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Globalisation of Financial Markets: An International Passport for Securities Offerings?

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I. Introduction

International sales and trading of securities are nothing new. In fact, studies suggest that international securities activities existed at least from the initial formation of stock exchanges in Europe. Over the last twenty years, there has been an increasing interest in international securities, their issuance, trading, and regulation.[1] This trend slowed somewhat with recent financial crises in emerging markets around the world, but increased again to the end of 2000. This increase included the highest volume of mergers activity in history, and massive capital raising by technology (especially telecommunications companies), which drove the volume and value of international securities business to, in absolute terms, the highest level ever. As equity markets stalled in 2001, with the collapse of the Internet bubble and terrorist attacks in the United States, new issues activity in international securities markets has become quiet, but not silent, with global issues still planned and discussion of related issues continuing.[2]

While securities markets have always encompassed international participants and sales, prior to the First World War, such activities were essentially unregulated. During the period from the First World War to the 1960s, international capital movements were tightly regulated and restricted through legislative efforts of individual countries. In fact one purpose of the Bretton Woods system was to prevent financial instability of the sort seen in the first half of the twentieth century; this was the system with which Sir Joseph Gold was closely involved.

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1. HAROLD JAMES, INTERNATIONAL MONETARY COOPERATION SINCE BRETTON WOODS 12 (International Monetary Fund ed., 1996).

2. Tony Major, *Deutsche Bank aims to go ahead with US listing*, FIN. TIMES WEEKEND, Sept. 15/16, 2001 (discussing planned listing of "global shares" on the New York Stock Exchange on 3 Oct. 2001).

Beginning in the 1960s, restrictions on capital movements began to be relaxed, with a resulting growth of international financial activities, culminating in the collapse of the Bretton Woods fixed exchange rate system in 1973. Sir Joseph was deeply involved in these developments and in attempting to secure international financial stability in the years following. Following the collapse of Bretton Woods, the remainder of the 1970s was characterised by petrodollar recycling, culminating in the emerging market debt crisis of the 1980s. Towards the end of Sir Joseph's career at the International Monetary Fund (IMF), changes in the international financial markets began to intensify.

As the move towards state dominance of individual economies began to reach its limits, the worldwide trend towards privatisation of state-owned companies and assets beginning in the 1980s, in the United Kingdom under Margaret Thatcher, led to interest and the need for offerings of equity securities in multiple capital markets throughout the world,[3] creating the first "global offerings," and highlighted the "internationalisation" of financial markets. Nonetheless, most of these activities have taken place in the context of individual domestic markets, with foreign participants (whether issuers, purchasers, or dealers) forced to meet the individual national requirements of any given jurisdiction of interest, a situation not dissimilar to that originally envisioned under Bretton Woods, but now in a far different context.

As a result of the pressures of internationalisation of financial markets, beginning with a number of regional experiments, steps have been taken toward the acceptance of foreign credentials for offerings and listings of securities on an equal basis with those of domestic participants, of which the European efforts to develop a single market for capital in the context first of the European Communities and now the European Union (EU) are the most advanced. For a variety of reasons, most of these efforts have not been entirely successful, often due to lack of synchronisation of domestic legal systems, with the increasingly open and internationalised character of international financial markets. As a result of increasing "globalisation" of financial markets in the 1990s, efforts are now being focused on the development of international standards applicable to securities markets, with the aim to harmonise minimum standards and eventually to support mutual recognition based upon common standards, including offerings and listings of securities.

Sir Joseph would have realised that the old system was no longer appropriate and that new initiatives, preferably on an international basis, were needed in order to limit volatility in a rapidly changing financial landscape to prevent the sorts of economic disturbances common prior to the establishment of the IMF. While he probably would have preferred a more coherent, international, and formal path, he would have recognised that this is not always possible and certainly would have been interested in progress. It is in this light and in light of the comments of Sir Joseph's son, Richard, respecting the next generation of international legal practitioners that this article is presented.

After describing the trends noted above in general terms, this article analyses the issue of whether, for the first time, international efforts may lead to the development of a standard format for the content of an international offering/listing document acceptable in jurisdictions around the world, i.e., a "global prospectus" or "international passport prospectus." Recent cross-border corporate mergers and acquisitions, proposed mergers and alliances between

3. For development of this thesis, see Daniel Yergin & Joseph Stanislaw, The Commanding Heights: The Battle between Government and the Marketplace that is Remaking the Modern World 370–71 (1998).

stock exchanges around the world, and the development of "global shares," traded on multiple markets underscore the growing importance and usefulness of such a mechanism.

Section II of this article briefly discusses the historical development of international securities markets. The most significant developments in this respect are the development of the Euromarkets and initiatives seeking to encourage international listings through relaxation of domestic standards for foreign issuers. These initiatives, however, do not truly foreshadow the development of a single global offering document, but rather reflect the needs and requirements of internationalisation of competition between markets for business opportunities represented by cross-border offerings and listings.

Section III discusses the development of two significant regional initiatives supporting mutual recognition of securities offerings: the multi-jurisdictional disclosure system (MJDS), involving the United States and Canada; and the securities Directives of the European Union (EU). These initiatives are the precursors to recent efforts to promote the creation of a single offering document for offering and listing securities around the world, involving the efforts of the International Organisation of Securities Commissions (IOSCO) and the International Accounting Standards Committee (IASC). Section IV discusses the content of the international standards as devised, both non-financial international listing requirements and financial and accounting harmonisation and standards. Section V discusses the implementation process in the United States, EU, and elsewhere. Finally, section VI concludes with a short discussion of the implications of the development of a global prospectus for further globalisation of financial markets.

This author concludes that these changes are driven by a search for high standards of regulation (necessary to encourage investor participation), and by the move toward creation of a single capital market in Europe to rival that in the United States. These trends will focus consolidation in other smaller markets (e.g., the various countries of east Asia), along with a move towards higher international standards in markets, in such jurisdictions around the world, if they are to maintain the interest of international investors. Nonetheless, even with an international passport for securities offerings and listings, domestic requirements will continue to address issues of enforcement and corporate governance.

II. Development of International Securities Markets

In the seventeenth and eighteenth centuries, the international capital markets of Europe were dominated by Amsterdam, with some competition from Geneva and Genoa. Dutch investments centered on (in consecutive periods) its Empire and the Continent, on Britain until the Anglo-Dutch Wars, then on France and the United States, until the occupation of Amsterdam during the Napoleonic Wars.[4] Throughout this period, activities took place through a variety of instruments, such as loans, bonds, annuities, and equity securities, and involved sophisticated techniques, such as short selling, puts, calls, and futures.[5] While loan contracts were in use, company law, including law governing equity securities, was quite undeveloped. The essential absence of any sort of regulation of securities markets or offering requirements in all likelihood exacerbated the frequency and severity of periodic panics and crashes.

4. *See* C. Kindleberger, A Financial History of Western Europe 208–14 (2d ed. 1993).

5. *Id.* at 210.

In the nineteenth century, London became the leading centre for international financial activities, although Paris provided strong competition. By the beginning of the First World War, the London financial markets were involved in wide and varied international financial transactions, rivaling the sophistication and extent of those today.[6] In fact, measurements of the degree of financial integration in the world economy indicate that at the beginning of the twentieth century, the world was more interconnected than at any subsequent time, including the 1990s.[7] Such developments were not limited to London, Paris, and Amsterdam; records indicate that foreign issues and listings of both foreign bonds and other trading securities were relatively common in Frankfurt in the nineteenth century.[8]

While the link has not been made explicitly, it is probable that the development of standardised company law (including basic requirements for financial reporting) in Britain and the United States encouraged the development of the markets.[9] Nonetheless, regulation of market activities and abuses remained largely governed by the common law in both England and the United States, making redress often difficult.[10]

While World War I significantly reduced international securities activities, the Crash of 1929 and the Great Depression drastically reduced international securities activities outside of Europe and the United States until the 1960s (centered during this period in New York, reflecting the United States' position as the world's banker). This drastic reduction in international financial activity reflected a conviction that the fundamental destabilisation of the previous decades had "stemmed from volatile and irresponsible flows of capital ('hot money')" and that the international financial system could only function effectively if such flows were curtailed.[11]

In the United States, congressional studies in the 1930s led to the conclusion that one of the causes of the market crash, and the depression that followed was excessive speculative activities in the financial markets and market abuses that both encouraged such activities and prejudiced the proper operation of the markets.[12] As a result, the United States enacted the first comprehensive legal regime for the regulation of securities activities, including issues, issuers, financial intermediaries and market participants, all based on the premise of full and fair disclosure of all material information.[13]

This marked the beginning of a period of increasing regulation of financial institutions and markets in the developed world, primarily as a response to varied crises. Outside of the United

6. *See id.* at 214–20.

7. JAMES, *supra* note 1, at 12.

8. *See* KINDLEBERGER, *supra* note 4, at 223–24. According to figures produced by Böhme, there were nine such issues in the period 1801–20 from countries such as Austria (4), Holland (2), Italy (1), and Russia (1). In the period 1851–60, there were 80, including Austria (17), Hungary (3), France/Belgium (5), Holland (1), Italy (13), Spain (2), and the US (35). *Id.* at 224 (*citing* HELMUT BÖHME, FRANKFURT UND HAMBURG, DES DEUTSCHES REICHES SILBER UND GOLDLOCH UND DIE ALLERENGLISHSTE STADT DES KONTINENTS 156–61 (1968)).

9. *See* Bernard S. Black, *The Legal and Institutional Preconditions for Strong Securities Markets*, 48 UCLA L. REV. 781 (2001); Brian R. Cheffins, *Does Law Matter? The Separation of Ownership and Control in the United Kingdom*, 30 J. LEGAL STUD. 459 (2001); Lucian Ayre Bebchuk & Mark J. Roe, *A Theory of Path Dependence in Corporate Ownership and Governance*, 52 STAN. L. REV. 127 (1999); John C. Coffee, Jr., *The Future as History: The Prospects for Global Convergence in Corporate Governance and its Implications*, 93 NW. U. L. REV. 641 (1999).

10. *See generally* sources, *supra* note 9. In the United States, "blue sky" laws began to develop early in the twentieth century. *See* Jonathan R. Macey & Geoffrey P. Miller, *Origin of the Blue Sky Laws*, 70 TEX. L. REV. 347 (1991).

11. JAMES, *supra* note 1, at 32. *See id.* at 87–92, 125.

12. *See* S. REP. No. 73–47 (1933).

13. *See* JOEL SELIGMAN, THE TRANSFORMATION OF WALL STREET: A HISTORY OF THE SECURITIES AND EXCHANGE COMMISSION AND MODERN CORPORATE FINANCE (1982).

States, securities activities continued to be regulated through company law and individual exchange rules, although in many cases they continued to remain unregulated outside of traditional sources of remedies in the domestic legal system. As will be discussed in the following section, this trend towards increased regulation, especially in the United States, combined with largely closed national financial markets, had an unintended consequence: the development of an international and unregulated capital market based in London.

A. The Euromarkets

A post-war market in dollar deposits and lending began in the late 1940s, when the new Chinese communist government began to place its dollar earnings with a Soviet bank in Paris (the Banque Commerciale pour l'Europe du Nord).[14] In 1957–58, European banks, primarily in London and Switzerland, began to deal more extensively in dollars.[15] The markets that developed, first in syndicated lending, then in bonds (Eurobonds) in the 1960s, became known as the "Eurodollar" markets. Rapidly, however, these markets expanded beyond dollars and beyond Europe, although they are still known as the Eurocurrency markets or the Euromarkets.[16] The Euromarkets developed as a truly international market, structured to avoid domestic regulatory restrictions, and their success has stimulated internationalisation of domestic markets and increasingly globalisation of financial markets. While the Euromarkets, with their emphasis on syndicated loans and bond offerings, fall somewhat outside the scope of the analysis of this article, given its focus on the development of a single set of issuing and trading requirements for international equity offerings, they are nonetheless important as an illustration of the possibilities available in the development of global capital markets.

As noted, the Euromarkets sought to avoid domestic regulation, and in fact grew partly as the result of such restrictions in the United States. The development of the Eurobond market was partly stimulated by the registration requirements of U.S. securities regulation and partly by the Interest Equalization Tax (IET) imposed in the United States in 1963 to reduce the borrowings of European countries in the United States.[17] With the repeal of the IET and all other restrictions on capital movements out of the United States in 1973, bonds began to be issued simultaneously in New York (through allowances by the Securities and Exchange Commission (SEC)) and European financial centres, and eventually in financial centres around the world, such as Hong Kong, Singapore, and Tokyo; thus, marking the beginning of the first multi-jurisdictional offerings of securities, albeit debt securities.

The development of the Eurocurrency markets was stimulated further by the Oil Price Shocks of 1973 and 1979, leading to an undertaking by international banks to recycle the increased earnings of oil states, earned in dollars and deposited principally in London and Switzerland (so-called "petrodollars").[18] While this process of recycling was successful following the first shock in 1973, it was less successful after the second shock in 1979, when

14. James, *supra* note 1, at 179.

15. Kindleberger, *supra* note 4, at 439.

16. According to Kindleberger, a "eurocurrency" is any currency borrowed and lent (whether through term loans, syndications or bonds) outside the country that uses the currency. *Id.* at 440. The market in fact travels around the world daily, shifting from market to market as the time zone advances, although London remains the hub.

17. *Id.* at 441; James, *supra* note 1, at 179.

18. *See* James, *supra* note 1, at 309–46.

combined with a global surplus of liquidity.[19] Until the Debt Crisis of the 1980s (which began with Mexico's default in 1982),[20] lending dominated over bonds in the Euromarkets in the form of both bilateral term loans and multi-lender syndications. These sorts of transactions were and are typically documented through a loan and syndication agreement, both of which have assumed a relatively standardised form, changed only slightly to reflect the experiences of each new crisis.[21] While these markets are truly global the loans themselves are increasingly traded and exchanged in various forms; the loan agreements themselves are private law contractual instruments- unregulated and not traditionally considered securities. Further, they are structured intentionally to avoid domestic regulation, in preference for structures built largely on private English law.

During the resolution of the Debt Crisis throughout the 1980s, bonds began to take precedence as banks securitised rescheduled debt and sought to decrease their risk exposure and increase their margins through a preference for bonds.[22] Syndicated lending nonetheless remained significant.[23] Like loans, Eurobonds have developed standardised forms, such as trust indenture agreements and offering documents.[24] As well, Eurobonds remain essentially unregulated, and as with the Euromarkets generally, their structures were developed to avoid regulation in domestic legal systems. Unlike loan agreements, which remain essentially contractual undertakings, bonds are traditional securities and therefore typically subject to domestic regulatory concern and therefore scrutiny. As a result, Eurobonds have traditionally not been listed in the United States, and instead have focused on exchanges such as London and Luxembourg with simple rules governing offer, sale, and listing of international bonds. Further, over time, the Eurobond market has been specifically exempted from most regulation in Europe, primarily in order to protect the position of London's financial markets and as a reflection of the institutional nature of the market and the consequent view that such players do not require the same level of protection as small investors. In order to encourage international offerings in the United States, the U.S. SEC has made special efforts to support access to the U.S. market through the promulgation of Regulation S and, more specifically, Rule 144A, and their predecessors.[25]

As highlighted above, unlike domestic capital markets, the Euromarkets are essentially unregulated and unsupervised (although the financial standing of participants is carefully monitored, both by government agencies (in the case of financial institutions) and private ratings agencies such as Standard & Poor's and Moody's). Participants (almost exclusively financial institutions, major international corporations, and sovereigns and their agencies) operate outside the traditional requirements of domestic securities markets, primarily be-

19. *See id.* at 347–408.

20. *See* Yergin & Stanislaw, *supra* note 3, at 130–33.

21. *See* Joseph J. Norton, *International Syndicated Lending: The Legal Context for Economic Development in Latin America*, 21 NAFTA L. Rev. 21 (1996); Ross Cranston, Principles of Banking Law ch. 11 (1997); Philip R. Wood, International Loans, Bonds and Securities Regulation chs. 1–7 (1995).

22. *See* Ross P. Buckley, *A Tale of Two Crises: The Search for Enduring Reforms of the International Financial System*, 6 UCLA J. Int'l L. & Foreign Aff. 2 (2001). *See also* William R. Cline, International Debt Reexamined (Institute for International Economics ed., 1995).

23. *See* Norton, *supra* note 21.

24. *See generally* Roy C. Smith & Ingo Walter, Global Banking ch. 9 (1997); Wood, *supra* note 21, chs. 8–10 (discussing the standard content of trust indentures and bond offerings).

25. For a discussion, see generally Marc Steinberg, International Securities Law: A Contemporary and Comparative Analysis ch. 4 (1999).

cause these sorts of participants are deemed capable of guarding their own interests and because the principal operating arenas for the Euromarkets fear loss of business and stature. Therefore, arrangements are made through contracts (loan agreements, syndication and participation arrangements, and trust indenture agreements). Thus, while these markets are global in nature and the legal arrangements involved are quite standardised, they are also organic by nature, having grown up between and around domestic legal requirements.

B. Internationalisation: Domestic Efforts to Encourage International Listings

As a result of the increasing awareness of firms, securities exchanges, and governments of the advantages of securities markets for accessing capital (reflected at least partially in the successes of the Euromarkets), individual countries and securities exchanges have undertaken generally unilateral initiatives to encourage foreign listings on domestic exchanges and in domestic markets.[26] While some advances have been made in encouraging such activities, the remaining expense and complexity have largely remained prohibitive as each individual jurisdiction developed its own requirements.[27] Recent international consolidation of securities exchanges (discussed in the final section, *infra*) is the most recent example of these efforts.

During the 1980s, privatisation of state-owned assets, including such companies as British Steel and British Telecommunications, required access to investors in markets outside of the home jurisdiction, essentially due to the massive amounts of securities required to be offered and sold. In such circumstances, the cost of compliance with the domestic offering requirements of multiple jurisdictions could be absorbed by the large value of the offering itself. With the success of multi-jurisdictional offerings in such circumstances, financial institutions and their legal advisors realised the possibilities for truly "global offerings" by private companies, as well as the future of privatisation throughout the world. Likewise, states saw the advantages that could be gained for their own markets and firms by encouraging market access by foreign firms through the possibility of enhanced liquidity. Finally, developments in investment theory (especially portfolio theory) and relaxations of restrictions on institutional investors encouraged such investors to diversify their portfolios through investments in foreign securities.

The result was the development of different mechanisms to allow foreign issuers to list and/or sell their securities to domestic investors, most importantly through the development of "depository receipts," whereby securities listed on a foreign exchange could be traded on a domestic exchange, if certain requirements were met.[28] In addition to depository receipts, securities regulators and stock exchanges began to allow certain derivations from domestic requirements for foreign issuers.[29] The most important of these has been the minimal deviation allowed by U.S. SEC from traditional home country requirements, in the area of accounting standards, shelf-registration, and short form registration statements.[30]

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26. *See id.* ch. 1.

27. *See* Howell E. Jackson & Eric J. Pan, *Regulatory Competition in International Securities Markets: Evidence from Europe in 1999—Part I*, 56 Bus. Law. 653 (2001).

28. *See* Jorge Gonzalez, Jr. & Christopher D. Olive, *Foreign Issuer Disclosure and Accounting Compliance in U.S. Public Offerings and Securities Listings*, 1 NAFTA L. & Bus. Rev. Am. 39 (1995).

29. *See* Steinberg, *supra* note 25, chs. 1, 4 (discussing domestic initiatives to encourage foreign listings and issues).

30. *See* Gonzalez & Olive, *supra* note 28. Regulation S also falls under this categorisation to some extent, in that it relaxes extraterritorial application of U.S. securities laws (but not of antifraud provisions). In reality, this

The dangers of the increasing internationalisation of financial markets, however, were graphically shown during the worldwide collapse of stock market values in October 1987. Following drastic falls and halts in trading on numerous exchanges (including the New York Stock Exchange (NYSE) and the Stock Exchange of Hong Kong), domestic regulators began to analyse the new risks, as well as the new opportunities, presented by internationalisation. The result was not only a strengthening of domestic standards and systems in many cases, but also increased international dialogue, not only among securities regulators, but also among central bankers and treasury officials, especially from the major industrialised countries.

III. Internationalisation of Standards for Securities Offerings: Regional Initiatives

Because of the difficulties of international financial cooperation and agreement on standards, regional efforts have been undertaken with increasing frequency since the late 1950s as an attempt at pragmatic solutions to the problems and needs of international financial markets.[31] Until the period following the worldwide market collapse of 1987, however, securities regulation was typically not considered significant enough to merit significant international cooperation. On a regional basis, the most significant efforts to date are those involving the United States, Canada, and the countries of Europe, respectively.

A. The United States and Canada: The Multi-jurisdictional Disclosure System

The MJDS originally began life as a proposal of the U.S. SEC to create a system for the facilitation of multinational securities offerings in the United States, the United Kingdom, and Canada.[32] According to the SEC, "to provide a context for public comment on internationalisation," it presented "two conceptual approaches" to "facilitate multinational offerings": (1) "the reciprocal approach" and (2) "the common prospectus approach," and requested comment on a series of questions dealing with these approaches.[33] Under the reciprocal approach, each country would agree to accept a prospectus, which was accepted in the issuer's domicile and met certain minimum requirements.[34]

Under the common prospectus approach, a common prospectus would be developed, which would then be filed simultaneously with each country's respective securities regulatory authority.[35] Following comment on the original release, the SEC, the Ontario Securities Commission, and the Commission des valeurs mobilieres du Quebec proposed the MJDS between the United States and Canada in 1989, reflecting a "hybrid" between the reciprocal and the common prospectus approaches.[36] The United Kingdom was not in-

only reflects a realisation that the rest of the world is in fact unlikely to adopt standards identical to those in the United States and that actual application of such a principle of universal extraterritoriality was impracticable and politically disadvantageous in discussions with other sovereign states.

31. *See* James, *supra* note 1, at 467–89; Kindleberger, *supra* note 4, at 436–50.

32. Facilitation of Multinational Securities Offerings, Exchange Act Release No. 33–6568, 1985 SEC LEXIS 2074 (Feb. 28, 1985).

33. *Id.* at *1.

34. *Id.* at *3.

35. *Id.*

36. *See* Multijurisdictional Disclosure, Exchange Act Release Nos. 33–6841, 34–27055, 39–2217, 1989 SEC LEXIS 1377, at *4 (July 24, 1989).

cluded for a number of reasons,[37] including differences in registration, accounting and auditing requirements,[38] and potential illegality interposed with the United Kingdom's acceptance of the Single Europe Act in 1986.[39]

As adopted, the MJDS is not an international legal agreement, but rather parallel sets of domestic administrative rules. In the United States, the SEC promulgated one set of rules governing securities transactions covered by U.S. federal securities laws,[40] which, if necessary under state law, could have been adopted by the various state securities regulatory agencies in order to apply to offerings within each respective state. In Canada, the Canadian Securities Administration, a non-governmental association of provincial regulatory authorities,[41] agreed and published a "national policy,"[42] which was then implemented in each province through provincial legislation, or statutorily delegated agency rule-making powers.

The Canadian MJDS permits public offerings of securities of U.S. issuers that meet specified eligibility requirements to be made in Canada, on the basis of disclosure documents prepared in accordance with U.S. law, with certain additional Canadian disclosures. Canadian authorities accept documents reviewed by the SEC, but monitor materials filed under the MJDS, to confirm compliance with its specific disclosure and filing requirements. Financial statements must be reconciled with Canadian Generally Accepted Accounting Principles (GAAP) or with International Accounting Standards (IAS),[43] although this does not apply to offerings of debt or preferred shares rated by an approved rating agency.[44]

The U.S. MJDS permits Canadian issuers who meet eligibility criteria to satisfy certain SEC registration and reporting requirements by providing disclosure documents prepared in accordance with the requirements of Canadian securities regulatory authorities. That document is filed with the SEC, along with a "cover page, certain legends and various exhibits."[45] Accounting standards may be in accordance with U.S. or Canadian GAAP, but not IAS.

In practice, the MJDS has not fulfilled its potential. While it was intended to be a first step towards international harmonisation,[46] in reality it has resulted only in increased harmonisation of U.S. and Canadian regulation, with the various Canadian authorities making most of the compromises.[47] It has, however, increased Canadian access to U.S. markets and stimulated some interest on the part of U.S. issuers in Canadian markets.[48]

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37. *See* David Johnston & Kathleen Doyle Rockwell, Canadian Securities Regulation 319–20 n.99, 102 (2d ed. 1998).

38. *See* Cally Jordan, *The Thrills and Spills of Free Riding: International Issues before the Ontario Securities Commission*, 23 Can. Bus. L.J. 379, 381 (1994).

39. *See generally* J. Lipsius, *The 1996 Intergovernmental Conference*, 20 Eur. L. Rev. 235, 237 (1995); J. Kingston, *External Relations of the European Community – External Capacity Versus Internal Competence*, 44 Int'l Comp. L. Q. 659 (1995).

40. Multijurisdictional Disclosure and Modifications to the Current Registration and Reporting System for Canadian Issuers, Exchange Act Release Nos. 33–6902, 34–29354, 39–2267, 1991 SEC LEXIS 1217 (June 21, 1991) [hereinafter Multijurisdictional Disclosure].

41. Such as, a non-statutorily self-regulatory organisation.

42. Canadian Securities Administration, Multijurisdictional Disclosure System, NI 71–101 (1991).

43. *Id.* § 12.8.

44. *Id.*

45. Multijurisdictional Disclosure, *supra* note 40.

46. *See id.* at 6 (the MJDS is designed with the intention of mitigating on a broader scale the difficulties posed by multinational offerings. Thus, the Commission is continuing its work with securities regulators of other countries with a view toward extending the multijurisdictional disclosure system).

47. Johnston & Rockwell, *supra* note 37, at 319–20. *See* Jordan, *supra* note 38, at 381.

48. Johnston & Rockwell, *supra* note 37, at 320.

B. EUROPEAN SECURITIES MARKETS

While both the oldest stock exchange[49] and the world's most significant international financial centre[50] are located in Europe, widespread individual ownership of securities was not common during the twentieth century outside of the United Kingdom prior to the 1990s.[51] Several explanations have been advanced to explain this, including: the major economic dislocations resulting from two World Wars and other armed conflicts; exchange and capital market controls imposed by European governments; the predominance of bank lending over securities offerings in corporate finance; the relatively small number of listed companies in continental Europe, each with only a minority of shares available in the open market; relatively high transaction costs; insufficient or non-existent transparency and liquidity in European securities markets; the absence of regulation affording investor protection; lack of public confidence in and understanding of securities markets; and popular aversion to the risks of securities investment.[52] The development of securities markets in Europe, however, has become an objective of national policy in most Member States of the EU, due in large part to the privatisation of many state-owned enterprises beginning in the 1980s.

A study of capital markets by the European Economic Community (EEC) in 1966 addressed impediments to the effective functioning of national markets and their availability to foreign borrowers. The Segré Report[53] (so-called after the chairman of the group of experts and the principal author, Claudio Segré) found that national markets in Europe discriminated in favour of domestic borrowers, especially national governments, as against foreign, primarily through regulations governing the investment of funds of savings banks and insurance, assistance for housing, etc. In addition, few European securities were listed on stock exchanges outside the domicile of the issuing company; as a result of practical governmental needs (combined with the forces of harmonisation, access deregulation, and prudential re-regulation inherent in the process of opening developing the "Maastricht" principal of free movement of capital), national securities regulation in western Europe has begun to develop in recent years.[54] Prior to the 1990s, however, securities regulation in western Europe had been virtually non-existent outside of the United Kingdom.[55] Although company law was well-developed across western Europe, European stock exchanges have been historically self-regulating, with little or no direct oversight by national governments.[56] Moreover, European states have not historically mandated full disclosure systems for the distribution or trading of securities, nor have they prohibited insider trading or other market manipulative practices long prohibited by the United States.[57]

49. Amsterdam Stock Exchange.

50. London.

51. *See* BENN STEIL ET AL., THE EUROPEAN EQUITY MARKETS: THE STATE OF THE UNION AND AN AGENDA FOR THE MILLENNIUM (1996).

52. Manning Gilbert Warren III, *Global Harmonization of Securities Laws: The Achievements of the European Communities*, 31 HARV. INT'L L.J. 185, 194 (1990).

53. EEC, THE DEVELOPMENT OF A EUROPEAN CAPITAL MARKET (1966) [hereinafter SEGRÉ REPORT]. *See* KINDLEBERGER, *supra* note 4, at 438–39.

54. Warren, *supra* note 52, at 194.

55. *Id.*

56. *Id.*

57. When the Public Offers Prospectus Directive was proposed in 1981, only five members of the EU required prospectus disclosure to investors in public offerings of securities, namely: Belgium, France, Ireland,

Most of the EU Member States only started to develop broad-based equity markets in the late 1980s. Further, the present state of EU financial services market is still absent any comprehensive and consistent regulation and enforcement as in the United States. While the current EU system is complex, it is still not so complex as that of the U.S. system, though the EU system is striving to be a comprehensive and coherent regulatory system.

The EU framework for investment services provides minimum standards for accounting and auditing standards, listings and stock exchange regulation, company law, market conduct regulation, and regulation of institutional investors. It should be borne in mind, however, that this framework is not complete, since its purpose is to ensure the harmonisation of the laws of the Member States, insofar as this is necessary for the achievement of a single market, and to fill gaps relating to cross-border activities, it builds on the existing national systems of company and securities laws, rather than trying to replace them with a complete new system. The purpose of this article is not to evaluate the specific provisions of the EU framework; however, a general appreciation of the key elements of the EU framework is necessary to understand the development of the European passport prospectus.

1. *The Creation of a Common Market in Investment Services*

The EU legislative framework for financial markets seems to be grounded in a concept that can be thought of as a search for equivalence among disparate regulatory and legal systems, while taking into account the continuing reality of separate and distinct national legal and regulatory regimes as the basis of any overall EU initiatives.[58] Initially, efforts focused on harmonisation of rules across Member States, however, this proved impossible in many areas and in the 1980s, efforts moved to the development of mutual recognition based upon common minimum standards. The key principles were outlined in the Commission's 1985 White Paper[59] and enshrined in the 1987 Single European Act,[60] implementing the common internal market on the basis of "mutual recognition," based on common minimum standards applicable in all Member States through European Directives and implemented through domestic legislation.[61] According to this methodology, all Member States agree to recognise the validity of one another's laws, regulations, and standards, thereby facilitating free trade in goods and services without the need for prior harmonisation,[62] while limiting the scope for competition among rules by mandating Member State conformity with a "floor" of essential minimum European requirements.[63] As such, investment services regulation in the EU seeks to avoid the problem of competitive deregulation and regulatory arbitrage that may undermine the legitimacy and efficiency of financial markets.[64]

Luxembourg, and the United Kingdom. 1980–1981 EUR. PARL. DOC. (COM. 893) (1980); 1981 O.J. (355) 39. As of 1990, West Germany still imposed no prospectus upon issuers in connection with public offers of securities not listed on an exchange. Warren, *supra* note 52, at 195 n.54.

58. *See* STEIL, *supra* note 51, at 113.

59. Completing the Internal Market: White Paper from the Commission to the European Council, COM (85)310 final (1985).

60. SINGLE EUROPEAN ACT, 1987 O.J. (L 169) 1 (1987) (effective July 1, 1987).

61. *Id.*

62. *See* STEIL, *supra* note 51. This principle underlies the Second Banking Directive (2BCD) as well as the ISD. *Id.*

63. *Id.* at 114. According to commentators, the Commission has recently followed the mutual recognition principle to a much greater extent than the harmonisation principle. *Id.* at 115; *see also* Warren, *supra* note 52.

64. *See* Warren, *supra* note 52.

As a general matter, the EU system of securities regulation rests on the EU company law directives and accounting directives. In turn, the basic framework for the EU securities regulatory regime is founded upon a series of directives known as the stock exchange Directives[65] (enacted prior to the 1987 Single European Act, but subsequently amended to provide for mutual recognition) and now consolidated into a single directive, as well as directives dealing with collective investment schemes (e.g., mutual funds), unlisted prospectuses, and insider dealing.

The second level of EU investment services regulation deals with the establishment of a single market in financial services, based on the common minimum framework provided by the basic company law, accounting and securities directives. This level centers principally around the Investment Services Directive (ISD) and the Capital Adequacy Directive (CAD). To put this in a broader perspective, the single market is rooted in basic tenets of the Treaty of Rome respecting the free movement of capital, establishment and services, and is manifested in the various single "passport" directives.[66] Under the concept of the "single" passport, an EU firm authorised in one Member State (its "home state") and wishing to operate in other Member States ("host states") will generally be able to choose to supply services through branches or to supply services on a cross-border basis without having a permanent physical presence in the host state.[67] The intended benefit of the passport is that it should increase competition by opening markets to a wider range of participants and by allowing firms to choose the most cost-effective means of supplying services to a particular market.[68] Combined with the basic framework established in the company law and securities directives and the capital standards of the CAD, the ISD was meant to establish the framework for a comprehensive European system of securities regulation.

2. *The Underlying Legal and Financial Infrastructure: Company Law*

Many areas traditionally considered in the United States as matters of securities law, rather than corporate law, are covered under the company law framework in Europe and elsewhere. EU company law is based on the prohibition of discrimination within the EU, and is based on the nationality of an entity organised within a Member State under Article 7 of the Treaty of Rome.[69] Companies organised under the laws of one Member State have the right to establish branches in other Member States.[70] Further, regulation for the protection of shareholders, employees, and creditors must be equivalent throughout the EU.[71] As a result of the political impossibility of achieving strict harmonisation in this very diverse

65. The Stock Exchange Listing Directives include: the Admission Directive, the Listing Particulars Directive, the Interim Reports Directive, and the Major Holding Directive.

66. The passport directives in the financial services area include: (1) the First and Second Banking Coordination Directives (1BCD and 2BCD) (banking); (2) the Investment Services Directive (ISD) (investment firms and securities markets); (3) the UCITS Directive (collective investment schemes); (4) the First, Second and Third Life Assurance Directives (life assurance); (5) the First, Second and Third Non-Life Insurance Directives (non-life insurance); and (6) the proposed First Pension Funds Directive (pension funds).

67. *See The EU Single Market in Financial Services*, BANK OF ENG. Q. BULL., Feb. 1993, at 92.

68. *Id.*

69. Treaty Establishing the European Economic Community, Mar. 25, 1957, art. 7, 298 U.N.T.S. 11 [hereinafter Treaty of Rome].

70. *Id.* art. 58.

71. *Id.* art. 54(3)(g).

area,[72] the EU began to propose directives that prescribed only basic, essential principles, with a requirement of mutual recognition among the Member States.[73]

Companies are organisations which are created and administered according to legal requirements, and involve different categories of persons—shareholders, employees, creditors, and third parties—who are all concerned in some way with the activity of the undertaking.[74] The first objective of the approximation or harmonisation of company law at the Community level is to ensure an equivalent degree of protection for the interests of these various constituencies.[75]

Most significant are the First Company Law Directive[76] and the Second Company Law Directive.[77] For present purposes, the first directive is important because it defines a system of public disclosure applicable to all companies—an area covered more by the securities laws in the United States. The second directive deals with the raising, maintenance, and alteration of the capital of public limited companies (PLCs)—once again, essential for the present discussion.[78] Other significant company law directives include: the Third Company Law Directive,[79] introducing a common procedure for mergers; the Eleventh Company Law Directive,[80] providing for consolidated reporting; the Twelfth Company Law Directive,[81] dealing with single-member limited liability companies; and the Regulation on the European Economic Interest Grouping (EEIG),[82] creating a Community level instrument permitting cooperation of undertakings from different Member State jurisdictions.

72. *See* Warren, *supra* note 52, at 197–98 (discussing development of EU company law).

73. *Id.*

74. EUR. COMM., White Paper on the Preparation of the Associated Countries of Central and Eastern Europe for Integration into the Internal Market of the Union, COM(95) 163 final 2, Annex, at 308 [hereinafter White Paper].

75. *Id.* The basic legal approach to harmonisation of company law has a two-fold aim: (1) to remove obstacles to companies' freedom of establishment in order to expand and improve market competitivity; and (2) to establish an equivalent degree of protection throughout the Community for the various constituencies. *Id.* at 309. *See* Treaty of Rome, *supra* note 69, art. 54. The second approach is to allow enterprises to create new or combine existing cross-border operations on the basis of EU rather than national laws. White Paper, *supra* note 74, at 309. *See* Treaty of Rome, *supra* note 69, arts. 235, 100A.

76. First Council Directive 68/151/EEC of 9 March 1968 on Co-Ordination of Safeguards Which, for the Protection of the Interests of Members and Others, are Required by Member States Companies Within the Meaning of the Second Paragraph of Article 58 of the Treaty, With a View to Making Such Safeguards Equivalent Throughout the Community, 1968 O.J. (L 65).

77. Second Council Directive 77/91/EEC of 13 December 1976 on Co-Ordination of Safeguards Which, for the Protection of the Interests of Members and Others, are Required by Member States of Companies Within the Meaning of the Second Paragraph of Article 58 of the Treaty, in Respect of the Formation of Public Limited Liability Companies and the Maintenance and Alteration of Their Capital, With a View to Making Such Safeguards Equivalent, 1997 O.J. (L 26), as amended by Council Directive 92/101/EEC, 1992 O.J. (L 347).

78. Most specifically, the minimum subscribed capital of a PLC must be at least ECU 25,000. This is decidedly different from U.S. law, under which no minimum capital is generally prescribed.

79. Third Council Directive 78/885/EEC of 9 October 1978 Based on Article 54(3)(g) of the Treaty Concerning Mergers of Public Limited Liability Companies, 1978 O.J. (L 295).

80. Eleventh Council Directive 89/666/EEC of 21 December 1989 Concerning Disclosure Requirements in Respect of Branches Opened in a Member State by Certain Types of Companies Governed by the Law of Another Member State, 1989 O.J. (L 395).

81. Twelfth Council Directive 89/667/EEC of 21 December 1989 Concerning Single Member Private Limited Companies, 1989 O.J. (L 395).

82. Council Regulation 2137/85/EEC on the European Economic Interest Grouping (EEIG), 1985 O.J. (L 199) 1, 2.

3. *The Stock Exchange Directives*

The overall objective of these directives is to provide a set of minimum standards capable of operating on a uniform basis throughout the EU, and in a way which removes some of the barriers which would otherwise result from the existence of conflicting requirements in a number of different markets. The result permits greater flexibility of access to the EU capital markets than might otherwise have been the case.

In July 2000, the European Commission proposed a simplification of the legislative framework governing stock exchange listings into a single Directive.[83] The four major Directives covered are:

- The Directive on the conditions for the admission of securities to official stock exchange listing (79/279) (Admission Directive);[84]
- The Directive on the listing particulars to be published for the admission of securities to official stock exchange listing (80/390) (Listing Particulars Directive);[85]
- The Directive on information to be published on a regular basis by companies, the shares of which have been admitted to official stock-exchange listing (82/121) (Interim Reports Directive);[86] and
- The Directive on the information to be published when a major holding in a listed company is acquired or disposed of (88/627) (Major Holdings Directive).[87]

Directives not included are those not directly linked to the listing of or limited to listed securities, namely:

- The Directive on undertakings for collective investment in transferable securities (85/611/EEC) (UCITS Directive);[88]
- The Investment Services Directive (93/22/EEC) (ISD);[89]
- The Directive on investor-compensation schemes (97/9/EC) (Investor Compensation Schemes Directive);
- The Directive on prospectuses in the case of a public offer (89/298/EEC) (Public Offer Prospectus Directive);[90] and

83. Securities: Commission proposes simplification of legislative framework, July 24, 2000; Proposal for a Directive of the European Parliament and of the Council on the Admission of Securities to Official Stock Exchange Listing and on Information to be Published on Those Securities (codified version), 2000 O.J. (0174) 2.

84. Council Directive 79/279/EEC of 5 March 1979, Coordinating the Conditions for the Admission of Securities to Official Stock Exchange Listing, 1979 O.J. (L 66) 1, 2.

85. Council Directive 80/390/EEC of 17 March 1980 Coordinating the Requirements for the Drawing Up, Scrutiny and Distribution of the Listing Particulars to be Published for the Admission of Securities to Official Stock Exchange Listing, 1980 O.J. (L 100) 2.

86. Council Directive 82/121/EEC of 15 February 1982 on Information to be Published on a Regular Basis by Companies the Shares of Which Have Been Admitted to Official Stock Exchange Listing, 1982 O.J. (L 48) 2.

87. Council Directive 88/627/EEC of 12 December 1988 on the Information to be Published When a Major Holding in a Listed Company is Acquired or Disposed of, 1988 O.J. (L 348) 2.

88. Council Directive 85/611/EEC of 20 December 1985 on the Coordination of Laws, Regulations and Administrative Provisions Relating to Undertakings for Collective Investment in Transferable Securities (UCITS), 1985 O.J. (L 375) 2, 3.

89. Council Directive 93/22/EEC of 10 May 1993 on Investment Services in the Securities Field, 1993 O.J. (L 141) 4.

90. Council Directive 89/298/EEC of 17 April 1989 Coordinating the Requirements for the Drawing-Up, Scrutiny and Distribution of the Prospectus to be Published When Transferable Securities are Offered to the Public, 1989 O.J. (L 124) 2.

- The Directive on insider dealing (89/592/EEC) (Insider Dealing Directive).[91]

The finalised consolidated listing Directive was adopted on May 28, 2001, in a substantially identical format to the initial proposal and repealing the underlying directives.[92]

Specifically, the consolidated listing directive details requirements for five major areas respecting listed securities, namely: official listing of securities[93] and information to be included,[94] conditions relating to official listing of securities,[95] ongoing obligations relating to securities admitted to official listing,[96] publication and communication of information,[97] and competent authorities and cooperation between Member States.[98] Information specified in Schedule A to Annex I, to be included in listing particulars for equity securities, includes: information on those responsible for the listing particulars and for auditing of accounts;[99] information concerning the listing and shares;[100] general information about the issuer and its capital;[101] information concerning the issuer's activities;[102] information about the issuer's assets, liabilities, financial position, profits, and losses;[103] information concerning administration, management, and supervision;[104] and information concerning recent developments and prospects.[105]

91. Council Directive 89/592/EEC of 13 November 1989 Coordinating Regulations on Insider Dealing, 1989 O.J. (L 334) 3.

92. Directive 2001/34/EC of the European Parliament and of the Council of 28 May 2001 on the Admission of Securities to Official Stock Exchange Listing and on Information to be Published on Those Securities, 2001 O.J. (L 184) (the "consolidated stock exchange Directive").

93. *Id.* tit. II. Issues addressed include: general conditions for admission (chs. I & II, arts. 5–8); derogations (ch. III, arts. 9–10); and powers of national competent authorities (ch. IV), including decision of admission (§ 1, arts. 11–15), information requested by authorities (§ 2, art. 16), actions against issuers failing to comply with obligations (§ 3, art. 17), suspension and discontinuance (§ 4, art. 18) and judicial review (§ 5, art. 19).

94. *Id.* ann. I.

95. *Id.* tit. III. Issues addressed include: publication of listing particulars (ch. I), including exemptions (§ 2, art. 23) and permitted omissions (§ 3, art. 24), contents (§ 4, arts. 25–34), control and circulation (§ 5, arts. 35–36), mutual recognition and negotiations with non-Member States (§§ 7–8, arts. 37–41); conditions for admission (ch. II), including those relating to the company (§ 1, arts. 42–44) and to the shares (§ 2, arts. 45–51); conditions relating to debt securities (ch. III, §§ 1–3, arts. 52–59); and government debt securities (ch. IV, arts. 60–63).

96. *Id.* tit. IV. Issues addressed include: general obligations (ch. II), including newly issued shares of the same class (§ 1, art. 64), treatment of shareholders (§ 2, art. 65), amendment of corporate documents (§ 3, art. 66), annual accounts and annual report (§ 4, art. 67), periodical information (§ 7, arts. 70–71), semi-annual reporting requirements (§ 8, arts. 72–77); obligations relating to debt securities and their issuers (ch. II, §§ 1–2, arts. 78–84); and obligations related to major holdings (ch. III), including disclosure requirements (§ 2, arts. 89–91), voting rights (§ 3, art. 92), exemptions (§ 4, arts. 93–95), role of competent authorities (§ 5, art. 96) and sanctions (§ 6, art. 97).

97. *Id.* tit. V. Issues addressed include: publication and communication of listing particulars (ch. I), including procedures (§ 1, arts. 98–100) and prior communication to competent authorities (§ 2, art. 101); publication and communication of information after listing (ch. II, art. 102); and languages (ch. III, arts. 103–04).

98. Directive 2001/34/EC, *supra* note 92, tit. VI, arts. 105–07.

99. *Id.* ann. 1, sch. A, ch. 1.

100. *Id.* ch. 2.

101. *Id.* ch. 3.

102. *Id.*, ch. 4.

103. *Id.* ch. 5.

104. Directive 2001/34/EC, *supra* note 92, ch. 6.

105. *Id.* ch. 7.

4. *Public Offer Prospectus Directive*

The Public Offer Prospectus Directive,[106] adopted in 1989 after ten years of negotiation,[107] sought to harmonise the disclosure standards of the Member States for public offerings of securities regardless of their listed or unlisted status. Like the consolidated listing directive, its underlying policy is to protect investors by providing information necessary to assess the risks of investment in securities; to reinforce confidence in securities markets; to contribute to the correct functioning and development of securities markets; and to establish an equivalent level of securities disclosure among the Member States.[108] The Directive, however, has largely been ineffective and not used in practice.[109]

5. *The Investment Services Directive*

The most relevant of the passport directives (for present purposes) is the ISD,[110] adopted in 1993. The ISD is intended to provide a "single passport" for EU securities firms to conduct cross-border operations anywhere in the EU, based on a license issued by their respective home states.[111] As originally proposed, the ISD was designed to achieve the goal of breaking down the various EU Member States' protectionist, non-tariff barriers to domestic market entry.

As adopted, the major provisions of the ISD are intended to provide: (1) common minimum authorisation or licensing requirements among the EU Member States;[112] (2) mutual recognition of the license granted in the home state by all other Member States or "host states";[113] (3) prudential rules establishing common minimum financial soundness standards among the Member States;[114] (4) certain guiding principles for adoption of conduct-of-business rules by the host states;[115] (5) direct access to each Member State's domestic stock exchange for both outside investment firms and banks;[116] (6) requirements for concentration of securities trading in regulated markets which preserve investor choice to trade in less regulated markets;[117] (7) minimum transparency rules for regulated markets;[118] and (8) reciprocity for non-EU firms to participate in the newly integrated marketplace.[119] Although the ISD frees authorised investment firms from having to obtain host state authorisation, it does impose certain regulatory conditions on those firms in connection with securing membership in, or access to, the host states' regulated markets, including rules concerning

106. Council Directive 89/298/EEC of 17 April 1989 Coordinating the Requirements for the Drawing-up, Scrutiny and Distribution of the Prospectus to be Published When Transferable Securities are Offered to the Public, 1989 O.J. (L 124). *See* Manning G. Warren III, *Regulatory Harmony in the European Communities: The Common Market Prospectus*, 16 Brook. J. Int'l L. 19 (1990).

107. Warren, *supra* note 52, at 215.

108. Council Directive 89/298/EEC, 1989 O.J. (L 124), *supra* note 106, at 8.

109. *See* Jackson & Pan, *supra* note 27, at 680–83.

110. Council Directive 93/22/EEC on Investment Services in the Securities Field, 1993 O.J. (L 141).

111. Manning Gilbert Warren III, *The European Union's Investment Services Directive*, 15 U. Pa. J. Int'l Bus. L. 181 (1994). The ISD is intended to establish a level playing field amongst banks and securities firms in the EU, and especially to prevent banks from having a comparative advantage over securities firms as a result of the single passport of the 2BCD. *See The EU Single Market in Financial Services*, *supra* note 67, at 95.

112. Directive 93/22/EEC, *supra* note 110, art. 3.

113. *Id.* art. 14(1), (2).

114. *Id.* art. 10.

115. *Id.* art. 11.

116. *Id.* art. 15.

117. *Id.* art. 14(3), (4).

118. Directive 93/22/EEC, *supra* note 110, art. 15.

119. *Id.* art. 7.

transactions in the host state market, professional standards, and rules and procedures for clearing and settlement of securities trades.[120]

6. European Economic Monetary Union and the Creation of a Single European Capital Market

On January 1, 1999, the individual currencies of the eleven EU Member States that met the relevant criteria and accepted the relevant obligations of the Maastricht Treaty (Austria, Belgium, Denmark, France, Germany, Ireland, Italy, Luxembourg, the Netherlands, Portugal, and Spain) became permanently fixed in exchange rate and ceased to exist, thereby creating a single European currency, the "euro", and European Economic and Monetary Union (EMU). From January 1, 2001, the twelve (Greece has since been added) different sets of notes and coins began to be replaced by a single physical currency. While significant differences still exist in European capital markets, with the introduction of the euro, financial statements and offering documents have begun to become comparable. This shift is beginning to produce, when combined with the painfully developed securities regulatory framework discussed in the previous sections, the development of a unified European capital market for the first time.

Prior to the signing of the Maastricht Treaty in 1992, there existed little impetus for Member States to actively implement the securities and company law directives. However, with the coming into force of the Treaty in 1994, and its requirements for adoption and implementation of the framework supporting freedom of capital movements necessary to underpin EMU, Continental Member States have adopted and implemented legislation quite foreign to the securities markets of their domestic systems. The result has been an increased awareness of the use of capital markets and the realisation that the legislative changes, when combined with the advent of the single currency, will change the nature of finance throughout the EU, but most especially in the Euro-11 (now Euro-12, with the addition of Greece) members.

While the ultimate result is yet to be seen, significant movements have already taken place with the significant and continuing development of domestic capital markets in the EU. Further, new initiatives are coming rapidly, seeking to take advantage of new opportunities and to place competitors at an advantage in the European markets that are, in all likelihood, to arrive in short order. Although numerous impediments to such developments remain (most notably in the area of taxation), activity is set to continue increasing at a rapid pace, putting pressure on the barriers that remain. One example of the recognition of continuing impediments and the pressure to remove them is the establishment of a triumverate of "wise men" to review the EU capital markets and to develop proposals to remove remaining barriers to the creation of a single European capital market.

It is this "real world" experience of the countries of the EU and their moves to development a single regional capital market with an agreed and mutually acceptable issuing and trading framework that indicates the real advantages of the path that may lie ahead in the globablisation of capital markets. The development of European capital markets, and other countries' nervousness respecting the same, has provided the impetus to international organisations, such as the International Organisation of Securities Commissions (IOSCO) and the International Accounting Standards Committee (IASC) (and their previously re-

120. *Id.* art. 15(2) ("Access to a regulated market, admission to membership thereof and continued access or membership shall be subject to compliance with . . . the professional standards imposed on staff operating on and in conjunction with the market.").

calcitrant members, such as the United States), to consider the development of an internationally acceptable offering document.

IV. International Disclosure Standards for Securities Offering and Listings

Originally formed in 1973 as an initiative of the U.S. SEC to facilitate cooperation among securities regulators of the Americas, IOSCO encompasses over 100 members, representing securities regulatory authorities from developed and developing countries around the world, as well as over fifty affiliate members, representing self-regulatory organisations (SROs) and stock and futures exchanges.[121] Today, IOSCO is the leading international financial organisation coordinating cooperation, standardisation, and establishment of minimum internationally agreed standards in the area of securities regulation.

In terms of functions, its members have agreed, through its permanent structure:[122] (1) to cooperate together to promote high standards of regulation in order to maintain just, efficient, and sound markets; (2) to exchange information on their respective experiences in order to promote the development of domestic markets; (3) to unite their efforts to establish standards and an effective surveillance of international securities transactions; and (4) to provide mutual assistance to promote the integrity of the markets by a rigorous application of the standards and by effective enforcement against offences.

Following the meetings of its Executive and Technical Committees in Paris in May 1998, IOSCO announced the release of four documents of significance to securities regulators and market participants:[123] (1) *Objectives and Principles of Securities Regulation*;[124] (2) *International Disclosure Standards for Cross-Border Offerings and Initial Listings by Foreign Issuers*;[125] (3) *Risk Management and Control Guidance for Securities Firms and their Supervisors*;[126] and (4) *Methodologies for Determining Minimum Capital Standards for Internationally Active Securities Firms*.[127] With the release of these four documents, IOSCO has sought to produce a largely complete and comprehensive body of internationally agreed principles and standards for securities regulation.

Of most interest for present purposes are the *Objectives and Principles* and the *International Disclosure Standards*. These two documents, taken together, establish the underlying standards for securities regulation and the form and content of an internationally acceptable offering document. The combination, accepted at IOSCO's Annual Meeting in September

121. *See* IOSCO, 1999 Annual Report (2000), *available at* http://www.iosco.org.

122. IOSCO, General Information on IOSCO, *available at* http://www.iosco.org/gen-info_01.html (last visited Sept. 3, 1998).

123. IOSCO, Press Communique (1998), *available at* http://www.iosco.org/press/presscomm980529.html.

124. IOSCO, Objectives and Principles of Securities Regulation: A Report of the International Organisation of Securities Commissions (1998), *available at* http://www.iosco.org/docs-public/1998-objectives-document01.html [hereinafter Principles].

125. IOSCO, Report of the Technical Committee, International Disclosure Standards for Cross-Border Offerings and Initial Listings by Foreign Issuers (1998), *available at* http://www.iosco.org/docs-public/1998-intnl_disclosure_standards-document01.html [hereinafter IDS].

126. IOSCO, Risk Management and Control Guidance for Securities Firms and their Supervisors (1998), *available at* http://www.iosco.org/docs-public/1998-risk_management_and_control_document01.html.

127. IOSCO, Methodologies for Determining Minimum Capital Standards for Internationally Active Securities Firms (1998), *available at* http://www.iosco.org/docs-public/1998-methodologies_for_determining-document01.html.

1998 in Nairobi, Kenya, is in turn to be implemented by the membership through domestic legislation and regulation with the intention to create a truly global set of standards for issuing and trading securities. According to IOSCO, in releasing the *International Disclosure Standards*, "the Technical Committee has developed and released for public comment a set of international standards for non-financial statement disclosure, which will greatly simplify cross-border offerings and initial listings on international markets."[128]

A. Objectives and Principles of Securities Regulation

Following an initiative of the Group of Seven (G-7) at their Lyon Summit in 1995, the Group of Ten and representatives of sixteen emerging market economies published a framework for promoting financial stability in domestic economies around the world.[129] As part of this initiative, international financial organisations, such as IOSCO, were instructed to develop internationally acceptable principles and standards for their respective disciplines. IOSCO's *Objectives and Principles* are the key standard in the area of securities regulation and reflect its membership's agreement that there are certain principles that form the basis for an effective system of regulation of securities and derivatives markets.

The document represents the joint efforts of IOSCO's Executive, Technical and Emerging Markets Committees and is intended to be a reference point for those who work in the financial markets, providing guidance for securities regulators, and "a yardstick against which progress towards effective regulation can be measured."[130] "The document sets out the three objectives of securities regulation, and presents 30 principles for the practical implementation of these objectives."[131] The IOSCO principles of securities regulation were formally adopted during its annual conference in September 1998.[132]

The IOSCO *Objectives and Principles of Securities Regulation* sets out three main objectives of securities regulation:[133] (1) the protection of investors; (2) ensuring that markets are fair, efficient, and transparent; and (3) the reduction of systemic risk. To achieve these objectives, IOSCO has developed principles to be implemented as part of a legal framework for securities and capital markets.[134] Most significantly for present purposes, in order to provide adequate market information, issuers of securities must meet requirements for full, timely, and accurate disclosure of financial results and other information material to investor decisions.[135] Legal safeguards should exist to ensure that holders of securities in a company are treated in a fair and equitable manner.[136] In addition, accounting and auditing standards need to be of a high and internationally acceptable quality.[137]

128. Press Communique, *supra* note 123.

129. Group of Ten—Financial Stability in Emerging Market Economies (1997), *available at* http://www.bis.org/publ/gten02.htm.

130. *Id.*

131. *Id.*

132. Principles, *supra* note 124.

133. *Id.* at 6–8.

134. *Id.* at 9 & Annexure 3 (listing areas of implementation necessary as a precondition).

135. *Id.* at 14.

136. *Id.* at 15.

137. *Id.* at 16.

B. International Disclosure Standards for Cross-border Offerings and Initial Listings by Foreign Issuers

In order to build upon the general principles respecting offering and listings standards, IOSCO has developed a framework for the minimum content of public offer prospectuses. This latter document is intended to set a basic framework for international offering documents acceptable to regulators and stock exchanges around the world. Such a framework could serve as an internationally acceptable basis for the further development of stock exchange listing requirements and prospectus regulations throughout the world. Specifically:

> The International Organisation of Securities Commissions (IOSCO) believes it is important for securities regulators to facilitate cross border offerings and listings by multinational issuers by enhancing comparability of information, while ensuring a high level of investor protection. An important factor in achieving these goals is the development of a generally accepted body of non-financial statement disclosure standards that could be addressed in a single disclosure document to be used by foreign issuers in cross-border offerings and initial listings, subject to the host country review or approval processes.[138]

According to IOSCO, "this report presents a set of non-financial statement disclosure standards (financial statements standards are the subject of another project) that will apply to foreign companies seeking to enter a host-country market, facilitating cross-border offerings and initial listings."[139] The intention is that these standards will allow issuers to prepare a single disclosure document that will serve as an "international passport" to capital raising and listing in more than one jurisdiction at a time. If successful, the implementation of these standards will represent an important step forward in reducing the costs of raising capital for companies, enabling them to issue or list shares in multiple jurisdictions without concern for the burdens of complying with a multiplicity of non-financial statement disclosure requirements. Following the receipt of comments from the IOSCO Emerging Markets Committee, and from the international financial community, the standards were approved by the membership of the entire organisation, including the U.S. SEC.

1. *Scope of the Standards*

Part I sets out *International Disclosure Standards (IDS)* for use by companies in connection with cross-border public offerings and listings of equity securities. The Standards are to apply to listings, public offers, sales of equity securities for cash, and unless otherwise indicated, the Standards are intended to be used for prospectuses, offering and initial listing documents and registration statements.[140] The Standards relate to non-financial statement disclosure requirements and do not address a number of issues, including:[141] (1) "which bodies of accounting or auditing principles may be followed by the issuer in preparation of its financial statements;" (2) "disclosure requirements that may apply in some countries in connection with other types of transactions, such as business combinations, tender offers, exchange offers, "going private" transactions or interested party transactions;" (3) "collective investment schemes or "start up" companies with no history of operations;" (4) "continuous reporting disclosure mandates which may arise, for example, out of insider

138. IDS, *supra* note 125, at 3.
139. Press Communique, *supra* note 123.
140. IDS, *supra* note 125, at 3.
141. *Id.* at 3–4.

trading laws, requirements to disclose material developments or antifraud prohibitions;" and (5) "suitability criteria that may be imposed by stock exchanges in connection with listings of equity securities, such as the company's operating history, asset size, profitability, market float, share price, etc."[142]

In addition, "[c]ompanies engaged in specialised industries (i.e., banking, insurance, mining and oil and gas companies) may be required to provide additional information in certain countries, and the sources of these requirements are set forth in Part II," which addresses disclosure issues outside of the Standards and includes "information of a general nature and other disclosure requirements that may apply in certain countries."[143] The disclosure requirements for certificates representing shares, such as depository receipts, voting trust certificates, or similar forms of ownership representation, are also referenced in Part II.

The Standards are intended to apply to cross-border offering and listings. Under the IDS, an offering or listing of securities is considered to be "cross-border" "when it is directed to one or more countries other than the company's home country (whether or not the offering or listing also is being made concurrently in the company's home country)."[144] As a general matter, according to IOSCO, all foreign companies, subject to certain exceptions, can apply the IDS to offerings or listings in a particular host country.[145]

2. *Additional Requirements*

The IDS were issued "with a recommendation that IOSCO members accept in their respective home jurisdictions a disclosure document containing the information set forth in the Standards."[146] According to IOSCO, additional actions, however, "may be needed in some jurisdictions to implement the Standards, and issuers are encouraged to verify that

142. *Id.* at 4.
143. *Id.* at 3.
144. *Id.* at 4.
145. IDS, *supra* note 125, at 4. In the document, IOSCO notes the following exceptions:

(i) Australia: the Standards will not apply to companies incorporated in New Zealand that are listed or seeking to be listed on an Australian Securities Exchange.
(ii) Canada: the Standards will not apply to companies organized in the United States that use the Canadian Multijurisdictional Disclosure System with the United States, described in National Policy No. 45. The Standards will not apply to a company legally organized, incorporated or established in Canada for offerings within Canada.
(iii) European Union: offerings or listings by a company registered in an EU member state that only take place within EU member states will not be considered to be cross-border (but see also Item XX, Mutual recognition in the European Union in Part II).
(iv) Hong Kong, the Standards will only apply to companies whose primary listing is on a stock exchange approved under the Stock Exchange of Hong Kong's Listing Rule 19.30 as being an exchange that is a "regulated, regularly operating, open stock market recognized for this purpose by the Exchange" and the issuer "conducts its business and makes disclosure according to the accepted standards in Hong Kong."
(v) United States, the Standards will not apply to (1) companies that are organized in a foreign country but do not meet the Securities and Exchange Commission's definition of a "foreign private issuer" as set forth in Rule 405 under the Securities Act of 1933, as amended, or in Rule 3b-4 under the Securities Exchange Act of 1934, as amended; or (2) companies organized in Canada that register under the U.S. federal securities laws using the rules and forms provided for in the U.S. Multijurisdictional Disclosure System with Canada.

Id. at 4–5.

146. *Id.* at 3.

the Standards are in effect in the host country jurisdiction prior to their use."[147] While the IDS are not necessarily intended to substitute for or to replace disclosure requirements applicable to any jurisdiction's domestic issuers, they are intended to provide alternative standards for the preparation of a single disclosure document by foreign issuers.[148]

In addition to the specific disclosures required in the Standards, according to IOSCO, "most countries rely on an overriding principle that in connection with a registration or listing of securities or a public offering of securities, a company should disclose all information that would be material to an investor's investment decision and that is necessary for full and fair disclosure."[149] Accordingly, information called for by specific requirements contained in the Standards may need to be expanded under this general principle of disclosure of material information, where supplemental information is deemed to be material to investors and necessary to keep the mandated disclosure provided pursuant to specific requirements from being misleading.[150]

The Standards also address omission of information and supplementary information.[151] Specifically, "[i]f a disclosure requirement is inapplicable to an issuer's sphere of activity or legal form, no information need be provided in response to that requirement, although equivalent information should be given, if possible."[152] Further, "[a]ny significant change or any inaccuracy in the contents of the document which may materially affect the company or its securities, that occurs between the date of publication of the document and the date of sale or listing also must be adequately disclosed and made public."[153]

3. *The Standards*

Following an introduction (summarised in the previous section) and a glossary of terms,[154] the Standards, in Part I, outline the contents of an acceptable document.[155] Part II provides

147. *Id.*
148. *See id.* at 3.
149. IDS, *supra* note 125, at 5.
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.*
154. The following terms are defined for consistency throughout the Standards: affiliate; beneficial owner; company; directors and senior management; document; equity securities; group; home country; host country; and pre-emptive issue. IDS, *supra* note 125, at 7–8. Of most interest for present purposes are "equity securities", and "home" and "host" country.

> The term "equity securities" includes common or ordinary shares, preferred or preference shares, options or warrants to subscribe for equity securities, and any securities, other than debt securities, which are convertible into or exercisable or redeemable for equity securities of the same company or another company. If the equity securities available upon conversion, exercise or redemption are those of another company, the disclosure standards also apply to the other company. The standards do not apply to debt securities or debt which is convertible into or exercisable or redeemable for equity or debt securities.

Id. at 7–8.

"Home country" "refers to the jurisdiction in which the company is legally organized, incorporated or established and, if different, the jurisdiction where it has its principal listing." *Id.* at 8. "Host country" "refers to jurisdictions, other than the home country, in which the company is seeking to offer, register or list its securities." *Id.* at 8.

155. Although IOSCO states that the "information headings and order of presentation are not mandatory, it recommends that the format of the Standards be followed to enhance comparability," "assum[ing] that all information contained in a given document is provided in a language acceptable to the host country." *Id.* at 5–6.

country specific information on areas not covered within the standards, necessary to validate the document in a given jurisdiction, which should be incorporated as a "wrapper" to the IDS prospectus. In outline form, the cross-border prospectus is to comprise the following ten information categories: (1) identity of directors, senior management and advisers; (2) offer statistics and expected timetable; (3) key information; (4) information on the company; (5) operating and financial review and prospects; (6) directors and employees; (7) major shareholders and related party transactions; (8) financial information; (9) the offer and listing; and (10) additional information.

The purpose of section I, the standard addressing identity of directors, senior management and advisers, "is to identify the company representatives and other individuals involved in the company's listing or registration."[156] The standard requires identification of directors and senior management, advisers (principal bankers and legal advisers), and auditors. Section II, offer statistics and expected timetable, is intended "to provide key information regarding the conduct of any offering and the identification of important dates relating to that offering."[157] The standard requires description of offer statistics, and the method and expected timetable of the offer.

Section III, key information, summarises key information about the company's financial condition, capitalisation and risk factors, and must be restated if the financial statements are restated to reflect materials changes in the company's group structure or accounting policies.[158] Compliance with the standard requires provision of selected financial data for the five most recent years in the same currency as the financial statements,[159] a statement of capitalisation and indebtedness, the estimated net amount of the proceeds broken down into each principal intended use thereof, prominently disclose risk factors that are specific to the company or its industry and make an offering speculative or one of high risk, in a section headed "Risk Factors," intended to be a summary of more detailed discussion contained elsewhere in the document.[160]

Section IV provides information on the company. In this respect, "[t]he purpose of this standard is to provide information about the company's business operations, the products it makes or the services it provides, and the factors which affect the business."[161] It is also "intended to provide information regarding the adequacy and suitability of the company's properties, plants and equipment, as well as its plans for future increases or decreases in such capacity."[162] Information must be provided on the history and development of the company, an overview of the company's business, the company's organisational structure

156. IDS, *supra* note 125, at 9.

157. *Id.*

158. *Id.* at 10.

159. Information is to include, at a minimum:

> net sales or operating revenues; income (loss) from operations; income (loss) from continuing operations; net income (loss); net income (loss) from operations per share; income (loss) from continuing operations per share; total assets; net assets; capital stock (excluding long term debt and redeemable preferred stock); number of shares as adjusted to reflect changes in capital; dividends declared per share in both the currency of the financial statements and the host country currency, including the formula used for any adjustments to dividends declared; and diluted net income per share.

Id. at 10–11.

160. *Id.* at 11–12.

161. *Id.* at 12.

162. IDS, *supra* note 125, at 11.

and details on group affiliation (if any), and information regarding any material tangible fixed assets, including leased properties, and any major encumbrances thereon, as well as any environmental issues that may affect the company's utilisation of its assets.[163]

Section V, operating and financial review and prospects,

> provide[s] management's explanation of factors that have affected the company's financial condition and results of operations for the historical periods covered by the financial statements, and management's assessment of factors and trends which are anticipated to have a material effect on the company's financial condition and results of operations in future periods.[164]

Information should

> discuss the company's financial condition, changes in financial condition and results of operations for each year and interim period for which financial statements are required, including the causes of material changes from year to year in financial statement line items, to the extent necessary for an understanding of the company's business as a whole.[165]

Information must be provided on operating results, liquidity and capital resources, research and development policies, and significant recent trends in its financial and operating environment, as well as such other information that is necessary for an investor's understanding of the company's financial condition, changes in financial condition and results of operation.[166]

Section VI, directors and employees, "provide[s] information concerning the company's directors and managers that will allow investors to assess such individuals' experience, qualifications and levels of compensation, as well as their relationship with the company."[167] Further, "[i]nformation concerning the company's employees is also required."[168]

Section VII, major shareholders and related party transactions, "provide[s] information regarding the major shareholders and others that control or may control the company," as well as "information regarding transactions the company has entered into with persons affiliated with the company and whether the terms of such transactions are fair to the company."[169]

Section VIII, financial information,

> specif[ies] which financial statements must be included in the document, as well as the periods to be covered, the age of the financial statements and other information of a financial nature. The comprehensive bodies of accounting and auditing principles that will be accepted for use in preparation and audit of the financial statements will be determined by the host country.[170]

Financial information must include consolidated statements, audited by an independent auditor and accompanied by an audit report, and include comparative financial statements that cover the latest three financial years, audited in accordance with a comprehensive body of auditing standards, as well disclosure of any significant changes since the date of the annual financial statements, and/or since the date of the most recent interim financial statements, if any, included in the document.[171]

163. *Id.* at 12–14.
164. *Id.* at 14.
165. *Id.* at 15.
166. *Id.* at 14–16.
167. *Id.* at 15–17.
168. IDS, *supra* note 125, at 16.
169. *Id.* at 18.
170. *Id.* at 20.
171. *See id.* at 20–23.

Section IX, the offer and listing, "provide[s] information regarding the offer or listing of securities, the plan for distribution of the securities and related matters."[172] Extensive information must be presented regarding the offer and listing details, plan of distribution, all stock exchanges and other regulated markets on which the securities to be offered or listed are traded, selling shareholders, dilution, and expenses of the issue.[173]

Finally, section X, additional information, "provide[s] information, mostly of a statutory nature, that is not covered elsewhere in the document."[174] The standard requires detailed information on share capital; memorandum and articles of association; material contracts; relevant exchange controls; taxes (including withholding provisions) to which shareholders in the host country may be subject and whether the company assumes responsibility for the withholding of tax at the source and regarding applicable provisions of any reciprocal tax treaties between the home and host countries, or a statement, if applicable, that there are no such treaties; and any dividend restrictions, the date on which the entitlement to dividends arises, if known, and any procedures for non-resident holders to claim dividends, including paying agents of the company.[175] Statements of experts must be attributed and the experts identified, and the company must provide an indication of where the documents concerning the company that are referred to in the document, may be inspected, translated into or summarised in the language of the host country.[176] Overall, while significant, the non-financial standards provided by the IDS will fail to serve as the basis for an "international passport prospectus" unless common financial standards are also used.

C. International Harmonisation of Accounting Standards

Accounting standards provide the essential means of communication for valuation of companies regarded as necessary to any sort of investor choice in equities, and therefore necessarily underlie any efforts to harmonise and/or standardise international offering requirements. At present, accounting standards are nationally determined, so preparers and users of financial statements from different countries essentially speak different languages.[177] The recent collapse of Enron has underlined the significance of national differences and also perhaps may serve as a spur to further action along the lines discussed below. Specifically, major initiatives are underway to establish internationally agreed accounting standards, with the most significant achievements to date involving, respectively, the (1) EU and (2) IOSCO and the IASC.

The Office of the Chief Accountant of the U.S. SEC surveyed international accounting and auditing standards in 1987 and found significant disparities in a number of respects.[178]

172. *Id.* at 23.

173. *See id.* at 23–27.

174. IDS, *supra* note 125, at 27.

175. *See id.* at 25–28.

176. *See id.* at 28.

177. *See* Glenn Alan Cheney, *Western Accounting Arrives in Eastern Europe*, 170 J. Acct. 40, 43 (Sept. 1990) (describing accounting as the "language of production and transaction" and discussing difficulties in integrating Eastern Europe and Western countries due to differences in accounting).

178. SEC, Internationalization of the Securities Markets (1987). At least as a partial result of this study, the SEC insists, in connection with financial statements used by foreign issuers, that assurances be provided that the auditing standards followed are the equivalent to U.S. generally accepted accounting standards (GAAS). *Id.* at IV-34. *See also* Gonzalez & Olive, *supra* note 28.

In general terms, systems of accounting rules in different countries at the time could be grouped into two categories:[179] (1) countries "where business finance is provided more by loans than by equity capital, where accounting rules are dominated by taxation considerations and where legal systems customarily incorporate codes with detailed rules for matters such as accounting;"[180] and (2) countries "in which equity sources of finance are more important, accounting measurements are not dominated by taxation considerations because tax breaks can be enjoyed independently of [the mechanism of reporting], and common law systems prevail."[181] Overall, however, at the time of the SEC's study, no one system seemed to have such clear merits as to deserve adoption by the entire world.

The task of harmonisation is especially important in the area of securities regulation because of the critical link between information and stability in the world's securities markets.[182] The disharmony in accounting standards that exists today creates difficulties for both users and preparers of financial statements,[183] and presents obstacles to the process of international capital formation.[184] Overall, the usefulness of financial statements prepared on the basis of varying accounting standards is limited because it is difficult and time consuming to understand what the information means.[185] Further, from the standpoint of preparers of financial statements and the companies involved, disharmony of accounting standards is an impediment to both international securities offerings and cross-border mergers and acquisitions.[186]

Globalisation of stock markets and other trading markets is driving the movement toward international harmonisation of accounting standards. Further, businesses and capital markets desire both uniformity and higher quality, thereby stemming fears of regulatory arbitrage and a race for the "lowest common denominator."[187] Interestingly, the debate surrounding the collapse of Enron also appears to be focusing on certain philosophical

179. Bryan Carsberg, *Harmonising Accounts Worldwide*, FIN. TIMES, Jan. 12, 1996, at XII.

180. *Id.* Reporting under these systems often leads to a "lack of full transparency" for investors due to their basis on the tax systems. Major countries in this category include France, Germany, and Japan. *Id.*

181. "These countries generally have some private sector system for setting accounting standards, often within a general statutory framework," and "capital market pressures (lead to the increased) quality of available information to investors. Major countries in this category include the United States, the United Kingdom, Australia, and the Netherlands." *Id.*

182. UNITED NATIONS, U.N. CENTRE ON TRANSNATIONAL CORPORATIONS, INTERNATIONAL ACCOUNTING AND REPORTING ISSUES: 1989 REVIEW III (1990). *See also* Barbara S. Thomas, *International Accounting and Reporting—Developments Leading to the Harmonization of Standards*, 15 N.Y.U. J. INT'L L. & POL. 517 (1983).

183. THOMAS G. EVANS ET AL., INTERNATIONAL ACCOUNTING AND REPORTING 85–86 (2d ed. 1994).

184. *See* SEC, INTERNATIONALIZATION OF THE SECURITIES MARKETS, *supra* note 178, at IV-8. A study of international accounting problems has confirmed that the lack of international accounting standards greatly diminishes the utility of financial statements in world markets. *See also* GEORGE M. SCOTT, EIGHTY-EIGHT INTERNATIONAL ACCOUNTING PROBLEMS IN RANK ORDER OF IMPORTANCE: A DELPHI EVALUATION (American Accounting Assoc. ed., 1980).

185. The case of Daimler-Benz is illustrative in this context: "in 1994, its reported profit under German accounting rules was DM 895 million, whereas its profit under U.S. accounting rules was DM 1,052 million. In 1983, however, accounting under German rules showed a profit of DM 615 million, but U.S. (rules) led to . . . a loss of DM 1,839 million." Carsberg, *supra* note 179, at XII. *See also* Gonzales & Olive, *supra* note 28.

186. A survey of multinational corporations indicated that "the greatest potential benefit" of harmonisation would be the acceptance by stock exchanges around the world of "one set of accounts" complying with international accounting standards, instead of requiring different financial information prepared in "accordance with local accounting standards." *Support for International Standards*, 169 J. ACCT. 15, 16 (1990).

187. FINANCIAL ACCOUNTING STANDARDS BOARD, INTERNATIONAL ACCOUNTING STANDARDS 540 (*quoting* Dennis Beresford, chairman of the U.K. Financial Accounting Standards Board (FASB)).

questions such as rules-based systems (e.g., U.S. standards) versus more judgement-based systems (e.g., U.K. standards or IAS).

1. *Harmonisation of Accounting Standards in the EU*

The EU has undertaken a number of initiatives to improve financial reporting among its Member States from both a qualitative and a quantitative standpoint. Accounting harmonisation is part of the company law harmonisation program aimed at furthering freedom of establishment. As such, it is aimed not only toward the equivalent protection of all investors, but of all third parties dealing with Member States' companies.[188]

EU legislative harmonisation in the accounting field presupposes the existence of a national accounting system.[189] EU accounting directives include the First Company Law Directive, discussed above; the Fourth Company Law Directive;[190] the Eighth Company Law Directive;[191] the Insurance Accounting Directive;[192] the Seventh Company Law Directive;[193] and the Bank Accounting Directive.[194] As insurance and banking matters are beyond the scope of the present discussion, the two directives dealing with specific accounting procedures in these areas will not be discussed.

For present purposes, in addition to the financial statements required in connection with listing applications, the Fourth Company Law Directive,[195] adopted in August 1978, requires limited liability companies to publish or otherwise make available to the public at no cost both their annual accounts and an annual report.[196] The annual accounts must comprise a balance sheet, profit and loss account (both presented on a comparative basis with the preceding year) and notes, including specified disclosures relating to, inter alia, the company's principal accounting policies,[197] and must give "a true and fair view of the company's . . . financial position and profit or loss."[198] The annual report must include a fair review of the development of the company's business and position; describe the important events since the end of the financial year, and set forth information relating to future developments as well as activities in the field of research and development.[199] A person

188. See Marc I. Steinberg et al., *The Development of Internationally Acceptable Accounting Standards: A Universal Language for Finance in the 21st Century?* 27 SECS. REG. L.J. 324 (1999).

189. *Id.*

190. Fourth Council Directive 78/660/EEC of 25 July 1978 Based on Article 54(3)(g) of the Treaty on the Annual Accounts of Certain Types of Companies, 1978 O.J. (L 222), as amended by Directive 84/569/EEC, 1984 O.J. (L 314), Directive 90/604/EEC, 1990 O.J. (L 317), Directive 90/605/EEC, 1990 O.J. (L 317), and Directive 94/8/EU, 1994 O.J. (L 82).

191. Eighth Council Directive 84/253/EEC of 10 April 1984 Based on Article 54(3)(g) of the Treaty on the Approval of Persons Responsible for Carrying out the Statutory Audits of Accounting Documents, 1984 O.J. (L 126).

192. Council Directive 91/674/EEC of 19 December 1991 on the Annual Accounts and Consolidated Accounts of Insurance Undertakings, 1991 O.J. (L 374). Insurance matters are beyond the scope of the present discussion of financial services.

193. Seventh Council Directive 83/349/EEC of 13 June 1983 Based on Article 54(3)(g) of the Treaty on Consolidated Accounts, 1993 O.J. (L 193).

194. Council Directive 86/635/EEC of 8 December 1986 on the Annual Accounts and Consolidated Accounts of Banks and Other Financial Institutions, 1986 O.J. (L 372).

195. Directive 78/660/EEC, *supra* note 190.

196. *Id.* art. 47.

197. *Id.* art. 2.

198. *Id.* art. 2.

199. *Id.* art. 46.

or persons authorised by national law must audit the annual accounts.[200] The layout of the balance sheet,[201] and of the profit and loss statement,[202] and the general content of the notes[203] are specified. A number of accounting principles, including those relating to valuation,[204] research and development,[205] inventory,[206] and depreciation,[207] are prescribed.

The Eighth Company Law Directive[208] requires auditors to meet specified standards of professional education and experience. The directive also requires, in most instances, that they take and pass a comprehensive examination. The preamble to the Directive, however, notes that while in some members statutory audits of the accounts of companies are entrusted to highly qualified persons, this is not the rule in all Community countries.[209]

The Seventh Company Law Directive,[210] adopted in 1983, requires companies with subsidiaries to present their financial statements on a consolidated basis. The proposed Fifth Company Law Directive also contains provisions that would require auditors undertaking annual reports to be independent; however, due to the controversial nature of the employee participation provisions contained in the directive, it is unlikely to be adopted.

In 1995, the Commission presented the outline for a "new accounting strategy,"[211] which was subsequently endorsed by the Council of Ministers in June 1996. Key objectives of the strategy are "easier access for European companies to international capital markets and improved comparability of consolidated accounts prepared by those companies which are important players in the Single Market."[212] Under this "new strategy," the Commission has determined to associate its work with that of the IASC and IOSCO in pursuit of international accounting standards, rather than establishing a European Accounting Standards Board or a new layer of EU accounting standards. In addition, the Commission's work in the area of accounting standards has been significantly spurred by the needs of EMU, which formally began on January 1, 1999.

According to Commissioner Mario Monti, "the accountancy sector has a fundamental role to play in an efficient Single Market. The preparation, publication and widespread circulation of financial information relating to companies allow economic actors to make appropriate choices and constitute the necessary basis for management to take the right decisions."[213] As part of its "new accounting strategy," the Commission adopted an Interpretative Communication[214] in January 1998, covering three main issues: consolidated ac-

200. *Id.* art. 51.
201. Directive 78/660/EEC, *supra* note 190, arts. 9–10.
202. *Id.* arts. 23–24.
203. *Id.* art. 43.
204. *Id.* § 7.
205. *Id.* art. 43.
206. *Id.* art. 40.
207. *Id.* art. 35(b).
208. 1984 O.J. (L 126) 27.
209. *Id.*
210. *Id.*
211. Accounting Harmonisation: A New Strategy vis-à-vis International Harmonisation, Communication from the Commission, EUR. COMM. (COM 508) 95. *See* Eur. Comm., Commission Proposes a New Strategy for the Improvement of the Financial Reporting Framework for Companies in Europe, Press Release IP/95/1234 (1995).
212. *Id.*
213. Mario Monti, Speech at the Conference on the Role, the Position and the Liability of the Statutory Auditor in the E.U., Dec. 6, 1996 (on file with author).
214. Commission Proposal for an Interpretative Communication Concerning Certain Articles of the Fourth and Seventh Council Directives on Accounting, XV/7009/97.

counts; the relationship between the Accounting Directives and IAS; and environmental issues in financial reporting. The Communication's conclusions regarding compatibility with IAS are based on the comparison undertaken between the EU Accounting Directives and IAS by a special Task Force of the Contact Committee on the Accounting Directives.[215] In addition, the Commission's work in the area of accounting standards has been significantly spurred by the needs of EMU. In this regard, the Commission has produced two sets of guidelines to assist companies in dealing with the practical financial implications of the advent of the euro.[216] Overall, despite significant general progress in establishing minimum accounting standards, the EU system has not reached the level of a coherent and comprehensive system and recognition of this fact has led to the decision to adopt IAS.

2. *International Accounting Standards Committee (IASC)*

Formed initially in 1973 by agreement among the accounting bodies of ten industrialised countries,[217] by 1989, the IASC had grown to include approximately 100 accountancy bodies from eighty countries.[218] The IASC is engaged in an effort to harmonise and improve accounting principles "for the benefit of the public."[219] This task is especially difficult for two reasons: first, the IASC seeks harmonisation on a worldwide basis,[220] and second, since the IASC has no official status, its standards are essentially recommendations.[221] Further, the IASC standards are generally broad and allow alternative practices; hence, they achieve no real uniformity.[222]

The IASC's overall objectives are to formulate and publish accounting standards to be observed in the presentation of financial statements and to promote their worldwide acceptance, and to work generally for the improvement and harmonisation of regulations, accounting standards, and procedures relating to the presentation of financial statements.[223] By agreement, members of IASC are bound to persuade governments and other standard setting bodies that financial statements should comply with the international accounting standards (IAS) promulgated by the IASC.[224] These standards are not binding on nations or the IASC members themselves, and the IASC has no enforcement authority.[225]

The reaction of nations to the IASs of the IASC has been divided into three categories: (1) for some countries that do not have a developed national system of accounting, the IASs have been given essentially the same status given domestic standards;[226] (2) a number of

215. Commission Proposal for an Examination of the Conformity Between the International Accounting Standards and the European Accounting Directives (1996).

216. *Id.*

217. The founding members were Australia, Canada, France, Germany, Japan, Mexico, the Netherlands, the United Kingdom, Ireland, and the United States. International Accounting Standards Committee, Objectives and Procedures § 9000.24 [hereinafter Objectives and Procedures].

218. Stephen H. Collins, *The Move to Globalization*, J. ACCT. 83 (1989). Note that the membership of the IASC consists of accountancy bodies rather than nations. Evans, *supra* note 182, at 89.

219. Objectives and Procedures, *supra* note 218, § 9000.33.

220. *See IASC Moves to United Worldwide Standards*, 165 J. ACCT. 22, 26 (1988).

221. *See* LeRoy J. Herbert, *Developments in the Harmonisation of Accounting Standards*, 3 J. COMP. CORP. L. & SEC. REG. 175, 177 (1981).

222. Note, however, that the IASC in recent years has been making efforts to eliminate alternatives, thereby increasing the possibility of real harmonisation. *See* Carsberg, *supra* note 179, at XII.

223. Objectives and Procedures, *supra* note 218, § 9000.58.

224. *Id.* § 9000.60.

225. *Id.*

226. EVANS, *supra* note 183, at 94. *Cf.* Cheney, *supra* note 177.

countries have accounting systems that are for the most part compatible with IASs;[227] and (3) some countries have well-developed accounting standards that in large part are incompatible with IASs.[228] Given the general reception and the overall necessity of harmonisation, increasing use of IASs appears likely.[229]

3. *International Federation of Accountants (IFAC)*

The IFAC, organised in 1977, which includes the International Auditing Practices Committee (IAPC), is charged with the responsibility of developing and issuing guidelines on generally accepted auditing practices and the content of audit reports.[230] Overall, the problems facing the IAPC are quite similar to those facing IASC; however, the focus of the IAPC is on auditing rather than on accounting standards.

4. *Cooperation Between IOSCO and IASC*

In the area of international accounting standards for financial reporting connected with stock exchange listings, the barriers created by the lack of a single financial language are especially significant to the process of international capital formation. IOSCO, however, had always withheld any endorsement of the various IASs, feeling that a core set of standards that dealt comprehensively with all the main financial reporting issues should be completed first.[231] In 1993, IOSCO agreed on "the necessary components of a reasonably complete set of accounting standards (core standards) that would comprise a comprehensive body of principles for enterprises undertaking crossborder offerings and listings."[232] IOSCO's list identified forty core standards.

The IASC, however, was unwilling to undertake such a process, until July 1995, at which time the IASC and IOSCO published a joint agreement agreeing to complete a comprehensive set of core standards agreed between the two organisations by 1999.[233] "In July 1995, the IASC's 16-member board and IOSCO's technical committee agreed that there is 'a compelling need' for high-quality, comprehensive international accounting standards."[234] In July 1995, IOSCO announced publicly:

> The [IASC] Board has developed a work plan that the Technical Committee agrees will result, upon successful completion, in IAS comprising a comprehensive core set of standards. Completion of comprehensive core standards that are acceptable to the [IOSCO] Technical Committee will allow the Technical Committee to recommend endorsement of IAS for cross border capital raising and listing purposes in all global markets. IOSCO has already endorsed IAS 7,

227. EVANS, *supra* note 183, at 95 (e.g., United States, Canada, and the United Kingdom).

228. *Id.* (e.g., Japan, although this may be changing somewhat).

229. Note that the London Stock Exchange began accepting IASs soon after the foundation of IASC. *See* Carsberg, supra note 179, at XII. The United States, Canada, and Japan, however, still refuse to permit the use of IASs for stock exchange purposes. *Id.*

230. *See* INTERNATIONAL FEDERATION OF ACCOUNTANTS, PREFACE TO INTERNATIONAL AUDITING GUIDELINES OF THE INTERNATIONAL FEDERATION OF ACCOUNTANTS, AICPA PROFESSIONAL STANDARDS, 8000.01–02 (1979).

231. Carsberg, *supra* note 179, at XII.

232. Paul Pacter, *International Accounting Standards: The World's Standards by 2002*, CPA J. ONLINE (1998).

233. IASC concluded that completion of this core set was a desirable objective for IASC in any event, and acceptance of this goal made an agreement possible under which both IOSCO and IASC would cooperate in order to fulfil an objective that was in the best interest of both organisations. *Id.* The completion date for this agreement was later advanced to March 1998. *See* Steve Burkholder, *International Accounting Standards Panel Accelerates Release of Rules*, 28 SEC. REG. & L. REP. 540 (1996).

234. *Id.* at 540.

Cash Flow Statements, and has indicated to the IASC that 14 of the existing International Accounting Standards do not require additional improvement, providing that the other core standards are successfully completed.[235]

Under the agreement, IASC and IOSCO agreed to collaborate to produce a comprehensive set of core standards for the global listing of securities, which then would be submitted to IOSCO for endorsement by its membership.[236] Overall, "the two groups' goal is the development of financial statements, prepared in accordance with such international rules, that can be read world-wide in cross-border securities listings as an alternative to the use of national accounting standards," thereby resulting in an increase in market efficiencies.[237]

In July 1995, the completion of the core standards work programme was scheduled for June 1999.[238] The participants in the core standards development process thereafter urged IASC to accelerate the timetable, and in March 1996 the IASC announced that its Board agreed to set a new date of March 1998.[239] This date, however, was subsequently delayed again to 1999.

As of October 1998, the IASC and its membership had formally approved thirty-six of forty proposed core standards. Of the four outstanding standards, those applicable to business combinations (including goodwill)[240] were finalized in July 1998, and approved by the membership of IASC. The core standards relating to the Financial Instruments Project, with respect to standards dealing with hedging,[241] investments,[242] and financial instruments/off-balance sheet items[243] were all eventually finalised and accepted during 1998 and 1999, in order to meet the revised March 1999 completion deadline.

The Core Standards as set forth in IOSCO's 1993 list are grouped into five major categories: general; income statement; balance sheet; cash flow statement; and other. General standards deal with the following areas: (1) disclosure of accounting policies;[244] (2) changes in accounting policies;[245] and (3) information disclosed in financial state-

235. Pacter, *supra* note 233, at 6.

236. Burkholder, *supra* note 234, at 540. Highlights of the IASC work plan include: (1) issuance of a final statement on international accounting standards on income taxes in June 1996; (2) revised standards on intangible assets, research and development, and goodwill, also in June 1996; (3) international accounting standards on earnings per share in January 1997, following issuance of a disclosure document in September 1996; (4) final standards on business segment reporting in March 1997; and (5) final rules on financial instruments and investments, interim reporting, discontinued operations, and provisioning and contingencies, all in March 1998. *Id.*

237. *Id.* (citing joint IOSCO/IASC statement of July 1995).

238. *Id.*

239. *Id.* at 12.

240. IAS 22, Business Combinations (Jan. 1, 1985) (revised July 1998), *reprinted in* AICPA, INTERNATIONAL ACCOUNTING AND AUDITING PROCEDURES (1988); *see also* http://www.iasc.org.uk.

241. IAS 39, Financial Instruments: Recognition and Measurement (1998), *available at* http://www.iasc.org.uk.

242. *Id.*

243. IAS 32, Financial Instruments: Disclosures and Presentation (Jan. 1, 1996) (revised 1998), *available at* http://www.iasc.org.uk.

244. IAS 1, Presentation of Financial Statements (July, 1, 1998) (revised 1997) (replaced IAS 1, Disclosure of Accounting Policies, which remained in effect until Jan. 7, 1998), *reprinted in* AICPA, *supra* note 241; *see also* http://www.iasc.org.uk.

245. IAS 8, Profit or Loss for the Period, Fundamental Errors and Changes in Accounting Policies (Jan. 1, 1979), *reprinted in* AICPA, *supra* note 241; *see also* http://www.iasc.org.uk.

ments.[246] Core standards related to the income statement are addressed to: (1) revenue recognition;[247] (2) construction contracts;[248] (3) production and purchase costs;[249] (4) depreciation;[250] (5) impairment;[251] (6) taxes;[252] (7) extraordinary items;[253] (8) government grants;[254] (9) retirement benefits;[255] (10) other employee benefits;[256] (11) research and development;[257] (12) interest;[258] and (13) hedging.[259]

Standards governing the balance sheet address: (1) property, plant and equipment;[260] (2) leases;[261] (3) inventories;[262] (4) deferred taxes;[263] (5) foreign currency;[264] (6) investments;[265] (7) financial instruments/off balance sheet items;[266] (8) joint ventures;[267] (9) contingencies;[268] (10) events occurring after the balance sheet date;[269] (11) current assets and current liabil-

246. IAS 1, *supra* note 245.

247. IAS 18, Revenue (Jan. 1, 1984), *reprinted in* AICPA, *supra* note 241; *see also* http://www.iasc.org.uk.

248. IAS 11, Construction Contracts (Jan. 1, 1980), *reprinted in* AICPA, *supra* note 241; *see also* http://www.iasc.org.uk.

249. IAS 2, Inventories (Jan. 1, 1976) (revised 1993), *reprinted in* AICPA, *supra* note 241; *see also* http://www.iasc.org.uk.

250. IAS 4, Depreciation (Jan. 1, 1977) (revised 1974) and IAS 16, Property, Plant and Equipment (Jan. 1, 1983) (revised 1993) (currently being revised), *reprinted in* AICPA, *supra* note 241; *see also* http://www.iasc.org.uk.

251. IAS 36, Impairment of Assets (July 1, 1999) (issued June 1998, effective for financial reporting periods beginning July 1, 1999), *available at* http://www.iasc.org.uk.

252. IAS 12, Income Taxes (Jan. 1, 1998) (this replaced IAS 12, Accounting for Taxes on Income, which remained in effect until Jan. 1, 1998) (revised 1996 and effective for financial reporting periods beginning on or after Jan. 1, 1998), *reprinted in* AICPA, *supra* note 241; *see also* http://www.iasc.org.uk.

253. IAS 8, *supra* note 246.

254. IAS 20, Accounting for Government Grants and Disclosure of Government Assistance (Jan. 1, 1984) (revised 1983), *reprinted in* AICPA, *supra* note 241; *see also* http://www.iasc.org.uk.

255. IAS 19, Employee Benefits (Jan. 1, 1985) (revised Jan. 1998 and effective for Reporting Periods beginning Jan. 1, 1999), *reprinted in* AICPA, *supra* note 241; *see also* http://www.iasc.org.uk.

256. *Id.*

257. IAS 38, Intangible Assets (July 1, 1999) (issued Sept. 1998 and effective for annual financial statements covering periods beginning on or after July 1, 1999), *available at* http://www.iasc.org.uk.

258. IAS 23, Borrowing Costs (Jan. 1, 1986) (revised 1993), *reprinted in* AICPA, *supra* note 241; *see also* http://www.iasc.org.uk.

259. E62, Financial Instruments: Recognition and Measurement (Exposure Draft June 1998); IAS 39, *supra* note 242.

260. IAS 16, Property, Plant and Equipment (Jan. 1, 1983) (revised 1998), *reprinted in* AICPA, *supra* note 241; *see also* http://www.iasc.org.uk..

261. IAS 17, Accounting for Leases (Jan. 1, 1984) (to be superseded by IAS 17 [revised 1997], Leases, effective Jan. 1, 1999), *reprinted in* AICPA, *supra* note 241; *see also* http://www.iasc.org.uk.

262. IAS 2, *supra* note 250.

263. IAS 12, *supra* note 253.

264. IAS 21, *The Effects of Changes in Foreign Exchange Rates* (Jan. 1, 1985) (revised 1993), *reprinted in* AICPA, *supra* note 241; *see also* http://www.iasc.org.uk.

265. IAS 39, *supra* note 242.

266. *Id. See* discussion of E62, *supra* note 260.

267. IAS 31, Financial Reporting of Interests In Joint Ventures (Jan. 1, 1992) (revised 1990), *reprinted in* AICPA, *supra* note 241; *see also* http://www.iasc.org.uk.

268. IAS 37, Provisions, Contingent Liabilities and Contingent Assets (Jan. 7, 1999) (issued Sept. 1998 and effective for annual financial statements covering periods beginning on or after July 1, 1999), *available at* http://www.iasc.org.uk.

269. IAS 10, Contingencies and Events Occurring after the Balance Sheet Date (Jan. 1, 1980) (revised 1974), *reprinted in* AICPA, *supra* note 241; *see also* http://www.iasc.org.uk. The portion of IAS 10 dealing with contingencies is being revised in the current IASC project on Provisions, Contingent Liabilities and Contingent Assets. The portion on subsequent events is being revised in a separate IASC project on that subject.

ities;[270] (12) business combinations (including goodwill);[271] and (13) intangibles other than R&D and goodwill.[272]

A single standard details cash flow statement contents.[273] Other relevant core standards cover: (1) consolidated financial statements;[274] (2) subsidiaries in hyperinflationary economies;[275] (3) associates and equity accounting;[276] (4) segment reporting;[277] (5) interim reporting;[278] (6) earnings per share;[279] (7) related party disclosures;[280] (8) discontinuing operations;[281] (9) fundamental errors;[282] and (10) changes in estimates.[283]

The IASC proposal has been submitted and approved by the membership of IOSCO[284] and has also been reviewed both by domestic authorities and other international institutions and organisations, such as the Basel Committee on Banking Supervision.[285] Although IOSCO endorsement of comprehensive IAS was not guaranteed, IOSCO did commit to undertake a review of the completed project, and upon completion of the IASC core standards working programme, IOSCO evaluated the resulting standards.[286] The IOSCO evaluation commenced after the final draft standards was completed and resulted in substantial approval. The standards were subsequently approved by the full membership of IOSCO (including the U.S. SEC), with a recommendation for implementation in member jurisdictions.[287] As a result, there exists the clear possibility for the eventual employment of core

270. IAS 1, *supra* note 245.

271. IAS 22, *supra* note 241. Revision to IAS 22 was approved in principle by the Board in July 1998, subject to mail ballot on a final draft.

272. IAS 38, *supra* note 258.

273. IAS 7, Cash Flow Statements (Jan. 1, 1979) (revised 1992), *reprinted in* AICPA, *supra* note 241; *see also* http://www.iasc.org.uk.

274. IAS 27, Consolidated Financial Statements and Accounting for Investments in Subsidiaries (Jan. 1, 1990) (revised 1988), *reprinted in* AICPA, *supra* note 241; *see also* http://www.iasc.org.uk.

275. IAS 21, *supra* note 265, and IAS 29, Financial Reporting in Hyperinflationary Economies (Jan. 1, 1990) (revised 1989), *reprinted in* AICPA, *supra* note 241; *see also* http://www.iasc.org.uk.

276. IAS 28, Accounting for Investments in Associates (Jan. 1, 1990) (revised 1988), *reprinted in* AICPA, *supra* note 241; *see also* http://www.iasc.org.uk.

277. IAS 14, Segment Reporting (July 1, 1998) (revised in 1997 and effective for financial reporting periods beginning on or after July 1, 1998) (this replaced IAS 14, Reporting Financial Information by Segment, which remained effective until Jan. 7, 1998), *reprinted in* AICPA, *supra* note 241; *see also* http://www.iasc.org.uk.

278. IAS 34, Interim Financial Reporting (Jan. 1, 1999) (issued Feb. 1998 and effective for financial reporting periods beginning Jan. 1, 1999), *available at* http://www.iasc.org.uk.

279. IAS 33, Earnings Per Share (Jan. 1, 1998) (issued Feb. 1997 and effective for financial reporting periods beginning Jan. 1, 1998), *available at* http://www.iasc.org.uk.

280. IAS 24, Related Party Disclosures (Jan. 1, 1986) (revised 1984), *reprinted in* AICPA, *supra* note 241; *see also* http://www.iasc.org.uk.

281. IAS 35, Discontinuing Operations (Jan. 1, 1999) (issued June 1998 and effective for financial reporting periods beginning Jan. 1, 1999), *available at* http://www.iasc.org.uk.

282. IAS 8, *supra* note 246.

283. *Id.*

284. IOSCO Technical Committee, IASC Standards—Assessment Report (May 2000; see IOSCO, Final Communique of the 25th Annual Conference of the International Organization of Securities Commissions (2000).

285. Basel Committee on Banking Supervision, Report to G7 Finance Ministers and Central Bank Governors on International Accounting Standards (2000).

286. IOSCO Technical Committee, IASC Standards—Assessment Report (2000).

287. IOSCO, Resolution and List of IASC 2000 Standards (May 2000), *at* http://www.asplus.com/resource/ioscoapa.pdf.

standards developed by IASC and approved by IOSCO being thereafter acceptable by the SEC for acceptance in the U.S. capital markets.

V. Implementation of International Standards for Offerings and Listings of Securities

International standards may be interesting from an academic standpoint, but real impact on financial markets only comes with domestic implementation in the world's most significant capital markets, namely the United States and the European Union.

Recognising the importance of implementation, in May 2000, IOSCO produced a *Report on Implementation of IDS*.[288] The Report surveyed the progress of implementation of IDS among the seventeen members of the Working Party.[289] Sixteen indicated either that they:

(1) currently accept documents prepared in accordance with the IDSs from foreign companies, or
(2) have taken steps to be in a position to do so at some point in 2000.

According to information supplied by those surveyed, progress in implementation fell into five categories: (1) those that had implemented IDS through changes in laws or rules by May 2000 (four jurisdictions: Spain, the United Kingdom, Mexico, and Italy); (2) those that were in the process of implementing IDS through changes in laws or rules by end-2000 (two jurisdictions: France and the United States); (3) those that permitted use of IDS without any need for rule changes, through discretionary authority or other means (eight jurisdictions: Australia, Belgium, Germany, Hong Kong, Japan, Luxembourg, the Netherlands, and Switzerland); (4) those that planned to undertake rule changes to implement IDS, but in the interim would permit use through discretionary authority (two jurisdictions: Ontario and Quebec); and (5) those that would not allow use of IDS (one jurisdiction: Sweden).

According to the survey participants, of the four jurisdictions which had made changes to the laws and/or rules: two (Spain and United Kingdom) permit optional use of the IDSs by foreign companies; one (Mexico) requires use of IDS by both foreign and domestic companies; and one (Italy) revised its listing rules in a manner that conforms to the IDS requirements (although without specific reference to the IDSs) and those listing rules apply to both foreign and domestic companies. As of May 2000, France and the United States were in the process of changing laws and/or rules to permit use of the IDSs, with the changes effective sometime in 2000.

According to the respondents, Australia, Belgium, Germany, Hong Kong, Japan, Luxembourg, the Netherlands, and Switzerland currently permit (either through discretionary authority or other means) foreign companies to use the IDSs without the necessity of changing their laws or rules. Japanese officials stated that its foreign company disclosure forms had been amended to be more comparable to the IDSs and disclosure that complies fully with the IDS would be accepted under discretionary authority. Switzerland noted plans to make follow-up changes to its laws or rules.

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288. IOSCO, Report on Implementation of International Disclosure Standards (May 2000), *at* http://www.iosco.org/iosco.html.

289. The seventeen Working Party members surveyed were: Australia, Belgium, France, Germany, Hong Kong, Italy, Japan, Luxembourg, Mexico, the Netherlands, Ontario, Quebec, Spain, Sweden, Switzerland, the United Kingdom, and the United States.

Two Canadian provinces, Ontario and Quebec, stated that rulemaking activities were planned in cooperation with other provincial securities regulators to permit use of the IDS by foreign companies. In the interim period, both would consider exercising their discretionary authority to permit a foreign company to use the IDSs to access their markets.

Sweden noted that the content of the IDSs would satisfy most, but not all, of its requirements for an offering, but that companies would have to provide additional information on the topics covered by the IDS before documents based on those standards would be accepted. In relation to domestic companies, according to the IOSCO survey, two (Italy and Mexico) require disclosure that conforms to the IDS requirements. Eight (Australia, Belgium, Germany, Luxembourg, the Netherlands, Spain, Switzerland, and the United Kingdom, would permit domestic companies to use the IDSs, although with conditions in some cases.

An informal survey of the implementation of IDS conducted by Samuel Wolff of Akin, Gump, Strauss, Hauer & Feld was published in February 2001.[290] Of the respondents to the informal survey, Wolff found four in which IDS had been implemented through rule and/or legislative changes applicable to foreign and domestic issuers[291]: two (Italy and Mexico) require use of IDS for both foreign and domestic issuers; one (Argentina) required IDS for foreign issuers and intended to apply the same requirements to domestic issuers by sometime in 2002; and one (Singapore) required IDS with modifications for both foreign and domestic issuers.

Of the respondents, Wolf found five jurisdictions which had implemented IDSs for foreign issuers only by rule and/or legislative change[292]: in two (the United States and Switzerland), IDSs were optional for foreign issuers, but different standards applied to domestic issuers, although foreign issuers could also comply with the domestic requirements; in one (France), changes were in progress during 2001 to allow use of IDS by foreign issuers; one (Spain) required use of IDS for foreign issuers; and one (the United Kingdom) listing rules exempt foreign issuers complying with IDS from certain provisions, but would nonetheless be required to furnish listing particulars in accordance with the remaining provisions of the listing rules.[293] Wolf found that seven of the respondents anticipated no legislative and/or rules changes were necessary, but IDS were acceptable for issuers: in four (Luxembourg, Hong Kong, the Netherlands, and Belgium), IDS would be accepted under discretionary authority; in one (Germany), IDS were deemed to meet listing requirements; in one (Japan), IDS would be accepted on a discretionary basis, but only if in Japanese proper format; and in one (Australia), Wolf was not able to confirm the response to the IOSCO survey indicating that IDS would be accepted under discretionary authority. In one jurisdiction (South Africa), it was unclear whether IDS would be accepted, and IDS were not acceptable in four jurisdictions (Israel, Canada, India, and Taiwan).

From these surveys, use of IDS by different jurisdictions appears to be falling into four categories: (1) required for all companies, foreign and domestic; (2) optional for all companies, foreign and domestic; (3) inapplicable to domestic companies, but required for

290. Samuel Wolff, *Implementation of International Disclosure Standards*, 22 U. PA. J. INT'L ECON. L. 91 (2001). Wolff surveyed twenty IOSCO member organisations. *Id.* at 94.

291. *See id.* at 95–104.

292. *See id.*

293. Public offerings without listing are governed by POS Regulations (based upon EU POP Directive), to which no change had been made in respect to IDS.

foreign companies; and (4) inapplicable to domestic companies and optional for foreign companies. Wolff concludes:

> the record so far, two and one-half years after promulgation of the IOSCO Standards, is mixed at best . . . While some progress has been made toward the implementation of International Disclosure Standards, the more toward implementation has probably been slower than IOSCO contemplated. There is still a hodge-podge of prospectus and listing rules which foreign issuers have to sort through as before on a country-by-country basis to determine applicable disclosure standards. More often than not, there is no reference at all to the IOSCO Standards.[294]

While Wolf's conclusion does not appear optimistic, closer analysis of implementation of IDS and IAS in the two most significant capital markets (the United States and the EU) actually suggests that significant progress is in fact being made.

A. International Disclosure Standards

1. *United States*

The principal securities legislation in the United States remains the Securities Act of 1933 (1933 Act) and the Securities Exchange Act of 1934 (1934 Act), the former regulating the initial public offering of securities and the latter secondary dealings in them. Although much amended by subsequent Congresses, and added to by rules and regulations of the Securities and Exchange Commission (SEC), the original purpose of the legislation remains unchanged, namely to protect investors by requiring the provision of accurate and timely information.[295] Specifically, in relation to disclosure in securities offerings, providing shareholders with better tools with which to scrutinise companies issuing securities (especially public/listed corporations) was one of the U.S. Congress's central purposes in adopting the 1933 and 1934 Acts.[296]

The key obligation imposed by the 1933 Act is the requirement for registration of any offering of securities, absent a specific exemption.[297] Initial disclosure obligations are supported by a liability framework, including criminal and civil (private and administrative) actions, as well as requirements for on-going disclosure of public companies, under the 1934 Act. General disclosure requirements are contained in Regulation S-K. In order to increase the attractiveness of U.S. capital markets for non-U.S. issuers, the SEC has made a number of accommodations over the years, including respecting disclosure standards.[298]

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294. Wolff, *supra* note 291, at 105.
295. Alistair Alcock, *Rise and Fall of Private Actions under Rule 10b-5*, J. Bus. L., May 1998, at 230–49.
296. H.R. Rep. No. 85, 73d Cong., 1st Sess. (1933).
297. *Id.* § 5.
298. Accommodations include:
   - Interim reporting on the basis of home country and stock exchange practice rather than quarterly;
   - Exemption from proxy rules and the insider reporting and short swing profit recovery provision;
   - Aggregate executive compensation disclosure rather than individual disclosure, if permitted in issuer's home country;
   - Acceptance of 3 IAS: cash flow statements (7), business combinations (22) and operations in hyperinflationary economies (21);
   - Offering document financial statements updated principally on a semi-annual rather than a quarterly basis; and
   - Exemption from 1934 Act registration under Section 12(g) for foreign private issuers that have not engaged in a U.S. public offering or whose securities are not traded on a national exchange or NASDAQ.

On September 28, 1999, the U.S. SEC adopted a complete revision of Form F-20,[299] which contains the basic disclosure requirements applicable to foreign private issuers under the U.S. Securities Acts, largely along the lines proposed previously in February 1999.[300] Under the SEC Final Rule and Form F-20 there under, the IOSCO IDS are substantially implemented into U.S. securities regulation, although the F-20 requirements remain more detailed and stringent than those of IDS. According to Allan Beller of Cleary, Gottlieb, Steen & Hamilton:

> foreign issuers that register with the Commission for the first time will not find the new disclosure regime any more hospitable than the old . . . Unless the IOSCO Standards are adopted for home-country disclosure, most issuers will probably continue to prepare substantially different offering documents and annual reports to satisfy home-country requirements and to satisfy U.S. requirements.[301]

Most significantly, the F-20 revision does not address issues respecting financial information, with reconciliation to U.S. GAAP continuing to be required. Nonetheless, IDS have been implemented in the United States.

2. *Europe*

As a result of EMU, EU Member States and the European Commission have re-examined the Single Market project and sought to take steps to remedy structural problems not addressed in the earlier SEA and Maastricht processes.

The European Council endorsed the European Commission's Single Market Action Plan on June 16–17, 1997 in Amsterdam. The Action Plan establishes four "Strategic Targets" for implementation under a three phase timetable: making rules more effective, addressing key market distortions, removing obstacles to integration, and delivering a "Single Market" for the benefit of all citizens of EU Member States.[302] As one aspect of the Single Market Action Plan, the Commission developed a Framework for Action for creating a single market in financial services in 1998.[303] A Financial Services Policy Group (FSPG) was established in January 1999 to develop specific recommendations. Following meetings of the FSPG, the Commission produced its Financial Services Action Plan for the establishment of a single market in financial services by 2005.[304]

Included within the FSAP were decisions to focus on, inter alia, developing a single prospectus for securities offerings and a single set of financial statements for listed companies. The Commission, the FSPG and a variety of specially created groups of market experts have since moved forward with proposals in a wide variety of areas, including the development of a single prospectus and single set of financial statements.[305] Most signifi-

299. Exchange Act Release No. 33–7745 (Sept. 28, 1999).

300. Exchange Act Release No. 33–7637 (Feb. 2, 1999).

301. A. Beller, *SEC Adopts New Disclosure Requirements for Non-U.S. Issuers*, *in* 32D ANNUAL INSTITUTE ON SECURITIES REGULATION, PRACTISING LAW INSTITUTE, CORP. L. & PRAC. COURSE HANDBOOK SERIES, 1213 PLI/CORP. 183, 186 (2000).

302. *Id.*

303. Financial Services: Building a Framework for Action, COM(625) (Oct. 1998).

304. Financial Services: Implementing the Framework for Financial Markets: Action Plan, COM(232) (May 1999).

305. *See generally* Financial Services Priorities and Progress: Third Report, COM(692/2) final (Nov. 2000); Progress on Financial Services: Second Report, COM(336) (May 2000); Financial Services Action Plan: Progress Report (Nov. 1999).

cantly, the Commission established a so-called "Committee of Wise Men" or the Lamfalussy Committee, chaired by Baron Alexandre Lamfalussy.[306] The European Council endorsed the recommendations (including a controversial new legislative process for EU securities legislation) of the Lamfalussy Committee in Stockholm in March 2001.[307] Key recommendations of the Lamfalussy Committee include adoption by the end of 2003 of a single prospectus for issuers and modernisation of admission to listing. Other key recommendations include home country control for all wholesale members and definition of professional investor, modernisation of investment rules for UCITS, adoption of IAS, and the creation of a single passport for recognised stock markets. Recommendations so far have resulted in the creation of a Committee of European Securities Regulators[308] and a European Securities Committee.[309]

As noted above, as one aspect of the creation of a single prospectus, the Commission has codified the four basic listing directives.[310] As a very significant follow-on development, the Commission, following the Lamfalussy recommendations, proposed a single prospectus, valid EU-wide, covering all listing and public offers of securities. According to the Commission, the key features are:[311]

(1) Definition of clear conditions for offering securities to the public and for admission to trading;
(2) Harmonisation of the essential definitions in order to avoid loopholes and different approaches, thus ensuring a level playing field throughout the EU;
(3) Introduction of enhanced disclosure standards in line with international standards (IOSCO) for public offer of securities and admission to trading;
(4) Introduction of the registration document system for issuers whose securities are admitted to trading on regulated markets in order to ensure a yearly update of the key information concerning the issuer;
(5) Concentration of the responsibilities in the Home State's administrative competent authority; and
(6) The "single passport" enabling the possibility to offer or admit securities to trading on the basis of a simple notification of the prospectus approved by the home competent authority.

Significantly, the requirements for information included in the prospectus are identical to those of the IOSCO IDS, albeit with much less detail present in the Commission pro-

306. Committee of Wise Men, Final Report of the Committee of Wise Men on the Regulation of European Securities Markets (Feb. 2001); Initial Report of the Committee of Wise Men on the Regulation of European Securities Markets (Nov. 2000).

307. Results of the Council of Economics and Finance Ministers, 22 March 2001, Stockholm – Securities Legislation (Mar. 23, 2001).

308. Commission Decision 2001/527/EC of 6 June 2001 Establishing the Committee of European Securities Regulators, 2001 O.J. (L 191).

309. Commission Decision 2001/528/EC of 6 June 2001 Establishing the European Securities Committee, 2001 O.J. (L 191).

310. Directive 2001/34/EC of the European Parliament and of the Council of 28 May 2001 on the Admission of Securities to Official Stock Exchange Listing and on Information to be Published on Those Securities, 2001 O.J. (L 184).

311. Financial services: Commission Proposes Single Prospectus Valid EU-Wide, (May 30, 2001); Proposal for a Directive of the European Parliament and of the Council on the Prospectus to be Published When Securities are Offered to the Public or Admitted to Trading, COM(280) final (May 2001).

posal.[312] At present, the ideas included within the proposed prospectus directive, while enjoying general support, are generating conflict amongst market practitioners, especially in respect to the lack of detail included in the initial proposal and in respect to potential liability for issuers using such a mechanism and the related lack of clarity in respect to general issues of enforcement outside of initial approval.[313] In addition to proposals on accounting standards and prospectuses, the Commission has also initiated consultation on on-going disclosure obligations of listed companies.[314]

B. Accounting and Auditing Standards

As noted, the IAS core programme has been approved by IOSCO, reviewed and largely recommended by the Basel Committee, and included as one of the key standards for sound financial systems by the Financial Stability Forum.[315] In addition, they have been accepted for international offerings and listings by a wide range of stock exchanges around the world.[316] Among the largest capital markets in the world, the EU has determined to use IAS as the basis for reporting by all EU listed companies by 2005, while the United States is currently discussing future usage of IAS in its markets. Significantly, with the on-going debate over Enron, pressure for adoption of IAS around the world may increase.

1. *Europe*

In the EU, the Accounting Directives have provided a base level of minimum standards for accounting; however, as noted above, they never reached the level of a complete, coherent, integrated system of accounting, with the result being that the accounting standards and practices varied significantly across Member States.

As a result of this realisation and of the increasing emphasis on the importance of developing a single capital market in the Euro Area and the EU as a whole, the Commission investigated whether to develop a complete system of European accounting standards—an European GAAP, perhaps through a European Accounting Standards Board or similar organisation—or whether to instead rely on the work of the IASC. In the event, the decision taken was to work with the IASC process and IAS. As the most concrete step to date, the Commission determined in 2001 to adopt the use of IAS as a requirement applying to all companies listed on any securities exchange within the EU by the end of 2005[317]—a requirement that will fundamentally effect the financial reporting of approximately 7,000 EU

312. Annex I (prospectus), Annex II (registration document) & Annex III (securities note).

313. As one simple example, the proposal intends to amend significantly both Directive 80/390/EEC on listing particulars and Directive 89/298/EEC on public offers of securities. As noted, the listing particulars Directive has been consolidated and repealed. Interestingly, no mention is made of the consolidated Directive.

314. Internal Market Directorate General, Towards an EU Regime on Transparency Obligations of Issuers whose Securities are Admitted to Trading on a Regulated Market, MARKT/11.07.2001 (July 2001).

315. Financial Stability Forum, International Standards and Codes to Strengthen Financial Systems (2001). *See also* Financial Stability Forum, Compendium of Standards, *available at* http://www.fsforum.org/standards/repiscsfs.html. The FSF is the key coordinating organisation for international financial standards, now a key aspect of the so-called "new international financial architecture (NIFA)." *See, e.g.*, M. Giovanoli, *A New Architecture for the Global Financial Market: Legal Aspects of International Financial Standard Setting*, *in* International Monetary Law: Issues for the New Millennium (Oxford Univ. Press 2000).

316. For a current summary, see the IASC website at http://www.iasc.org.hk.

317. Proposal for a Regulation of the European Parliament and of the Council on the Application of International Accounting Standards, COM(80) final (Feb. 13, 2001).

listed companies. As a result of the Commission's determination to work directly with the international standards-setting process and to require all EU listed companies to report according to IAS by 2005, recent and developing international efforts in this area are of considerable interest and importance.

2. *United States*

In the United States, the SEC has responsibility for setting accounting standards for securities issuers, which it in turn delegates to the Financial Accounting Standards Board (FASB). The FASB in turn establishes U.S. GAAP, which govern accounting practices in the United States.

Historically, by far the greatest barrier to foreign issuer access to the U.S. capital markets has been the requirement for use of U.S. GAAP for required financial information and reporting.[318] In order to partially address these concerns, the SEC has allowed foreign issuers to use either GAAP or home country (or IAS) reconciled to GAAP. Reconciliation, however, is an expensive and time-consuming process and can still be regarded as the major barrier to foreign issuer access to U.S. markets.

Notwithstanding IOSCO endorsement of IAS (and participation of the U.S. SEC in that process), the U.S. SEC is considering the IAS package independently with no underlying legal obligation to follow IOSCO endorsement. Congressional testimony of SEC officials indicates that in order for IAS to be adopted, the standards must (1) constitute a comprehensive basis of accounting; (2) be of high quality and result in comparability and transparency and provide for full disclosure; and (3) be rigorously interpreted and applied.[319] The SEC has repeatedly stated that its decision to adopt IAS would be premised upon an evaluation of the impact of IAS upon capital formation, cost of capital for domestic registrants, and investor protection.[320] The SEC concluded that the IASC's efforts have already contributed greatly to raising the level of accounting standards worldwide and reducing the number of differences between international standards and accounting principles used in the United States. These and other efforts at the international level are encouraging development of accounting principles that have the needs of investors and capital markets as their primary focus.[321]

The SEC at present has a request for public comment respecting adoption of IAS pending.[322] In respect to the IAS proposal, the United States is looking at four options: (1) retain the current reconciliation system; (2) remove some reconciliation requirements for selected IAS; (3) allow IAS for recognition and measurement, with GAAP and SEC supplemental footnote disclosure; or (4) allow IAS without reconciliation. The first (no change) and last

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318. *See* Gonzales & Olive, *supra* note 28.

319. *See, e.g.*, Remarks by Jane B. Adams, Deputy Chief Accountant, Office of the Chief Accountant, U.S. Securities and Exchange Commission, at the 17th Annual SEC and Financial Reporting Institute Conference, Leventhal School of Accounting, University of Southern California, Los Angeles (May 14, 1998). These factors have been repeated on numerous occasions in SEC testimony and speeches since April 1996, when the SEC released a statement in support of the efforts of IOSCO and the IASC. *See* SEC News Digest, SEC Statement Regarding International Accounting Standards, Issue 96–67, *reprinted in* 1996 SEC LEXIS 873 (Apr. 11, 1996).

320. *See, e.g.*, Remarks by Mary B. Tokar, Senior Associate Chief Accountant, Office of the Chief Accountant, U.S. Securities and Exchange Commission, at the 2nd Annual International Accounting Standards Conference, Belgium (Mar. 10, 1998).

321. *See* SEC, INTERNATIONALIZATION OF THE SECURITIES MARKET, *supra* note 178, at 23.

322. *See* Tokar, *supra* note 320, at 5.

(adopt IAS for foreign issuers) are both unlikely. In respect to the first, the SEC (through IOSCO) has endorsed the use of IAS for foreign issuers. As a result of this, combined with congressional pressure, it would seem as if the SEC would have to make some allowances in respect to IAS. In respect to the last, given the comments of both the SEC and domestic constituents, it appears unlikely (even in the context of the Enron debate) that IAS will be adopted wholesale, at least at this point in time.

It therefore seems probable that the SEC will allow use of IAS to some extent by foreign issuers. The SEC may decide to endorse certain IASC core standards but not endorse other standards. Notably, the SEC has previously endorsed three IASC standards for partial use by foreign issuers without requiring reconciliation to U.S. GAAP.[323] The SEC could decide to endorse IAS for use by foreign issuers coupled with a requirement that issuers explore U.S. GAAP on particular issues not addressed or inadequately addressed in the opinion of the SEC. The SEC could also exclude one or more of the core standards adopted by IOSCO from domestic endorsement.

VI. Conclusion: Globalisation of Securities Offerings?

As noted at the outset, the key issue is globalisation of financial markets, specifically the market for securities offerings and listings, which at present is largely impossible due to disparities between domestic legal and regulatory standards. Essential to true "globalisation" of securities offerings and listings is the issue of whether, for the first time, international efforts may lead to the development of an agreed format for the content of an international offering/listing document acceptable in jurisdictions around the world, i.e., a "global prospectus" or "international passport prospectus." Three trends underscore the forces supporting the growing pressure for such a mechanism: cross-border mergers and acquisitions, mergers and alliances between stock exchanges around the world, and the development of "global shares," traded on multiple markets. As a preliminary matter, however, it is necessary to look at the current status of international securities offerings in order to determine whether, despite current disparities, truly global offerings in fact do exist.

A. "Global Offerings" in Practice

In February 2001, Howell Jackson of Harvard University and Eric Pan of Covington & Burling published the results of an investigation into how European corporate issuers are currently (as of 1999) raising capital in European transactions.[324] Jackson and Pan conclude, "the most notable feature of capital-raising practices in Europe in 1999 is the fact that market forces, and not formal legal requirements, appear to be the most important determinant of the manner in which European issuers raise capital in pan-European offerings."[325] They conclude that the practices in Europe have two significant implications for the debate over regulatory competition:[326] first, competition seems to be following a pattern of higher standards,

323. *See A Window of Opportunity*, Corp. Accounting Int'l 10 (1996).

324. Jackson & Pan, *supra* note 27. This is the first part of a two-part study, investigating European corporate capital raising in Europe (the subject of Part I) and in the United States (the subject of Part II—yet to be published).

325. *Id.* at 654.

326. *Id.* at 655–56.

rather than a feared "race to the bottom"; and second, market practices are moving towards a level and system of disclosure similar to that found in U.S. private placements, supported by effective linkages between national markets through secondary market access.

Overall, Jackson and Pan's research suggests that "the overwhelming number of European equity offerings consist of a distribution to local investors (including retail investors) plus a pan-European offering limited to institutional investors across Europe (and elsewhere in the world, often including U.S. institutional investors under Rule 144A)", termed an "International-style Offering."[327] Essentially, the mutual recognition provisions of the European prospectus and stock exchange directives are not useful in practice due to state barriers and technical issues. Instead, it is simpler and more effective to rely on the Euromarkets and exemptions for professional investors required under the Public Offer Prospectus Directive.[328] Further, market practice allows transfers from professional purchasers to domestic retail purchasers, through loose resale restrictions (termed by the authors, "resale leakage") and also through European stock exchange access provisions of the ISD (termed by the authors "secondary market linkages").[329]

While Jackson and Pan's subsequent study has not yet been published, a review of market practices suggests that at present securities offerings take six primary forms: (1) domestic offerings by domestic companies to domestic investors, subject to domestic regulatory standards; (2) foreign offerings by foreign companies to investors in another jurisdiction, subject to domestic standards which have in some cases been relaxed to encourage such activities (e.g., Regulation S/Rule 144A in the U.S.); (3) international or Euromarkets offerings by companies of any jurisdiction to international institutional investors, structured to avoid domestic regulatory standards through exemptions for certain transactions and investors and typically following U.S. private placement standards (as noted by Jackson and Pan); (4) international-style offerings (as described by Jackson and Pan) by companies of any jurisdiction, to domestic (including retail) investors in the company's home jurisdiction, plus institutional investors across the EU through the Euromarkets, and often to U.S. institutional investors through the Regulation S/Rule 144A mechanism; (5) so-called "global offerings", in reality a series of domestic offerings to domestic investors in various jurisdictions subject to domestic regulatory requirements, often combined with an international or international-style offering, and sometimes structured around a "global share" tradable across various domestic exchanges; and (6) internet offerings, which typically reflect domestic or international-style structures.

By contrast, a true global offering would involve a single coordinated offering to investors around the world based upon identical standards respecting not only offering/listing but also marketing requirements and based upon a freely tradable global share structure. At present, due to conflicting domestic requirements, such an offering is not possible, even absent considerations of subsequent ongoing reporting or liability concerns.

B. Stock Exchange Consolidation

In the past several years, in addition to growing numbers of international and multi-jurisdictional offerings of securities and drives towards truly "global" offerings, securities

327. *Id.* at 681.
328. *Id.* at 680–83.
329. *Id.* at 687–90.

exchanges around the world have been moving to encourage listings by foreign companies and to expand operations internationally, through organic growth, mergers and alliances.

The first method attracting foreign listings has been favoured by the NYSE and the London Stock Exchange (LSE). The difficulty here, namely for the NYSE, has been U.S. inflexibility with respect to requirements for listing and accounting standards, as discussed above. The second method, international expansion, is illustrated by NASDAQ's drive to organically establish linked exchanges in the major securities markets around the world. Because of varying legal requirements in the major financial jurisdictions (i.e., the United States, the EU and Japan), this has not been overly successful, as the discussion above indicates.

The third key method is the recent spate of mergers and alliances between exchanges around the world. In respect to consolidation of exchanges, this trend began with NASDAQ's drive to establish linked exchanges in the major securities markets around the world in order to avoid certain difficulties associated with organic expansion. Other key examples are the merger of the Paris, Amsterdam, and Brussels bourses to form "Euronext" and the ongoing efforts on the parts of the Frankfurt and London exchanges to expand their respective international reaches. While these latter moves are being driven by changes in the EU (especially EMU), the trend has now spread internationally, with the mooted creation of Global Equity Market (GEM), combining, inter alia, the NYSE and Euronext.

As with the move towards fully global offerings of securities, international expansion by historically domestic stock exchanges has been driven by investors (especially institutions) and companies seeking to diversify risk and maximise opportunities for capital raising and generation of returns. Put simply, the overall goal is "a single 24-hour market in which the shares of the world's biggest blue-chip firms can be traded cheaply and efficiently."[330]

A number of key impediments exist however, of which differing regulatory and financial standards are the most significant. In addition, other significant impediments include settlement and custody and nationalistic protectionism and pride. Interestingly, however, in terms of regulation, what does not seem to be happening is the classic fear of a "race to the bottom" (as was seen historically in U.S. corporate law). Rather, there seems to be a move towards higher standards, rather than lower, with two major systems appearing most competitive: that of the United States and that of the United Kingdom—the two systems with historically the highest standards of securities regulation and also the two predominant financial centres of their respective continents.

C. Cross-border Mergers and Acquisitions

In respect to cross-border mergers and acquisitions (M&A), the growing importance and usefulness of such a mechanism is underscored by recent cross-border merger activities, of which the Daimler Benz-Chrysler and British Petroleum-Amoco mergers are the most high profile instances.[331] While in the area of international bonds, a de facto global prospectus has been in existence for some time (through the mechanisms of the Eurobond markets), this article argues that the development of a global prospectus for international equity offerings may soon be a reality. In fact, in some ways as discussed below, it already has and

330. *Stock Exchanges: The Battle for Efficient Markets*, Economist, June 17, 2000, at 86.

331. For discussion and analysis, see Bernard S. Black, *The First International Merger Wave (and the Fifth and Last U.S. Wave)*, 54 U. Miami L. Rev. 799 (2000).

is set to continue, essentially because of support from the various concerned constituencies in major markets around the world.

D. Proposals to Support the Development of Global Offerings

According to Hal Scott of Harvard University, "[i]n fully internationalised securities markets, issuers in public primary markets should be able to issue securities to investors worldwide using one set of optimal distribution procedures and disclosure documents, and subject to one set of liability standards and enforcement remedies."[332] Scott argues that "the imposition of U.S. rules for disclosure, distribution, and enforcement, within and to some extent outside the United States, impedes the achievement of [this goal]"—and in fact at present makes achievement of the goal impossible.[333] According to Scott, an issuer can, at present deal, with diverse national distribution requirements in three ways—none of which are entirely satisfactory:[334] (1) abstain entirely from issuing in the U.S. market; (2) distribute in foreign markets under foreign rules and in the U.S. market under U.S. marketing standards, which may result in the U.S. distribution occurring later in the United States than elsewhere; or (3) refrain from issuing marketing materials, other than a U.S. compliant prospectus, in any market until the registration statement is effective in the United States. As a result of the current impasse, Scott analyses three possible alternatives:[335] (1) harmonisation to an agreed common set of rules; (2) mutual recognition of domestic rules; and (3) off-shore free zones in which issuers issue securities to investors from any country under a single set of market-determined rules. In respect to harmonisation, Scott is dismissive of the likely success of IDS.[336] While this can be disputed, he also suggests that more significant impediments remain in respect to, first, standardisation of distribution procedures, second, standardisation of enforcement, and third, interpretation, updating and potential to stifle competition.[337]

With respect to mutual recognition, Scott concludes (along with most others) that the neither the MJDS nor the EU passport system have not been satisfactory in practice.[338] In relation to the possible extension of mutual recognition beyond the MJDS or the EU, Scott concludes that the United States is unlikely to converge its standards with those of others, that any mutual recognition must be limited to true home country companies, and non-standardised distribution and enforcement rules would remain.[339]

Scott's preferred alternative is the creation of an off-shore free-zone, in which countries would permit issuers to offer securities to the public (including residents of their own countries) offshore, subject only to minimum disclosure standards, which would require substantial changes in current U.S. rules embodied principally in Regulation S.[340]

John Coffee, Jr. of Columbia University has argued that global convergence of share-

332. Hal S. Scott, *Internationalisation of Primary Public Securities Markets*, 63-SUM Law & Contemp. Probs. 71 (2000).

333. *Id.* at 72–73.

334. *Id.* at 74–75.

335. *Id.* at 78–103.

336. *See id.* at 78–79.

337. *Id.* at 79–81.

338. *See* Scott, *supra* note 333, at 80–84.

339. *See id.* at 85–92.

340. *Id.* at 92.

holder protection norms is more likely to come from stock exchange regulation than corporate law.[341]

Marc Steinberg of Southern Methodist University and Lee Michaels develop a proposal combining elements of mutual recognition and harmonisation.[342] First, IOSCO should develop a common prospectus or offering document, with different standards for companies from developed, semi-developed and emerging markets.[343] Second, "[e]ach nation's antifraud provisions would apply to enable regulators (and where authorised, investors) to pursue relief for disclosure deficiencies or other wrongs."[344]

While all of these are potentially valid suggestions, the recent use of "global shares" may indicate a different path forward.

E. Global Shares

Global shares are used by a number of companies, including Daimler-Chrysler and most recently Deutsche Bank. Under the global share structure, companies issue a single, interchangeable and freely tradable class of shares, which are in turn listed on multiple exchanges pursuant to the individual requirements of the individual exchanges (e.g., the NYSE, the LSE, and Deutsche Bourse). Shares are created pursuant to the law of the jurisdiction of incorporation, which governs internal matters, and listed pursuant to the requirements of the securities regulatory systems in the jurisdictions of the respective stock exchanges, which also typically requires certain standards of corporate governance and on-going disclosure. Enforcement of securities violations is pursuant to the rules and structures of the jurisdictions in which the listings take place, although the jurisdiction of incorporation governs in certain circumstances. Shares are then traded through linkages between the clearing and settlement structures associated with each listing exchange, with a register maintained under the rules of the jurisdiction of incorporation.

This sort of structure, while complex, is quite appealing, in that it also provides companies access to investors in a variety of markets, while at the same time encouraging liquidity through identity of shares traded on all listing markets. The rules of the listing jurisdiction (in order to ensure adequate disclosure and appropriate investor protection) and the law of the jurisdiction of incorporation maintain standards of corporate governance.

At this point in time, the major impediment to the further development of this sort of structure lies in the disparity of offering/listing rules (making a simultaneous global offering/listing still impossible), in the lack of international linkages between securities clearing and settlement systems (making inter-exchange trading impossible in some cases), and in disparity between accounting systems across various jurisdictions (making it necessary, in some cases, to produce multiple sets of accounts). Nonetheless, it is this sort of model that most exchanges likely will move forward as consolidation and expansion continues.

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341. John C. Coffee, Jr., *The Future as History: The Prospects for Global Convergence in Corporate Governance and its Implications*, 93 Nw. U. L. Rev. 641, 704 (1999).

342. Marc I. Steinberg & Lee E. Michaels, *Disclosure in Global Securities Offerings: An Analysis of Jurisdictional Approaches, Commonality and Reciprocity*, 20 Mich. J. Int'l L. 207 (1999).

343. *See id.* at 262–64.

344. *Id.* at 262.

F. A Modest Proposal based upon Pragmatism and Public Policy

Based upon the analysis above, this author suggests the following as a possible pragmatic approach to the development of mechanisms to support true global offerings, while at the same time maintaining high standards of disclosure and adequate investor protection across jurisdictions.

Countries should continue to implement the IOSCO IDS, along with improving IAS to an acceptable level within a short period. Companies (whether domestic or foreign) seeking to sell securities to the public (either through a stock exchange listing or through a public offering) should be required to use IDS in conjunction with IAS or have the option to use domestic standards (if such exist). Companies would have to comply with the distribution rules of each jurisdiction in which it is desired to list or make an offering to the public (as is presently the case). IOSCO (and where relevant, regional organisation such as the EU) would seek to develop harmonised distribution standards, a process that in all likelihood will be facilitated and encouraged by consolidation and international expansion on the part of securities exchanges. In the interim, companies and their legal advisors are well equipped to deal with divergent systems. By accessing the public markets of a given jurisdiction, companies would become subject to the domestic enforcement standards applicable. The risks would be limited by registration requirements of exchanges and securities regulators. For institutional investors (the major constituency of the Euromarkets), exemptions/relaxations should be in place to reduce the more stringent disclosure requirements appropriate for the public (and used in all listings). This however will necessitate convergence in respect to definitions of public offers.

Clearly, companies are in a better position than individual investors to monitor their potential legal and regulatory risks. Companies would also be subject to the legal regime of their jurisdiction of incorporation and/or domicile. As stock exchange linkages develop, standards of enforcement will move upwards, as individual exchanges seek partners with exchanges from countries with higher regulatory standards or choose such standards for market reasons. Institutional investors pursuant to exemptions from the stringent requirements of public offerings in turn would rely on the standards of the home jurisdiction, as well as listing jurisdictions, as appropriate in the given case. The end result is a placing of the burden on companies in the context of listings and public offerings and allowing the public in a given jurisdiction to use the rules available in their own jurisdiction for enforcement. Institutional investors operating outside of the standards appropriate for the investing public should be able to enforce on the basis of the home jurisdiction of the issuer, as well as on the basis of the rules of any jurisdiction on which the issuer is listed.

The United States should continue to emphasise high minimum standards for disclosure and enforcement, but should be flexible in their actual form and work through IOSCO to achieve harmonisation of standards. Mutual recognition will in all likelihood increase as minimum international standards are established, implemented, and enforced, reflecting the experiences of the EU in its ongoing project to create a single European capital market.