paradigm that is more cost efficient.[100]

V. CONCLUSION

The internationalization of the world's securities markets illustrates the increasing trend of globalization that has impacted nearly every facet of American life. In the context of securities regulation, this raises several key implications. First, the contemporary economic reality is that the world's markets are no longer individual, national, and self-sufficient cap-

95. *Id.*
96. *See* Chang, *supra* note 6, at 242 (noting that in 1995, Finnish telecommunications giant Nokia posted net profits of 1,971 million Markka under Finnish accounting standards, 2,232 million Markka under international accounting standards, and 2,162 million Markka under U.S. GAAP).
97. *Id.* at 243.
98. *Id.*
99. *Id.*
100. *Id.*

ital formation zones. Rather, the trend of internationalization has injected an element of interdependency and competition among the various capital market participants. Second, this trend of internationalization has also illuminated the dilemma inherent in the articulation of a regulatory policy that effectively balances the twin goals of securities regulation: investor protection and the facilitation of capital formation. One area that the articulation of such a regulatory policy has proved significant in is the disclosure obligations that are imposed in the private offering context. These obligations have often been described as burdensome and thus restrictive of the accessibility to U.S. capital, especially to foreign issuers in search of capital.

As illustrated by the comparison of the disclosure regimes currently in operation in the United States and Mexico, a disparity exists between the United States and most foreign countries with respect to the disclosure obligations imposed on market participants. But this disparity is really not that significant, especially considering the regulatory changes that may soon elevate the level of disclosure requirements imposed by the Mexican securities regulation framework. Further, the SEC has already taken steps to minimize the ill effects of this regulatory dynamic, and while there is arguably room for more accommodations, several risks and other considerations weigh against it. Therefore, in the years to come, the SEC's stance on this issue should accurately represent several issues, including: 1) the nature of the problem; 2) the necessity of an adequate and continually evolving response; 3) the consideration of investor protection; and 4) the avoidance of any adverse impact on domestic market participants because the vitality of both the U.S. market and the global market as a whole are becoming inextricably linked to the attainment of optimal international participation.