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The Tyranny of the Multitude is a Multiplied Tyranny: Is the United States Financial Regulatory Structure Undermining U.S. Competitiveness?

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THE TYRANNY OF THE MULTITUDE IS A MULTIPLIED TYRANNY:[1] IS THE UNITED STATES FINANCIAL REGULATORY STRUCTURE UNDERMINING U.S. COMPETITIVENESS?

Elizabeth F. Brown[2]

I. INTRODUCTION

In a 2006 op-ed in the *Wall Street Journal*, New York City Mayor Michael Bloomberg and New York Senator Charles Schumer sounded the alarm that the United States was losing its competitive edge in the area of financial services.[3] A number of studies and academic articles completed in the wake of this op-ed compared the market share and growth of the United States in certain segments of financial services, particularly securities and investment banking, with that of other nations.[4] Some of these studies

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1. Edmund Burke, Letter, Feb. 26, 1790.

2. Assistant Professor, The University of St. Thomas School of Law (Minnesota), BA, 1985, The College of William and Mary, MA, 1987, The Nitze School of Advanced International Studies, Johns Hopkins University, and JD, 1994, The University of Chicago Law School. Research stipends from the University of St. Thomas School of Law were of assistance in the preparation of this article. The author gratefully acknowledges the helpful comments of Roberta Karmel, Lisa Schiltz, Susan Stabile, the participants at the Seventh Annual Global Conference on Business and Economics, at which a draft of this article was presented on Oct. 14, 2007, and the participants at American Association of Law School's Section on Securities Regulation meeting, at which a draft of this article was presented on Jan. 4, 2008, and the research assistance of Martin Norder.

3. Charles E. Schumer & Michael R. Bloomberg, *To Save New York, Learn from London*, WALL ST. J., Nov. 1, 2006, at A18. In this article, "financial services" refers to any of the activities considered financial in nature pursuant to Section 103 of the Gramm-Leach-Bliley Act of 1999 (GLBA), which include banking, securities, merchant banking, and insurance products and services. Gramm-Leach-Bliley Act § 103, 12 U.S.C.A. § 1843(k) (2007). This definition of financial services is not universally applied by other organizations. For example, the Basel II Capital Accord excludes insurance activities from the definition of "financial activities" and excludes insurance entities from the definition of "financial entities." BASEL COMM. ON BANKING SUPERVISION, BANK FOR INT'L SETTLEMENTS, INTERNATIONAL CONVERGENCE OF CAPITAL MEASUREMENT AND CAPITAL STANDARDS: A REVISED FRAMEWORK 7 n.5 (2004) [hereinafter BASEL II CAPITAL ACCORD].

4. MCKINSEY & CO., SUSTAINING NEW YORK'S AND THE US' GLOBAL FINANCIAL SERVICES LEADERSHIP (2007), *available at* http://www.senate.gov/~schumer/SchumerWebsite/pressroom/special_reports/2007/NY_REPORT%20_FINAL.pdf [hereinafter MCKINSEY REPORT]; COMM. ON CAPITAL MKTS. REGULATION, INTERIM REPORT (2006) [hereinafter COMM. ON CAPITAL MKTS., INTERIM REPORT]; COMM. ON CAPITAL MKTS. REGULATION, THE COMPETITIVE POSITION OF THE U.S. PUBLIC EQUITY MARKET (2007) [hereinafter COMM. ON CAPITAL MKTS., COMPETITIVE POSITION REPORT]; COMM'N ON THE REGULATION OF U.S. CAPITAL MKTS. IN THE 21ST CENTURY, U.S. CHAMBER OF COMMERCE, REPORT AND RECOMMENDATIONS (2007) [hereinafter U.S. CHAMBER OF COMMERCE COMM'N REPORT]; RICHARD M. KOVACEVICH ET AL., FIN. SERVS. ROUNDTABLE, THE BLUEPRINT FOR U.S. FINANCIAL COMPETITIVENESS (2007) [hereinafter FIN. SERVS. ROUNDTABLE REPORT]; Chris Brummer, *Stock Exchanges and the New Market for Securities Laws*, 75 U. CHI. L. REV.

concluded that the previous lead of the United States was eroding and that the trends indicated that it would continue to erode unless something was done.[5] These recommended a wide range of reforms to the current system.[6] Among the recommended reforms was a call to consolidate financial services regulators in the United States, perhaps going as far as creating a single financial services regulator like the United Kingdom's Financial Services Authority (UK FSA).[7]

Not surprisingly, the conclusions of these studies generated a significant amount of concern in the U.S. financial press and among U.S. policymakers. The concern that the way in which the United States regulates financial services might be undermining U.S. competitiveness even played an influential role in the recently decided *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc*.[8] In that case, Justice Kennedy rejected the petitioners' "scheme liability" concept of reliance.[9] The Court was concerned that accepting the plaintiff's theory would undermine Congress' specific intent to not provide for a private cause of action against aiders and abettors.[10] He worried that such an expansion would have negative practical consequences because:

> Overseas firms with no other exposure to our securities laws could be deterred from doing business here. This, in turn, may raise the cost of

(forthcoming 2008); Stephen J. Choi, *Channeling Competition in the Global Securities Market* (Univ. Cal. Berkeley Sch. of Law Pub. Law & Legal Theory Research Paper Series, Paper No. 111, 2003), *available at* http://www.ssrn.com/abstract_id=371700; John C. Coffee, Jr., *Racing Towards the Top? The Impact of Cross-Listings and Stock Market Competition on International Corporate Governance*, 102 COLUM. L. REV. 1757 (2002); James D. Cox, *Rethinking U.S. Securities Laws in the Shadow of International Regulatory Competition*, 55 LAW & CONTEMP. PROBS. 157 (1992); Steven M. Davidoff, *Regulating Listings in a Global Market*, 86 N.C. L. REV. 89 (2007); Peter Hostak et al., An Examination of the Impact of the Sarbanes-Oxley Act on the Attractiveness of U.S. Capital Markets for Foreign Firms (Apr. 30, 2007) (unpublished manuscript, *available at* http://ssrn.com/abstract=956020); Donald C. Langevoort, *The Social Construction of Sarbanes-Oxley*, 105 MICH. L. REV. 1817 (2007); Kate Litvak, *Sarbanes-Oxley and the Cross-Listing Premium*, 105 MICH. L. REV. 1858 (2007); Eric J. Pan, *Why the World No Longer Puts its Stock in Us* (Cardozo Sch. of Law Jacob Burns Inst. for Advanced Legal Studies, Working Paper No. 176, 2006), *available at* http:// ssrn.com/abstract=951705; Larry E. Ribstein, *Cross-Listing and Regulatory Competition*, 1 REV. L. & ECON. 97 (2005).

5. MCKINSEY REPORT, *supra* note 4, at 7–29; COMM. ON CAPITAL MKTS., INTERIM REPORT, *supra* note 4, at 1–22; COMM. ON CAPITAL MKTS., COMPETITIVE POSITION REPORT, *supra* note 4, at 1; U.S. CHAMBER OF COMMERCE COMM'N REPORT, *supra* note 4, at 146; FIN. SERVS. ROUNDTABLE REPORT, *supra* note 4, at 7–15.

6. MCKINSEY REPORT, *supra* note 4, at 95–127; COMM. ON CAPITAL MKTS., INTERIM REPORT, *supra* note 4, at 1–22; U.S. CHAMBER OF COMMERCE COMM'N REPORT, *supra* note 4, at 164–76; FIN. SERVS. ROUNDTABLE REPORT, *supra* note 4, at 11–15.

7. MCKINSEY REPORT, *supra* note 4, at 24–25; *see* U.K. FSA, What We Do, http://www.fsa.gov.uk/pages/About/What/index.shtml (last visited Mar. 26, 2008).

8. Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 128 S. Ct. 761, 772 (2008).

9. *Id.* at 770. Under the scheme liability concept of reliance, "in an efficient market investors rely not only upon the public statements relating to a security but also upon the transactions those statements reflect." *Id.*

10. *Id.* 771.

> being a publicly traded company under our law and shift securities offerings away from domestic capital markets.[11]

The claim that the U.S. regulatory structure undermines U.S. competitiveness appears at first blush to have some validity. Presumably if a system or process aids competitiveness, others will copy it. The failure to copy a particular process or system suggests that it is perhaps not instrumental in enhancing the competitiveness of an entity, a market, or a nation. While other nations have adopted laws and regulations similar to U.S. financial regulations,[12] no other nation has sought to copy the federal and state regulatory structure that the United States uses to supervise and regulate financial services. Currently, the United States has over 115 federal and state agencies involved in regulating some aspect of financial services and Congress is contemplating adding new agencies to the list.[13]

In fact, the rest of the world is moving in the other direction. As illustrated in Table 1, fifty nations have consolidated their financial services regulators, and sixteen nations, including the United Kingdom, Germany and Japan, have created single financial services agencies.

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11. *Id.* at 772 (citation omitted). Justice Stevens in his dissenting opinion directly challenged this view. He quoted with approval from the Brief for Former SEC Commissioners as Amici Curiae that making those who violate § 10(b) liable for these violations "'will not harm American competitiveness; in fact, investor faith in the safety and integrity of our markets *is* their strength. The fact that our markets are the safest in the world has helped make them the strongest in the world.'" *Id.* at 779 (Stevens, J., dissenting).

12. *See* Coffee, *supra* note 4, at 1804–11.

13. Elizabeth Brown, *E Pluribus Unum—Out of Many, One: Why the United States Needs a Single Financial Services Agency*, 14 U. MIAMI BUS. L. REV. 1, 28–39 (2005). Bills have been introduced into both the U.S. House of Representatives and the U.S. Senate to create an Office of National Insurance within the U.S. Department of the Treasury to regulate insurance at the federal level for the first time. *See* H.R. 3200, 110th Cong., 2d Sess. (2007); S. 40, 110th Cong., 2d Sess. (2007).

Table 1: Countries with Either an Integrated or Semi-Integrated Financial Services Agency[14]

Single Supervisor for Financial Services (Year Created)	Single Agency Supervising Two Types of Financial Intermediaries		
	Banks and Securities Firms	Banks and Insurers	Securities Firms and Insurers
Austria (2002)	Dominican Republic	Australia	Bolivia
Bahrain (2002)	Finland	Belgium	Bulgaria
Cayman Islands (1997)	Luxembourg	Canada	Chile
Denmark (1988)	Mexico	Colombia	Egypt
Estonia (2002)	Switzerland	Ecuador	Jamaica
Germany (2002)	Uruguay	El Salvador	Mauritius
Gibraltar (1991)		Guatemala	Slovakia
Hungary (2000)		Kazakhstan	South Africa
Iceland (1999)		Malaysia	Ukraine
Ireland (2003)		Peru	
Japan (2000)		Saudi Arabia	
Kazakhstan (2004)		Venezuela	
Latvia (2001)			
Maldives (1999)			
Malta (2002)			
Nicaragua			
Norway (1986)			
Singapore (1984)			
South Korea (1998)			
Sweden (1991)			
Taiwan (2004)			
UAE			
UK (1997)			

The nations that adopted single regulators have found this approach to have several significant advantages over the multiple regulators that they previously had. First, the single regulator was better able to harmonize regulations across sectors, eliminate duplicative regulations, and address

14. *See* José de Luna Martínez & Thomas A. Rose, International Survey of Integrated Financial Sector Supervision 13 tbl.4 (World Bank Fin. Sector Operations & Policy Dep't, Policy Research Working Paper No. 3096, 2003); James R. Barth et al., *A Cross-Country Analysis of Bank Supervisory Framework and Bank Performance*, 12 FIN. MARKETS, INSTITUTIONS & INSTRUMENTS 67, 80 tbl.1 (2003); Central Bank and Financial Services Authority of Ireland Act, 2003 (Act No. 12/2003) (Ir.); Central Bank of Bahrain: Financial Sector Overview,

gaps than were the multiple regulators.[15] Second, the single regulator was better situated to address the unique problems posed by financial conglomerates that operate in and across multiple sectors.[16] Third, the single regulator was more cost-effective than the multiple ones.[17] Finally, the single regulator was better for consumers, because it provided a one-stop shop for filing complaints against financial service providers and a more uniform level of consumer protection.[18]

When discussing whether the United States is losing its competitive edge relative to other nations in the area of financial services, commentators are not always clear about what they mean by competitiveness. One way of viewing competitiveness is to analyze the share of the global market for a particular financial service or product captured by financial institutions chartered or headquartered in the United States and compare how large it is relative to the share captured by firms from other nations. This view is the one that dominates many of the recent studies on the competitiveness of the U.S. financial services. Concerns about the loss of this type of competitiveness tend to be based on fears that it indicates a loss of national power and prestige if U.S. firms no longer capture the largest share of a particular financial market and on fears about the loss of jobs in particular cities or regions within the United States.

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http://www.cbb.gov.bh/cmsrule/index.jsp?action=article&ID=16 (last visited Jan. 16, 2008); Bulgaria Financial Supervision Commission: About the Commission, http://www.fsc.bg/e_fsc_page.asp?v=2 (last visited Jan. 18, 2008); Cayman Islands Monetary Authority: About Us, Some Events in the History of the Cayman Islands, http://www.cimoney.com.ky/section/aboutus/default.aspx?id=41 (last visited Jan. 18, 2008); *Dominica to Set Up a Single Financial Regulatory Body*, FIN. TIMES, Dec. 31, 2003; Independent Financial Centre of the Americas, http://www.ifcamericas.com (last visited Mar. 26, 2008); Finland Ministry of Finance: Stability and Supervision http://www.vm.fi/vm/en/11_financial_market/05_stability_and_supervision/index.jsp (last visited Jan. 18, 2008); Official Government of Gibraltar: Financial Services Commission, http://www.gibraltar.gov.uk/bus/finservcomm.asp (last visited Mar. 17, 2008); Financial Services Commission of Jamaica: What We Do, http://www.fscjamaica.org/content.php?action=content&id=61 (last visited Mar. 17, 2008); CENTRAL BANK OF ICELAND, ANNUAL REPORT 1999, 22 (2000), *available at* http://www.sedlabanki.is/uploads/files/ark_99_3.pdf; INT'L MONETARY FUND, REPUBLIC OF KAZAKHSTAN: FINANCIAL SYSTEM STABILITY ASSESSMENT—UPDATE INCLUDING REPORTS ON THE OBSERVANCE OF STANDARDS AND CODES ON THE FOLLOWING TOPICS: BANKING SUPERVISION AND ANTI-MONEY LAUNDERING AND COMBATING THE FINANCING OF TERRORISM 7 (Aug. 2004), *available at* http://www.imf.org/external/pubs/ft/scr/2004/cr04268.pdf; Latvia Financial and Capital Markets Commission, http://www.fktk.lv/eng/ (last visited Apr. 9, 2008); SAUDI ARABIAN MONETARY AGENCY, A CASE STUDY ON GLOBALIZATION AND THE ROLE OF INSTITUTION BUILDING IN THE FINANCIAL SECTOR IN SAUDI ARABIA 12 (2004), *available at* http://www.sama.gov.sa/en/news/2004-03/; About Finansinspektionen, http://www.fi.se/Templates/StartSectionPage_842.aspx (last visited Apr. 9, 2008); *Taiwan Combining Financial Regulators to Bring in Investors*, TAIWAN NEWS, July 1, 2004; South Africa Financial Services Board, http://www.fsb.co.za/index.htm (last visited Mar. 26, 2008).

15. *See generally* Brown, *supra* note 13 (discussing at length the advantages offered by a single financial regulator over a regime that uses multiple regulators).

16. *Id.* at 39–46.

17. *Id.* at 59–67.

18. *Id.* at 52–59.

This view of competitiveness places the competition by U.S. firms for market share in the financial services markets within the broader context of competition among nations. Nations compete in order to grow and develop. They compete for markets, technology, skills and investment in order to reduce poverty, increase living standards and create jobs.[19] Governments play a significant role in either fostering or hindering this competition. Governments do this primarily by providing security, supporting the rule of law, absorbing extraordinary risks, managing the macro-economy, and either implicitly or explicitly implementing an industrial policy through a series of microeconomic choices.[20]

Another way of viewing competitiveness examines whether the financial markets within a nation foster competition among firms. Economics views competitive markets as ones in which enough sellers and buyers for particular goods or services exist such that each firm providing the good or service is too small relative to the overall market to affect prices. These firms must be able to enter or exit the market in response to demand for a particular product or service. To the extent that financial markets in the United States are not competitive in this way, investors or customers are harmed because they may have access to a more limited range of products or services that may be of a lower quality and for which they must pay higher prices than if the financial services markets were competitive. This view of competitiveness is less concerned with measuring U.S. markets' performance relative to the markets in other nations and is more concerned with measuring how U.S. markets are performing against the economic ideal of perfectly competitive markets. These very different views of what "U.S. competitiveness" means can lead to significantly different policy prescriptions.[21]

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19. RICHARD H. K. VIETOR, HOW COUNTRIES COMPETE: STRATEGY, STRUCTURE, AND GOVERNMENT IN THE GLOBAL ECONOMY 1 (2007).

20. *Id*.

21. For example, regulations that make it difficult for foreign insurance companies to enter the U.S. insurance markets may help U.S. insurance companies to capture a larger share of the global market for insurance, at least in the short term, because the United States market makes up such a large percentage of the global market. Such regulations, however, would reduce the level of competition within U.S. insurance markets and thus, harm consumers who would have a more limited range of suppliers of insurance from which to choose. In the long run, however, other nations may retaliate if the regulations seemed designed to protect U.S. firms and harm foreign firms by making it harder for U.S. insurance companies to operate in their markets. If the regulations are specifically aimed at harming foreign firms and arguably serve some other goal, such as protecting consumers from firms that have engaged in fraud, it decreases the likelihood that other nations will retaliate.

The importance of not undermining the amount of competition occurring within U.S. domestic markets in order to aid certain U.S. firms is evident when one considers the growth in financial assets held by U.S. households. The value of the total financial assets of U.S. households more than tripled from $8.8 trillion in 1986 to $37.4 trillion in 2006. INS. INFO. INST., FINANCIAL SERVICES FACT BOOK 2008 (2008), *available at* www.iii.org/financial2/banking/commercial [hereinafter FINANCIAL SERVICES FACT BOOK 2008]. The mix of financial assets held by U.S. households in banking, securities, and insurance products has not remained constant over this

Enhancing the competitiveness of U.S. markets so that they more closely approximate the economic ideal of perfectly competitive markets is just one of the goals of financial regulation that should not be sacrificed in order to enhance the competitive position and market shares of U.S. firms in the global marketplace. Other essential goals that should not be sacrificed include:

1) The Protection of the General Public: Regulations to promote this goal generally are those that fully informed and fully rational investors, depositors and insurance policy holders would choose to protect themselves from problems like fraud.[22]
2) The Elimination of Negative Externalities from Financial Failures: Regulations to promote this goal include prudential regulations to ensure that financial services institutions are solvent enough to meet their obligations to investors, depositors and insurance policy holders.[23]
3) The Advancement of Various Equitable and Redistributive Objectives: Regulations to promote this goal include ones like banking regulations that encourage lending in certain markets in order to foster economic development.[24]
4) The Promotion of Certain Aspects of Political Economy: Regulations to promote this goal include restrictions on commercial activities by financial holding companies.[25]
5) The Elimination of Crime and International Terrorism: Regulations to promote this goal include anti-money laundering controls.[26]

The United States government cannot support policies that enhance the competitiveness and market shares of U.S. firms while undermining these other goals. For example, completely deregulating financial services may greatly increase the market share of U.S. securities firms in the short term but it may lead to an increase in fraud on investors. Since almost 50% of households in the United States now own securities, permitting an increase in fraud may destroy the ability of these people to finance their retirements or their children's college educations.[27] It could have a disastrous effect on

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twenty-year period. For example, securities made up roughly the same percentage of U.S. households' financial assets in 1986 (31.6%) and in 2006 (35.8%) but in 1996 during the stock market boom, securities made up 43.6% of the total financial assets of U.S. households. *Id.* Thus, U.S. policymakers need to be concerned about creating and maintaining competitive markets in all financial products and services.

22. Howell Jackson, *Variation in the Intensity of Financial Regulation: Preliminary Evidence and Potential Implications*, 24 YALE J. REG. 253, 258–59 (2007).

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. Brown, *supra* note 13, at 63–64.

the U.S. economy in the long term. So competitiveness cannot be seen as the sole Holy Grail of financial services regulation. It is an important goal that may need to be balanced against the other goals of financial services regulation.

This article examines what possible factors within the U.S. regulatory structure for financial services may be harming the competitive position of U.S. firms within the global markets. Section II examines how the U.S. regulatory structure may affect both the share of global financial markets captured by U.S. companies and the level of competition among financial services firms within the United States. Section III examines some of the available evidence regarding whether U.S. financial services firms are losing market share to other nations, and to what extent any loss of market share can be attributed to the U.S. regulatory structure. Given the breadth of the markets for financial services, it will not be possible in this article to examine in depth how U.S. financial services firms are doing in each product and service market. Instead, this article will focus primarily on those markets or firms about which prior studies have raised concerns. Section IV draws some conclusions based on the available evidence and makes some policy recommendations.

II. EFFECTS OF THE U.S. REGULATORY STRUCTURE ON COMPETITIVENESS

The existing studies tend to blame the erosion of U.S. competitiveness in the financial services arena primarily on two factors: overregulation and the litigious environment in the United States.[28] Both of these problems deter foreign firms from entering or investing in the United States, and encourage U.S. firms to minimize their exposure to U.S. markets. Both of these factors can increase the costs of doing business for firms that choose to or must operate within the United States, and these higher costs can potentially put these firms at a competitive disadvantage to other firms not saddled with these costs. Gaps in regulation or the absence of appropriate regulation, however, also can undermine the competitiveness of the United States by eroding the trust necessary to make the financial markets work properly. The regulatory structure can be the root cause of all of these problems.

A. REGULATION

In the area of financial services, government regulators promulgate laws and regulations concerning the licensing and operations of banks, securities firms, and insurance companies and their respective services and

28. COMM. ON CAPITAL MKTS., INTERIM REPORT, *supra* note 4, at 45–48; U.S. CHAMBER OF COMMERCE COMM'N REPORT, *supra* note 4, at 6–10; MCKINSEY REPORT, *supra* note 4, at 73–89; FIN. SERVS. ROUNDTABLE REPORT, *supra* note 4, at 11–15.

products. While these regulations may encourage confidence that the financial institutions and markets are trustworthy and encourage customers and investors to buy their products and services, they may also make it more difficult for new firms to enter the markets. This is particularly true if the firms will be subject to duplicative and inconsistent regulations from different regulatory agencies. Some firms may decide not to offer their services in a particular nation if they determine that the costs involved with satisfying these entry requirements outweigh the expected benefits of being in that market. In addition, to the extent that regulations may limit the ability of firms to exit a market if it proves less profitable than they hoped, such regulations may deter a firm from entering in the first place if they are not confident about their chances for success. This problem of inconsistent and duplicative regulation is more likely to occur when multiple regulators exist than when a single regulator is responsible for the financial services industry.

The markets for banking, securities and insurance goods and services are no longer distinct, but overlap in many areas today. For example, money market accounts offered by securities firms compete with checking and savings accounts offered by banks. In addition, hybrid products that combine banking and securities attributes, securities and insurance attributes, or banking and insurance attributes have become more prevalent in recent years. Variable annuities, which combine life insurance features with securities features, are one example of these hybrid instruments.

As a result of these changes in financial services, regulatory structures that rely on multiple regulators, such as the United States, may overregulate when compared to structures that use a single regulator because multiple regulators produce overlapping and conflicting regulations.[29] Burdensome regulations can be a barrier to entry that decreases competition because the compliance costs may make it unprofitable for some firms to enter the market or to provide certain products.

1. Duplicative and Inconsistent Regulations

The United States has over 115 different state and federal agencies that regulate some aspect of the financial services industry. Each of these agencies generates regulations to govern its sphere of influence. Unfortunately, these spheres of influence overlap.[30] Banks and securities

29. On the other hand, multiple regulatory structures may produce more efficient and less burdensome regulation than a single regulator if the multiple regulators engage in regulatory competition. HELEN A. GARTEN, US FINANCIAL REGULATION AND THE LEVEL PLAYING FIELD 135–38 (2001) (describing the opposition to a single regulator because of a "preference for federalism, fear of big government and faith in the power of regulatory competition"); Roberta Romano, *Empowering Investors: A Market Approach to Securities Regulation*, 107 YALE L.J. 2359, 2360 (1998) (arguing that states should play a greater role in securities regulation because of the benefits of regulatory competition).

30. Brown, *supra* note13, at 24–36.

firms are regulated at both the federal and state levels. A nationally chartered bank must comply with rules and regulations issued by the Federal Reserve, the Office of the Comptroller of the Currency (OCC), and the Federal Deposit Insurance Corporation (FDIC). A state chartered bank that is a member of the Federal Reserve system must comply with the rules and regulations promulgated by Federal Reserve, the FDIC, and the state banking regulator that issued the bank's charter. If a life insurance company wants to operate in all fifty states, it must obtain a license from each state in order to do business and a license for each of its products or services from all fifty states, as well as comply with regulations issued by the SEC and the state securities regulators governing any hybrid insurance/securities products, like variable annuities. If a firm is a financial conglomerate offering banking, securities, and insurance, it may have to comply with the rules and regulations of a range of state and federal agencies, including the Federal Reserve, the OCC, the FDIC, the Office of Thrift Supervision (OTS), the National Credit Union Administration (NCUA), the SEC, the Commodities Futures Trading Commission (CFTC), the Office of Federal Housing Enterprise Oversight (OFHEO), the Securities Investor Protection Corporation (SIPC) and the Pension Benefit Guaranty Corporation (PBGC), as well as the state banking, securities and insurance regulators. Thus, financial services firms frequently find themselves having to comply with duplicative regulations from different regulators. Numerous studies have identified the problem of overlapping regulatory authorities producing inconsistent regulations, including the Commission on Organization of the Executive Branch of Government (the Hoover Commission), which recommended consolidating federal banking regulators as early as 1949, and the 2004 U.S. General Accountability Office's report on Financial Regulation—Industry Changes Prompt Need to Reconsider U.S. Regulatory Structure.[31] Another study, on the effect of state insurance regulation on insurance firms that operate in more than one state,[32] found that the duplicative nature of state regulations resulted in (1) "multiple state reviews of product filings [that] are cumbersome and inefficient" and (2) "significant delays in multi-state company licensing [] inhibit[ed] the ability

31. Steven A. Ramirez, *Depoliticizing Financial Regulation*, 41 WM. & MARY L. REV. 503, 564 n.371 (2000); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-61, FINANCIAL REGULATION: INDUSTRY CHANGES PROMPT NEED TO RECONSIDER U.S. REGULATORY STRUCTURE 75–76 (Oct. 2004) [hereinafter GAO FINANCIAL REGULATION REPORT].

32. Insurance companies must obtain a license from each state in which they do business and a license for each of their products or services in each such state, as well as comply with regulations issued by the SEC and the state securities regulators governing any hybrid insurance/securities products, like variable annuities. Brown, *supra* note 13, at 24–36.

of smaller companies to expand operations to the benefit of larger companies with pre-established multi-state infrastructures."[33]

Federal and state regulatory agencies have made some attempts to eliminate duplicative and inconsistent regulations. For example, federal banking regulators now jointly issue regulations and the OCC, OTS, and the FDIC adopted a uniform application form for obtaining a charter and federal deposit insurance.[34] The National Association of Insurance Commissioners (NAIC) has worked to set up a centralized system for filing and approving insurance products to be provided in multiple states, although its efforts have met with very limited success.[35] Nevertheless, no inter-agency forum currently exists in the United States in which all of the state and federal financial services regulators can meet to share information, assess risks that cross traditional regulatory sectors, and develop and coordinate regulations to address risks.[36] The lack of this type of forum is particularly problematic when one considers that no recent financial crisis affecting the United States fell within the jurisdiction of any single federal or state financial services regulator.[37]

While federal and state regulators have made some attempts to cooperate and coordinate activities, at other times they have spent significant amounts of time and money fighting with each other over who has the right to issue regulations or the final say over whether those

33. SHEILA BAIR, UNIV. MASS. ISENBERG SCH. MGMT., CONSUMER RAMIFICATIONS OF AN OPTIONAL FEDERAL CHARTER FOR LIFE INSURERS, at i–ii (2004), *available at* http://www.isenberg.umass.edu/finopmgt/Faculty/Profiles/Sheila_Bair/.

34. *Regulators Issue Common Form*, BANKING & FIN. SERVICES POL'Y REP., Aug. 2002, at 17.

35. NAT'L ASS'N INS. COMM'RS, INTERSTATE INSURANCE PRODUCT REGULATION COMPACT (2003); NATIONAL TREATMENT & COORDINATION (EX) WORKING GROUP, NAIC DRAFT 2004 WORK PLAN (2004).

36. *See generally* Brown, *supra* note 13.

> The existing inter-agency forums include the Federal Financial Institutions Examination Council (FFIEC), the President's Working Group on Financial Markets (the President's Working Group), the Financial and Banking Information Infrastructure Committee (FBIIC), the Financial Literacy and Education Commission, the North American Securities Administrators Association, the Conference of State Banking Supervisors (CSBS), and NAIC.

Id. at 29. FFIEC, the President's Working Group, and FBIIC have the broadest range of regulators. FFIEC consists of the Federal Reserve, the FDIC, the NCUA, the OCC, and the OTS. The President's Working Group consists of the heads of the Federal Reserve, the SEC, the CFTC, and the Treasury. The FBIIC consists of representatives from the Federal Reserve, FDIC, OCC, OTS, SEC, CFTC, NCUA, NAIC, CSBS, OFHEO, the Federal Housing Finance Board, the Office of Homeland Security, and the Office of Cyberspace Security. *Id.* at 29–30. "None of these groups currently has the authority, jurisdiction or resources to ensure the systematic sharing of information between regulators in order to coordinate their activities and to assess the systemic risks to the financial industry as a whole." *Id.* at 30.

37. GAO FINANCIAL REGULATION REPORT, *supra* note 31, at 110.

regulations apply to particular institutions.[38] These battles, like the one fought between the SEC and CFTC in the 1980s over who would regulate securities futures, have been well documented.[39] These turf wars continue to this day. In response to the Interim Report of the Committee on Capital Markets Regulation, the report of the U.S. Chamber of Commerce Commission on the Regulation of U.S. Capital Markets, and the McKinsey Report, which all supported measures to reduce the role of states in regulating national financial services firms as a means of reducing overregulation of national firms, the North American Securities Administrators Association (NASAA) issued a statement that it would "continue to vigorously defend their authority to regulate at the state level" and it would "remain vigilant in fighting" attempts to have federal regulators preempt state regulatory authority.[40]

Given the inability of federal and state agencies to effectively cooperate with one another, it is unlikely that a significant reduction in inconsistent or duplicative regulations can be made in the United States without consolidating some of the existing regulators. The experience of the United Kingdom shows that such consolidation can be effective in reducing the regulatory burden in a country: When the United Kingdom created its Financial Services Authority by consolidating the prior self-regulatory organizations and government agencies that dealt with financial services into one entity, it was able to streamline the regulations under which UK financial services firms operated. The UK FSA shortened the Code of Market Conduct by 30%, reduced the listing rules for new securities by

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38. *See* Brown, *supra* note 13, at 64–65; *NASAA: State Securities Regulators Want Congress to Ensure Their Authority*, Sec. L. Daily (BNA) (Jan. 31, 2008).

39. *See* Jerry W. Markham, *Super Regulator: A Comparative Analysis of Securities and Derivatives Regulation in the United States, the United Kingdom, and Japan*, 28 BROOK. J. INT'L L. 319, 362 (2003).

40. *NASAA: State Securities Regulators Want Congress to Ensure Their Authority*, Sec. L. Daily (BNA) (Jan. 31, 2008). The NASAA supports measures to strengthen cooperation between state, federal and industry regulators. *Id.* The NASAA is a voluntary association of the securities administrators in the fifty states, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, Canada, and Mexico. About NASAA, *available at* http://www.nasaa.org/About_NASAA/. As a result, it lacks any authority to make binding commitments on behalf of the state securities regulators. Thus, any cooperation efforts between state and federal regulators require the individual assent of each of the fifty states, which is not always easy to obtain. It is not clear what NASAA's vision of cooperation would entail. The NASAA and its members appear unwilling to cede regulatory authority to any other regulator. For example, variable annuities are a hybrid insurance-securities product, which is currently regulated by the state insurance regulators, the state securities regulators and the SEC. The NASAA and its members have made it clear that they do not want to allow the state insurance regulators to become the sole agencies permitted to regulate these products. *NASAA: State Securities Regulators Want Congress to Ensure Their Authority*, Sec. L. Daily (BNA) (Jan. 31, 2008). Instead, the NASAA and its members want to retain their authority to bring enforcement actions and other measures against companies and individuals who sell them. In this case, "cooperation" seems to mean that every agency simply retains the right to regulate and bring enforcement actions and does not appear to contemplate any reduction in the overlapping regulations or regulatory authority.

40%, and "cut 200 pages from the provisions on collective investment schemes."[41]

2. Regulatory Costs

Financial services firms generally try to pass the cost of regulation on to their clients, and those that cannot struggle to stay in business.[42] Some studies suggest that the high costs of the U.S. system make U.S. financial services firms less competitive, because those costs either are passed along to clients or borne by U.S. financial services firms.[43] In head-to-head comparisons with other nations, the U.S. regulatory regime appears to be significantly more expensive than the regimes that employ a single financial services regulator.[44]

The UK FSA publishes a chart in its annual report comparing its costs with the costs of the financial services regulatory regimes in the United States, Germany, France, Hong Kong, Ireland, and Singapore.[45] Unfortunately, the UK FSA has not included all of the costs for the over 115 different state and federal agencies that regulate financial services in the United States, nor has it been consistent with regard to which U.S. agencies it does include.[46] This means that the UK FSA report actually

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41. HANDBOOK DEV. (Fin. Servs. Auth., U.K.), Dec. 2004, at 2, *available at* http://www.fsa.gov.uk/pubs/handbook/HB58.pdf.

42. *See, e.g.*, STEVEN W. POTTIER, AM. COUNCIL OF LIFE INSURERS, STATE REGULATION OF LIFE INSURERS: IMPLICATIONS FOR ECONOMIC EFFICIENCY AND FINANCIAL STRENGTH 6 (2007), *available at* http://www.acli.com/NR/rdonlyres/3A7453E3-FDF9-44DC-9A5B-66A41C949F97/9195/PottierPackage3.pdf (providing a relevant study on insurance companies' practices). For a study regarding the securities industry, see OXERA CONSULTING LTD., THE COST OF CAPITAL: AN INTERNATIONAL COMPARISON 4 (2006), *available at* http://www.londonstockexchange.com/NR/rdonlyres/B032122B-B1DA-4E4A-B1C8-42D2FAE8 EB01/0/Costofcapital_full.pdf. This study, for the London Stock Exchange, found that underwriting fees for a listing on one of the European exchanges run between 3–4% on average, while underwriting fees for similar transactions in the U.S. were 6.5–7% on average. *Id.* As a result, the IPO proceeds received by the listing companies were at least 3% lower in the U.S. than in Europe. *Id.* Initial listing fees, legal, accounting and advisory fees did not appear to be significantly different across markets, although professional fees in New York tended to be higher than London, Frankfurt and Paris. The higher legal and accounting fees were largely attributed to the costs of complying with the U.S. securities regulations. *Id.*

43. Brown, *supra* note 4, at 67.

44. *See* OXERA CONSULTING LTD., *supra* note 42.

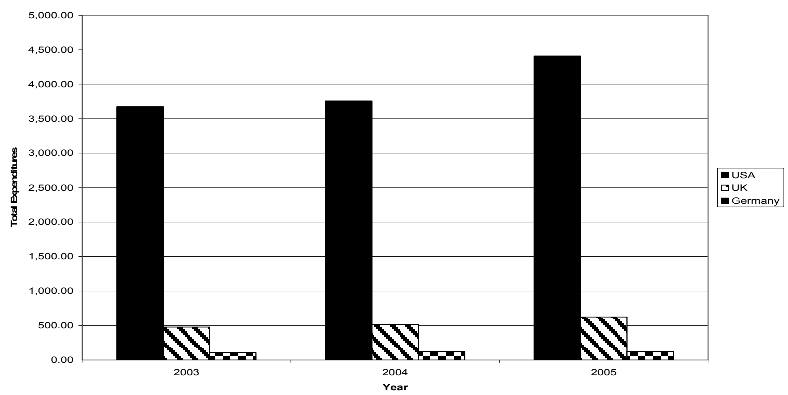
45. FIN. SERVS. AUTH., ANNUAL REPORT 2003/04 app.5 at 99–103 (2004) [hereinafter FSA ANNUAL REPORT 2003/04]; FIN. SERVS. AUTH., ANNUAL REPORT 2004/05 app.5 at 111–14 (2005) [hereinafter FSA ANNUAL REPORT 2004/05]; FIN. SERVS. AUTH., ANNUAL REPORT 2005/06 app.5 at 101–04 (2006) [hereinafter FSA ANNUAL REPORT 2005/06].

46. For example, in 2002/03, 2003/04, the UK FSA included the budgets for the Office of Thrift Supervision in the U.S. Department of Treasury and the National Association of Securities Dealers (NASD) but left the budgets for these organizations out of the charts in later years. FIN. SERVS. AUTH., ANNUAL REPORT 2002/03 app.8 at 205–10 (2003) [hereinafter FSA ANNUAL REPORT 2002/03]; FSA ANNUAL REPORT 2003/04, *supra* note 45, app. 5 at 99–103; FSA ANNUAL REPORT 2004/05, *supra* note 45, app.5 at 111–14; FSA ANNUAL REPORT 2005/06, *supra* note 45, app.5 at 101–04. As a result, the UK FSA numbers underestimate the regulatory costs of the U.S. system. On July 30, 2007, the regulatory, risk assessment, enforcement, and

*under*estimates the already high costs it reports for_state and federal regulation of financial services in the United States. The data collected by the UK FSA for comparison with its 2002/03 fiscal year placed the total annual regulatory costs incurred by the United States at approximately twelve times the total annual regulatory costs for the UK FSA.[47] The total regulatory costs for the United States for 2002 would be more than sixteen times the annual expenses of the UK FSA if all of the annual expenses for the federal and state agencies that regulate financial services were combined.[48]

The following table provides an idea of how much more expensive the U.S. system is when compared with the UK FSA.

Table 2: Total Financial Service Regulatory Expenditures (in millions of constant 2000 US dollars)[49]



arbitration functions of the NASD and the New York Stock Exchange (NYSE) were consolidated to form the Financial Industry Regulatory Authority (FINRA). Actually achieving a single rulebook for FINRA may take until 2009. Stephen Joyce, *Securities: Consolidation of NASD, NYSE Rules Could Take Until '09, FINRA's Merrill Says*, Banking Daily (BNA) (Oct. 26, 2007).

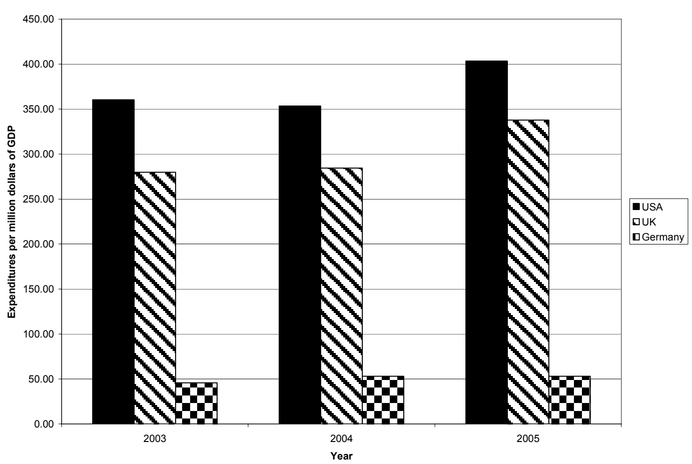
47. FSA ANNUAL REPORT 2002/03, *supra* note 46, app.8 at 207. In each of its annual reports, the UK FSA raised the following caveats regarding the comparability of the data collected: (1) the figures do not necessarily relate to the same accounting period and may not have been compiled on the same basis; (2) labor and other costs vary between countries; (3) variations in exchange rates will affect the results expressed in a single currency; (4) the scope of the responsibility of the regulatory authorities differ from one country to the next; and (5) the nature and scale of the financial services industries in different countries differs materially. *Id.* at app.8 at 205–10; FSA ANNUAL REPORT 2003/04, *supra* note 45, app.5 at 99–103; FSA ANNUAL REPORT 2004/05, *supra* note 45, app.5 at 111–14; FSA ANNUAL REPORT 2005/06, *supra* note 45, app.5 at 101–04.

48. Brown, *supra* note 13, at 60–61.

49. FSA ANNUAL REPORT 2003/04, *supra* note 45, app.5 at 99; FSA ANNUAL REPORT 2004/05, *supra* note 45, app.5 at 111; FSA ANNUAL REPORT 2005/06, *supra* note 45, app.5 at 101. To make the comparisons between the numbers provided in the 2003/04 chart and charts for 2004/05 and 2005/06, the amounts for the OTS and the NASD were subtracted from the total regulatory costs listed for the United States for 2003/04. In addition, the total expenditures for each country and the total GDP for each country were translated into constant 2000 US dollars to eliminate the effects of inflation in each country.

As the table illustrates, the United States spent at least 7.7 times more than the United Kingdom and at least 35.1 times more than Germany to regulate financial services in 2003. The ratios did not alter significantly between 2003 and 2005. Even if one accounts for the differences in the gross domestic product (GDP) of each country, the United States still spends substantially more than the United Kingdom and Germany. In 2003, the United States spent 28.9% more than the United Kingdom and 689% more than Germany to regulate financial services after accounting for GDP.[50] Between 2003 and 2005, the gap between the United States and the United Kingdom narrowed, although the gap between the United States and Germany did not change much.[51] In 2005, the United States spent 19.4% more than the United Kingdom and 663% more than Germany to regulate financial services.[52] The gap between the United States and the United Kingdom narrowed, in part, because the UK FSA assumed the responsibility for regulating both mortgage and general insurance intermediation for the first time in 2004/05.[53]

Table 3: Total Financial Service Regulatory Expenditures per million dollars of GDP (in constant 2000 U.S. dollars)[54]



50. FSA ANNUAL REPORT 2002/03, *supra* note 46, app.8 at 205–10; FSA ANNUAL REPORT 2003/04, *supra* note 45, app.5 at 99–103; FSA ANNUAL REPORT 2004/05, *supra* note 45, app.5 at 111–14; FSA ANNUAL REPORT 2005/06, *supra* note 45, app.5 at 101–04.

51. FSA ANNUAL REPORT 2002/03, *supra* note 46, app.8 at 205–10; FSA ANNUAL REPORT 2003/04, *supra* note 45, app.5 at 99–103; FSA ANNUAL REPORT 2004/05, *supra* note 45, app.5 at 111–14; FSA ANNUAL REPORT 2005/06, *supra* note 45, app.5 at 101–04.

52. FSA ANNUAL REPORT 2002/03, *supra* note 46, app.8 at 205–10; FSA ANNUAL REPORT 2003/04, *supra* note 45, app.5 at 99–103; FSA ANNUAL REPORT 2004/05, *supra* note 45, app.5 at 111–14; FSA ANNUAL REPORT 2005/06, *supra* note 45, app.5 at 101–04.

53. *See* FSA ANNUAL REPORT 2004/05, *supra* note 45, at 10–11.

54. FSA ANNUAL REPORT 2002/03, *supra* note 46, app.8 at 205–10; FSA ANNUAL REPORT 2003/04, *supra* note 45, app.5 at 99–103; FSA ANNUAL REPORT 2004/05, *supra* note 45, app.5 at 111–14; FSA ANNUAL REPORT 2005/06, *supra* note 45, app.5 at 101–04.

The lower regulatory costs imposed on financial services firms in other nations provides a competitive advantage for those nations. The costs for financial services in the United States generally are covered by the fees that financial services firms pay to the state and federal regulators.[55] As previously noted, financial services firms attempt to pass these costs onto their clients.

While the United States system is more expensive, it is not completely clear how much the United States might save if it consolidated its regulators. While useful in making clear *how* expensive the U.S. regime is, the comparisons done to date on the regulatory costs spent by nations on financial services have failed to account for a number of other significant factors that may contribute to these cost differences. These factors include:

- Differences in composition and sophistication of the financial services industry;
- Differences in regulatory objectives;
- Differences in resource endowments, like wages, capital costs and education;
- Differences in enforcement intensity; and
- Differences in the degree to which the population respects the law.

Unless these differences are accounted for, one cannot say with any degree of certainty that switching from the U.S. regulatory model to the UK FSA's model will produce significant cost savings.

The states within the United States also use a range of regulatory models from a separate regulator for each financial service to having all financial services regulated by a single agency. An examination of the costs associated with these state regulatory models would enable one to eliminate or significantly reduce many of the differences that arise when comparing national regimes. A preliminary examination of the costs of the state regulatory regimes in the United States does not reveal that states which employ a single financial services regulator spend significantly less than those that use multiple regulators.[56] This study therefore casts doubt on the assertion that the United States could reduce its regulatory costs and thereby potentially enhance the competitive positions of U.S. financial service firms by moving to a single financial service regulatory model.

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55. THE CONFERENCE OF STATE BANK SUPERVISORS, A PROFILE OF STATE CHARTERED BANKING 2002-2003, at 36–38 (19th ed. 2003); NAIC, INSURANCE DEPARTMENT RESOURCES BOOK 27–32 (2006).

56. *See* Elizabeth F. Brown, *A Preliminary Look at Regulatory Structures for Financial Services* (Univ. St. Thomas Sch. of Law, Legal Studies Research Paper No. 07-42, 2007), *available at* http://papers.ssrn.com/asbtract=1008961.

3. Regulatory Gaps

The structure of the financial markets is changing in the United States and around the world. More products and institutions are being created that do not neatly fit within the traditional categories of banking, insurance, and securities. In addition, businesses and other entities increasingly rely on capital markets for raising funds rather than borrowing them from traditional commercial banks.[57] This process of disintermediation is having a profound impact on the financial services markets.[58] In particular, it is increasing the number and variety of entities that may create systemic risks for the financial system.[59] While no single, clear definition for systemic risk exists, the common elements of the current definitions are that systemic risk entails a triggering event that causes a chain of events resulting in negative economic consequences to financial institutions or markets.[60] These chains of events are possible because banks and other financial institutions and markets are so closely intertwined.[61]

Systemic risks are risks *to* the financial system.[62] Market forces, however, are not sufficient to encourage firms operating within the financial system to reduce their systemic risk (and correspondingly their potential profits) in order to maintain the stability of the financial system as a whole.[63] Professor Steven Schwarcz has characterized this problem as a "type of tragedy of the commons."[64] As a result, some forms of financial regulation are necessary in order to promote economic efficiency and force firms to internalize the externalities to the financial system caused by their risky behaviors.[65] The fragmentary nature of the existing U.S. regulatory structure, however, was not designed, nor is it able, to deal with the problems posed by hybrid products and institutions and by the spread of systemic risks to entities and markets outside of banking.

Attempts to deal with these hybrid products and institutions are often at the root of many of the turf wars between the federal and state banking, securities and insurance regulators. These wars often result in significant regulatory gaps, which harm the industry, investors, and customers. The current subprime mortgage crisis is simply the most recent example of state and federal agencies allowing regulatory gaps to arise while they debated who should regulate the various players that gave rise to the crisis.

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57. *See* Steven L. Schwarcz, *Systemic Risk* 8–9 (Duke Law Sch., Legal Studies Paper No. 163, 2008), *available at* http://ssrn.com/abstract=1008326.

58. *See id.* at 8. Disintermediation means removing the intermediaries, like banks, from the process of accessing capital. *Id.*

59. *See id.* at 8–11.

60. *Id*. at 4–15.

61. *Id*. at 8–11.

62. *Id.* at 18.

63. Schwarcz, *supra* note 57, at 15–17.

64. *Id.* at 17.

65. *Id.* at 15–17.

The subprime mortgage crisis involves the following entities, among others: the mortgage brokers who sold the loans, the banks who made the loans, the international loan market that allowed loans to be traded like stocks on an exchange, the special purpose vehicles created to buy the loans from the banks, the investment banks that helped create the special purpose vehicles and helped repackage the loans as securities, the credit rating agencies, and the bond insurance firms that provided guarantees for complex mortgage debt. Mortgage brokers were regulated in some states by the state banking regulators, but in other states they were unregulated. As noted above, the banks were regulated by the following banking regulators: the state banking authority, OCC, FDIC, and the Federal Reserve. The special purpose vehicles, the investment banks, and the credit rating agencies were regulated by the SEC and the state securities regulators. The SEC and the state regulators, however, subjected the credit rating agencies to very little regulation. Finally, the bond insurance companies were regulated by the state insurance regulators.[66]

The banking regulators do not appear to have considered the impact of the loans once they were securitized and failed to catch and root out the soft fraud perpetuated by some mortgage originators who disclosed misleading and inaccurate information to the rating agencies.[67] The securities regulators did not consider how the loans underlying the securities were created and did not appear to grasp that rating agencies had failed to adequately account for the loosening underwriting standards when assigning ratings.[68] The insurance regulators failed to consider how potential regulatory failures by the banking and securities regulators might harm insurance companies, particularly the ones insuring the mortgage securities.[69] In addition, the lack of transparency in the financial markets for structured products meant that neither investors nor regulators were aware of who precisely held the subprime mortgage risk.[70] Not surprisingly, federal and state regulators were played off against each other by elements within the financial services sector, such as the mortgage lenders, which claimed that they were policing themselves and therefore, additional state or federal regulation was unnecessary.[71] In the end, the failure of the U.S. regulators to consider the

66. Vikas Bajaj & Julie Creswell, *A Warning on Insurers Frays Nerves*, N.Y. TIMES, Jan. 31, 2008, at C1. William A. Ackerman, a manager of the Pershing Square hedge fund, issued a report that predicted that MBIA and Ambac Financial Group, two bond insurance companies, might lose up to $24 billion on mortgage investments that they guaranteed. *Id.* Those two companies guarantee more than $1 trillion in municipal, corporate and mortgage debt. *Id.*

67. U.K. FIN. SERVS. AUTH., FINANCIAL RISK OUTLOOK 2008, at 9 (2008).

68. *Id.* at 22.

69. Bajaj & Creswell, *supra* note 66.

70. *Id.*

71. Stephen Joyce, *Mortgages: State Regulator Seeks Help to Police Mortgage Industry; Lauds Frank Bill, NMLS*, Banking Daily (BNA) (Dec. 4, 2007). North Carolina Bank Commissioner Joseph Smith chided the mortgage industry for "trying to play rope-a-dope with Congress and with the agencies" and accused it of failing to police itself. *Id.*

entire series of transactions as a whole and to tailor regulations to the systemic risks that these transactions could, and did, pose resulted in the current crisis.

The subprime crisis has harmed the profitability of U.S. financial institutions and weakened their ability to compete with those of other nations. An alarming number of Americans are now facing foreclosure of their homes as a result of this crisis while others are unable to obtain loans due to the credit crunch brought on by the crisis. While deregulation or the absence of regulation is frequently touted as a means of making markets more competitive, in the case of the subprime crisis, the failure of the multiple U.S. regulators to provide the appropriate level of regulation has had the opposite effect.

Regulatory regimes that rely on an integrated regulator or a semi-integrated regulator theoretically should be better positioned to deal both with hybrid products and institutions, and with the systemic risks posed by entities other than traditional banks, than the multiple regulators employed by the United States for the reasons suggested above. Of the eighteen nations that the McKinsey Report classifies as "mature" financial markets because of the level of capital markets penetration, fifteen of them either have an integrated or a semi-integrated regulatory regime.[72] The only ones that do not are the United States, France, and Italy.[73] Many, if not all, of the fifteen nations that employ an integrated or a semi-integrated regulatory regime deliberately adopted it in order to deal with the increasing number of financial conglomerates and hybrid products.[74] By failing to adopt a regulatory structure that can deal with the new hybrid products and institutions and the growing threat of systemic risks posed by entities other than traditional banks, the United States may well place its financial markets and firms at a competitive disadvantage with those of other financially mature nations.

B. LITIGATION

Another reason often advanced for why the United States is losing its competitive edge is the number and cost of the lawsuits brought against financial institutions in the United States.[75] The United States is perceived as presenting corporations with a significantly more litigious environment

72. MCKINSEY REPORT, *supra* note 4, at 40. Capital markets penetration is defined as the private debt and equity as a percentage of gross domestic product of a nation. It provides evidence of the level of disintermediation occurring within a nation. Banking traditionally is the bedrock for the financial services industry in most countries with securities and insurance playing subordinate roles to it. As financial markets mature, businesses become increasingly willing and able to bypass banks and other financial intermediaries in order to obtain financing directly through the capital markets.

73. *Id.*

74. Martínez & Rose, *supra* note 14.

75. MCKINSEY REPORT, *supra* note 4, at 16–17.

than any other country in the world. This is due in part to the relative ease with which one can bring a class action lawsuit in the United States and in part to the enforcement efforts by state and federal financial services regulators.

1. Private Class Actions

Private litigation in the United States imposes significant monetary sanctions on financial services firms operating within the United States.[76] During the 2002–2004 period, an average of almost $3.5 billion per year of private monetary sanctions were imposed on firms and individuals in the U.S. securities markets.[77] Most of this amount was due to settlements of class action lawsuits, although $160 million of it was from NASD arbitrational awards.[78]

Traditionally, private litigation seeking to enforce the financial services regulations was a unique feature of the United States, as such actions were negligible in other jurisdictions.[79] This difference was due in part to the fact that other jurisdictions either do not permit private class action lawsuits to be brought or had rules that discourage lawsuits that have a marginal chance of success. For example, the United Kingdom discourages frivolous or weak suits by employing a "loser pays" rule under which the losing party in a suit must not only cover his own attorneys' fees but must pay those of the winning side as well.[80]

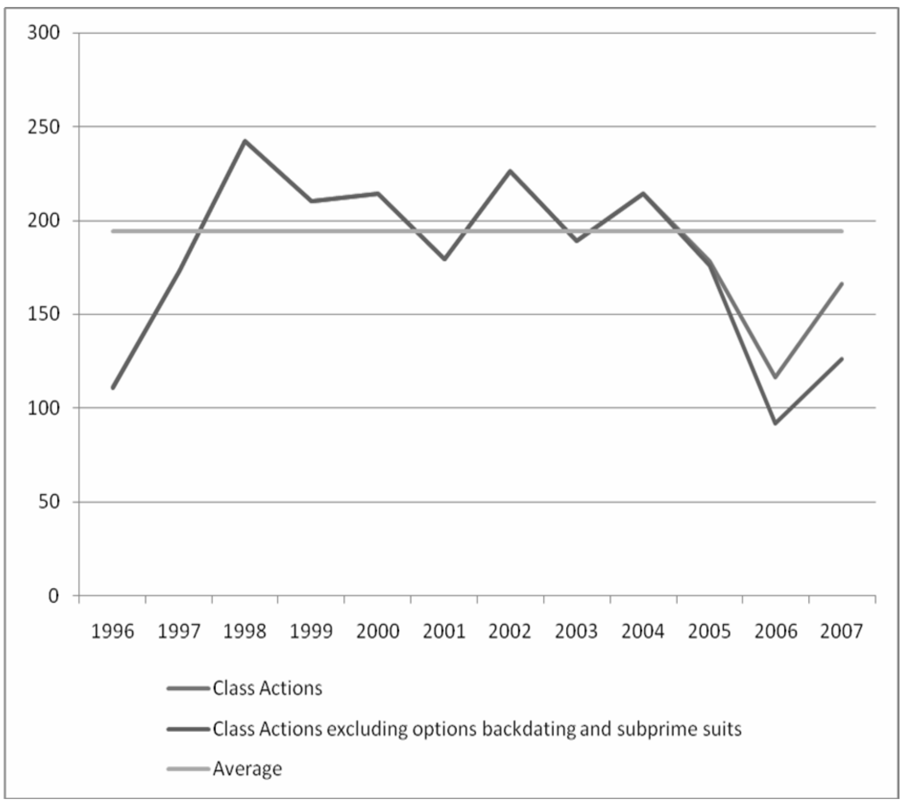
The differences between the U.S. regime and those of other nations may decrease in the future for two reasons. First, European countries are making it easier to bring class action-style law suits in the form of "group litigation" or "representative actions or proceedings."[81] In the United Kingdom, representative actions have been available for two centuries but were rarely used due to narrow court interpretations, but they are now being used more frequently where declaratory or injunctive relief is sought.[82] In addition, the European Directive on Injunctions for the Protection of Consumers, which was passed into law in 2000, permits group litigation.[83] Although the directive focuses on injunctions, damages may be sought in some countries.[84] In addition, several countries, including the United Kingdom,

76. *See* Jackson, *supra* note 22, at 280–81.
77. *Id.*
78. *Id.* at 281.
79. Linda A. Willett, *U.S.-Style Class Actions in Europe: A Growing Threat?*, BRIEFLY (Nat'l Legal Ctr. for the Pub. Interest, Washington, D.C.), June 2005, at 6.
80. *Id.*
81. *Id.*
82. *Id.*
83. Willett, *supra* note 79, at 7; Council Directive 98/27/EC, 1998 O.J. (L 166) 51, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31998L0027:EN:NOT.
84. Willett, *supra* note 79, at 7.

the Netherlands, Portugal, Spain and Sweden, have adopted laws that permit class-action types of litigation.[85]

Second, while securities class actions have fluctuated over the years, they may be occurring less frequently in the United States. This seems more likely to be true if one excludes actions that are likely to be due to short-term phenomena, such as the options backdating and the subprime crisis.[86] Over the past decade securities class actions have averaged about 194 per year.[87] Between 2005 and 2007 securities class actions, excluding those relating to options backdating and the subprime crisis, declined by over 28% from 176 to 126.[88]

Table 4: Number of Securities Class Actions[89]



85. *Id.* at 8.

86. CORNERSTONE RESEARCH, SECURITIES CLASS ACTION CASE FILINGS 2007: A YEAR IN REVIEW 5 (2008).

87. *Id.*

88. CORNERSTONE RESEARCH, *supra* note 86, at 5; Joseph A. Grundfest, *The Class-Action Market*, WALL ST. J., Feb. 7, 2007, at A15.

89. CORNERSTONE RESEARCH, *supra* note 86, at 5.

One explanation for this decline is that there has been less fraud as a result of the enactment of the Sarbanes-Oxley Act and tougher SEC and Justice Department enforcement actions.[90] PricewaterhouseCoopers LLP conducted over 5,428 interviews of chief executive officers, chief financial officers, and other executives concerning crime prevention and detection in their companies.[91] This survey found that accounting fraud in the United States declined from 36% in 2005 to 13% in 2007.[92] In addition, over 70% of U.S. respondents found that the Sarbanes-Oxley requirements had been at least marginally effective in detecting economic crime.[93]

2. Government Enforcement Efforts

Even if the difference between the threat of private litigation in the United States and the rest of the world declines, financial services firms will continue to view the threat of governmental legal action against them as being higher in the United States because of the enforcement actions of the state and federal regulators. Each of the over 115 regulators in the United States has the power to bring enforcement actions against the firms that it regulates. Depending on the regulatory agency, these enforcement actions can be for either criminal or civil penalties.

In addition, once one agency decides to bring an enforcement action, it is not uncommon for other state or federal agencies to bring additional actions against the same alleged violator. In fact, actions by government regulators and self-regulatory organizations make up the vast majority of the enforcement actions faced by financial services firms. For example, during the period from 2002–2004, class action lawsuits made up just 3.3% of the securities regulations enforcement actions brought, while the SEC, the Department of Justice, state agencies, the NASD and the NYSE brought the remaining 96.7% of the actions.[94] The sanctions imposed by these actions were substantial. Monetary sanctions averaged over $5.3 billion per year.[95] At the federal level, approximately 4,200 months of prison time plus

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90. Grundfest, *supra* note 88.

91. *Crime: Study Says Economic Crimes Occurring in Nearly 50 Percent of Global Companies*, Corp. L. Daily (BNA) (Oct. 18, 2007).

92. *Id.*

93. *Id.*

94. Jackson, *supra* note 22, at 280. Government enforcement actions also have spurred some class action lawyers to bring suits against the same alleged violator. It is unclear how these additional lawsuits can be justified from the perspective of further deterring corporations or the people who work for them from engaging in fraud or violations of the financial services. Stephen Joyce, *International Developments: Global Regulators Disagree On Effective Enforcement Tools, Practices*, Sec. L. Daily (BNA) (Feb. 4, 2008), *available at* http://pubs.bna.com/ip/bna/sld.nsf/eh/A0B5U3H6U0.

95. Jackson, *supra* note 22, at 279, 280 tbl.3.

over 1,500 months of probation per year were imposed on average during the 2002–2004 period.[96]

If one compares the level of public enforcement actions against financial services firms in the United States with those in other nations with roughly similar laws and levels of economic development, one finds that the intensity of U.S. enforcement efforts is higher than that of most other jurisdictions, even after accounting for differences in the size of the domestic markets.[97] For example, in the area of securities enforcement, the state and federal securities regulators in the United States brought an average of 224 actions per trillion dollars of stock market capitalization during the 2002–2004 period.[98] By contrast, the UK FSA averaged only twenty-five actions per trillion dollars of stock market capitalization, and the German BaFin brought ninety actions per trillion dollars of stock market capitalization.[99]

The sanctions imposed by U.S. authorities also appear to be significantly higher than those imposed by the regulators of other nations. In the 2002–2004 period, U.S. securities regulators imposed monetary sanctions averaging $326 million per trillion dollars of stock market capitalization while the UK FSA only imposed an average of $9 million per trillion dollars of stock market capitalization.[100] While Germany's BaFin did not provide comparable data, anecdotal evidence suggests that Germany's BaFin imposed even lower amounts of monetary sanctions than the UK FSA imposed.[101]

Thus, the U.S. regulatory structure imposes higher costs on U.S. financial firms, which may be a drag on their competitiveness in global markets. The U.S. regulatory structure also may fail to foster the appropriate level of competition among firms within the United States by creating barriers to entry in the form of regulation and litigation.

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96. *Id.* at 279 ("Comparable data on state criminal sentences and probation [was] not available.").

97. *Id.* at 281–83.

98. *Id.* at 282. Of the ninety actions per trillion dollars of stock market capitalization brought by the German BaFin, over half concerned voting rights issues, which would be considered a state corporate law issue in the United States, not a violation of the securities laws. *Id.*

99. *Id.*

100. *Id.*

101. Jackson, *supra* note 22, at 282. The figures for the United States and the United Kingdom only represent monetary sanctions imposed by the governmental authorities and do not include amounts from private securities litigation, which comprise over a third of the monetary penalties imposed on U.S. securities markets and which is negligible in the United Kingdom and Germany. *Id.*

III. EVIDENCE THAT U.S. FIRMS ARE LOSING GLOBAL MARKET SHARE

The recent studies by McKinsey, the Financial Services Roundtable, the U.S. Chamber of Commerce Commission on the Regulation of U.S. Capital Markets in the 21st Century, and the Committee on Capital Markets Regulation all provide empirical evidence, which they claim illustrates that the U.S. is losing its competitive edge.[102] These studies almost exclusively focused on U.S. competitiveness in the area of securities and investment banking. As evidence of loss of competitiveness, these studies primarily examined the loss of market share in terms of IPOs, the increased willingness of U.S. companies to list abroad, the delisting of foreign corporations from U.S. exchanges, and the decline in cross-listing premiums.

If one is going to assess the competitive standing of the United States in the area of financial services, one needs, however, to look at the broader market for financial services. Financial services cover a much larger spectrum of products than companies listed on U.S. stock exchanges. Financial services include banking and insurance products and firms, as well as securities and investment banking. In 2005, the GDP from financial services in the United States totaled $957.7 billion or about 8% of U.S. GDP.[103] Of that amount, the securities industry only comprised 17.5%, while the remainder came from banking and insurance.[104]

While the securities industry clearly is important to New York, it plays a less important role in most other states. The McKinsey Report noted that Connecticut, Delaware, North Carolina and South Dakota all employ major portions of their workforces in the financial services industry.[105] What the McKinsey Report failed to mention is that the securities industry is not crucial to any of those states, except Connecticut. While 45% of New York's GDP from financial services and 22.6% of Connecticut's GDP from financial services are due to the securities industry, the percentage of the state GDP from financial services that is due to securities is only 3.1% in Delaware, 4.5% in North Carolina and 1.6% of South Dakota.[106] In order to

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102. MCKINSEY REPORT, *supra* note 4, at 39–89; COMM. ON CAPITAL MKTS., INTERIM REPORT, *supra* note 4, at 23–50; COMM. ON CAPITAL MKTS., COMPETITIVE POSITION REPORT, *supra* note 4, at 6–29; U.S. CHAMBER OF COMMERCE COMM'N REPORT *supra* note 4, at 15–48; FIN. SERVS. ROUNDTABLE REPORT, *supra* note 4, at 39–40. These studies differ concerning the time periods used to compare U.S. market share of capital markets, how markets and market share are defined, and what factors affecting market share are considered.

103. *See* U.S. Bureau of Economic Analysis, Regional Economic Accounts, Gross Domestic Product by State, Gross Domestic Product for all U.S. States and Regions, Finance and Insurance and Securities, commodity contracts, investments, 1997-2006 (2007), *available at* http://www.bea.gov/regional/gsp.

104. *Id.*

105. MCKINSEY REPORT, *supra* note 4, at 10.

106. U.S. Bureau of Economic Analysis, *supra* note 103.

make a more accurate assessment of whether U.S. financial services firms are losing market share to the financial services firms of other nations, a broad examination of financial markets and firms is undertaken below.

A. MARKETS SHOWING EVIDENCE OF LOSS OF MARKET SHARE BY U.S. FIRMS

1. Securities Markets

a. Domestic Market Capitalization

While the United States' share of global market capitalization has fluctuated over the past twenty-five years, it has tended to decline over time. The United States' share of the total global capitalization has risen and fallen as financial crises rocked the developing world and recessions adversely affected the U.S. markets. In 1983, the United States' market capitalization of its equities represented 56.0% of the total global market capitalization.[107] The United States' share of total global market capitalization dropped to 34.7% during the 1994 recession in the United States.[108] Then a series of financial crises in developing countries combined with the resurgence of the United States economy led to the longest stock market expansion in U.S. history. The Mexican peso crisis (1994–1995), the Asian financial crisis, and the Russian financial crisis (1998–1999) produced a "flight to quality," as both western investors and local investors pulled their funds out of Asia, central and eastern Europe, and Latin America and reinvested them in more stable, developed markets, such as the United States. The share of total global market capitalization of stock exchanges in developed countries was only 82.3% by the end of 1992.[109] After the Mexican peso crisis, the developed nations' share rose to 86.5% by the end of 1995.

After the Asian financial crisis in 1997 and the Russian financial crisis in 1998–1999, the developed nations' share of total global market capitalization averaged about 90.2% for the period 1997–2001.[110] By 1999, at the height of the dotcom bubble, the United States' market capitalization had risen to 47.8% of the total global capitalization as tracked by the World Federation of Exchanges.[111] When the dotcom bubble burst and a recession

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107. Maria K. Boutchkova & William L. Megginson, *Privatization and the Rise of Global Capital Markets*, FIN. MGMT., Winter 2000, at 31, 36 tbl.II. These numbers are as tracked by the World Federation of Exchanges.

108. *Id.*

109. World Federation of Stock Exchanges, Statistics/Time Series/1990-2006, *available at* http://www.world-exchanges.org/publications/Ts2%20Market%20cap..pdf.

110. *Id.*

111. *Id.* The actual U.S. market share is even less because the World Federation of Exchanges only tracks the market capitalization of its members. It does not have data for certain exchanges of growing importance, such as Russian exchanges like the Russian Trading System Stock Exchange

in the United States followed, the developed nations' share dropped to 86.4% in 2002.[112] The developed nations' share has declined every year since 2002 even as the stock markets in these nations recovered and was only 78.0% in 2006.[113] By 2006, the United States' market capitalization was down to 37.4% of the total global market capitalization.[114]

While the developed world as a whole has lost market share to the emerging markets, the United States lost market share to other developed markets from 2001 to 2006, as illustrated in the table below.[115] Despite the warnings in the McKinsey Report and others, the United States does not appear to have lost market share to London between 2000 and 2006. London's market share remains relatively constant between 2000 and 2006. Nevertheless, the United States does appear to be losing market share to the smaller developed countries like Spain and Australia and to the resurgence in the Japanese stock markets during this period.[116]

Table 5: Domestic Market Capitalization as a Percentage of Developed Markets' Capitalization[117]

Countries	2000	2001	2002	2003	2004	2005	2006
USA	54.3	57.6	56.0	53.9	52.7	51.1	48.6
LSE	9.3	9.0	9.4	9.3	9.2	9.0	9.4
Euronext	8.1	7.9	7.8	7.8	7.9	7.9	9.2
Japan	11.3	9.4	10.5	11.2	11.5	13.9	11.9
Spain	1.8	1.9	2.3	2.7	3.0	2.8	3.3
Australia	1.3	1.6	1.9	2.2	2.5	2.4	2.7

(RTS). The members of the World Federation of Exchanges include American Stock Exchange, Amman Stock Exchange, Athens Exchange, Australian Securities Exchange, Bermuda Stock Exchange, BME Spanish Exchanges, Bolsa de Comercio de Buenos Aires, Bolsa de Comercio de Santiago, Bolsa de Valores de Colombia, Bolsa de Valores de Lima, Bolsa de Valores do Sao Paulo-BVSP, Bolsa Mexicana de Valores, Bombay Stock Exchange Ltd., Borsa Italiana SPA, Bourse de Luxembourg, Bourse de Montreal, Budapest Stock Exchange Ltd., Bursa Malaysia, Cairo & Alexandria Stock Exchanges, Chicago Board Options Exchange, Colombo Stock Exchange, Cyprus Stock Exchange, Deutsche Börse AG, Hong Kong Exchanges and Clearing, Indonesia Stock Exchange, International Securities Exchange, Irish Stock Exchange, Istanbul Stock Exchange, Jasdaq Securities Exchange, Inc., JSE Limited, Korea Exchange, Ljubljana Stock Exchange, London Stock Exchange, Malta Stock Exchange, Nasdaq Stock Market, National Stock Exchange of India Limited, New Zealand Exchange Ltd., NYSE Euronext, OMX Nordic Exchange, Osaka Securities Exchange, Oslo Børs, Philippine Stock Exchange, Shanghai Stock Exchange, Shenzhen Stock Exchange, Singapore Exchange, Stock Exchange of Mauritius, Stock Exchange of Tehran, Stock Exchange of Thailand, SWX Swiss Exchange, Taiwan Stock Exchange Corp., Tel-Aviv Stock Exchange, Tokyo Stock Exchange Group, Inc., TSX Group, Warsaw Stock Exchange, and Wiener Borse AG. World Federation of Exchanges, Members, http://www.world-exchanges.org/WFE/home.asp?action=document&menu=54.

112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*
117. World Federation of Stock Exchanges, *supra* note 109.

b. Market Share of IPOs

The McKinsey Report and some of the other reports have focused on the fact that in 2006 and 2007, China eclipsed the United States in terms of total capital raised through IPOs and that in 2007 China eclipsed the United States in terms of the number of IPOs as evidence that the United States has lost its competitive edge.[118] Until 2005, the United States was the number-one country in terms of total capital raised in IPOs with $33 billion in 2005, representing almost 20% of the total capital raised that year.[119] The United States was the number-one country in terms of the number of IPOs conducted in 2006 with 187 listings compared with China's 175 listings.[120] China, however, raised $56.6 billion in 2006 (over 23% of the total capital raised worldwide through IPOs) compared with $34.1 billion in the United States.[121] In 2007, China raised over $52.6 billion in the first eleven months of 2007 (over 20% of the total capital raised worldwide through IPOs) compared with $38.6 billion in the United States.[122] In addition, China had the largest number of IPOs with 209 in 2007 (over 12% of the total number of IPOs worldwide in 2007) compared with 179 IPOs in the United States.[123]

Many of these firms that did not elect to go public in the United States may have found U.S. markets less receptive because they could not meet the disclosure requirements under U.S. law or because they were not very good investments. Some companies clearly are choosing the London Stock Exchange because of its weaker disclosure and listing requirements. IPOs by Russian companies, in particular, were (until recently) choosing to list in London because of its weak regulatory environment.[124] Another example of

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118. Press Release, Ernst & Young, Emerging Markets Fuel Record Global IPO Activity in 2006 (Dec. 18, 2006), *available at* http://www.ey.com/global/content.nsf/International/Media_-_Press_Release_-_IPO_Survey_Year_End_2006 [hereinafter Ernst & Young, Emerging Markets Press Release]; Press Release, Ernst & Young, Accelerated Globalization Drives Record-Setting World IPO Markets (June 22, 2007), *available at* http://www.ey.com/global/content.nsf/International/Media_-_Press_Release_-_IPO_Trends_Report_2007 [hereinafter Ernst & Young, Accelerated Globalization Press Release]; Press Release, Ernst & Young, Global IPO Activity Reaches Record Levels in 2007 (Dec. 17, 2007), *available at* http://www.ey.com/global/content.nsf/International/Media_-_Press_Release_-Year_End_IPO_Activity [hereinafter Ernst & Young, Global IPO Activity Press Release].

119. Ernst & Young, Accelerated Globalization Press Release, *supra* note 118.

120. *Id.*

121. *Id.*

122. Ernst & Young, Global IPO Activity Press Release *supra* note 118.

123. *Id.*

124. Dmitry Dokuchayev, *Russia's IPO Record*, MOSCOW NEWS WKLY., Dec. 13, 2007, http://mnweekly.ru/business/20071213/55296456.html. Investors fled the Russian markets in the wake of the 1998 financial crisis and have been slowly returning in recent years. *Id.* Russian IPOs have been migrating back to Russian exchanges as investors become more willing to invest in Russia's domestic exchanges and as the Russian Federal Service for Financial Markets has undertaken reforms to improve the domestic markets. In 2005, 94% of all Russian IPOs were listed in London. *Id.* In 2006, the percentage of Russian IPOs listed in London dropped to 61% and it declined to 57% in 2007. *Id.* In 2006, only 28% of Russian offerings were corporate

a firm that elected to list in London because of its more lax disclosure and listing requirements was PartyGaming, an online casino operator, which listed on LSE in 2005.[125] The IPO for PartyGaming raised $1.9 billion, all of which went to its founders, an American couple who live in Gibraltar.[126] The company used computers located on Native American lands, and 90% of its revenues came from U.S. residents despite the fact that online gambling was and is illegal for U.S. residents.[127] The prospectus disclosed that the directors relied on the inability or unwillingness of U.S. officials to enforce the laws against online gambling.[128] On October 13, 2006, the United States banned money transfers to offshore online gambling firms and the share price of PartyGaming plunged.[129] Such a company would not have been able to list on the U.S. exchanges because the SEC would not have considered its risk disclosures adequate. In the wake of criticisms about the laxity of its regulatory environment, the London regulators have tightened listing requirements within the past year.[130] As a result, some Russian corporations are now searching for a new exchange with looser legal procedures and financial reporting requirements than the London Stock Exchange's Alternative Investment Market (AIM).[131]

c. Market Share of Global IPOs

In 2000, the United States hosted nine out of the ten largest IPOs in the world.[132] In 2005 and 2006, the United States only hosted one of the twenty-five largest IPOs in the world.[133] This decline is not necessarily solely due to a decrease in U.S. competitiveness. Many factors affect a corporation's decision regarding where to list its securities.

Geography is a major factor. The vast majority of corporations list their securities in their home markets. In 2006, 90% of corporations chose to list their shares in their home countries.[134] The corporations that undertook almost all of the twenty largest IPOs decided to go public in their native

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offerings, not shareholder offerings, which meant that the money went to the corporations for investment in the business rather than to the shareholders. *Id.* In 2007, however, 86% of the offerings by Russian companies were corporate offerings. *Id.*

125. David Henry, *London's Freewheeling Exchange*, BUS. WEEK, Nov. 27, 2006, at 40.

126. *Id.* Normally, in a U.S. listing, the founders would receive 15% or less of the funds raised from an initial public offering. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Deutsche Boerse Is Strengthening Position in Russia*, GAZETA.KZ (Kaz.), Dec. 21, 2007, http://eng.gazeta.kz/art.asp?aid=101981.

131. *Id.*

132. Pan, *supra* note 4, at 2.

133. *America's Capital Markets: Maintaining Our Lead in the 21st Century: Hearing Before the Subcomm. on Capital Markets, Insurance and Government Sponsored Enterprises of the H. Comm. on Financial Services*, 109th Cong. 12 (2006) (testimony of Marshall Carter, Chairman, NYSE Group, Inc.).

134. Ernst & Young, Accelerated Globalization Press Release, *supra* note 118.

countries.[135] Improvements in local liquidity and international investor willingness to invest in companies listed outside of the major exchanges have facilitated these listings.[136]

In recent years, the corporations in emerging markets, particularly Brazil, Russia, India and China, were responsible for the largest IPOs. In 2007, fourteen out of the twenty largest IPOs were by emerging-market corporations, up from nine out of the twenty largest IPOs in 2006.[137] IPOs for Russian and Chinese companies were responsible for almost half of the value of the top twenty IPOs in 2006.[138] In 2007 China had more IPOs, which raised more money than Russia, Brazil and India combined.[139]

In addition, the types of companies bringing the largest IPOs in the late 1990s and in 2000 were technology and financial services corporations based in the United States. More recently, para-statal corporations that emerging-market governments are taking public have represented the largest IPOs. For political reasons, these entities are not going to be listed in their home jurisdictions. For example, in recent years most Chinese corporations were forced to pick an exchange for their IPOs based on political or other non-economic considerations because they were government controlled.[140] It would have been politically unpalatable for the Chinese government to conduct their IPOs in the United States.[141] As a result, the Chinese companies with the largest IPOs in 2005 and 2006 used one of the Chinese markets.[142] These factors that draw market share of global IPOs away from the United States suggest that there are other factors at work out of U.S. regulators' and legislators' control.

These listings are not necessarily beneficial for the companies involved. In 2007 in China, forty-one companies have listed their shares on both the Hong Kong and Shanghai stock markets.[143] These shares trade at vastly different prices due to the Chinese restrictions on stock ownership. For example, China CITIC Bank had an IPO in April 2007. After the first day of trading, its shares were worth eleven Yuan (approximately HK$10.68) on the Shanghai stock exchange and were worth HK$ 6.68 on the Hong Kong stock exchange.[144]

In addition, it is important to note that while the Chinese stock markets may look like stock markets elsewhere, they do not operate under the normal economic rules. China tightly controls its stock markets and places

135. Ernst & Young, Global IPO Activity Press Release, *supra* note 118.
136. Ernst & Young, Accelerated Globalization Press Release, *supra* note 118.
137. Ernst & Young, Global IPO Activity Press Release, *supra* note 118.
138. Ernst & Young, Accelerated Globalization Press Release, *supra* note 118.
139. Ernst & Young, Global IPO Activity Press Release, *supra* note 118.
140. *See* Thomas Easton, *Flashing Red*, THE ECONOMIST—THE WORLD IN 2008, at 53 (2008).
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*

restrictions on the ability of foreigners to invest in companies listed on the Shanghai stock exchange, and places limitations on the ability of mainland Chinese nationals to invest in companies listed abroad or even on the Hong Kong stock exchange.[145] Chinese nationals, thus, are forced to choose between investing their money in savings accounts that pay less than inflation, real estate with questionable property rights, or shares listed on the Chinese stock exchanges.[146] Investors buying shares in Chinese corporations are not receiving the same sort of investment that they would receive if they were able to purchase shares in an American corporation. Shares in Chinese corporations are not equivalent to shares in U.S. corporations because they do not give the buyers real ownership rights, such as the ability to determine management of the corporation, which is frequently determined by the Chinese central government, or dividend rights.[147] In addition, investors in China do not enjoy the types of protections, particularly regarding disclosure of material corporate information, afforded investors in the United States or London.[148] Chinese corporations and the investment banks that work with them disclose information to selected investors but not to the market as a whole.[149] Stock prices on the Chinese stock exchanges do not, therefore, accurately reflect the corporations' valuation. The shares of major benchmark companies in China also are predominately held by the corporation or the government, which do not trade them.[150] The prices listed on the exchanges are, therefore, based on a very small volume of shares traded back and forth.[151]

These factors combined with the large amount of funds flooding the Chinese stock exchanges from local investors mean that the stock prices on these exchanges are extremely out of step with reality. On the Shanghai exchange in October 2007 stock prices were sixty-five times earnings while on the Shenzhen exchange the stock prices were seventy-five times earnings.[152]

d. Market Growth Rates

The McKinsey Report concluded that strong growth outside of the United States in capital markets revenue would erode the United States' position.[153] The median growth rate for capital markets revenue is about 20% in the European Union and 17% in Japan compared with 7% in the

145. *Id.*
146. Easton, *supra* note 140.
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.*
152. Easton, *supra* note 140.
153. MCKINSEY REPORT, *supra* note 4, at 40–41.

United States.[154] The major indexes in the United Kingdom, Germany and Japan were outperforming the major U.S. indexes, such as the Standard and Poor's 500, the Dow Jones Industrials, and the Nasdaq Composite over the past three years.

The weakness of the U.S. dollar has also made investing overseas more attractive. The euro is now significantly stronger than the dollar in currency markets.[155] The euro has become an alternative reserve currency to the U.S. dollar for many investors. The euro could replace the U.S. dollar as the primary reserve currency within the next twenty years if all members of the European Union adopted the euro or if the current depreciation trend of the U.S. dollar persists into the future.[156]

As a result, the compound annual growth rates for these exchanges are distorted. Both the Shanghai and the Shenzhen exchanges are members of the World Federation of Exchanges (WFE). These market distortions for both the Shanghai and Shenzhen stock exchanges also affect the 24.9% compound annual growth rate for the other member exchanges of the WFE for 2002–2007 cited by the Committee on Capital Markets Regulation.[157] The Committee on Capital Markets Regulation cited this growth rate as a cause for concern because the average compound annual growth for the U.S. public exchanges for 2002–2007 was only 11.4%.[158] This comparison, however, is something of an apples-and-oranges comparison because the other WFE exchanges, particularly the Chinese exchanges, do not operate under the same economic rules under which the U.S. public exchanges operate.

It is important to note that the decline of the U.S. dollar relative to other currencies, particularly the euro and the British pound, affects the accuracy of the growth rate comparisons. The Committee on Capital Markets Regulation cited as a source of concern as regards U.S. competitiveness the fact that the London Stock Exchange had an average compound annual growth rate of 18.2% for the period from 2002 to 2007.[159] It is not clear, however, that the Committee accounted for the distortions that the decline of the U.S. dollar has on these growth rates. For example, between 2005 and 2006, the New York Stock Exchange grew 13.1% and the London

154. *Id.*

155. As of December 28, 2007, the euro-U.S. dollar exchange rate was €1 = US$ 1.4716. Min Zeng, *Dollar Posts Biggest Weekly Decline Since April 2006 on Housing*, BLOOMBERG (Dec. 28, 2007), *available at* http://www.bloomberg.com/apps/news?pid=20601087&sid=ady9KnpH9Ahs&refer=home.

156. Chinn Menzie & Jeffrey Frankel, *Will the Euro Eventually Surpass the Dollar as the Leading International Reserve Currency?* (Nat'l Bureau Econ. Research, Working Paper No. 11,510, 2006), *available at* http://www.nber.org/papers/w11510.pdf?new_window=1; *Euro Could Replace Dollar as Top Currency—Greenspan*, REUTERS, Sept. 17, 2007, *available at* http://www.reuters.com/article/bondsNews/idUSL1771147920070917.

157. COMM. ON CAPITAL MKTS., COMPETITIVE POSITION REPORT, *supra* note 4, at 7.

158. *Id.*

159. *Id.*

Stock Exchange grew 24.1% in U.S. dollars.[160] Most of the London Stock Exchange's growth, however, was due to the declining value of the U.S. dollar. In British pounds, the London Stock Exchange's growth was only 8.8% between 2005 and 2006.[161]

In addition, as foreign markets have outperformed the U.S. stock markets, U.S. investors have become more willing to invest in securities traded in overseas markets than they were before the adoption of the Sarbanes-Oxley Act in 2002. Six years ago eight cents out of every new dollar invested was invested overseas.[162] Today around seventy-seven cents out of every new dollar invested is invested in international markets.[163] In addition, globalization has made more Americans aware of foreign companies and their products. Technology also has made it easier to list and trade securities outside of the United States.[164]

e. U.S. Companies Listing Outside of the United States

A new development in the past few years is the willingness of U.S. firms to list on an exchange outside of the United States. The primary beneficiary of these listings has been AIM, where over forty-four U.S. companies have listed. Several factors have affected the decision of these firms to list on AIM. First, small start-up companies found the U.S. markets, particularly Nasdaq, to be less receptive to venture capitalist-backed firms following the burst of the dotcom bubble in March 2000.[165] Additionally, critics of the Sarbanes-Oxley Act frequently point to the concerns that small companies have regarding the costs of complying with the federal securities laws in the wake of the Sarbanes-Oxley Act.[166] Other costs, however, also affect these firms' decisions to list in London. The initial fee and the yearly fee for an AIM listing are both less than $7,500 each, while Nasdaq charges a minimum of $100,000 for the initial listing fee and between $25,000 and $75,000 a year to maintain the listing.[167]

It is, however, worth noting that listing at a lower cost initially does not ultimately result in monetary gain. Therefore, the U.S. markets may well still have advantages over the foreign ones that, superficially, seem to be challenging their competitiveness. Of the forty-six U.S. technology companies that listed on AIM between 2001 and 2006, two-thirds of them

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160. WORLD FED'N OF EXCHS., ANNUAL REPORT 2006, at 28 (2006), *available at* http://www.world-exchanges.org/WFE/home.asp?menu=413.
161. *Id.*
162. Tomoeh Murakami Tse, *The Global Bet*, WASH. POST, Feb. 4, 2007, at F1.
163. *Id.*
164. *Move Away From New York a Natural Progression*, INT'L FIN. R., Jan. 1, 2007.
165. Thomas Frostberg, *AIM Grabbing NASDAQ Business*, SAN FRANCISCO CHRON., Apr. 18, 2006, at D1.
166. *See, e.g.*, *id.*
167. *Id.*

lost money for their investors.[168] A study conducted by Innovation Advisors, a U.S. investment bank, compared technology companies with $10 million or more in revenues that listed on AIM with those that listed on Nasdaq.[169] It found that after two years the companies on AIM had lost 57% of their initial value on average while those on Nasdaq had gained 12%.[170] In addition, companies on Nasdaq appear to be more highly valued than those on AIM. Nasdaq companies are valued at an EBITDA multiple of 13.2 compared with an EBITDA multiple of 7.1 for companies listed on AIM.[171]

One of the authors of the Innovation Advisors' study concluded that the tighter regulatory requirements in the United States is actually better for investors, since it may mean that only stronger companies can list here.[172] Critics of the Innovation Advisors' study, however, point to the fact that AIM and Nasdaq serve different markets, and that the companies listing on AIM are smaller and earlier in their development than those that list on Nasdaq.[173] The hypothesis that these exchanges serve different markets may also be borne out by the fact that some firms that initially listed on AIM have later sought a listing on Nasdaq. For example, Ocean Power Technologies, a New Jersey-based company, raised £22.4 million with a listing on AIM in 2003.[174] It, however, never made a profit and by 2006 needed to raise an additional $100 million.[175] Rather than just doing a secondary offering on AIM, Ocean Power Technologies decided to list its shares on both Nasdaq and AIM.[176]

f. Companies Delisting and Listing

In addition to U.S. markets seeing a general decline in firms doing initial listings on them, some evidence exists that firms that initially listed in the U.S. seem to either be considering delisting or actually moving to delist their shares. A survey of fifty-four European companies with shares

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168. David Blackwell, *Tighter U.S. Rules Help NASDAQ Technology Companies Seem to Age Better in New York than on AIM*, FIN. TIMES (Asia), Nov. 24, 2006, at 19.

169. Blackwell, *supra* note 168; Avital Louria Hahn, *Research Shows AIM Misses Mark*, INVESTMENT DEALERS' DIG., Aug. 14, 2006, at 10.

170. *Id.*

171. *Id.*

172. Blackwell, *supra* note 168.

173. *See* Nandini Sukumar & Edgar Ortega, *Companies May Do Better on NASDAQ than LSE's AIM, Report Says*, BLOOMBERG.COM, Aug. 23, 2006, http://www.innovationadvisors.com/pdf/AIM_Study.pdf ; Hahn, *supra* note 169.

174. Blackwell, *supra* note 168. In part, its decision to list on AIM was driven by the fact that it had a UK subsidiary and wanted a higher profile in Europe for its buoys that harness wave power to generate electricity. *Id.*

175. *Id.*

176. *Id.* In its amended Form S-1, Ocean Power Technologies noted that its stock on AIM had low trading volumes, which limited the liquidity of its stock in that market. Ocean Power Technologies, Inc., Registration Statement (Form S-1/A), at 22 (Apr. 23, 2007).

listed on U.S. exchanges in 2006 found that 17% of them would consider delisting.[177] On June 4, 2007, the new SEC rules permitting deregistration by foreign companies with relatively low trading volumes took effect.[178]

As a result of the new rules, the NYSE and Nasdaq saw an increase in the number of foreign firms delisting in 2007.[179] Nasdaq, however, did not experience as sharp a rise in delistings as the NYSE experienced. It may be due to the difference in the number of foreign firms listed on Nasdaq and the NYSE. Nasdaq had only 312 foreign firms listed on it at the end of 2007 while the NYSE had 424 foreign firms listed on it at the end of 2007. Alternatively, it may be that the lower listing costs for listing on Nasdaq made foreign firms more willing to maintain their listings on Nasdaq.

Table 6: Number of Foreign Firms Delisting From NYSE, Nasdaq and AMEX[180]

	2002	2003	2004	2005	2006	2007
NYSE	24	22	27	26	30	56
Nasdaq (Regulatory)	34	17	7	9	5	4
Nasdaq (Voluntary)	40	27	22	34	29	37
Nasdaq (Total)	74	44	29	43	34	41
AMEX	NA[181]	8	7	7	NA	NA

177. Press Release, Mazars, Worldwide Survey on the Sarbanes-Oxley Act: Overall Companies Ready (July 2006), *available at* http://www.mazars.com/pdf/pressrelease_sox.pdf.

178. Rule 12h-6 (2007); Form 15F (2007); Termination of a Foreign Private Issuer's Registration of a Class of Securities under Section 12(g) and Duty to File Reports under Section 13(a) or 15(d) of the Securities Exchange Act of 1934, Exchange Act Release No. 55,540, 72 Fed. Reg. 16,934 (Mar. 27, 2007).

179. Nasdaq, All Listing Information (2008), *available at* www.nasdaq.com/newsroom/stats/documents/2008_Download.xls.

180. *Id.*; World Federation of Exchanges, Statistics/Annual webpage for listing and delisting statistics for 1997 to 2006, http://www.world-exchanges.org/WFE/home.asp?action=document&menu=27 (last visited Apr. 22, 2008). It is unclear from the NYSE and AMEX data available from the WFE how many of the foreign firms voluntarily delisted versus being required to delist for failing to meet the regulatory requirements for listing. The NYSE changed its Rule 500, which governs voluntary delistings, in 1999 and in 2003. In 1999, the SEC allowed the NYSE to change Rule 500 from requiring approval of two-thirds of a company's shareholders to approve a decision to delist, to requiring approval of its board of directors, approval of its audit committee, notification in writing of its thirty-five largest stockholders of record of its intention to delist from the NYSE, and issuance of a press release. Press Release, Nat'l Ass'n of Sec. Dealers, NASD Opposes SEC Approval of NYSE's Anti-Competitive Amendment to Rule 500 (July 22, 1999), *available at* www.finra.org/PressRoom/NewsReleases/1999NewsReleases/P010305. In 2003, the SEC approved the repeal of NYSE Rule 500 and allowed the NYSE to only require that a certified board resolution approving delisting be provided to the NYSE in order for a corporation to voluntarily delist. Self-Regulatory Organizations, Exchange Act Release No. 48,720, 68 Fed. Reg. 62,645 (Nov. 5, 2003). This change put the NYSE and Nasdaq on a more even footing as prior to 2003, Nasdaq had only required a notice from a company seeking to delist in for it to delist from Nasdaq. Jeffery Harris, *Why Rule 500 Should be Repealed*, NASDAQ, Sept/Oct. 2003, at 54–55 Data for delistings by foreign firms on Nasdaq was not available for the period from 1997–2001. It is also unclear from the delisting data how many of these firms actually deregistered as opposed to switching their listing from one exchange to another. Not all firms that delist also deregister. If the concern is that foreign firms are leaving the U.S. markets, then one needs to determine the number of firms that have deregistered, not merely delisted.

Outside economic factors may also play a role in delisting rates of foreign firms. Both the NYSE and Nasdaq previously experienced a sharp rise in the number of delistings by foreign firms when the dotcom bubble burst. Even with the relaxed deregistration standards permitted by the SEC, Nasdaq had more foreign firms voluntarily delist in 2002 than in 2007.[182] In fact, Nasdaq had more foreign firms forced to delist in 2002 for failing to meet its listing standards than those voluntarily delisting.

Reduced listing and increased delisting of foreign firms in the U.S. may also be explained in part by the fact that, in most cases, foreign firms have derived few benefits from being listed on a U.S. exchange, because a very small percentage of their shares, or American Depository Receipts (ADRs),[183] are traded in the United States. Intershop Communications AG, a German technology company that deregistered in 2004, found that only 1% of its shares were being held as ADRs.[184] Even a large foreign firm like Daimler-Benz found that in the mid-1990s less than 5% of its shares were held through ADRs traded in the United States.[185] The remainder traded on Deutsche Boerse.[186]

Some commentators have noted that U.S. stock exchanges offer two or more tiers of benefits for companies listed on them.[187] Large corporations with stock that is widely followed by analysts and that has large trading volumes reap substantial benefits from being listed.[188] Small- and medium-sized firms with stock that lacks analyst coverage and that has low trading volumes reap very few benefits from being listed.[189] It may be that many small-and medium-sized firms overestimated the benefits of being listed during the stock market bubble of the late 1990s. These small- and medium-sized firms may have been encouraged to list by investment banks seeking fees and by venture capitalists seeking a quick exit.[190] The U.S. exchanges experienced a significant rise in the number of foreign firms electing to list in the United States during the 1990s. The increase in delisting might be

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181. Not available.

182. Nasdaq, *supra* note 179; World Federation of Exchanges, *supra* note 180.

183. ADRs are the form in which shares of foreign companies are traded on U.S. markets. *See* BLACK'S LAW DICTIONARY 91 (8th ed. 2004).

184. *See* Stephen Taub, *Sarbox: Spur to Foreign-Company Flight?*, CFO.COM, Sept. 21, 2004, http://cfo.com/article.cfm/3217608?f=search.

185. G. Andrew Karolyi, *DaimlerChrysler AG, the First Truly Global Share*, 9 J. CORP. FIN. 409, 417 (2003).

186. *Id.*

187. Frank K. Reilly & Eugene F. Drzycimski, *An Analysis of the Effects of Multi-Tiered Stock Market*, 16 J. FIN. & QUANTITATIVE ANALYSIS 559 (1981); Luigi Zingales, *Is the U.S. Capital Market Losing Its Competitive Edge?* (European Corporate Governance Inst., Finance Working Paper No. 192/2007, 2007), *available at* http://ssrn.com/abstract=1028701.

188. Zingales, *supra* note 187, at 35 tbl.2.

189. *Id.*

190. Gil Avnimelech, Martin Kenney & Morris Teubal, *Building Venture Capital Industries: Understanding the U.S. and Israeli Experiences* 27 (Berkeley Roundtable on the Int'l Econ., Working Paper No. 160, 2004), *available at* http://repositories.cdlib.org/brie/BRIEWP160.

attributed to these firms' delayed realization that the expected benefits of their U.S. listings had not materialized and were unlikely to do so in the future. Thus, all of the blame for the fact that these firms wanted to delist should not be placed on the Sarbanes-Oxley Act.

Foreign firms can become listed on a U.S. exchange without undertaking an IPO. These firms gain the cross-listing benefits of having their shares traded in the United States, even though they may become listed through a secondary offering or other type of offering. In order to judge the true demand to participate in the U.S. market, one needs to look at total listings, not just IPOs. In fact, only about half of the foreign firms listed on the NYSE became listed through an IPO.[191] Below is a table showing how many firms listed on the NYSE, Nasdaq, and AMEX without undertaking an IPO.

Table 7: Number of Foreign Firms Listing on the NYSE, Nasdaq and AMEX[192]

	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006
NYSE	63	43	28	60	51	33	16	20	19	28
Nasdaq	75	50	61	119	21	NA [193]	3	23	23	21
AMEX	13	8	7	4	5	8	16	20	34	10

As is evident from this table, the number of foreign firms listing on the three national exchanges in the United States fluctuated substantially even before the enactment of the Sarbanes-Oxley Act. The NYSE had the same number of foreign firms listing on it in 1999, during the dotcom bubble, as it did in 2006. Before the enactment of the Sarbanes-Oxley Act, Nasdaq's foreign listings swung wildly from highs in 1997 and 2000 to lows in 1998 and 2001. In fact, the number of foreign firms listing on Nasdaq in 2006 was the same number that listed on Nasdaq in 2001. The nadir for foreign listings on both the NYSE and Nasdaq was in 2003. Since then, the number of foreign firms listing on these exchanges has been relatively constant. The American Stock Exchange saw a decline in the number of foreign firms listing on it from 1997 to 2001. The number of foreign firms listing on AMEX increased noticeably from 2002 to 2005 and then dropped in 2006.

The percentage of the total firms listed on Nasdaq comprised by foreign firms declined very slightly from 10.3% in 2002 to 10.0% in 2007. The percentage of the total firms listed on NYSE comprised by foreign firms declined noticeably from 20.0% in 2002 to 18.5% in 2007.

Finally, it is worth noting that the total number of firms listed on the NYSE, Nasdaq and AMEX had been declining for several years before the

191. *See infra* tbl.9.
192. Nasdaq, *supra* note 179; World Federation of Stock Exchanges, *supra* note 109.
193. Not available.

passage of the Sarbanes-Oxley Act. The number of listed firms (both domestic and foreign) peaked on Nasdaq at the end of 1996 when 5,556 firms were listed. By the end of 2002, the total number of firms listed on Nasdaq had dropped to 3,649, a 34% decline from Nasdaq's peak in 1996. By the end of November 2007, Nasdaq had 3,134 firms listed on it.

The total number of firms listed on the NYSE peaked at the end of 1999, when 3,025 firms were listed on the exchange. By the end of 2002, the total number of firms listed on NYSE had declined to 2,366. By the end of 2006, the total number of firms listed on the NYSE was 2,280.

The American Stock Exchange saw the number of firms listed on it decline from 824 in 1990 to 557 in 2003. Since 2003, AMEX has seen a rise in the number of firms listed on it. By the end of 2006, the total number of firms listed on AMEX was 592. Since the Sarbanes-Oxley Act affects all listed companies equally, one wonders what the AMEX has done that Nasdaq and the NYSE have not done, which has led to the rise in the number for firms listed on AMEX in recent years.

g. Cross-Listing Premiums

Several studies have attempted to address whether one can detect problems with U.S. competitiveness by analyzing the premium received by foreign companies cross listed on both a U.S. and a foreign exchange.[194] One study by Kate Litvak found that the premium enjoyed by such companies that were already high-disclosing or from high-disclosing countries declined significantly in the wake of the enactment of the Sarbanes-Oxley Act.[195] The size of the premium may be declining because the requirements of the Sarbanes-Oxley Act make a U.S. listing more expensive, or because other nations are strengthening their own securities regulation, or both. The Litvak study was not able to determine which of these factors was responsible for the decline.[196] However, this decrease in premium could discourage similar companies from wanting to cross-list in the United States in the future.[197] The reduction in the cross-listing premium provides evidence of a decline in U.S. competitiveness because traditionally, companies from countries with weak institutional structures and shareholder protections could reduce their cost of capital by cross-listing on a U.S. exchange.[198] These benefits erode as other nations strengthen their regulations or as the United States makes its regulations significantly more expensive.

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194. Davidoff, *supra* note 4; Hostak et. al., *supra* note 4; Litvak, *supra* note 4; Ribstein, *supra* note 4.
195. Litvak, *supra* note 4, at 1897.
196. *Id.* at 1898.
197. *Id.* at 1860.
198. *Id.*

Another preliminary study by Peter Hostak, Thomas Lys and George Yang looked at the effect the Sarbanes-Oxley Act had on cross-listings and the decision to delist.[199] The study sought to determine if the delistings were occurring because the extra compliance costs associated with the Sarbanes-Oxley Act had negatively altered the cost-benefit trade-off associated with a U.S. listing (the Compliance Cost Hypothesis) or because the stricter governance standards under the Sarbanes-Oxley Act reduced the ability of the firms' managers or controlling shareholders to extract private benefits from other shareholders and increase their litigation risks for engaging in such behavior (the Agency Problem Hypothesis).[200] This study concluded that on average the Sarbanes-Oxley Act was driving away firms that had poor corporate governance standards and that either did not want to improve them or found it too costly to do so.[201] If this conclusion is correct, then the loss of this share of the market may be a necessary price to pay in order to achieve other regulatory goals, such as investor protection.

Traditionally, the strong corporate governance regime employed by the United States has enabled it to attract foreigners to list on its securities markets who want to attract investors to whom they would otherwise be unable to appeal because of the weak regulatory regimes in their home countries.[202] In recent years, a debate has raged over whether the Sarbanes-Oxley Act and the regulations implemented in its wake have strengthened the U.S. corporate governance regime or simply increased the costs for publicly traded companies in the United States without improving their corporate governance.[203] The number of financial report restatements that companies filed after the enactment of Sarbanes-Oxley and the costs of switching auditing firms has fueled this discussion.[204]

Proponents of the Sarbanes-Oxley Act, however, point to recent data that indicate that the Sarbanes-Oxley Act has improved financial reporting and reduced corporate scandals, cases of fraud, and financial-reporting issues.[205] While the number of restatements increased each year from 2002 to 2006, peaking at 1,346 restatements filed in 2006, the number of restatements filed declined 15% to 1,298 in 2007.[206] In addition, the number of companies reporting material weaknesses, which often result in erroneous financial statements, continued to decline in 2007 to 1,161, down

199. Hostak et al., *supra* note 4.
200. *Id.* at 4.
201. *Id.* at 26–27.
202. Coffee, *supra* note 4, at 1765–66.
203. Litvak, *supra* note 4; Hostak et al., *supra* note 4; HENRY N. BUTLER & LARRY E. RIBSTEIN, THE SARBANES-OXLEY DEBACLE (2006).
204. Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L. J. 1521 (2005).
205. Hostak et al., *supra* note 4.
206. *See* Steven Marcy, *Financial Restatements: Financial Restatements Reverse Trend by Falling in 2007, Glass Lewis Reports*, Corp. L. Daily (BNA) (Jan. 28, 2008).

12.1% from its peak of 1,322 in 2005.[207] This decline appears to be linked to compliance with the Sarbanes-Oxley Act. Companies required to comply with §404 of the Act experienced the largest declines in material weaknesses, while the number of material weaknesses reported by microcap companies, which are not subject to §404 yet, continued to increase.[208] Section 404 also appears to have reduced the number of adverse internal-control opinions issued by external audit firms. The number of adverse internal-control opinions has declined 43% since some companies had to begin complying with §404 on November 15, 2004.[209]

Nevertheless, other nations, particularly the United Kingdom, pose challenges to the U.S. leadership in the area of corporate governance. A survey by Davis Global Advisors ranked the United States second, after the United Kingdom.[210] The survey found the United Kingdom to be marginally better than the United States because of its shareholder-friendly environment, which includes requirements that shareholders vote on board remuneration, and the fact that a quarter of the companies in the FTSE 100 do not have the same individual serving as both the Chairman of the Board and the Chief Executive Officer.[211] Other nations, like Bermuda, Dubai, Luxembourg, Singapore and Hong Kong, also are improving their financial regulatory regimes and closing the gap between their regulatory standards and U.S. standards.[212]

In the wake of the Sarbanes-Oxley Act's passage, the European Union found it easier to adopt measures to strengthen its own regulatory environment.[213] For example, the adoption of the Sarbanes-Oxley Act made it easier for the European Union to enact modernization directives that national governments and the private sector had previously delayed, including legislation addressing EU financial market supervision, accounting oversight, and corporate governance standards.[214] These measures may have enhanced the perception that it is a solid alternative to the U.S. market, as well as improved investors' trust in these markets and made investors more willing to invest in companies listed in these markets.

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207. *Id.*
208. *Id.*
209. *Id.*
210. DAVIS GLOBAL ADVISORS, LEADING CORPORATE GOVERNANCE INDICATORS 2002 (Nov. 2002).
211. *Id.* at 4.
212. *See* FIN. SERVS. ROUNDTABLE REPORT, *supra* note 4, at 41. Former Senator Paul Sarbanes has noted that other nations are adopting Sarbanes-Oxley-like innovations. Rachel McTague, *Sarbanes-Oxley Implementation: Officials Say Sarbanes-Oxley Act Restored Confidence in Financial Statements*, Corp. L. Daily (BNA) (Aug. 2, 2007).
213. Klaus C. Engelen, *Preventing European "Enronitis"*, INT'L ECONOMY, Summer 2004, at 40.
214. *Id.*

2. Banking Markets

Banking is the most mature financial services market internationally. Global growth for banking was only 6% in 2004.[215] Nevertheless, the growth of foreign banks' assets in the United States grew by 77% from 1998 to 2005, significantly faster than the growth of all FDIC-insured assets, which only grew at a rate of 67% during the same period.[216]

The United States' banking sector remains relatively fragmented when compared with the banking sectors of other developed nations. This fragmentation results from the historic barriers that limited both the financial sectors and geographic regions in which banks could operate.[217] Those limitations were largely eliminated in the 1990s.[218] As a result, the United States has experienced a wave of banking mergers in the past decade and will likely see additional consolidation within the banking industry in the future.[219]

U.S. banks traditionally have faced a competitive disadvantage because of the stricter capital adequacy requirements imposed by U.S. banking regulators when compared with the regulations imposed by the counterparts internationally. Basel I and Basel II both were designed to level the playing field by establishing minimum international standards for capital adequacy.[220] Specifically, Basel II, which replaces Basel I in most nations, attempts to implement a consistent international risk-based capital standard for banking institutions.[221] Unfortunately for U.S. banks, U.S. banking regulators will only permit the very largest banks to implement the risk-based model proposed in Basel II.[222] Other banks must still use Basel I or a hybrid set of regulations referred to as Basel I-A.[223] Even the largest banks, however, would not always be able to apply the risk-based system. For example, a Notice of Proposed Rulemaking issued by the U.S. banking regulators would require even the largest banks to maintain a leverage ratio that would force them to hold more capital than required under the risk-based system of Basel II.[224] These requirements would maintain the competitive disadvantage of U.S. banks vis-à-vis their international counterparts, who will be permitted to operate solely under Basel II.

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215. U.S. International Trade Administration, Banking Sector 2007, http://trade.gov/investamerica/banking.asp (last visited Apr. 24, 2008).
216. *Id.*
217. Brown, supra note 4, at 12–16.
218. *Id.* at 19.
219. *Id.* at 15–16.
220. *Id.* at 46–49.
221. MCKINSEY REPORT, *supra* note 4, at 88.
222. *Id.* Other banks must still use Basel I or a hybrid set of regulations referred to as Basel I-A. *Id.*
223. *Id.*
224. *Id.*

3. Insurance Markets

The U.S. regulatory structure reduces competition within the United States by erecting significant barriers to entry both for new American firms and for foreign firms. This structure protects existing U.S. insurance companies but harms consumers by limiting both their choices of products and providers. The states regulate insurance within the United States.[225] Each state within the United States requires that both insurance providers and products be licensed before they can operate or be sold within the state. These licensing procedures can be time consuming and costly. It can take over two years to get a new product licensed in all fifty states within the United States.[226]

The United States is not alone in imposing regulations that hinder competition.[227] Some OECD nations maintain statutory monopolies for particular compulsory lines of insurance.[228] Other nations severely limit cross-border trade in insurance products. For example, Hungary does not permit its citizens to sign insurance contracts with foreign nationals.[229]

Liberalization of trade in insurance services is tied to the ability of nations to establish common minimum standards in order to prevent trade in insurance services from undermining the goals of domestic regulation. The U.S. structure for insurance regulation, however, has severely hampered the United States' ability to negotiate with other nations on insurance issues. The U.S. Trade Representative (USTR) conducts international trade negotiations on behalf of the United States. The USTR, however, has no ability to make binding commitments to change the laws or regulations governing insurance that the fifty states have adopted.[230] The National Association of Insurance Commissioners (NAIC) frequently acts as a proxy for the fifty states in international negotiations. The NAIC, however, also does not have the power to make binding commitments on behalf of the state governments.[231] As a result, other nations find it extremely difficult to negotiate with the United States on insurance issues. Lack of progress in

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225. Insurance generally may be broken down into four categories: life, health, property and casualty, and reinsurance. The amount of regulation and competition in each category varies greatly. In addition, some of insurance products compete directly with other financial services products offered by banks or securities firms.

226. Ruth Gastel, Optional Federal Charter, Insurance Information Institute Insurance Issues Update (Aug. 2003); *Insurance Product Approval: The Need for Modernization: Hearing Before the Subcomm. on Capital Markets, Insurance, and Gov't Sponsored Enterprises of the H. Comm. on Financial Services*, 107th Cong. 1 (2001) (remarks of Rep. Richard H. Baker).

227. *Competition and Related Regulatory Issues in the Insurance Industry*, OECD J. COMPETITION L. & POL'Y, Vol.3/No.3, 2001, at 67 [hereinafter *Competition and Related Regulatory Issues*].

228. *Id.* at 70.

229. *Id.* at 71.

230. GAO FINANCIAL REGULATION REPORT, *supra* note 31, at 5.

231. *Id.*

negotiating more liberal international insurance regulations has hampered international competition, which in turn has harmed U.S. companies.

Some regions have liberalized trade in insurance products. For example, the European Union's passport system, which allows a financial service provider licensed in one nation to operate in any other member state, is increasing competition within the European Union.[232] In light of this new passport system, the United States' regulatory regime does seem to be producing a less competitive market for insurance when compared to the European Union. Efforts have grown in the past decade to create an American equivalent of this passport regime by creating a federal charter for insurance.[233] Nevertheless, these efforts face stiff opposition from some U.S. insurance companies that currently benefit from the protection of the current regime and from state regulators. As a result, the proposals to create a federal charter for insurance have stalled in Congress.

B. MARKETS IN WHICH U.S. FIRMS ARE NOT LOSING MARKET SHARE

The financial services firms from the United States continue to lead the world in many areas of financial services, including many aspects of the securities sector. The United States has more financial stock (equities, private debt, government debt and bank deposits) than any other area of the world. In 2005, the United States had $51 trillion in financial stock, which was 34% more than Europe, 190% more than Japan, and 346% more than the total held by Asian-Pacific nations other than Japan.[234]

1. Largest Financial Services Firms

In 2006, four of the top ten of the largest financial services firms by revenues were American, up from only three in 2001.[235]

232. *Competition and Related Regulatory Issues*, *supra* note 227, at 70.

233. The National Insurance Act that proposed creating an optional federal charter for insurance was first introduced into Congress as the National Insurance Act of 2006, S. 2509, 109th Cong., 2d Sess. (April 5, 2006). Senators John Sununu (R-NH) and Tim Johnson (D-SD) co-sponsored this bill. A companion bill that is virtually identical to this bill was introduced into the House of Representatives by Rep. Edward Royce (R-Cal). The National Insurance Act was reintroduced to Congress as the National Insurance Act of 2007, S. 40, 110th Cong., 1st Sess. (May 24, 2007) and by Rep. Royce and Rep. Melissa Bean (D-Ill) as H.R. 3200, 110th Cong., 1st Sess. (July 25, 2007). The major change between the National Insurance Act of 2006 and that of 2007 is that the 2007 bill makes clear that health insurance is included among the types of insurance that can receive a federal charter. For purposes of this article, NIA will refer to the language in S. 40.

234. MCKINSEY REPORT, *supra* note 4, at 9–10.

235. INS. INFORMATION INST., FINANCIAL SERVICES 2002, at 144 (2002) [hereinafter FINANCIAL SERVICES FACT BOOK 2002]; FINANCIAL SERVICES FACT BOOK 2008, *supra* note 21.

Table 8: World's Largest Financial Services Firms by Revenue[236]

	2001	2002	2003	2004	2005	2006
1	General Electric (US)	General Electric (US)	General Electric (US)	General Electric (US)	General Electric (US)	General Electric (US)
2	Citigroup (US)	AXA (France)	Allianz (Germany)	AXA (France)	ING Group (Netherlands)	ING Group (Netherlands)
3	Allianz (Germany)	Citigroup (US)	AXA (France)	Allianz (Germany)	AXA (France)	Citigroup (US)
4	ING Group (Netherlands)	ING Group (Netherlands)	ING Group (Netherlands)	Citigroup (US)	Allianz (Germany)	AXA (France)
5	Deutsche Bank (Germany)	American International Group (US)	Citigroup (US)	ING Group (Netherlands)	Fortis (Belgium/ Netherlands)	Credit Agricole (France)
6	AXA (France)	AXA (France)	American International Group (US)	American International Group (US)	Credit Agricole (France)	Allianz (Germany)
7	Credit Suisse (Switzerland)	Nippon Life Insurance (Japan)	Assicurazioni Generali (Italy)	Assicurazioni Generali (Italy)	American International Group (US)	Fortis (Belgium/ Netherlands)
8	Nippon Life Insurance (Japan)	Assicurazioni Generali (Italy)	Berkshire Hathaway (US)	Fortis (Belgium/ Netherlands)	Assicurazioni Generali (Italy)	Bank of America Corp. (US)
9	American International Group (US)	Fannie May (US)	Nippon Life Insurance (Japan)	Berkshire Hathaway (US)	HSBC Holdings (UK)	HSBC Holdings (UK)
10	BNP Paribus (France)	Deutsche Bank (UK)	Aviva (UK)	Aviva (UK)	Aviva (UK)	American International Group (US)

Most of the top ten financial firms predominately focus on either banking or insurance even though they are engaged in a wider array of products and services. Only one, General Electric, is classified as a diversified financial firm. The top four out of the top five global diversified

236. FINANCIAL SERVICES FACT BOOK 2002, *supra* note 238 at 144; INS. INFORMATION INST., FINANCIAL SERVICES FACT BOOK 2003, at 159 (2003) [hereinafter FINANCIAL SERVICES FACT BOOK 2003]; INS. INFORMATION INST., FINANCIAL SERVICES FACT BOOK 2004, at 177 (2004) [hereinafter FINANCIAL SERVICES FACT BOOK 2004]; INS. INFORMATION INST., FINANCIAL SERVICES FACT BOOK 2005, at 159 (2005) [hereinafter FINANCIAL SERVICES FACT BOOK 2005]; INS. INFORMATION INS., FINANCIAL SERVICES FACT BOOK 2006, at 177 (2006) [hereinafter FINANCIAL SERVICES FACT BOOK 2006]; FINANCIAL SERVICES FACT BOOK 2008, *supra* note 21, at World Rankings.

financial firms were American in 2006.[237] These firms included General Electric, Freddie Mac, American Express, and Countrywide Financial.

The number of domestic financial holding companies in the United States has fluctuated between 2002 and 2006 as more companies have opted to become financial holding companies while others have merged. The number of foreign companies choosing to operate as financial holding companies in the United States has grown steadily during the period from 2002 to 2006.

Table 9: Financial Holding Companies in the United States[238]

	2002	2003	2004	2005	2006
Domestic	602	612	600	591	599
Foreign	30	32	36	38	44

The size of U.S. financial institutions and the number of financial conglomerates in the United States reflects two trends within the United States: (1) the increasing concentration of financial markets as fewer companies control ever larger shares within these markets and (2) the wave of mergers of financial firms in the past two decades as deregulation permitted firms to engage in wider range of activities. The *number* of financial services firms participating in the U.S. financial markets has declined steadily since World War I and this trend is likely to continue.[239]

While the total number of domestic insurers in the United States has fluctuated, as evidenced by Table 10 below, the numbers of life insurance companies, property/casualty insurance companies, and health insurance companies have declined steadily over the years. The number of domestic life insurance companies, which was 1,615 in 1999, dropped 22% to 1,257 by 2006.[240] The number of domestic property/casualty insurance companies, which was 3,405 in 1999, also declined by 22% to 2,648 by 2006.[241] The number of domestic health insurance companies, which was

237. FINANCIAL SERVICES FACT BOOK 2003, *supra* note 236, at 144; FINANCIAL SERVICES FACT BOOK 2004, *supra* note 236, at 155; FINANCIAL SERVICES FACT BOOK 2005, *supra* note 236, at 159; FINANCIAL SERVICES FACT BOOK 2006, *supra* note 236, at 177; FINANCIAL SERVICES FACT BOOK 2008, *supra* note 21.

238. FINANCIAL SERVICES FACT BOOK 2008, *supra* note 21

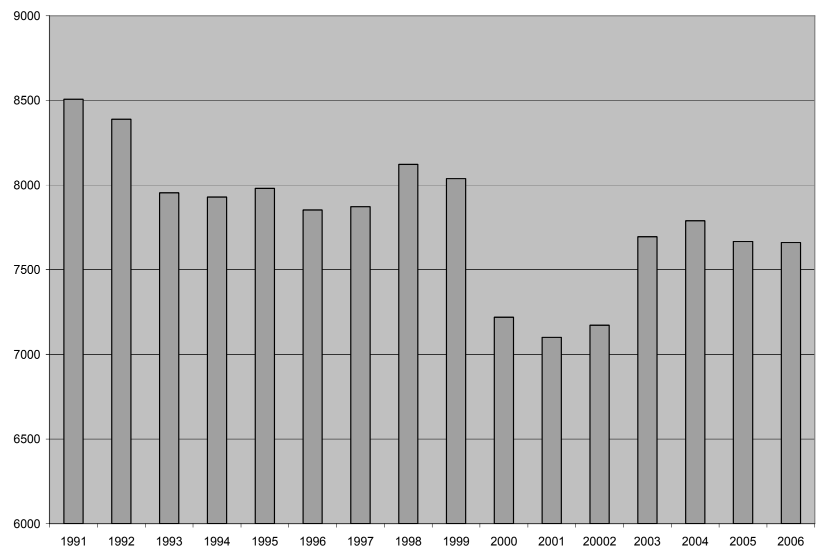
239. FINANCIAL SERVICES FACT BOOK 2003, *supra* note 236, at 1–2. Before World War I, the United States had approximately 25,000 commercial banks and by 2006, the number had dropped to 7401. *Id.* at 1; FINANCIAL SERVICES FACT BOOK 2008, *supra* note 21, at Banking: Commercial Banks.

240. NAT'L ASS'N INS. COMM'RS, INSURANCE DEPARTMENT RESOURCE REPORT 1999, at 40 (2000) [hereinafter 1999 INSURANCE DEPARTMENT RESOURCE REPORT]; NAT'L ASS'N INS. COMM'RS, INSURANCE DEPARTMENT RESOURCE REPORT 2006, at 47 (2007) [hereinafter 2006 INSURANCE DEPARTMENT RESOURCE REPORT].

241. 1999 INSURANCE DEPARTMENT RESOURCE REPORT, *supra* note 243; 2006 INSURANCE DEPARTMENT RESOURCE REPORT, *supra* note 243.

943 in 1999, declined by about 15% to 804 by 2006.[242] The periodic increases in the number of insurance companies are due to increase in companies that provide miscellaneous forms of insurance that do not fit within the traditional insurance categories.

Table 10: Number of Domestic Insurers in the United States[243]



In addition, the asset share of the major financial services sectors captured by the top ten companies in those sectors has grown over time, except in the case of securities.

Table 11: Asset Share of Top Ten Companies in the Major Financial Services Sectors[244]

	1995	2001
Banks	34	40
Savings Institutions	21	38
Securities Firms	60	53
Life Insurance Firms	34	44
Property/casualty insurance firms	30	45

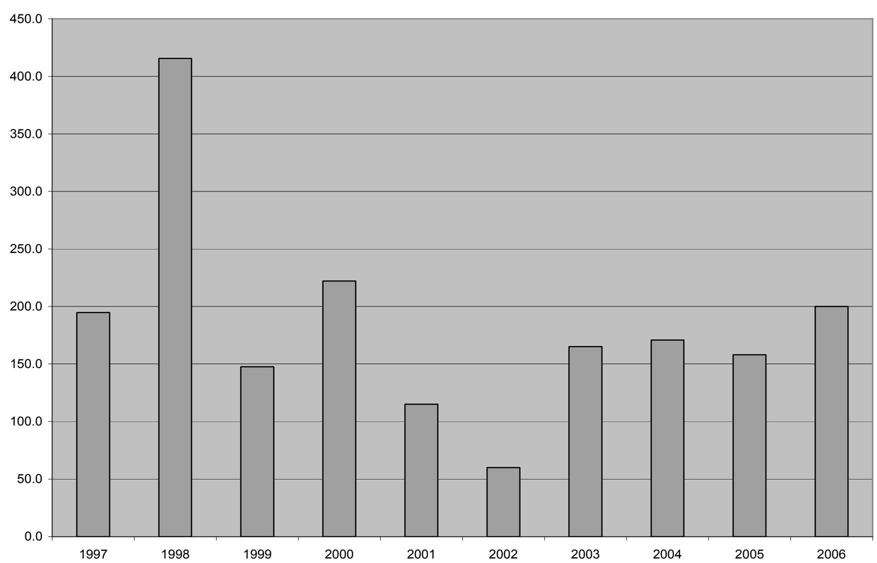
242. 1999 INSURANCE DEPARTMENT RESOURCE REPORT, *supra* note 243; 2006 INSURANCE DEPARTMENT RESOURCE REPORT, *supra* note 243.

243. NAT'L ASS'N INS. COMM'RS, INSURANCE DEPARTMENT RESOURCE REPORT 1992, at 35 (1994); 1999 INSURANCE DEPARTMENT RESOURCE REPORT, *supra* note 243, at 38; 2002 INSURANCE DEPARTMENT RESOURCE REPORT, 38 (2000) [hereinafter 2002 INSURANCE DEPARTMENT RESOURCE REPORT]; 2006 INSURANCE DEPARTMENT RESOURCE REPORT, *supra* note 243, at 46.

244. FINANCIAL SERVICES FACT BOOK 2003, *supra* note 236, at VII.

Over the past two decades regulatory reforms within the United States eliminated laws and regulations that had restricted the affiliations among banks, insurance companies and securities firms; prohibited the sale of certain products or services by banks; and limited the geographic area in which banks could operate. These reforms spurred mergers among financial firms. The number of mergers spiked in 1998 immediately before the passage of the Gramm-Leach-Bliley Act of 1999.[245]

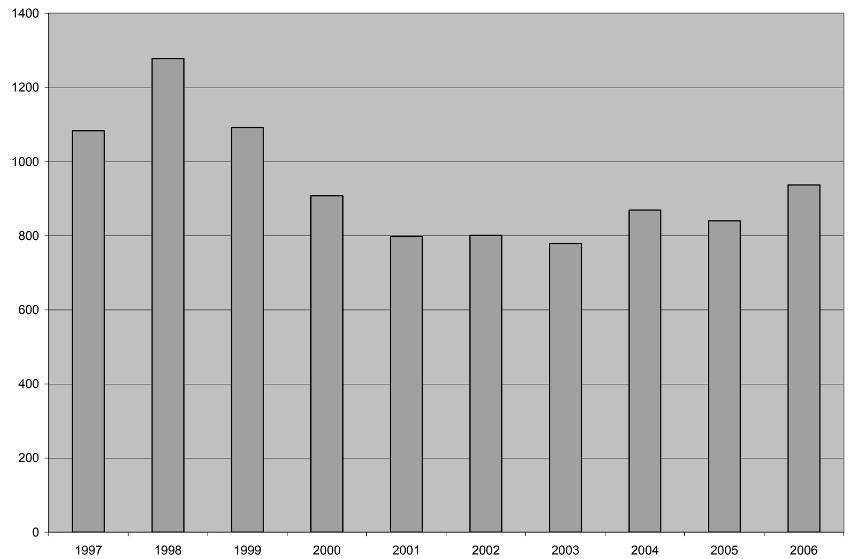
Table 12: Value of Announced Mergers of Financial Services Firms[246]



After accounting for the bursting of the dotcom bubble in 2001 and the recession in 2002, both the number and value of financial services mergers remained relatively constant in recent years.

245. *See infra* tbl.14.
246. FINANCIAL SERVICES FACT BOOK 2003, *supra* note 236, at 2; FINANCIAL SERVICES FACT BOOK 2008, *supra* note 21, at Financial Services Industry: Mergers.

Table 13: Total Number of Announced Financial Services Mergers[247]



Certainly, these mergers have increased the size of U.S. financial institutions and allowed them to compete with conglomerates from other nations. While this may be good for the competitive position of the United States vis-à-vis the rest of the world in financial services, it is not clear that these larger institutions are entirely positive for the financial system. Specifically, consumers may be disadvantaged by the reduction in choice as the number of banks or of insurance companies declines. Larger institutions may be less responsive to consumers' concerns and problems than smaller, more local institutions. The immense size of these institutions means that if even one of them should fail, it could bankrupt the taxpayer-backed deposit insurance fund. Since many of these institutions extend well beyond banking, they are putting pressure on the United States government to bail them out rather than allow them to go under, even if the cause of their failure is due to excessive speculation by the traders of their investment banking subsidiaries or underwriting mismanagement by their insurance subsidiary. The bailout of the investment bank Bear Stearns by the Federal Reserve illustrates the problem of financial conglomerates and firms that are "too big to fail."[248] Even though four of the world's largest financial services firms are U.S. firms, providing evidence of the global

247. FINANCIAL SERVICES FACT BOOK 2003, *supra* note 236, at 2; FINANCIAL SERVICES FACT BOOK 2008, *supra* note 21, at Financial Services Industry: Mergers.
248. James Surowiecki, *The Financial Page: Too Dumb to Fail*, THE NEW YORKER, Mar. 31, 2008, at 46.

competitiveness of these firms, U.S. policymakers should temper their judgments about the value of this competitiveness against the potential costs that these firms pose to U.S. consumers and the U.S. government.

2. Banking Markets

After suffering significant declines in market share in the 1970s and 1980s, the largest U.S. banks reinvented themselves as universal banks and recaptured market share in the 1990s and 2000s. U.S. banks have come to dominate traditional bank lending. Citigroup, Bank of America and JPMorganChase were in the top ten global commercial and savings banks by revenues in 2006.[249] JPMorganChase, Citigroup and Bank of America were responsible for 50% of all global lending and comprised over 70% of the global loan book of the world's ten largest banks in 2004.[250] Retail banking still tends to be a local or regional phenomenon due primarily to government regulations. Nevertheless, some U.S. banking institutions have staked out significant global positions in certain product lines, like credit cards. Visa and American Express have global presences in part because of their willingness to undertake joint ventures with foreign institutions.[251]

3. Insurance Markets

More global insurance companies in most insurance sectors are from the United States than from any other nation. Three of the top ten insurance companies and five of the top ten property and causality insurers were American in 2006. Three of the top-ten reinsurers were American in 2006.[252] In 2006, eight of the top ten insurance brokers by revenues were American, up from seven in 2004. Three of the top ten reinsurance firms were American in 2006.[253] Four of the top ten reinsurance brokers by revenue were American in 2006, including the largest reinsurance broker, Aon Re.[254] The remaining reinsurance brokers in the top ten were all from the United Kingdom.

Only one of the top ten life/health insurance companies, however, was American.[255] Two of the top ten life/health insurance companies came from each of the Netherlands, Japan, and the United Kingdom.

249. FINANCIAL SERVICES FACT BOOK 2003, *supra* note 236, at 2; FINANCIAL SERVICES FACT BOOK 2008, *supra* note 21, at Financial Services Industry: Mergers.

250. Lawrence Franko, *U.S. Competitiveness in the Global Financial Services Industry* 7 (Univ. Mass. Boston College of Mgmt. Fin. Servs. Forum, Working Paper No. 1001, 2004), *available at* http://www.financialforum.umb.edu/documents/Franko%20Fin%20Svcs%20Global%20Comp.pdf

251. *Id.* at 3.

252. FINANCIAL SERVICES FACT BOOK 2008, *supra* note 21, at World Rankings.

253. *Id.*

254. *Id.*

255. *Id.*

4. Securities Markets

Even in the area of securities, the United States still leads the world in many aspects. Foreign markets, particularly in Europe, are more mature and offer greater liquidity than they did twenty-five or thirty years ago. Even so, these markets still cannot match the size and liquidity of the securities markets in the United States. One quarter of the world's capital is invested in the United States but only 6% of it is invested in the United Kingdom.[256] According to the World Federation of Exchanges, the world's ten largest stock markets by total value of share trades in 2006 were:[257]

1) New York Stock Exchange (NYSE): $21.79 trillion
2) Nasdaq Stock Market: $11.81 trillion
3) London Stock Exchange: $7.57 trillion
4) Tokyo Stock Exchange: $5.82 trillion
5) Euronext: $3.85 trillion
6) Deutsche Boerse: $2.74 trillion
7) BME Spanish Exchanges: $1.93 trillion
8) Borsa Italiana: $1.59 trillion
9) Swiss Exchange: $1.40 trillion
10) Korea Stock Exchange: $1.34 trillion

In addition, U.S. investment banks continue to dominate the world. During the period from 2001 to 2006, the four largest investment banks were all American.[258] These banks operate globally and have significant operations in each of the world's major financial markets.[259]

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256. *PCAOB Board Member Disputes Reports that Sarbanes-Oxley Has Hurt U.S. Markets*, Sec. L. Daily (BNA) (June 4, 2007).

257. Edward Hadas & Robert Cyran, *Euronext, a U.S. Retreat?*, WALL ST. J., Apr. 5, 2007, at C12. This data was compiled before the merger of the New York Stock Exchange with Euronext. In the wake of that merger, the NYSE is less concerned about attracting foreign listings to New York as long as it can attract them to Euronext and away from London. *Id.* Figures are in trillions of U.S. dollars.

258. FINANCIAL SERVICES FACT BOOK 2003, *supra* note 236, at 142; FINANCIAL SERVICES FACT BOOK 2004, *supra* note 236, at 158; FINANCIAL SERVICES FACT BOOK 2005, *supra* note 236, at 162; FINANCIAL SERVICES FACT BOOK 2006, *supra* note 236, at 182; FINANCIAL SERVICES FACT BOOK 2008, *supra* note 21, at World Rankings.

259. FINANCIAL SERVICES FACT BOOK 2003, *supra* note 236, at 142; FINANCIAL SERVICES FACT BOOK 2004, *supra* note 236, at 158; FINANCIAL SERVICES FACT BOOK 2005, *supra* note 236, at 162; FINANCIAL SERVICES FACT BOOK 2006, *supra* note 236, at 182; FINANCIAL SERVICES FACT BOOK 2008, *supra* note 21, at World Rankings.

Table 14: World's Top Four Investment Banks[260]

	2001	2002	2003	2004	2005	2006
1	Morgan Stanley (U.S.)	Morgan Stanley (U.S.)	Morgan Stanley (U.S.)	Morgan Stanley (U.S.)	Morgan Stanley (U.S.)	Morgan Stanley (U.S.)
2	Merrill Lynch (U.S.)	Merrill Lynch (U.S.)	Merrill Lynch (U.S.)	Merrill Lynch (U.S.)	Merrill Lynch (U.S.)	Merrill Lynch (U.S.)
3	Goldman Sachs (U.S.)	Goldman Sachs (U.S.)	Goldman Sachs (U.S.)	Goldman Sachs (U.S.)	Goldman Sachs (U.S.)	Goldman Sachs (U.S.)
4	Lehman Brothers Holdings (U.S.)	Lehman Brothers Holdings (U.S.)	Lehman Brothers Holdings (U.S.)	Lehman Brothers Holdings (U.S.)	Lehman Brothers Holdings (U.S.)	Lehman Brothers Holdings (U.S.)

The United States also dominates the $8.06 trillion securitization market, controlling approximately 83% of the global issuance by value and 87% of revenues in 2005.[261] Thus, even if one only looks at the securities and investment banking industry the evidence is mixed regarding the extent to which the United States has lost its competitive edge.

5. Assets Under Management

The stocks floated on U.S. exchanges or sold through private placements need buyers. These buyers usually are pension funds, mutual funds, or private bankers for high net worth individuals. As a result, many investment banks and universal banks in the United States have significant asset-management businesses. These businesses are competitive internationally. Although the largest asset manager was a UK firm (Barclays Global Investors), seven of the top ten asset managers were American companies, including the second-, third-, fourth- and fifth-largest asset managers by revenue in 2005.[262]

Although precise measurements for the amount of foreign money managed by U.S. institutions in the United States and by foreign subsidiaries of U.S. institutions abroad are difficult to come by, anecdotal

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260. FINANCIAL SERVICES FACT BOOK 2002, *supra* note 235, at 142; FINANCIAL SERVICES FACT BOOK 2003, *supra* note 236, at 158; FINANCIAL SERVICES FACT BOOK 2004, *supra* note 236, at 162; FINANCIAL SERVICES FACT BOOK 2005, *supra* note 236, at 162; FINANCIAL SERVICES FACT BOOK 2006, *supra* note 236, at 182; FINANCIAL SERVICES FACT BOOK 2008, *supra* note 21, at World Rankings.

261. MCKINSEY REPORT, *supra* note 4, at 13.

262. FINANCIAL SERVICES FACT BOOK 2008, *supra* note 21, at World Rankings.

evidence suggests that foreign holdings of U.S. securities are substantial,[263] and at least some of these holdings are accounted for by the assets under management listed by U.S. institutions and their subsidiaries.[264]

Table 15: Foreign holdings of U.S. securities, by type of security, as of recent survey dates [265] (billions of U.S. dollars)

Type of Security	June 30, 2005	June 30, 2006
Long-term Securities	6,262	7,162
Equity	2,144	2,430
Long-term debt	4,118	4,733
Asset-backed	717	980
Other	3,401	3,753
Short-term debt securities	602	615
Total	6,864	7,778
Of which: Official	1,938	2,301

6. Private Equity and Venture Capital

U.S. firms dominate the private equity field. In 2006 seven of the ten largest private equity firms by revenue are American, including all five of the top five firms.[266] Venture capital is a sub-category of private equity. U.S. firms also are leaders in that area as well. Venture capitalists made significant investments in businesses in twenty-one countries in 2006. In 2006, they undertook 3,560 deals with a total value of nearly $26.3 billion.[267] In Europe that year, venture capitalists did only 867 venture capital deals with a total value of €4.12 billion (about $5.43 billion), or only about 20% of the value of American deals in 2006.[268]

263. *See infra* tbl.16.

264. Franko, *supra* note 250, at 9.

265. Press Release, U.S. Dept. of Treasury, Report on Foreign Holdings of U.S. Securities at End June 2006 (May 31, 2007), *available at* http://www.ustreas.gov/press/releases/hp437.htm. Figures are in billions of U.S. dollars. The amount listed as "official" refers to the amount held by foreign governments.

266. FINANCIAL SERVICES FACT BOOK 2008, *supra* note 21, at World Rankings.

267. National Venture Capital Association, Industry Statistics, http://www.nvca.org/ffax.html (last visited Mar. 26, 2008).

268. Press Release, Ernst & Young, Venture Capital Investment in Europe Climbs to €4.12 Billion in 2006, Highest Amount in Four Years (Feb. 6, 2007), *available at* http://www.ey.com/global/content.nsf/International/Media_-_Press_Release_-_VentureOneQ406.

In a 2006 survey of venture capitalists from around the world, over half of U.S. and non-U.S. venture capitalists were considering expanding their operations globally.[269] U.S. venture capitalists are primarily interested in China and India.[270] European venture capitalists were most interested in investing in Central and Eastern Europe while Asian-Pacific venture capitalists were most interested in investing in the United States and China.[271] Less than 2% of the U.S. and non-U.S. venture capitalists considered the U.S. regulatory environment a major impediment to making further investments in the United States.

IV. CONCLUSION

While the United States has not yet lost its competitive edge in many areas of financial services, this does not mean that U.S. regulators should be complacent that the U.S. regulatory structure will not harm the competitiveness of the U.S. financial industry in the future. The unwieldy nature of the over 115 different financial regulators in the United States raises significant concerns about their ability to address risks to the financial system proactively in the future. Other nations have found that, by employing a single regulator or a consolidated regulatory structure, they can create regulatory environments that are comparable to or better than the United States' at a lower cost and with a greater level of predictability in terms of enforcement and litigation risks for businesses. While the United States may not be facing an immediate crisis regarding the competitiveness of its financial services industry, this does not mean that there are not other compelling reasons for the United States to begin to consolidate its financial regulators.

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269. DELOITTE, GLOBAL TRENDS IN VENTURE CAPITAL 2006 SURVEY 3 (2006), *available at* http://www.deloitte.com/dtt/cda/doc/content/2006%20Venture%20Capital%20Report.pdf.
270. *Id.* at 4.
271. *Id.* at 9.